

Subjectivism and Objectivism in the Criminal Law: an examination of the limits of recklessness and negligence.

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Declaration

I confirm that the thesis conforms to the prescribed word length for the degree for which I am submitting it for examination. I confirm that no part of the material offered has previously been submitted by me for a degree in this or in any other University. If material has been generated through joint work, my independent contribution has been clearly indicated. In all other cases material from the work of others has been acknowledged and quotations and paraphrases suitably indicated.

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Canadian Criminal Code s.221

Abstract

This thesis is a critical examination of the boundaries of recklessness and negligence in English and Welsh criminal law and of the extent to which these *mentes reae* terms reflect the leading theories of culpability. The general principle requiring *mens rea* to be established before criminal liability is justified stems from the maxim ‘*actus non facit reum nisi mens sit rea*’, and the historical foundations of this concept will be analysed to assess whether there can be criminal liability for inadvertent conduct whilst still upholding this tenet. The interpretation of recklessness and negligence has proven to be problematic as both have included inadvertent actions and subjective and objective labels have been employed inconsistently, exacerbating an already difficult situation. What becomes clear is that the recent judicial pronouncements that have given rise this state of affairs is the result of a desire for flexibility so that justice can be done in a particular case, but this has culminated in a lack of transparency and some confusion.

The aim of this work is to determine appropriate limits for criminal recklessness and negligence with regard to serious offences. Over the last century recklessness has had three main interpretations, none of which are satisfactory as will be demonstrated. This is partly because they cannot be adequately underpinned by the theories of choice and character, the leading theories of culpability. Further, the objective/subjective labels attached to the three interpretations are inaccurate and misleading, with the potential for injustice. Accordingly, other culpability theories are scrutinised and a new interpretation of recklessness is advocated in an attempt to provide a more consistent philosophical and practical approach to determining criminal recklessness and negligence.

Chapter 1

Introduction

1.1 Introduction to the thesis: aims and objectives

The aim of this work is to recommend the appropriate limits of the *mens rea* concepts of recklessness and negligence in the criminal law of England and Wales¹ with regard to serious crimes. In order to do this, a detailed critical examination will be made of the extent to which judicial statements have blurred the distinction between the *mentes reae* of intention, recklessness and negligence. A critical exposition of recklessness results in the submission that the current definition of recklessness in the Draft Criminal Code is a form of ideal subjectivism. As such, it could be interpreted as requiring that a defendant should not only foresee the risk of harm resulting from his actions, but that he should also appreciate that the risk is an unjustifiable one to take in the circumstances. This is an interpretation that would not have been intended by the Law Commission and would be an unwarranted restriction on establishing liability. A capacity based approach to recklessness will be advocated, coupled with the abolition of criminal liability for negligent conduct with regard to serious crimes.² What is propounded is that recklessness with regard to serious offences should encompass both advertent and inadvertent conduct.³ As will be demonstrated, ‘gross’ negligence and recklessness are treated as synonymous by the courts and it is argued that recklessness is the more appropriate term where gross negligence is found.

¹ Any reference to ‘English’ criminal law in this work should be taken to mean ‘English and Welsh’ criminal law.

² Strict liability for regulatory offences is necessary for public safety; here no *mens rea* is required as commission of the prohibited act alone is sufficient.

³ Currently, recklessness generally requires that the defendant adverted to the risk that his conduct could cause harm of a particular kind but continued to act.

There has been much debate over the use of the labels ‘subjective’ and objective’ with regard to the interpretation of *mentes reae*, with some finding these labels unhelpful.⁴ What will become clear from the analysis of judicial and academic opinion is that these terms operate along a continuum and are not consistently used in the same way. As a result, without further explanation accompanying their inclusion, they can be misleading.

The relationship in current law between *mens rea* and moral blameworthiness will be explored and the leading theories of culpability will be examined to ascertain which theory, if any, underpins the current approaches to these *mens rea* terms and which would best accommodate the ambit for recklessness proposed here. The result of this examination of the theories of culpability will demonstrate that only Gardner’s⁵ ‘role’⁶ theory can truly fit with criminal liability for negligence and this theory would be more appropriately utilised if restricted to strict liability offences.⁷ Elements of more than one theory currently underpin intention and recklessness and a synthesis of aspects of two theories⁸ will form the basis of the new approach to recklessness advocated.

To date, there has been much debate surrounding the theories of culpability. Whereas others have explored these theories in the context of exculpation (the criminal defences, justification and excuse) here they are analysed with regard to inculcation. Some authors have examined the link between one or more of the theories of culpability and *mens rea*, but this area still

⁴ See, for example, Lord Diplock in *MPC v Caldwell* [1982] AC 341 at 352-354.

⁵ J. Gardner, ‘The Gist of Excuses’ (1998) 1 *Buffalo Criminal Law Review* 575; and *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) Chapter 6.

⁶ Gardner’s theory is referred to as ‘role’ theory in this thesis. Here, criminal liability is founded upon a failure to meet the standard required for the role you were performing, be that doctor, parent, or simply human being.

⁷ Discussion of strict liability offences, and of penology, is beyond the scope of this work.

⁸ ‘Role’ theory and Character theory. The latter theory grounds liability upon the ‘bad’ character of the defendant as demonstrated by his actions.

remains relatively unexplored.⁹ Although some invaluable insight has been provided on the development of the subjective approach to recklessness,¹⁰ to the author's knowledge no work has focussed on linking culpability and the *mens rea* terms under scrutiny here with a view to determining the limits of criminal recklessness and negligence proposed. The author hopes to make an original contribution by this examination, noting that the current definition of recklessness is ideal subjectivism and advocating a new approach to establishing reckless conduct that will obviate the need for liability in negligence for serious crimes.¹¹

It will be argued that a capacity based approach to recklessness is actually in operation despite a subjective definition. As such, the formal introduction of a more objective capacity based definition will better reflect current practice, enabling the courts to secure convictions where purely subjective foresight of risk cannot be proven beyond reasonable doubt. The current practice of finding that a defendant, (D), must have foreseen a risk in circumstances where this is highly questionable,¹² or declaring that he had 'closed his mind to it',¹³ can then be dispensed with.

⁹ R.A. Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990); *Criminal Attempts*, (Oxford: Clarendon Press, 1996); 'Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?' (2002) 6 *Buffalo Criminal Law Review* 147; J. Horder, 'Two Histories and Four Hidden Principles of Mens Rea' [1997] 113 *Law Quarterly Review* 95; M.D. Bayles in 'Character, Purpose, and Criminal Responsibility' (1982) 1 *Law and Philosophy* 5; H. Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979); C. Finkelstein 'The Inefficiency of Mens Rea' (2000) 88 *California Law Review* 895; J. Gardner, J and H. Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *Oxford Journal of Legal Studies* 559; J.A. Laing, 'The Prospects of a Theory of Criminal Culpability: Mens Rea and Methodological Doubt' (1994) 14 *Oxford Journal of Legal Studies* 57; L. Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (2000) 88 *California Law Review* 931; J. Dressler, 'Does One Mens Rea Fit All? Thoughts on Alexander's Unified Conception of Criminal Culpability', (2000) 88 *California Law Review* 955; E. Pincoffs, 'Legal Responsibility and Moral Character', [1973] 19 *Wayne Law Review* 905; H.L.A. Hart, 'Negligence, Mens Rea and Criminal Responsibility,' in *Punishment and Responsibility Essays in the Philosophy of Law*, (Oxford: Oxford University Press, 1968).

¹⁰ A. Norrie, *Crime, Reason and History*, 2nd Edn, (London: Butterworths, 2001).

¹¹ The modified interpretation of recklessness proposed will encompass both acts of commission and omission.

¹² *Booth v CPS* [2006] EWHC.

¹³ *R v Parker* [1977] 1 WLR 600.

1.2 Defining *Mens Rea* - intention, oblique intention, recklessness, and criminal negligence

1.2.1 Mens Rea

When a person is convicted of a criminal offence the message conveyed to society is that the person deserves blame. It should follow that where blameworthiness is absent criminality should not be established. Consequently, there should be no conviction without fault and the element within the definition of a criminal offence that reflects the necessary culpability required is the *mens rea*, the mental element specified for the particular offence. Whether *mens rea* now reflects moral fault or purely legal fault will be examined in Chapter Two and it will be demonstrated that none of the main culpability theories alone provide an adequate rationale for *mens rea*.¹⁴ In relation to choice theory,¹⁵ there is nothing to explain the relevance of how harm was caused in determining the degree of culpability,¹⁶ and character theory has been adjudged irrelevant to *mens rea* and explaining culpability.¹⁷ However it will be argued that a combination of the theories underpin the *mentes reae* terms of intention and recklessness in their current forms. Criminal liability for negligence is problematic for all but one of the theories examined and it will be proposed that criminalising negligent conduct *per se* for serious offences is inappropriate and that having a cognitive, capacity based test for recklessness would make such criminalisation unnecessary.

1.2.1.1 Subjective and objective approaches to *mens rea*

Any examination of intention, recklessness and criminal negligence needs to scrutinize the role of subjective and objective approaches to *mens rea*, which will inevitably include an

¹⁴ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law and Philosophy* 193

¹⁵ Here, criminal liability is grounded in the agent's conscious choice to break the law. See, for example, M. Moore, 'Choice, Character, and Excuse' (1990) 7 *Social Philosophy and Policy* 29.

¹⁶ *Ibid.* at 203.

¹⁷ *Ibid.* at 208.

analysis of the adjectives “subjective” and “objective”. This is not quite as straightforward as it first appears as the labels operate along a continuum, from purely subjective through to ideal objectivism. Often a compromise between the two approaches is used in practice. Although ‘subjective’ approaches¹⁸ to establishing fault elements have gained dominance in the courts recently, it will be argued here, that there is scope for more objectivity in the criminal law with regard to determining recklessness as traditionally a synthesis of both subjective and objective elements have been successfully utilised.¹⁹

(i) *Subjectivism*

Subjectivists would argue that there should be no liability incurred unless D intended to commit the offence or foresaw there was a risk of committing the particular harm but nonetheless continued to act.²⁰ Subjectivist theory is morally justified on the basis that foresight results in the defendant making a ‘reprehensible choice’ to continue to act.²¹ On this view, the interpretation of a ‘guilty mind’ (*mens rea*) is demonstrated by a requirement of intention or reckless conduct with foresight. Here, moral wrongdoing is easily established as a matter of fact, as once it is proven that the D made such a choice, it is unnecessary to delve further into his motive or attitude. Consequently, D is equally reckless whether he is indifferent to a risk, wants to run it because he is a thrill seeker, or hopes that it will not happen.²²

(ii) *Objectivism*

Objectivists propose that liability should be expanded to include those whose conduct causes harm to others regardless of whether they foresaw a risk of harm occurring, but where the

¹⁸ See, for example, *R v G & R* [2004] 4 All ER 765; with the exception with regard to the defence of provocation, see *Holley* [2005] UKPC 23. This has now been replaced by the loss of control defence, Coroners and Justice Act 2009.

¹⁹ J. Horder, ‘Two Histories and Four Hidden Principles of Mens Rea’ [1997] 113 *Law Quarterly Review* 95.

²⁰ See, for example, the work of Professors J.C. Smith and Glanville Williams.

²¹ D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ [1988] *Criminal Law Review* 4.

²² *Ibid.* at 6.

reasonable person would have foreseen such a risk.²³ This is a much broader extension of liability which includes inadvertent conduct. It focuses on ‘moral arguments about powers of cognition’²⁴ in determining culpability and it can hold culpable those who *should* have done better.²⁵ Controversially, in its purest form, it can impose liability on those who could not have done any better.

1.2.2 Intention

Although the focus of this work is primarily on recklessness and negligence, the development of the former has historically been intertwined with the development of intention, or more precisely, with the concept of ‘oblique’ intention. Intention, regarded as the most blameworthy state of mind,²⁶ is where D aims to bring about a consequence because he wants and desires a particular outcome; it is his purpose to cause a desired result.²⁷ The concept of intention also incorporates ‘oblique intention’, whereby D may be found to have intended the proscribed act where he foresaw its occurrence as a virtually certain consequence of his actions.²⁸ The development of this concept will be discussed further in Chapter Three.

1.2.3 Recklessness

The development of this *mens rea* term has been invaluablely investigated by Norrie,²⁹ who traces its oscillation from an objective approach to a subjective view at the hands of the

²³ See, for example, Lord Diplock in *Metropolitan Police Commissioner v Caldwell* [1982] AC 341, and R A. Duff who argues for a broader approach to constructing liability than subjectivists permit, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990)

²⁴ J. Horder, ‘Cognition, Emotion, and Criminal Culpability’ [1990] 106 *Law Quarterly Review* 469.

²⁵ Criminal liability is based upon what the reasonable person would have foreseen, not what the particular defendant intended or foresaw.

²⁶ This is generally accepted, however cases of reckless mass endangerment could be considered to be on a par.

²⁷ A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine* 3rd Edn., (Oxford: Hart Publishing, 2007) 120.

²⁸ *R v Woollin* [1999] 1 AC 82.

²⁹ A. Norrie, *Crime, Reason and History*, (n 10).

Victorian Law Commissioners. The case of *R v Cunningham*³⁰ maintained this subjective position holding that recklessness is established 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.’³¹ A second interpretation of recklessness was adopted by the House of Lords in *Metropolitan Police Commissioner v Caldwell*,³² producing a more objective definition. This became known as Lord Diplock’s ‘Model Direction.’ An accused could now be reckless for offences under the Criminal Damage Act 1971 if he either foresaw some risk of damage or destruction to property or, where there was an obvious risk of damage or destruction, he gave no thought to the possibility of any risk existing and continued to act. In *R v Lawrence*,³³ significantly decided on the same day, the ‘*obvious risk*’ was amended to an ‘*obvious and serious risk*’ for offences of reckless driving. In 2004, the decision of the House of Lords in *R v G & R*³⁴ departed from *Caldwell* recklessness³⁵ resulting in a third approach to recklessness.³⁶ It heralded a return to a subjective definition of recklessness.³⁷ A critical analysis of these cases and the definitions employed are provided in Chapter Three where it is argued that the current definition could be interpreted as a purely subjective test which would represent a departure from all previous forms of criminal recklessness, and, it is submitted, would consequently be unacceptable as securing convictions would require proof that D knew the risk was an unreasonable one to take in the circumstances.

³⁰ [1957] 2 All ER 412.

³¹ *Ibid.* per Byrne J.

³² [1982] AC 341.

³³ [1982] AC 510.

³⁴ [2004] 4 All ER 765.

³⁵ [1982] AC 341 This departure was only in relation to the definition of ‘reckless’ for the purpose of the CDA 1971, *G & R* [2004] 4 All ER 765, per Lord Bingham at 783, para.(j); but see *Attorney-General’s Reference (No 3 of 2003)* 2 Cr App R 367.

³⁶ Lord Rodger states *G&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, see D. Kimel, (2004) 120 *Law Quarterly Review* 548.

³⁷ The judgment essentially restricted its application to criminal damage but it has since been held to cover all offences unless otherwise specified in statute. However, this definition differs from the subjective test from *Cunningham* in its wording and also includes specific reference to recklessness as to circumstances.

1.2.4 Negligence

While *Cunningham* recklessness prevailed there was a clear distinction between reckless conduct and negligent conduct: recklessness required foresight of risk whereas negligence covered inadvertent conduct. Whether this distinction was ever so clear cut is questionable as analysed in Chapters Three and Four of this work. However, the decision in *Caldwell*³⁸ blurred any such demarcation as D could be reckless where he failed to give any thought to a risk. Following the decisions in *Caldwell* and *Lawrence*, in *R v Seymour*³⁹ it was held that the law applicable to manslaughter was the same as that for the offence of reckless driving. The Court of Appeal in *Seymour* had found it unnecessary to refer to negligence because the *Lawrence* direction on recklessness was comprehensive and of general application to all offences.⁴⁰ It seemed that gross negligence manslaughter had been subsumed within the more objective test for recklessness, a position supported with some important modifications in this work. However, *R v Adomako*⁴¹ reaffirmed the existence of gross negligence manslaughter, overruling *Seymour*, and when *G&R* heralded the resurgence of a subjective interpretation of recklessness, unless statute declared otherwise,⁴² the distinction between advertent and inadvertent fault terms was reinstated.

Negligence as a threshold of liability has always been seen as anomalous because of the lack of a conscious perception of the risk entailed by the conduct. For those who support subjective theories of culpability, punishment is justified only where D chose to engage in activity that risked breaking the law, either by acting intentionally or with foresight of the

³⁸ [1982] AC 341

³⁹ [1983] 2 All ER 1058 at 1064.

⁴⁰ (1983) 76 Cr App Rep 211 at 216, per Watkins LJ.

⁴¹ [1993] 4 All ER 935.

⁴² Once again requiring foresight of the risk by D.

kind of harm that might be caused.⁴³ On this basis, negligence is not seen as an appropriate member of the *mentes reae* family and is said to fall outside the Latin maxim, '*actus non facit reum nisi mens sit rea*,'⁴⁴ viz an act alone does not make a man guilty unless his mind is also guilty.⁴⁵ The merits of this argument are critically evaluated in Chapters Two and Four. For others, to automatically exclude criminal liability for inadvertence would be to unduly shield a morally culpable agent at the expense of his victim, and would not accord with society's perception of justice.

1.2.5 Culpability Theories

The theories of culpability that will be examined in this work are 'choice theory,' 'character theory,' 'role' theory and the 'agency theory,' of criminal culpability, to determine which theory/theories underpin current law and which would accommodate the scope of liability for recklessness and negligence advocated in this work. Choice theorists hold that a defendant is culpable only where D has made a choice to break the law when he/she had the capacity and a fair opportunity to act otherwise.⁴⁶ Character theory bases culpability on the 'bad character' of the defendant and generally makes no allowance for a defendant's particular weaknesses with regard to character flaws.⁴⁷ Agency theory⁴⁸ judges 'conduct... by reference to its relative (lack of) success,'⁴⁹ and attempts to relate the theory to the different

⁴³ For example, L. Alexander, K. Ferzan, with S. Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009).

⁴⁴ E. Coke, Third Institute (1641)107; an adaptation of '*reum non facit nisi mens rea*' found in the context of perjury in *Leges Henrici Primi* c.5, § 28. cited in Simester and Sullivan, (n 27) 27 but traced back to St. Augustine, G. Williams, *Textbook of Criminal Law*, 2nd Edn., (London: Stevens, 1983) 70.

⁴⁵ Statutory law has not been based on the same maxim although there is a presumption that *mens rea* is required which can be rebutted, see *Sweet v Parsley* [1970] AC 132, cf. the Sexual Offences Act 2003 ss5-8.

⁴⁶ H.L.A. Hart, 'Negligence, Mens Rea and Criminal Responsibility,' in *Punishment and Responsibility Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968) 136-157.

⁴⁷ D. Hume, *Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1888).

⁴⁸ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 14).

Horder attributes the inspiration for this theory to the work of Antony Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) Chapter 5.

⁴⁹ *Ibid.* Horder, 'Criminal Culpability: The Possibility of a General Theory' at 210.

levels of culpability reflected in the degrees of *mens rea*. Finally, the ‘role’ model of culpability⁵⁰ relates to the role we are fulfilling, for example a specific role such as doctor or parent, or a non-specific role i.e. a human being, and we fall below an idealised standard of a reasonable person in the role we are fulfilling. A synthesis of aspects of ‘role’ and character theory will be advocated to provide a theoretical rationale for the approach to recklessness proposed in this thesis.

1.3 Methodology

This study is both philosophical and doctrinal. It is qualitative research which focuses on the link between moral blameworthiness, the theories of culpability and the *mentes reae* terms of intention, recklessness and negligence in English criminal law. The research adopts a library based methodology, using both primary and secondary sources. Critics of this methodology argue that this traditional⁵¹ method⁵² of legal research is too narrow and purely doctrinal analysis has been viewed as ‘intellectually rigid, inflexible and inward-looking’.⁵³ This is because law does not exist in a vacuum⁵⁴ and these critics suggest that socio-legal methodologies are more appropriate.⁵⁵ This work does acknowledge socio-legal perspectives in its examination of moral blameworthiness and policy considerations are analysed, where appropriate. Most influential with regard to attributing moral blame and its links with

⁵⁰ J. Gardner, ‘The Gist of Excuses’ (1998) 1 *Buffalo Criminal Law Review* 575; *Offences and Defences Selected Essays in the Philosophy of Criminal Law*, (n.5).

⁵¹ C. Morris and C. Murphy, *Getting a PhD in Law* (Oxford: Hart, 2011) 30

⁵² “One of the assumptions is that ‘the character of legal scholarship is derived from the law itself,’” E.L. Rubin, *Law and the Methodology of Law* (1997) *Wisconsin Law Review* 525 cited in *Research Methods for Law*, M. McConville and W.H. Chui (eds) (Edinburgh: Edinburgh University Press, 2007)

⁵³ D.W. Wick, ‘Interdisciplinary and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 164 in *Research Methods for Law*, M. McConville and W.H. Chui (eds) (Edinburgh: Edinburgh University Press, 2007) 4.

⁵⁴ W. Twining observes that by focussing as it does on rules of law, doctrinal research’s central weakness is that it can lack reference to the context of problems the law is set to resolve, the purpose for which it was intended and its effect on society; (1976) *Taylor Lectures 1975 Academic Law and Legal Development*, Lagos: University of Lagos Faculty of Law, 20.

⁵⁵ R. Cotterrell, ‘Why Must Legal Ideas be Interpreted Sociologically’ (1998) 25 *Journal of Law and Society* 171.

criminal responsibility were the works of Antony Duff⁵⁶ and Victor Tadros⁵⁷ and it is clear that both historically and in terms of society's perceptions of justice, this link is still important. Where relevant, reference is also made to the law in other jurisdictions although conducting a comparative study as an alternative was rejected in favour of a study which would determine whether the current interpretations of recklessness and negligence could be theoretically justified and if not, to devise an alternative theoretical rationale that would support a new model of attributing criminal liability. In essence, the research began as doctrinal but then identified issues with the existing law, philosophy and the policies underpinning the law, leading to the formulation of appropriate reform.⁵⁸ The central aim was to critically analyse the concepts of recklessness and negligence to determine what the approach to recklessness should be for the future. Originally, the intention was to begin with an examination of the underlying rationale for the criminal law to ascertain whether the current definition of recklessness satisfied these theoretical principles in practice. This was to be followed in the next chapter by an examination of theories of culpability and moral blameworthiness, including character and choice theories and utilitarianism. Subsequent chapters were going to analyse the *mens rea* requirement and its historical development, and analyse intention, recklessness, and negligence with strict liability, respectively. Finally the work would conclude with a recommendation for a new approach to recklessness.

At an early stage in the research, it had become clear that the thesis needed a much narrower focus. What was emerging from the literature was a common underlying theme – the

⁵⁶ R.A. Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990); *Criminal Attempts*, (Oxford: Clarendon Press, 1996); 'Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?' (2002) 6 *Buffalo Criminal Law Review* 147; *Answering For Crime Responsibility and Liability in the Criminal Law* (Oxford and Portland: Hart Publishing, 2007).

⁵⁷ V. Tadros, 'The Characters of Excuse' (2001) 21 *Oxford Journal of Legal Studies* 495; *Criminal Responsibility* (Oxford University Press: Oxford, 2005)

⁵⁸ To this extent it is seen to refute the criticisms of this method of research; I. Dobinson and F. Johns, Qualitative Legal Research, in *Research Methods for Law*, M. McConville and W.H. Chui (eds) (Edinburgh: Edinburgh University Press, 2007).

historical prerequisite for moral blameworthiness for serious criminal offences. The research became honed; whereas the earlier work had provided a commentary on the development of the criminal law in this area, the new objective was a comprehensive critique of the historical development of the *mentes reae* of recklessness and negligence to make recommendation for the future ambit of these terms with an appropriate theoretical rationale. Alan Norrie's authoritative work on the history of recklessness was invaluable;⁵⁹ the work of Herbert Hart,⁶⁰ Michael Moore,⁶¹ Peter Arenella,⁶² Jeremy Horder⁶³ and John Gardner⁶⁴ were also extremely influential with regard to culpability and establishing an appropriate basis for reform. Francis Sayre's⁶⁵ and Albert Lévit's⁶⁶ studies of the development of the requirement for *mens rea* were also illuminating.

With the underlying theme of moral blameworthiness, additional culpability theories were examined in the search for a hybrid theory to justify the recommendations made, but the relevance of culture to moral blameworthiness and criminal responsibility was omitted in order to accommodate this, given the word limit. Any meaningful discussion of strict liability was excluded as there is no mental element in such offences and generally no moral fault is required for these crimes. In a similar vein, the theory of utilitarianism is restricted in the discussion. Although it is said to have a role in providing the theoretical rationale for criminal negligence, and is considered in this context but found to be of limited value, as the

⁵⁹ *Crime, Reason and History*, (n 10).

⁶⁰ 'Negligence, Mens Rea and Criminal Responsibility,' in *Punishment and Responsibility Essays in the Philosophy of Law* (n 46).

⁶¹ 'Choice, Character, and Excuse' (1990) 7 *Social Philosophy and Policy* 29.

⁶² 'Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments' (1990) 7 *Social Philosophy and Policy* 59.

⁶³ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 14).

⁶⁴ J. Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575; *Offences and Defences Selected Essays in the Philosophy of Criminal Law*, (n.5).

⁶⁵ 'Mens Rea' (1931-1932) 45 *Harvard Law Review* 974.

⁶⁶ 'The Origins of the Doctrine of Mens Rea' (1922-1923) 17 *Illinois Law Review* 117.

theory is not grounded in morality as it focusses on the promotion of the greatest happiness of the greatest number of members of a given society.

1.4 Overview of the thesis

Following on from the Introductory Chapter, Chapter Two examines in more depth the meaning of *mens rea* demonstrating that there has been a judicial departure from the traditional view that *mens rea* must signify moral blameworthiness. The discussion will then consider objective and subjective approaches to *mens rea* and what is understood by these labels, advocating a consistent interpretation. Finally the theories of culpability will be critically examined to identify which theories provide the most appropriate philosophical explanation of our current *mentes reae* terms of intention, recklessness and negligence, and it is submitted that none of the theories can apply independently without reliance on aspects of other theories. However, a synthesis of character and role theory would support both the current position and the proposals advocated in this thesis in subsequent chapters. Ultimately it will be demonstrated that whilst *mens rea* may equate to criminal responsibility, it is only one of a number of factors relevant to the degree of culpability of the agent.

Chapter Three considers the interpretation and development of recklessness in the criminal law, noting that the development of the concept of oblique intention has employed the language of recklessness and this usage blurred the distinction between the two mental elements. The historical link between intention and foresight of consequences underlies this movement, combined with judicial creativity to make the concepts of intention and recklessness sufficiently flexible to do justice in particular circumstances. The extent to which justice has been achieved is questionable. An analysis of the various attempts to define recklessness will be undertaken and a new interpretation of the current definition is

advanced and linked to the theories of culpability. The wording of the definition that is currently employed is technically capable of being purely subjective which would mean that it no longer requires that D takes an objectively unjustifiable risk. Where there is doubt in the interpretation of law in a criminal case the courts should give the benefit of doubt to the defendant. This would mean that securing convictions would be more difficult as D could argue either that he did not foresee a risk, or that he thought it was a reasonable risk to run. Such an interpretation would be more unacceptable than the earlier subjective test in *Cunningham* that left it to the judge or jury to determine whether running the risk was justifiable. An approach to determining recklessness that synthesises objective and subjective viewpoints will be advocated as it will provide a true reflection of current practice.

Chapter Four considers criminal liability for negligence and how the courts have used the language of recklessness and negligence interchangeably in their attempts to define one or other of these terms. A further examination of the meaning of *mens rea* in relation to inadvertent conduct is undertaken which reveals that a mental state constituted by lack of thought can properly be included in the family of *mentes reae*. The appropriateness of imposing criminal liability for negligence/inadvertence is questioned where stigmatic offences are concerned as most theories of culpability fail to show how such liability can be justified.⁶⁷ A person can be negligent where their conduct falls short of a reasonable standard of behaviour in the circumstances. Where a person is held to be criminally liable without any of their personal characteristics being taken into consideration it can be difficult to suggest that D necessarily deserves blame. The theory of culpability that reflects such

⁶⁷ The composite of certain aspects of character theory and 'role' theory advocated in this thesis will provide a theoretical rationale for liability for inadvertence in the right circumstances.

disregard is Gardner's 'role theory,'⁶⁸ and it is submitted that this theory could not be universally applied without causing injustice in cases where a person could not possibly meet the standard of the reasonable person.⁶⁹ Any reasonable person test needs to be partly subjective to respond to situations where D's conduct does not reflect fault on his part. Moral blaming practices can support the ascription of criminal responsibility where serious harm is caused and proposals are made to both extend liability for inadvertence by expanding the interpretation of recklessness but also restricting liability by requiring further factors to be considered in order to better reflect the culpability of the potentially broad range of inadvertent defendants. It is proposed that liability for negligence should be abolished with regard to stigmatic (*mala in se*) offences. If the approach to recklessness advocated in Chapter Three was adopted, such liability would be otiose anyway. Additionally, in Chapter Four, the test advocated in Chapter Three for recklessness will be adapted to encompass liability for omissions. Some of those currently caught by the test for gross negligence will still be found liable but others will not be deserving of criminal liability.

The final Chapter will recall the aims and objectives of this work and will provide a summary of the position taken in this thesis. It will be noted that the distinctions between the mental states of intention and recklessness need to be maintained to reflect different degrees of moral censure. A unified all-encompassing form of recklessness replacing all other mental states is not advocated for this reason. In particular, it will be proposed that recklessness as a state of mind should be determined by a synthesis and modification of the subjective and objective approaches previously employed so that D would be presumed to be reckless either where he foresaw the risk of harm, or where the risk was serious and obvious and D had the general

⁶⁸ J. Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575; *Offences and Defences Selected Essays in the Philosophy of Criminal Law*, Chapter 6, (n 5). However, the theory is propounded in the context of current criminal defences and therefore may not have been intended to be applied literally to offences.

⁶⁹ Perhaps for reasons of age or other mental incapacity.

capacity to foresee it. It will then be up to the defence to show why D should not be deemed reckless; D would be excused where he lacked the specific capacity to perceive the risk in the circumstances but not where his attitude manifested a wanton disregard for the welfare of others.

It will be recalled that it has been submitted that criminal liability for negligence is inappropriate for serious offences. Whilst some defendants currently found to be criminally negligent may alternatively be deemed reckless under the proposed definition, others will escape criminal censure altogether. The defendant who fails to foresee a risk that is not an obvious one may only be subject to civil liability. Similarly, where D fails to advert to a serious risk or where a risk is foreseen but D believes he has eliminated it before acting, an assessment of both his general and specific capacity at the time of acting will determine whether he was reckless and deserving of criminal punishment or merely negligent and therefore not criminally blameworthy.

Chapter 2

2.1 Introduction to Chapter Two

This chapter will seek to explore the link between the criminal law's general requirement of *mens rea* before imposing criminal liability and its link to moral blameworthiness. The common law has always relied on the maxim: '*actus non facit reum nisi mens sit rea*,'¹ viz an act alone does not make a man guilty unless his mind is also guilty.² It will be established that there have been two different interpretations of the term *mens rea* and the analysis will show that this term is no longer necessarily indicative of moral blameworthiness.

Following this, there will be an examination and analysis of the leading theories of culpability which are argued to be the basis of justifying criminal punishment to determine whether, and to what extent, they can theoretically underpin the most common *mens rea* terms of intention, recklessness and negligence. It will be argued that although some theoretical rationale can be found between these theories and the currently accepted definitions of intention, recklessness and negligence, no single theory of culpability is universally applicable to all the definitions. It is only by synthesising the theories that an adequate theoretical rationale can be provided and it will be advanced that culpability can be grounded in the character of our actions to the extent that they reflect on our characters, employing a synthesis of aspects of character and 'role' theory. Furthermore, the presence of *mens rea* is only generally relevant in determining innocence or guilt, as other supplementary factors need also to be taken into account to distinguish between the different levels of moral

¹ E. Coke, Third Institute (1641) 6, 107; an adaptation of '*reum non facit nisi mens rea*' found in the context of perjury in Leges Henrici Primi c.5, § 28. cited in A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine* 3rd Edn., (Oxford: Hart Publishing, 2007) 8; but traced back to St. Augustine, G. Williams, *Textbook of Criminal Law* 2nd Edn., (London: Stevens, 1983) 70.

² Statutory law has not been based on the same maxim although there is a presumption that *mens rea* is required which can be rebutted, see *Sweet v Parsley* [1970] AC 132, cf. Sexual Offences Act 2003 ss5-8.

and legal culpability that the law seeks to recognise. This is despite the fact that the different *mens rea* terms examined in this work are intended to reflect this distinction themselves.

Finally, the proposal for a unified concept of *mens rea* will be considered, but rejected on the ground that it would not adequately reflect important moral culpability distinctions.

2.2 Mens Rea

Mens Rea is an abstract principle³ which links criminal liability with the mental ‘guilt’ of the actor.⁴ Crime has ‘always been regarded as a moral wrong’ and deserving of public condemnation and retribution.⁵ Accidental harms may arise but lack the necessary moral fault or blameworthiness that the criminal law generally requires before imposing criminal sanctions. Proscribed acts can now arise for ‘social expediency’ and not because the forbidden conduct is immoral.⁶ For this reason, *mens rea* has been described as a ‘misleading’ term as ‘it suggests moral guilt is a necessary condition of criminal responsibility.’⁷

Historically⁸ *mens rea* has been regarded as the requirement of a ‘guilty mind’,⁹ which was seen as a necessary condition to establish the defendant’s moral blameworthiness and this justified his punishment. The maxim, *actus non facit reum nisi mens sit rea* was founded upon a sermon delivered by St Augustine on the Epistle of St James, the original wording

³ An earlier draft of some of the material in this chapter can be found in C. Crosby, ‘Culpability, Kingston and the Law Commission’ (2010) 74(5) *Journal of Criminal Law* 434.

⁴ J. Horder, ‘Two Histories and Four Hidden Principles of Mens Rea’ [1997] 113 *Law Quarterly Review* 95.

⁵ D. Ormerod, *Smith and Hogan Criminal Law* 11th Edn., (Oxford: Oxford University Press, 2005) 4.

⁶ *Ibid.* at 13.

⁷ H.L.A. Hart, *Punishment and Responsibility Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968) 14.

⁸ W. Wilson, *Criminal Law Doctrine and Theory* 2nd Edn., (Essex: Longman, 2003) 119.

⁹ Its commonly claimed Latin meaning, see G. Williams, *Textbook of Criminal Law* 2nd Edn., (London: Stevens, 1983) 71.

being: ‘*Ream linguam non facit nisi mens sit rea*’.¹⁰ It was used in the context of perjury¹¹ where a man could not be guilty of perjury unless he thought what he was saying was untrue. For Augustine, men should aspire to be close to God and, if they behaved badly, the only way to be reconciled to God was through penance (punishment) for their sins. It seems that the later fusion of Christian theology with Anglo-Saxon law led to the mental element in crime becoming increasingly important in finding the moral blameworthiness necessary to establish guilt and justify punishment.¹² The most influential penitential books were those by ‘Vinnian, of the Irish church, and of Theodore of Tarsus, Archbishop of Canterbury’.¹³ It was the ‘evil thought’ which constituted the sin, whether it was acted upon or not.¹⁴ From Theodore’s writing it is clear that ‘the guilty mind is punished more severely than the non-guilty mind’,¹⁵ but it must be remembered that under Anglo-Saxon law, if you were responsible for causing harm to someone you had to compensate them, even if the harm was accidental. At this time, *mens rea* was used to determine the extent of the punishment to be meted out.¹⁶ Fortunately, English law has not adopted the teachings of the penitential books literally as bad thought alone will not suffice for conviction, an act or in some cases an omission, is also required. By the twelfth century, church law had become the dominant influence and the canonists’ held a fundamental belief that the mental element was the determinant of guilt.¹⁷ Under canon law, the penance for various sins outlined in the penitential books was intrinsically dependent upon the mental state of the sinner, as the

¹⁰ A. Lévit, ‘The Origin of the Doctrine of Mens Rea’ (1922) 17 *Illinois Law Review* 117.

¹¹ The reference to the maxim in *Leges Henrici Primi*, written about 1118, is also made in this context, F. Sayre, ‘Mens Rea’ (1931) 45 *Harvard Law Review* 974 at 983.

¹² *Ibid.* Sayre at 974. Note Sayre and Lévit disagree about the extent to which Roman Law was influential in this evolution of *mens rea*. Lévit, ‘The Origin of the Doctrine of Mens Rea’ (1922) (n 10).

¹³ A. Lévit, ‘The Origin of the Doctrine of Mens Rea’ (n 10) at 132.

¹⁴ *Ibid.* at 133.

¹⁵ *Ibid.* at 134.

¹⁶ *Ibid.* at 136.

¹⁷ F. Sayre, ‘Mens Rea’ (n 12) at 980.

essence of moral guilt.¹⁸ At this time, the clergy were both the educators of the day and those who conducted the trials by ordeal, extending their influence.

Later authoritative works followed this trend of equating *mens rea* to moral blameworthiness, ingraining it into the fabric of English law.¹⁹ Yet it has been argued that the focus had perhaps shifted in Coke's writing from moral guilt towards 'a precise intent at a given time'²⁰ and generally referring to the mental element required for an offence. It has been suggested that *mens rea* has evolved as a reaction to changing objectives in the administration of criminal justice: first to facilitate the shift away from the blood feud, then to its use to punish moral wrongdoing, and finally to the modern aim of protecting social and public interests.²¹ This is true to some extent and is a point that can be illustrated by the example of failing to summon medical assistance for a dying child. When *mens rea* equated to moral wrongdoing and just deserts, conviction for homicide could not occur if the reason for the failure was an honest belief that prayer was the answer. Now parents would be prosecuted for manslaughter because society requires protection from those with 'dangerous and peculiar idiosyncrasies'²² as well as those who act with a bad intent. Where serious crimes are concerned, it remains the general rule that a finding of moral blameworthiness should be a precursor to punishment.

It is worth noting that the function of *mens rea* is not restricted to establishing culpability²³ although it usually forms part of attributing criminal responsibility. *Mens rea* may be established yet D may not be deemed culpable, for example where he has a defence.

Similarly, as will be demonstrated, D may lack moral culpability and yet have the necessary

¹⁸ Ibid. at 988.

¹⁹ For example, Bracton's mid-13th century *De Legibus et Consuetudinibus Angliae*, and Coke's *Third Institute* (1641), cited in F. Sayre, 'Mens Rea' at 985 and 988.

²⁰ Ibid. at 1000.

²¹ Ibid. at 1017.

²² Ibid. at 1018.

²³ W. Chan and A.P. Simester, 'Four Functions of Mens Rea' [2011] *Cambridge Law Journal* 381.

mens rea for the offence and be convicted.²⁴ On some occasions, without a specific state of mind D's actions can be lawful; it is only the presence of the requisite *mens rea* that may turn an otherwise lawful act into a criminal one.²⁵ In this respect, *mens rea* helps to constitute the morally wrongful act.²⁶

Mens rea also serves to provide citizens with fair warning of the extent of criminal prohibitions, which Hart saw as its basic function, rather than fault.²⁷ This proposition links well with Hart's version of choice theory discussed below, as where the law is clear and D is shown to act with intention or subjective recklessness he has chosen to engage in criminality and is deserving of punishment.²⁸ It has been argued²⁹ that Gardner goes further than this, as he stated that the 'mens rea principle' requires 'criminal wrongs to have certain constituents, namely the wrongdoer's intending or being aware of at least some of the (other) wrong-making features of her action.'³⁰ Gardner's claim is made in the context of strict liability where he combines it with the 'fault principle,' namely that criminal liability should only be imposed for wrongs faultily committed. Fault is important in the criminal law even where 'it is not a constituent of the wrongdoer's wrong.'³¹ Certainly, Gardner's 'role' theory of culpability, discussed below,³² has no such mental restrictions.³³

Finally, it is important to realise that *mens rea* can limit or extend the scope of any criminal prohibition. Some offences can only be committed where D is proven to have intended the

²⁴ See the analysis of *Kingston* [1994] 3 All ER 353, below at 2.5.3.

²⁵ An example is the presence of dishonesty and the intention to permanently deprive under s.1 Theft Act 1968.

²⁶ W. Chan and A.P. Simester, 'Four Functions of Mens Rea' (n 23) at 386.

²⁷ *Ibid.* at 390.

²⁸ H.L.A. Hart, *Punishment and Responsibility Essays in the Philosophy of Law* (n 7) 181-2.

²⁹ W. Chan and A.P. Simester, 'Four Functions of Mens Rea' (n 23) at 391-2.

³⁰ J. Gardner, 'Wrongs and Faults' in A.P. Simester (ed) *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) 51 at 69.

³¹ *Ibid.* at 70-71.

³² At 2.7.1.

³³ However, his propositions are made in the context of current criminal defences, not offences *per se*, and no assumption should be made that his proposals were meant to have such universal applicability.

proscribed act. This restricts those who will be caught by the offence and maximises autonomy. If the mental element specified is negligence, the individual needs to take more care to avoid breaking the law, making it more intrusive upon society and requiring justification.³⁴

2.2.1 *Mens Rea* and Moral Blameworthiness

Culpability is often referred to as a requirement for moral blameworthiness, but there is uncertainty as to what is meant by the use of the word “moral” in this context: whether criminal culpability requires doing something that is seen as inherently morally wrongful (such as murder or rape) or simply connotes a legal fault, with law breaking itself deemed to be morally wrongful. Although traditionally there were few criminal offences and all were easily recognisable as morally wrongful conduct in themselves,³⁵ for example rape, murder and theft, the number of criminal offences now exceeds 8 000³⁶ and most of these are regulatory offences³⁷ which are often morally neutral. From this it would appear that criminal culpability can now arise without conduct being judged as morally wrongful *per se* and without requiring moral blameworthiness to be shown even for more serious offences.³⁸ This stance has been a fairly recent legal development as in 1990 it was acknowledged that:

while utilitarian theorists do not insist on any necessary link between criminal liability and moral culpability, they do assume that the law’s moral responsibility

³⁴ W. Chan and A. P. Simester, ‘Four Functions of Mens Rea’ (n 23) at 394-5.

³⁵ See A. Lévy, ‘The Origins of the Doctrine of Mens Rea’ (n 10) and F.B. Sayre, ‘Mens Rea’ (n 12) for a detailed exposition of the development of English criminal law, moral blameworthiness and *mens rea*.

³⁶ A. Ashworth, ‘Is the Criminal Law a Lost Cause’ (2000) 116 *Law Quarterly Review* 225.

³⁷ Gardner makes the point that such offences govern our specific activities in relation to the roles we assume, such as motorist, parent, shopkeeper, etc.; J. Gardner, *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (Oxford : Oxford University Press, 2007) Chapter 6.

³⁸ G. R. Sullivan notes that in *Kingston* [1995] 2 AC 355, Lord Mustill’s view was that ‘conviction for a serious offence need not entail descriptively or prescriptively that the defendant was in any sense at fault,’ in ‘Making Excuses’ in A. P. Simester and A. T. H. Smith (eds), *Harm & Culpability* (Oxford: Clarendon Press, 1996) 13 at 134.

*requirement will reassure the public that the criminal actor deserves moral blame when he is convicted of a serious non-regulatory offense.*³⁹

There is no doubt that for practical purposes criminal liability for stigmatic offences will generally arise only when D would also be morally responsible as without some incorporation of society's moral principles the aims of the criminal law could not be achieved.⁴⁰ Although it is a fundamental moral principle that moral blameworthiness is a prerequisite to punishment, it is not an absolute principle, *ceteris paribus*; it can be subject to derogation where it is outweighed by other principles or by a 'substantial gain in utility.'⁴¹ Whether such derogation should ever apply in the case of stigmatic offences is open to question, although it must be recognised that for serious offences, if there was an absence of moral blameworthiness there could be a defence available. If this was not the case a conviction could be controversial and subject to criticism.⁴² Such criticism is often levelled at imposing criminal liability for negligence/inadvertence, especially for serious offences, and also at crimes of strict liability.⁴³

The distinction between legal guilt and moral guilt is one that has often been blurred⁴⁴ and choice theorists have been criticised for this flaw in their propositions.⁴⁵ If *mala in se* crimes are under consideration this is not an issue as D would be both legally and morally guilty, but many crimes are merely *mala prohibita* and breach of such regulatory crimes will not

³⁹ P. Arenella, 'Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments' (1990) 7 *Social Philosophy and Policy* 59 at 63.

⁴⁰ G. Vuoso, 'Background, Responsibility, and Excuse' (1986-1987) 96 *Yale Law Journal* 1661 at 1663.

⁴¹ *Ibid.* at 1664.

⁴² See, for example, *R v Kingston* [1994] 3 All ER 353. Here, the defendant had been drugged to loosen his inhibitions and, for the purposes of blackmail, was video recorded sexually assaulting a 15 year old boy.

⁴³ Such offences require neither *mens rea* nor moral blameworthiness.

⁴⁴ Kant clearly distinguished between the two, I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, trans. Ladd, (Indianapolis: Bobbs-Merrill, 1965); see text to note 56.

⁴⁵ P. Arenella, 'Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments' (n 39) at 60.

necessarily attract moral guilt, unless it could be argued that D is morally guilty for law breaking *per se*.⁴⁶ This could be on the basis that regulatory offences are there to protect the public good and if D commits such an offence he is gaining an unfair advantage over his fellow citizens who are law abiding. It is submitted that this argument only works if D is consciously flouting the law however. Even strict liability offences have been said to be justified on the basis that D is choosing to undertake an activity subject to regulation and must therefore ensure he is aware of the regulations and observes them.⁴⁷ In many instances where the offences are merely regulatory this can be justified where there is a due diligence defence available.⁴⁸ It will be argued here that the ‘role’ theory of culpability links well with objective recklessness and negligence, as well as strict liability offences.⁴⁹

It has been suggested⁵⁰ that categorising the criminal defences as justifications or excuses is the way in which the criminal law now recognizes what is morally right or wrong and such categorisation provides moral guidance to citizens.⁵¹ Yet some offences do have concepts of morality in their very definitions, for example ‘dishonesty’ for the purposes of the Theft Act 1968, as defined in *R v Ghosh*.⁵² It has also been observed⁵³ that when moral issues are brought into the definitional elements of an offence it can cause uproar, an example being *MPC v Caldwell*.⁵⁴ Having noted that criticism, it is submitted in this thesis that the ‘uproar’

⁴⁶ E. Pincoffs, ‘Legal Responsibility and Moral Character’ (1973) *Wayne Law Review* 905.

⁴⁷ H.L.A. Hart, *Punishment and Responsibility Essays in the Philosophy of Law* (n 7).

⁴⁸ However, there are some serious offences such as those under the Sexual Offences Act 2003 where strict liability is imposed because the protection of children is given paramountcy. Here, culpability without moral fault can be imposed to uphold the State’s moral duty to protect the vulnerable.

⁴⁹ See below at 2.7.1 Discussion of offences of strict liability are beyond the scope of this work.

⁵⁰ G. Fletcher, *Rethinking Criminal Law* (Boston Toronto : Little, Brown and Co., 1978) Chapter 10.

⁵¹ Further discussion of this treatment of the criminal defences is beyond the scope of this work.

⁵² [1982] 2 All ER 689.

⁵³ J. Gardner, ‘The Gist of Excuses’ (1998) 1 *Buffalo Criminal Law Review* 575 at 597; *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (n 37).

⁵⁴ [1982] AC 341, a case seen to introduce a capacity-independent standard for recklessness, discussed in Chapter 3 below.

referred to, arising from this decision, was in consequence of its ambiguity and the potential for unfairness if it was rigidly applied without adaptation to different circumstances.⁵⁵

Kant,⁵⁶ to whom the choice theory of culpability is attributed, is one of the rare theorists to have distinguished between legal and moral guilt, identifying ‘two distinct ways of being bound to do one’s duty,’ one external and the other internal. The external, to which he also refers as ‘juridical’ legislation, entails the use of external coercion and incentives to motivate the citizen to behave in the required manner. Alternatively, if a person fulfils their duty purely because it is their duty, this is internal coercion, or as he calls it ‘ethical’ legislation. In this latter example, the act would be termed as ‘moral’ whereas if the motivation is external the act is merely ‘legal.’ Kant believed ‘moral laws...are valid as laws only insofar as they can be seen to have an *a priori* basis and to be necessary’ and ‘the instructions of morality...command everyone...solely because and insofar as he is free and has practical reason’⁵⁷ as ‘reason commands how one ought to act.’⁵⁸

For Hampton, another choice theorist, culpability is based on the choice to defy moral norms and grades of immorality can be distinguished by the degrees of rebellion. These are represented by the degrees of *mens rea* denoting the ‘the severity of the offense’ and the ‘emotional and intellectual attitudes attending its performance’.⁵⁹ For her, *mens rea* establishes the ‘signs of a defiant mind’, for example knowledge, purposiveness and recklessness, whereas the excuses and justifications that the law recognises in its permitted defences show a lack of defiance. Recklessness here includes not only subjective

⁵⁵ An analysis of this judgment is in Chapter 3.

⁵⁶ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, (n. 44) at xiv.

⁵⁷ *Ibid.* at 15.

⁵⁸ *Ibid.* at 16.

⁵⁹ J. Hampton, ‘Mens Rea’ (1990) 7 *Law and Philosophy* 1at 19-25.

recklessness, but also those who ‘had to know’⁶⁰ they were risk-taking even though they may not have meant to cause harm; D is morally and legally culpable because he ‘wanted to do that which entailed risking the kind of harm ruled out by legal and moral imperatives.’⁶¹

2.2.2 *Mens Rea* as Legal Fault

The second and more modern interpretation of *mens rea* is illustrated in *Kingston*.⁶² Here, Lord Mustill stated that *mens rea* is purely a technical term which specifies the mental element of the particular offence.⁶³ It is suggested that in legal use, this is now more technically correct. Moral blameworthiness is no longer a precondition of criminal liability, although it will be argued that it should generally be a precondition with regard to serious offences. His Lordship found that the Court of Appeal’s decision in this case had been founded on the assumption that ‘if blame is absent the necessary mens rea must also be absent’,⁶⁴ but that no such general principle exists in the criminal law. In the majority of cases proof of the mental element will attract disapproval and will be appropriately labelled a ‘guilty mind’ but this, he stated, is not always so: ‘In respect of some offences the mind of the defendant, and still less his moral judgment, may not be engaged at all’.⁶⁵ Furthermore:

to assume that contemporary moral judgments affect the criminality of the act, as distinct from the punishment appropriate to the crime once proved, is to be misled by the expression “mens rea,” the ambiguity of which has been the subject of complaint for more than a century. Certainly the “mens” of the defendant must usually be

⁶⁰ Ibid. at 25.

⁶¹ Ibid. at 25.

⁶² [1994] 3 All ER 353.

⁶³ C. Wells, ‘Swatting the Subjectivist Bug’ [1982] *Criminal Law Review* 209 at 210.

⁶⁴ *Kingston* [1995] 2 AC 355 at 364.

⁶⁵ Ibid.

*involved in the offence; but the epithet “rea” refers to the criminality of the act in which the mind is engaged, not to its moral character.*⁶⁶

If this second interpretation is accepted it appears that “guilt” is not used in the sense of its everyday meaning, i.e. that it must necessarily involve moral wrongdoing. Immorality is not an essential ingredient as an offence can be committed when acting ‘with a good motive, or for conscientious reasons.’⁶⁷ Similarly, immoral behaviour is not always criminalised, for example adultery is not a criminal offence,⁶⁸ however, it is conceded that the more immoral the conduct, the more likely it is that the court will interpret *mens rea* as being equivalent to moral mental guilt. It is a general principle of English criminal law⁶⁹ that no one should be convicted of a crime unless there is some fault⁷⁰ attributable to the accused, with the exception perhaps⁷¹ of crimes of strict liability.⁷² It is apparent that in modern times it can be purely legal fault, and not necessarily moral or mental guilt, that is the key, even though moral blameworthiness may also be present.

It has been argued that an analysis of the judgments in *Kingston* reveal that Lord Mustill’s view was that ‘conviction for a serious offence need not entail descriptively or prescriptively that the defendant was in any sense at fault.’⁷³ This led to the criticism that ‘a conviction for a stigmatic offence is a sanction in its own right and that sanctions should only be confined to

⁶⁶ Ibid. at 365.

⁶⁷ G. Williams, *Textbook of Criminal Law*, (n 9) 72.

⁶⁸ It is noted that society’s morality is a fluid concept as the decriminalisation of homosexuality demonstrates.

⁶⁹ This is a common law principle, not necessarily a statutory one.

⁷⁰ Celia Wells suggests *mens rea* could also be widely defined as ‘the determinant of culpability’ in ‘Swatting the Subjectivist Bug’ (n 63) at 210.

⁷¹ Some such offences have a ‘no negligence’ defence.

⁷² See, for example, *Larsonneur* (1933) 149 *LT* 542. However, on closer inspection of the facts even here there was moral fault much earlier than her arrest upon deportation from Ireland. D.J. Lanham, ‘*Larsonneur* Revisited’ [1976] *Criminal Law Review* 276.

⁷³ G.R. Sullivan, ‘Making Excuses’ in A.P. Simester and A.T.H. Smith (eds), *Harm & Culpability* (Oxford: Clarendon Press, 1996) 131 at 135.

the blameworthy,⁷⁴ limited only where there are issues of consistency and forensic practicability. Certainly Lord Mustill's view seems to conflict with that of Lord Bingham of Cornhill who said in *R v G & R*⁷⁵ that conviction for a serious crime required proof of a culpable state of mind and that the problem could not simply be solved by conviction and a nominal penalty. Whilst the argument is a forceful one and a lack of any fault should prevent the imposition of criminal liability, the defendant in *Kingston* was not perhaps totally faultless as he was still found to have some control over his actions; *mens rea* could still be established. It follows from the discussion above, that *mens rea* equates to a 'guilty' mind only in the sense of legal guilt: 'the word '*rea*' refers to the criminality of the act, not its moral quality.'⁷⁶ Whilst acknowledging this, it will generally be the case that moral blameworthiness will also be a precondition for criminal responsibility and that departures from this general principle should be rare in the interests of justice.

2.2.3 Should *mens rea* be subjective or objective?

As criminal behaviour is identified by the coincidence of the *actus reus* and *mens rea*⁷⁷ of the offence, there are different viewpoints as to what should be the minimum *mens rea* for criminal liability to arise. Wilson cites intention, recklessness, wilfulness, knowledge and malice as relevant states of mind⁷⁸ but distinguishes negligence on the basis that it is not a state of mind but an unacceptable standard of conduct which is included in *mens rea*⁷⁹ because it signifies fault.⁸⁰

⁷⁴ Ibid.

⁷⁵ *R v G & R* [2004] 4 All ER 765, discussed in Chapter 3.

⁷⁶ D. Ormerod, *Smith and Hogan Criminal Law* (n 5) 92.

⁷⁷ There are two views to note here: either the *actus reus* includes the absence of a defence, or alternatively that defences are taken into account separately.

⁷⁸ Gardner and Jung include 'dishonestly' and 'without due care and attention' and add *actus reus* terms implying *mens rea*: 'possessing' and 'permitting'; J. Gardner and H. Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *Oxford Journal of Legal Studies* 559 at 562.

⁷⁹ See further discussion of the suitability of negligence as a *mens rea* term in chapter 4 below at 4.4.1.

⁸⁰ W. Wilson, *Criminal Law Doctrine and Theory* (n 8) 119.

There have been both subjective and objective interpretations of the main *mens rea* terms and these different approaches to determining criminal liability are reflected to different degrees by the theories of culpability, which will be discussed later in this chapter. For example, where there is an intention to cause harm or where an offender can foresee harm will arise from his actions, it is easy to argue that he possessed a ‘guilty’ mind, but where a person does not intend harm and does not even foresee a risk of harm resulting from his conduct it becomes more difficult to justify criminal responsibility. That is not to say that the inadvertent should always be excused for any harm they cause. A failure to consider the welfare of others should attract censure where D has the cognitive capacity to be aware of the risk of harm had he stopped to think, in circumstances where he also displays an indifference to the needs of others who may be harmed by his actions.

2.2.3.1 Subjectivism

Subjectivists⁸¹ would argue that there should be no liability unless the defendant intended to commit the offence or foresaw there was a risk of committing the offence, but nonetheless continued to act. Subjectivist theory is morally justified on the basis that foresight results in the defendant making a “reprehensible choice” to continue to act.⁸² This reasoning would hold the interpretation of ‘guilty mind’ to mean a requirement of intention or reckless conduct with foresight. Using this approach moral wrongdoing is easily established as a matter of fact. Once it is established that such a choice has been made it is unnecessary to delve further into D’s motive or attitude.⁸³

⁸¹ For example, Glanville Williams and John C. Smith.

⁸² D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ [1988] *Criminal Law Review* 4.

⁸³ *Ibid.* at 6.

Subjectivist theory also supports the argument from “inexorable logic” propounded by Lord Hailsham in *DPP v Morgan*,⁸⁴ applied in *Williams*⁸⁵ and *Beckford*.⁸⁶ In all three of these cases the defendants argued that they believed they were acting lawfully or were unaware of the risk of their conduct causing harm to others. In such circumstances subjectivism (and the argument from logic) would result in acquittal. This could be seen as encouraging people to close their minds to what they were doing in the face of the blindingly obvious. Accordingly, cases like *Morgan* clearly illustrate that it is not possible to simply limit moral culpability to situations of intention, knowledge or foresight, and for this reason the argument from logic has been rejected as a pivotal determinant of criminal liability.⁸⁷ Often incidents may occur in a split second and it is unrealistic to ask whether D thought about certain results⁸⁸ or circumstances before acting. Subjectivists also have problems with voluntarily intoxicated defendants so that securing a conviction in such circumstances is based on the argument that where D recklessly gets into such a state of intoxication that he cannot form the requisite *mens rea* of a particular offence, recklessly getting intoxicated is deemed sufficient for the fault required.

2.2.3.2 Objectivism

Objectivists propose that liability should be expanded to include those whose conduct causes harm to others regardless of whether they foresaw a risk of harm occurring, but where the reasonable person would have foreseen such a risk. This is a much broader extension of liability which includes inadvertent conduct. It focuses on ‘moral arguments about powers of

⁸⁴ [1976] AC 182. Here, D invited 3 men to have sex with his wife telling them if she resisted or screamed she was merely enjoying sexual intercourse. The men forced her to have sexual intercourse without her consent but would have had a defence if they honestly believed she consented.

⁸⁵ (1987) Cr.App.R.276 D believed someone was being attacked when actually they were being lawfully arrested by X and D assaulted X.

⁸⁶ [1988] 1 AC 130 (P.C.) D was an armed policeman who thought X was armed and terrorising his family. He thought X was shooting at him and returned fire killing him. X was unarmed.

⁸⁷ J. Horder, ‘Cognition, Emotion, and Criminal Culpability’ [1990] 106 *Law Quarterly Review* 469.

⁸⁸ R. Cross, ‘The Mental Element in Crime’ (1967) 88 *Law Quarterly Review* 215 at 226.

cognition⁸⁹ in determining culpability and can hold culpable those who *should* have done better. It can cope easily with the intoxicated agent as the reasonable person does not get intoxicated and commit crimes and it is the standard of behaviour of such a prudent and responsible person that D will be judged against. An objective standard has strong correlations with everyday blaming practices as we judge others by comparison with our reasonable expectations of how people should behave.⁹⁰

If a defendant makes a mistake but had reasonable grounds for believing he was acting lawfully then he must be acquitted as it is not reasonable to expect more than that we should take reasonable care. Even this extension of culpability has its failings, one being that it fails to distinguish sufficiently between different kinds of mistaken action in that it cannot differentiate between the defendants in *Morgan* and the defendant in *Williams*, the former it has been suggested being morally culpable and the latter not.⁹¹

The objective approach also assumes that all people are capable of always acting in a rational manner. This is simply not possible as some people may only be capable of what appears to be 'irrational' behaviour to others and even the most rational of us act irrationally at times by virtue of the fact that we are human. We are not legal individuals in the abstract, one of the criticisms of any 'reasonable man' test and also a flaw in the subjective approach and 'choice' theory. The main criticism of objectivism is that in its pure form, it can hold someone criminally responsible where they lacked the cognitive capacity to foresee the risk that their actions might cause harm to others. Punishing a person who lacks the capacity to ever achieve the standard of the reasonable man is hard to justify although Gardner's 'role'

⁸⁹ J. Horder, 'Cognition, Emotion, and Criminal Culpability' (n 87).

⁹⁰ S. Kadish, 'Excusing Crime,' (1987) *California Law Review* 257 at 289.

⁹¹ *Ibid.*

theory, discussed below,⁹² would support such a position. It is contended here that the criminal law should not be used in these circumstances as to do so would lack any moral justification. Criminal sanctions could not act as a deterrent and criminal punishment can not be solely grounded on the protection of society at the expense of the individual, and this should be especially so in the case of *mala in se* crimes.

2.2.3.3 Beyond subjectivism and objectivism -taking account of emotions and desires

It has been proposed that a further dimension should be considered when devising principles of culpability, that account should be taken of ‘the evaluation of actions stemming from desires associated with emotions.’⁹³ This would then allow distinctions to be made ‘by reference to what we (morally) expect of people experiencing the desires associated with the emotions that they experienced at the time of the alleged offences.’⁹⁴ In consequence, those acting negligently through great fear or through compassion would be morally excused by ‘ethically well-disposed agents’ from any wrongdoing whereas those acting negligently through a desire for sexual satisfaction would not. It is submitted that this suggestion is problematic as people respond differently to emotions, and it could be difficult to determine beyond reasonable doubt whether D was indeed very afraid or compassionate. Such a proposal would still need to be supported by a general requirement of reasonableness and each case would need to be judged on its own facts, which might result in differing results on similar facts and a lack of certainty as to what possible outcomes may occur.

⁹² At 2.7.1.

⁹³ J. Horder, ‘Cognition, Emotion, and Criminal Culpability’ (n 87) at 476.

⁹⁴ *Ibid.*

2.2.3.4 The subjective/objective debate within recklessness

Nowhere in the criminal law has the subjective / objective debate been more apparent than in the context of the definition of recklessness. Gardner and Jung argue that this is because there are inherent difficulties with the term as “recklessness” ‘is a vice or personal fault’ and as such is identified to some extent by the ‘*ends or motives*’ and perhaps the emotions of the agent.⁹⁵ They submit that legal culpability standards should be both motive and emotion-independent. The difficulty that the ‘subjectivists’ and ‘objectivists’ have with recklessness as a concept of *mens rea* has been in trying to incorporate the moral concept and culpability of recklessness into a legal motive-independent construct which, some have argued, is not possible.⁹⁶ One of the main reasons for the legislature choosing to use the term “reckless” instead of “malice” was that in law, “malice” no longer had any similarities with its moral counterpart.⁹⁷ In attempting to link morality with recklessness the same problem was perhaps predictable but removing moral concepts altogether would be problematic as the law needs to reflect the community’s moral values and blaming practices to some extent so that public confidence in the criminal justice system is maintained.

As will be discussed in Chapter Three below,⁹⁸ it has been argued that a blank mind is not a state of mind, whereas the contrary view had the support of the House of Lords in *R v Reid*.⁹⁹ If inadvertence is accepted as sufficient to qualify, it is submitted that ‘guilty mind’ is possibly better interpreted simply as a requirement that the accused acted in a blameworthy manner in circumstances where society would judge culpability to be appropriate. This reasoning is the cause of much of the debate surrounding issues of moral blameworthiness, criminal culpability and the interpretation of *mens rea* terms. It has resulted in courts trying

⁹⁵ J. Gardner, and H. Jung, ‘Making Sense of Mens Rea: Antony Duff’s Account’ (n 78) at 574.

⁹⁶ *Ibid.* at 575.

⁹⁷ *Ibid.*

⁹⁸ At 3.3.3.6.

⁹⁹ [1992] 3 All ER 673.

to use ordinary language or to create legal fictions to give themselves the moral elbow room needed to negotiate through the minefield of the great variety of criminal behaviour and its contexts.

Whether D is advertent or inadvertent to a risk of harm is only one factor that may be relevant to determining the degree of culpability. Generally, inadvertence can only be a mitigating factor when D:

*has attenuated cognitive capacities, and even then it does not normally entail that her fault is converted from recklessness to something else, like carelessness, but only that her recklessness is diminished in scale. The quality of the motive is an essential part of what distinguishes a reckless person from a careless person in moral evaluations, and that distinction cannot be replicated by relying on any other factor instead, such as advertence to the risk.*¹⁰⁰

2.2.3.5 Interpreting the ‘subjective’/‘objective’ labels

In *MPC v Caldwell*, Lord Diplock stated that analysis of judicial use of the term ‘reckless’ showed that its use ‘was not easily assignable to one of those categories rather than the other.’¹⁰¹ Believing ‘reckless’ not to be a term of ‘legal art’ any interpretation would surely include, in his Lordship’s opinion, not only deciding to ignore a foreseen risk of harmful consequences resulting from one’s acts, but also:

failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was. If

¹⁰⁰ J. Gardner, and H. Jung, ‘Making Sense of Mens Rea: Antony Duff’s Account’ (n 78) at 575-576.

¹⁰¹ [1982] AC 341 at 353.

*one is attaching labels, the latter state of mind is neither more nor less “subjective” than the first.*¹⁰²

This is an understandable argument given that in each case account is being taken of the state of mind of the particular defendant. It is therefore important when applying these labels that everyone has the same understanding of what the terms mean in the particular context in which they are used.

It will be argued in the next chapter that the scope of recklessness could usefully be expanded from the subjective approach currently adopted to a more objective stance which would take into account the cognitive capacity of the agent. As a result of the subjective and objective approaches and their deficiencies, it is submitted that it is not possible to adopt only one such approach to *mens rea* and determining culpability if the aim is to achieve a system of criminal justice that has public support. An inflexible adherence to subjectivism can result in a gap between the legal test of *mens rea* and the community’s sense of moral wrongdoing.¹⁰³ Clearly, if the criminal law:

*earns a reputation as a reliable statement of what the community perceives as condemnable and not condemnable, people are more likely to defer to its commands as morally authoritative...A distribution of liability that the community perceives as doing justice enhances the criminal law’s moral credibility; a distribution of liability that deviates from community perceptions of justice undermines it.*¹⁰⁴

¹⁰² [1982] AC 341 at 354.

¹⁰³ K. Amirthalingam, ‘Caldwell Recklessness is Dead, Long Live Mens Rea’s Fecklessness’ (2004) 67 *Modern Law Review* 491.

¹⁰⁴ P. Robinson, ‘The Criminal - Civil Distinction and the Utility of Desert’ (1996) 76 *Boston University Law Review* 201, 212-213.

That is not to say that the criminal law should simply mirror and be determined by public perception as this can change, often quicker than the law can, and can sometimes be difficult to ascertain. In the pursuit of a fair system of justice one option would be to abandon consistency and apply an appropriate test dependent on the offence or defence under consideration.¹⁰⁵ Such a solution is not without practical consequences; where an agent is charged with more than one offence juries could then have to apply different tests. For this reason it is submitted that consistency is preferable, if at all possible. Whereas the subjective approach to determining recklessness produces a simple formula which has triumphed over the need for a comprehensive one,¹⁰⁶ an objective test that fails to recognise the capacity of the particular defendant is also liable to cause injustice. A hybrid test, a synthesis of the subjective and objective positions, is a better alternative and this will be discussed and advocated in the next chapter.

Having now examined the relationship between moral blameworthiness and *mens rea* it is important to determine how well the *mens rea* terms under scrutiny in this work fit with the leading theories of culpability. The theories claim to be the basis for justifying criminal punishment and moral censure. It will be shown that none of the theories alone can universally support all these *mentes reae*. Moreover, although proof of the requisite *mens rea* establishes guilt for legal purposes, in the absence of a defence, and may ground culpability in isolation, it does not represent the degree of culpability of the accused.

¹⁰⁵ See the approach to the defence of provocation taken by the majority in *Smith (Morgan)* [2001] 1 AC 146.

¹⁰⁶ D.J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' (n 82).

2.3 Theories of culpability - an overview

Three general theories of blame and excuses have been identified¹⁰⁷ which have been attributed mainly to Bentham,¹⁰⁸ Kant¹⁰⁹ and Hume,¹¹⁰ although others will be addressed. Bentham's utilitarian rationale was based on the greatest happiness of the greatest number and his rationale for excuses was that punishment of the individual by the State would not act as a deterrent in the circumstances where the excuses are allowed. For example, when acting under duress, the threat of criminal liability is subsumed by considerations that are temporarily more important to the actor. A similar argument could be advanced against imposing criminal liability for negligence as it could be said that inadvertence to risk could not be deterred by imposition of criminal sanctions for a failure to think. This approach has been rejected by some¹¹¹ upon the ground that punishment can act as a general deterrence rather than at an individual level.

As far as criminal liability for serious offences is concerned, it is submitted that Kant¹¹² is correct in so far as he rejected any form of utilitarian theory as it conflicted with his own theory founded on the rights of the individual.¹¹³ As such, any approach based upon the greatest happiness of the greatest number has to be dismissed no matter how much overall good Bentham's theory would produce.¹¹⁴ Judicial punishment could never be justified solely as a way of advancing some other good for the criminal himself or for society at large but only on the basis that a person had committed a crime.

¹⁰⁷ M.D. Bayles, 'Character, Purpose, and Criminal Responsibility' (1982) 1 *Law and Philosophy* 5.

¹⁰⁸ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner Publishing Co., 1948).

¹⁰⁹ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, (n 44).

¹¹⁰ D. Hume, *Treatise of Human Nature*, ed. L.A Selby-Bigge (Oxford: Clarendon Press, 1888).

¹¹¹ M.D. Bayles, 'Character, Purpose, and Criminal Responsibility' (n 107).

¹¹² I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, (n 44) xi.

¹¹³ This work provides qualified support for Kant in his rejection of utilitarianism and further, retributivism based on moral desert, but the thesis does not support choice theory.

¹¹⁴ Further discussion of Bentham's theory falls outside the scope of this work.

He must be deserving of punishment before any consideration is given to the utility of this punishment for himself or his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding path of a theory of happiness... in keeping with the Pharisaic motto "It is better that one man should die than that the whole people should perish."¹¹⁵

The modern, predominant theories are based upon Kantian theory: that people should not be punished if they could not have avoided doing a criminal act; and Humean¹¹⁶ or Aristotelian theory,¹¹⁷ based upon the character traits of the individual. These are the two main theories of excuses or culpability which claim to establish the proper basis of criminal liability and to which particular consideration will be given, before more marginal theories are examined. Although the choice and character theories are generally treated as theories of excuses, for the purposes of this thesis they will critically analysed from the alternative inculpatory viewpoint, that is as theories of culpability. Both theories are deemed to be subjective in nature in that they do not focus on the actual impact of someone's actions upon the world, but instead focus either on the individual choices a person makes or alternatively on a person's character. It is submitted that character theory is to an extent objective in that good/bad character is judged against an external objective standard of what can be expected from a reasonable person, whereas choice is focussed on the individual's reason and belief.

¹¹⁵ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, (n 44) 101.

¹¹⁶ Bayles (n 107) attributes character theory to David Hume's *Treatise of Human Nature* (n 110).

¹¹⁷ Wilson credits the origin of character theory to Aristotle; W. Wilson, *Central Issues in Criminal Theory* (Oxford: Hart Publishing, 2002) 342.

2.4 Choice Theory

‘Choice’ theory is an adaptation of Kantian retributivism¹¹⁸ and the principle of desert which underpin justification for punishment. The essence of Kant’s moral and political philosophy was the ‘dignity of the individual’ whereby morality and law should only be founded on the rights of individual man to autonomy. Choice is important because of the need to respect autonomy and, on Kantian principles; a person should only be criminally liable for harm that he is responsible and culpable for bringing about. It is only matters over which a person has control that he can be responsible for, and he only controls what he chooses to do or causes to happen.¹¹⁹ This approach restricts influences of chance and luck over which we have no control and which should be irrelevant to culpability and criminal liability.¹²⁰

In Kant’s view, ‘it is no business of the state or ...of other individuals to try to make men moral; only an individual can do that for himself’ as otherwise he would lose his autonomy.¹²¹ He regarded the law as ‘primarily instrumental, promoting moral autonomy in general rather than respecting it in the case of the accused.’¹²² The moral authority of the law is achieved by striking the right balance between the rights of the individual and those of society so that its rules can be ‘experienced as fair from the (reasonable) subject’s point of view although adverse to him’.¹²³ Kant believed that each man was his own sovereign moral legislator as ‘every man knows in his heart what is right and what is wrong.’¹²⁴ If this is

¹¹⁸ ‘Only the Law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment,’ applying the ‘retributive principle of returning like for like.’ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals* (n 44) 101.

¹¹⁹ R.A. Duff, *Criminal Attempts* (Oxford: Clarendon Press, 1996) Chapter 6.

¹²⁰ *Ibid.* at 148.

¹²¹ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals*, (n 44) at x.

¹²² J. Gardner, and H. Jung, ‘Making Sense of Mens Rea: Antony Duff’s Account’ (n 78) at 584, citing Kant, *The Metaphysical Elements of Justice* (n 44) 18-21.

¹²³ W. Wilson, *Central Issues in Criminal Theory* (n 117) 325.

¹²⁴ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals* (n 44) at xi.

correct then it follows that if a person chooses to break the law and he knows he is doing wrong then he is deserving of punishment.

To what extent it is true that each man knows what is right and wrong is now more open to debate than it was in Kant's time.¹²⁵ Furthermore, the extent to which a person appreciates that something is right or wrong may also have relevance to his responsibility and blameworthiness. Some choice theorists prefer the term 'defiance' to 'choice' suggesting that only those who consciously choose to act in defiance of legal norms deserve punishment.¹²⁶ This defiance or choice demonstrates the necessary expression of 'an attitude towards the [legal] rule itself rather than the values underpinning it'.¹²⁷ Although in some instances it may well be an indifference to both.

Hart and Moore¹²⁸ are the two leading modern proponents of the 'choice' theory, although it has been suggested that in extending 'choice' to include capacity and opportunity as necessary elements dilutes the focus on actual choice and their stance would be more appropriately labelled 'capacity theory'.¹²⁹ The intention here is to use 'choice' to encompass both the original and extended versions. The basis of this theory is that an agent should not be punished unless he had both the capacity and a fair opportunity to abide by the law.¹³⁰ An

¹²⁵ See for example Arenella's discussion on the capacity for moral responsiveness as a prerequisite for criminal liability, discussed below at 2.5.7.

¹²⁶ J. Hampton, 'Mens rea' (n 59).

¹²⁷ W. Wilson, *Central Issues in Criminal Theory* (n 117) 333.

¹²⁸ M. Moore notes that what he calls 'choice theory' has also been given other labels, including the "capacity conception of responsibility" by Nicola Lacey, *State Punishment* (London: Routledge, 1988) 62; the "responsibility principle" by Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) 137; the "Kantian theory of Responsibility" by Michael Bayles, 'Choice, Character, and Excuse' (1982) 11 *Law and Philosophy* 5 at 6; and his own earlier label, the "disturbed practical reason" theory of excuse in Moore, 'Causation and Excuse' (1985) 73 *California Law Review* 1148-1149 and *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984) 85-90.

¹²⁹ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law and Philosophy* 193 at 198-199.

¹³⁰ H.L.A. Hart, *Punishment and Responsibility Essays in the Philosophy of Law* (n 7).

early reference to this theory¹³¹ has been traced back to Blackstone¹³² who considered legal excuses were founded on:

the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or avoid the act in question, being the only thing that renders human actions praiseworthy or culpable.

The ‘choice’ theorists maintain that a person should only be held criminally liable for actions that he freely chooses to do. Therefore ‘one is responsible if he could have done otherwise,’¹³³ “could” in this context meaning ‘could have done otherwise if he had chosen to.’¹³⁴ This choice was not made impossible by external factors beyond the control of the agent. Surprisingly, Moore at one point excludes from the ambit of free choice situations where a choice is also made ‘very difficult’ by such external factors, but this extension appears only once in his argument¹³⁵ and whether it could include a temporary lack of capacity to control oneself is unclear but unlikely.¹³⁶

2.4.1 The meaning of ‘choice’

As ‘choice’ underpins culpability it is necessary to determine what ‘choice’ actually means. For example, it could be said that where a person acts under duress or while suffering from a mental disorder, he is still making a choice to engage in prohibited conduct. Choice theorists would argue that making a choice requires the exercise of ‘free will’ and thus someone acting

¹³¹ M. Moore, ‘Choice, Character, and Excuse’ (1990) 7 *Social Philosophy and Policy* 29 at 31.

¹³² Sir William Blackstone, *Commentaries on the Laws of England*, Chitty ed., vol. IV (London, 1826) 20 cited in M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 32.

¹³³ *Ibid.* Moore at 34.

¹³⁴ *Ibid.* at 35.

¹³⁵ *Ibid.*

¹³⁶ See, for example, the defendant in *R v Kingston* [1995] 2 AC 355. In this case, as already noted, D had been given drinks laced with intoxicants and, for the purposes of blackmail, was video recorded indecently assaulting a 15 year-old boy, something that would not have occurred without the disinhibiting effects of the drugs.

under duress would be exculpated as the expression of free will is absent in such circumstances. This concept of 'free will' needs to consist of 'the capacity for choice...and of choice as a rational capacity which manifests our freedom as responsible agents.'¹³⁷ If this approach is taken the mentally disordered offender is appropriately exculpated if he lacked such rational capacity at the time he did the act. Similarly, it is submitted the person who lacks the cognitive capacity to rationally consider the situation before acting should also be exculpated.

Hart did not examine what attributes D would need in order to be capable of behaving in a reasonable manner but such an account was propounded by Moore who stated that D would need:

*those qualities of character that we think persons should possess, and those capacities of mind that we think all persons do possess....He is ...capable of calculating what actions are likely to lead to what results and even to assign relative probabilities to each. He is, in other words, a pre-eminent practical reasoner, finding the morally and legally correct major premises...and forming the accurate means/end beliefs...for his minor premises...It is because people have the capacity to reason this way that they can be said to be culpable when they do not do so.*¹³⁸

There are factors that have been acknowledged to make choices impossible or difficult. Hart advances that these are 'either an incapacity in the agent' (an internal factor of the agent) 'or the lack of fair opportunity to use a non-defective capacity'¹³⁹ (an external factor, the situation the agent finds himself in). Two internal factors identified were 'extreme emotion

¹³⁷ R.A. Duff, *Criminal Attempts* (n 119) 150.

¹³⁸ M. Moore, *Law and Psychiatry: Rethinking the Relationship*, cited in P. Arenella 'Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments' (n 39) at 70.

¹³⁹ M. Moore, 'Choice, Character, and Excuse' (n 131) at 35.

or cravings.’¹⁴⁰ Most choice theorists would reject an ‘internal disability’ capacity based excuse like hatred because ‘recognizing fears, cravings, instinctual desires, strong passions, or other internal states as excuses unduly reduces one’s true responsibility.’¹⁴¹ This argument has merit with regard to most of the examples listed but there could clearly be an argument for acknowledging fears provided there was evidence that it was truly incapacitating and a low cognitive capacity should also be accommodated here. One choice theorist had originally included ‘extreme emotion and cravings,’ as noted above,¹⁴² but again it is possible to distinguish between the two, the former perhaps meritorious in the right circumstances, the latter not so.

It has been said that for a claim of lack of a ‘fair opportunity’ to succeed there ‘must be some (objectively regarded) evil that one is avoiding.’¹⁴³ Our opportunities ‘are not unfairly diminished simply because they are diminished... ‘[F]air opportunity is not measured by ...psychological difficulties, but rather by the objective facts of the matter.’¹⁴⁴ It is only where D acts to prevent a substantial harm that the diminished opportunity defence will operate. It is not relevant that subjectively the choice may be hard. This is quite a draconian view and it is contended here that there could be scope for exculpation where the choice is so hard that it is almost non-existent. Even if exculpation was not granted it would certainly be a mitigating factor in sentencing. If the harder line is followed, it is submitted that the defendant in *Kingston*¹⁴⁵ would be correctly convicted and the suggestion¹⁴⁶ that perhaps a ‘destabilisation’ defence could apply in such circumstances would not find favour, even

¹⁴⁰ M. Moore, ‘Causation and the Excuses’ 1985) 73 *California Law Review* 1091 at 1130.

¹⁴¹ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 37.

¹⁴² Ibid.

¹⁴³ P. Arenella, ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39) at 78; M. Moore ‘Choice, Character, and Excuse’ (n 131) at 37.

¹⁴⁴ Ibid. Moore, ‘Choice, Character, and Excuse’ (n 131) at 40.

¹⁴⁵ [1994] QB 81 (CA); [1995] 2 AC 355 (HL).

¹⁴⁶ G.R. Sullivan, ‘Making Excuses’ (n 73) at 145.

though the possibility of the creation of a new defence would have been acceptable to some members of the judiciary in the Court of Appeal and the House of Lords in this case.¹⁴⁷

The requirement that opportunity be measured by objective fact could allow us to make a ‘character-based moral judgment’ about D’s failure to act in a morally responsible manner.¹⁴⁸ This has led to the recognition that defining the ‘moral self’ purely in terms of conscious will is too narrow and that ‘some’ emotions must be considered.¹⁴⁹ Moore is criticised for failing to address the implications of broadening his view of the moral self whilst still maintaining the capacity for rational choice as the sole determinant of moral culpability.¹⁵⁰ Furthermore ‘it is not clear that we choose some of the strongest emotions that motivate our choices, nor is it clear that we can simply choose not to feel or act on the basis of such emotions.’¹⁵¹ It is accepted that our strongest emotions are not always a matter of choice and that we might not be able to control what we feel when affected by them, but that is not to say that emotions should be given free reign. Clearly, there are certain emotions that can impair D’s capacity to make rational choices that the law could, and in some circumstances does make allowance for, for example fear, compassion and grief. Other less deserving strong emotions like jealousy and anger we are rightly expected to control.

2.4.2 The role of luck or chance and choice theory

Elements of luck or chance have also been considered by choice theorists. It has been argued that although ‘outcome-luck’ is irrelevant, ‘constitutive’ luck is relevant because it has

¹⁴⁷ [1994] QB 81 (CA) per Lord Taylor of Gosforth, and [1995] 2 AC 355 (HL) Lord Mustill at 375-378 could see serious practical difficulties with the recognition of a new defence and suggested the Law Commission’s examination of intoxication should be enlarged to consider the questions raised by this appeal.

¹⁴⁸ P. Arenella ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39) at 78.

¹⁴⁹ Ibid at 80; M. Moore ‘Choice, Character, and Excuse’ (n 131) at 33-34.

¹⁵⁰ P. Arenella ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39) at 78-80.

¹⁵¹ Ibid. at 81.

resulted in me being the person that I am and influences the free choices that I make when I decide whether to engage in criminal conduct.¹⁵² Additionally, choice theorists assume that every individual is a rational moral agent, free to make their own choices without addressing what attributes one needs to become a fully developed moral agent and how such attributes are acquired.¹⁵³ But elements of luck and chance can be relevant in this respect too.

One aspect for examination is the extent to which we have control over our ‘constitutive’ luck, if any. Some individuals may never develop into moral agents because of ‘bad constitutive luck.’¹⁵⁴ Although determinists would argue that we are what we are and we have no control at all, if this is the case it would be difficult justifying state punishment for any criminal offences because defendants simply could not help being what they are and acting the way they did, they were just unlucky to have been ‘made that way.’¹⁵⁵ There is a difficulty in resolving the extent to which D’s actions can be ‘*freely*’ chosen ‘despite the unchosen influence of genetics, environment, and chance.’¹⁵⁶ The accepted rationale is that despite such factors, as humans we still have a limited autonomy and control, we are not robots. Our genetic makeup and background may make some of our choices harder for us than they are for others, but generally speaking we do still make a free choice. This is, of course, dependent on possession of sufficient mental capacity to be aware of our situation and the opportunities available.

¹⁵² R.A. Duff, *Criminal Attempts*, (n 119) Chapter 6.

¹⁵³ P. Arenella, ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39), see below under flaws in choice theory at 2.4.6.

¹⁵⁴ *Ibid.* at 69.

¹⁵⁵ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 35.

¹⁵⁶ S.H. Pillsbury, ‘The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility’ (1992) 67 *Indiana Law Journal* 719 at 720.

‘Situational’ luck is also relevant because it places a person in a position where he can be exposed to temptation or have the opportunity to commit crime.¹⁵⁷ Although this affords no excuse, it perhaps explains why people with previously good characters can suddenly act in a manner that is inconsistent with their previous conduct and it can be a mitigating factor in sentencing. Whether such uncharacteristic conduct can be said to be ‘out of character’ is an issue that will be discussed below.¹⁵⁸

2.4.3 Choice Theory, intention and recklessness

Accordingly, only intention and recklessness where the defendant foresaw a risk of harm and went on to take the risk of it would suffice as *mens rea*; negligence, for the majority of choice theorists, would not be sufficient.¹⁵⁹ Subjectivists follow this rationale maintaining that a lack of awareness of the risk of harm makes it impossible for D to make a ‘rational and voluntary choice’ to act in a manner that risks breaking the law.¹⁶⁰ The other important principle for choice theorists is belief; a person should only be responsible for what they believed they were doing in the circumstances they believed to exist at the time rather than for what actually did happen or what the actual circumstances turned out to be.¹⁶¹ Any actions that fall outside of these principles should not attract criminal liability as we cannot be responsible for matters of chance or luck¹⁶² that are beyond our control.

Only chosen conduct, therefore, attracts responsibility and culpability so that even if a person’s actions create an obvious risk of harm to others and that harm results, the person

¹⁵⁷ R.A. Duff, *Criminal Attempts* (n 119) 150.

¹⁵⁸ Below at 2.5.3 and 2.5.5.

¹⁵⁹ R.A. Duff, *Criminal Attempts*, (n 119) 149.

¹⁶⁰ P. Arenella, ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39) at 70.

¹⁶¹ Such a principle appears to be reflected in the definition of recklessness found in the Draft Criminal Code for England and Wales, cl. 18(c) of the Criminal Code Bill (1989), discussed in Chapter Three below.

¹⁶² R.A. Duff, *Criminal Attempts* (n 119) Chapter 6.

will not be liable unless they were aware of the risk themselves. The advantage of this approach to culpability is that it recognises and respects individual autonomy. The citizen is able to exercise control over his own life knowing that he will only be liable to criminal sanctions if he chooses to break the law and he has the power to determine for himself whether or not to do so. The features within the criminal justice system that are supportive of this ‘choice-based’ theory of criminal responsibility are the fact that most *mens rea* terms for offences concerned with moral wrongdoing are cognition- based, and criminal defences generally apply where D’s act could be seen as non-voluntary to some extent.¹⁶³ Purely objective recklessness, negligence and crimes of strict liability are problematic as they can all be committed inadvertently, without a conscious choice to break the law.

2.4.4 Choice theory and negligence

Hart¹⁶⁴ justified including negligence within choice theory by arguing that negligent behaviour could be encompassed where D had the capacity to act like a reasonable person. He believed that D would be culpable where he possessed both the physical and moral capacity to abide by the law and had a fair opportunity to avoid criminal behaviour.¹⁶⁵ This more sophisticated and complex version of choice theory overlaps substantially with character theory by including moral incapacity. Elsewhere, the suggestion that a person can in any real sense ‘choose’ to behave in a negligent manner¹⁶⁶ has been refuted, as negligence connotes inadvertent action and if no thought is being given before acting in a particular way how can the subsequent act be ‘chosen’?¹⁶⁷ If criminal liability should only lie where D is both responsible and culpable, this arises only where D has control which is limited to those

¹⁶³ W. Wilson, *Central Issues in Criminal Theory* (n 117) 333.

¹⁶⁴ H.L.A. Hart, ‘Negligence, Mens Rea and Criminal Responsibility,’ in *Punishment and Responsibility Essays in the Philosophy of Law* (n 7) 136-157.

¹⁶⁵ Ibid.

¹⁶⁶ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 56.

¹⁶⁷ R.A. Duff, *Criminal Attempts* (n 119)149.

things he chooses to do or causes to happen. This subjective view limits the influence of chance and luck that should be irrelevant to criminal liability.¹⁶⁸ It is submitted that a person can in a sense ‘choose’ to behave negligently in that he can consciously choose not to do a risk assessment before he acts. It is accepted that there is merit in the argument that usually one does not truly ‘choose’ to be inadvertent, but if we accept that we can control our actions then we must accept that we can normally choose to take care to avoid harming others. This is even more important when we are engaging in activities that we know have the potential to cause harm, especially when serious harm may occur. This is not to suggest that on occasions when we do not consciously stop to consider possible risks that we are necessarily choosing not to do so. In fact such instances will probably be rare, especially where the proposed activity is inherently risky.

Hampton¹⁶⁹ acknowledges difficulty in reconciling choice or defiance theory with negligence as it is implausible to argue that an inadvertent person has *chosen* to defy the law. She tries to justify criminal liability for negligence by proposing that the act of defiance arises not at the time of the *actus reus* of the offence but much earlier in the process of that person’s character formation. D developed an irresponsible character in defiance of what he knew to be an acceptable standard of responsibility.¹⁷⁰ This is lapsing into character theory (discussed below). It is submitted that this argument is flawed as it fails to consider the many instances where responsible people behave negligently because of momentary lapses in concentration and also because of the assumption that people can choose their characters and the dispositions they want to possess.¹⁷¹ Even if someone had opted to become a careless person,

¹⁶⁸ Ibid. at 147-149.

¹⁶⁹ J. Hampton, ‘Mens Rea’ (n 59).

¹⁷⁰ Ibid. at 27.

¹⁷¹ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 129) at 197.

it would not necessarily mean that on a particular occasion when they had acted carelessly it was as a consequence of their chosen disposition.

On a traditional Kantian view, liability for negligence would only lie where D had an opportunity to become aware of the risk. Moore, an original supporter of Hart's accommodation of negligence within choice theory, has now rejected his approach on the basis that 'it shifts the touchstone of responsibility from choice to capacity' ... 'relegating choice to a subsidiary role.'¹⁷² This is because giving capacity such prominence would mean that there were two ways responsibility could be grounded based upon the agent's capacity: he could choose to do wrong or be inadvertent. As an alternative, Moore argues that 'what makes the intentional or reckless wrongdoer so culpable is not unexercised capacity' but his choice not to exercise it.¹⁷³ Horder questions the inclusion of the word "so" before "culpable" querying whether Moore is saying that choosing not to exercise this capacity grounds culpability or whether such a choice makes D more culpable than he would be if he had not made such a choice and had simply been careless.¹⁷⁴ Furthermore, he sees Moore's criticism of Hart's approach to negligence as an inconsistency in Moore's own argument because 'the moral capacity to avoid wrongdoing, which ... Moore regards as an essential prerequisite for a culpability judgment, is the very basis...' of liability for negligence as Hart realised.¹⁷⁵ This second criticism is clearly correct.

¹⁷² M. Moore, 'Choice, Character, and Excuse' (n 131) at 57.

¹⁷³ Ibid.

¹⁷⁴ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n129) at 199.

¹⁷⁵ Ibid. at 200.

2.4.5 Choice theory and ‘stupidity’

As stupidity was expressly referred to in the case of *R v G & R*¹⁷⁶ it is necessary to consider whether stupidity¹⁷⁷ would be sufficient to exculpate under choice theory. Where the stupidity in question arises from a lack of cognitive capacity generally then the individual cannot make a rational choice at the time of acting nor have a fair opportunity to appreciate the alternative courses of action available. If a person has sufficient cognitive capacity but acts stupidly on a particular occasion he should be held culpable for any harm that results. Stupidity in this context should not be taken to mean intellectually ‘stupid,’ but would certainly encompass the ‘practical joker’ who caused serious harm whilst acting in a way that had no social utility whatsoever. An example is the defendant in *Brady*¹⁷⁸ who had to be deemed subjectively reckless in order to secure a conviction, even though it is highly unlikely that he consciously appreciated the risk involved in balancing on the rail of a balcony above a dance floor.¹⁷⁹

2.4.6 Flaws in the choice theorists approach

As noted above, many *mens rea* terms are cognition-based, a feature supportive of choice theory, however not all *mens rea* terms are subjective and most offences are crimes of strict liability. It has been said that it is ‘only where punishment is an expression of moral criticism

¹⁷⁶ [2004] 4 All ER 765 at 784, per Lord Bingham. This case will be examined in Chapter 3 as it provides the current definition of recklessness.

¹⁷⁷ Gardner sees stupidity as a vice and not as an excuse, J. Gardner *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (n 37) 26; Victor Tadros identifies it as a reprehensible character flaw but not a proper target of the criminal law, ‘The Characters of Excuse’ (2001) 21 *Oxford Journal of Legal Studies* 495.

¹⁷⁸ [2007] EWCA Crim 2413.

¹⁷⁹ Brady fell, injuring a woman on the dance floor below and causing her serious injury. Note that Brady was, perhaps fortunately for the court, intoxicated at the time and his recklessness in getting into that state was sufficient to constitute the *mens rea* of the offence. Had he not been voluntarily intoxicated it could have been difficult to establish he foresaw the risk of harm and he could have escaped criminal liability. The offences under the Offences against the Person Act 1861 do not encompass negligence and the victim did not die to enable a charge of gross negligence manslaughter to apply. This kind of action poses problems for choice theorists if they want to establish culpability as it may be difficult to argue that D made a conscious choice.

involving stigmatic penalties that fairness in punishment requires conscious rule flouting.’¹⁸⁰

On this basis, liability for negligence or inadvertent recklessness would still remain a problem, unless Hart’s rationale is accepted and the focus is moved from ‘choice’ to ‘capacity’, a shift Moore opposes.¹⁸¹ Making conscious rule flouting a precondition for punishment for stigmatic offences is drawing the principle too narrowly as there are circumstances where punishment without consciously flouting the law can be justified. Choice theory can even accommodate strict liability on the basis that such offences are generally regulatory offences and, in consequence, the sanctions attached to them are preventative. This argument only works to a limited extent as although the regulated activity is one that the agent has chosen to engage in, he can still be held criminally accountable when he may not be personally at fault, for example, an employee might have ignored or forgotten the relevant rule.

One of the inherent flaws in the choice theory is its capacity to inculcate a person who would otherwise not be criminally liable in relation to criminal attempts. If criminal liability is rightly attached to those who intend to engage in criminal activity, then the person who attempts to commit a crime and fails should be punished in the same way as the person who completes the offence; there is no difference in culpability.¹⁸² Similarly, there are problems where a person believes that he is committing a criminal offence when in fact he is not. Using the example of a person recklessly starting a bonfire aware that it might damage a neighbour’s fence, a subjectivist would have to accept that this person would be equally subject to conviction if the fence was damaged, if the fence was actually not the neighbour’s

¹⁸⁰ W. Wilson, *Central Issues in Criminal Theory* (n 117) 334.

¹⁸¹ H.L.A. Hart, ‘Negligence, Mens Rea and Criminal Responsibility,’ in *Punishment and Responsibility Essays in the Philosophy of Law* (n 7) 136 at 155; and M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 57.

¹⁸² R.A. Duff cites Ashworth’s example that there is ‘no relevant moral difference’ as far as their respective culpability is concerned between the would-be killer who succeeds and the one who fails, *Criminal Attempts* (n 119) 149.

but the person's own fence, and even if the fence was not damaged at all.¹⁸³ If a man is to be liable for what he intends or believes this result is a natural consequence.

An even more disturbing consequence, it is submitted, is in relation to the 'defence' of mistake. If the choice theory is accepted as the appropriate test for culpability, a person who believes that a woman is consenting to sex should be acquitted of rape as long as he can show that he honestly believed she was consenting. His belief would not have to be on reasonable grounds.¹⁸⁴ Similarly, if D mistakenly but genuinely believes he is about to be attacked and attacks an innocent person in 'self-defence,' then under choice theory his belief would negate the *mens rea* for an offence under the Offences against the Person Act 1861. Alternatively, if he was justified in acting in self-defence but used objectively 'unreasonable force,' the defence, on the choice theorists view, should still be available to him as long as he believed the force used was necessary. Under the current law the defence would fail.

2.4.7 Self-induced intoxication

Self-induced intoxication also poses problems for choice theorists¹⁸⁵ as it is open to a defendant to argue that he was so drunk that he lacked the capacity to make an informed and rational choice and therefore he should not be found culpable for acts committed whilst in this state. As is known, many intoxicants can remove inhibitions and increase the risk of criminal behaviour.¹⁸⁶ Although it is possible to argue that the agent makes a free choice to become intoxicated earlier, prior to the *actus reus* of the offence, and the effects of alcohol

¹⁸³ Ibid. at 172.

¹⁸⁴ *DPP v Morgan* [1976] AC 182 now overruled by s.1 Sexual Offences Act 2003.

¹⁸⁵ This is also a problem for those advocating a subjective approach to criminal liability, Law Commission, *Intoxication and Criminal Liability*, Cm 7526 (2009) Law Com No 314, paras. 1.51-1.55; and see, for example, Professor John Smith [1975] *Criminal Law Review* 574.

¹⁸⁶ Law Commission, *Intoxication and Criminal Liability*, (n 185) para. 1.35, and para. 2.15.

(and drugs) are well publicised, the law on self-induced intoxication still leaves us with two issues.

The first issue is the obvious criticism that with founding liability on an earlier free choice there is not the usual coincidence of the *actus reus* and *mens rea* that is normally a prerequisite for liability. In these circumstances for public safety reasons, the intention to drink without regard to its possible effects is substituted for the relevant *mens rea* and the intent to drink is transferred to the commission of the offence. This is because being advertently reckless in becoming intoxicated can be morally equated with the fault element of subjective recklessness that is often sufficient for criminal liability.¹⁸⁷ As Lord Mustill opined in *Kingston*,¹⁸⁸ for crimes of basic intent, it is not possible to rely on an absence of *mens rea* when that is caused by D's voluntary acts. His Lordship's assertion that self-induced intoxication is a substitute for *mens rea* is not correct as it would not take into account the slightly intoxicated defendant whose defence would be that he would have acted in exactly the same way and with the identical state of mind if he had been completely sober, he would have still failed to see the risk of harm.¹⁸⁹

The second issue to consider is whether it would be appropriate to blame someone who had never been intoxicated through drugs or alcohol before and who would therefore have no idea of the effect of the intoxicants upon him? The circumstance envisaged here is where someone consumes a very small amount of an intoxicant, but experiences an unusual reaction to it. It could be argued that such an individual is not making a free and rational choice, if he does not realise the effects the intoxicants will have upon him, being unaware of how the intoxicant will affect his personal capacity to make a rational choice.

¹⁸⁷ Ibid. paras. 1.61. and 2.45.

¹⁸⁸ *Kingston* [1995] 2 AC 355 at 369.

¹⁸⁹ Law Commission, *Intoxication and Criminal Liability* (n 185) paras. 2.25-2.26.

2.4.8 'Fair opportunity'

One major difficulty with the choice theorists' requirement of a 'fair opportunity' is that the theory is ambiguous on this requirement as a failure to avoid wrongdoing can vary from a cognitive failure in the case of a negligent act to a failure to meet the standard of the reasonable man for the defence of duress. Such 'fundamental differences' between the two failures are 'hidden behind the all-embracing notion of "fair" or "unfair" opportunity.'¹⁹⁰ In what circumstances does D have a fair opportunity to avoid law breaking? The theory answers this by using the 'yardstick' of the 'reasonable man' and as a result '[R]ule breakers are [often] punished without regard to their real capacities and opportunities to conform'.¹⁹¹

For some this is not an insurmountable problem, even if D could not have been expected to do any better than he actually did because of the kind of person he has become, he still deserves punishment because he 'chose to attack our basic moral values.'¹⁹² In short, it is only where an external crisis occurs that D can usually be excused, providing he behaved as a reasonable person would have done in his situation. This is too hard a line where conviction for a serious offence may result, although it could be arguably justified on public safety grounds for minor offences. Another issue is the practical difficulty of determining whether in any given situation, D was actually deprived of the capacity/fair opportunity, given that this may come down to the disputed evidence of expert witnesses.¹⁹³

¹⁹⁰ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 129) at 203.

¹⁹¹ W. Wilson, *Central Issues in Criminal Theory* (n 117) 339.

¹⁹² S.H. Pillsbury, 'The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility' (n 156) at 721.

¹⁹³ W. Wilson, *Central Issues in Criminal Theory* (n 117) 340.

2.4.9 Moral agency and the capacity for moral responsiveness

Perhaps the biggest flaw of all in the choice theory is that there is an insufficient account of what preconditions are necessary for an individual to make a free and rational choice.¹⁹⁴ It fails to provide an ‘adequate account of what it is to be a responsible agent, or of what makes an action ‘mine’ as its responsible agent.’¹⁹⁵ The choice theorists’ assumption that everyone is a moral agent is one of the major flaws in their theory, because they have paid insufficient attention to two of the three fundamental conditions on which the theory is based.¹⁹⁶ Moral theorists generally agree that three requirements must be satisfied before moral blameworthiness can be attributed, namely: ‘(1) a moral agent (2) must breach some governing moral norm (3) under circumstances ...that give the moral agent a fair opportunity to avoid its breach.’¹⁹⁷ Choice theorists stand accused of failing to pay sufficient attention to the first and second of these prerequisites and should explore the link between ‘moral address and evaluation’ and the ‘special attributes’ D needs ‘to understand and use moral norms as a reason for his action.’¹⁹⁸ These attributes have been identified as the ‘abilities to react to moral norms in thought, feeling, perception and behaviour.’¹⁹⁹ Where these attributes are absent, or where D fails to ‘exercise them competently’²⁰⁰ then we need to determine whether D can control the aspects of his character that govern his capacity for moral responsiveness. In consequence only a ‘character based conception of a moral agent’s necessary attributes can explain how this capacity for moral responsiveness is developed’ and why it may sometimes be appropriate to blame those who fail to exercise it.²⁰¹

¹⁹⁴ P. Arenella, ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39) at 80; and R. A. Duff, *Criminal Attempts* (n 119) 172.

¹⁹⁵ Ibid. Duff at 176.

¹⁹⁶ P. Arenella, ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39) at 60.

¹⁹⁷ Ibid. at 60.

¹⁹⁸ Ibid at 61.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

Both retributivism and utilitarianism rely on choice theory as the rationale for moral responsibility and the theory is also compatible with a ‘soft determinist’ view which assumes that sane adults are free to act in accordance with their reasoned choices, a limited autonomy as they cannot ‘revise their will.’²⁰² On a ‘hard determinist’ view both choice and character theories would be rejected as both our actions and characters would be predetermined. For choice theory to be accepted, it needs to explore whether it is fair to hold someone morally accountable for the ‘goals, desires, values, and emotions that motivate his rational choices.’²⁰³ Choice theory would inculcate psychopaths and the brainwashed and yet could exculpate those who would be currently liable; for example negligent offenders and those unable to rely on a criminal defence because they failed to live up to the standard of the ‘reasonable man.’²⁰⁴

Focussing on psychopaths, there are two faults with the choice theorists’ assertion that moral blameworthiness can be grounded where there is both capacity and opportunity to abide by the law, as it would equally apply where the law in question was morally neutral and also where it was morally bad when disobedience would be meritorious. Secondly, there is the ‘assumption that the capacity to be moved by moral reasons for action is not a necessary condition of moral agency.’²⁰⁵ It is questionable whether a person should be deemed to be a moral agent if he ‘lacks the capacity to deliberate about whether he *should* have acted differently.’²⁰⁶ If we accept that such moral responsiveness is a precondition for criminal liability this would raise several other issues, including how such a capacity would be determined. Would it need to be determined in every case unless D was either very young or insane? For those found to be morally unresponsive, there would be further issues of how to

²⁰² Ibid. at 64.

²⁰³ Ibid.

²⁰⁴ Ibid. at 65.

²⁰⁵ Ibid. at 67.

²⁰⁶ Ibid. at 69.

deal with them as, if they were simply allowed to walk away from any harm they had caused, they could be a danger to themselves or the public. In theory, we would need to try to distinguish between those who lacked the capacity and those who had capacity but failed to exercise it competently as the latter may be helped by education.

2.4.10 The relevance of emotions to choice

Moore has accepted that choice theorists did not demonstrate how the ability to be a practical reasoner could explain how a person developed moral responsiveness and his position has now altered.²⁰⁷ Recognising this issue and focussing on the capacity element in his hypothetical duress problem he questions whether the responsible self is to be identified solely in terms of conscious will or whether some emotions should be included. If emotions are included then it is possible that character based judgments are being incorporated.²⁰⁸ This second difficulty leads him to examine whether our emotions and our ‘choosing agency, the will’ are inextricably linked?²⁰⁹ Although it is possible that our emotions need not necessarily control our choice processes, choice theorists must accept that some emotions have a role to play in the formation of our intentions and beliefs and in any plan of action, ‘emotions are both products and causes of the judgments we make as we decide what to do’²¹⁰ but Moore submits that they are not ‘invaders of our processes of reasoned deliberation.’²¹¹ It is submitted here that generally this is correct, but it is not a universally applicable principle.

²⁰⁷ Ibid. at 71.

²⁰⁸ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 37.

²⁰⁹ Ibid. at 38.

²¹⁰ Ibid. at 39.

²¹¹ Ibid. at 36.

If it is accepted that emotions do not incapacitate choice, the effect on his hypothetical duress problem would be that where someone is genuinely acting under duress out of fear for his own safety or that of others, he would only be able to rely upon the second limb of choice theory, diminished opportunity, which could not be correct when considered in the wider context of defences.²¹² This would be fatal for those claiming other defences such as provocation where the second limb is not available. Moore considers the psychological view that some emotions “short circuit” choice and questions whether such emotions can ever continue without the choice to give them free reign but he offers no answer to this conundrum.²¹³

2.4.11 Spontaneity and the way harm is caused

Moore stands accused of misunderstanding the nature of choice when he sees intentional and reckless wrongdoing as ‘paradigm examples of chosen wrongdoing’ because it ‘presupposes a comparison between alternative courses of action’ which may not occur.²¹⁴ Often the intentional or reckless actor may act spontaneously without considering other options and as such, Moore’s analysis of the relationship between *mens rea* and culpability is flawed because it cannot accommodate those who act impulsively. They have made no choice and yet are still culpable. This point can also be extended to include the negligent actor who, as already discussed, is not really making a choice. It is submitted that it might be better to treat spontaneous and instinctive acts as ‘reactions’ rather than ‘actions’ and acknowledge that punishment for such acts cannot be justified by choice theory.

²¹² Ibid. at 39.

²¹³ Ibid.

²¹⁴ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 129) at 201.

When considering ‘choice’ from a ‘defiance’ stance²¹⁵ the grounding of criminal culpability lies in D’s defiance of the law in causing harm, as D makes a choice to defy an authoritative moral command in order to satisfy personal desires, knowing obedience is expected.²¹⁶ It is important to acknowledge that this is not the sole consideration. An example to illustrate this point is where D intentionally rapes or kills. In such cases ‘the nature of the harm and the way in which it is caused to the victim are naturally thought of as central to an explanation of culpability, ... not just a manifestation of defiance.’²¹⁷ This is the final flaw: choice theory misses any consideration of the way harm is caused, a crucial feature of determining degrees of culpability.²¹⁸

2.5 Character Theory

The main proponents of character theory are Aristotle,²¹⁹ Hume,²²⁰ and more recently Bayles,²²¹ Pincoffs²²² and Arenella.²²³ The basis of founding criminal liability on character is appealing as it reflects a general communitarian principle that only ‘bad people’ should be punished.²²⁴ This approach ‘seems to follow our standard moral intuitions.’²²⁵ It permits punishment of those who may be unable to resist non-compliance with the law, avoiding the

²¹⁵ J. Hampton, ‘Mens Rea’ (n 59).

²¹⁶ *Ibid.* at 16.

²¹⁷ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 129) at 198.

²¹⁸ *Ibid.* at 203.

²¹⁹ Aristotle, *Nicomachean Ethics, Book III* (trans. Terence Irwin) (Indianapolis: Hackett Publishing, 1985) Chapter 5.

²²⁰ D. Hume, *Treatise of Human Nature* (n 110).

²²¹ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107).

²²² E. Pincoffs, ‘Legal Responsibility and Moral Character’ (n 46).

²²³ P. Arenella, ‘Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments’ (n 39); and ‘Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability’ (1991) *39 University of California Law Review* 1511.

²²⁴ This view follows the teachings of Christian doctrine advocated by St Augustine, punishment (penance) brought man closer to God by man’s repentance for sin and his acceptance of such punishment. Note that the punishment was for the ‘bad thought’ (the Sin) that preceded any action, if there was any. A deed required compensation under Anglo-Saxon law; see F. Sayre, ‘Mens Rea’ (n 12); and A. Lévy, ‘The Origin of the Doctrine of Mens Rea’ (n 10).

²²⁵ W. Wilson, *Central Issues in Criminal Theory* (n 117) 342.

issue of whether D possessed the normal capacities to behave in a reasonable way.²²⁶ In fact, it should make us aware that D can be punished for acts that “we” might also have done in D’s position,²²⁷ for example if we had had D’s abusive family background. Having a weak character is no excuse.

Character theory is still a subjective theory because it founds culpability on the subjective character traits of the individual agent. For Hudson, ‘[m]oral virtues and vices...are traits which received opinion holds to be traits of character; they are time-tested.’²²⁸ Hume proposed that ‘[b]lame and punishment are not directly for acts but for character traits...’ and such traits are not restricted to ones which an individual can voluntarily control,²²⁹ as considered by Aristotle, but ‘any socially desirable or undesirable disposition.’²³⁰ As such, criminal liability is properly grounded where D’s action manifests an undesirable character trait, an enduring mental quality²³¹ that requires correction. Furthermore, in Hume’s *Treatise*, the term ‘mental qualities’ includes ‘character, passions, and affections.’²³² Non-voluntariness is not an excuse in its own right, it only affords an excuse because it fails to demonstrate possession of an undesirable enduring mental quality. It is Hume’s view that while some mental qualities can be changed by hard work, others may not be. Accordingly, although mental qualities do not have to be voluntary to be blameworthy, punishment requires their voluntary manifestation.²³³

²²⁶ Ibid.

²²⁷ S.H. Pillsbury, ‘The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility’ (n 156) at 722.

²²⁸ S.D. Hudson, ‘Character Traits and Desires’ (1980) 90 *Ethics* 539.

²²⁹ Both Wilson and Vuoso believe the ability to voluntarily control the character trait is essential, see below at n 289.

²³⁰ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107) at 7.

²³¹ M.D. Bayles, ‘Hume on Blame and Excuse’ (1976) 2 *Hume Studies* 17.

²³² Ibid. at 23.

²³³ Ibid. at 33.

If an act does not indicate an undesirable character trait blame would be inappropriate and a person would be excused on Hume's account.²³⁴ Yet preventative measures could still be taken to avoid future unwanted consequences. Bayles fails to expand upon this point but he may be considering civil detention for the mentally disordered or perhaps education and training.²³⁵ Although the foremost of these preventative measures can be achieved by compulsion, without criminal liability it is difficult to see how individuals could be compelled to undertake education or training currently. Hume is clear that the role for punishment is only where its intended use is to alter a person's conduct.²³⁶

Hume argued that mental qualities could sometimes be indicated better by *how* a person did something rather than by *what* he did and even if acts are manifestations of mental qualities, 'it is only classes of actions which are so, not particular ones.'²³⁷ This is because an action can be the result of differing motives which shows that there is not necessarily a direct link between possession of a certain character trait and actions of a certain type.²³⁸ This point is also raised by Moore²³⁹ in relation to a bad character trait which the agent tries to hide. An alternative example could be where D, through no fault of his own, has to resort to stealing food to survive. Here the cause of the stealing is not a bad character flaw, but the fact that the instinct for survival is paramount.²⁴⁰

There is a certain attraction to the view that a person's actions are representative of their good or bad character, that people are 'moved to perform certain actions'²⁴¹ providing a

²³⁴ Ibid. at 21.

²³⁵ M.D. Bayles, 'Character, Purpose, and Criminal Responsibility' (n 107).

²³⁶ M.D. Bayles, 'Hume on Blame and Excuse' (n. 231) at 26.

²³⁷ Ibid. at 28.

²³⁸ Ibid.

²³⁹ Below at n. 342; M. Moore, 'Choice, Character, and Excuse' (n 131) at 47.

²⁴⁰ G. Vuoso, 'Background, Responsibility, and Excuse' (n 40) at 1672 and 1685.

²⁴¹ S.D. Hudson, 'Character Traits and Desires' (n 228).

‘motivational pattern’ which might be strongly linked to desires and aversions. Traditional character theorists such as Plato, Aristotle and Brandt, pay insufficient attention to the ‘interrelationships between desires, emotions, the will and various competencies and abilities.’²⁴² For Aristotle, a person should aspire to develop good character traits, which he terms human virtues or excellences, but such excellences are only achieved when certain conditions are satisfied. For an individual to possess a trait deemed to be a human excellence, an act apparently demonstrating such a trait is insufficient in itself. What is required is that the individual must be in the right state when he does the act:

*First, he must know [that he is doing virtuous actions]; second, he must decide on them, and decide on them for themselves; and third, he must do them from a firm and unchanging state.*²⁴³

Such a human excellence could be acquired by habituation. Plato, Aristotle and Hume believed that character traits were linked to desires, and possession of a particular virtue or vice could motivate someone to act in a certain way. Following on from this, a direct link could be made between motivation and desires.²⁴⁴ Furthermore, both Plato and Aristotle ‘thought that human excellences applied primarily to persons and only secondarily to actions’,²⁴⁵ hence Aristotle’s three preconditions quoted above.

Character traits have also been defined as ‘relatively stable patterns of thought, emotion, and action... dispositions to act in certain ways, to be motivated or affected by certain kinds of consideration, to think in certain ways.’²⁴⁶ The law demands of its citizens ‘certain

²⁴² Ibid. at 540.

²⁴³ Aristotle, *Nicomachean Ethics* (n 219) 1105a30.

²⁴⁴ S.D. Hudson, ‘Character Traits and Desires’ (n 228).

²⁴⁵ Ibid. at 544 -545.

²⁴⁶ R.A. Duff, *Criminal Attempts* (n 119) 177.

dispositions: of obedience to its rules and of respect for the values it protects,²⁴⁷ which requires us to have or develop particular character traits which will enable us to be law abiding members of society. It could be argued that it should not be within the ambit of the criminal law to interfere in the moral character of its citizens. Character theorists can counter such arguments by restricting criminal liability only to undesirable moral character traits that are likely to lead to or produce obviously harmful conduct. Such harmful conduct is rightly the concern of the criminal law. This raises further questions, discussed below.

2.5.1 Responsibility for character

The first issue is the extent to which we are responsible for our characters. There are the opposing opinions of Robert Owen²⁴⁸ who believed that a man's character is formed independently of himself and Aristotle's view that people can be rightly blamed for having acquired a bad character if they have failed to live how they should and have been negligent in developing their character.²⁴⁹ Aristotle did not advocate punishment for bad character alone, just that possessing a bad character could not be available as an excuse for breaking the law. A common misconception of Aristotle's view is that in firmly believing that everyone had the capacity to develop human excellences, Aristotle did not accept that if a person lacked such a capacity he could be excused for his bad actions.²⁵⁰ Such actions themselves were sufficient to ground culpability. In support of this stance, where incapacity to abide by the law is attributable to some negligence on the agent's part in striving to

²⁴⁷ Ibid.

²⁴⁸ R. Owen, *The Book of the New Moral World*, (1845) cited by E. Pincoffs, 'Legal Responsibility and Moral Character' (n 46).

²⁴⁹ Ibid. Pincoffs, at 906.

²⁵⁰ J. Gardner, 'The Gist of Excuses' (n 53).

develop a stronger and better character, he should not be excused from his wrongdoing.

There should be a presumption that our characters are our own responsibilities.²⁵¹

2.5.1.1 Determinate and determinable dispositions

Pincoffs describes character traits generally as a ‘subclass of personality traits’ which are ‘generally approved or disapproved’ by society and he focuses on ‘moral character traits which we have a moral right to demand or expect of one another.’²⁵² Such character dispositions are then subdivided into two separate categories, determinate and determinable dispositions and he argues that both are needed for a just society. Determinate dispositions he states, are ones that can be enshrined in law and tell us precisely what we must or must not do to qualify as having the disposition, the examples given are ‘you must not steal’ or be ‘incestuous’.²⁵³ Determinable dispositions, such as fairness, honesty and concern for others need to be cultivated too. But the converse of these determinable dispositions, e.g. unfairness, dishonesty, indifference to others, can be manifested in so many different ways that if we have the right to expect that individuals should cultivate their characters so that they develop good determinable dispositions we have a problem. How are such good dispositions cultivated, and is everyone in possession of an innate ability to cultivate them or is it something that can be acquired?

The example of fairness is used to illustrate how difficult it would be to explain what we mean if we want people to be fair. Even with an interminably long set of instructions which could be followed, the ‘individual might still be *blindly* following the instructions... without any sense that what he is doing is right or wrong because [*sic*] fair or unfair. The sense of

²⁵¹ E. Pincoffs, ‘Legal Responsibility and Moral Character’ (n 46) at 906.

²⁵² Ibid.

²⁵³ Ibid. at 908-909.

fairness is essential; it is this that we have a right to demand.²⁵⁴ But can we demand a sense of fairness from an agent who may be incapable of meeting such a demand? This raises questions about how a sense of fairness develops in an individual and to what extent the individual would have control over its development. If these positive attributes are not automatically developed and an individual has not been helped to develop them, by having good role models, experience, education, religious moral instruction, to what extent can we blame agents for acting immorally?²⁵⁵ One answer would be that the agent could be blamed and punished not because he *chose* to become a bad person but because of his chosen bad action.²⁵⁶

Arenella examines this issue from another perspective in his criticism of choice theory, questioning whether it is appropriate to hold an agent to be blameworthy when he cannot appreciate the moral significance of legal norms on the sole basis that he has the capacity to comply with the law for non-moral reasons.²⁵⁷ If an agent is incapable of empathy and views ‘moral norms as arbitrary restraints’ on his autonomy should he be morally blameworthy where he makes a purely rational choice and commits an offence? This question can be addressed by arguing that many theorists have blurred the distinction between legal and moral norms; breaching the criminal law does not necessarily involve moral fault.²⁵⁸

Furthermore, an individual needs certain attributes to ‘understand and use moral norms as a reason for his action’ and where an individual lacks ‘such attributes or fails to exercise them

²⁵⁴ Ibid. at 913.

²⁵⁵ Research by the Prince’s Trust in 2008 showed that one in three teenagers did not view either parent as a good role model. This was attributed, in part, to the generation gap.

²⁵⁶ S.H. Pillsbury, ‘The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility’ (n 156) at 722.

²⁵⁷ P. Arenella, ‘Character, Choice and Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments’ (n 39).

²⁵⁸ See discussion of *Kingston*, above at 2.2.2; and discussion regarding *mala in se/mala prohibita* offences at text to note 46, above.

competently' we should determine whether the individual had control over the character aspects that impair his capacity to conform before finding blameworthiness.²⁵⁹

Choice theorists would argue that simply having the capacity to make a choice to abide by the law would be sufficient to ground culpability but it must at least be acknowledged that the majority of citizens have moral as well as legal reasons for conforming,²⁶⁰ making it easier for them to be law abiding.²⁶¹ Where it is more difficult for an individual to comply with the law because of a lack of moral development should allowances be made? Choice theory is inadequate here on the basis that it defines 'the moral agent's capacities for rational and uncompelled action in the abstract without tying those capacities to the unique character of the individual possessing them.'²⁶² In consequence, most criminal defendants can be held morally blameworthy without consideration of the factors that may have impacted upon their ability to conform because they are capable of rational self-determined action. This would only exempt young children and the insane from culpability unless defendants could rely on an excuse of 'lack of a fair opportunity' to act otherwise. Even then, in cases like *Kingston*,²⁶³ being judged to have retained some control would be fatal to a defence.

It is submitted that morally, we can demand desirable character traits from members of our community because they are demands that are universal for the common good. To fail to criticise those who fail to live up to our universal standard is to encourage 'characterological

²⁵⁹ P. Arenella, 'Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments' (n 39) at 60-61.

²⁶⁰ R.A. Duff, *Answering For Crime Responsibility and Liability in the Criminal Law* (Oxford and Portland: Hart Publishing, 2007) 85-86, argues that the majority do not steal because it is wrong, not because it is illegal.

²⁶¹ There is evidence that the threat of criminal sanction is little, or no deterrent; P. Robinson, 'Does Criminal Law Deter? A Behavioural Science Investigation.' (2004) *Oxford Journal of Legal Studies* 173.

²⁶² P. Arenella, 'Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments' (n 39) at 64: note this is an irrelevant consideration for Pillsbury, see 'The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility' (n 156).

²⁶³ [1994] QB 81; [1995] 2 AC 355.

free enterprise' but by finding fault 'the element of justice enters in'.²⁶⁴ Moreover, as questions of fairness are moral and an agent is less inhibited without a well developed moral character, no one should be permitted an unfair advantage over others by being allowed to build the wrong kind of character.²⁶⁵ Although it is appropriate to criticise and to condemn bad acts, it is important to note that justice does not necessarily demand punishment or the stigma of a criminal conviction, which can be viewed as a punishment in its own right.

Character theorists recognise that character formation is not attributable to one thing or one person alone, 'being a matter of circumstances and of degree.'²⁶⁶ Many things impact on a person's character formation, including genetics, family, environment, circumstances, accidents, experience, etc. On this basis, it has been argued that where there is sufficient reason to believe that the agent 'could not have helped becoming what he has become,' and his defects of personality are correctable, then he should be treated. This treatment would be to help the agent behave to an appropriately acceptable standard that he can 'understand and accept for good reason.'²⁶⁷ Presumably, where such an agent has a notably uncorrectable defect or one that does not respond to treatment in a particular case, punishment would be the only option, on utilitarian grounds. If an agent could have avoided becoming what he has become, then punishment is advocated.²⁶⁸ It is submitted that proving that someone could have done something to avoid becoming what they have become may be very difficult. For others, whether or not someone could have avoided turning out the way they have is completely irrelevant. Responsibility lies in D's free choice, even accepting that human

²⁶⁴ E. Pincoffs, 'Legal Responsibility and Moral Character' (n 46) at 917.

²⁶⁵ Ibid. at 920.

²⁶⁶ Ibid.

²⁶⁷ Ibid. at 923.

²⁶⁸ Ibid. at 922.

action is caused, and therefore determined, ‘free choice is not precluded,’²⁶⁹ provided it was rational and non-coerced.

2.5.2 The requirement of an act

Condemning undesirable character traits that result in harm to others affirms the harm principle²⁷⁰ and could be justified on this basis, but what must be considered further is (1) whether it can be acceptable to punish an agent for a defective character trait before this trait has been manifested in harmful conduct,²⁷¹ and (2) whether one harmful act alone²⁷² can be shown to manifest such an undesirable character trait? To address the first of these questions, it would generally be seen as unacceptable for the criminal law to extend its reach to punish its citizens for bad thoughts without such thoughts, indicative of an undesirable character trait, manifesting themselves in a harmful act.²⁷³ This is because it is a characteristic of human nature that we are all capable of bad thoughts, but such thoughts usually do not lead to harmful conduct. Although there were government proposals to detain dangerous severe personality disordered individuals under a new Mental Health Bill²⁷⁴ if they were diagnosed as potentially posing a serious risk to themselves or others, but before they had committed any criminal offence, such proposals were not pursued. The Humean character theory could be seen to support the view that such preventative action is justified but submits that blameworthiness alone is an insufficient condition for punishment or treatment noting that

²⁶⁹ S.H. Pillsbury, ‘The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility’ (n 156) at 724.

²⁷⁰ J.S. Mill, *On Liberty* (Harmondsworth: Penguin, 1974) Chapter 1.

²⁷¹ For example, a person suffering from a severe mental disorder, or someone with learning disabilities.

²⁷² G. Fletcher, *Rethinking Criminal Law* (n 50).

²⁷³ It is clear that English criminal law has never extended this far even though it has been heavily influenced by Christian theology, bad thoughts being sufficient for the latter to require punishment (penance) to atone for sin and bring man closer to God, see A. Lévy, ‘The Origins of the Doctrine of Mens Rea’ (n 10).

²⁷⁴ Home Office, ‘Managing Dangerous People with Severe Personality Disorder, Proposals for policy development, (July 1999); Department of Health and the Home Office: Reforming the Mental Health Act Part II High risk patients, (Dec 2000), CM 5016DII.

granting the state the power to punish or treat without an overt act requirement ‘unreasonably risks freedom for security.’²⁷⁵

The character theorist’s answer to the second question also provides a rationale for the answer to the first question. Without an act there would be insufficient evidence of an undesirable character trait that deserved censure and a social response. If actual criminal conduct was not a requirement, there would be a danger that innocent people would be convicted. This approach establishes that the connection between the undesirable character trait and criminal conduct are contingent. To punish on the basis of what an individual would or might do rather than for actual deeds fails to respect the presumption that the individual is a rational and responsible agent.²⁷⁶ As yet it does not answer why one act can be sufficient to attract liability.

Character theorists propose that the courts should determine in each case whether one action was indeed sufficient to evidence an undesirably dangerous disposition and if it did not they should acquit.²⁷⁷ Also the criminal law’s general requirement of proof of *mens rea*, for example that an act is done ‘purposely, knowingly, recklessly’ can help to support the inference of bad character.²⁷⁸ It has been argued that the different mental elements required by the *mens rea* of offences differentiate between attitudes to harm with greater blame being attached to more undesirable attitudes.²⁷⁹ On a Humean character view liability for negligence could be difficult to justify as it may not be possible to infer an undesirable character trait from one careless act.

²⁷⁵ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107) at 19.

²⁷⁶ R.A. Duff, *Criminal Attempts* (n 119) 190.

²⁷⁷ *Ibid.* at 187.

²⁷⁸ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107) at 8.

²⁷⁹ See discussion below at 2.5.15.

Lacey's view is that defendants should not be held criminally liable for 'out of character' actions, actions only being 'in character' when they are 'genuinely expressive of the agent's disposition.'²⁸⁰ An obvious response to this suggestion is that any theory which exempts liability for serious harm on the basis that the conduct was uncharacteristic of the defendant's normal disposition is clearly controversial. An alternative way of addressing these issues is to state that if the 'out of character' behaviour is a result of circumstances that would give rise to a defence then exemption for liability would be justified. This is because the agent's 'capacity to guide his actions by the values to which he was truly committed'²⁸¹ was impaired. It could also be the case that the action was not *caused* by D's character and as such, no adverse inferences to bad character can be drawn.²⁸²

2.5.3 Character theory, *Kingston*, and determining what is 'character'

This raises the question of how character theorists might deal with a case like *Kingston*.²⁸³ From the judgments it was found that the defendant retained some control over his actions and he knew that what he was doing was morally wrong. His argument that his capacity to retain his self-control was diminished by involuntary intoxication²⁸⁴ attracted sympathy from the appeal courts but the House of Lords held that a drugged intent was still an intent, the circumstances only affording mitigation. In the Court of Appeal, Lord Taylor of Gosforth was prepared to allow a defence where the sole reason for crossing the threshold between having paedophilic inclinations and putting them into practice 'is, or may have been that the

²⁸⁰ R.A. Duff, *Criminal Attempts* (n 119) 187.

²⁸¹ *Ibid.* at 188.

²⁸² Note the example given earlier, text to note 240, where a previously honest person finds himself in a situation, through no fault of his own, where he has to steal food to survive.

²⁸³ [1994] QB 81 (CA); [1995] 2 AC 355 (HL).

²⁸⁴ A defence under the Model Penal Code if it causes D to lack 'substantial' capacity to appreciate the criminality of his act, 'or to conform his conduct to the requirements of law.' §2.08(4) However, most States only allow the defence where the incapacitation is the extent required to satisfy a defence of legal insanity had it been caused by mental disease, S. Kadish, 'Excusing Crime' (n 90).

inhibition which the law requires has been removed by the clandestine act of a third party,²⁸⁵ as ‘the operative fault is not his.’ There are different ways of interpreting Kingston’s character from these circumstances. The first possibility is that Kingston was acting ‘out of character’ whilst he was denying his desires but, when he sexually assaulted the boy he was then acting in accordance with his character and should not be afforded any excuse. This would accord with the view, noted by Wilson, that ‘[O]ne’s settled dispositions... are those which would be acted upon in the absence of self-control’.²⁸⁶

Character has been described in terms of a ‘very significant subpart’ of a person’s personality, a ‘collection of many of his dispositions to act.’²⁸⁷ Problematically, there is no accepted analysis of which traits and dispositions to act are included within the conception of moral character and those which are not.²⁸⁸ One distinguishing feature that has gained acceptance is the view that relevant character traits are those which produce acts which are subject to D’s voluntary control, the exercise of his free will.²⁸⁹ In each case it will be a matter of assessing the ‘*degree* to which their manifestation is subject to voluntary control.’²⁹⁰ If then, with regard to a particular character flaw, a person cannot behave in any other way their flaw is not a character trait. An obvious example would be that of stupidity in the sense of a lack of intelligence. This is an interesting argument but it raises two questions. First, surely the level of control we generally exhibit forms part of our character? As many of us do not behave well or responsibly when we lose our self control such a proposition would suggest that we all have ‘bad’ characters. The second issue is that it is odd to think that a

²⁸⁵ *Kingston* [1994] QB 81 at 89, per Lord Taylor.

²⁸⁶ W. Wilson, *Central Issues in Criminal Theory* (n 117) 349; see also W. Wilson, *Criminal Law Doctrine and Theory* (n 8) 226.

²⁸⁷ G. Vuoso, ‘Background, Responsibility, and Excuse’ (n 40) at 1670.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.* As noted earlier, text to note 229, Hume held a contrary view, not restricting character traits in this way.

²⁹⁰ G. Vuoso, ‘Background, Responsibility, and Excuse’ (n 40) at 1671.

prolific sexual offender who was unable to behave otherwise would not be considered to be a bad character. Consequently, the theory may work with flaws like stupidity but not with others.

If an agent possesses a character trait because he can normally refrain from manifesting it in actions then it seems that Kingston had an underlying, hitherto hidden, bad character and would be deserving of punishment but if we also take into account the ‘degree of control’ then allowances should be made when the will is undermined, when the self control is taken away by the acts of others. All that is clear from the view is that if the ‘manifestation is *not at all* subject’²⁹¹ to D’s control, it is not one of his character traits. There is no explanation of whether it matters that there is some control, and if so, how much or little is needed. Where the trait can be controlled in the absence of external interference it is unclear which side of the boundary the disposition to act would fall on. One criticism of character-based theories is their assumption that one’s character is the fundamental cause of our dispositions to act in a particular way, taking no account of ‘situational phenomena’.²⁹² From a psychological perspective, it is suggested that an agent is behaving in a certain way because of his ‘conditioned’ reaction to specific situational factors,²⁹³ not because of internal character traits. Whilst this argument is based on limited evidence it poses a potential problem for character theorists. The research still provides evidence that character is responsible for behaviour, and furthermore, without the underlying character trait being present, it would be impossible to determine whether the agent would still have acted in the same way.

²⁹¹ Ibid.

²⁹² A. Lelling, ‘A Psychological Critique of Character-Based Theories of Excuse’ (1998) 49 *Syracuse Law Review* 35 at 89.

²⁹³ Ibid. at 83.

A distinction has also been made between ‘hidden’ character traits, as in *Kingston*, for which one can be held legitimately responsible, and ‘alien’ character traits which are deserving of exculpation as in the case of *T*.²⁹⁴ It will be recalled that *T* had taken part in a robbery having been raped three days earlier. She was acquitted on the grounds of non-insane automatism because of her disassociated state at the time of the offence. Had this decision been based on any ‘out of character’ defence it would be very difficult in determining in any given case whether the court was dealing with a ‘hidden’ trait or an ‘alien’ trait; such a distinction would cause exactly the same forensic difficulties that arose in *Kingston*.

The second possibility is to alternatively argue that having previously managed to successfully control his predilections, Kingston had shown evidence of good character and this incident was an example of ‘out of character’ behaviour that should therefore be exculpatory. This second view would accord with the proposition that character theorists must acknowledge the interdependency between possession of a particular trait, D’s strength or weakness of will and his choices.²⁹⁵ It has been observed that sexual preferences are a matter of luck and to require forbearance is ‘to require a great deal’.²⁹⁶ Consequently, where someone becomes blamelessly disinhibited and loses self-control when tempted it is not obvious that it is in the public interest for him to be punished for a stigmatic offence²⁹⁷ unless his conduct was very grave, such as killing and non-consensual penetrative sex.

There are some, like Aristotle, who would dispute whether our character was all a matter of luck.

²⁹⁴ [1990] *Criminal Law Review* 256. It seems that in the case the defence centred on an inability to reason rationally rather than behaving ‘out of character’.

²⁹⁵ S.D. Hudson, ‘Character Traits and Desires’ (n 228).

²⁹⁶ G.R. Sullivan, ‘Making Excuses’ (n 38) at 134.

²⁹⁷ *Ibid.*

*Persons who have attained sufficient maturity can, it is argued, by introspection and reflection respond to criticism and resolve the tension between first- and second-order desires. Values can be strengthened and secured, thereby developing and enlarging moral selves.*²⁹⁸

To what extent such exercises can affect our ability to control our sexual preferences is open to debate. It has been suggested that in some circumstances criminal responsibility should be subject to a ‘unity of self doctrine’ so that in cases such as *Kingston*, where there is a ‘temporary change in the mentality or personality’²⁹⁹ of D as a result of blameless external factors which arise outside D’s control, a defence should be possible.³⁰⁰ Lord Mustill admitted that there ‘is an instinctive attraction in the proposition that a retributory system of justice should not visit penal consequences on acts which are the ultimate consequence of an event outside the volition of the actor’³⁰¹ and that to treat it as purely a matter of mitigation was unjust. In such circumstances this is clearly correct.

2.5.4 A destabilisation defence

A form of character theory could be employed in cases where D is blamelessly destabilised by exceptional circumstances to such an extent that he acts in a way that he would not otherwise have done. This would apply to a first or first relevant, offence and would require consideration of previous convictions, if any, before a defence of ‘good character’ could be raised.³⁰² In other words, ‘good character’ for the purposes of this proposal simply means an ‘absence of previous relevant convictions or relevant character-based acquittals.’³⁰³ In the few exceptional cases where such a defence could be raised, as it would not be available for

²⁹⁸ Ibid. at 138.

²⁹⁹ *Kingston* [1995] 2 AC 355 at 365, per Lord Mustill.

³⁰⁰ G.R. Sullivan, ‘Making Excuses’ (n 38) at 137.

³⁰¹ *Kingston* [1995] 2 AC 355 at 363.

³⁰² G.R. Sullivan, ‘Making Excuses’ (n 38) at 143.

³⁰³ Ibid. at 151.

the most heinous wrongdoing,³⁰⁴ punishment could not be justified on either Kantian or utilitarian grounds. For retributivists, punishing those whose crimes were committed as a result of circumstances that were not of their own making and where compliance with the law was made extremely difficult for them is to ‘punish beyond just deserts, notwithstanding the presence of *mens rea* and the absence of compulsion’³⁰⁵ and from a utilitarian viewpoint deterrence would not be achievable because of the requirement for exceptional circumstances. In recognizing such a defence we would be accepting that D is the ‘victim of events’ rather than his ‘own psychology, history or context,’ and ‘general morality bids us excuse.’³⁰⁶

More recently, the Law Commission rejected any move towards a defence of ‘reduced inhibitions or blurred perception of morality’³⁰⁷ in cases of involuntary intoxication. The Commission could not agree to support Sullivan’s proposal to completely negate *mens rea* where D was still to some extent at fault, as with the partial defence of provocation. Apart from public safety demands, it drew attention, as Lord Mustill had already noted, to practical difficulties with any such defence, including the fact that it would be an entirely subjective test³⁰⁸ as to whether a particular defendant’s inhibitions or ‘moral compass’ were completely undermined, a factor that would be difficult for a jury to determine even with the aid of expert evidence. Furthermore, there was concern that the ‘strength of D’s disposition to engage in anti-social conduct should not make it easier for D to claim a complete excuse for any crime committed in consequence.’³⁰⁹ This final consideration is perhaps the most

³⁰⁴ Here Sullivan proposes the only relevance would be in mitigation, at 142.

³⁰⁵ *Ibid.* at 141.

³⁰⁶ W. Wilson, *Central Issues in Criminal Theory* (n 117) 329.

³⁰⁷ Law Commission, *Intoxication and Criminal Liability* (n 185) para. 4.8.

³⁰⁸ *Ibid.* at para. 4.19.

³⁰⁹ *Ibid.* at para. 4.20.

persuasive as it could open the floodgates to those who possess other morally reprehensible dispositions, such as those who are predisposed to violence.

Finally, if such a defence was permitted where D's inhibitions were caused by an act for which he was blameless there would be no grounds for refusing to recognize 'a general character-based excusatory defence for any inherent condition or "irresistible impulse" for which D is equally not responsible.'³¹⁰ The Commissioners considered that extending existing defences³¹¹ to give them a more general application could be argued for but was beyond the scope of their current deliberations.

2.5.5 A broader view of character traits and acting 'out of character'

Arenella adopts a 'motivational' view of character traits which goes beyond the descriptive view that stems from identifying a person's 'consistent course of action over time,' and takes a more 'holistic and integrated' view of character which 'referred to the way an individual's relatively consistent and coherent values, emotions, desires and aversions interact with each other over time to generate that person's goals, motivations, and interpretations of his social reality.'³¹² If we apply the first limited conception of character then any act inconsistent with the normal pattern of behaviour will be 'out of character' whereas if we adopt his second broader view, fewer actions will be judged to be 'out of character' even when a person has never acted in such a way before. This is because understanding a person's character allows us to identify enduring moral character traits in his future actions.

³¹⁰ Ibid. at para. 4.21.

³¹¹ For example, diminished responsibility, provocation or insanity, at para. 4.22.

³¹² P. Arenella, 'Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments' (n 39) at 81.

Criminal actions are constitutive of the kinds of character traits and dispositions that should concern the criminal law and therefore the actions must be ‘suitably related to the attitudes or motives which are aspects of her continuing identity as a person.’ These are ‘the agent’s practical attitudes as manifested in and constituted by her criminal actions.’³¹³ Any ‘out of character’ behaviour in the relevant sense is neither indicative of the agent’s settled dispositions nor does it reveal ‘character’ at all. Finding criminal actions as constitutive of undesirable character traits supports the view that the law should treat citizens as rational and responsible agents and seek to guide their conduct by giving them good reasons to comply with its requirements. On this rationale it is necessary to subject them to criminal sanctions only where they refuse to act rationally by complying with legal requirements when they have the capacity to do so.

2.5.6 Character theory and the mentally disordered

The mentally disordered offender could pose a problem for some character theorists. It has been suggested that it would be appropriate to convict a criminal with a severe mental disorder because his behaviour demonstrates an undesirable character trait³¹⁴ and whether he lacked the capacity to conform to the law is irrelevant. It is conceded that treatment rather than punishment could be more appropriate if it could correct the undesirable trait.

Presumably if treatment would not be effective punishment would be the only option on such a view. This notion has been rejected on the basis that it abandons ‘any attempt to justify a ‘character’ theory of criminal liability: it destroys the distinction ...between condemning and punishing responsible wrong-doers for their crimes, and diagnosing and treating those who are dangerous to themselves or others.’³¹⁵ A more rational response to the problem of

³¹³ R.A. Duff, *Criminal Attempts* (n 119) 189.

³¹⁴ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107) at 17.

³¹⁵ R.A. Duff, *Criminal Attempts* (n 119) 179.

mentally disordered offenders is for the character theorist to recognize that ‘defects of character are defects of attitude or motivation’ and a mental disorder does not fall within such a definition. Character in this nomenclature:

*consists in a person’s rational dispositions of thought, feeling, and motivation – those which reflect an intelligible conception of reality and value. It is, though, a defining feature of mental disorder that it involves non-rational, or rationally unintelligible, patterns of thought, feeling, and motivation.*³¹⁶

As the mentally disordered individual is incapable of engaging in a critical discussion of his conduct or his underlying motives for acting such a person cannot be held morally responsible or criminally liable as this is reserved only for rational agents.³¹⁷ This proposition would also seem to suggest that the individual needs to possess the capacity for reflection. Although this argument is persuasive, it must be remembered that the term ‘mental disorder’ covers a multitude of states of mind,³¹⁸ for example, ranging from psychopathy to depression, and whereas a severely mentally disordered agent might well be incapable of rational thought it does not follow that all mentally disordered individuals are so afflicted.³¹⁹ On that basis it is suggested that the proposition needs to be refined somewhat to exclude from liability those who are genuinely incapable but to hold accountable those who have sufficient capacity. This would obviously require expert medical evidence to be adduced in each case.³²⁰

³¹⁶ Ibid. at 180.

³¹⁷ Arenella also supports this view, below at 2.5.7.

³¹⁸ See a review of the Mental Health Act 1959 (HMSO, 1976); Art 3(1) Mental Health (Northern Ireland) Order 1986, S.I. 1986/595; The International Classification of Diseases (ICD-10) and the Diagnostic and Statistical Manual (DSM-IV); and the Green Paper, Reform of the Mental Health Act 1983, DoH 1999 which chose not to define ‘mental disorder’ but to leave it to the medical profession.

³¹⁹ See, for example, *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

³²⁰ Under the French Penal Code, Article 64 provided that a person could not be guilty of a criminal offence if he was insane. This was interpreted by the judiciary to mean that the madder you were the less guilty you were, M. Foucault, *Discipline and Punish: the birth of the prison* (London: Allen Lane, 1977).

2.5.7 Character theory and the capacity for moral responsiveness

Arenella, who extends character traits to include ‘motivational character traits,’³²¹ agrees that a capacity for reflection is necessary, but does not restrict his discussion to this capacity alone. He proposes that moral agents need a ‘capacity for moral responsiveness’ which presupposes an appreciation of the ‘normative significance of the moral norms governing their behaviour,’ coupled with an assumption that they can ‘exercise moral judgment’ to apply these norms appropriately.³²² This latter ability requires ‘moral motivation: the desire to use the applicable moral norm as the basis for acting,’ which can be acted upon ‘despite conflicting desires and impulses.’³²³

In summary, these factors are crystallised down to ‘some modest capacity for *critical self-reflection and self-revision*.’³²⁴ These moral capacities are acquired and developed through social interaction and it has been contended that the ability for character control ‘often requires some form of socially created *transformational opportunity* being made available to an individual who has the capacity to take advantage of it.’³²⁵ Therefore, it has been argued where defendants have experienced life conditions that have made it difficult for them to develop into full moral agents, we need to address these conditions and offer the individuals transformational opportunities.³²⁶

³²¹ P. Arenella, ‘Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments’ (n 39) at 81.

³²² Ibid. For a contrasting view see S. H. Pillsbury, ‘The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility’ (n 156).

³²³ P. Arenella, ‘Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments’ (n 39) at 82.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ D. Bazelon, CJ, ‘The Morality of the Criminal Law’ (1976) 49 *Southern California Law Review* 385.

There has been some debate about the extent to which it is fair to punish someone who, given their poor upbringing and social/environmental background, has broken the law.³²⁷ Clearly there are some who would show some sympathy towards such defendants,³²⁸ whereas others would view the absence of such an upbringing and opportunities as irrelevant because punishment would still be deserved for bad deeds.³²⁹ Aristotle himself considered that the importance of a ‘good upbringing’ was essential to the development of a good character³³⁰ and the rejection of bad character traits. Whilst this may be true to some degree the difficulty in permitting such a defence is that it fails to stand up to scrutiny as it is not a cause of criminal activity in itself. Society may have a moral responsibility in failing to address social deprivation but that does not equate to an individual lacking personal responsibility for wrongdoing³³¹ and further consideration of this is outside the scope of this work.³³²

2.5.8 Flaws in the character theorists approach

One major criticism advanced by ‘choice’ theorists would be the exclusion of criminal liability where the agent acted ‘out of character’.³³³ The assertion that culpability is grounded on bad character traits which are attributable to the ‘settled disposition of the agent’ is seen as a major error³³⁴ on the part of some character theorists like Lacey.³³⁵ This is primarily because it would exculpate even the gravest harm intentionally inflicted if D acted

³²⁷ Ibid. and also S. Kadish, ‘Excusing Crime’ (n 90) at 285. There has also been debate about the extent to which culture should excuse crime, examples include: M. Moody-Adams, ‘Culture, responsibility, and affected ignorance’ (1994) 104(2) *Ethics* 291; S. Reddy, ‘Temporarily Insane: Pathologising Cultural Differences in American Criminal Courts’ (2002) 24(5) *Sociology of Health and Illness* 667; and M. Tunick, ‘Can culture excuse crime’ (2004) 6(4) *Punishment & Society* 395.

³²⁸ See D. Bazelon, CJ, ‘The Morality of the Criminal Law’ (n 326).

³²⁹ S.H. Pillsbury, ‘The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility’ (n 156) at 721-722.

³³⁰ Aristotle, *Nichomachean Ethics* (n 219) 1095a25.

³³¹ J. Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code’ (1987) *Rutgers Law Journal* 671 at 686.

³³² G. Vuoso, ‘Background, Responsibility, and Excuse’ (n 40); see also S. Kadish, ‘Excusing Crime’ (n 90) at 283.

³³³ See discussion at 2.5.5 and 2.5.10.

³³⁴ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 129) at 207.

³³⁵ See text to notes 380-386, below, for Moore’s criticism of Lacey’s view.

uncharacteristically. Rather than seek a settled disposition or trait, character theorists should instead hold that the crux of culpability lies in an ‘evaluation of the defendant’s conduct, in the circumstances, in the light of an idealised conception of an agent of good character.’³³⁶ Accordingly, culpability could then arise even where D has previously been of scrupulous character.

Of course, although this suggestion is a logical means of solving this issue for some character theorists, it would need to incorporate some elements of the capacity/choice theory to accommodate those who lack the capacity to attain the minimum reasonable standard set by this idealised ‘good character.’ Without such an accommodation this view links well with Gardner’s³³⁷ proposal, discussed below,³³⁸ that culpability is determined in light of a person’s ability to fulfil their particular role in the way a reasonable person in that role should.

Moore, the leading critic of character theory, has scrutinised the character theorists’ position on the relationship between character and actions and concludes that it means:

*we are excused from responsibility for our actions when those actions do not manifest, express, reveal or indicate bad character; when such actions are not the result of, not determined by, explained by, or are not attributed to bad characters; when such actions are not an exercise of a character defect; or when such actions are not evidentiary of bad character.*³³⁹

³³⁶ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 129) at 207.

³³⁷ J. Gardner, ‘The Gist of Excuses’ (n 53); *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (n 37).

³³⁸ Below at 2.7.1

³³⁹ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 47.

2.5.9 Character and action

Moore first questions whether responsibility for character is merely a retrospective analysis of past behaviour because if character amounts to nothing more than this it is clearly wrong: ‘character is not identical to past behaviour although it can be evidenced by it.’³⁴⁰ Nor can he accept that character can be determined by dispositions to act in certain ways in the future. He rejects the notion that the character theorists’ stance, noted above, describes the logical relation between character and actions that are ‘in character’ on the basis that it is ‘too behavioural’.³⁴¹ Considering whether a causal link exists between character and action would move away from a purely behavioural focus, but this would be problematic too because character traits can be manifested in a variety of ways and not just one. He gives the example of the greedy man who can either demonstrate greedy behaviour or can behave in an overtly generous way in an effort to compensate for his greediness.³⁴²

2.5.10 The ‘out of character’ problem

Whether an overtly generous person could genuinely be greedy is open to question. An obvious difficulty that arises once an action is labelled as ‘out of character’ and therefore subject to exculpation would be in ensuring that it was not the result of a latent character defect that was manifesting itself at a suitable opportunity or arising because of a change in external circumstances. An ‘out of character’ defence could lead to the exculpation of someone of previous good character who simply yielded to an irresistible temptation.³⁴³ How can we know whether someone is a person of reasonable firmness, for example, if they have never been put to the test? An apparently honest and trustworthy person may suddenly

³⁴⁰ Ibid. at 41.

³⁴¹ Ibid. at 47.

³⁴² Ibid. Moore cites as an example the character of Bulstrode in *Middlemarch*.

³⁴³ W. Wilson, *Criminal Law Doctrine and Theory* (n 8) 209.

decide to steal when an opportunity to take an unusually large amount presents itself for the first time or when they realise they are in a lot of debt and face a greater temptation than before. It is difficult to insist that such cases would be examples of ‘out of character’ behaviour. It is such concerns that have prompted challenges to the traditional restricted view of character theorists and to the submission that there are crucial connections between possession of a character trait and how such a trait links in with both the motivational goals and desires, and the strength of will of the individual.³⁴⁴

Having rejected the behavioural approach and the causal link discussed above, Moore argues that an ‘evidentiary relation’ between character and action is the most appropriate approach.

*Some act A will evidence some trait C if and only if not only C causes A, but also states of type C typically cause events of type A. Effects are evidence of causes only where there is some general connection between the class of events that includes the effect and the class of events that includes the cause.*³⁴⁵

Moore uses this ‘evidentiary relation’ to try to identify a distinction between a person’s character and his choices to differentiate between the two leading theories of culpability. He concludes that the character is not just another way of referring to choice as:

*[a]ny action evidences the possession of a will, because a will can typically will anything and still be a will. But ...while a character can cause any action, to be possessed of a character precludes the possibility that one’s character can typically cause any class of actions equally well. Characters, to be characters, can only typically cause some classes of actions, but not others.*³⁴⁶

³⁴⁴ S.D. Hudson, ‘Character Traits and Desires’ (n 228).

³⁴⁵ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 48.

³⁴⁶ Ibid.

At first sight this argument seems to be correct because otherwise how would any class of action be indicative of a character trait? The difficulty lies with Moore's own example of the character Bulstrode.³⁴⁷ If a greedy person can hide his greedy disposition by being overtly generous to others then surely to be 'possessed of a character' does not preclude acting contrary to it if we so wish.

The criminal actions that the character theorist would excuse for being 'out of character' are precisely the same kind of actions that the 'choice' theorists would exclude on the basis that that they were not 'freely chosen'.³⁴⁸ There are similar problems for the character theorist with the defence of mistake as there are with the 'choice' theory, namely that as long as the mistake blocks any inference of a bad character trait it should be irrelevant that the mistaken belief is unreasonable. The only way character theorists could catch the unreasonable mistake-maker would be if there was a lesser offence of negligence as to make an unreasonable mistake could be sufficient to infer the undesirable character trait of failing to take reasonable care.

2.5.11 What is 'character'?

There have been difficulties in determining exactly what "our character" should include. Drawing on the work of Freud and Watson, Moore examines how we constitute our sense of self 'through owning up to, or disowning various emotions, desires or behaviours. The phenomenological sense of the id is of the "not-me", the ego-alien emotions, thoughts etc.,'³⁴⁹ that we may suppress into our subconscious. Moore cites Freud's view that the ego-alien represents our 'instinctual desires and emotions' and Watson's proposition that our

³⁴⁷ See text to note 342, above.

³⁴⁸ R.A. Duff, *Criminal Attempts* (n 119) 188.

³⁴⁹ M. Moore, 'Choice, Character, and Excuse' (n. 131) at 43.

sense of self exists in the ‘reflective, evaluative self that picks and chooses which of the desires, emotions, thoughts, etc. are worth being considered part of the self.’³⁵⁰

If this research into the phenomenology of character is accepted, does character include only the part of us that we identify as ‘self’ or the broader view encompassing other elements like our instinctual desires? If the broader view of character and choosing are taken, then both choice and character theorists can equally ground culpability where D states that his wrongful action stems from strong emotions.³⁵¹ Similarly, if this broader view of character is adopted, it would be difficult if not impossible to suggest that D’s action was out of character. Plato referred to this as the ‘appetite’ or ‘spirited part of us’ and St Paul called this the “sin that has its lodgings in us” [Romans 7:14-20] which subsumes/overrides the part of us that directs moral action.³⁵² It has been proposed that when this has occurred it would be unfair to punish as we do not choose the part of us that is the “bad part” that overrides the “good part” of us when we act immorally.³⁵³ Yet this argument cannot prevail because in the majority of instances we do possess the capacity to control our instincts and desires even though we may choose to give in to them knowing that we are doing wrong.

It has also been suggested that if a person knowingly acts immorally and is ‘genuinely indifferent to the authority of moral imperatives’ then such imperatives do not apply to that person, ‘she is outside their scope and hence does nothing wrong...,’ such a person is ‘amoral’ rather than immoral and moral blame would be unjustified.³⁵⁴ However, just because someone is ‘indifferent’ to moral imperatives does not necessarily mean that they do not apply to them. If such a person is incapable of moral responsiveness then perhaps such an

³⁵⁰ Ibid.

³⁵¹ Ibid. at 44

³⁵² J. Hampton, ‘Mens Rea’ (n 59) at 12.

³⁵³ Ibid.

³⁵⁴ Ibid.

attempt at excusing them is correct, providing an alternative to punishment was available. Certainly, if someone has this capacity but simply chooses to pursue their own desires in the full knowledge that they are breaching society's moral norms then blame is fully justified. The contrary view is that all that is necessary to hold someone criminally responsible is that they have 'a basic conception of human value;' it is not necessary that the individual agrees with society's conception of this value or that they have 'feelings for others.'³⁵⁵

2.5.12 The extent of responsibility for our characters

If 'character' is simply another way of describing our 'choosing agency' then there is really only one theory, choice³⁵⁶ unless there is a 'metaphysical difference between character and will.' Whilst not denying that in some sense we are responsible for our characters there is 'room for disagreement as to exactly how and in what sense.'³⁵⁷ Pillsbury³⁵⁸ identifies three different approaches to character theory, the first being 'a causal model' that 'tries to distinguish between those aspects of character caused by unchosen influence,' which should be excused, leaving only those that are attributable to the individual as attracting blame and punishment. Although seemingly an attractive proposition, it fails because it would eliminate choice entirely as all action is causally linked. The second approach, his 'representative action model', is where culpability is linked to D's 'enduring moral character' and here punishment is for wrongful action which demonstrates possession of a bad character trait. It is not only the act that is being punished here, but the person 'revealed by the

³⁵⁵ S.H. Pillsbury, 'The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility' (n 156) at 745. Pillsbury submits D need only experience personal pleasure and pain.

³⁵⁶ M. Moore, 'Choice, Character, and Excuse' (n 131) at 44.

³⁵⁷ Ibid. at 45.

³⁵⁸ S.H. Pillsbury, 'The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility' (n 156) at 731.

action.’³⁵⁹ There is a lack of a clear definition from character theorists as to what counts as an ‘enduring character trait’ limiting the effectiveness of this view.

The third approach Pillsbury terms the ‘moral capacity model’ and on this view a precondition of moral responsibility requires more than simply chosen action. It requires ‘certain moral-emotional capacities’, including ‘the ability to empathize,’³⁶⁰ a prerequisite for Arenella. Such an approach could raise serious public protection issues if wrongdoers lacking such a capacity are excused. How is such moral capacity determined? It is generally judged by one’s deeds, but it also encompasses moral potential and that we ‘must resist the conclusion that a person who never *has* done better, also *could not* do better.’³⁶¹ The difficulty in determining moral capacity, the problem that this capacity model opposes commitment to choice theory, and finally the fact that such a stance ‘mandates’ that D must have the ‘ability *to want* to do good’ causes Pillsbury to refute it.³⁶²

Moore considers two possibilities as to how we could be deemed responsible for our characters: the first is that we have chosen to become what we are, but if this is correct it collapses into choice as its foundation. The second option is that we are responsible for our characters because ‘we are (at least in part) our characters.’³⁶³ For Moore, although Aristotle³⁶⁴ advanced the first view, there are two reasons to doubt it. The first is whether we actually have much of a capacity to mould our characters; and then perhaps more fundamentally, ‘who is the “he” who is choosing character? Does he himself have any

³⁵⁹ Ibid. at 733.

³⁶⁰ Ibid. at 734.

³⁶¹ Ibid. at 748.

³⁶² Ibid. at 749.

³⁶³ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 45.

³⁶⁴ Aristotle, *Nicomachean Ethics* (n 219) 396-399.

character, and, if so, was it chosen too?’³⁶⁵ This is a problem for character theorists, which ‘invites an infinite regress.’³⁶⁶

Must a person already possess some character before he can start this selection process to build the character he wants to become? Do we acquire some through early experiences and then at some point afterwards start to make choices? Moore addresses such questions using what he terms the weak Aristotelian view – initial character formation is something we have little or no control over, responsibility comes from ‘our later choices to *maintain* these already formed traits.’³⁶⁷ He accepts there is some merit in this argument but he does not believe that it can account for all our attributes that can be subject to moral judgement giving emotions as an example. We cannot will our emotions ‘into or out of being,’ despite this ‘we still hold people responsible for their emotional makeup’.³⁶⁸ Despite holding people morally responsible for their emotional makeup we expect people to control any morally reprehensible emotions and not act on them. It is only when they fail to exercise reasonable control and commit a proscribed wrong that we hold them criminally responsible.

Because of this problem Moore believes that it is the second possibility that reflects responsibility for character – ‘that we are, in part, constituted by our characters.’³⁶⁹ We do not choose to become or remain who we are in the same way that we choose and are responsible for acting in a certain way, yet responsibility for characters stems from ‘a kind of aesthetic morality that governs our assessment of character’ as character judgments have

³⁶⁵ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 45.

³⁶⁶ Ibid.

³⁶⁷ Ibid. at 44 citing as a proponent of this view R. Nozick, ‘*Philosophical Explanations*’ p396.

³⁶⁸ M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 46.

³⁶⁹ Ibid.

‘moral overtones’ and we shun and disadvantage those with bad characters.³⁷⁰ To ‘the extent that such persons did not choose their character, they are ...morally unlucky.’³⁷¹

2.5.13 Moore’s critique of five claims advanced by character theorists

The first claim,³⁷² that preventative aims of punishment can only be justified when individuals have shown a bad character because others are not dangerous and punishment could not act as a deterrent, is dismissed by Moore because it cannot show when someone is morally innocent. The second claim,³⁷³ that character theory fits in well with the current practice in American law he rejects because it does not show which theory the law should recognize. The third claim³⁷⁴ is that character theory can cope with the hard determinist view, difficult for choice theorists, if we support the argument that we are responsible for our characters ‘because we are our characters.’³⁷⁵ The fourth³⁷⁶ is that character theory best represents society’s blaming practices as it focuses on a more holistic view of the sort of person D is, whereas choice theory is limited to an examination of capacity and opportunity at the moment D acts. Moore argues that this still fails to explain why one theory is better than the other.³⁷⁷ The final claim for character theorists that Moore raises is Fletcher’s view that ‘[a]n inference from the wrongful act to the actor’s character is essential to a retributive theory of punishment.’³⁷⁸ As punishment is linked to desert ‘the desert of the offender is

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid. at 49.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid. at 50.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ G. Fletcher, *Rethinking Criminal Law* (n 50) 800, cited by M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 51.

gauged by his character' so that 'judgment about character is essential to the just distribution of punishment.'³⁷⁹

It is Lacey's defence of this stance that Moore then attacks. He examines her claim that it is morally 'unfair to hold people responsible for actions which are out of character [but] fair to hold them so for actions in which their central dispositions are centrally expressed.'³⁸⁰ He then tests this rationale by devising the following two examples:

- (1) *an actor freely chooses to do wrong (i.e., he had the capacity and a fair opportunity not to so choose), and yet the action is "out of character" for that actor;*
- (2) *an actor's behavior is good evidence for a settled disposition (character) of a bad kind, and yet he has not (yet) chosen to act on that disposition.*³⁸¹

If Lacey is right, Moore argues, we ought to find it fair to punish the second but not the first.³⁸² Such a result would be obviously wrong. The problem with "out of character" excuses, as in the first example, has been discussed earlier. In relation to (2) if we examine Lacey's claim more closely she is clearly requiring a wrongful act and not punishment for bad character *per se*. Also, if an actor's behaviour is truly to be taken as evidence of his bad character, are we to assume his lack of action in line with his bad character is simply down to a lack of opportunity to do so, or is it in the alternative, evidence of a good character in trying successfully to resist acting wrongfully?

Moore also takes issue with Lacey because she holds that "bad character" means 'a settled hostility to, rejection of, or indifference to the values of the community that the criminal law

³⁷⁹ Ibid. G. Fletcher, *Rethinking Criminal Law* (n 50) 800, cited by M. Moore, 'Choice, Character, and Excuse' (n 131) at 51.

³⁸⁰ N. Lacey, *State Punishment*, 68, cited in M. Moore, 'Choice, Character, and Excuse' (n 131) at 51.

³⁸¹ Ibid. Moore.

³⁸² Ibid.

seeks to protect and foster.³⁸³ It is not clear why, for some character theorists, bad character traits require proof of a continuing bad attitude³⁸⁴ but this is not the concern here. He quotes Lacey's statement that the criminal law should 'treat seriously the individuality and sense of identity of each person by responding punitively only to actions which are genuinely expressive of the actor's relevant disposition: with which the agent truly identifies, and can call her own.'³⁸⁵ On his interpretation this means that 'we are only our character' which has two 'startling implications.' The first is that as our character develops and changes we would become a different person; the second, that a multiple-personalities person would actually be 'many persons with one character each'³⁸⁶ rather than just one individual. In consequence he dismisses the notion that character is equivalent to identity.

This argument has merit but perhaps all Lacey is suggesting is that before punishment can be justified, both a person's character and his identity need to be taken into account. Our characters show the 'kind of person' we are but our identity also considers 'who we are' and gives an insight into how we have become the person we are now. Such a view would incorporate the weak Aristotelian view, as our identity would include factors such as our socio-economic background, education, IQ/ capacity and our ability to be morally responsive, etc., and in consequence if D could not have helped becoming what he has become then punishment for crime is perhaps only appropriate where serious harm has been caused.

Moore admits that we have an 'aesthetic' kind of responsibility for 'unchosen' aspects of our character but such aspects do not warrant punishment because 'we could not have avoided

³⁸³ N. Lacey, *State Punishment*, 189-90, cited by M. Moore, 'Choice, Character, and Excuse' (n 131) at 53.

³⁸⁴ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 129) at 206.

³⁸⁵ N. Lacey, *State Punishment*, 77, cited by M. Moore, 'Choice, Character, and Excuse' (n 131) at 53.

³⁸⁶ M. Moore, 'Choice, Character, and Excuse' (n 131) at 54.

possessing these aspects of ourselves.’³⁸⁷ Consequently, choice theory is the preferred theory of excuse because it only ‘excuses where there is no choice, no matter how much bad character may be exhibited’ and does not ‘excuse where there is free choice, however much out of character it may be’.³⁸⁸

A choice theorist would argue that the criminal law does not punish people for having a ‘bad character’ but it does punish those with ‘good characters’ who act in a bad way, thus choice theory is the correct blaming practice. The choice theorists’ suggestion that only those showing objectionable character traits can be punished if character theory is employed could be rejected on the basis that negligent behaviour can also be encompassed either because D was ‘careless and inattentive’ as a person or because D failed to ‘exercise their character strengths because of a momentary distraction.’³⁸⁹ Whilst it may seem appropriate to hold someone criminally liable for harm caused in circumstances where an individual is ‘careless and inattentive’ because they are indifferent to the welfare of those around them,³⁹⁰ it is hard to justify criminal responsibility where someone has been momentarily distracted simply because it can happen to us all.

2.5.14 Liability for negligence

Choice theorists struggle with liability for negligence but have argued that character theorists have difficulty too, which is a weak argument for promoting the supremacy of choice theory.³⁹¹ Even though we may punish one negligent act, such an isolated action does not signify that we are often careless, a bad character trait. When Lacey suggests that a

³⁸⁷ Ibid. at 56.

³⁸⁸ Ibid.

³⁸⁹ P. Arenella, ‘Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments’ (n 39) at 75.

³⁹⁰ See the discussion of indifference in relation to recklessness in Chapter 3.

³⁹¹ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 129).

consistently negligent actor demonstrates an attitude of indifference³⁹² this is not necessarily the case for all those who would fit this description, which could equally be attributable to ‘awkwardness and stupidity.’³⁹³ Moore proposes that criminal liability for negligence can only be justified on utilitarian rather than moral grounds, as it cannot be founded upon culpable choice unless it could be universally applied to all negligent actors. Similarly, character theory fails because it too cannot always apply universally even though it often can identify inferences of bad character where moral excuse fails.³⁹⁴ This is true to the extent that character and choice theories alone cannot underpin criminal negligence, but the utilitarian justification is also weak.

2.5.15 *Mens Rea* and Character Theory

It has been suggested that the distinctions between the various forms of *mens rea* are grounded in degrees of dangerousness rather than reflective of any particular mental element³⁹⁵ but Bayles³⁹⁶ has refuted this proposition, arguing that they are each indicative of the agent’s attitude towards harm occurring, reflecting different degrees of bad character traits. He attempts to differentiate between certain *mens rea* terms based upon the different degrees of risk involved in such behaviour and links these mental states to different attitudes towards harm, proposing that more blame is deserved the more undesirable the attitude inferred.³⁹⁷ He lists ‘purposefully,’ ‘knowingly’ and ‘recklessly’ as comparators and suggests that the agent who acts ‘purposefully’ shows the worst attitude as he positively desires the harm to occur. Is the ‘purposeful’ actor really showing the worst possible attitude as Bayles

³⁹² N. Lacey, *State Punishment*, 66, cited by M. Moore, ‘Choice, Character, and Excuse’ (n 131) at 58.

³⁹³ *Ibid.* Moore.

³⁹⁴ *Ibid.*

³⁹⁵ H. Gross, *A Theory of Criminal Justice*, 340, 386, cited by Bayles in ‘Character, Purpose, And Criminal Responsibility’ (n 107) at 9.

³⁹⁶ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107).

³⁹⁷ *Ibid.* at 9-10.

suggests? True, such an actor desires the harm to occur to a particular person but he will generally have a specific reason for his action, such as a sense of being wronged by that person.

This assertion that recklessness portrays evidence of a less undesirable character trait than intentional acts has been questioned.³⁹⁸ Bayles observes that harm could be intended without any confidence in the agent's actions being successful. Where harm is intended the agent is likely to try again making him more dangerous. An alternative view is that as the agent with intention is acting for a reason his level of dangerousness would depend on how often he is likely to have that reason for acting. With the reckless agent, he is willing to cause harm for no reason at all, other than that he wants to pursue another goal. As a result it is difficult to see how the intentional agent is demonstrating a worse undesirable character trait than the reckless agent. A reckless action does not demonstrate a willingness to act in a way that is *sure* to cause harm, just a willingness to take the risk that the foreseen harm might occur.³⁹⁹ Having said this it must be recognised that in general terms the intentional actor would usually be deemed to be the worse character of the two and the most dangerous, even though this may not always be the case. It could also be said that harm is more likely to result when it is actually intended.⁴⁰⁰ There can be some fine distinctions drawn between the degrees of probability of harm occurring, an issue to be discussed later in chapter three which examines the development of the concept of oblique intention using the language of recklessness.

³⁹⁸ R.A. Duff, *Criminal Attempts* (n 119) 181.

³⁹⁹ *Ibid.*

⁴⁰⁰ R. Posner, *Economic Analysis of Law* (4th Edn., 1992) cited by C. Finkelstein, 'The Inefficiency of Mens Rea' (2000) 88 *California Law Review* 895 at 897.

For Bayles,⁴⁰¹ the ‘knowing’ actor displays a slightly less undesirable attitude than the ‘purposeful’ actor as he is almost certain that harm will occur but he does not necessarily desire it and the ‘reckless’ actor is less reprehensible still because ‘he will usually try to avoid harm whereas the defendant who knowingly causes harm, simply not caring, will not.’⁴⁰² Unfortunately, he does not make any attempt at defining the terms ‘knowingly’ or ‘recklessly’ which makes it difficult to determine any distinction between these two states of mind. Is the ‘knowing’ actor a person who could be deemed to be acting with oblique intention? If recklessness is considered in its purely subjective sense then the actor *knows* of the risk and goes on to take it; this would seem to place him in the category of a ‘knowing’ actor. If recklessness is approached from a purely objective standpoint the actor does not know of the risk (at least in the sense of conscious advertence) but could not, in consequence, possibly try to avoid it.

There are three responses to the debate as to whether *mens rea* reflects levels of dangerousness or degrees of bad character. There are those who would dispute Gross’ claim that *mens rea* terms necessarily reflect dangerousness as the intentional actor may be less dangerous than the reckless person;⁴⁰³ at least the intentional actor will have a reason for desiring harm in a particular instance and perhaps only in a particular instance. The reckless actor could potentially be more dangerous as he may expose more people to harm, more frequently. The second contention is that Bayles makes too much of a generalisation by suggesting that reckless people usually try to avoid harm and the third response is that like those who act knowingly, the reckless actor can also simply not care, being indifferent to the needs of others.⁴⁰⁴

⁴⁰¹ M.D. Bayles, ‘Character, Purpose, and Criminal Responsibility’ (n 107).

⁴⁰² *Ibid.* at 10.

⁴⁰³ See the discussion of recklessness in Chapter 3.

⁴⁰⁴ Indifference is discussed in the context of recklessness in Chapter 3, below.

There has been support of Bayles' attempt to identify the link between *mens rea* and character because if crimes reveal bad character traits, which are correctable, it is helpful to know what D's mental state was to determine what treatment should be provided to help D to correct his character in the most socially beneficial way.⁴⁰⁵ A sole examination of D's mental state at the time of the *actus reus* would be retributive and perhaps too restrictive, the entire circumstances could be scrutinised to determine whether the act is truly indicative of a character flaw.⁴⁰⁶

2.6 Choice or character theory as a sufficient basis for criminal liability

Neither of these theories of culpability, including others discussed below, can adequately explain the criminal law's determination of culpability to the exclusion of all other theories, possibly because the law is as much the product of the 'shared history of cultural-moral evolution,'⁴⁰⁷ as it is of moral theory.⁴⁰⁸ It is also clear from the discussion above that there is a fair amount of congruence between the theories, each to some extent relying on the other. We are morally responsible both for who we are and the choices we make.⁴⁰⁹ Moreover the minimum standard of behaviour the criminal law demands does not accommodate an individual's personal characteristics or the context within which he acts.⁴¹⁰ The criminal law should recognize and make allowances for the cognitive capacity of the individual defendant.

Even though we might not be morally blameworthy for external factors beyond our control that may make us more susceptible to break the law, such as poor upbringing and environmental pressures, these factors can only offer an explanation for our wrongdoing, not

⁴⁰⁵ E. Pincoffs, 'Legal Responsibility and Moral Character' (n 46) at 922-3.

⁴⁰⁶ Ibid.

⁴⁰⁷ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 129) at 215.

⁴⁰⁸ Ibid. at 193.

⁴⁰⁹ W. Wilson, *Central Issues in Criminal Theory* (n 117) 328.

⁴¹⁰ Ibid. at 327.

excuse it. Compassion for such individuals is not incompatible with blame and criminal liability, ‘over-excusing can have a morally and psychologically undesirable effect on wrongdoers.’⁴¹¹ This is because it sends the wrong moral message to offenders. It is also psychologically desirable to encourage the feelings of guilt and remorse as they are evidence of the recognition that D has breached society’s values, he blames himself, accepts responsibility and connects to our moral values. It is by feeling the pain of guilt and remorse that D can decide to change his behaviour and become a better person.⁴¹² Punishment allows him to pay his debt to society and alleviate some of the guilt felt. Excusing him is saying he is not morally responsible for what he has done, undermines this ‘regenerative process’ and can sometimes be seen as shifting the blame onto others, or even the victim.⁴¹³

The ‘character’ theory advances the preferred approach as to *who* can be held criminally liable, i.e. moral agents who exhibit antisocial and undesirable character traits, reminding us that actions can be judged as criminally wrong because of the bad attitudes that they reveal, as well as bad choices that have been made. This theory suggests that offenders are liable for what they *are* rather than for what they *do*. It has been advanced that it is more the character of our actions that is the focus of the criminal law rather than an agent’s character *per se*.⁴¹⁴ There is also a risk that where D is known to possess a ‘bad’ character he may be denied a legitimate excuse because we may not believe him and a ‘good’ person may convince a court that he is entitled to an excuse when there is little evidence to support his claim.⁴¹⁵ The ‘choice’ theory, on the other hand, identifies in a preferred way what we should be liable *for*,

⁴¹¹ J. Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code’ (n 331).

⁴¹² Ibid. at 690.

⁴¹³ Ibid. at 691.

⁴¹⁴ R.A Duff, ‘Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law’ (2002) 6 *Buffalo Criminal Law Review* 147.

⁴¹⁵ J. Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code’ (n 331) at 691 and 694, fn. 113.

but it does this by reference to our ‘choices’ and fails to accept the integral relationship between our character and our choices.

The law’s concern is with the character of our actions, not in ‘character’ as distinct from action.⁴¹⁶ This is the extent to which character traits, or virtues and vices are relevant. That is why it is submitted here that the focus is on the character of our actions to the extent that they reflect our character. Responsibility for actions stems from D’s free choice because it is only under such circumstances that it can reflect badly on his character.⁴¹⁷ It is clear that ignoring the link between character and choice weakens the choice theorists’ stance and results in a failure of that theory to justify moral culpability.⁴¹⁸ Neither theory sits happily with negligence nor can they cope with spontaneous and instinctive reactions where on the one hand there is no choice and on the other, there is no evidence of ‘bad’ character.

2.7 Alternative theories:

2.7.1 The ‘role’ theory of culpability

Gardner⁴¹⁹ dismisses the traditional views of both choice and character theorists, judging them both to be flawed, and instead grounds culpability and responsibility on a role basis. In his dismissal of character theory, he argues that the actions of D are not merely evidence of D’s character but rather constitute it. Therefore if D acts ‘out of character’ it can only be a mitigating factor. Similarly he opposes choice theory which he finds inextricably linked to character theory:

⁴¹⁶ R.A. Duff, *Criminal Attempts* (n 119) 191.

⁴¹⁷ G. Vuoso, ‘Background, Responsibility, and Excuse’ (n 40) at 1672.

⁴¹⁸ P. Arenella, ‘Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments’ (n 39) at 61.

⁴¹⁹ J. Gardner, ‘The Gist of Excuses’ (n 53); *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (n 37) Chapter 6.

*the capacity that D has to act virtuously at t is also no more and no less than the virtue that D has at time t. And this is because one cannot have the capacity associated with a particular virtue whilst at the same time lacking the tendency to be virtuous.*⁴²⁰

Possession of a good character trait is not equivalent to always behaving virtuously in accordance with it.⁴²¹ Rather, our behaviour at any given time will be determined not only by whether or not we possess a particular virtue but also on our other ‘motivations and goals.’ This view seems to support the proposition that strength of will and other goals are important.⁴²² Even if Gardner accepted a distinction between character and choice theories he would still find no ground for exculpation because a ‘lack of capacity to behave with a good character provides no excuse at all’.⁴²³ Surely the question here does not concern a lack of capacity to behave virtuously, rather a lack of the strength of will to do so?

On Gardner’s⁴²⁴ model, responsibility only lies where we are fulfilling a role, for example a specific role like doctor, police officer, teacher, parent; or a non-specific role i.e. a human being, and we fall below an idealised standard of a reasonable person in the role we are fulfilling. All roles have standards of character, skills and knowledge attached to them and D should only be excused if his conduct fell within the boundaries of reasonableness for someone in that role. It is irrelevant whether we have the capacity to achieve this idealised standard; a person’s capacity to do better is immaterial.

⁴²⁰ J. Gardner, ‘The Gist of Excuses’ (n 53) at 583.

⁴²¹ V. Tadros, ‘The Characters of Excuse’ (2001) 21 *Oxford Journal of Legal Studies* 495.

⁴²² See Hudson’s example of the Pliable Dodger who would normally act virtuously but on one occasion does not because he lacks the strength of will, for Aristotle such a person would be incontinent, i.e. weak-willed, S. Hudson, ‘Character Traits and Desires’ (n 227) at 548.

⁴²³ J. Gardner, ‘The Gist of Excuses’ (n 53) at 583; V. Tadros, ‘The Characters of Excuse’ (n 421) at 496.

⁴²⁴ J. Gardner, ‘The Gist of Excuses’ (n 53) at 593-596.

Gardner's model fits well with liability for negligence and for non-advertent recklessness (as per *Caldwell* recklessness which covered both subjective and objective tests within its scope)⁴²⁵ and yet it will have difficulty with advertent recklessness because where it could not be proved that D foresaw the risk of harm occurring he would have to be acquitted, even if a reasonable person would have foreseen the risk. Thus Gardner supports a stricter, more Aristotelian view of character theory.⁴²⁶ Yet currently the criminal law does acknowledge either a lack of responsibility or alternatively, for exculpation on capacity grounds. For example, defences like insanity and diminished responsibility operate in this way. A lack of responsibility applies in relation to status as in infancy. Furthermore, capacity can be relevant in establishing the requisite mental element as was shown in *Sheppard*⁴²⁷ where the *mens rea* of the offence specified, 'wilful neglect,' becomes impossible to prove where D lacks the mental capacity to realise the harm being incurred.

Other factors preventing the 'role' theory of culpability having a universal application are that it cannot adequately accommodate the defences of provocation,⁴²⁸ duress and involuntary intoxication, even though the first two incorporate elements of reasonableness.⁴²⁹

Provocation becomes difficult because even if getting angry was justified it can never be reasonable to kill in such circumstances. In involuntary intoxication, there is no standard of the reasonably intoxicated man for comparative purposes. This would not help a defendant like Kingston, and furthermore such a person could only be compared with a reasonable human being, not a person with Kingston's predilections. To adequately allow for these three

⁴²⁵ See Chapter 3, below.

⁴²⁶ J. Gardner, 'The Gist of Excuses' (n 53); *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (n 37) Chapter 6.

⁴²⁷ [1980] 3 All ER 899 where parents failed to summon medical help and their child died. Lord Diplock held the parents were not 'wilful' if they had neither thought their child was at risk unless examined by a doctor nor being unaware of the risk they refrained from seeking assistance because they did not care whether the child needed treatment or not.

⁴²⁸ Now the defence of 'loss of control'.

⁴²⁹ V. Tadros, 'The Characters of Excuse' (n 421) at 499-502.

defences it has been argued that we need to rely on character and choice theories instead. This is because some part of our character is dependent on the reasons that motivate us and the reasons to which we are indifferent, and following Sullivan's destabilisation defence proposal, this could affect D's ability to practically reason, to control himself, or 'an alteration in his motivations ...the reasons that motivate his actions.'⁴³⁰

Accordingly, the defences of provocation and involuntary intoxication can only properly be grounded, not on Gardner's rationale, but on the basis that D's loss of control shows that he is no longer responsive to the guiding reasons that normally motivate him to act or refrain from acting, an argument founded in character theory. Alternatively, on a capacity view, D is exculpated because he could not have behaved any better than he did in the circumstances. Using duress as an example, where D is overwhelmed by fear and submits to the threat, Gardner would state that D's claim to be cowardly would not be a reason for excusing him of any wrongdoing but an admission of fault on D's part. In rebutting Gardner's claim that there is no distinction between D's character and the character of D's action at time *t*, it has rightly been argued that D can possess a virtue without mechanically acting in accordance with it on every occasion.⁴³¹

In the Aristotelian tradition, Gardner⁴³² would state that if D is courageous he would see life through the courageous person's eyes, viewing danger as a challenge and not as the threat that more cowardly people would perceive it to be. In consequence D cannot have the virtue of courage if he does not act courageously or if he has to overcome the inclination to act as a coward. Such a viewpoint would leave no room for the true hero, D, who foresees the threat and may well be afraid but chooses to act courageously nonetheless. It could be argued that

⁴³⁰ Ibid. at 504.

⁴³¹ Ibid. at 496 and 502-503; J. Gardner, 'The Gist of Excuses' (n 53) at 583.

⁴³² Ibid. at 582; V. Tadros, 'The Characters of Excuse' (n 421) at 511.

such an actor is truly courageous whereas Gardner's courageous person is one who may be acting without courage, acting impulsively perhaps. It could even be said that Aristotle and Gardner's heroes lack imagination. Courage suggests bravery – can D be brave if he only sees the danger as a challenge rather than a threat? This aside, being courageous surely depends upon the circumstances and whether the reasons to act or refrain from acting are sufficiently strong in that instance.

If account was taken of capacity, D could be allowed a defence even where he would fail to meet the standard of the reasonable person for the defence of duress because he is overly fearful. This would not be applicable where D's conduct showed a lack of respect for the criminal law but this would make it necessary to be able to distinguish between a defendant who 'simply succumbs to fear'⁴³³ and the person who could not possibly have acted in any other way because of his fear. This would not be an easy distinction to make but that is not to say it is not possible to do so. A defence of choice theory in this regard seems to follow Hampton's⁴³⁴ defiance theory principles, discussed above.⁴³⁵

It would, however, be possible to draw on character theory and Gardner's 'role' theory to present a composite of the two that would ground culpability based on moral desert. This could be achieved by subjectivising Gardner's theory to take account of the capacity of D. In this way D could be judged not on the basis of whether he was acting in or 'out of character,' but on whether on the particular occasion in question, in performing whatever role, the character of his conduct was morally blameworthy. It is this synthesis of the two theories that is advocated in this work and which forms the basis of the limits of criminal recklessness and negligence advanced in Chapters Three and Four.

⁴³³ V. Tadros, 'The Characters of Excuse' (n 421) at 514.

⁴³⁴ J. Hampton, 'Mens Rea' (n 59).

⁴³⁵ Text to notes 59 -61, above, at 2.2.1.

2.7.2 The manifestation of vices

In contrast with the view that the criminal law is concerned with judgements about D's fitness for a particular role, for Tadros it is also concerned with D's manifestation of certain vices, those that cause D to be 'insufficiently motivated to act or not to act by the interests of others.'⁴³⁶ Carelessness should only be included where D demonstrates insufficient regard for the risk that D's activity might cause to others to take proper care, particularly where the activity is a risky one. Any vices which do not show a lack of regard for the interests of others should not be the concern of the criminal law and 'merely having a vice, or displaying a lack of skill does not show this in itself.'⁴³⁷ This is because criminal liability represents the State's condemnation which is only appropriate where D's vices cause harm and demonstrate a lack of concern for the interests of others. Where D lacks capacity these criteria are not met. In relation to *Kingston*,⁴³⁸ D should be offered at the very least a partial excuse, either on the basis that his character had been destabilised or because his motivational reasons for acting or not acting had been altered by the intoxicants.

2.7.3 Aristotle's virtues and vices

Aristotle⁴³⁹ distinguished between four possible states of character: the truly virtuous, the self-controlled (or 'continent'), the weak-willed (or 'incontinent'), and the vicious. It is clear that such distinctions cannot be successfully employed within the modern criminal law simply because there would be no reliable way of distinguishing between the classes, particularly between the virtuous and the self-controlled, and the weak-willed and the

⁴³⁶ V. Tadros, 'The Characters of Excuse' (n 421) at 517.

⁴³⁷ Ibid.

⁴³⁸ [1994] QB 81; [1995] 2 AC 355.

⁴³⁹ Aristotle, '*Nichomachean Ethics*' (n 219).

vicious.⁴⁴⁰ It could be impossible to determine whether someone was manifesting a vice on a specific occasion or simply succumbed to temptation. As it is not possible to get inside someone else's mind we could not be certain whether an agent was truly virtuous by Aristotle's criteria⁴⁴¹ or simply exercising his self-control to remain law abiding. To undertake such a task would involve examining 'not just his behavioural dispositions to act rightly or wrongly, nor just his deliberative dispositions –the kinds of reasons by which his actions are guided: we must examine his emotive and appetitive dispositions too, the patterns of feeling and desire which help to constitute his character.'⁴⁴² This would be too intrusive an inquiry and also unnecessary as the law is not concerned with whether someone is vicious or weak willed, neither does the law demand true virtue –self-control is quite sufficient.⁴⁴³ It is only in certain situations when some of the criminal defences are called upon that vice can be a condition of liability, for reliance on the defences of provocation, duress and self-defence. In these instances, we are determining whether D's action was 'reasonable' or not rather than judging his character or whether he possesses a virtue or vice. This also avoids argument over which of D's characteristics are attributed to the 'reasonable person.'⁴⁴⁴

2.7.4 'Agency' Theory

Another possibility has been proposed, 'agency' theory,⁴⁴⁵ where what is being judged is not 'character' but 'conduct... by reference to its relative (lack of) success.'⁴⁴⁶ This theory links better with degrees of *mens rea* and allows us to rank harms. Starting with the paradigm of successful agency, i.e. when harm is intentionally caused in the way intended, an

⁴⁴⁰ R.A. Duff, 'Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law' (n 414).

⁴⁴¹ Text to note 432, above.

⁴⁴² R.A. Duff, 'Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law' (n 414) at 165.

⁴⁴³ *Ibid.* at 168.

⁴⁴⁴ *Ibid.* at 179.

⁴⁴⁵ J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 129) attributes the inspiration for this theory to the work of Antony Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) Chapter 5.

⁴⁴⁶ *Ibid.* Horder, at 210.

evaluation of D's conduct depends on how close it comes to hitting this target directly, like the target in archery. An attempt to cause the same harm that was unsuccessful would form a concentric circle close to the circle of the paradigm as would intentional harm not caused in the intended way. Concentric circles further away from the centre would include endangerment and the 'lower the risk of harm posed by the particular conduct, the further distance' away it would be.⁴⁴⁷ This would leave negligence the outermost ring. In this manner 'the way in which the victim is harmed, or subjected to the risk of harm, shapes culpability.'⁴⁴⁸ It would not be helpful to a defendant like Kingston as a drugged intent is still an intent and would fall within its paradigm of successful agency.

Even 'agency' theory cannot stand alone as it relies on the presumption that 'agency' means 'sane, mature agency' and is thus dependent on capacity or character theory to justify the exculpation of the young and the insane.⁴⁴⁹ With its focus on the way harm is brought about, it disregards D's reasons for acting which are important when seeking to rely on the defence of duress, for example, and would again need supplementing by one of the other theories. The theory does not address the situation where the resultant harm exceeds that envisaged by the defendant, e.g. the one throw punch that kills. Such circumstances can still be encompassed by the choice theory on the basis that D chose to cause some harm, and by the character theory because it shows aggression.

⁴⁴⁷ Ibid. at 212.

⁴⁴⁸ Ibid. at 213.

⁴⁴⁹ Ibid. at 214.

2.7.5 A 'first-person' approach to culpability

There has been the suggestion that responsibility is not dependent on choice, rather we should be responsible only where we *'feel'* responsible, irrespective of choice.⁴⁵⁰ If distinctions are made between the concept of guilt as a legal concept and as a feeling, it is accepting the 'third-person concept' as correct: if the law says you are guilty then you are, no matter what you feel. On an alternative first-person approach, legal guilt would correspond with the feelings of guilt: if you really feel that you are not responsible then the law should not find otherwise, and vice versa. From a practical stance, where D feels responsible even if the current law would find he was not so, there would have to be systems in place to help D accept his responsibility and work through the consequences of it.⁴⁵¹ Where D feels he bears no responsibility, even where a court feels that he should, he must accept that his sense of responsibility falls to be considered 'alongside the first-person sense of responsibility of the judge and jury and all others concerned,'⁴⁵² so it would seem that a false claim or indeed, any claim, could be overruled by the other participants in the legal process. It is difficult to see how the first-person approach could work in practice. It could end up criminalising the wrong people, those who feel responsible when they are without fault, and how could we know, beyond reasonable doubt, what a defendant was actually feeling and if a lack of feeling could be supplanted by the court's view what would be the point? It is submitted here that such a proposition is unworkable.

It is apparent that there is no single theory of culpability or excuse that can universally apply to all of the main *mens rea* terms and circumstances, as has been observed.⁴⁵³ Our choices,

⁴⁵⁰ A. Freeman, 'Responsibility Without Choice A First-Person Approach' (2000) 7 *Journal of Conscious Studies* 61.

⁴⁵¹ *Ibid.* at 65.

⁴⁵² *Ibid.* at 66.

⁴⁵³ V. Tadros, 'The Characters of Excuse' (n 421); and J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (129).

character and the role we are fulfilling are all relevant factors in currently determining criminal liability but they are not an exhaustive list of considerations. Furthermore, it is not simply a matter of establishing culpability in these terms but a matter of proving that D had the mental element proscribed by the particular criminal offence with which he is charged. It is for this reason that the requirement of *mens rea* must now be reconsidered.

2.8 *Mens Rea* - The relationship between *mens rea* and culpability

So what is the relationship between *mens rea* and culpability? It would appear from the above that degrees of *mens rea* do not equate necessarily to the level of culpability, rather *mens rea* is only one facet to determining blameworthiness. The fact that D may have possessed the requisite *mens rea* will not necessarily equate with a conviction as he may have a defence. Furthermore, *mens rea* has other functions too. For example, stipulating a particular mental state requirement for an offence may actually increase or reduce the ambit of the offence. From the standpoint of the mental element of the defendant and culpability, the latter is also influenced by other factors that feature in the criminal justice system which include the degree of harm caused, how the harm was brought about, the identity of the victim(s), whether it was a first offence, the capacity of D and other mitigating circumstances. Such factors are relevant to sentencing rather than establishing that D is criminally liable. Moreover there are procedural matters such as the burden of proof, admissibility of evidence etc. that cause practical difficulties in the trial process, factors that played a crucial role in the Law Commission's deliberations when deciding not to recommend a change to the law on involuntary intoxication. Gardner and Jung⁴⁵⁴ have argued that culpability principles or *mentes reae* must be sensitive to such procedural issues

⁴⁵⁴ J. Gardner and H. Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (n 78) at 583.

whereas moral culpability distinctions need not be. For them, *mentes reae* comprise a ‘number of heterogeneous elements without any common core’⁴⁵⁵ but this is challenged on the ground that there are common concepts central to a theoretical examination of mental states, the imposition of liability and the attribution of degrees of culpability.⁴⁵⁶

Gardner and Jung’s position on this is that *mens rea* terms should be defined on the basis that legally stipulated definitions are preferable even if they cannot accurately reflect their moral counterparts in ordinary language.⁴⁵⁷ For example, any:

*more “accurate” definitions of intention, capturing the essence of the concept as it features in moral evaluation, might be less readily understood and less readily applied in concreto than more artificial, legally stipulated definitions, so that the use of the former actually promotes perverse results.*⁴⁵⁸

Moreover, their argument intimates that definitions of such terms are necessarily hostage to instrumental considerations and cannot equate to moral responsibility. This would seem to conflict with the views and approach of some of the judiciary. For example, Lord Bridge’s statement in *R v Moloney*⁴⁵⁹ where he said that intention should be given its ordinary meaning and deciding whether D intended the act should be left to the jury’s good sense, the judiciary should only explain the term in cases where ‘further explanation or elaboration is strictly necessary to avoid misunderstanding.’ Similarly, Lord Diplock in *MPC v Caldwell*⁴⁶⁰ thought that recklessness was not a term of legal art and should bear its ordinary meaning.

Negligence is already an area where this happens; a jury are not given extra guidance on what

⁴⁵⁵ J.A. Laing, ‘The Prospects of a Theory of Criminal Culpability: Mens Rea and Methodological Doubt’ (1994) 14 *Oxford Journal of Legal Studies* 57 at 58.

⁴⁵⁶ *Ibid.* at 61.

⁴⁵⁷ *Ibid.* at 58.

⁴⁵⁸ J. Gardner and H. Jung, ‘Making Sense of Mens Rea: Antony Duff’s Account’ (n 78) at 581.

⁴⁵⁹ [1985] AC 905 at 906.

⁴⁶⁰ [1982] AC 341 at 351, examined in Chapter 3, below.

exactly amounts to ‘gross negligence’ even though some tautologous advice can be provided on what ‘gross’ means.

If *mens rea* terms are simply ‘composite standards of culpability,’ which merely imitate some aspects of morality then the argument is that we will need ‘different custom-built distinctions for different kinds of situations.’⁴⁶¹ Gardner and Jung’s argument has been criticised because it seems to suggest that there is no underlying moral theory behind *mens rea* terms. Clearly we believe that there are morally distinctive differences between diverse types of behaviour reflected in different cognitive states and/or the practical attitudes demonstrated.⁴⁶² What is clear is that they are arguing that it is not possible to have equivalence between legal terms of *mens rea* and their moral counterparts. Perhaps this is the real issue here, as it is clear that the courts have tried to achieve this in relation to oblique intention, recklessness, and particularly with negligence where the jury also have a role in imparting their own moral judgments. When the terms used for the proscribed mental element are guilt-assuming, unless they are clearly straightforward to interpret, it has been argued that we need some guidance to their meaning in non-normative terms, otherwise we are left with the assumption ‘that “we just know” the look of a vicious, malicious or dishonest man or action.’⁴⁶³

The various *mens rea* terms employed in the criminal law are necessary to adequately reflect the distinctions between differing degrees of culpability demonstrated by D. It is for this reason that any attempt to reduce the mental element required for criminal responsibility to just one mental state, such as ‘recklessness’⁴⁶⁴ or perhaps ‘knowledge’⁴⁶⁵ are unlikely to gain

⁴⁶¹ J. Gardner and H. Jung, ‘Making Sense of Mens Rea: Antony Duff’s Account’ (n 78) at 581.

⁴⁶² J.A. Laing, ‘The Prospects of a Theory of Criminal Culpability: Mens Rea and Methodological Doubt’ (n 455) at 57.

⁴⁶³ Ibid. at 64.

⁴⁶⁴ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (2000) 88 *California Law Review* 931.

much support. The idea of ‘recklessness as insufficient concern’ for others being advanced as a ‘unified conception of criminal culpability’⁴⁶⁶ is also misleading as what is being advocated is more precisely a unified conception of *mens rea*.

2.8.1 A single mental state of ‘recklessness as insufficient concern’

A single, unifying *mens rea* state has been advanced: purpose and knowledge can be subsumed within recklessness as all these mental states demonstrate the same ‘basic moral vice of insufficient concern for the interests of others.’⁴⁶⁷ Remaining terms can either fit within the scope of such recklessness or are ‘undesirable, because they punish a character trait or disposition rather than an occurrent mental state.’⁴⁶⁸ Negligence would be excluded from criminal liability.

It has been said that advocates of such a unified concept can base it on some or all of the following grounds:

*(1) purposeful, knowing, and reckless wrongdoers who cause the same harm are equally blameworthy; (2) they are not equally blameworthy, but the differences in culpability are de minimis; and (3) whether or not significant differences in culpability exist, there is no reliable way to draw out distinctions, so we are better off with a one-mens-rea-fits-all system.*⁴⁶⁹

There would be some advantage to such an approach. For example, it would avoid having to distinguish between direct and oblique intention. It would have solve the problem of having

⁴⁶⁵ C. Finkelstein ‘The Inefficiency of Mens Rea’ (2000) 88 *California Law Review* 895.

⁴⁶⁶ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (n 464).

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ J. Dressler, ‘Does One Mens Rea Fit All? Thoughts on Alexander’s Unified Conception of Criminal Culpability’ (2000) 88 *California Law Review* 955 at 956.

to hold that D ‘closed his mind’ to a risk of harm arising from his conduct where foresight of harm was required for recklessness⁴⁷⁰ and conscious awareness could not be established.

Finally, it would prevent the need to deem ‘all cases of purpose with respect to a given harm to be more culpable than all cases of recklessness with respect to the same harm.’⁴⁷¹

In practice subtle academic *mens rea* distinctions are often irrelevant where offences can be committed with more than one *mens rea*. For example, where D is charged with intentionally or recklessly committing an offence⁴⁷² a jury will determine the innocence or guilt of the offender. They are generally not required to decide whether they believe D intended to commit the offence or was merely reckless. As this leaves the actual state of mind of D undecided no culpability distinction is actually made by them. It is the judge or magistrates who then determine whether they think the act was done intentionally or recklessly (not a jury) and sentence accordingly taking any other mitigating factors into consideration. It is quite possible that the judge’s perception may differ from that of the jury as to D’s mental state. Having said that, where it is clear from the evidence that D intended to commit the offence a more stringent sanction would be expected. Certainly, society would view the intentional actor as the more morally blameworthy of the two.⁴⁷³

Alexander’s justification appears to be grounded in the belief that those who cause the same harm, unless it is done negligently, are equally blameworthy. Under the Model Penal Code, §2.02(2)(a)(i) D acts with criminal purpose if ‘it is his conscious object to engage in conduct of [the required] ...nature or to cause [the required]...result.’ In consequence, as D ‘must

⁴⁷⁰ See Chapter Three, below.

⁴⁷¹ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (n 464) at 932.

⁴⁷² For example, some offences under the Criminal Damage Act 1971 or the Offences Against the Person Act 1861.

⁴⁷³ Whether there is a moral distinction between intending to seriously harm one person and recklessly exposing many to the risk of harm is open to debate.

believe that he is increasing to some extent the risk of harm, then criminal purpose has the same structure as recklessness.⁴⁷⁴ Knowledge under the MPC is where D believes ‘to a practical certainty’ that his ‘conduct will bring about a particular result,’⁴⁷⁵ and therefore amounts to nothing more than ‘a limiting case of recklessness’ in American law. The only distinction ‘is at some point as the risk of harm approaches a practical certainty, the burden of proof ...shifts’ so that it falls to D to prove that his actions were justifiable.⁴⁷⁶

2.8.2 Knowledge as the basic mental state required

Finkelstein does not propose a unified concept of *mens rea* but does submit that the basic mental state for criminal liability is knowledge, ‘whether knowledge that a certain result will occur or knowledge that there is a substantial risk of the occurrence of that result.’⁴⁷⁷ The argument starts from the position that the *mens rea* of ‘intention’ is relatively unimportant as a concept within the criminal law because the focus is not generally on D’s reasons or motives for acting,⁴⁷⁸ rather the legal concept of guilt looks to ‘conformity to a conduct norm.’⁴⁷⁹ Occasionally a crime requires intention but generally this is not the case. To illustrate the point, Finkelstein gives the example of D who plants a bomb on a plane to kill a particular passenger X but sees a friend boarding the plane. He might not get another opportunity to kill X and reluctantly continues with his plan even though he knows his friend will be killed too. He sincerely hopes his friend will survive but all aboard are killed when the bomb detonates:

⁴⁷⁴ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (n 464) at 942.

⁴⁷⁵ MPC §2.02(2)(b) 1985.

⁴⁷⁶ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (n 464) at 940.

⁴⁷⁷ C. Finkelstein ‘The Inefficiency of Mens Rea’ (n 465) at 897.

⁴⁷⁸ Ibid. at 913: Except in crimes of attempt and accomplice liability, in exculpatory defences the reasons for acting are relevant to exculpation, not inculpation.

⁴⁷⁹ Ibid. at 906.

*The law of murder does not care that he intended the death of one, actively hoped for the survival of another, and was indifferent about the deaths of the rest. The lowest common denominator for all the bomber's victims is his knowledge that by blowing up the plane he would cause their deaths, a mental state that is sufficient to make all the killings murder.*⁴⁸⁰

Although it may seem a credible suggestion that a unified form of *mens rea* is possible it would create too broad a concept and cannot, as noted above, reflect the gradations of culpability which is 'not naturally an all-or-nothing concept.'⁴⁸¹ Although under the Model Penal Code 'a knowing or extremely reckless killing⁴⁸² is as good as an intentional one'⁴⁸³ in English law direct or oblique intent must be proven. Nonetheless, the claim that the basic notion of *mens rea* is that applicable to murder, i.e. D 'is as culpable if he merely knew his action would result in someone's death as if he intended his action to have that result'⁴⁸⁴ is true with respect to guilt even though it may not necessarily be reflected in sentencing.

2.8.3 Reflecting moral blameworthiness

Moral blameworthiness is more apparent in the defences that the criminal law permits and Fletcher's categorization of defences into either justifications or excuses represents guidance as to the morality of behaviour expected.⁴⁸⁵ For example, where D has committed a proscribed wrong but can avail himself of the defence of self-defence his behaviour would be justified in that he had done what was morally acceptable. Where D has committed a proscribed wrong and is merely excused, for example where D relies on the defence of loss of

⁴⁸⁰ Ibid.

⁴⁸¹ J. Dressler, 'Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability' (n 469) at 963.

⁴⁸² Amounting to 'extreme indifference to the value of human life'

⁴⁸³ §210.2 (Official Draft 1980).

⁴⁸⁴ C. Finkelstein 'The Inefficiency of Mens Rea' (n 465) at 910.

⁴⁸⁵ G. Fletcher, *Rethinking Criminal Law* (n 50).

self-control on a murder charge, then the message to society is that this kind of behaviour is not morally acceptable but some allowance is being made because of the circumstances D was in.⁴⁸⁶ Consequently, the criminal law encourages citizens to develop reasonable standards of behaviour and is not simply reflecting expected standards.⁴⁸⁷

Where elements of moral concepts have been employed by the legislature and courts to promote reasonable standards of behaviour, it has led to approaches to culpability that have been either subjective, objective, or a mixture of the two approaches. Whilst some would suggest that inadvertent behaviour should not attract criminal liability and morally we should reserve punishment only for those who were consciously aware of the risk of harm to others by their actions, others would state that excluding those who act inadvertently provides a morally unsubstantive account of the criminal law. This is because inadvertence can also demonstrate moral fault. The two viewpoints need further consideration in terms of culpability and moral blameworthiness.

2.9 Conclusion to Chapter Two

The main theories of culpability, character and choice, are considered to be subjective in nature, as noted earlier. Choice theory focuses on what the particular agent chose to do, requiring intention, foresight or belief. This would require all approaches to culpability to be purely subjective, although in relation to the criminal law excuses, choice theory uses the concept of the reasonable man, introducing an element of objectivity. Character theory, although subjective as it directly judges the character of the individual agent, does so by

⁴⁸⁶ See Colvin's critique of the justification/excuse distinction in E. Colvin, 'Exculpatory Defences in Criminal Law' (1990) 10 *Oxford Journal of Legal Studies* 381.

⁴⁸⁷ J. Gardner, 'The Gist of Excuses' (n 53) at 594-595.

comparison with a society's view of what it is to possess a good character, again an 'objectivised' subjectivity.

Choice theory cannot adequately accommodate liability arising through inadvertence but character theory can to an extent where the inadvertence manifests an indifference to the welfare of others. Gardner's 'role' theory fits nicely with inadvertence, an objective test for recklessness, and liability for negligence would not be an issue here; but subjective recklessness would create difficulty. This theory makes no allowance for the capacity of the accused with regard to his ability to achieve the standard of the reasonable man, whereas this is relevant to subjective recklessness. Clearly, none of the theories discussed above have universal application to the forms of *mentes reae* addressed in this work and it has been submitted that the criminal law's concern is with the character of our actions to the extent that they reflect our character. Consequently, it is submitted that a synthesis of aspects of the character and role theories is the most appropriate basis for grounding culpability and this approach underpins the proposed formulation of recklessness advanced in Chapter Three of this work and the remit of criminal negligence proffered in Chapter Four.

There have been suggestions that the *mentes reae* terms should be unified, but such proposals have been rejected as moral culpability distinctions are necessary to the extent that they can be incorporated into the criminal law, otherwise the requirements of justice cannot be adequately satisfied. Conflicting subjective and objective approaches have been identified and it has been shown that part of the problem with this labelling lies in determining what is meant by 'subjective' and 'objective' when these terms are employed.

The next chapter will critically examine greatest debate on the subjective/objective distinction which has taken place in the context of the definition of recklessness. In his leading judgment in *MPC v Caldwell*,⁴⁸⁸ as noted earlier, Lord Diplock, expressed concern with the increasing use of these labels stating that ‘questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective.’⁴⁸⁹ This is especially the case when it is unclear that these terms are being interpreted consistently. Moreover, with regard to recklessness for example, even if we adopt a subjective definition it will nevertheless have an objective element to it, which is the taking of an ‘unjustified risk.’⁴⁹⁰ Whether a risk is an unjustified one to take or not is a question that has been judged by reference to an external standard, whether the judge or jury think it was reasonable to take it in the circumstances known to D. If this “subjective” definition was truly subjective the justifiability of the risk would have to be judged by whether D, himself, thought it was reasonable, not by the standards of others.⁴⁹¹ This, it will be submitted, is a possible interpretation of the current definition established in *R v G & R*⁴⁹². Some⁴⁹³ have rejected this criticism of labelling, arguing that these are straightforward terms that are convenient expressions of important legal distinctions. This, as has been observed above in relation to character and choice theory, and as will be demonstrated with regard to recklessness, is not necessarily as straightforward as it has been claimed. It will be seen that it has also been an issue with regard to determining intention,⁴⁹⁴ although this was later overruled by statute.

⁴⁸⁸ [1982] AC 341.

⁴⁸⁹ [1982] AC 341 at 353 para.(E) and 354 para.(F).

⁴⁹⁰ See also K. Amirthalingam, ‘Caldwell Recklessness is Dead, Long Live Mens Rea’s Fecklessness’ (n 103) who argues that blameworthiness and culpability cannot be determined without reference to some external standard which calls for a degree of objective evaluation.

⁴⁹¹ This is an issue identified with the wording of the current ‘definition’ of recklessness in the next chapter, below.

⁴⁹² [2004] 4 All ER 765.

⁴⁹³ J. C. Smith, ‘Commentary on Caldwell’ [1981] *Criminal Law Review* 392 at 396; and G. Williams, ‘Recklessness Redefined’ [1981] *Cambridge Law Journal* 252.

⁴⁹⁴ *DPP v Smith* [1961 AC 290].

It will be submitted, in the next chapter, that the current definition of recklessness is too narrow and it does not truly reflect current practice. A broader, more objective approach will be advocated that takes into consideration both the general and specific capacity of the defendant.

Chapter 3

Mens Rea: An Analysis of the Language of Criminal Recklessness

3.1 Introduction to Chapter Three

Any examination of intention, recklessness and criminal negligence needs to scrutinize subjective and objective approaches to *mens rea*; this is because much of the complexity in the academic and judicial debate in this area centres around whether foresight of the risk of harm alone can ground criminal responsibility. An objective stance allows for constructive liability where conscious advertence cannot be established, but the standard subjective interpretation requires that D was consciously aware of the risk his intended action posed and went on to take that risk. As noted earlier,¹ determining whether an approach is objective or subjective is not quite as straightforward as it first appears given that the labels operate along a continuum. These issues are critically analysed briefly in relation to the development of one form of intention, oblique (or indirect) intention, and particularly with regard to defining criminal recklessness.

It is submitted that a more detailed approach is needed in the use of these labels and a synthesis of the two is required to appropriately determine reckless conduct. A system of criminal justice can and does employ both objective and subjective approaches² to culpability,³ and often these modes of culpability are mixed so that a test is neither entirely subjective nor purely objective. It could be said that the lack of judicial consistency in the application of subjective or objective approaches to interpretation within the criminal law

¹ Chapter 1 at 1.1

² J.C. Smith, 'Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England' (1981) 27 *Villanova Law Review* 1179.

³ Applied in *R v Mohammed* [2005] EWCA Crim 1880 and *R v Van Dongen* [2005] EWCA Crim 1728.

results from a desire to hold culpable those who are deemed so⁴ and also to do justice in a particular case.⁵ A similar line of reasoning has led to the development of oblique intention, also discussed in this chapter in order to illustrate how the language of recklessness was employed to hold criminally responsible those who killed without direct intent.

Although subjective approaches⁶ have gained dominance in the courts recently,⁷ it will be argued that there is scope for more objectivity in the criminal law with regard to determining recklessness, whilst supporting the overturning of an objective approach to intention in *DPP v Smith*.⁸ It is contended here that the current definition of recklessness is a form of ideal subjectivism, which is unacceptable. It will be demonstrated that the courts already create legal fictions when they find foresight of risk in cases where it is highly unlikely that conscious thought of the risk ever occurred, even though defendants may well have had knowledge that a risk may exist had they stopped to think about it. A cognitive capacity based approach to recklessness will be advocated which will avoid this pretence.

3.2 Intention

Although the focus of this work is primarily on recklessness and negligence, the development of the former has historically been intertwined with the development of intention, or more

⁴ Victoria Nourse submits that different approaches have sometimes been applied depending on gender, producing inequality before the law. She contends that the debate over purely subjective or objective standards 'obscures the commonsense necessity of having a hybrid standard; 'After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question' (2008) 11 *New Criminal Law Review* 33.

⁵ Although Gardner and Jung argue that the dispute between subjectivists and objectivists is essentially about imposing criminal liability for negligence, J. Gardner, and H. Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *Oxford Journal of Legal Studies* 559. However, it is submitted here that it has a broader remit; it is a debate about the theoretical underpinning of English criminal law.

⁶ See for example *R v G & R* [2004] 4 All ER 765.

⁷ Except for the defence of provocation, see *Holley* [2005] UKPC 23, and now the new loss of self control defence.

⁸ [1961] AC 290.

precisely with ‘oblique’ intention.⁹ Intention has always been seen as the most serious form of wrongdoing,¹⁰ ‘the central or fundamental kind of wrong-doing is to *direct* my actions towards evil – to *intend* and to *try* to do what is evil.’¹¹ This seems to be a morally substantive account of what we would generally feel towards those who intend harm but, on closer inspection, the position is not as clear cut as it might seem.

As a general principle those who intend to cause harm are often viewed as thoroughly bad characters, possibly because intention implies desire¹² and the feeling that wanting to cause harm is morally worse than causing the same harm without wanting to. This position is only tenable where D is unaware of the risk of harm or tries to avoid it or perhaps minimise it. In some circumstances D would also be judged in a better light if, aware of the risk, he ran it because he was trying to avoid a greater harm. But generally, if D foresees that harm will occur and deliberately runs the risk of it occurring, even though he might not want it to happen, there is arguably little moral distinction between him and the intentional harmer; neither care sufficiently about another to desist.

Even if a distinction was to be made between D who wanted to harm another for its own sake and the person who foresaw harm as a consequence of his actions in order to achieve another goal, it can be difficult to show that the latter was morally not as bad as the former. At least the first actor considers the interests of others, the second is apparently indifferent.¹³ Yet still there may well be an intuition that the intentional harmer, the agent who wants to cause harm

⁹ Arguably constructive intention as D might not “intend” to harm in the ordinary sense of the word.

¹⁰ Crimes committed recklessly or negligently are generally sentenced more leniently than those committed intentionally because of the social and moral differences between them, G Williams *Textbook of Criminal Law*, 2nd Edn., (London: Stevens, 1983) 83; See also T. Baldwin, ‘Foresight and Responsibility’ [1979] 54 *Philosophy* 347 at 352.

¹¹ R.A. Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) 113.

¹² T. Baldwin, ‘Foresight and Responsibility’ [1979] 54 *Philosophy* 347 at 352.

¹³ *Ibid.* at 353.

to another, is morally worse and deserving of more condemnation and punishment. It is submitted here that this is because the intentional harmer gains satisfaction, if not pleasure, from inflicting harm whereas the person who risks harm in the pursuit of another goal may be selfish, but he does not experience the same emotion if the unintended/ unwanted harm results. It is the satisfaction or pleasure that makes the intentional harmer morally worse and deserving of more censure and punishment.

The development of the concept of oblique intention has arisen in the context of homicide cases,¹⁴ perhaps to address the lack of moral distinction noted above between the intentional harmer and the person who foresees the risk of harm arising from his actions but nonetheless continues and runs the risk of it occurring. Originally English common law held that homicide was a strict liability offence, before moving towards a requirement of moral blameworthiness and then finally to the modern position that the act must be accompanied by a mental state.¹⁵ It has been a long held principle that foresight was sufficient for criminal responsibility,¹⁶ often foresight being seen as proof of intention.¹⁷ Although it was acknowledged¹⁸ that the maxim '[A] man must be taken (or presumed) to intend the natural consequences of his acts,' relied upon in *R v Vickers*,¹⁹ was not an irrebuttable presumption of law but an inference that could be drawn from all the facts of a particular case. Given that a man is usually able to foresee the natural consequences of his acts, Byrne J observed that as a rule it would therefore be reasonable to infer that he did foresee them and intend them, but this would not always be the case. Similarly, in *R v Steane*²⁰ Lord Goddard CJ stated:

¹⁴ As murder requires proof of intention, recklessness will not suffice in English Law.

¹⁵ M. Sornarajah, 'Reckless Murder in Commonwealth Law' (1975) 24 *The International and Comparative Law Quarterly* 846.

¹⁶ This proposal is found in the work of utilitarian philosopher J. Bentham, *Introduction to the Principles of Morals and Legislation* (New York: Hafner Publishing, 1965) Chapters 8-9.

¹⁷ T. Baldwin, 'Foresight and Responsibility' (n 12).

¹⁸ *DPP v Smith* [1961] noted by Byrne J in the Court of Criminal Appeal.

¹⁹ [1957] 2 QB 664; [1957] WLR 326; [1957] 2 All ER 741; 41 Cr App R 189, CCA.

²⁰ [1947] KB 997; [1947] 1 All ER 813 CCA.

No doubt if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they think either that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.²¹

This position appears to be a matter of common sense and it is perhaps difficult to see how the later difficulties with interpreting intention in the context of homicide arose. Intention is obviously present where D aims to bring a consequence about because he wants and desires a particular outcome; it is his purpose to bring about a desired result.²² In *DPP v Smith*,²³ the accused was found to have intended to kill a policeman, not because it was his aim or purpose, but because a reasonable person would have foreseen that serious harm may have befallen the victim as a result of the defendant's actions. Smith's appeal to the Court of Criminal Appeal led to the decision of the trial judge being reversed and a verdict of manslaughter substituted. The Crown then appealed to the House of Lords. Smith's appeal was on the ground that the trial judge had applied an objective test of intention, namely what the reasonable man would contemplate as the probable result of his acts and would therefore intend, not what D, *himself*, contemplated.

²¹ [1947] KB 997 at 1004.

²² A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine*, 3rd Edn., (Oxford: Hart Publishing, 2007) 120.

²³ [1961] AC 290, D had stolen goods on the back seat of his car and when a policeman asked him to pull over he drove off with the officer clinging on to the side of the car. The officer was shaken off into the path of an oncoming car receiving fatal injuries and D was charged with capital murder.

The Court of Criminal Appeal considered there was a distinction to be made dependent on whether, during the relevant 10 seconds, Smith really did realise the degree of likelihood of serious injury. If the jury believed he deliberately tried to drive the body of the officer against oncoming cars it was open to them to find he intended serious injury. If they concluded he merely swerved or zigzagged to throw him off or that for any reason he may not have realised the degree of danger he was exposing the officer to different inferences could be drawn. In the former case ‘they were dealing with consequences that were certain; in the latter only with degrees of likelihood’.²⁴

The House of Lords had a different view holding that ‘it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions’.²⁵ The test of foresight was not to be what the particular accused foresaw, but what a man of reasonable prudence would foresee as the natural and probable result of D’s actions.²⁶ Furthermore, Lord Kilmuir cited with approval the judgment of Palles CB who said:

*[T]he law imputes to a person who wilfully commits a criminal act an intention to do everything which is the probable consequence of the act constituting the corpus delicti which actually ensues. ...[T]his inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal, and whether his conduct is reckless or the reverse.*²⁷

The quote shows an amalgamated approach to intention and recklessness. The appeal was allowed and the conviction for murder was restored. This was an extremely harsh and highly

²⁴ [1961] AC 290 at 326.

²⁵ Ibid. at 327.

²⁶ [1961] AC 290 at 327 per Viscount Kilmuir L.C., citing with approval the words of J. Holmes in “The Common Law”.

²⁷ *R v Faulkener* (1877) 13 Cox C.C. 550, 561-562 (Court of Crown Cases Reserved for Ireland).

criticised decision,²⁸ especially as Smith had been on friendly terms with his victim, there was no evidence of an intent to kill and the death penalty applied. He had even returned to the scene of the incident after disposing of the stolen goods to see how the officer was.

The precedent set by this decision was overturned by section 8 of the Criminal Justice Act 1967²⁹ which now requires a judge or jury to determine whether D ‘did intend or foresee that result, drawing such inferences from the evidence as appear proper in the circumstances.’ This could be seen as setting the law back on the right track as it was in line with the guidance in *Steane* and should have resolved matters. Evidence of foresight of harm could have been left to consideration of reckless conduct; only in rare cases would there be sufficient evidence on which a judge or jury could find that D intended harm. Unfortunately the judiciary struggled subsequently to find a balance between foresight of risk, generally equated with criminal recklessness, and intention. What followed was the development of the concept of ‘oblique intention,’³⁰ starting with the decision in *Hyam v DPP*.³¹

3.2.1 Hyam v DPP

In this case a murder conviction was upheld by a majority of 3:2 stating that the court was not applying an objective test as in *Smith*, but that the jury must have found that the appellant knew it was highly probable that serious bodily harm would be caused and that following *R v Vickers*, that was sufficient *mens rea* for murder. There are three issues from this: once again probability was brought into the equation,³² Lord Hailsham’s use of knowledge rather than

²⁸ See, for example, G. Williams, *Criminal Law (The General Part)*, 2nd Edn., (London: Stevens, 1961) 94 et seq.; Law Commission Report No. 10, Imputed Criminal Intention (*Director of Public Prosecutions v Smith*) (1967).

²⁹ The decision in *Smith* was overruled later in *Frankland and Moore v R* [1987] AC 576.

³⁰ A term first coined by Bentham.

³¹ [1975] AC 55. D set fire B’s house to frighten her into leaving the neighbourhood. Two of B’s children died in the fire.

³² Also present in the decision in *DPP v Smith* [1961] AC 290.

foresight, and whether the decision in *Vickers* was sound (that an intention to cause grievous bodily harm was sufficient in the absence of an intent to kill).

Lord Hailsham, delivering the leading judgment, stated unequivocally that ‘knowledge or any degree of foresight’ is insufficient for a murder conviction; it is only evidence from which a jury may find the necessary intention existed. There must be ‘an intent to kill or cause grievous bodily harm (in the sense of really serious injury).’³³ Approving this classical definition of murder cited in the earlier decision of the Court of Appeal in *Vickers*,³⁴ Lord Hailsham stated that the definition contains no reference to ‘foresight of the consequences as such, either as equivalent to intention in murder or as an alternative to the requisite intention, or to a “high degree of probability” to describe the degree of certainty of what has to be foreseen.’³⁵ His Lordship approved the comments of Byrne J in the Court of Appeal in *Smith* in quashing the conviction because the trial judge’s direction to the jury had clearly indicated that foresight of consequences could establish sufficient *mens rea* and ‘likelihood and not certainty is enough.’³⁶ Lord Hailsham also agreed with comments made by Lord Reid in a civil case:

*Chance probability or likelihood is always a matter of degree. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability.*³⁷

³³ [1975] AC 55 at 65.

³⁴ [1957] 2 QB 664.

³⁵ [1975] AC 55 at 68.

³⁶ *Ibid.* at 69.

³⁷ *Southern Portland Cement Ltd. v Cooper* [1974] AC 623 at 640.

At this stage in the judgment the position appeared clear and straightforward and in line with approved authorities. Lord Hailsham then shifted his attention from foresight of the probability of consequences to situations such as the present case, where D ‘knows’ that his/her proposed action exposes another to a serious risk of death or grievous bodily harm without directly intending such consequences and continues to do the act without lawful excuse.³⁸ For his Lordship, this was not merely foresight of probable consequences (which should be deemed recklessness and insufficient *mens rea* for a murder conviction)³⁹ but ‘an actual intention to expose his victim to the risk of those consequences whether they in fact occur or not’,⁴⁰ despite not intending them, and the necessary intent for the conviction to stand. Support for this proposition was found in the Fourth Report of the Commissioners on the Criminal Law (1839) where no legal distinction was found between a direct intent to kill and ‘wilfully doing an act of which death is the probable consequence.’⁴¹ Lord Hailsham stated ‘[i]n the field of guilty knowledge it has long been accepted...that “a man who deliberately shuts his eyes to the truth will not be heard to say that he did not know it.”’⁴²

His Lordship rejected that such a stance was incorporating an objective test of knowledge or intention, but as it is not possible to read the mind of a defendant at the time he commits the prohibited act, it is contended here that this created the danger that juries would apply an objective test, depending on the circumstances, if they would expect that D, as a reasonable person, would have had knowledge of the risk. A similar problem existed with the test for recklessness following *MPC v Caldwell*, discussed below. Lord Hailsham’s approach was also moving away from foresight of consequences, which is actual awareness of the risk of

³⁸ [1975] AC 55 at 74.

³⁹ Note recklessness is sufficient *mens rea* for murder in other common law jurisdictions; M Sornarajah, ‘Reckless Murder in Commonwealth Law’ (n 15).

⁴⁰ *Ibid.*

⁴¹ [1975] AC 55 at 77.

⁴² *Ibid.* at 77-78 quoting Lord Reid in *Southern Portland Cement Ltd. v Cooper* [1974] AC 623 at 638.

harm, to knowledge that is passive consciousness and quite frequently linked to what D as a reasonable person should have known. Furthermore, passive consciousness of the risk of harm is more the realm of criminal negligence, which would be a degree of assimilation between three quite distinct forms of *mens rea*.

Lord Hailsham found that as Hyam had first checked that her ex-lover, Mr Jones, was not at his new girlfriend's house, as she did not want him to come to any harm, and as she was aware of the danger of harm to the occupants of her rival's house, she must have intended to expose them to the risk of death or serious injury.⁴³ How Lord Hailsham came to this conclusion is not straightforward and may well be as a result of the means Hyam adopted to frighten her rival, rather than her actual degree of foresight.⁴⁴ What is not clear is that Hyam foresaw the risk of death or serious injury to the occupants so that even if the court was taking a subjective and not an objective approach to establishing intention, the outcome is the same as in *Smith*.⁴⁵

Lord Dilhorne was in agreement with Lord Hailsham, citing *Desmond's Case*,⁴⁶ the definition of "malice aforethought" in Stephen's *Digest of Criminal Law*,⁴⁷ and the Royal Commission on Capital Punishment⁴⁸ who had stated:

it is murder if one person kills another by an intentional act which he knows to be likely to kill or to cause grievous bodily harm, ...and may either be recklessly

⁴³ [1975] AC 55 at 78.

⁴⁴ T. Baldwin, 'Foresight and Responsibility' (n 12) at 350.

⁴⁵ [1961] AC 290.

⁴⁶ (1868) *The Times*, April 28. An attempt to break Irish prisoners out of Clerkenwell jail by blowing a hole in the prison wall using explosives, at least 12 people living nearby were killed. The murder conviction for those responsible was based on the old doctrine of constructive malice but alternatively it was proposed that doing an act with the knowledge or belief that life would be endangered by it was sufficient.

⁴⁷ (1877) Art. 223.

⁴⁸ (1949-1953) (Cmd. 8932) at 27.

indifferent as to the results of his act or may even desire that no harm should be caused by it.

His Lordship contended there was no question of a subjective or objective test arising as the jury must have found that Hyam knew it was highly probable that serious harm would ensue.⁴⁹ The issue here is that ‘knowledge’ is not the same as actual foresight of the risk of harm, as it does not require actual awareness at the time of acting.

Lord Diplock, in *Hyam*, found no distinction to be drawn in English law between the state of mind of one who acts with the desire to bring about a result and one who acts ‘knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve...’ as both show ‘willingness to produce the particular evil consequence.’⁵⁰ The difficulty is that knowing there is a risk and going on to take it is the domain of criminal recklessness, not the *mens rea* of intention. The reason that foresight of harm was relevant in murder trials was enunciated by Lord Diplock:

*Until as late as 1898 persons accused of murder were incompetent to give evidence in their own defence. So the actual intent with which they had done the act which had in fact caused death could only be a matter of inference from the evidence of other witnesses as to what the accused had done or said. In drawing this inference from what he had done it was necessary to assume that the accused was gifted with the foresight and reasoning capacity of a “reasonable man” and, as such, must have foreseen as a possible consequence of his act, and thus within his intention, anything which, in the ordinary course of events, might result from it.*⁵¹

⁴⁹ [1975] AC 55 at 85.

⁵⁰ Ibid. at 87.

⁵¹ Ibid. at 90.

Thus the objective test, wrongly applied in *Smith*, was in earlier times the only way of ascertaining what the actual intention of the accused was. Once a defendant was permitted to give evidence on his own behalf there was more than one way of assessing D's actual state of mind. Finally, his Lordship and Lord Kilbrandon dissented from the majority to the extent that they believed that the crime of murder should be restricted to a direct intention to kill or where there was foresight of bodily injury likely to endanger life.⁵² Lord Cross was not prepared to decide this point, but voted with Lords Hailsham and Dilhorne in upholding the murder conviction. This is a concern given the seriousness of the offence. First, this is because murder is the most heinous of crimes and if there was any uncertainty Lord Cross should have sided with the dissenters. Secondly, Lord Hailsham's judgment was clearly contradictory and an extension of the existing law of murder without acknowledgement that this was his intention.

However, Lord Cross did note that Hyam could not have been deemed to have been acting recklessly 'in the sense of not having reflected on the probable consequences of her act.'⁵³ This is a strange comment to make given that foresight of risk was required at this time for criminal recklessness to be established; objective recklessness did not officially arrive until the decision of the House in *Caldwell*.⁵⁴ It would appear that Lord Cross was confusing recklessness with negligence.

Following *Hyam*, Lord Diplock stated in *Whitehouse: Lemon* [1979] AC 617 at 638:

When Stephen (History of the Criminal Law of England) was writing in 1883, he did not regard it as then settled law that, where an intention to produce a particular result was a necessary element of an offence, no distinction was to be drawn in law

⁵² Ibid. at 93; Lord Kilbrandon at 98.

⁵³ Ibid. at 95.

⁵⁴ [1982] AC 341.

between the state of mind of one who did an act because he desired it to produce that particular result and the state of mind of one who, when he did the act, was aware that it was likely to produce that result but was prepared to take the risk that it might do so, in order to achieve some other purpose which provided his motive for doing what he did. It is now settled law that both states of mind constitute 'intention' in the sense in which that expression is used in the definition of a crime whether at common law or in a statute. Any doubts on this matter were finally laid to rest by the decision of this House in R v Hyam [Hyam v DPP][1975] AC 55.⁵⁵

Again, the difficulty with this, is that it clearly shows a lack of distinction between criminal intent and criminal recklessness; something that should not happen if we regard acting with intention as more blameworthy and deserving of more punishment.⁵⁶ As has been noted,⁵⁷ there are clear justifications for holding that a person who intentionally and deliberately causes harm to another, without lawful excuse, is more of a morally bad person.

3.2.2 Moloney

The decision in the subsequent case of *R v Moloney*⁵⁸ held that apart from a direct intention to kill, the necessary intention to kill for a murder conviction can be found where foresight of the death as a natural consequence is established.⁵⁹ This would mean that the decision in *Hyam* was wrong as it is unlikely that Hyam saw foresight of death or serious injury as

⁵⁵ D. Ormerod, *Smith & Hogan Criminal Law Cases and Materials*, 9th Edn., (Oxford: Oxford University Press, 2006).

⁵⁶ A. Norrie refers to *Hyam*- style recklessness, *Crime, Reason and History*, 2nd Edn., (London: Butterworths, 2001) 55; R.A. Duff, *Intention, Agency and Criminal Liability* (n 11).

⁵⁷ Above, note 10.

⁵⁸ [1985] AC 913 D shot and killed his beloved step-father when they were both drunk. They challenged each other to load a shotgun and fire it to see who was fastest.

⁵⁹ This could be argued to be simply the worst degree of criminal recklessness rather than intention but such a debate is outside of the scope of this thesis.

virtually certain to occur.⁶⁰ Moloney's conviction was quashed on appeal as the judge had misdirected the jury that D intended serious bodily harm if he foresaw it as probable. Lord Bridge advanced his well-known terrorist bomber example⁶¹ and wrongly suggested that the result in his example would be murder, as there would be an intention to expose the bomb disposal squad to the risk of death or serious bodily harm. Although there is an intention to expose the squad to the risk of harm, such harm is not virtually certain, or highly probable,⁶² to occur. His Lordship's example did not come close to meeting his own criteria of serious harm that would occur as a 'moral certainty,' 'a probability which is little short of overwhelming' and a 'certain event' unless something unforeseen intervenes to prevent it.⁶³ It has been argued that this hypothetical example does not establish intention, but looks like recklessness which is insufficient *mens rea* for murder.⁶⁴

Moloney established the 'golden rule' that the courts employ, that intention should be left to bear its ordinary meaning, 'the judge should avoid any elaboration or paraphrase of what is meant by intent and leave it to the jury's good sense to decide whether the accused acted with the necessary intent.'⁶⁵ Unfortunately, Lord Bridge then muddied the waters by directing that where a jury require more guidance they should be asked if death or serious injury was a 'natural consequence' of D's voluntary act and if so, whether D foresaw it as a 'natural consequence.'⁶⁶ This narrowed the definition from *Hyam* by removing foresight of probable consequences as sufficient *mens rea* for murder, but caused its own difficulty by referring to 'natural consequences,' discussed below.

⁶⁰ D. Ormerod, *Smith and Hogan Criminal Law*, 12th Edn., (Oxford: Oxford University Press, 2008) 104.

⁶¹ A bomber plants a time bomb in a public place and gives a warning so that the public will be evacuated, knowing that a bomb disposal squad will be called. The bomb explodes killing one of the squad who was trying to diffuse it.

⁶² As required in *Hyam*.

⁶³ [1985] AC at 925, 926, and 929.

⁶⁴ D. Ormerod, *Smith and Hogan Criminal Law*, 12th Edn., (n 60) 104.

⁶⁵ *R v Moloney* [1985] AC 905 at 926 per Lord Bridge.

⁶⁶ *Ibid.* at 1039.

3.2.3 Hancock and Shankland

Natural consequences can have varying degrees of probability, not just consequences that were morally certain to occur. An example often cited to illustrate this point is that of pregnancy being a natural consequence of sexual intercourse. As a result, in *R v Hancock and Shankland*⁶⁷ the Court of Appeal found the *Moloney* guidelines used by the trial judge to be defective in this respect and quashed the conviction. The jury may have equated 'natural consequence' with a 'direct consequence' rather than the 'moral certainty' Lord Bridge had intended.⁶⁸ This ambiguity could give rise to convictions in cases where there was a causal link between D's act and V's death without this outcome being virtually certain to occur.⁶⁹ Lord Lane's explanation of what 'natural' signified used the phrase 'highly likely'⁷⁰ which in effect means 'probable,' thus reverting back to the *Hyam* test of foresight of the probability of harm.⁷¹ Lord Lane's position was supported by Lord Scarman in the House of Lords stating:

*[T]he greater the probability of a consequence the more likely it is that the consequence was foreseen and if that consequence was foreseen the greater the probability is that this consequence was also intended.*⁷²

The effect of this was to broaden the law through the guidance given to juries whilst at the same time acknowledging that the *mens rea* for murder was a direct intention to kill or an intention to cause serious bodily harm. The end result is a combination of intention and

⁶⁷ [1986] AC 455 Two striking miners threw concrete blocks over the parapet of a motorway bridge onto the carriageway below killing a taxi driver taking a striking miner to work. They claimed to be aiming for an adjacent lane so as to scare the miner and stop him going to work, and did not mean to harm anyone.

⁶⁸ D. Ormerod, *Smith and Hogan Criminal Law*, (n 60) 104.

⁶⁹ A. Norrie, *Crime, Reason and History*, (n 56) 52.

⁷⁰ [1986] AC 455 at 644.

⁷¹ A. Norrie, *Crime, Reason and History*, (n 56) 53.

⁷² [1986] AC 455 at 650.

recklessness: ‘the law is expressed in terms of virtual certainty while advice to the jury is premised on a kind of recklessness test.’⁷³

3.2.4 Nedrick and Woollin

The appellate courts continued this approach in the cases of *R v Nedrick*⁷⁴ and *R v Woollin*.⁷⁵ As a result, where there is an absence of a direct intent, it is now settled law that D *may* be found to have intended the proscribed act (i.e. the *actus reus* of the offence) where he foresaw its occurrence as a virtually certain consequence of his actions.⁷⁶ For Norrie, this leaves the law based on ‘orthodox subjectivist principles’ with the guidelines reflecting a broader morally substantive approach to encompass certain kinds of violence.⁷⁷ Given that foresight of virtual certainty simply entitles a jury to find that D intended death or serious injury, rather than establishing that in such circumstances it must find that D acted with the necessary mental element, there is still ‘moral elbow room’⁷⁸ for the jury to acquit in circumstances where D does not morally deserve the label ‘murderer.’ The cause of the difficulties with the broadening or narrowing of the definition of criminal intention was the desire to separate legal responsibility from moral responsibility, a division that becomes unworkable when substantive moral issues arise that need redress. By incorporating foresight of consequences into the deliberations it is clear that there has been a blurring of the distinction between criminal intent and criminal recklessness.

⁷³ A. Norrie, *Crime, Reason and History*, (n 56) 54.

⁷⁴ *R v Nedrick* [1986] 1 WLR 1025 The facts were very similar to Hyam. D poured paraffin through the letter box of a woman’s house, ignited it, and her son died in the fire. Nedrick’s conviction for murder was quashed.

⁷⁵ *R v Woollin* [1999] 1 AC 82 D threw his crying baby against a hard surface in a moment of anger.

⁷⁶ *Ibid.*

⁷⁷ A. Norrie, *Crime, Reason and History*, (n 56) 55.

⁷⁸ J. Horder, ‘Intention in the Criminal Law – A Rejoinder’ (1995) *Modern Law Review* 678 at 688.

It has been argued that using foresight as a method of determining intention is flawed, as is assessing degrees of probability of risk.⁷⁹ The former is impossible to know without a confession from the defendant, the latter unreliable as there can be many possible degrees of probability dependent upon the main purpose for acting.⁸⁰ Whilst these arguments have merit, foresight can be a useful guide as to what D may have intended by his actions. The probability of risk and D's perception of risk would need to be analysed from both a subjective viewpoint and applying a common sense reasonable person test. This would mean taking the individual characteristics of the defendant into account and then considering what a person with such characteristics could reasonably foresee.

It has been observed that had it not been for the old presumption of intention, then the cases above may never have arisen and it is odd to state that an agent intends harm in circumstances when he clearly may not.⁸¹ What is also clear is that a person can intend to do something he does not desire in order to achieve another goal. A prime example is *R v Steane*,⁸² where the defendant intended to assist the enemy because that was the only way to save his family from the concentration camps.⁸³ Similarly in *Re A*,⁸⁴ separating conjoined twins was the only way of saving one of them, even though it meant the death of the other, yet without the operation both would die. In both these instances, the effect of pursuing the chosen course of action would have been accompanied by foresight of the unwanted consequences.

⁷⁹ M.C. Kaveny, 'Inferring Intention from Foresight' (2004) *Law Quarterly Review* 81.

⁸⁰ *Ibid.* at 96.

⁸¹ E. Griew, 'States of mind, presumptions and inferences' in P. Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith* (London, Butterworths, 1987) 82.

⁸² [1947] KB 997.

⁸³ A. Halpin, 'Intended Consequences and Unintentional Fallacies' (1987) 7 *Oxford Journal of Legal Studies* 104 at 111.

⁸⁴ *Re A (children)(conjoined twins: surgical separation)*[2004] 4 All ER 961.

By way of contrast, in *Hyam, Moloney, Hancock and Shankland, Nedrick*, and *Woollin* it is quite possible that such foresight was absent. It has been argued that instructing a jury that they may infer intention is simply a way of saying, ‘[y]ou may, if you see fit, declare that this case is one of murder.’⁸⁵ Perhaps that would have been a preferable approach all along. Certainly, there have been suggestions that a better solution would have been to either restrict the definition of intention to direct intent, or to extend the *mens rea* of murder rather than risk merging the concepts of intention and recklessness.⁸⁶ These suggestions have merit as we cannot on the one hand advocate that causing harm intentionally is morally worse and deserving of the most severe punishment, whilst at the same time assimilating intention and recklessness.

Having considered the boundaries between intention and recklessness it is clear that the earlier decisions obscured the breakpoint between these two legal concepts by equating intention with foresight because of historic developments and a desire to find culpable defendants guilty of the most serious form of homicide. More recent cases, have sought to separate the two fault terms by limiting oblique intention to foresight of virtual certainty but although some distance has now been put between them for the purposes of this analysis, there is still criticism of the current state of indirect intention and future reform is possible.⁸⁷ It is now necessary to turn the focus on to the courts’ treatment of the concept of recklessness, where it will be demonstrated that the judiciary have had a similar battle in determining the appropriate scope for criminal recklessness. Whereas the debate about intention concerned the degree of foresight necessary to permit a finding that D intended the proscribed act, the development of recklessness has centred upon whether foresight of the

⁸⁵ E. Griew, ‘States of mind, presumptions and inferences’ (n 81) at 82.

⁸⁶ A. Halpin, ‘Intended Consequences and Unintentional Fallacies’ (n 83) at 114.

⁸⁷ D. Ormerod, *Smith and Hogan’s Criminal Law*, 13thEdn., (Oxford: Oxford University Press, 2011) at 108-116.

risk of harm is relevant at all. Once again it will be shown that in an attempt to convict those deemed deserving of punishment, the courts have struggled to find a settled definition of recklessness which has universal application, impinging on the realm of criminal negligence as a result.

3.3 Recklessness: The history – a move from “malice” to “recklessness”

As this chapter has already highlighted, there has been difficulty in establishing the legal definition of “intention,” a word with a relatively straightforward everyday meaning. However, the judicial struggles over “intention” have been matched, if not eclipsed, when compared to the judicial search for a legal definition of the word “reckless”. This chapter will now critically analyse the different approaches to determining recklessness in the criminal law resulting from a judicial and legislative search for a legal definition. The advantages and disadvantages of each approach will be considered in relation to issues of moral culpability. 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*.⁸⁸ It will be submitted that the latest definition is flawed, inappropriate, and does not reflect current practice. Consequently, a more objective, capacity based approach will be advocated.

As is known, in 2004, the decision of the House of Lords in *R v G & R*⁸⁹ overruled the definition of recklessness from *MPC v Caldwell*,⁹⁰ or at least departed from it, and heralded a

⁸⁸ [2004] 4 All ER 765.

⁸⁹ *G & R* [2004] 4 All ER 765.

⁹⁰ [1982] AC 341 But only in relation to the definition of ‘reckless’ for the purpose of the CDA 1971, *G & R* [2004] 4 All ER 765, per Lord Bingham at 783, para.(j); but see *Attorney-General’s Reference (No 3 of 2003)* 2 Cr App R 367. Lord Rodger states *G&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; D. Kimel, ‘Inadvertent Recklessness in Criminal Law’ (2004) 120 *Law Quarterly Review* 548.

return to a subjective definition of recklessness,⁹¹ not an earlier interpretation from *R v Cunningham*,⁹² but using the definition found in the Draft Criminal Code. An analysis of these cases and the definitions employed will be discussed below. What will become clear is that the labels of ‘subjective’ and ‘objective’ can be misleading as there are different degrees of subjectivism and objectivism revealed by the case analysis. The current definition, it will be argued here, could be now interpreted as a purely subjective test which would be a departure from all previous forms of criminal recklessness. If such an interpretation was to be followed it would be extremely difficult to convict anyone of recklessly committing an offence.

What will be considered in greater detail is whether recklessness as a form of *mens rea* should be based on subjectivism or objectivism,⁹³ or a synthesis of the two.⁹⁴ It will also be necessary to consider whether there needs to be a consistent application of approach to recklessness across all offences where it forms part of the *mens rea* or whether a variety of interpretations are more appropriate.

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. A more objective form of recklessness that considers the capacity and attitude of the defendant will be strongly advocated, but not a revival of the *Caldwell/Lawrence Model*

⁹¹ The judgment essentially restricted its application to criminal damage but it has since been held to cover all offences unless otherwise specified in statute.

⁹² [1957] 2 QB 396.

⁹³ V. Tadros proposes a more objective test in ‘Recklessness and the Duty to Take Care’ in S. Shute and A. Simister (eds.), *Criminal Law Theory Doctrines of the General Part* (Oxford: Oxford University Press, 2002) 257-258. This test would address some of the issues with the subjective position but does not address all of them, which is why it is not adopted here.

⁹⁴ R. Tur, ‘Subjectivism and Objectivism: Towards Synthesis’ in S. Shute, J. Gardner and J. Horder (eds.), *Action and Value in the Criminal Law* (Oxford: Oxford University Press, 1993) 213.

Direction, as this was deemed to be purely objective. It will be argued that recklessness based upon conscious awareness produces too narrow a definition and culpable inadvertence should be encompassed by examining *why* no thought was given to the risk.

3.3.1 Recklessness – the continuing search for a definition⁹⁵

There are three⁹⁶ main approaches which have been employed to deal with the concept of recklessness within the criminal law, although others have been recognised.⁹⁷ These will be examined in turn, after a brief historical background has been outlined.

The development of this *mens rea* term has been invaluable investigated by Norrie⁹⁸ who traces its oscillation from an objective approach to a subjective view at the hands of the Victorian Law Commissioners. The Commissioners were considering the doctrine of implied malice, now the concept of recklessness, as it applied to murder.⁹⁹ Norrie notes that they reinterpreted the words used by the eighteenth century lawyer, Sir Michael Foster, which would have extended liability beyond foresight. As a result, the concept was restricted to a ‘question of subjective advertence’ which ‘was a means of deobjectivising, de-moralising and thereby rendering certain the law of recklessness with regard to homicide.’¹⁰⁰ To facilitate certainty and consistency in decisions a more objective approach, with its inherent flaw of

⁹⁵ An earlier draft of much of the following material in this chapter has been published: C. Crosby, ‘Recklessness – the continuing search for a definition’ (2008) 72 *Journal of Criminal Law* 313.

⁹⁶ 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).

⁹⁷ ‘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] 3 All ER 316, *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 & 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 soon be another definition added by the Law Commission’s Draft Criminal Law Bill for the offences against the person, Law Com. 218 (1993).

⁹⁸ A. Norrie, *Crime, Reason and History*, (n 56).

⁹⁹ *Ibid.* at 76.

¹⁰⁰ *Ibid.* at 77.

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. It can be argued that as juries in Victorian times were hardly representative of the population at large and could well have possessed a skewed set of moral values relative to the values of the wider society; this could have been some justification for such a restriction of culpability.

3.3.2 *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*¹⁰¹ which maintained the subjective view of the Commissioners referred to above. As will be recalled, in *Cunningham*, Byrne J had cited with approval the definition apparently¹⁰² 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.’¹⁰³ The requirement of foresight was then accepted throughout the criminal law, providing consistency. Although this is described as a ‘subjective’ test it is important to make clear at this stage that this is a little misleading. The test is certainly subjective to the extent that the particular defendant must be found to have foreseen the risk of a particular harm arising from his conduct. It is also objective in the assessment of whether the risk was a reasonable one to run in the circumstances, a question for the judge or jury to determine.

The facts of *Cunningham* are worthy of further consideration because the case was not as straightforward as it first appears. *Cunningham* tore a gas meter from a cellar wall to steal

¹⁰¹ [1957] 2 All ER 412.

¹⁰² See J. Horder, ‘Two Histories and Four Hidden Principles of Mens Rea’ [1997] 113 *Law Quarterly Review* 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 his *Outlines of Criminal Law* (1902) 147-148.

¹⁰³ [1957] 2 All ER 412.

money from it. He left gas escaping from the pipes, which seeped into a neighbouring occupied house. He was charged and convicted of theft of the money from the meter, but he was also convicted under s.23 Offences against the Person Act 1861, with maliciously causing a noxious thing to be taken by a person so as to endanger life. This conviction was subsequently quashed by the Court of Appeal on two grounds. First, because the trial judge had instructed the jury that D must have known the gas would seep through into the neighbouring property, whereas it was the jury's role to determine whether D foresaw such a risk as a matter of fact;¹⁰⁴ and secondly, because the judge had stated that statutory malice meant 'wickedness', clearly a wrong direction and the reason the term 'malice' was later abandoned.

What is interesting is that D was not trespassing in the cellar; he had permission to be there from his future mother-in-law, the tenant of the house. He was going to move into the house after his marriage and there was a stopcock nearby which he could have used to turn off the gas supply. His behaviour did not make any sense, but he did not give evidence at trial. Clearly, by leaving the gas escaping there was a danger of an explosion, but as it was the gas escaped into the adjoining property. This happened because the two properties had originally been one, and when converted into two separate houses, the party wall in the cellar between the two houses was 'shoddily constructed of rubble loosely cemented'.¹⁰⁵ The question is whether Cunningham was aware of this. It is not certain that he would have been convicted even if the trial judge had given the correct direction to the jury as it is possible that he did not know of the problem with the wall.

¹⁰⁴ G. Williams, 'The Unresolved Problem of Recklessness' (1988) 8 *Legal Studies* 74 at 79.

¹⁰⁵ *Ibid.* at 79.

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 subsequently extended and clarified in the later cases of *R v Parker*,¹⁰⁶ *R v Briggs*,¹⁰⁷ and *R v Stephenson*,¹⁰⁸ to mean that foresight of ‘some’ damage of a particular kind 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.’¹⁰⁹

The unfortunate consequence of applying the 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,¹¹⁰ 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 subjective definition clearly reflects choice theory as D is making a conscious choice to risk harm, but where D acts with a total disregard for the welfare of others, even though he fails to consider any risk in his actions, he should be held criminally responsible and character theorists would support such an extension of liability. A lack of thought can portray a bad character.

The dilemma which arises as a result of *Cunningham* recklessness is whether it is appropriate to adopt a narrow liability based solely upon whether, as a question of fact, the accused

¹⁰⁶ [1977] 2 All ER 37 D was having a terrible day, he overslept on the train home missing his station, had to pay an extra fare to cover his excess travel and tried to phone a taxi to get home but the public telephone did not work. He banged the telephone handset down on its cradle 2-3 times just as two police officers were passing. He was charged with criminal damage to the cracked phone.

¹⁰⁷ [1977] 1 All ER 475 D tugged at V’s car door handle to open the door causing it to break off. He was charged with criminal damage but acquitted on appeal as he had only used normal force and the risk was not so inherent in his actions as to make his appreciation of the risk inevitable.

¹⁰⁸ [1979] QB 695 at 704 D was a tramp who sheltered from the cold in a haystack and lit a fire to keep warm. He was a schizophrenic and may not have had the capacity to appreciate the risk of damage and so his conviction was quashed.

¹⁰⁹ [1979] QB 695 at 704, per Lord Lane.

¹¹⁰ A. Norrie, *Law and the Beautiful Soul* (London: Glasshouse Press, 2005) 84.

foresaw the risk of harm? Admittedly, this approach¹¹¹ clearly establishes the morally censurable behaviour of D in that he exercised a 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 judge or 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. The only way liability could still lie would be if the particular offence could also be committed negligently, inadvertence being sufficient in such circumstances.

This is not always the case. Sometimes where D should possibly have foreseen the risk and the matter of foresight is in doubt, D has still been convicted because the courts have found foresight existed where it may well not have done.¹¹² There has also been foresight found on occasion where it is doubtful that even the reasonable person would have foreseen the risk.¹¹³ Such convictions have been secured by imposing an objective standard in reality, whilst stating that the subjective test applied. This risks undermining confidence in the criminal justice system as the law is not being applied in a transparent way. The solution is to adopt a more objective standard.

In support of the subjective approach it has been said that a judge or jury in practice does not have to rely entirely on D's account of what he was or was not thinking at the time of acting:

¹¹¹ Now adopted in the leading case of *G & R* [2004] 4 All ER 765, discussed below.

¹¹² For example, *R v Parker* [1977] 2 All ER 37, discussed below.

¹¹³ See *Booth v CPS* [2006] EWHC, discussed below.

*The jury may (and generally should) find that he knew of a risk of which everyone would have known – provided that there is nothing in the facts to indicate that the defendant did not know it.*¹¹⁴

This is evidence that an objective approach is being applied in practice and it also creates the danger that a jury may well decide that as they would have foreseen the risk then D must have done so too, yet the jury has the benefit of hindsight, something not available to D at the time of acting. In some of the examples, discussed below, it is unlikely that even a jury would have actually foreseen the risk, without the benefit of hindsight. It would be preferable to have a more transparent test for recklessness that does not require advertence to risk, based upon the capacity and attitude of D and placing an evidential burden on him to show why he should not be deemed reckless in the particular circumstances.

3.3.3 *Caldwell/Lawrence Recklessness*

In response to the flaws in the subjective test, noted above, a second interpretation of recklessness was adopted by the House of Lords in *Metropolitan Police Commissioner v Caldwell*,¹¹⁵ producing a more objective definition of recklessness. In this case the term ‘reckless,’ chosen by the legislature as a replacement for the misunderstood term of ‘malicious’ under the Criminal Damage Act 1971, was interpreted.¹¹⁶ The House held that the term reckless should not be restricted to the narrow interpretation given in *Cunningham* and a broader approach was propounded. Lord Diplock, delivering the leading judgment, stated that a person would be reckless under the Criminal Damage Act 1971 if:

¹¹⁴ G. Williams, ‘The Unresolved Problem of Recklessness’ (n 104) at 75.

¹¹⁵ [1982] AC 341, [1981] 1 All ER 961. Having quarrelled with an hotel owner, D got drunk and set fire to the hotel. The fire was discovered and extinguished before any serious harm occurred.

¹¹⁶ Note, the term had already been interpreted subjectively by the Court of Appeal, see, for example, *R v Stephenson* [1979] QB 695 at 703-704.

(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.¹¹⁷

In his Lordship's opinion, this was an appropriate direction to be given to a jury and it later became known as Lord Diplock's Model Direction. In *R v Lawrence*,¹¹⁸ decided after *Caldwell* but on the same day, Lord Diplock again used his Model Direction but the 'obvious risk' under (1) was amended to an 'obvious and serious risk' for offences of reckless driving. The direction encompassed two states of mind in which either the defendant chose to ignore a risk of harmful consequences flowing from an act which the accused had recognised as existing, or he failed to give any thought to whether there was any risk in circumstances where, if any thought were given to the matter, it would be obvious¹¹⁹ that there was.¹²⁰ Lord Diplock's Direction 'defined'¹²¹ statutory recklessness, with the exception of offences under the Offences against the Person Act 1861,¹²² for more than 20 years. This was seen as creating a link between *mens rea* and concepts of moral wickedness.¹²³

The flaw that emerged from this 'definition' resulted from the ambiguity in Lord Diplock's judgment. It was not at all clear whether the test was to be a purely objective one regardless

¹¹⁷ *Caldwell* [1981] All ER 961 at 967, per Lord Diplock.

¹¹⁸ [1982] AC 510, a case of reckless driving.

¹¹⁹ Williams suggested that Lord Diplock intended that the risk be obvious to the defendant, G. Williams, 'Recklessness Redefined' (1981) 40 *Cambridge Law Journal* 252 at 270. However, subsequently the courts gave Lord Diplock's Direction a purely objective meaning, see, for example, *Elliott v C (A Minor)* [1983] 1 WLR 939, discussed below.

¹²⁰ Note, Donovan J in *R v McKinnon* [1958] 3 WLR 688 had considered 'recklessness' should be left to bear its full meaning and would cover the case of a high degree of negligence without dishonesty. See also *Hyam* where Lord Cross used 'reckless' to cover 'not having reflected on the probable consequences of her act.' (1974) 50 Cr.App.R 9 at 100.

¹²¹ 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* (Oxford: Hart Publishing, 2004) 78-80.

¹²² It may seem unprincipled that this established an objective test for criminal damage yet cases of physical injury employed a subjective approach; K. Campbell and A. Ashworth, 'Recklessness in assault – and in general?' (1991) *Law Quarterly Review* 187.

¹²³ L.H. Leigh and J. Temkin, 'Recklessness Revisited' [1982] 45 *Modern Law Review* 198.

of the cognitive capacity of the accused or if it was intended to be adaptable to the capacity of the individual defendant. Choice theory would clearly be represented in the second limb of the Model Direction (where D has recognised the risk), but could only be reflected in the inadvertent strand if it was clear that D had knowledge of the risk involved in his actions. Utilising character theory principles, both the advertent and inadvertent agent could be demonstrating bad character flaws on either limb of the Direction, but the capacity of the individual defendant would need to be taken into account when determining whether his actions evidenced a bad character flaw. This would retain some subjectivity in an otherwise objective test. If the capacity of the accused was irrelevant it would fit well with Gardner's role theory of culpability¹²⁴ and would result in pure objectivism. What was clear was that by including inadvertence to risk Lord Diplock was blurring the clear distinction that had hitherto existed between reckless and negligent conduct, the former requiring advertence unlike the latter.

As will be shown, the courts subsequently chose to follow an objective interpretation; the defendant would be reckless if an ordinary prudent person would have been aware of the risk. This had the potential to produce inherently unjust convictions and attracted trenchant criticism.¹²⁵ It must be noted that his Lordship ascribed to the adjective's possible meanings 'careless, regardless, or heedless' which he believed presupposes that if D thought about it before acting the risk of the harmful consequences would have been apparent to him.¹²⁶ These terms are also employed to describe criminal negligence and someone who causes harm by being 'careless, regardless, or heedless' should not be considered reckless without more. It is the combination of these with sufficient cognitive capacity and evidence of a callous disregard for others that should amount to criminal recklessness.

¹²⁴ See discussion of this in Chapter 2 at 2.7.1

¹²⁵ For example, G. Williams, 'The Unresolved Problem of Recklessness' (n 104).

¹²⁶ *Caldwell* [1982] AC 341 at 351.

Attention has been drawn to the fact that the Model Direction is presented as a unity but 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 recognized 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'¹²⁷ for running even a small risk. If this is correct and the risk does not have to be an obvious one to a reasonable person where D has recognized that there is a risk, this surely must refer to a conviction for deliberately running a small risk that could possibly result in serious consequences rather than choosing to risk a slight possibility of minor harm. It would be more difficult to justify imposing liability where the risk was not an obvious one and the harm risked was minimal but, if D's actions had no social utility whatsoever, liability could still be justified. However, it must be acknowledged that assessing the degree of risk and probability of harm can be difficult and involves evaluative socio-political and moral judgements which cause indeterminacy.¹²⁸ Here, it is advocated that where D is inadvertent a requirement that the risk be an obvious one to a reasonable person should be a minimum requirement, but account should also be taken of the cognitive capacity and attitude of the accused.

3.3.3.1 The Caldwell/Lawrence Lacuna

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,¹²⁹ Williams,¹³⁰ and Griew¹³¹ all identified a lacuna within the

¹²⁷ A. Norrie, *Crime, Reason and History* (n 56) 76.

¹²⁸ A. Norrie, *Law and the Beautiful Soul* (n 110) 84-85.

¹²⁹ J.C. Smith, 'Commentary on Caldwell' [1981] *Criminal Law Review* 392 at 394.

¹³⁰ G. Williams, 'Recklessness Redefined' (n 119) at 278.

Caldwell/Lawrence direction where D had considered whether there was a risk and decided there was none or where D had foreseen a risk and believed he had taken ample precautions to prevent it from happening. This has led to the suggestion that the genuine but negligent mistake-maker would be excused from liability for recklessness.¹³² This would be a desirable state of affairs.

Clearly, any reference to such an individual was unnecessary on the facts in either case, however, it has been argued that there would be no justification for acquitting a driver 'whose unshakeable faith in their ability to avoid danger displays an arrogance bordering on lunacy.'¹³³ Whilst this is acknowledged, whether such an individual would be deemed by a judge or jury to be a 'genuine but negligent mistake maker' is perhaps unlikely. Also, such an individual could be deemed reckless, under the approach advocated here, as his actions would show a callous disregard for the welfare of others; he would not be able to satisfy the evidential burden imposed upon him. This would leave the truly negligent mistake maker to fall within the remit of negligence.

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.¹³⁴ Another issue raised¹³⁵ concerned 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

¹³¹ E. Griew, 'Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence' [1981] *Criminal Law Review* at 748.

¹³² J.C. Smith, 'Commentary on Caldwell' (n 129); G. Williams, 'Recklessness Redefined' (n 119).

¹³³ D.J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' [1988] *Criminal Law Review* 4 at 5.

¹³⁴ *Ibid.*

¹³⁵ J.C. Smith, 'Commentary on Caldwell' (n 129).

because the ordinary prudent individual would have lacked the expertise to realise that a risk existed. This would not have happened under the Model Direction as it clearly included the subjective test; rather it was the objective test that was satisfied by reference to the ordinary prudent person so that the inadvertent risk taker was judged by reference to common sense rather than specific expertise.

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.*¹³⁶

He contends 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.

These lacunae have never been successfully argued. In *Chief Constable of Avon and Somerset v Shimmen*,¹³⁷ 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

¹³⁶ G. Williams, 'Recklessness Redefined' (n 119) at 279.

¹³⁷ (1987) 84 Cr.App.R. 145 D was a martial arts expert and was demonstrating his skill to friends by kicking close to a window that he did not intend to break but he smashed the window.

because no risk exists' would benefit from it.¹³⁸ 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.'¹³⁹ Certainly from a choice or character theory viewpoint Birch's contention is correct.

There are 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.¹⁴⁰

These are both salient arguments. Where D forms an opinion based upon unreasonable grounds or where he wrongly believes there is no risk it is likely that the court would find his explanations unconvincing unless there were other factors present that impacted upon D's practical reasoning.

3.3.3.2 The Effect of *Caldwell*

As is known, *Caldwell* attracted widespread criticism¹⁴¹ and its application was subsequently judicially limited to the offences of criminal damage, reckless manslaughter¹⁴² and reckless driving.¹⁴³ Lord Diplock's leading judgment had changed the definition of recklessness from

¹³⁸ D.J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' (n 133) at 17-18. See the comments of Mustill LJ in *R v Reid* (1989) 91 Cr App Rep at 269.

¹³⁹ D.J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' (n 133) at 18.

¹⁴⁰ *Ibid.*

¹⁴¹ See, for example, the judgments of Glidewell, J. and Goff, L.J. in *Elliott v C (A Minor)* (1983) 77 Cr.App.R. 103; G. Williams, 'Recklessness Redefined' (n 119); E. Griew, 'Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence' (n 131); J.C. Smith, 'Commentary on Caldwell' (n 129); cf G. Syrota, 'A Radical Change in the Law of Recklessness' [1982] *Criminal Law Review* 97; and also J. McEwan and St J. Robilliard, 'Recklessness: the House of Lords and the criminal law' (1981)1 *Legal Studies* 267.

¹⁴² *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.

¹⁴³ Later replaced by dangerous driving following the Dept. 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., (London: Sweet & Maxwell, 2003).

the subjective test in *Cunningham*¹⁴⁴ to an objective test, based upon the state of mind of the ‘ordinary prudent individual.’¹⁴⁵ This upset the ‘well-established order of forms of liability,’¹⁴⁶ that being intention (the most culpable), recklessness requiring advertence, then negligence (but only when it is “gross”) which involves inadvertence when the mind is ‘negatively or passively at fault’¹⁴⁷ and finally crimes of strict liability where no *mens rea* is required.

The attraction of a more objective approach, provided it considers the cognitive capacity of the individual, is that those agents who *should* have foreseen the risk of their conduct causing harm to others could 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. Allowing such influences makes the law arguably fairer because justice can be done in a particular case and precedents would be established over time which would make the law more certain. 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.

3.3.3.3 The Question before the House in *Caldwell*

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

¹⁴⁴ [1957] 2 All ER 412.

¹⁴⁵ *Caldwell* [1982] AC 341 at 354 para.(c).

¹⁴⁶ A. Norrie, *Crime, Reason and History* (n 56) 62.

¹⁴⁷ G. Williams, *Criminal Law: the General Part* (n 28) 100.

was a defence to a charge based on intention or recklessness under s1(2)(b) Criminal Damage Act 1971, following *R v Majewski*.¹⁴⁸ 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 of Lord Diplock's whole judgment before the *ratio* was determined.¹⁴⁹ This 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 nor over-excited, the precedent could have been distinguished. This option could have drastically limited the scope of a more objective test and provided an opportunity to close a gap in the law to ground culpability where the risk was obvious and D should have foreseen it. 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.

This could support an argument, (though not one supported here) that, as in both *Caldwell* and *Majewski* the defendants were drunk, the approach to recklessness approved by the majority in *Caldwell* should have only been applied in such circumstances of self-induced

¹⁴⁸ [1977] AC 443 D, whilst heavily intoxicated, assaulted a number of police officers who were restraining and arresting him.

¹⁴⁹ Note the judgments of Lords Goff and Ackner in *R v Reid* [1992] 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.

intoxication.¹⁵⁰ More importantly, it should be noted that this quote is also partially subjective in that the actor ‘*would*’ have been aware had he been sober. This could be viewed as evidence that a capacity to foresee risk was an essential element of the *Caldwell/Lawrence* objective test, as submitted here. It is not that the actor *should* have been aware because a reasonable person would have foreseen the risk.¹⁵¹

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,¹⁵² nor drunk, nor even excited,¹⁵³ it is less clear that they really intended that individuals who were incapable of ever foreseeing the risk could be guilty of an offence.¹⁵⁴ What is beyond doubt, is that the judgment in *Caldwell* is ambiguous and where there is any uncertainty in the criminal law subsequent courts should interpret any such words in favour of the defendant.¹⁵⁵

It is possible to argue that after sitting in judgment in *Majewski*, Lord Diplock’s approach may have become hardened by appeals involving defendants who chose to become intoxicated and were trying to escape liability for resulting crimes,¹⁵⁶ such defendants becoming the focus of his attempts to redefine ‘recklessness’. Yet, such an argument would fail as it is evident from some of his judgments that he did not apply purely objective

¹⁵⁰ Lord Edmund-Davies found even this suggestion “draconian” drawing support from the Report of the Butler Committee, [1981] 1 All ER 961 at 972; [1982] AC 341 at 361.

¹⁵¹ G. Williams, *Criminal Law: the General Part* (n 28) 105.

¹⁵² G. Williams, ‘Recklessness Redefined’ (n 119) at 260 supports this argument as it is culpable.

¹⁵³ Ibid: rejecting extending culpability to include those who are excited.

¹⁵⁴ However, Lord Bingham 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 *G&R* at 786 para.(a)

¹⁵⁵ ‘One does not have to accept the full sweep of Dworkin’s rights thesis to believe that, where there is ambiguity in the case law, it should be interpreted, where possible, in accordance with the fundamental principle that an individual ought not to be punished where there is no capacity or fair opportunity to act otherwise,’ F. Field and M. Lynn, ‘The capacity for recklessness’ (1992) 12 *Legal Studies* 74 at 79. For statute ambiguity see *Hobson v Geldhill* [1978] 1 WLR 215.

¹⁵⁶ ‘One instinctively recoils from the notion that a defendant can escape the criminal consequences of his injurious conduct by drinking himself into a state where he is blind to the risk he is causing to others,’ per Lord Bingham in *G&R* at 785 para.(j).

principles. For example, in *R v Sheppard*,¹⁵⁷ he held that the *mens rea* for reckless wilful neglect of a child required an awareness of the risk or unawareness due to not caring, and also in *R v Miller*,¹⁵⁸ D would only be liable where he had an awareness of the risk that he had created and then failed to take reasonable steps to avoid harm. Clearly, Lord Diplock did not advocate liability for inadvertence *per se*.

It was observed that Lord Diplock's *dicta* in *Sheppard* would only have excused those who were 'constitutionally incapable'¹⁵⁹ of seeing the danger. Consequently, if the parent had the necessary capacity and yet failed to act, indifference would be presumed, indifference being 'a conclusion to be drawn from capacity.'¹⁶⁰ Where the welfare of the vulnerable is concerned this is seemingly the correct position however it should not be an irrebuttable presumption as there could be a rare case where justice would demand leniency.

3.3.3.4 The Problems of a Capacity Based Test

In order to advocate a capacity based test for recklessness, 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 this 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'.¹⁶¹ Such a defendant would be guilty under a

¹⁵⁷ [1980] 3 W.L.R. 960 Parents were acquitted of the wilful neglect of a child because they lacked the capacity to appreciate the child needed medical attention.

¹⁵⁸ [1983] 2 AC 161 D was squatting in a house and fell asleep while smoking. When he woke he realised his mattress was on fire and simply moved to another room instead of taking steps to prevent the fire spreading.

¹⁵⁹ D.J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' (n 133) at 13.

¹⁶⁰ *Ibid*.

¹⁶¹ [1982] AC 341 at 352 para.(b).

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 not be guilty, unless voluntarily intoxicated.¹⁶²

The important point here is that Lord Diplock regarded both scenarios as equally blameworthy,¹⁶³ but did not elaborate on why this should be so.

If we interpret Lord Diplock's words to be referring to the defendant who has the capacity to foresee the risk under normal circumstances, when not affected by rage or excitement, then what he is suggesting makes sense. Such a defendant may be deemed to be morally blameworthy for failing to show sufficient practical concern for the welfare of others and failing to control his behaviour. We would not excuse a reckless driver from moral blame if his defence was based on his lack of perception of risk where he claimed to be too angry to think of it because another driver had pulled out suddenly in front of him or because he had had a row with his wife before leaving home. Nor would we excuse from blame a driver who started his journey or continued driving when overtired, and arguably even the person who is reckless because of over excitement would be deemed blameworthy if he caused serious harm to others. The same justification for liability can be applied in such circumstances as when consuming too much alcohol, the defendant can behave recklessly in the way he acts immediately *prior* to the *actus reus*, as in the self-induced intoxication cases,¹⁶⁴ as well as during the commission of an offence.

The leading academic subjectivists at the time of the decisions in *Caldwell* and *Lawrence* were highly critical of this extension of culpability. Griew¹⁶⁵ argued that where the lack of perception arises not from indifference but from the 'effects of shock, stress or fatigue'

¹⁶² *R v Majewski* [1977] AC 443.

¹⁶³ [1982] AC 341 at 352 para.(c): 'Neither state of mind seem to me to be less blameworthy than the other'.

¹⁶⁴ Although such cases do create problems for the general principle that the *actus reus* and *mens rea* must coincide for criminal liability.

¹⁶⁵ 'Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence' (n 131) at 747.

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. Whilst one might have sympathy with the driver and would not want him to be criminally liable, this would surely depend upon whether he had the opportunity to pull over and stop the vehicle until he recovered. From a character theory viewpoint, where there was no evidence of indifference or rage there would be no evidence of a bad character and such an agent should be excused.

Williams¹⁶⁶ 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 Crime¹⁶⁷ but questioned extending the proposition to excitement, even though he had permitted this possibility earlier.¹⁶⁸ He considered that in such a state someone could play a stupid and dangerous practical joke, but where there was no evil intent it would be wrong to convict such a person on the basis of constructive recklessness. This is a debatable point where serious harm results and, moreover, what amounted to evil intent would require further elaboration.

A suggestion that there should never be any criminal responsibility without some 'evil intent' in such circumstances is too great a generalisation because there may well be instances where it would be appropriate to convict, especially where the activity undertaken is inherently dangerous. Much would depend on the cognitive capacity of the accused and the attitude he

¹⁶⁶ G. Williams, 'Recklessness Redefined' (n 119) at 260.

¹⁶⁷ Law Commission, *Criminal Law, Report on the Mental Element in Crime Draft Criminal Liability (Mental Element) bill* (Law Com No 89) (London: HMSO, 1978).

¹⁶⁸ *Textbook of Criminal Law* (London: Stevens, 1978) 77.

showed to the welfare of those around him. Williams¹⁶⁹ 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. He does not develop this point further. Syrota,¹⁷⁰ 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. This extension of incapacity is criticised; if such factors could be considered then why not ‘absent-mindedness arising from worry or anxiety...or any other cause’¹⁷¹ apart from self-induced intoxication? What principle makes it permissible to select between different factors affecting foresight as such an approach would restrict the decision in *Caldwell* to intoxication.¹⁷² Of course, the principle that would make it permissible to select certain factors over others, it is submitted, would be grounded in character theory and allow justice to be done in circumstances where a bad character or attitude was manifested and for agents to be found not criminally liable where it was absent. There could be further complications, including 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.¹⁷³ It has been observed that unless we have learned by experience or have information that risk exists in some particular activity we are unlikely to think about it.¹⁷⁴ Again, this is something that character theory would take into account. There is also an alternative argument, which is that the inexperienced might take more care precisely because

¹⁶⁹ G. Williams, ‘Recklessness Redefined’ (n 119) at 260

¹⁷⁰ [1981] *Criminal Law Review* 658.

¹⁷¹ J.C Smith, Letters to the editor, a reply to Mr Syrota, [1981] *Criminal Law Review* 660.

¹⁷² *Ibid.*

¹⁷³ S. Field and M. Lynn, ‘The capacity for recklessness’ (1992) 12 *Legal Studies* 74. 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, 76.

¹⁷⁴ G. Williams, ‘Recklessness Redefined’ (n 119) at 279.

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. Another similar factor which would need to be considered is the evidence that young people's perception of risk differs from that of the average adult.¹⁷⁵ Although these issues would require consideration, 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 such as shock, grief and fear; but those factors which demonstrate undesirable character traits, like rage and intoxication, we would not. While it is easy to argue that both of the states of mind to which Lord Diplock refers are blameworthy, it is difficult to support his assertion that they are (necessarily) *equally* so.¹⁷⁶ In *R v Reid*,¹⁷⁷ some years later, the House of Lords when applying *Caldwell/Lawrence* recklessness seemed to be of the same view. Their Lordships concluded that in terms of moral desert, there was no distinction between the agent who takes a known risk whilst engaging in a dangerous activity and an agent who fails to see the risk, remarking that it is possible that in some cases the former might even be less blameworthy.¹⁷⁸

It is possible that a defendant who foresees a risk of harm and consciously decides to continue to act is more blameworthy because he has made a conscious choice to risk the harm. He may simply view the risk of harm as minimal or the ensuing degree of harm negligible. It is equally possible that the defendant who did not foresee any risk at all was perhaps so self-absorbed that even if he might have done so under normal circumstances, the

¹⁷⁵ See, for example, the view of I. D. Brown in 'The Traffic Offence as a Rational Decision', that young male drivers are more dangerous than other drivers because of hazard perception failure rather than a different attitude to risk, in S. Lloyd-Bostock, *Psychology in Legal Contexts* (1981) 203; cited in F. Field and M. Lynn, 'The capacity for recklessness' (n 172).

¹⁷⁶ G. Williams, 'Recklessness Redefined' (n 119) at 261 describes Lord Diplock's argument that they are equally blameworthy as "totally unconvincing".

¹⁷⁷ [1992] 1 WLR 793 D was driving in heavy traffic and tried to pass a car on its nearside. Whilst accelerating the nearside of his car hit a taxi hut, and was thrown into the traffic, killing his passenger.

¹⁷⁸ L.H. Leigh, Cases: 'Recklessness After Reid' [1993] 56 *Modern Law Review* 208 at 209.

thought of any risk never entered his mind, and if it had, he might not have altered his conduct in any way. Such defendants could be seen as at fault but to different degrees and need to be distinguished from defendants who under normal circumstances could not be judged to bear any fault attracting moral blameworthiness due to their inability to foresee any risk at all, for example those of immature or retarded development.

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’¹⁷⁹ 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’¹⁸⁰ between awareness of the risk and not troubling to think about it. His Lordship argued that this is not a practical distinction for a jury to make because:

*[t]he only person who knows what the accused’s mental processes were is the accused himself, and probably not even he can recall them accurately, when the rage or excitement under which he acted has passed, or he has sobered up.*¹⁸¹

Note that he was continuing with the same underlying theme by referring to the defendant who is enraged, excited or drunk. This is noteworthy for two reasons: it illustrates, as discussed above, that Lord Diplock may only have addressed his mind to one category of defendant, and secondly, because if D fell outside of this particular grouping he may be able to recall what he was thinking perfectly well.

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:

¹⁷⁹ [1982] AC 341 at 351.

¹⁸⁰ Ibid. at 352.

¹⁸¹ Ibid.

*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.*¹⁸²

However, Lord Diplock's Direction apparently required the accused's mind to be assessed by reference to the equally hypothetical 'ordinary prudent individual'.¹⁸³ If Lord Diplock's concerns are meritorious and it is accepted that it is difficult for a jury to determine that the 'narrow dividing line'¹⁸⁴ has been crossed, it is submitted that the jury's task must therefore be further complicated if they are expected to determine¹⁸⁵ whether D must have suppressed an awareness of the risk or have 'driven it out of his mind.'

Although *Caldwell* overruled *R v Stephenson*,¹⁸⁶ this, it is submitted, was in regard to the more restrictive definition of recklessness rather than the decision itself. This is argued because it is not at all clear that Lord Diplock intended to find defendants reckless regardless of their innate cognitive capacity to appreciate a risk. Given Lord Diplock's stance in *Lawrence, Miller and Sheppard*, noted above, all the evidence points to a contrary intention. Lord Diplock was extremely critical of the Court of Appeal's decision in *R v Briggs*¹⁸⁷ 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 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

¹⁸² Ibid. at 354 para.(b).

¹⁸³ E. Griew defines him as 'one who gives his mind adequately to what he is doing, unaffected by bodily states or emotional conditions,' 'Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence' (n 131).

¹⁸⁴ *Caldwell* [1982] AC 341 at 352.

¹⁸⁵ Ibid. at 352-353.

¹⁸⁶ [1979] QB 695, the first case to interpret recklessness for the purposes of s1 Criminal Damage Act 1971, where it required the defendant to have an appreciation of the risk: '[T]he knowledge or appreciation of risk of some damage must have entered [his] mind even though he may have suppressed it or driven it out,' at 703-704.

¹⁸⁷ [1977] 1 WLR 605.

even the most prudent of men would feel justified in taking it.’¹⁸⁸ If the latter was the case then the agent could not be deemed reckless.

*R v Parker*¹⁸⁹ attracted less criticism from his Lordship because it extended *Cunningham* recklessness to cover closing the mind to an obvious risk¹⁹⁰ 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 mind¹⁹¹ suggests that you would have to have thought about it first before you could drive it out.¹⁹²

Cases like *Parker* raise suspicion as to whether foresight is actually the test in such instances where the risk is obvious to a reasonable man. Here, D was having a terrible day, had overslept on the train home missing his station, had to pay an extra fare to cover his excess travel and used the remainder of his money trying to phone a taxi to take him home. Unfortunately the public phone did not work and in his frustration he banged the telephone handset down on its cradle 2-3 times, cracking it. This occurred just as two police officers were passing and he was charged with, and convicted of, criminal damage to the phone. The judge at first instance had directed the jury that D is reckless if he acts ‘without thought for the consequence[s]’¹⁹³ and the Court of Appeal upheld the conviction.

Given the circumstances it is highly possible that the risk of damaging the phone did not cross Parker’s mind at all, certainly nobody could state categorically that it did so beyond any

¹⁸⁸ *Caldwell* [1982] AC 341 at 352-353.

¹⁸⁹ *Parker* [1977] 1 WLR 600.

¹⁹⁰ *Caldwell* [1982] AC 341 at 353.

¹⁹¹ *Stephenson* [1979] QB 695.

¹⁹² J.C. Smith, ‘Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England’ (n 2) at 1190.

¹⁹³ (1976) 63 Cr App 211 at 214.

reasonable doubt. He may well have passively had knowledge that phones could be broken by such actions but knowledge is not the test. That is not to suggest that such behaviour should be excused and, on the approach advocated here, Parker could still be convicted. It would appear that Parker's conviction was based upon his knowledge of the fragility of the equipment and the degree of force he applied, a clearly objective standpoint. Furthermore, although this imported 'Holmesian theory' applied in *DPP v Smith* back into current law after being removed by s.8 of the Criminal Justice Act 1967,¹⁹⁴ this decision was supported by one of the leading subjectivists of the last century, Professor Glanville Williams.

Williams had contended that knowledge of risk did not require conscious awareness at the time of acting.¹⁹⁵ Accordingly, Williams stood accused of undermining subjectivism in its entirety, Smith contending that where there is no foresight D is convicted only 'by a fiction, through a "constructive crime"'.¹⁹⁶

If foresight of a risk can be satisfied by knowledge of the risk without conscious awareness then it has been suggested that all that is required to secure a conviction is that D has the kind of knowledge of this risk which he could summon to the forefront of his mind at will. For example, things can break if not handled appropriately. Such a position has been criticised because:

*such knowledge is not knowledge of the particular risk created by my act; knowledge that this act may damage this receiver, ... for I may fail to see my present act in the light of my general knowledge of the likely effects of certain kinds of action.*¹⁹⁷

¹⁹⁴ J.C. Smith, 'Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England' (n 2) at 1190.

¹⁹⁵ G. Williams, *Textbook of Criminal Law* (n 168) 79.

¹⁹⁶ J.C. Smith, 'Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England' (n 2) at 1191.

¹⁹⁷ R.A. Duff, 'Professor Williams and Conditional Subjectivism' [1982] 41 *Cambridge Law Journal* 273 at 274. See Williams' response: 'A Reply to Mr. Duff' [1982] 41 *Cambridge Law Journal* 286.

It also would make most negligent agents reckless under current law as they would generally know of the relevant risk in the abstract but have acted without consideration of it, often because they were distracted, absent minded or forgetful. It is obvious that the subjective test for recklessness which requires advertence to risk taking cannot adequately deal with situations where an agent fails to consider a risk because he was too angry or tired.¹⁹⁸

If the judiciary are prepared to go to such lengths to secure the conviction of defendants that are deemed to be morally blameworthy we have to question 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. If in practice a constructive advertence test is being applied,¹⁹⁹ 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.

3.3.3.5 The Apparent Change from a Subjective Test to an Objective Approach

The decision in *Caldwell*, and also that of *R v Lawrence*,²⁰⁰ whose judgment was significantly delivered on the same day, were seen to create a change to an “objective” test for recklessness, but was this really the case? Professor Smith²⁰¹ 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

¹⁹⁸ L.H. Leigh, ‘Recklessness after Reid’ (n 178).

¹⁹⁹ See also *Booth v CPS [2006] EWHC*, discussed below.

²⁰⁰ [1981] 2 W.L.R. 524.

²⁰¹ ‘Commentary on Caldwell’ (n 129).

himself.²⁰² 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 adopted by the Scottish courts. 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. Griew also deplored the turn the law had taken in these two cases suggesting it would need some modification.²⁰³

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,²⁰⁴ but he regarded *Lawrence* to be completely objective²⁰⁵ as the risk only had to be obvious to the "ordinary prudent man". This argument is incorrect and *Lawrence* is not entirely objective.²⁰⁶ 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.*²⁰⁷

²⁰² *Caldwell* [1982] AC 341 at 354 para.(b).

²⁰³ E. Griew, 'Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence' (n 131).

²⁰⁴ G. Williams, 'Recklessness Redefined' (n 119). See also G. Syrota, 'A Radical Change in the Law of Recklessness' [1982] *Criminal Law Review* 97, who supported this approach.

²⁰⁵ G. Williams, 'Recklessness Redefined' (n 119).

²⁰⁶ Dept. of Transport and the Home Office, Road Traffic Review Report in 1998 which found *Lawrence* recklessness too subjective, C. Clarkson and H.M. Keating, *Criminal Law, Text and Materials*, 5th Edn., (London: Sweet & Maxwell, 2003).

²⁰⁷ *Lawrence* [1981] 1 All ER at 982, (my emphasis added).

Concern was expressed because it was uncertain what this highlighted phrase means, leaving it difficult to refute the conclusion that it ties in with the lacuna²⁰⁸ in the *Caldwell/Lawrence* Direction, noted earlier.²⁰⁹ More interestingly, the dictum certainly appears to introduce an element of subjectivity and if, as has been suggested,²¹⁰ *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.²¹¹ It could be said that where D was inadvertent, both capacity and the presence of moral wickedness was required for culpability to be attributed.²¹² This is a sound proposal although it is submitted that the requirement of ‘moral wickedness’ should be replaced with the need for a moral failure. As a consequence, the potential for injustice lies more with how *Caldwell* was subsequently interpreted than with the decision itself.²¹³

Syrota²¹⁴ refers to Lord Diplock’s comparison in *Lawrence* of s.3 Road Traffic Act 1972 with s.2 of the same Act,²¹⁵ 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 argued that for a s.2 offence it was therefore necessary to show that the defendant was both “conscious” of his acts and their consequences. It was proposed that the use of the word “conscious” is not in the sense of

²⁰⁸ See discussion of the lacuna, above, at 3.3.3.1.

²⁰⁹ D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ (n 133).

²¹⁰ E. Griew, ‘Reckless Damage and Reckless Driving: Living with *Caldwell* and *Lawrence*’ (n 131); and G. Syrota, ‘A Radical Change in the Law of Recklessness’ [1982] *Criminal Law Review* 97 at 98.

²¹¹ See also the judgments of Lords Keith, Ackner, Goff and Browne-Wilkinson in *R v Reid* [1992] 3 All ER 673.

²¹² L.H. Leigh and J. Temkin, ‘Recklessness Revisited’ (n 123) at 203.

²¹³ See, for example, *Elliott v C (A Minor)* [1983] 1 W.L.R. 939.

²¹⁴ G. Syrota, ‘A Radical Change in the Law of Recklessness’ [1982] *Criminal Law Review* 97 at 100.

²¹⁵ 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*.

actually thinking about his actions, but that the defendant ‘could instantly have brought his mind to bear on what he was doing, had he chosen to do so.’²¹⁶

This is consistent with Lord Diplock’s critique of *Murphy*.²¹⁷ It is clear that Lord Diplock in *Caldwell* approved of Eveleigh L.J.’s dictum in *R v 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.*²¹⁸

It was the reference in this passage to “due care and attention” that Lord Diplock was critical of as its use in this context blurred the distinction between reckless driving with the lesser offence of negligent driving. 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 with regard to the legal definition of intention.²¹⁹ This approach would legitimately catch those 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 their mind at the time of the *actus reus*.²²⁰

²¹⁶ G. Syrota quotes from G. Williams, *Textbook of Criminal Law* (1978) 78-79: “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.” [1982] *Criminal Law Review* 97 at 101.

²¹⁷ G. Syrota, ‘A Radical Change in the Law of Recklessness’ (n 214) at 100 referring to [1981] 1 All ER at 981g-982d.

²¹⁸ *Murphy* [1980] QB at 440.

²¹⁹ V. Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) 218.

²²⁰ 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).

3.3.3.6 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.*²²¹

From this statement it would seem that Lord Hailsham had not interpreted Lord Diplock's concept of recklessness as being wholly objective, and that it required a mental element on the part of the accused. This is further evidence that a synthesised approach to determining recklessness was possible. It has been argued²²² that the difference between 'mere inadvertence' and culpable inadvertence amounting to recklessness is provided by Eveleigh L.J. in *Murphy*,²²³ and by Lane L.J. in *Stone and Dobinson*;²²⁴ it is indifference.²²⁵

Indifference is used in the sense of not caring,²²⁶ rather than mere carelessness. Thus indifference is an essential element in both *Lawrence*, 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:²²⁷

[s]ome 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.

²²¹ [1981] 1 All ER at 978, cited in G. Syrota, 'A Radical Change in the Law of Recklessness' (n 214) at 103. Note that we are not provided with a definition of recklessness here either.

²²² Ibid.

²²³ [1980] QB at 440-441.

²²⁴ [1977] 2 All ER 341.

²²⁵ [1977] QB 354, 363

²²⁶ The kind of recklessness used in the civil law, as per *Derry v Peek* (1889) 14 App.Cas. 337.

²²⁷ R.A. Duff, 'Recklessness' [1980] *Criminal Law Review* 282 at 290-291.

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 emotions²²⁸ 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. It has been contended that judgements about indifference are objective judgements about character²²⁹ but if the extra part of the Model Direction added by *Lawrence* was employed, as advocated here, it would not be a purely objective test as D could provide evidence as to why he should not be seen as indifferent.

Duff²³⁰ distinguishes between three different categories of advertent indifference, which attract distinct degrees of moral censure. He distinguishes the accused who foresees the risk of harm as a near certainty, from the accused who foresees the risk as a likely consequence and from the accused who foresees the risk as an unlikely occurrence, but in all three situations the defendant continues to act and harmful consequences result. What this insight provides is a gradient of culpability from a thorough moral condemnation in the first example to lesser moral outrage at the final instance and yet the same harm has resulted and in each case the defendant would argue that no harm was intended.

A difficulty with his distinction can be seen when it is applied to the offence of murder. If the accused foresees harm as a 'near certainty' and this is reckless indifference, then D can only be guilty of manslaughter. If D foresees the harm as a 'virtual certainty' he

²²⁸ J. Horder, 'Cognition, Emotion and Criminal Culpability' (1990) 106 *Law Quarterly Review* 469.

²²⁹ J.B. Brady 'Recklessness' (1996) 15 *Law and Philosophy* 183.

²³⁰ R.A. Duff, 'Recklessness' (n 227).

demonstrates oblique intention and therefore has the *mens rea* required for murder. The dividing line between ‘near certainty’ on the one hand and ‘virtual certainty’ on the other may not be an easy distinction to make. Under the Law Commission’s proposals for reform of the law of homicide,²³¹ the distinction between the two examples would be second degree murder for the former and first degree murder for the latter. This change would at least result in a fairer labelling of the two types of conduct.

Given the proposed statutory definition of recklessness²³² Duff’s three defendants would all be guilty of the same offence if harm ensued. Duff argues that although sentencing may reflect the lesser seriousness of the risk taken, this fails to alter the stigma of conviction for the offence. If recklessness is to be a basis of criminal liability then we must determine for each offence what would amount to an unreasonable kind or degree of risk, and thus what level of practical indifference should attract liability, as perhaps not all unreasonably indifferent actions should be encompassed, especially given that the law should only criminalise behaviour falling short of what is minimally acceptable conduct rather than an ideal standard of behaviour.²³³

Traditionalists²³⁴ would disagree with Duff’s suggestion of distinguishing between different categories of advertent recklessness because the foresight of harm evidences a reprehensible choice on the part of the defendant to increase the risk of harm occurring.²³⁵ As it is morally wrong to make such a choice it is irrelevant to delve further into the motives, attitude or

²³¹ Law Commission, Consultation Paper No 177, *A New Homicide Act for England and Wales?* (London: HMSO, 2005).

²³² Cl 18(c) of the Criminal Code Bill (1989); Law Commission, *A Criminal Code for England and Wales* (Law Com No 177) (London: HMSO, 1989)

²³³ R.A. Duff, ‘Recklessness’ (n 227).

²³⁴ For example, G. Williams, *Criminal Law: the General Part* (n 28) 53.

²³⁵ However, a distinction would be made where D wrongly believed his act was completely safe, see D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ (n 133) at 16.

desires of the defendant, he is ‘equally reckless if he wants to run the risk because it gives him a thrill, or if he is indifferent to whether it materialises or not, or if he fervently hopes it will not do so, and takes some steps to avoid it.’²³⁶ Society generally would not necessarily agree with such a hard line and it is likely that some would give credit where steps had been taken to avoid the risk, and even perhaps where an attempt had been made to minimise it.

One objection was 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.²³⁷ Lord Keith in *R v Reid*²³⁸ stated that ‘absence of something from a person’s mind is as much part of his state of mind as its presence.’ This is why it is still categorised by some as a subjective approach; it is still examining the state of mind of a particular defendant rather than considering what a reasonable person would have thought. Again this highlights the difficulty that can arise in knowing precisely what is meant by the labels of “subjective” and “objective” when they are employed. Lord Diplock had refused to become embroiled in this debate in *Caldwell* as he found the terms unhelpful, possibly because their meaning can depend upon the context they are used in. For his Lordship, D’s mental state is subjective to him, regardless of foresight.²³⁹ On occasion academics have been known to define the sense in which they are using the terms but this is rare, hence the confusion.²⁴⁰ Even when they do, the precise extent of remit may still be unclear. For example, in one instance an objective test was stated as meaning where D *ought* to have known or foreseen a risk of harm or of a circumstance, and it would be irrelevant if D did not know these things if a reasonable man would.²⁴¹ What is unclear here is whether D’s innate capacity to know is relevant.

²³⁶ *Ibid.* at 6.

²³⁷ See G. Williams, ‘Recklessness Redefined’ (n 119).

²³⁸ [1992] 3 All ER 673.

²³⁹ L.H. Leigh and J. Temkin, ‘Recklessness Revisited’ (n 123) at 199.

²⁴⁰ J.C. Smith, ‘Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England’ (n 2).

²⁴¹ *Ibid.* at 1180.

Birch,²⁴² 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 *Parker*²⁴³ and *Kimber*²⁴⁴ 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 difficulties 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. Furthermore, it is submitted that as he may well have been reacting without thinking to the phone not working after swallowing his money, it is difficult to agree that Parker was displaying an attitude of indifference.

It has been suggested that defendants who are attempting to evade being caught by the subjective test could argue that they were too preoccupied to realise any risk was involved in their action.²⁴⁵ For example, Cunningham was perhaps too preoccupied in getting money from the gas meter and Parker was too preoccupied with his difficulty in getting home. The response to this argument was that it would not be a problem in practice because if a jury was properly directed they could be told to consider D’s knowledge before (at the planning stage),

²⁴² D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ (n 133).

²⁴³ [1977] W.L.R. 600.

²⁴⁴ (1983) 77 Cr.App.R. 225.

²⁴⁵ G. Williams, ‘The Unresolved Problem of Recklessness’ (n 104) at 82.

during and after committing the crime.²⁴⁶ Knowledge is not the same as foresight and the relevant time frame is being extended beyond its normal limit if this plan is followed. There would still be no guarantee it would catch the Cunninghams or Parkers even if it was applied.

Further, 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 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.²⁴⁷

In *Kimber*, D raised the defence of honest belief in the victim’s consent as a defence to the offence of indecent assault but had then admitted that he was indifferent to her feelings.

Birch submits that the importance 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.

Attention has been drawn 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 previous such conduct being relied upon in court.²⁴⁸ The advantage of foresight is that it is confined to the occasion in question.²⁴⁹ 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

²⁴⁶ Ibid.

²⁴⁷ D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ (n 133) at 7-8.

²⁴⁸ Ibid. at 6.

²⁴⁹ Ibid. at 9; and see discussion of *Elliott*, below.

evidence in the Criminal Justice Act 2003,²⁵⁰ 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? 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.

3.3.3.7 The Misinterpretation of Parliament’s Intention

Another issue from *Caldwell* is that Lord Diplock, representing the majority, apparently misinterpreted Parliament’s intention when passing the Criminal Damage Act 1971 as there was little evidence before the court on which to base his claim that Parliament’s intention was to give “recklessness” its less restrictive meaning.²⁵¹ On the contrary, as Lord Edmund-Davies in his strongly dissenting judgment observed, the Law Commission had intended the definition applied in *Cunningham*²⁵² to be maintained. However, Lord Diplock had apparently not referred to any extrinsic aids to interpretation, but instead attached importance to the fact that the Act was described as a ‘revising’ statute in its long title.

²⁵⁰ Section 101.

²⁵¹ J.C. Smith, ‘Commentary on Caldwell’ (n 129) at 394 cites the discussion of the meaning of the word “recklessness” in the House of Commons debates where Mr. Mark Carlisle stated the word covered the offender who ‘did not necessarily intend to cause the damage but could not care less whether he caused it or not’. Smith sees this as a state of mind requiring knowledge of risk, but this is not the only interpretation, it is consistent with a requirement of indifference. This may suggest that it is the Law Commission’s view that is being returned to and not necessarily that of Parliament. Furthermore, the Commission referred to “knowledge” and not “foresight,” in its Working Paper No.31, *Codification of the Criminal Law, General Principles, The Mental Element in Crime* (1970).

²⁵² [1957] 2 All ER 412.

Perhaps Lord Diplock was influenced by the fact that the Law Commission had highlighted that most crimes of criminal damage were committed by juvenile offenders.²⁵³ It may have been perceived that to hold such defendants reckless would not be possible where there was a subjective test, because it is less likely that a juvenile would foresee the risk and be perceived by a jury as having done so. There was no evidence on which to base a claim that the law as it then stood resulted in ‘unjustified acquittals’.²⁵⁴

3.3.3.8 The Capacity to Foresee 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 D who would usually have had the capacity to foresee the risk²⁵⁵ and this narrow focus is the crux of the problems that subsequently arose. Lord Diplock did not consider certain classes of D who would be incapable of foreseeing any risk, even if they had been asked to think about it.²⁵⁶ There was no need to do so on the facts of the case before him.²⁵⁷ But it is also possible that it would have made no difference even if Lord Diplock had had such D’s in mind. Lord Bingham in *R v G & R*,²⁵⁸ 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

²⁵³ Law Commission Working paper No. 23, April, 1969 cited in *G & R* [2004] 4 All ER 765 at 775 para.(j), per Lord Bingham, where he states that the Working Paper described ‘the Malicious Damage Act 1861, despite five later amending statutes, as ‘unsatisfactory’ (p1 (para.(2)). ...the Law Commission drew attention (pp4-5 (para.(9)) to the prevalence of malicious damage offences among the youngest criminal age group (the 10-14-year olds) as well as among other juveniles, ...more than half of those convicted of the most serious offence (arson) were under 21.’

²⁵⁴ *G & R* [2004] 4 All ER 765 at 777 para.(d).

²⁵⁵ N.P. Metcalfe and A.J. Ashworth, ‘Arson: Mens Rea- Recklessness Whether Property is Destroyed or Damaged’ [2004] *Criminal Law Review* 369.

²⁵⁶ See, for example, *Elliott v C (A Minor)* [1983] 1 W.L.R. 939.

²⁵⁷ 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 468 para(e); cited in Field and Lynn, ‘The Capacity for Recklessness’ (n 172).

²⁵⁸ [2004] 4 All ER 765 at 786, per Lord Bingham.

departing from the subjective definition. This approach has been contrasted with the narrower focus in *G & R*, with the need for the House to consider the liability of children.²⁵⁹

This begs the question of whether the Model Direction would have still been followed had the D's in *G & R* not been minors.

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.²⁶⁰

Although Lord Diplock accepted in *Caldwell* that certain offences would fall outside his extended definition of recklessness so that only foresight could ground criminal liability, he was referring to crimes which required 'malice' and it is not possible to 'maliciously' do something without awareness.

*Elliott v C (A Minor)*²⁶¹ 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. As will be recalled, D 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. The proposal that 'obvious' in the Direction meant obvious to the particular D²⁶² was not adopted as on a literal interpretation of the wording of the Direction, D's foresight was not required. Some²⁶³ were undeniably outraged at this result

²⁵⁹ N.P. Metcalfe and A.J. Ashworth, 'Arson: Mens Rea- Recklessness Whether Property is Destroyed or Damaged' (n 255).

²⁶⁰ D. Kimel, 'Inadvertent Recklessness in Criminal Law' (2004) 120 *Law Quarterly Review* 548.

²⁶¹ *Elliott v C (A Minor)* [1983] 1 WLR 939.

²⁶² G. Williams, 'Recklessness Redefined' (n 119).

²⁶³ G. Williams, 'The Unresolved Problem of Recklessness' (n 104).

and yet all may not be quite as straightforward as it seems. Although it is justifiable to be outraged at the conviction of a defendant who lacked the cognitive capacity to foresee the risk of harm, that may not be the situation in this case; there was evidence of similar conduct in her past that could not be brought before the court because of the rules of evidence.²⁶⁴ The girl was judged to have learning difficulties because she was in a remedial class at school but attention has been drawn to the fact that children can be put into such classes for a variety of reasons and it cannot be assumed that it is through mental impairment.²⁶⁵ She was also cold and tired but this was the result of a conscious decision to stay out all night rather than go home.

There is perhaps a more significant factor at play in this decision. 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.²⁶⁶ Despite the furore this decision caused, as the Model Direction was claimed to be ‘universally deplored’ for its application here,²⁶⁷ it must be pointed out that the girl would also have been caught even if the *Cunningham* subjective test had been operative. After all, this test simply required that she could foresee some harm of the particular kind arising from her actions, in this instance criminal damage. When she poured the white spirit onto the carpet in the shed and lit it she would have at least appreciated that she would damage the carpet, even if she did not foresee that the fire would burn down the shed. That is all that the subjective test needs for a conviction.

²⁶⁴ D.J. Birch, ‘The Foresight Saga: The Biggest Mistake of All?’ (n 133) at 9.

²⁶⁵ F. Field and M. Lynn, ‘The capacity for recklessness’ (n 173).

²⁶⁶ Given the evidence of similar conduct in her past that could not be brought before the court because of the rules of evidence, this may have influenced the framing of the question, whereas the Court of Appeal in the subsequent case of *G & R* (discussed below) framed their question in terms of incapacity to foresee the risk.

²⁶⁷ G. Williams, ‘The Unresolved Problem of Recklessness’ (n 104).

In *R v Bell*,²⁶⁸ another case cited in support of *Caldwell* producing a purely objective test of recklessness, D believed he was compelled by God to act the way he did and he intentionally caused damage. This was a clear case of intention and not recklessness and there was no explicit reference to incapacity to foresee risk, nor the relevance of incapacity or inability.²⁶⁹ This suggests that both *Elliott* and *Bell* should not be used to justify the assertion that capacity was an irrelevant factor when applying the Model Direction.

In *R v Stephen Malcolm R*,²⁷⁰ D was a 15 year old boy who threw petrol bombs close to a girl's bedroom window. He was convicted of arson, but claimed that he was not reckless as to endangering life as he did not realise that if a bomb had gone through the bedroom window, the girl might have been killed. The issue of D's capacity was not raised by his counsel, rather his defence were seeking a ruling that recklessness should be judged by reference to someone of D's 'age and with such of his characteristics as would affect his appreciation of the risk.'²⁷¹ Consequently, it has been contended that this is also a case that cannot be seen as authority for the proposition that capacity is irrelevant.²⁷² There are two cases to support the proposition that capacity could be relevant: '*Hardie*²⁷³ was explicitly reasoned and decided on the basis that incapacity to foresee a relevant risk will excuse on a charge of *Caldwell* recklessness. *Dickie*²⁷⁴ rests implicitly on a similar assumption.'²⁷⁵

In *R v Hardie*, the Court of Appeal quashed D's conviction for arson because the jury should have been directed that if they concluded that D was unable to appreciate the risk because of

²⁶⁸ [1984] 3 All ER 842.

²⁶⁹ F. Field and M. Lynn, 'The capacity for recklessness' (n 173) at 82.

²⁷⁰ (1984) 79 Cr App R.334.

²⁷¹ Ibid. at 337.

²⁷² F. Field and M. Lynn, 'The capacity for recklessness' (n 173) at 82.

²⁷³ [1984] 3 All ER 848.

²⁷⁴ [1984] 3 All ER 173.

²⁷⁵ F. Field and M. Lynn, 'The capacity for recklessness' (n 173) at 83.

the valium he had taken, they should then consider whether the taking of the valium was itself reckless. The appellate court concluded that D did not know that the quantity of valium taken could render him incapable of appreciating the risk.

In *R v Dickie*, evidence of D's hypomania was adduced, revealing that this may have made him unaware of the risk arising from his conduct. The trial judge erred in allowing the jury to decide whether D was *M'Naghten*²⁷⁶ insane, but when the Court of Appeal set aside the verdict of not guilty by reason of insanity, they did not substitute it with a verdict of guilty, which suggests that the court accepted that D lacked the necessary *mens rea*.

Finally, in *R v Coles*,²⁷⁷ a strict application of the Model Direction was applied. Here D's friends were sleeping on hay in a barn when he set it alight. He admitted that he had realised that they might not have woken up in time and got up. In this instance, D clearly had the capacity to foresee the risk and again, he would have been convicted even if the *Cunningham* test for recklessness had applied. It has been pointed out that the Court of Appeal were influenced by the fact that D was 'unmeritorious',²⁷⁸ and this leaves the courts to be the determinants of merit and whether a particular case was to be judged on the basis of a purely objective Model Direction or an adapted version²⁷⁹ as advocated in *Reid*.²⁸⁰

It could equally be argued that exactly the same concern arises with the subjective test in practice; the courts determine the merit of the particular defendant and then decide to what extent they will apply the subjective test. This can be advanced because of the subjectivists'

²⁷⁶ *M'Naghten* (1843) 4 St Tr NS 847.

²⁷⁷ [1995] 1 Cr App Rep 157.

²⁷⁸ *Ibid.* at 169.

²⁷⁹ A. Halpin, *Definition in the Criminal Law* (n 121).

²⁸⁰ [1992] 1 WLR 793.

criticism of the decision in *Elliott* where no doubt acquittal would have been preferred even though foresight of some harm was appreciated, and convictions in *Parker* and *Booth* where foresight was questionable. It is worth noting that under German criminal law an objective position on recklessness has been adopted but it is capacity based, allowing for D's mental capacity and knowledge at the time to be taken into account.²⁸¹ The *Caldwell* test for recklessness actually could have worked well in practice, despite the criticisms. Therefore, a more objective test for recklessness is advocated here, not a simple reversion to the *Caldwell/Lawrence* Model Direction, but utilising the Direction as a template before enquiring why the particular defendant did not foresee the risk. This applies Glidewell J's suggestion in *Elliott* (when applying the *Caldwell/Lawrence* Direction):

*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.*²⁸²

This will impose an evidential burden on the accused. 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. A synthesis of the subjective/objective positions will acknowledge that moral culpability cannot rationally be dependent upon advertence or inadvertence. Where D's inadvertence to the risk is the result of morally blameless factors he should not be held criminally responsible for serious offences. 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 and manslaughter.

²⁸¹ A. Ashworth, *Principles of Criminal Law*, 6th Edn., (Oxford, Oxford University Press, 2009) 182, citing J.R. Spencer and A. Pedain, 'Strict Liability in Continental Criminal Law' in A. P. Simester (ed) *Appraising Strict Liability* (2005) 241.

²⁸² (1983) 77 Cr.App.R. 103 at 119.

3.3.3.9 Recklessness and Rape

Prior to *DPP v Morgan*,²⁸³ the offence of rape 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 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.²⁸⁴

It was observed²⁸⁵ that 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 decisions²⁸⁶ 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

²⁸³ [1976] AC 182.

²⁸⁴ 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.

²⁸⁵ H. Power, ‘Towards a Redefinition of the *Mens Rea* of Rape’ (2003) 23 *Oxford Journal of Legal Studies* 379.

²⁸⁶ *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 334; *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 & Kewal* (1983) 78 Cr App R 149 seems at odds with these decisions.

“practical indifference”.²⁸⁷ 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 report²⁸⁸ 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’²⁸⁹ 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 ‘[T]he 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.’²⁹⁰

This resulted in a recommendation that recklessness in sex offences ‘should include lack of thought to consent; this can be described as “could not care less about consent”.’²⁹¹ 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.²⁹² It is accepted that there cannot be a true balance

²⁸⁷ H. Power, ‘Towards a Redefinition of the Mens Rea of Rape’ (n 284) at 386-8, noting that the indifference element is from Lord Cross in *Morgan* [1976] AC 184 at 203.

²⁸⁸ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (2000), vol.1

²⁸⁹ *Ibid* at 2.12.1.

²⁹⁰ *Ibid* at 2.12.4.

²⁹¹ *Ibid* at 2.12.6.

²⁹² Note Power advocates a hierarchy of rape offences linked to mens rea: intentional rape, reckless rape and negligent rape, H. Power, ‘Towards a Redefinition of the Mens Rea of Rape’ (n 285).

of rights as from the victim's point of view. The fact that the rapist was 'negligent' is not going to make V feel any better about the commission of the offence, i.e. any less raped. From D's viewpoint it may seem harsh to label him a rapist, if he would not have had intercourse had he realised V was really not consenting. The other problem is that introducing an offence of negligent rape may lead to defendants pleading guilty to this lesser offence where they have raped intentionally or recklessly and, given the low conviction rate for such offences, it may be tempting for the prosecution to accept such a plea.

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'²⁹³ 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.²⁹⁴

Unfortunately,²⁹⁵ 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. Furthermore, the combined effect of the conclusive and rebuttable presumptions as to lack of consent in s.75 and s.76 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.²⁹⁶ In effect, without allowing for consideration of the particular defendant and the circumstances known to him at the time, a negligent standard

²⁹³ Setting the Boundaries: Reforming the Law on Sex Offences, (n 288) at 2.13.4.

²⁹⁴ H. Power, 'Towards a Redefinition of the Mens Rea of Rape' (n 285).

²⁹⁵ 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 *Journal of Criminal Law* 130.

²⁹⁶ *Ibid.*

had been introduced for some of the most serious sexual offences without the offences being ranked in degrees of moral culpability.

3.3.3.10 Reckless Manslaughter

For years, the court interchangeably used the terms “gross negligence” and “reckless” to describe involuntary manslaughter that was not caused by the commission of an unlawful and dangerous act.²⁹⁷ It was uncertain whether these terms represented two distinct forms of fault or were simply two ways of describing the same fault.²⁹⁸ In one edition of Smith and Hogan’s *Criminal Law*,²⁹⁹ the authors had expressed the view that there were indeed two distinct forms of fault: ‘gross negligence manslaughter must be whether death or serious injury be caused, and reckless manslaughter where the recklessness might be as to death, personal injury, whether serious or slight, and possibly any injury to “health or welfare,”’³⁰⁰ (following the judgment in *Stone and Dobinson*). Following the decisions in *Caldwell* and *Lawrence*, in *R v Seymour*³⁰¹ the House of Lords held that the law applicable to manslaughter was the same as that for the offence of reckless driving. In the Court of Appeal in *Seymour*, Watkins LJ delivering the judgment stated:

*we are of the view that it is no longer necessary or helpful to make reference to compensation and negligence. The Lawrence direction on recklessness is comprehensive and of general application to all offences.*³⁰²

Lord Roskill in the House of Lords opined that *Caldwell* recklessness applied to all offences unless Parliament decided otherwise, but his proposition was not accepted subsequently, as *R*

²⁹⁷ This will be analysed further in the next chapter.

²⁹⁸ J. C. Smith and B. Hogan, *Criminal Law*, 7th Edn., (London: Butterworths, 1992) 372.

²⁹⁹ 5th Edn.

³⁰⁰ J.C. Smith and B. Hogan, *Criminal Law* (n 298) 372.

³⁰¹ [1983] 2 All ER 1058 at 1064.

³⁰² (1983) 76 Cr App Rep 211 at 216.

*v Savage and Parmenter*³⁰³ made clear. Offences against the person maintained the *Cunningham* subjective test but once the offence of reckless driving was abolished, it was mainly criminal damage offences and manslaughter that were decided on the basis of *Caldwell*. At this point, if gross negligence manslaughter still existed as a separate offence it should have appeared in *Kong Cheuk Kwan v R*³⁰⁴ as on its facts it would previously have been treated as gross negligence, but this did not occur.

Smith and Hogan remarked that under *Caldwell* recklessness there was a ‘substantial overlap between recklessness and gross negligence’ noting that the number of instances of gross negligence which do not amount to *Caldwell* recklessness will be very small.³⁰⁵ *R v Lamb*³⁰⁶ would be one such exception as the boy considered the risk that the gun might fire and after checking it and finding no bullets opposite the barrel, wrongly thought it was safe to pull the trigger.

It was not until the decision of the House of Lords in *R v Adomako*³⁰⁷ that recklessness was replaced by the restoration of gross negligence as the appropriate test for manslaughter offences.³⁰⁸ After this it seemed that reckless manslaughter in the objective sense of *Caldwell/Lawrence* had been abolished, however the decision of the Court of Appeal in *R v Lidar*³⁰⁹ suggests it might not be entirely extinct. Clearly there is no reason why advertent reckless manslaughter should not be an option.³¹⁰ If someone causes death without

³⁰³ [1991] 4 All ER 698 at 720.

³⁰⁴ (1985) 82 Cr App Rep 18D was at the helm of one of two hydrofoils that collided in sunny weather whilst ferrying passengers from Hong Kong to Macau.

³⁰⁵ J.C. Smith and B. Hogan, *Criminal Law* (n 298) 69.

³⁰⁶ [1967] 2 QB 981; [1967] 2 All ER 1282.

³⁰⁷ [1995] 1 AC 171.

³⁰⁸ This case is analysed in more detail in the following chapter.

³⁰⁹ [2000] 4 Archbold News 3 D drove over V killing him. There had been a fight, not involving D but his companions, and it continued when V was hanging on to the car with his body half inside an open car window of D’s car. When the car gained speed V’s feet caught in the front wheel, he fell, was run over and sustained fatal injuries.

committing an unlawful act and yet foresees the risk of serious harm it is possible that, without foresight of a risk of death, gross negligence manslaughter would not be available as a charge.³¹¹ However, given the ruling in *R v Stone and Dobinson*³¹² and the current tendency of the appellate courts to extend the remit of gross negligence in this sphere,³¹³ it is possible that gross negligence would indeed be used.

At first instance in *Lidar*, the trial judge, Scott Baker J, had directed the jury on the basis of advertent recklessness as to ‘some physical harm, however slight’ adding ‘mere inadvertence is not enough. The defendant must have been proved to have been indifferent to an obvious risk of injury to health or to have actually foreseen the risk’. The Court of Appeal considered that such a direction was subject to criticism because it failed to specify a ‘high probability of physical harm’ and that the risk was of ‘serious injury’ rather than lesser physical harm but the main point of interest here is the reference in the direction to proof of indifference as an alternative to foresight of harm. This could be viewed as leaving the way open to a more objective test for recklessness that would reflect character theory.

3.3.4 Recklessness in *G&R* and the Draft Criminal Code

As is known, in 2004, the decision of the House of Lords in *R v G & R*³¹⁴ overruled *Caldwell*³¹⁵ or at least departed from it and resulted in the third main approach to recklessness.³¹⁶ In his leading judgment Lord Bingham stated:

³¹⁰ As suggested by Lord Mackay in *Adomako* at paras. 187h-188b.

³¹¹ D. Ormerod, *Smith and Hogan's Criminal Law*, 13th Edn., (Oxford: Oxford University Press, 2011) 560.

³¹² [1977] 2 All ER 341 CA a risk to the ‘health and welfare’ of V is sufficient.

³¹³ For example: *R v Evans*[2009] EWCA Crim 650; *R v Willoughby* [2005] *Criminal Law Review* 393; *R v Wacker* [2002] EWCA Crim 1944.

³¹⁴ *G & R* [2004] 1 AC 1034; [2004] 4 All ER 765.

³¹⁵ [1982] AC 341; but only in relation to the definition of ‘reckless’ for the purpose of the CDA 1971, *G & R* [2004] 4 All ER 765, per Lord Bingham at 783, para.(j); but see *Attorney-General's Reference (No 3 of 2003)* 2 Cr App R 367.

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 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.³¹⁷

Although it is accepted that no one should be censured for an accidental harm, it does not automatically follow that in every circumstance³¹⁸ 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 has harmed others.³¹⁹ Note from Lord Bingham's statement above, he is not saying 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

³¹⁶ Lord Rodger states *G&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; D. Kimel, 'Inadvertent Recklessness in Criminal Law' (2004) 120 *Law Quarterly Review* 548.

³¹⁷ *G & R* [2004] 1 AC 1034 at 1055.

³¹⁸ See Lord Rodger's comments in *G & R* [2004] 4 All ER 765 at 794-5.

³¹⁹ For example, *R v Brady* [2006] EWCA 2413.

be taken, to avoid or seek to prevent harm occurring.³²⁰ Whether criminal blame should result in such circumstances is the subject of much debate.³²¹

Following this judgment, there was a warning³²² 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. This supported earlier submissions that if the criminal law accurately reflects the community's perception of justice they are more likely to defer to its commands, yet if it fails in this regard, its authority is undermined.³²³ The subjective approach clearly produces a simple formula which has triumphed over the need for a comprehensive one.³²⁴

The judgment in *G & 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 in the Draft Criminal Code which states:

*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.*³²⁵

This new version, unlike that in *Cunningham*,³²⁶ 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 Crime³²⁷ (RMEC) which Duff³²⁸ criticised as

³²⁰ J.C. Smith and B. Hogan, *Criminal Law* (n 55) 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.'

³²¹ This is discussed further in the following chapter.

³²² K. Amirthalingam, 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (2004) 67 *Modern Law Review* 491.

³²³ P. Robinson, 'The Criminal - Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201 at 212-213.

³²⁴ D.J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' (n 133).

³²⁵ *G & R* [2004] 4 All ER 765 at 787, citing cl 18(c) of the Criminal Code Bill (1989).

³²⁶ 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', per Byrne J in *Cunningham* [1957] 2 All ER 412 at 414.

³²⁷ Law Commission, *Criminal Law, Report on the Mental Element in Crime* (n 167).

³²⁸ R.A. Duff, 'Recklessness' (n 227).

being ‘too wide, in counting every conscious and unreasonable risk-taker as “reckless” and too narrow’” in requiring advertence to the risk.

The new definition has the same faults that Duff identified in the original proposal. Duff³²⁹ does not rule out inadvertent recklessness as a possibility but in the context of the offences against the person, he seeks to limit such an extension of the accepted limits of reckless conduct to occasions where there is a close connection between the intended action and the fact as to which a person may be held reckless. Where the fact as to which he may be held reckless forms part of his intention, i.e. he intends to take a risk of harming someone, this closer connection is established. The example he uses is rape, where the perpetrator intends to have intercourse thinking that he may have the woman’s consent, but aware that she might not be consenting. In such a case, his action ‘makes an essential difference to the moral character of the proposed action itself’.³³⁰

Duff continues by suggesting that not every conscious and unreasonable risk taker should be caught by the definition of recklessness; instead there should be a requirement that the actor should ‘realise that it is probable, not just possible, that the relevant fact exists; or that the fact is so essentially and significantly connected to his intended action that he could be reckless even if he only considered the fact as a possibility.’³³¹ Why recklessness should be restricted in this way in the former of the two parts is not at all clear, especially as assessing the degree of the probability of a risk can be very difficult.

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

³²⁹ Ibid.

³³⁰ Ibid. at 288.

³³¹ Ibid.

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.³³² He submits that a party can be reckless 'even though, and even partly because, he does not realise the risk'³³³ because his conduct manifests such serious 'practical indifference' and 'lack of concern', that the possibility of there being a risk is unimportant.³³⁴

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'.³³⁵ Accordingly, 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.'³³⁶ It is questionable whether this statement is still apposite following one possible interpretation of the Draft Criminal Code.³³⁷ Under this new definition, not only must the accused advert to the risk, 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 has been noted³³⁸ that determining recklessness entails a balancing act 'focussing on the utility or otherwise of the defendant's actions, ... balancing the seriousness of the risk against the gravity of the harm.' Although determining whether running a risk is justified will depend on the social utility of the act, it is D's perceptions that are relevant here if choice

³³² Ibid. at 289.

³³³ Ibid. at 292.

³³⁴ Ibid. at 289.

³³⁵ See also K. Amirthalingam, 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (n 322) who argues that blameworthiness and culpability cannot be determined without reference to some external standard which calls for a degree of objective evaluation.

³³⁶ A.P Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine*, 2nd Edn., Revised (Oxford and Portland, Oregon: Hart Publishing, 2004) 139.

³³⁷ See the analysis of the Draft Criminal Code definition of recklessness applied in *G & R*, below.

³³⁸ P. Seago and A. Reed, All ER Annual Review 2003.

theory underpins criminal responsibility, not society's. The social utility of an act would seem to have a more important role to play in determining the degree of foreseeability, rather than the reasonableness of taking the risk, in that where there is no social utility it is likely that even a remote chance of harm would be sufficient for a finding of recklessness.³³⁹ This is likely to catch practical jokers who are most unlikely to actually foresee the risk of any harm resulting from their actions and such actions will frequently have no social utility whatsoever.

It appears that under this new version from the Draft Criminal Code,³⁴⁰ to satisfy (i) D 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 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. It would actually make the jury's task harder because now it 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.

³³⁹ Ibid.

³⁴⁰ *G & R* [2004] 4 All ER 765 at 787; cl 18(c) of the Criminal Code Bill (1989).

3.3.4.1 Should G & R have modified the Caldwell Test?

Why did the House fail to take the opportunity to modify the *Caldwell* test rather than depart from it? Lord Rodger seemed to have ruled 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.*³⁴¹

He appears to have been particularly influenced by the desire to 'set the law back on the track that Parliament originally intended it to follow.'³⁴² Whether this is a sufficient justification for overruling *Caldwell* recklessness is questionable as for more than 20 years Parliament could have amended the law had they so wished.³⁴³ 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,³⁴⁴ not wanting to substitute one misinterpretation of s.1 for another. He further argued that:

³⁴¹ *G & R G & R* [2004] 4 All ER 765 at 793, para.(c).

³⁴² Ibid. Note the quote from Mr Mark Carlisle in the House of Commons debates cited by Smith, 'Commentary on Caldwell' (n 128) 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 we are returning to and not necessarily Parliament's. However, as noted earlier, the Commission referred to knowledge and not foresight.

³⁴³ Lord Rodgers states that 'if Parliament now thinks it preferable for the 1971 Act to cover culpably inadvertent as well as advertent wrongdoers, it can so enact. The Law Commission recognised that, if codifying the law, Parliament might wish to adopt that approach....' *G & R* [2003] 4 All ER at 795 para.(d).

³⁴⁴ Supported by Lord Steyn.

*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.*³⁴⁵

This reasoning has been criticised for being the paramount reason *to* modify the Direction, even indicating the kind of modification needed, namely that recklessness only occurred where the risk would have been obvious to the defendant had she thought about it.³⁴⁶ Lord Bingham of Cornhill's concern that such a modification could complicate matters for a jury has some merit but juries already face similar tasks, no less complicated, and examples cited include the defences of provocation and duress, and "dishonesty" under the Theft Act 1968.³⁴⁷

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 others have argued,³⁴⁸ there are certain character traits and emotions to which we tend to attach blameworthiness, 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

³⁴⁵ *G&R* [2003] UKHL 50 at 786 paras.(a-d).

³⁴⁶ D. Kimel, 'Inadvertent Recklessness in Criminal Law' (n 260) at 552.

³⁴⁷ *Ibid.* Note s.2 of this Act provides examples of when D will not be deemed dishonest, dishonesty being determined by reference to the test laid down in *R v Ghosh* [1982] QB 1053.

³⁴⁸ G.P. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) 513; J. Horder, 'Cognition, Emotion, and Criminal Culpability' (n 228).

failure to give sufficient attention and consideration to what you were doing.³⁴⁹ Where there is stupidity in the sense of having the capacity to be aware of a risk, but the lack of awareness is due to ‘larking about’, there could justifiably be liability where D’s actions posed an obvious risk and caused serious harm. On this basis, incapacity would not attract culpability unless it was self-induced. A person may have some capacity to foresee a risk and yet not be able to identify the choices that are then open to them. For this reason in such circumstances they 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 noteworthy that Lord Rodger in *G&R* did not find a broader concept of recklessness was necessarily ‘undesirable’³⁵⁰ in terms of culpable inadvertence,³⁵¹ recognising that there was scope for an objective approach and referred to the Model Direction as ‘a legitimate choice between two legal policies’ which ‘may be better suited to some offences than to others.’³⁵² He stated that historically different views have been adopted by English judges at different times over the centuries,³⁵³ so it remains to be seen if the decision in *G&R* will be the last word on this area. Indeed a small survey conducted following this judgment showed that 69% of the respondents would have found the children criminally responsible, 40% believing the boys were mature enough to realise the risks involved and moreover, 38% holding that their realisation of risk was irrelevant.³⁵⁴ From this it can be argued that where defendants are adults, rather than children, an overwhelming majority would favour a more objective approach and public support for subjectivism here is limited.

³⁴⁹ F. Field and M. Lynn, ‘The capacity for recklessness’ (n 173) at 86.

³⁵⁰ Birch described the extension of recklessness in Caldwell as an understandable attempt to bridge the gap between foresight and a morally culpable attitude, see ‘The Foresight Saga: The Biggest Mistake of All?’ (n 133).

³⁵¹ A constructive advertence/awareness test was also proposed by G. Williams, ‘Recklessness Redefined’ (n 119) at 270-271; and M. Davies, ‘Lawmakers, Law Lords and Legal Fault: Two Tales From The (Thames) Riverbank: Sexual Offences Act 2003; R v G and Another’ (n 295).

³⁵² See *G & R* [2004] 4 All ER 765 at 794-795, per Lord Rodger.

³⁵³ A. Norrie, *Crime, Reason and History* (n 56).

³⁵⁴ H. Keating, *Reckless Children?* [2007] *Criminal Law Review* 546 at 552.

Following *G & 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.³⁵⁵ It seems odd, given the view that *Caldwell* recklessness was very ambiguous and potentially caused injustice, that Lord Bingham limited its overruling to criminal damage offences.³⁵⁶ The new definition was applied in *Booth*,³⁵⁷ where D was appealing against his conviction for the criminal damage caused to 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. As in *Parker* earlier, an objective approach to foresight is being applied.

3.3.5 A Fourth Approach.

Under suggested reforms the Law Commission's Draft Criminal Law Bill³⁵⁸ slightly modifies the definition of recklessness provided by the Draft Code so that a person acts:

(a) '*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

³⁵⁵ *Attorney-General's Reference (No 3 of 2003)* [2004] 2 Cr App R 367.

³⁵⁶ A point made by A. Halpin, *Definition in the Criminal Law* (n 121) Chapter 3.

³⁵⁷ *Booth v CPS* [2006] EWHC

³⁵⁸ Law Commission, *Legislating the Criminal Code Offences against the Person and General Principles*, Law Com. No. 218, Cm 2370 (1993)

otherwise. This latest definition seems to be more objective in interpretation than the Draft Code, that is, 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. It has been argued that if different definitions of recklessness are to be applied to different offences we need to be able to justify why this is so and yet this has not been attempted.³⁵⁹ Different definitions could cause problems for juries when two different offences were being alleged and they would have to consider both definitions separately. Although this could be a concern, there is a lack of evidence from the time that *Cunningham* and *Caldwell* recklessness co-existed to support this. Furthermore, the capacity based recklessness advocated in this work could not be applicable universally; if it was to be it would leave gaps where behaviour should be criminalised, for example the offence of stalking.³⁶⁰

3.4 Conclusion to Chapter Three

This chapter began with a critical review of the development of the law on intention, detailing how intention had historically been equated with foresight of harm. This led over time to defining the *mens rea* of intention as being either direct intent or oblique intent, with the latter being something that a judge or jury could find in circumstances where D had foreseen the particular risk of harm (death or serious bodily injury) as a virtual certainty. It was noted that this occurred in the context of homicide as murder cannot be committed recklessly. It was frequently the language of recklessness that was used in jury directions and in the judgments of the appellate courts to convict defendants on the basis that they obliquely intended the consequences in the absence of evidence of any direct intent. The need to

³⁵⁹ A. Halpin, *Definition in the Criminal Law* (n 121).

³⁶⁰ Section 1 Protection from Harassment Act 1997. It is sufficient if a reasonable person would realise the course of conduct amounted to harassment; *R v Colohan* [2001] EWCA Crim 1251.

distinguish intention from recklessness is seen as important because these *mens rea* terms represent different degrees of moral turpitude, those found to have intentionally harmed others being deserving of more censure and punishment than those who behaved recklessly.

This analysis was followed by a thorough critical evaluation of criminal recklessness. It is submitted that the plethora of current definitions for recklessness and the lack of a morally substantive interpretation will lead to further developments and debate. When employing the subjective approach in *Cunningham* and *G & R* to cases such as *Parker* and *Booth* it is argued that in reality an objective 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. If the Draft Criminal Code definition was to be interpreted as ideally subjective that would be untenable. 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 as advocated here, or by introducing a form of practical indifference test, discussed earlier. It is advocated that Glidewell J's suggestion in *Elliott* (when applying the *Caldwell/Lawrence* Direction) would be a 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.*³⁶¹

This will impose an evidential burden on the accused. Once the reason why no thought was given to the risk emerged, it would be relatively straightforward to assess the degree of moral

³⁶¹ (1983) 77 Cr.App.R. 103 at 119.

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*³⁶² and the context in which the proscribed act occurred. 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. This position is clearly grounded in character theory as evidence of a bad character would give rise to criminal liability but it is also a subjectivised version of ‘role’ theory as the inference that D is reckless is determined by reference to what a reasonable person performing his role would have foreseen. It has been proposed elsewhere that there needs 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.*³⁶³

The sooner this happens the better as transparency as to what definition is really being employed should be an essential requirement.

Where the labels “subjective” and “objective” are employed it must be clear in what precise context they are being used. The subjective test from *Cunningham* was observed to have an objective strand to it, namely the determination of whether the risk was a reasonable one to take in the circumstances fell to the judge or jury, not the defendant. When the *Cunningham* test was held to encompass the deliberate closing of the mind to the risk, an objective test was being imposed in reality. The objective test advanced in *Caldwell/Lawrence* was not entirely

³⁶² See J. Horder’s approach in ‘Cognition, Emotion, and Criminal Culpability’ (n 228).

³⁶³ N.P. Metcalfe and A.J. Ashworth, ‘Arson: Mens Rea –Recklessness Whether Property is Destroyed or Damaged’ (n 255) at 372.

objective as it encompassed the *Cunningham* test, as well as introducing an inadvertent strand. Furthermore, it has been demonstrated that there is substantial evidence to support the contention that the Model Direction espoused by Lord Diplock was intended to be capacity dependent. The latest test from the Draft Criminal Code adopted in *G & R* could be subjective/objective like the *Cunningham* test but has the potential to be interpreted as entirely subjective given its wording. If this is the case it must be proven that D foresaw the relevant risk and that D knew it was an unreasonable one to take. This would make it extremely difficult to secure a conviction.

Having analysed the blurring of the distinction between intention and recklessness in this chapter, the following chapter will critically analyse the similar problems with the boundary between recklessness and negligence, briefly noted above.³⁶⁴ This will be undertaken in an attempt to determine whether there is a distinction and, if so, where the line should be drawn between the two forms of *mens rea*.

³⁶⁴ At 3.3.3 to 3.3.3.1.

Chapter 4

Distinguishing between recklessness and negligence; the scope for criminal negligence

'There but for the Grace of God, go I'

(Attributed to John Bradford (1510-1555))

4.1 Introduction to Chapter Four

This chapter will examine in more detail the role and ambit of negligence in the criminal law, given that the *Caldwell/Lawrence* Model Direction encroached on the historical remit of this area of *mens rea*. As a more objective position on recklessness is being advocated in this work, it is necessary to determine the appropriate limits for both fault terms. Although it is accepted that no one should be censured for an accidental harm, it does not automatically follow that in every circumstance¹ a person should be exempt from liability when they have acted with extreme carelessness or stupidity and as a result have harmed others.² 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.³ Where the risk of harm was obvious and serious, thoughtless conduct could have been caught by the *Caldwell/Lawrence* Model Direction but this is no longer applicable in the majority of circumstances. It would not be appropriate to advocate that criminal responsibility for serious crimes should follow mere carelessness; momentary carelessness is often a common feature of everyday human

¹ See Lord Rodgers comments in *G & R* [2004] 4 All ER 765 at 794-5.

² In *G & R* [2004] 4 All ER 765 at 784 Lord Bingham states that '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 serious crime or the risk of punishment'.

³ J.C. Smith, and B. Hogan, *Criminal Law*, 9th Edn., (London: Butterworths, 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'.

interaction. Stupidity, in the sense of a failure to exercise a capacity to behave more responsibly, is perhaps another matter when it results in serious harm. In situation of this kind the conduct could fall within the ambit of the recklessness proposed in the previous chapter if accompanied by evidence of an indifference or disregard for the interests of others, in other words evidence of D's bad attitude or character.⁴ This would remove the need to use gross negligence as a form of liability for serious offences leaving simple negligence as the appropriate fault term for minor crimes.

Those who advocate criminal liability for negligence do so on the basis that 'it is a standard that reflects fault on the part of the defendant.'⁵ This is because it is not sufficient to only hold criminally responsible those who choose to cause harm, or choose to run the risk of causing harm; we are under an obligation to others to take care lest we cause harm.⁶ For others, where an agent is unaware of a potential risk of harm, culpability is not easily established because failing to select between unknown options is not blameworthy.⁷ As a result of these opposing views, there has been much debate on liability for negligence in criminal law and this will be examined in this chapter. Following this, the focus will be on the extent to which liability for negligence can be encompassed by the theories of culpability, discussed in Chapter Two, to determine whether the ascription of criminal responsibility can be justified, including the extent to which the capacity of the particular defendant is relevant.

First, however, the analysis will embark on a critical inspection of the judicial blurring of the *mentes reae* terms of criminal recklessness and negligence with a view to determining

⁴ Discussed further, below, at 4.6.1.

⁵ A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine*, 3rd Edn., (Oxford: Hart Publishing, 2007) 145.

⁶ A.P. Simester, 'Can Negligence be Culpable?' in J. Horder (ed.), *Oxford Essays in Jurisprudence* 4th Series (Oxford: Oxford University Press, 2000) 89.

⁷ *Ibid.*

whether these terms should be quite distinct or should remain as practically synonymous. It will be contended that instances of criminal behaviour that are currently deemed to amount to gross negligence are more appropriately labelled recklessness. To implement such a proposal calls for a modification of the *Caldwell/Lawrence* Direction on recklessness⁸ as this lacked clarity and had the potential for unfairness if the inadvertent limb was interpreted as being purely objective. This modification would adopt the changes advanced in *Reid*⁹ which would allow for the mental capacity of the individual defendant to be taken into account but would also require an examination of the reason why D failed to advert to the risk, as advocated in the previous chapter.¹⁰ The modification would also need to encompass acts of omission as well as acts of commission and a proposed direction to accommodate acts of omission is advanced. This proposition, if adopted, would remove criminal liability for negligence in relation to serious crimes. It would also ascribe culpability on retributive Kantian principles based upon the character of D's conduct.

What will be made clear is that much of the debate surrounding liability for recklessness or negligence is a consequence of a lack of judicial and academic commitment to clear legal definitions. In 1965, it was alleged that judicial reluctance to arrive at settled definitions arises because it allows the courts to warp legal concepts to 'meet the exigency of the moment' which is a process that would be hindered by rigid definitions.¹¹ It is evident from the analysis undertaken in this work that the courts are still prepared to blur the boundaries of the *mentes* reae under examination here. Given the nature of these terms, some blurring of the boundaries is inevitable in the courts' pursuit of justice; the concepts raise similar issues

⁸ See Chapter 3 at 3.3.3. and 3.3.3.5.

⁹ [1992] 1 WLR 793, see chapter 3 at 3.3.3.3. note 147.

¹⁰ Chapter 3 at 3.4.

¹¹ G. Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, 1965) 9.

to trying to define indeterminate dispositions like fairness, discussed in Chapter 2.¹² It is contended here that this lack of demarcation is because recklessness and negligence are context/reason dependent; it is only when the full context in which D's behaviour arose and his reasons for so behaving are analysed that we can determine whether the imposition of criminal responsibility in any given instance is appropriate.

4.2 Blurring the Distinction between Recklessness and Negligence

As discussed in the preceding chapter, to a large extent the decision in *Caldwell* effectively abolished the distinction between recklessness and negligence. Recklessness had historically required advertence to risk on its subjective interpretation, leaving negligence to cover the inadvertent agent in a limited number of offences as most crimes required *mens rea*, in the traditional sense of intention or at least subjective recklessness. Even if this extension of recklessness required knowledge of a risk rather than actual foresight, as was possible on one interpretation of Lord Diplock's judgment, it would still leave the difficulty that almost all negligent actors would generally know of the risks attached to any venture even if they did not stop to think about them before or at the time of acting. In theory this would make them all reckless following the *Caldwell* Direction which would be unreasonable.

As negligence generally only attracts liability for summary offences, unless it is deemed to be 'gross' and causes the death of another, it would indeed seem strange that in one move, the House of Lords in *Caldwell* had managed to make more people criminals for serious offences committed inadvertently, without the extra requirement that existed for negligence (that it needed to be gross) and where no liability would have been founded previously because the

¹² At 2.5.1.2.

offence was not one that could be committed negligently.¹³ It was suggested that following *Caldwell*, a person could not be reckless in any sense if he failed to think but would not have realised there was a risk even if he had stopped to consider if there was one.¹⁴ After all, Lord Diplock's judgment referred to the defendant who *would* have realised the risk had he stopped to think about it, not *should* have realised it. Certainly, if D was convinced there was no risk he could not be *Caldwell* reckless and could at most be negligent but this would be in circumstances where D had consciously considered potential risks arising from his proposed action.

At least for the purposes of objective recklessness it could be argued that the risk had to be both 'obvious',¹⁵ and 'serious',¹⁶ which would have a limiting effect and which would more closely reflect the current ambit of criminal negligence with respect to manslaughter. Even this would nevertheless greatly extend the reach of the criminal law. For example, the Law Commission did not propose an offence of negligently causing damage to property when drafting the Criminal Damage Bill, now the Criminal Damage Act 1971, and similarly, the Criminal Law Revision Committee rejected an offence of negligent injury to the person.¹⁷

The obvious difficulty with the concepts of recklessness and negligence is that the terms are often used interchangeably, even by the courts, with one being defined by reference to the other. As noted above, this should not happen as most of the serious offences cannot be committed negligently. Yet there is substantial evidence that the courts have found it

¹³ G. Williams, *Textbook of Criminal Law*, 2nd Edn., (London: Stevens, 1983) 113, noting that if the model direction is taken in isolation it could be interpreted that any negligence on the part of D is equivalent to recklessness. Yet in negligence the probability of risk and the possible degree of injury are inversely related.

¹⁴ *Ibid.* at 106. This would have left the decision in *R v Stephenson* intact, as suggested here in Chapter 3.

¹⁵ *Caldwell* [1982] AC 341.

¹⁶ *Lawrence* [1982] AC 510.

¹⁷ Working Paper on the Offences Against the Person (HMSO, 1976) cited in G. Williams, *Textbook of Criminal Law* (n 13) 97.

difficult to define, not only intention and recklessness as discussed in the previous chapter, but also criminal negligence. As with the discussion on oblique intention and recklessness in the previous chapter, the synthesis of the fault terms of recklessness and negligence has arisen in cases of homicide. This demonstrates that at both ends of this spectrum, intent/recklessness and recklessness/negligence, the difficulties in definition have emerged because of a desire to appropriately label and punish those who cause death. This is perhaps more striking in the realm of negligence given that negligently causing a person serious physical injury attracts no criminal liability at all. Accordingly, gross negligence manslaughter is something of an anomaly as it is the only common law crime where this fault term will suffice for criminal liability, although negligence liability arises in statutory offences regulating commercial and other activities.¹⁸ Indeed, it may seem strange that criminal responsibility can be attributed where death is caused but not where D, with an equal degree of negligence, causes another serious harm or suffering, a matter some other legal systems address.¹⁹

Historically, there was the view that any lack of care that caused death was sufficient for manslaughter, as is noted in the exposition of Lord Atkin in *Andrews*.²⁰ It was the nineteenth century before there was a move to require a higher degree of fault, that of ‘gross’ negligence.²¹ In *R v Nicholls*,²² when giving guidance on the degree of fault required for a charge of gross negligence manslaughter, Brett J. stated that ‘wicked negligence’ was needed: ‘negligence so great, that you must be of the opinion that the prisoner had a wicked mind, in

¹⁸ A. Ashworth, *Principles of Criminal Law*, 6th Edn., (Oxford: Oxford University Press, 2009) at 185

¹⁹ Ibid. and see J.R. Spencer and Marie-Aimee Brajeux, ‘Criminal Liability for Negligence – a Lesson From Across the Channel?’ [2010] *International and Comparative Law Quarterly* 1; G. Fletcher ‘The Theory of Criminal Negligence: A Comparative Analysis’ (1971) 119 *University of Pennsylvania Law Review* 401.

²⁰ *Andrews v DPP* [1937] AC 576 at 582.

²¹ An example illustrating this shift is *Williamson* (1807) 3 C & P 635, Law Commission, *Criminal Law Involuntary Manslaughter*, Consultation Paper No. 135 (London: HMSO, 1994) 6.

²² (1874) 13 Cox CC 75 D was P’s grandmother and she was held to owe a duty of care to her grandchild which arises after undertaking to care for a helpless and infirm relative.

the sense that she was reckless and careless whether the creature died or not'.²³ This is not helpful as although moral turpitude seems to be essential, which is laudable, adverting to recklessness and carelessness is obfuscating matters by combining two mental states. It has been noted that the courts of the day were not as scrupulous in distinguishing between subjective and objective mental states,²⁴ and, as this work has shown, judges and academics still have some work to do in this regard.

In *R v Doherty*,²⁵ the level of fault required in such cases was examined by Stephen J. in the context of a negligent doctor:

Supposing a man performed a surgical operation, whether from losing his head, or from forgetfulness, or from some other reason, omitted to do something he ought to have done, or did something he ought not to have done, in such a case there would be negligence. But if there was only the kind of negligence that was common to everybody, or if there was a slight want of skill, any injury which resulted might furnish a ground for claiming civil damages, but it would be wrong to proceed against a man criminally in respect of such injury.

Stephen J continued with the example of a drunken surgeon who attended a patient and through inebriation neglected his duty causing the patient's death. This was an example of 'culpable negligence of a grave kind. It is not given to everyone to be a skilful surgeon, but it is given to everyone to keep sober when such a duty has to be performed.'²⁶ The example would fit well with the approach to recklessness advocated in this work as the drunken surgeon would have knowledge of the risk to his patient even if he failed to stop to think

²³ Ibid. at 76.

²⁴ J. Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 *University of Toronto Law Journal* 495 at 497.

²⁵ (1887) 16 Cox CC 306 at 309.

²⁶ Ibid.

about it. Any inadvertence would be evidence of an attitude of disregard towards the patient's interests and could only be displaced by evidence that had he not tried to assist the patient she would have died anyway.

Donovan J in *McKinnon*,²⁷ considered 'recklessness' should be left to bear its full meaning and would cover the case of a high degree of negligence. This would suggest that negligence could perhaps be evidenced by a little carelessness or alternatively where no serious harm is caused. If evidenced by mere carelessness, criminal liability for serious offences should not arise. Minor harms should fall within the remit of the civil law. More importantly perhaps, if recklessness is evidenced by a high degree of negligence then there is no reason why recklessness and extreme negligence should not be considered to be the same concept, one being a synonym of the other. If this is the case, then it follows that 'gross' negligence as a concept can be dispensed with altogether, as all such agents would be adjudged reckless.

In *R v Cato*,²⁸ the judge directed the jury that D could be convicted of manslaughter if he injected the heroin into his friend 'with gross negligence, that is to say, recklessly.'²⁹ On appeal against conviction the Court of Appeal failed to pick up this conflation of the two concepts even though recklessness was still the *Cunningham* subjective test at the time. It was noted later³⁰ that there was no need to mention recklessness for the purposes of gross negligence manslaughter in this case as the court could have relied on Lord Hewart's guidance on gross negligence from *R v Bateman*,³¹ which required 'such disregard for the life and safety of others as to amount to a crime.'

²⁷ [1958] 3 WLR 688.

²⁸ [1976] 1 All ER 260 D and his friend filled syringes of heroin and injected each other several times during the course of a night. His friend died the next morning.

²⁹ C. Wells, 'Perfectly Simple English Manslaughter' (1976) 39 *Modern Law Review* 474 at 476.

³⁰ *Ibid.* at 477.

³¹ (1925) Cr App R 11.

Further evidence of mixing the two concepts is found in *Hyam*,³² where Lord Cross used “reckless” to cover ‘not having reflected on the probable consequences of her act.’³³ As is known, this was in the context of indirect intention and Hyam was convicted of murder, yet inadvertence to risk had traditionally been deemed negligence. This approach may have been a precursor to the inadvertent strand of recklessness in the *Caldwell* Direction a few years later. As discussed in Chapter Three, an actual definition of recklessness was not provided in *Caldwell*, the word was to bear its ordinary English meaning, Lord Diplock recognising a number of states of mind but not providing a synthesising definition.³⁴ This ordinary meaning included being ‘careless, regardless, or heedless’³⁵ of the possible consequences of one’s acts. Each state of mind will be now considered below.

4.2.1. Regardless, Careless, and Heedless

To be regardless could suggest that D was indifferent to the risk he was exposing others to; that D would have continued to act even if he had become aware of the risk. In other words, D has no regard for the interests of others. Alternatively it could equally arise where D was regardless of a risk because he did not believe that any such risk existed. As for carelessness, it is submitted that to be careless is quite different from being reckless, but it is also acknowledged that it is difficult to formulate any all encompassing definitions to differentiate between each of the states of mind. What is contended here is that recklessness is evidenced by the cognitive capacity to have appreciated the risk involved in one’s actions coupled with evidence of a bad attitude to the interests and welfare of others. This view is clearly grounded in character theory.

³² *Hyam v DPP* [1975] AC 55; [1974] 2 WLR 607, discussed above at 3.2.1.

³³ (1974) 50 Cr.App.R 91 at 100; *Hyam v DPP* [1975] AC 55; [1974] 2 WLR 607.

³⁴ A. Halpin, *Definition in the Criminal Law* (Oxford: Hart Publishing, 2004) 78-80.

³⁵ [1982] AC 341 at 351.

Negligence is often equated with carelessness and yet one can clearly be careless without being negligent. Negligence will cover both the thoughtless and also the incompetent who fall below the standard of the reasonable or prudent man. Even taking 'carelessness' as an alternative term, this description is not sufficiently accurate to adequately describe negligence as it would lead to a determination of what was meant by 'carelessness' itself. Carelessness in the legal sense can apply to those who care deeply.³⁶ An honest but negligent mistake will not exculpate an agent where negligence suffices as the requisite mental element. The fact that D is incapable of doing any better is also generally irrelevant, but the capacity to do better should be relevant to the criminal law. The incapacitated and the majority of negligent mistake makers³⁷ should be dealt with under the civil law.

When considering carelessness it is important to distinguish between those who 'did not take care' and those who 'did not care less' about the welfare of others. There is a marked moral distinction between the two, the latter suggesting an attitude of disregard, of selfishness perhaps, of indifference. If, on the other hand, we are simply stating that in a given circumstance D did not take sufficient care, such a reprehensible attitude is not necessarily demonstrated.

'Heedlessness' has been defined in the Law Commission's Draft Code³⁸ and is where D 'gives no thought to whether there is a risk that it exists or will exist or occur although the risk would be obvious to any reasonable person' but this is strikingly similar to part of the *Caldwell* Direction and has additionally been employed as a definition of negligence.³⁹ For

³⁶ G. Williams, *Textbook of Criminal Law* (n 13) 90.

³⁷ Unless they are deemed to be reckless on all the evidence.

³⁸ Law Commission (Law Com No 143), *Codification of the Criminal Law, Draft Code*, in *Law Com No 177, A Criminal Code for England and Wales* (1989).

³⁹ G. Williams, 'The Unresolved Problem of Recklessness' (1988) 8 *Legal Studies* 74 at 75.

example, Glanville Williams also discusses *Caldwell* recklessness in terms of D ‘not giving thought to the risk he is negligently creating.’⁴⁰

The Draft Code defined negligence in terms of a very serious deviation from the standard of the reasonable person, giving it a more restrictive definition than ‘heedlessness’ and placing it at the bottom of the ranking of *mentes reae* (intention, subjective recklessness, heedlessness, and negligence) but although this attempt at definition shows a sign of recognising the need for a distinction between *Caldwell* recklessness, heedlessness and negligence, it has been contended that it is not useful and in practice could cause all the same problems of interpretation, justice and policy as the Model Direction.⁴¹ Whether D’s behaviour is considered reckless, negligent, regardless, careless or heedless can only be determined by a full examination of the circumstances leading to, and at the time, of causing the prohibited consequence.

4.3. Judicial Precedents

In *R v Adomako* it was acknowledged by the Crown that ‘for centuries gross negligence was equivalent to recklessness.’⁴² The definition of gross negligence had been developed primarily in the cases of *R v Bateman*,⁴³ *Andrews v DPP*,⁴⁴ with further guidance being provided by the House of Lords in *Adomako*,⁴⁵ but the decision in *R v Stone*, *R v Dobinson*,⁴⁶ will be included as it also illustrates the blurring of the boundaries of recklessness and

⁴⁰ G. Williams, *Textbook of Criminal Law* (n 13).

⁴¹ G. Williams, ‘The Unresolved Problem of Recklessness’ (n 39) at 75.

⁴² [1995] 1 AC 171 at 178.

⁴³ (1925) 19 Cr App R 8.

⁴⁴ *Andrews v DPP* [1937] AC 576.

⁴⁵ [1995] AC 171; [1994] 3 WLR 288.

⁴⁶ [1977] 2 All ER 341; [1977] QB 354 Stone and his mistress, D, were deemed to have assumed responsibility for caring for S’s sister who died from a combination of anorexia nervosa and their incompetent neglect.

negligence. This evolution will now be subject to a critical examination to determine the similarities and differences between what should be two distinct fault terms.

4.3.1 *Bateman*

In *Bateman*, Lord Hewart CJ opined:

[I]n explaining to juries the test which they should apply to determine whether the negligence [is criminal] ...whatever epithet be used...in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.⁴⁷

There is no specific reference to whether such ‘disregard’ is founded on inadvertence or advertence and it is submitted it could encompass both states. It is suggested that in some cases there will not be much distinction, if any, between disregard and indifference to the welfare of others. Indifference is a term that has often been used in the context of recklessness⁴⁸ so we have a conflation of the two concepts. Perhaps this could be because gross negligence was traditionally viewed as the minimum state of recklessness to cover circumstances where there was a lack of foresight of risk. In this way the lacuna left by a subjective definition of recklessness could be addressed where, in the eyes of the court, policy and justice demanded that the accused was ‘deserving’ of punishment.

⁴⁷ (1925) 19 Cr App R 8 at 11. Here, a doctor attended a patient who was in childbirth and she died.

⁴⁸ See above at 3.3.3.6

4.3.2 Andrews

Lord Atkin in *Andrews*⁴⁹ referred to Lord Hewart's words but developed matters further stating:

...I do not myself find the connotation of mens rea helpful in distinguishing between different degrees of negligence...[A] simple lack of care such as will constitute civil liability is not enough: for the purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case...but it is probably not all-embracing, for 'reckless' suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.⁵⁰

What is clear from this statement is that if the accused appreciates the risk and tries to avoid it by taking inadequate measures, then he is not reckless according to Lord Atkin but can only be negligent. So at least here, there appears to be an identifiable difference between the two concepts. Indifference is not a fundamental precondition to a finding of recklessness.

Although, in general terms, the negligence shown by those who incompetently try to avoid a perceived risk may not be deemed reckless, much should depend on the reasons both for continuing to act and for their incompetence. There could be indifference or callousness evidenced by the fact that sufficient care was not taken to eliminate the risk foreseen.

Additionally inadvertence would not necessarily exclude criminal liability if it demonstrated

⁴⁹ *Andrews v DPP* [1937] AC 576.

⁵⁰ *Ibid.* at 583.

criminal disregard for others, such as ‘the grossest ignorance or the most criminal inattention.’⁵¹

4.3.3 *Stone and Dobinson*

Lord Atkin’s statement of the law was cited with approval by Lane LJ in *R v Stone, R v Dobinson*,⁵² adding:

*[I]t is clear from that passage that indifference to an obvious risk and appreciation of such risk, coupled with a determination to run it, are both examples of recklessness...Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it.*⁵³

Of course, what separates the cases of *Andrews* and *Stone and Dobinson* is the decision in *Cunningham*, which used the subjective definition of recklessness, requiring D to have foreseen the risk or ‘closed his mind’ to it. It would seem possible that using the phrase ‘indifference to an obvious risk and appreciation of such risk’ was opening the door for the *Caldwell* Direction. It is clear that inadvertence alone is not sufficient but then this is exactly the position of Lord Hailsham in *Lawrence* who stated that the word ‘reckless’ applied ‘to a

⁵¹ [1937] AC 576 at 582, per Lord Atkin.

⁵² [1977] 2 All ER 341; [1977] QB 354 *Stone and his mistress, D*, were deemed to have assumed responsibility for caring for S’s sister who died from a combination of anorexia nervosa and their incompetent neglect.

⁵³ *Ibid.* at 364.

person or conduct evincing a state of mind stopping short of deliberate intention, and going beyond mere inadvertence, or...mere carelessness.’⁵⁴

Furthermore, in *R v Stone, R v Dobinson*,⁵⁵ the conviction for gross negligence manslaughter was based upon ‘gross neglect amounting to reckless disregard’ for the sister’s welfare. The court found culpability could be founded either by indifference to an obvious risk or subjective recklessness. This case, apart from once again failing to distinguish between the concepts of recklessness and negligence, is hard to justify given that both defendants were of low intelligence. They were therefore not indifferent to the sister’s wellbeing, doing their best to try to help her, and it is unlikely that either of them was subjectively aware of the serious risk to her health.⁵⁶ Plainly the court found that foresight of consequences was unnecessary, but it is hard to see how the defendants fell within the guidance from Lord Atkin in *Andrews* upon which the appeal court relied.⁵⁷

4.3.4 *Seymour; Reid*

The next relevant milestone was the House of Lords decision in *R v Seymour*,⁵⁸ where Lord Roskill ruled that recklessness was the most suitable term to signify the level of culpability required for what had previously been termed gross negligence manslaughter.⁵⁹ Given that this case was decided after the decisions of the House in *Caldwell* and *Lawrence* this is not surprising as recklessness now included both the advertent and inadvertent risk taker. What was surprising about this decision was that Lord Roskill, whilst applying *Caldwell/Lawrence*

⁵⁴ [1981] 1 All ER at 978, cited in G. Syrota, ‘A Radical Change in the Law of Recklessness’ [1982] *Criminal Law Review* 97 at 103.

⁵⁵ [1977] 2 All ER 341; [1977] QB 354.

⁵⁶ Under the test for recklessness advanced in this work a conviction could not stand.

⁵⁷ Above, text to note 50.

⁵⁸ [1983] 2 AC 493 a case of causing death by reckless driving.

⁵⁹ A.P. Simester, J.R. Spencer, G. R. Sullivan, and G. J. Virgo, *Simester and Sullivan’s Criminal Law Theory and Doctrine*, 4th Edn., (Oxford: Hart Publishing, 2010) 410.

recklessness, contended that recklessness as to ‘the risk of any degree of harm would suffice.’⁶⁰ By way of contrast, gross negligence manslaughter had generally required a risk of death or at least serious harm,⁶¹ apart from the judgment in *Stone and Dobinson* (above) where Lord Lane suggested that ‘an obvious risk of injury to health’ was necessary. Similarly, the *Caldwell/Lawrence* Direction called for an ‘obvious’ and ‘serious’ risk. Therefore the extensive approach to manslaughter adopted in *Seymour* (the risk of any degree of harm was sufficient) would be too broad to sustain without being subject to amelioration by consideration of capacity and circumstances. This leeway was potentially provided by the House of Lord in *R v Reid*⁶² when holding that Lord Diplock’s Model Direction was not to be followed *ipsissima verba* but should be adapted to the facts of the particular case with consideration of any explanation or excuses offered by the defence as to why D should not be found reckless.

4.3.5 *Prentice and Another, Adomako, and Holloway*

The next development came in 1993 with a group of appeals against conviction for involuntary manslaughter heard together in the Court of Appeal: *R v Prentice and another; R v Adomako; and R v Holloway*.⁶³ The first two defendants, Prentice and Sullman, were doctors who were responsible for administering a drug in the wrong way leading to their patient’s death. Adomako was an anaesthetist whose patient died from hypoxia after a tube enabling him to breathe became disconnected during an operation; and Holloway was an electrician who had wrongly wired a central heating system with the consequence that a man was fatally electrocuted. Each of the appeals was centred upon the question as to the correct

⁶⁰ [1983] 2 AC 493 at 505.

⁶¹ A.P. Simester, J.R. Spencer, G.R. Sullivan, and G.J. Virgo, *Simester and Sullivan’s Criminal Law Theory and Doctrine*, 4th Edn., (Oxford: Hart Publishing, 2010) 411.

⁶² [1992] 3 All ER 673 at 675.

⁶³ [1993] 4 All ER 935.

approach to be adopted for involuntary manslaughter by breach of duty. Traditionally such cases had fallen to be decided on the basis of gross negligence manslaughter in line with *Bateman* and *Andrews* (noted above), but *Seymour* had suggested that recklessness was the preferred test and this meant *Caldwell/Lawrence* recklessness.

The trial judges in the present appeal cases had directed their juries either in terms of the *Caldwell/Lawrence* Model Direction, in terms of gross negligence, or a hybrid of the two, hardly a satisfactory situation. The Law Commission subsequently noted that in cases of involuntary manslaughter, where the death was not caused during the commission of another crime (which is unlawful act manslaughter), it must be shown that D caused the death of another through gross negligence or recklessness, but it was unclear what these fault terms meant or even whether they were describing two separate categories of manslaughter or the same one.⁶⁴

The Court of Appeal attempted to resolve this issue by finding that the test for recklessness applicable to cases of motor manslaughter was not appropriate to involuntary manslaughter by breach of duty, for which the test required was that for determining gross negligence manslaughter. There were four reasons given for adopting this stance, the first being that the ‘wide definition’ of recklessness from *Caldwell/Lawrence* had caused difficulty for the ordinary lawyer and juror who may have felt that the word ‘reckless’ had stricter connotations (presumably accounting for capacity). Similarly the court believed it had caused problems for the courts in cases of involuntary manslaughter that would not have happened had gross negligence been the test.⁶⁵

⁶⁴ Law Commission, Criminal Law *Involuntary Manslaughter*, Consultation Paper No. 135 (London: HMSO, 1994) 5.

⁶⁵ [1993] 4 All ER 935 at 940-941.

The second reason centred around the perceived difficulty that the *Caldwell/Lawrence* Direction on recklessness specifically referred to circumstances where the defendant himself had created the relevant risk, Lord Diplock stating that a person would be reckless if ‘(1) he does an act which in fact creates an obvious risk ... and (2) when he does that act...’⁶⁶ The problem that follows from a literal approach to this wording is that many of the cases of involuntary manslaughter, other than motor manslaughter, arise not because of D’s commission of an action, but rather because D failed to act to prevent harm when he was placed under a legal duty to act. The Court of Appeal observed that breach of duty cases involving doctors are in a different category as the risk to the patient’s health is already present and this is what causes the doctor to assume the duty of care with consent, often in an emergency situation.⁶⁷ Accordingly, it seemed that the *Caldwell/Lawrence* Direction, due to its formulation, could only apply to cases of commission, leaving omissions to be dealt with utilizing the requirements for establishing gross negligence. This is a cogent argument but it must be said that given the acceptance of their Lordships that Lord Diplock’s Direction was not to apply *ipsissima verba*, this was hardly an insurmountable hurdle.

The third reason was also related to the exact wording of the Model Direction; the ‘obvious’ risk referred to in the Direction meant that the risk would be obvious to the ‘ordinary prudent individual.’ In cases where a breach of duty arises the defendant is often an expert in his field and would therefore appreciate risks, or should appreciate risks, which the ordinary prudent person may not. Again, this is another valid argument, but only if we adhere to the exact wording of the Direction; it could easily be modified to take account of this factor. Where a defendant has special knowledge or expertise and therefore should identify a risk that would not be obvious to the ordinary prudent man, he could still be caught by the

⁶⁶ *R v Caldwell* [1981] 1 All ER 961 at 967.

⁶⁷ [1993] 4 All ER 935 at 943, per Lord Taylor.

subjective part of the Model Direction, rather it was the objective limb of the test that was satisfied by reference to the ordinary prudent person so that the inadvertent risk taker was judged by reference to common sense rather than specific expertise.⁶⁸

It would, therefore, only be necessary to modify the objective limb of the Direction ('has not given any thought') to make it clear that the capacity, knowledge and skill of the accused is to be taken into consideration. In this way, a doctor could be judged by the standard of a doctor with similar training and experience, an electrician with a competent electrician, etc.

Applying this proposition to Prentice and Sullman, as neither doctor was familiar with chemotherapy drug administration and only Sullman had experience of performing lumbar punctures, combined with other mitigating factors, neither would be deemed reckless.

In the Court of Appeal, Lord Taylor found that on a literal interpretation of the *Caldwell/Lawrence* Model Direction such factors could not be considered, whereas a jury could take them into account when deciding if their negligence was gross.⁶⁹ This was arguably only an accurate statement of the law if Lord Diplock's Direction in *Caldwell* had to be taken *ipsissima verba*, yet the House of Lords in *Reid*⁷⁰ had already ruled that this was not the case, a point already noted by the appellate court in this case. Also, the version of the Direction given in *Lawrence*⁷¹ expressly allowed for such factors to be taken into consideration. It is difficult to see why the court then decided to ignore the guidance from *Reid* after citing it; presumably it was because of the problems the appellate courts had faced with the ambiguity in Lord Diplock's judgments. It is respectfully submitted that the court must have misunderstood the effect of the *Lawrence* Direction, as the Direction clearly

⁶⁸ As discussed above at 3.3.3.1.

⁶⁹ [1993] 4 All ER 935 at 949.

⁷⁰ [1992] 3 All ER 673 at 675.

⁷¹ [1981] 1 All ER at 982.

allowed evidence to be adduced to show why D should not be deemed reckless.⁷² Lord Diplock's guidance suggested that when the jury is satisfied that D created 'an obvious and serious risk' by his conduct, they 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.*⁷³

An application of this Direction to the facts of *Stone and Dobinson*⁷⁴ would find the limited capacity of the defendants to be exculpatory. Similarly, an explicitly modified objective limb of the Direction, as advocated above, or a contextualised version as suggested by their Lordships in *Reid*,⁷⁵ would have the same effect. Yet applying the test of gross negligence to these defendants resulted in their conviction!

The final reason for choosing gross negligence over recklessness was with regard to the situation where D has foreseen a risk and tries to eliminate it in an incompetent manner.

Technically, a person technically was not covered by the Model Direction unless he realised he had not entirely eliminated the risk before acting and he would fall within the perceived lacuna.⁷⁶ If he really thought he had eliminated the risk entirely, D would still be caught by the test for gross negligence. As was noted in Chapter 3, it is doubtful that the lacuna ever existed,⁷⁷ and it is possible under the approach to recklessness advocated in this work that in such circumstances D could be deemed reckless in choosing to eliminate or avoid the risk in the way that he did, or alternatively he could be simply negligent because he did his

⁷² Discussed in Chapter 3 at 3.3.3.5.

⁷³ *Lawrence* [1981] 1 All ER at 982.

⁷⁴ [1977] 2 All ER 341; [1977] QB 354.

⁷⁵ [1992] 3 All ER 673 at 675.

⁷⁶ See discussion of the apparent lacuna in Chapter Three, above, at 3.3.3.1. See also B. Mitchell, 'Being really stupid: the meaning and place of gross negligence in English criminal law' (2002) *Coventry Law Journal* 12.

⁷⁷ At 3.3.3.1.

incompetent best and honestly thought he had done enough to prevent harm. In the latter case liability would not be justified.

Having held that gross negligence was the appropriate test for cases of involuntary manslaughter by breach of duty, except for motor manslaughter, Lord Taylor found the necessary ingredients of the offence to be (1) the existence of a duty; (2) a breach of this duty causing death; and (3) gross negligence. Preferring not to suggest a standard direction for juries as to what would amount to a finding of gross negligence on their part, his Lordship propounded the following as a non-exhaustive list:

- (a) indifference to an obvious risk of injury to health;*
- (b) actual foresight of the risk coupled with a determination nevertheless to run it;*
- (c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance that the jury consider justifies conviction;*
- (d) inattention or failure to advert to a serious risk which goes beyond 'mere inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address.⁷⁸*

What is clear from these categories is that (a), (b) and (d) were potentially covered by the Model Direction on recklessness. Even (c) would have been accommodated where there was evidence that D was uncertain that he had eliminated the risk entirely as demonstrated by *Chief Constable of Avon and Somerset v Shimmen*.⁷⁹ Where D had sufficient knowledge and skill and his efforts to entirely eliminate the risk were abysmal, it is likely that a jury would deem him to be reckless anyway. In practice a judge or jury is unlikely to find D's version of

⁷⁸ [1993] 4 All ER 935 at 943-944.

⁷⁹ (1987) 84 Cr. App. R 145 discussed in Chapter 3, above, at 3.3.3.1.

events very convincing in such circumstances. In *Reid*, their Lordships were sceptical about the existence of any ‘lacuna’ in the Model Direction, Lord Browne-Wilkinson stating:

[t]here may be cases where, despite the defendant being aware of the risk and deciding to take it, he does so because of a reasonable misunderstanding, sudden disability or emergency which render it inappropriate to characterise his conduct as being reckless.⁸⁰

It is therefore a matter of logic that where D unreasonably decides he has eliminated such a risk he is deemed reckless,⁸¹ unless there is evidence to rebut that presumption.

The appeals against conviction of all the defendants, apart from Adomako, were allowed.⁸²

Adomako was an experienced anaesthetist monitoring a patient during an eye operation when a tube to a ventilator allowing the paralysed patient to breathe became disconnected. Several of the machines the patient was connected to would have registered that the patient was no longer breathing but Adomako failed to notice. There was evidence that he had left the room on two different occasions when he should have been at the side of his patient, but the defendant denied this. The prosecution also alleged that the defendant had turned the ventilator alarm off with a key when he left the room to get a drink. The ventilator alarm was working when it was later tested leaving no evidence as to why it did not go off. What was evident was that the defendant took no remedial steps to help the patient for at least three minutes after the disconnection and after this he made the wrong diagnosis. Further evidence was adduced to the effect that any competent anaesthetist would have recognised the problem within 15 seconds.

⁸⁰ [1992] 1 WLR 793 at 819.

⁸¹ L.H. Leigh, ‘Liability for Inadvertence: A Lordly Legacy?’ (1995) 58 *Modern Law Review* 457 at 466.

⁸² Holloway’s conviction was quashed because of the misdirection by the trial judge, the Court of Appeal stating that had the jury been given a gross negligence direction, there may well have been enough evidence for a conviction.

Lord Taylor, in the Court of Appeal, considered this case to be an example of the problems that can arise if Lord Diplock's Direction is given to the jury.⁸³ If a defendant is reckless where he has failed to give any thought to an obvious and serious risk then a jury would convict Adomako readily on the facts. Once the defendant realised there was a serious risk his response was grossly negligent, circumstances not within the formulation of Lord Diplock's Direction but covered by Lord Atkin's *dicta* in *Andrews*.⁸⁴ This is a fair point, given the courts' interpretation of the Direction, but the defendant here must have realised that he had not done enough to eliminate the risk and would still technically be caught. He would be convicted under a modified direction on recklessness too providing his conduct showed an undesirable attitude towards his patient's care. In his defence, he may have submitted that he was overtired as he had been on duty till 3am, sleeping at the hospital, and had been back on duty at 7am. This argument was not pursued and would hardly be exculpatory as it may have convinced a jury he was reckless to assist with the operation when he was exhausted.

With regard to *Holloway*, the trial judge had directed the jury in terms of the *Caldwell/Lawrence* Direction on recklessness. As the defendant had never thought there was a serious risk to the occupants of the house he clearly fell within its scope. Although the jury were told to take account of the defendant's explanations as to why he failed to identify the risk, as far as the Court of Appeal were concerned, once that state of mind was confirmed (D giving no thought to the risk) any explanations were superfluous – the state of mind was already made out and could not be altered by the reasons why it occurred. This was important as it justified adopting gross negligence rather than recklessness as the correct approach; questioning why there was a lack of awareness of the risk would be central to a

⁸³ [1993] 4 All ER 935 at 953.

⁸⁴ [1937] AC 576, above, text to note 50.

finding of gross negligence when ‘examining the degree of negligence of a skilled man exercising his trade.’⁸⁵ If D’s reasons as to why he should not be deemed reckless are redundant in the *Lawrence* formulation of the Model Direction, it is not clear why they were specifically included in it⁸⁶ and it is respectfully submitted that the Court of Appeal erred in this respect.

Adomako was granted leave to appeal by the House of Lords on the question of whether a direction to the jury on gross negligence manslaughter was sufficient without reference to the test for recklessness as formulated in *Lawrence* or as adapted to the circumstances of the particular case. The House of Lords rejected defence counsel’s cogent arguments that a sole test of negligence was inapt because it could mislead a jury into thinking it equated with the civil test, adding the further point that the term “gross” is unhelpful. This is because the epithet does not provide a mental element and if it is there to signify that a jury must consider both the seriousness of the degree of negligence and a bad attitude on the part of the defendant, it needs greater elucidation.⁸⁷ As an alternative, recklessness meets these objections and it seems that the most influential factor for the court in rejecting recklessness in favour of gross negligence was purely because of the difficulties the *Caldwell/Lawrence* formula had caused since its emergence, rather than for any other reason. These difficulties were not simply attributable to the lack of clarity in Lord Diplock’s judgments but more specifically were the result of the poor judicial reasoning and application that followed in their wake.

⁸⁵ [1993] 4 All ER 957.

⁸⁶ In *Lawrence*, Lord Diplock stated ‘If satisfied that an obvious and serious risk was created by the defendant...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’. [1981] 1 All ER 974 at 982.

⁸⁷ [1995] AC 171 at 175.

Counsel for the Crown in *Adomako* argued that the Model Direction on recklessness is only ‘really applicable’ where D creates the danger or is present when it arises,⁸⁸ and the Direction was almost impossible to apply to cases of omission, presumably because of the exact wording of its formulation, a matter already dealt with above. *Adomako* was present when the tube enabling his patient to breathe became dislodged so the Direction would be applicable to his case. The danger arose from the disconnection of the endotracheal tube, not from any pre-existing life threatening medical condition. Therefore *Adomako* was clearly present when the danger arose.

The House of Lords agreed with the Court of Appeal’s decisions to reject the *Seymour* objective recklessness approach to manslaughter and with the reinstatement of gross negligence as the appropriate fault term for culpability in all such cases of involuntary manslaughter.⁸⁹ For Lord Mackay, once a duty of care and causation were established the question for the jury was whether ‘having regard to the risk of death involved’ D’s conduct was ‘so bad in all the circumstances’ as to amount to a crime.⁹⁰ His Lordship recognised that there is circularity in the test: D can be convicted of a crime if the jury find his conduct is criminal; but Lord Mackay found this acceptable.⁹¹ Elsewhere, a more appropriate formulation has been advanced: the real issue for the jury is not whether D’s conduct was so bad that it was criminal, but rather ‘whether it is bad enough to be condemned as the very grave crime of manslaughter and punished accordingly’.⁹²

⁸⁸ *Ibid.* at 178.

⁸⁹ [1995] 1 AC 171.

⁹⁰ *Ibid.* at 187.

⁹¹ *Ibid.*

⁹² D. Ormerod, *Smith & Hogan Criminal Law Cases and Materials*, 9th Edn, (Oxford: Oxford University Press, 2006) 647.

Lord Mackay in *Adomako* further opined that it is perfectly appropriate to use the epithet ‘reckless’ in these cases but in the ‘ordinary connotation of that word’⁹³ as used, for example, in *Stone and Dobinson*⁹⁴ and *R v West London Coroner, Ex parte Gray*.⁹⁵ The difficulty with this suggestion is that it may well reintroduce uncertainty and confusion, a problem that the appellate courts were keen to redress by adopting a single test applicable to all cases of this branch of involuntary manslaughter. Apart from this, *ordinary* meanings can lack precision and clarity as we can all *know* what a term means, but actually there is the danger that we may all be thinking it means something slightly different.

Following *Adomako* it was clear that an opportunity to simplify the law in this area had been bypassed as it had been thought that all criminal liability for inadvertence was subsumed with recklessness, as properly understood.⁹⁶ Instead two separate forms of liability for inadvertence coexisted, gross negligence for manslaughter and recklessness for other crimes. What then fell to be examined was whether there was any substantial difference in these two fault terms. The Court of Appeal in *Adomako* had differentiated between motor manslaughter where *Seymour* (and hence *Caldwell/Lawrence* recklessness) would apply and other manslaughters; and further between manslaughters where a duty of care existed to the victim and those where a duty was absent.

These distinctions were not approved by the House of Lords who desired a sole test for all forms of this type of involuntary manslaughter. Now the test was to be that for gross negligence, it was initially unclear as to the extent of the risk involved, was it a risk of death or would a lesser risk suffice? The House of Lords in *Adomako* had not dissented from the

⁹³ *Ibid.*

⁹⁴ [1977] 2 All ER 341; [1977] QB 354.

⁹⁵ [1988] QB 467.

⁹⁶ L.H. Leigh, ‘Recklessness after *Reid*’ (1993) 56 *Modern Law Review* 208.

Court of Appeal's decision in this case:⁹⁷ a risk of injury or death.⁹⁸ This would mean that the test was just as broad as that for reckless manslaughter in *Seymour* (the risk of any degree of harm), and not as restrictive as *Caldwell/Lawrence* (an obvious and serious risk). Subsequently, *R v Gurphal Singh*⁹⁹ and *R v Misra*¹⁰⁰ confirmed that a risk of death was required.

Lord Mackay's acknowledgement that a judge may use the term 'reckless' in his guidance to a jury in this type of case with the meaning used in *Stone and Dobinson* and *R v West London Coroner, Ex parte Gray* is a further complication. It has been contended¹⁰¹ that Lord Lane's reference in *Stone* to indifference to an obvious risk or foresight of the risk is reminiscent of the recklessness directions that the House was now seeking to avoid. In *Ex parte Gray* the judgment is consistent with both *Lawrence* and *Seymour*.¹⁰²

Continuing with reckless manslaughter, based upon the *Caldwell/Lawrence* Direction as modified by *Reid*, would have been a better option. This could have eliminated the need to establish that D owed his victim a duty of care,¹⁰³ a requirement for gross negligence; although such a requirement would be necessary to maintain limited criminal liability for omissions in order to uphold personal autonomy. Further, maintaining reckless manslaughter would have been a more appropriate determination given that the offence, in the *Cunningham* subjective sense, still exists¹⁰⁴ where D acts in what would be a lawful way (were it not reckless) knowing that there is a high probability that he will cause serious injury but where

⁹⁷ L.H. Leigh, 'Liability for Inadvertence: A Lordly Legacy?' (n 81).

⁹⁸ [1994] 3 WLR 288 at 296.

⁹⁹ *R (on the application of Gurphal) v Singh* [1999] Crim LR 582 a maintenance man owed a duty of care to an occupant of a lodging house who died as a result of carbon monoxide poisoning from a defective gas fire.

¹⁰⁰ [2004] EWCA Crim 2375. Two doctors failed to notice a patient had developed toxic shock syndrome.

¹⁰¹ L.H. Leigh, 'Liability for Inadvertence: A Lordly Legacy?' (n 81).

¹⁰² *Ibid.* at 460.

¹⁰³ B. Mitchell, 'Being really stupid: the meaning and place of gross negligence manslaughter in English criminal law' (2002) *Coventry Law Journal* 12.

¹⁰⁴ Whether, where reckless is charged, a lesser degree of risk will suffice is not clear.

he does not see it as a virtual certainty.¹⁰⁵ As the contrary position was adopted, it would have been far more sensible for the House to have erred on the side of caution if the test had to be one of gross negligence, and to have ruled that the epithet ‘reckless’ should be avoided altogether in a judge’s direction in this type of case.

Alternatively, a pragmatic solution to any confusion would have been to hold that recklessness required advertence.¹⁰⁶ This occurred nearly a decade later, not in *R v G & R*¹⁰⁷ as subjectivists may have hoped, but in *Attorney-General’s Reference (No 3 of 2003)*.¹⁰⁸ It is not the solution advocated in this thesis as it is contended here that a capacity based modification to the *Caldwell/Lawrence* Direction would have been a preferable alternative to gross negligence. A broader, capacity based approach to recklessness, taking into consideration D’s cognitive capacity and knowledge,¹⁰⁹ and *why* D failed to see the risk or continued to act despite his appreciation of it, is advocated. If such an examination reveals that D’s conduct displays a bad character, liability could lie. As far as the capacity of D is concerned, where there is evidence of incapacity exculpation will be dependent upon the extent to which such incapacity is manifest in the circumstances and the extent to which this is fault-free.¹¹⁰

The only remaining obstacle to using a version of the Model Direction on recklessness to cover all liability for inadvertence, except where statute declared otherwise and required a purely objective test, would be adapting it to cover liability for omissions. It is proposed that

¹⁰⁵ D. Ormerod, *Smith & Hogan Criminal Law Cases and Materials* (n 92) 659.

¹⁰⁶ L.H. Leigh, ‘Liability for Inadvertence: A Lordly Legacy?’ (n 81) at 460.

¹⁰⁷ [2004] 1 AC 1034.

¹⁰⁸ [2004] EWCA Crim 868, a case where the defendants were both police officers who had arrested V after V had received hospital treatment. V was handcuffed and placed face down in the custody suite, developed breathing problems and died. Recklessness now requires advertence unless statute specifies otherwise.

¹⁰⁹ German law has a broader, capacity based approach to recklessness; J. R. Spencer and A. Pedain, ‘Strict Liability in Continental Criminal Law’, in A. P. Simester (ed.) *Appraising Strict Liability* (Oxford: Oxford University Press, 2005).

¹¹⁰ L.H. Leigh, ‘Liability for Inadvertence: A Lordly Legacy?’ (n 81) at 465.

a person will be deemed reckless for failing to act if he has a legal duty of care towards another and is, or should be, aware of a serious and obvious risk to their welfare and yet fails to act to prevent or ameliorate harm. Therefore a person may be deemed reckless where:

(1) he fails to act when there is an obvious and serious risk of death or serious harm to another when he under a legal duty to that other person, and

(2) 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 ignored it or tried to eliminate it in a wholly incompetent manner; and

(3) if satisfied that an obvious and serious risk in such circumstances has not been considered or is dealt with in a wholly inappropriate manner by the defendant, the jury are entitled to infer that he has the state of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives which may displace the inference.

(3)(i) evidence of a general or specific lack of capacity in the circumstances may be exculpatory;

(3)(ii) evidence of a reprehensible attitude or other moral failing will not displace the inference.

On the one hand, such guidance would extend inadvertent liability to causing someone serious injury¹¹¹ making it apparently broader than the test for gross negligence which now requires a risk of death. On the other hand, it is more restrictive in that without evidence of a reprehensible attitude criminal liability will not be established. The extension of liability to cover an obvious risk of serious bodily harm will provide some symmetry with the law of murder as it is submitted that it is hard to justify liability for death whilst not providing a

¹¹¹ Bringing English law in to line with our Continental neighbours and the USA, see G. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (1971) 119 *University of Pennsylvania Law Review* 401; J. Spencer and M. Brajeux 'Criminal Liability for Negligence – a Lesson from Across the Channel?' [2010] *International and Comparative Law Quarterly* 1.

criminal sanction for someone who may cause irreparable harm such as tetraplegia. It is also in line with recommendations made by the Criminal Law Revision Committee¹¹² and the draft Code.¹¹³

The Law Commission, in its proposed reforms of involuntary manslaughter,¹¹⁴ has opted to abolish common law involuntary manslaughter and replace it with the offences of reckless killing¹¹⁵ and killing by gross carelessness.¹¹⁶ It is submitted here that the first of these, reckless killing, has the same defect as the draft Code's definition of recklessness; it fails to make clear who decides whether the risk is a reasonable one to take. Lamentably, it also departs from the Code's attempt to restrict the grievous bodily harm rule to circumstances where D was aware that his intention to cause serious harm might cause death.¹¹⁷ The proposed offence of killing by gross carelessness will be satisfied where a person causes the death of another if:

- (a) *a risk that his conduct will cause the death or serious injury would be obvious to a reasonable person in his position;*
- (b) *he is capable of appreciating that risk at the material time; and*
- (c) *either –*
 - (i) *his conduct falls far below what can reasonable be expected of him in the circumstances; or*
 - (ii) *he intends by his conduct to cause some injury or is aware of, and unreasonably takes, the risk that it may do so.*¹¹⁸

¹¹² Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person* (1980) (Cmnd 7844).

¹¹³ Clause 55(c), *A Criminal Code for England and Wales* (n 38).

¹¹⁴ Law Commission, Law Com No 237, *Involuntary Manslaughter* (1996).

¹¹⁵ Clause 1 - where D is aware of a risk that his conduct will cause death or serious injury.

¹¹⁶ Clause 2.

¹¹⁷ This was the approach cogently advocated by Lord Diplock in *Hyam*, discussed in Chapter 3.

¹¹⁸ D. Ormerod, *Smith & Hogan Criminal Law Cases and Materials* (n 92) 663.

It is clear that this offence not only provides a mixture of both advertent and inadvertent conduct, but also encompasses intention, recklessness and negligence. It is too widely drafted and fails to take account of whether D appreciated the risk or why he failed to appreciate it.

It has been suggested that the difference between reckless conduct and negligence is that with the former there is indifference to the risk of harm whereas the latter is a failure to take adequate precautions to ensure a risky act is performed safely,¹¹⁹ but neither indifference to risks nor awareness of them are necessarily the deciding factors. The real difference is that the term ‘reckless’ implies condemnation¹²⁰ and censure in a way that ‘negligence’ does not. ‘Gross’ negligence is synonymous with recklessness and should be deemed to be recklessness, leaving negligence to mean mere inadvertence or everyday carelessness. Once the definition of recklessness is allowed to encompass both the advertent and inadvertent risk taker, the problem with terminology disappears. This change would also bridge the existing gap where a negligent act does not result in death, as if inadvertent recklessness is the test liability could arise where serious physical injury occurs.

Following *Adomako*, it seemed that reckless manslaughter in the objective sense of *Caldwell/Lawrence* had been abolished, however the decision of the Court of Appeal in *R v Lidar*¹²¹ suggested it might not be entirely extinct. As discussed earlier,¹²² the trial judge in *Lidar* had directed the jury in terms of advertent recklessness as to ‘some physical harm, however slight’, adding that ‘mere inadvertence is not enough. The defendant must have

¹¹⁹ H. Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) 87.

¹²⁰ G. Williams, *Textbook of Criminal Law* (n 13) 96.

¹²¹ [2000] 4 Archbold News 3. D drove over V killing him. There had been a fight, not involving D but his companions, and it continued when V was hanging on to the car with his body half inside an open car window of D’s car. When the car gained speed V’s feet caught in the front wheel, he fell, was run over and sustained fatal injuries.

¹²² At 3.3.3.10.

been proved to have been indifferent to an obvious risk of injury to health *or* to have actually foreseen the risk'.¹²³ The main point of interest here is the reference in this direction to proof of indifference as an alternative to foresight of harm. This could be viewed as leaving the way open to a more objective test for recklessness that would reflect both character and 'role' theory. The appellate court's judgment in *Lidar* seems strikingly similar to *Caldwell/Lawrence* recklessness, the only distinction being the reference to indifference rather than giving no thought to the risk.¹²⁴

In *R v Kennedy* (Simon),¹²⁵ Lord Bingham in the House of Lords suggested that only two forms of manslaughter existed, constructive manslaughter (unlawful act manslaughter) or by gross negligence.¹²⁶ Elsewhere, it is argued that manslaughter by subjective recklessness still survives where D kills by a lawful reckless act foreseeing he might cause serious bodily harm¹²⁷ and this seems logical. *Lidar* has been cited as the leading case for this type of recklessness¹²⁸ as the Court of Appeal held that recklessness manslaughter required proof that D foresaw a serious (significant) risk of serious injury or death. If this argument is correct, then as *Lidar* did not just cater for advertence but included inadvertence, in the form of indifference to an obvious risk, it is possible that an objective form of manslaughter could be employed.

¹²³ [2000] 4 Archbold News 3, my emphasis added.

¹²⁴ C. Elliott, 'What Direction for Gross Negligence Manslaughter?: *R v Lidar* and *Attorney-General's Reference (No.2 of 1999)* (2001) 65 *Journal of Criminal Law* 145 .

¹²⁵ [2007] UKHL 38; [2008] 1 AC 269.

¹²⁶ [2008] 1 AC 269 at 274.

¹²⁷ D. Ormerod, *Smith and Hogan's Criminal Law 13th Edn.*, (Oxford: Oxford University Press, 2011) 560. This could not found a conviction for gross negligence manslaughter as foresight of a risk of death is required.

¹²⁸ *Ibid.*

4.4 The Imposition of Criminal Liability for Negligence

There has been much debate as to whether there should be criminal liability for negligence, and if so, to what extent. There are some who are totally opposed to any such liability.¹²⁹ Understandably, those who support the subjective approach to criminal liability would advocate that D is only subject to the sanctions of the criminal law when he has chosen to cause or risk a proscribed harm. As negligent conduct is inadvertent this conscious deliberation is absent, and some would suggest no moral blame is present.¹³⁰ Other subjectivists can still find a place for negligence but restrict it mainly to purely regulatory offences where a high degree of care needs to be ensured coupled with the proviso that the onus should be on the objectivist to demonstrate why, in any given instance, negligent liability is warranted.¹³¹

Economists view the law as a means of providing incentives for citizens to engage in efficient behaviour with no need for further requirements such as mental states.¹³² However, it has been observed that incentives operate in different ways depending on whether an action is intentional:

A law that provides stiff penalties for intentional behaviour gives agents incentives to avoid punishment by abandoning the behaviour itself. A law that provides stiff penalties for inadvertent behaviour...gives agents incentives to abandon or take

¹²⁹ J. Hall, 'Negligent Behavior Should Be Excluded From Penal Liability' (1963) 63 *Columbia Law Review* 632; L. Alexander and K. Ferzan, with S. Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009).

¹³⁰ M. Jefferson, *Criminal Law*, 7th Edn., (Essex, Pearson Education, 2006) 112.

¹³¹ J.C. Smith, 'Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England' [1981-1982] *Villanova Law Review* 1179 at 1214.

¹³² C. Finkelstein, 'The Inefficiency of Mens Rea' (2000) 88 *California Law Review* 895.

*greater care in performing some other activity...that produces the conduct or result the law wants to discourage.*¹³³

Whilst that may well be the case in most circumstances, a general liability for negligence would have the effect of greatly restricting the day to day activities of citizens if they chose to abandon certain activities and, generally speaking, people do their best to take care but sooner or later we all make mistakes. For the most part we are fortunate that no harm is caused by our inadvertent errors. Where harm does occur it can be compensated by insurance or civil liability in most instances. Generally people do their best to avoid causing harm for its own sake, *simpliciter*, or because they want to avoid financial repercussions, and not because causing such harm attracts criminal liability for negligence.

Where D is found negligent it is because his conduct is deemed to fall below, or in some cases grossly deviate from, the standard expected of the reasonable man. This requirement of reasonableness is designed to serve as a balance for competing legal interests: those of the particular defendant and those of society.¹³⁴ By focussing on the comparator of this hypothetical reasonable man the motives, intentions, attitudes, etc., which underpin the defendant's conduct are largely irrelevant, which has the potential for unfairness. As a result of this objective approach it has been contended that where D is subject to a negligence-based conviction, such 'judgements of blame are not moral judgements of action *per se*. Neither are they judgements of persons. Rather, blame combines person with action.'¹³⁵ The alternative view here is that negligent conduct is a moral judgement of blame of both the behaviour and the agent, but this does not equate with establishing criminal liability. This is

¹³³ Ibid. at 899.

¹³⁴ A.P. Simester, 'Can Negligence be Culpable?' (n 6) 85.

¹³⁵ Ibid. at 87-88.

because, where there are negligence-based convictions, it can be very hard to distinguish between simple mistakes and accidents for which civil liability might be more appropriate, and instances where an agent's stupidity, disregard for others, lack of expertise or arrogance may deservedly attract criminal sanction.

It is accepted that there are two main elements to criminal law, namely harm and culpability. The latter is not established just because D caused harm but because that harm was done culpably, 'even a dog distinguishes between being kicked and being stumbled over.'¹³⁶

*Some people are born feckless, clumsy, thoughtless, inattentive, irresponsible, with a bad memory and a slow "reaction time". With the best will in the world, we all of us at some times in our lives make negligent mistakes. It is hard to see how justice (as distinct from some utilitarian reason) requires mistakes to be punished.*¹³⁷

Similarly, it has been posited that 'stupidity' is not an appropriate basis for serious offences.¹³⁸ Obviously these are forceful arguments and it must be said that where an isolated incident of accidental harm is caused of a minor nature, punishment would be an inappropriate response, as it would be a case of taking a sledgehammer to crack a nut. Where a person has the capacity to avoid causing harm but fails to exercise it and serious harm results, or where persistent minor harms are caused by the same person, it raises the question of whether the offender has any thought for the welfare of others. In such circumstances it would be wrong to consider that such a person automatically lacks culpability.

¹³⁶ A. Ashworth, 'Is the Criminal Law a Lost Cause?' (1990) *Law Quarterly Review* 225 at 228.

¹³⁷ G. Williams, *Criminal Law: The General Part*, 2nd Edn., (London: Stevens, 1961).

¹³⁸ B. Hogan, 'The Mental Element in Crime the Law Commission's Report No 89' [1978] *Criminal Law Review* 593.

An alternative view is that liability for negligence can be justified on utilitarian grounds in that it acts as a deterrent in general, even if not on an individual basis.¹³⁹ Where the harm caused is serious and the risk of harm is an obvious one, failure to think about or recognise this risk can be as culpable as where D perceives a risk. Often the fault can lie in an agent's failure to notice a particular consideration is relevant.¹⁴⁰ In such circumstances the debate could more aptly centre on the issue of whether the degree of negligence demonstrated needs to be gross or if any carelessness will suffice. If account were to be taken of any limiting capacities of the defendant this would circumvent the problem with the *Caldwell* Model Direction,¹⁴¹ although it would 'derogate from any principle of contemporaneity, in the sense that the culpable failure to take precautions often pre-dates the causing of the harm,...giving precedence to the doctrine of prior fault'.¹⁴²

Simply allowing for any innate limited capacity of a particular defendant could still leave negligence liability too wide however and for this reason what is advocated here is liability arising from a more objective capacity-based approach to recklessness where there is a serious and obvious risk of harm, which also takes account of *why* D failed to foresee the risk of harm. This would alert people to the fact that they need to take special precautions in certain situations. The remit of liability for negligence would remain firmly rooted in civil law, except where D persistently fails to take due care and causes minor harms. In these latter circumstances it is submitted that D may be subject to criminal sanctions.

When considering criminal liability for negligence, where a person is physically disabled it is assumed that the reasonable man comparator has the same disability but allowances are not

¹³⁹ It could only operate at an individual level if D has the capacity to learn from his mistakes and alter his future conduct, as to work as a deterrent D must be able to reflect on the possible consequences of his proposed action.

¹⁴⁰ A.P. Simester, 'Can Negligence be Culpable?' (n 6) 89.

¹⁴¹ The Direction was interpreted as excluding such considerations; discussed above, Chapter 3.

¹⁴² A. Ashworth, *Principles of Criminal Law* (n 18) 187.

generally made¹⁴³ for those who are cognitively deficient, unless such deficiency would fall within the insanity defence. This is broader than the remit of negligence posited by Hart who advocated that liability can lie if we ask whether D could, given his mental and physical capacities, have taken the precautions that a reasonable man would have taken.¹⁴⁴

Unfortunately this has been taken to suggest that D has the capacity to overcome his own incapacity, and although this can occur, when it does not happen it is said to be not because D has suddenly lost his ‘overcoming’ capacity, but rather that he lacked it.¹⁴⁵ This may not always be the case and in the majority of instances, although D’s conduct may reflect an apparent ‘incapacity’, as Hart¹⁴⁶ was aware, it would generally be the case of an unexercised capacity to take more care. What should be important in such instances is any explanation as to *why* D did not take the necessary precautions. This is something that use of a modified *Caldwell/Lawrence* Direction would permit.

Of the most common offences, few can be committed negligently¹⁴⁷ other than driving offences¹⁴⁸ and homicide. For example, there are no offences of negligently causing criminal damage to property or of negligent injury to the person, and this seems an arbitrary distinction unless we take the view that negligent harms are less deserving of criminal culpability unless they cause death.¹⁴⁹ It may seem strange that a conviction for negligent homicide is possible but not for negligently causing serious injury, as noted above.¹⁵⁰ When

¹⁴³ Although see the discussion of *R v Adomako*, above.

¹⁴⁴ H.L.A. Hart, *Oxford Essays in Jurisprudence*, A.G. Guest (ed.) (London: Oxford University Press, 1961).

¹⁴⁵ G. Williams, *Textbook of Criminal Law* (n 13) 93.

¹⁴⁶ H.L.A. Hart, *Oxford Essays in Jurisprudence*, (n 144).

¹⁴⁷ Although crimes that can be committed negligently are on the increase, O. Quick, ‘Medicine, mistakes and manslaughter: a Criminal Combination?’ [2010] *Cambridge Law Journal* 186.

¹⁴⁸ Road Traffic Acts 1988 and 1991, Road Safety Act 2006; for a discussion of these controversial offences see M. Hirst, ‘Causing Death by Driving and Other Offences: a Question of Balance’ [2008] *Criminal Law Review* 339.

¹⁴⁹ Indeed, it has been noted that medical professionals only appear in the dock when their errors are fatal; see M. Brazier and A. Alghrani, ‘Fatal Medical Malpractice and Criminal Liability’ [2009] *Professional Negligence* 51

¹⁵⁰ At 4.2.

negligence causes serious bodily harm such a distinction is not logical as the consequences for the victim can be a matter of pure luck. It has been argued that extending negligence liability would ‘either strain the overworked resources of the penal system or bring about highly selective and indeed capricious enforcement,’¹⁵¹ which is possible given that juries views may vary as to what the acceptable standards are that need to be maintained for simple negligence, and what amount to ‘gross’ for its more serious counterpart. If any extension of liability required the necessary level of negligence to be tantamount to recklessness, as argued in this thesis, it would militate against such objections.

In the context of the prosecution of medical practitioners for gross negligence manslaughter, a lack of flexibility has been identified with a ‘one size fits all approach’ that fails to adequately distinguish between different medical mistakes, the relevance of moral luck and the vagaries of expert witness testimony.¹⁵² There is clearly a serious issue to be addressed in this regard, especially given that such healthcare professionals are placed under a duty of care by virtue of their profession and are trying to help their patients, often in a highly pressurised environment.¹⁵³ There have been suggestions that either new tailor-made offences should be enacted to cover medically caused death or injury,¹⁵⁴ or, that only reckless doctors should be criminally liable.¹⁵⁵ These professionals should only be prosecuted where their conduct

¹⁵¹ G. Williams, *Textbook of Criminal Law* (n 13) 97.

¹⁵² O. Quick, ‘Medicine, mistakes and manslaughter: a Criminal Combination?’ (n 147).

¹⁵³ M. Brazier and A. Alghrani, ‘Fatal Medical Malpractice and Criminal Liability’ [2009] *Professional Negligence* 51

¹⁵⁴ Such as an offence of endangerment, D. Griffiths and A. Sanders, ‘The Road to the Dock: Prosecution Decision Making in Medical Manslaughter Cases’ in D. Griffiths and A. Sanders (eds.) *Bioethics, Medicine and the Criminal Law: Medicine, Crime and Society* (Cambridge: Cambridge University Press, 2013) 126.

¹⁵⁵ Reckless in the context of advertent recklessness, for example, A. McCall Smith who calls for prosecutions to be restricted to those who are subjectively reckless, in ‘Criminal Negligence and the Incompetent Doctor’ (2009) 1 *Medical Law Review* 336; or recklessness that encompasses inadvertence but requires the manifestation of a vice, see V. Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) 84.

evinces a level of ineptitude that equates to inadvertent recklessness¹⁵⁶ coupled with evidence of a bad character trait.

When looking at criminal negligence more generally, a broader liability has been adopted in other European jurisdictions and under the American Model Penal Code.¹⁵⁷ In Germany, Switzerland and France, for example, there is negligent liability for homicide, battery and arson.¹⁵⁸ Many Continental jurisdictions penalise negligence more liberally than is the practice in England yet hold strict liability,¹⁵⁹ to be a step too far.¹⁶⁰ In England, although the number of strict liability offences has increased particularly over the last few decades,¹⁶¹ liability for negligence (until relatively recently in legal terms) has generally been limited to regulatory offences, and for the only serious offence at common law that could be committed negligently, manslaughter, the requirement is that the negligence must be ‘gross’.¹⁶²

In recent years, a plethora of new statutory offences have been created in England in response to a perceived public dissatisfaction with the lack of sufficiently harsh criminal sanctions

¹⁵⁶ This proposal goes further than A. McCall Smith who calls for prosecutions to be restricted to those who are subjectively reckless, ‘Criminal Negligence and the Incompetent Doctor’ (2009) 1 *Medical Law Review* 336.

¹⁵⁷ G. Fletcher, ‘The Theory of Criminal Negligence: A Comparative Analysis’ (1971) 119 *University of Pennsylvania Law Review* 401; J. Spencer and M. Brajeux ‘Criminal Liability for Negligence – a Lesson from Across the Channel?’ [2010] *International and Comparative Law Quarterly* 1.

¹⁵⁸ G. Fletcher, ‘The Theory of Criminal Negligence: A Comparative Analysis’ (1971) 119 *University of Pennsylvania Law Review* 401 at 403.

¹⁵⁹ For such offences there is no need to establish D was at fault. Fletcher observes that strict liability is viewed as negligence conclusively presumed from the occurrence of harm. This avoids the difficult analytical problems courts encounter when determining whether the appropriate level of liability should be gross negligence, criminal negligence or ordinary negligence. G. Fletcher, ‘The Theory of Criminal Negligence: A Comparative Analysis’ (n 158) at 403.

¹⁶⁰ *Ibid.*

¹⁶¹ A. Ashworth, ‘Is the Criminal Law a Lost Cause’ (n 136).

¹⁶² There are serious statutory offences where negligence, without the requirement that it is gross, will suffice as the fault element, including causing or allowing a child to die by an unlawful act under s.5 Domestic Violence Crime and Victims Act 2004 and public nuisance. It has been proposed that the latter offence becomes a crime requiring recklessness, D. Ormerod, *Smith and Hogan’s Criminal Law*, (n 127) 150.

against those who negligently kill,¹⁶³ creating a total of nine homicide offences,¹⁶⁴ with a fault element lower than gross negligence, most involving driving motor vehicles¹⁶⁵ whilst existing maximum sentences for pre-existing offences have been increased.¹⁶⁶ Unlike some of our European neighbours and North America, we do not subscribe to criminal negligence liability for arson or criminal damage, or for non fatal offences against the person.¹⁶⁷

Although our position may seem lenient in comparison to our European neighbours and the United States with regard to negligence liability, they would view us as more draconian as we have many strict liability offences.¹⁶⁸

4.4.1 Justifying Criminal Liability for Negligence

It is clear that criminal liability for negligence is an issue that divides academic opinion¹⁶⁹ because of the lack of awareness in D's state of mind that accompanies such acts. It has been acknowledged in the discussion of *mens rea* in Chapter 2, that *mens rea* does not necessarily mean a 'guilty mind', but rather the mental state required for the offence, the relevant legal fault. For subjectivists, liability requires a conscious awareness of risk as a minimum.

¹⁶³ J.R. Spencer and M. Brajeux, 'Criminal Liability for Negligence – a Lesson from Across the Channel?' [2010] *International and Comparative Law Quarterly* 1.

¹⁶⁴ If both types of involuntary manslaughter are counted as separate offences.

¹⁶⁵ Sections 1, 2B, 3A, 3ZB Road Traffic Act 1988; s.12A Theft Act 1968; s.5 DVCVA 2004 and corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007.

¹⁶⁶ M. Hirst, 'Causing Death by Driving and Other Offences: a Question of Balance' (n 148).

¹⁶⁷ See, for example, Criminal Code (France) articles 121-3.

¹⁶⁸ We also punish more severely for negligence. In France, for example, if defendants are convicted of negligent homicide or injury, the accepted judicial response is a fine, the stigma of conviction and a suspended custodial sentence; J.R. Spencer and M. Brajeux, 'Criminal Liability for Negligence – a Lesson from Across the Channel?' (n 163) at 23. Indeed, there is much to be said for increasing criminal liability for inadvertence providing this does not extend too far, especially if English courts would adopt a similar method of disposal. A. Leipold suggests that whilst there is nothing immoral with the imposition of criminal liability for negligence, defendants can be punished disproportionately to the harm caused and the blameworthiness of the agent because of a lack of nuanced grading in criminal statutes; 'A Case for Criminal Negligence' (2010) 29 *Law and Philosophy* 455. Further discussion of penology is beyond the scope of this thesis.

¹⁶⁹ G. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (n 158). Fletcher supplies a detailed exposition of criminal liability for negligence in Western legal systems including the United States of America, Russia, West Germany, Switzerland, France and England.

Although intention and recklessness can easily fit into this description, negligence does not necessarily involve a mental state¹⁷⁰ in terms of an active mind being directed towards consideration of risk even though, as noted above in Chapter 3, a blank mind is just as much a description of a state of mind as that possessed by someone who intends a consequence or foresees it as possible.

The main issue for theorists was the question of whether negligence could truly be classified as a form of *mens rea*. This was important for subjectivists who want to attribute some conscious fault to negligent conduct before they can accept that it falls within the maxim *actus non facit reus nisi mens sit rea*.¹⁷¹ If it is accepted that negligence is imposing a purely objective standard, then the oft cited response is that it requires no proof of a subjective (conscious) state of mind¹⁷² and thus it cannot be a form of *mens rea*, but this only holds true if the traditional meaning of *mens rea* is still applied.

As discussed in Chapter 2,¹⁷³ the modern interpretation of *mens rea* is simply the mental state specified for the proscribed act, and if inadvertence suffices as the mental state required, no subjective psychological inquiries need to be made. Furthermore, it appears that the subjectivists' argument is based upon a misunderstanding of earlier writing¹⁷⁴ using the *mens rea* maxim. In one context it was used to argue that a man could not be convicted of larceny without the intent to steal, (a narrow interpretation) yet the maxim was also cited in the

¹⁷⁰ G. Williams, *Textbook of Criminal Law* (n 13) 88.

¹⁷¹ G. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (n 158) at 408-9.

¹⁷² See, for example, the Court of Appeal's judgment in *Attorney-General's Reference (No.2 of 1999)* [2000] 3 All ER 182, which stated that gross negligence was not a form of *mens rea* so that D's state of mind was irrelevant, whilst acknowledging that D's state of mind could be relevant in determining whether or not the negligence was "gross".

¹⁷³ At 2.2.1- 2.2.2.

¹⁷⁴ E. Coke, Third Institute 54, 107 (Brooke Ed. 1797) cited in G. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (n 158) at 411.

context of an analysis of suicide which revealed that an ‘absence of mens rea is the absence of responsibility, not the absence of a particular intention or mental state required by law’.¹⁷⁵ This is a broader interpretation of the maxim and these two different perspectives portray the essence of the debate about whether the criminal law should be morally neutral and value free, or whether it should embrace underlying moral judgments.¹⁷⁶ Following from this, it is suggested that the maxim should relate to a normative standard of culpability, simply that an ‘act is not culpable under the law (*actus non facit reum*) unless the actor is culpable for acting as he did (*nisi mens sit rea*)’.¹⁷⁷ Accordingly, inadvertent criminal culpability is no longer aberrant as a form of *mens rea* as a conscious awareness of risk is not required, only the moral culpability of the actor needs to be determined.

One of the particularly thorny aspects of criminal liability for negligence is whether it is, or should be, entirely objective. Some continental jurists hold that negligence is a subjective standard¹⁷⁸ whereas others argue it is an objective, external standard.¹⁷⁹ What is clear is that whether the standard adopted is a subjective or an objective one, it is purely a matter of policy. In English law, where the fault element is one where simple negligence is sufficient, negligence is proved where D’s conduct falls below that expected of a reasonable person, an objective standard, and evidence of his personal state of mind is no excuse.¹⁸⁰ Where the fault required is ‘gross’ negligence the position is not so clear. In *A-G’s Reference (No 2 of 1999)*¹⁸¹ it was stated that on a charge of gross negligence manslaughter it was unnecessary to produce evidence of the state of mind of the accused. This would suggest that the standard is

¹⁷⁵ Ibid. Fletcher, at 412.

¹⁷⁶ Ibid. at 412.

¹⁷⁷ Ibid. at 414.

¹⁷⁸ Ibid. at 406.

¹⁷⁹ W. Seavey, ‘Negligence – Subjective or Objective?’ (1927) 41 *Harvard Law Review* 1.

¹⁸⁰ D. Ormerod, *Smith and Hogan’s Criminal Law* (n 127) 146.

¹⁸¹ [2000] QB 796.

purely objective. Yet in *Adomako* it was found that all evidence was worthy of consideration as it is useful in determining whether in all the circumstances the negligence in question attains the higher degree of fault categorised as “gross” for this type of involuntary manslaughter. This would suggest that subjectivised elements can be taken into consideration.

The extent to which this objective standard can, or should, be subjectivised is open to debate. Some would argue that the standard can only be objective, an evaluation of what other people would have done in D’s situation. Yet there is evidence that the standard is both objective and subjective: whether the risk was an unjustified one in the circumstances is objective, the subjective element is whether D can be excused for taking that risk. Where an agent has special knowledge or expertise, the comparison is with a reasonable person with that knowledge or expertise.¹⁸² Generally, there is a judicial reluctance to permit general personal incapacities to excuse in favour of efficiency and pragmatism.¹⁸³ Defences would be open to abuse but a failure to recognise such instances results in the criminal liability of the non culpable. There has been an instance where youth was taken into account,¹⁸⁴ but it has been suggested that other characteristics of D should be taken into consideration when they affect his ability to behave as the reasonable person would and when they are not D’s fault.¹⁸⁵

¹⁸² D. Ormerod, *Smith and Hogan’s Criminal Law* (n 127) 148.

¹⁸³ G. Fletcher, ‘The Theory of Criminal Negligence: A Comparative Analysis’ (n 158) at 436.

¹⁸⁴ *R (RSPA) v C* [2006] EWHC 1069 (Admin) where it was held that in determining whether a 15 year old girl was negligent in not seeking veterinary attention for an injured cat, her age should be taken into account.

¹⁸⁵ A.P. Simester, J.R. Spencer, G.R. Sullivan, and G.J. Virgo, *Simester and Sullivan’s Criminal Law Theory and Doctrine*, (n 61)155.

This argument has been advanced before, accompanied by the proposal that liability for inadvertence should also be extended to negligent destruction of property and battery at the same time.¹⁸⁶ These proposals support the position taken in this work for the extension of liability to cover inadvertent conduct that causes serious harm. There are further important considerations to be taken into account when assessing D's culpability for an offence. It is not simply any characteristics that are not his fault that should limit the inquiry, but also why he failed to advert to the risk.

The debate about imposing liability for negligence has been said to represent the crux of the dispute between subjectivists and objectivists,¹⁸⁷ centering on whether conscious or inadvertent culpability meet the requirements of morality and justice. Supporters of the imposition of liability suggest that opponents have mistaken notions of culpability or specific views on punishment and it has been contended that 'crimes of negligence consist of conduct that is blameless in one aspect but quite blameworthy in another.'¹⁸⁸ Where D is 'merely' negligent due to a momentary lapse in concentration or being momentarily distracted, it is easy to see why there is opposition to the imposition of criminal liability as it could happen to any of us. Clearly, there is also no intention to cause harm in such circumstances, nor even foresight of harm, but an intention to do harm is not a prerequisite of criminal responsibility.

¹⁸⁶ G. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' ((n 158) at 437.

¹⁸⁷ J. Gardner and H. Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *Oxford Journal of Legal Studies* 559. However, it could be argued that the debate is more specifically about the tension between subjective and objective themes that underpin English criminal law.

¹⁸⁸ H. Gross, *A Theory of Criminal Justice* (n 119) 419.

When liability for inadvertence is imposed, this makes it more difficult for citizens to live without fear of unexpected criminal charges,¹⁸⁹ the reason why most stigmatic offences require intentional or subjectively reckless wrongdoing. Gardner is quoted, in the context of what he describes as the *mens rea* principle, as stating:

*criminal wrongs should be such that one does not commit them unless one intends or is aware of at least one wrong-making feature of what one is about to do, such that (assuming one knows the law) one is also alerted to the fact that what one is about to do will be of interest to the criminal law.*¹⁹⁰

It would appear from this that Gardner is opposed to criminal liability for negligence and yet when considering his 'role' theory of culpability there is a direct conflict. However, this statement was made with regard to offences of strict liability and should be understood to be restricted to this context. His proposal has been criticised as it would deprive victims of protection and where the interest of a victim is sufficiently important, as with manslaughter, gross negligence can be a defensible *mens rea* fault term.¹⁹¹ It is difficult to see how this argument can bear up to scrutiny, given the offence chosen, as the criminal law cannot protect a victim who is now deceased and it is submitted that having an offence of gross negligence manslaughter is unlikely to have any impact on the number of victims falling foul of it.

Even though negligent harm may result from human frailty and is perhaps something D could not have helped and should not therefore be responsible for, it has been suggested that as D

¹⁸⁹ W. Chan and A.P. Simester, 'Four Functions of Mens Rea' [2011] *Cambridge Law Journal* 381 at 391.

¹⁹⁰ J. Gardner, cited by W. Chan and A.P. Simester, 'Four Functions of Mens Rea' [2011] *Cambridge Law Journal* 381 at 391 from Gardner's 'Wrongs and Faults', in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) 51 at 71.

¹⁹¹ W. Chan and A.P. Simester, 'Four Functions of Mens Rea' (n 189) at 392.

still chose to engage in a particular activity in a certain way he is fully responsible.¹⁹² This is too harsh a position in a system of justice, yet it falls clearly within the realms of Gardner's 'role' theory of culpability. Although Hart¹⁹³ encompassed liability for negligence within choice theory, he restricted its ambit by requiring the capacity of the particular defendant to be taken into consideration, a factor not relevant for Gardner. Pinning responsibility on the grounds that D chose to engage in a particular activity is generally too wide a principle to do justice without further limiting requirements to allow for D's due diligence, or incapacity, to provide a defence.

Sometimes there can be derogations from this principle where the moral balance is in favour of protecting the vulnerable no matter how blameless the offender is. Derogations can be justified in relation to engaging into specific activities such as sexual intercourse but would be much harder to justify if extended to cover going about one's daily business. That is not to say that culpability for inadvertence can never be justified. A system of justice that was totally reliant on subjective *mens rea* to establish criminal culpability would be at odds with society's perception of justice. We do blame people for failing to appreciate risks and causing harm to others; it is establishing an appropriate boundary between advertence and inadvertence that has proven difficult. Indeed, as noted above, it has been posited that one of the reasons why *mentes reae* terms lacked clear definition was to facilitate the 'desire of the judges to achieve particular results in particular cases [which] leads them too often to warp a concept in order to meet the exigency of the moment.'¹⁹⁴ There has been ample evidence of this over the last fifty years.

¹⁹² H. Gross, *A Theory of Criminal Justice* (n 119) 421.

¹⁹³ H.L.A. Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968).

¹⁹⁴ G. Williams, *The Mental Element in Crime* (n 11) 9.

For those who see punishment as linked to the moral desert of the offender, this is achieved by an examination of his unlawful act and his choice to cause harm. This process reveals his character flaws and justifies his punishment; whereas intention and subjective recklessness easily fit this format, negligence generally does not establish the ‘condition of a man’s heart or conscience.’¹⁹⁵ If culpability demands a link to morality for justification, it could be grounded for negligent acts in moral forfeiture, rather than moral desert. An agent’s failure to exercise his capacity to take more care will result in him losing the moral right to complain of state interference with his autonomy.¹⁹⁶

The flaw inherent in the subjectivist position is that conduct can entail unforeseen consequences and it is our conduct that is central to any criminal liability, rather than pure intention or foresight.¹⁹⁷ Contrary to the subjectivist view, there are circumstances in which it can be morally justified to hold agents responsible for consequences beyond those intended or foreseen.¹⁹⁸ Furthermore, the foundations of subjectivism have been shown to be based upon flawed and selective analysis of developments in the criminal law over the centuries. In reality, the criminal law has developed an increasingly ‘sophisticated blend of subjective and objective principles of culpability’¹⁹⁹ and with regard to liability for unforeseen consequences such principles have neither been purely subjective or objective.²⁰⁰

A different argument used against liability for inadvertent conduct is the criminal law’s requirement for voluntariness, for volitional action or inaction, often termed in the

¹⁹⁵ O. Holmes, *The Common Law* (1881) 50 cited by Fletcher, ‘The Theory of Criminal Negligence: A Comparative Analysis’ (n 158) at 417.

¹⁹⁶ *Ibid.* Fletcher, at 417.

¹⁹⁷ J. Horder, ‘Two Histories and Four Hidden Principles of Mens Rea’ (1997) *Law Quarterly Review* 95 at 119.

¹⁹⁸ For example, see J. Horder, ‘A Critique of the Correspondence Principle in Criminal Law’ [1995] *Criminal Law Review* 759.

¹⁹⁹ J. Horder, ‘Two Histories and Four Hidden Principles of Mens Rea’ (n 197) at 100.

²⁰⁰ *Ibid.* at 95.

requirement of a willed bodily movement. Such a requirement would seem to exclude liability for negligence and indeed any inadvertent action. Yet this is to misunderstand what is meant by voluntariness, it does not require the consequences of conduct to be brought about deliberately, rather that the original act itself is deliberate and negligent acts meet this criterion. It is enough, in this context, that the negligent person had the capacity to avoid causing harm; voluntariness does not equate to choice.²⁰¹

Having critically examined the blurring of the distinction between recklessness and negligence in judicial decisions, followed by an analysis of the principles of criminal liability for negligence and the general academic debate as to whether such liability should be permitted, the next issue is to re-examine the theories of culpability to ascertain the extent to which each can justify the imposition of criminal liability for inadvertence.

4.5. Negligence and the theories of culpability

As will be recalled from Chapter Two, there are three main theories of culpability,²⁰² Bentham's utilitarianism,²⁰³ Kant's retributive theory²⁰⁴ of which choice theory is an adaptation, and Hume's character theory.²⁰⁵ It was the latter two leading theories that were put under detailed scrutiny to ascertain their links to *mens rea*. Other theories examined were Gardner's 'role' theory and Horder's proposal based upon agency, and it was argued that a

²⁰¹ G. Fletcher, 'The Theory of Criminal Negligence: A Comparative Analysis' (n 158) at 416.

²⁰² M.D. Bayles, 'Character, Purpose, and Criminal Responsibility' (1982) 1 *Law and Philosophy* 5.

²⁰³ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner Publishing Co., 1948).

²⁰⁴ I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals* (Indianapolis: Bobbs-Merrill, 1965).

²⁰⁵ D. Hume, *Treatise of Human Nature*, ed. L.A Selby-Bigge (Oxford: Clarendon Press, 1888).

synthesis of the character and role theories would provide a theoretical rationale underpinning the limits of criminal recklessness and negligence proposed here.

4.5.1. Negligence and utilitarianism

From Bentham's utilitarian rationale, based on the greatest happiness of the greatest number, it would appear that liability for negligence could be justified on the basis that it would produce conformity to legal standards necessary for the wellbeing of society. Yet this theory is not actually fully compatible with criminal liability for negligence as utilitarianism is a consequentialist theory, grounded on the premise that punishment could only be justified where it would act as a deterrent to others and it could be said that inadvertence to risk could not be deterred by imposition of criminal sanctions for a failure to think. This is simply because it is only when D considers his proposed action that he recognises that he risks breaking legal norms which entail punishment and can be dissuaded from continuing. This argument has been rejected by some²⁰⁶ upon the ground that punishment can act as a general deterrence rather than at an individual level. The financial 'punishment' of civil liability could equally be sufficient to achieve the same level of deterrence without the imposition of criminal sanctions.

4.5.2. Negligence and choice theory

Following Kantian (choice) theory, as people should not be punished if they could not have avoided doing a criminal act, it is apparent that this could be difficult to reconcile with criminal liability for negligence. Unlike two of the other forms of *mens rea* discussed in Chapter Three, intention and advertent/subjective recklessness, negligence lacks conscious

²⁰⁶ M.D. Bayles, 'Character, Purpose, and Criminal Responsibility' (n 202).

awareness of risk. If D is unaware of the risky nature of his conduct and that it is likely to breach a proscribed norm, how can he be deterred from his action? On Kantian principles, a person should only be criminally liable for harm that he is responsible and culpable for bringing about. A person can only be responsible for matters over which he has control and it is only what he chooses to do or causes to happen that he controls.²⁰⁷ In general terms therefore, D will be criminally liable where he has chosen to break the law and has made a conscious choice to bring about a certain consequence or as a minimum, to take the risk that a certain consequence will happen.

This stance is incorporated in the correspondence principle, which postulates that D should only be punished for harm that he knew would happen or where he realised that such consequences could arise from his conduct.²⁰⁸ The alternative position allows for constructive liability where D has caused harm because it can be deemed appropriate to punish for the actual consequences of D's acts, rather than limiting the attribution of blame to results intended or foreseen.

Some choice theorists prefer the term 'defiance' to 'choice' suggesting that only those who consciously choose to act in defiance of legal norms deserve punishment.²⁰⁹ This evidence of defiance is perhaps present where an agent intentionally causes harm or where he sees the risk of harm occurring but continues to act. Those who act negligently can hardly be branded defiant or even necessarily indifferent to the harm they cause. The only exception to this could be where a competent person was persistently careless without any mitigating factors.

²⁰⁷ R.A. Duff, *Criminal Attempts* (Oxford: Clarendon Press, 1996) Chapter 6.

²⁰⁸ C.M.V. Clarkson, *Understanding Criminal Law*, 4th Edn., (London: Sweet and Maxwell, 2005) 164.

²⁰⁹ J. Hampton, 'Mens rea' (1990) 7 *Social Philosophy and Policy* 1.

It is because of such issues that negligence, for the majority of choice theorists, would not be sufficient to ground criminal responsibility.²¹⁰ For them advertence is the key to criminal responsibility. Subjectivists support this rationale maintaining that a lack of awareness of the risk of harm makes it impossible for D to make a 'rational and voluntary choice' to act in a manner that risks breaking the law.²¹¹ The other important principle for choice theorists is belief; a person should only be responsible for what they believed they were doing in the circumstances they believed to exist at the time rather than for what actually did happen or what the actual circumstances turned out to be.²¹²

From the standpoint that only chosen conduct attracts responsibility and culpability, even if D's actions create an obvious risk of harm to others and that harm results, D will not be liable unless he was aware of the risk himself. The advantage of this approach to culpability is that it recognises and respects individual autonomy. The citizen is able to exercise control over his own life knowing that he will only be liable to criminal sanctions if he chooses to break the law and he has the power to determine for himself whether or not to do so. Liability for inadvertence, (inadvertent recklessness, negligence and crimes of strict liability), is problematic for choice theory as relevant offences can be committed without any conscious choice to break the law.

On a traditional Kantian view, liability for negligence would only lie where D had an opportunity to become aware of the risk. Hart²¹³ managed to justify including negligence within choice theory by arguing that negligent behaviour could be encompassed where D had

²¹⁰ R.A. Duff, *Criminal Attempts* (n 207) 149.

²¹¹ P. Arenella, 'Character, Choice and Moral Agency: the Relevance of Character to our Moral Culpability Judgments', (1990) 7 *Social Philosophy and Policy* 59 at 70.

²¹² Such a principle appears to be reflected in the definition of recklessness found in the Draft Criminal Code for England and Wales, cl. 18(c) of the Criminal Code Bill (n 38), discussed in Chapter Three.

²¹³ H.L.A. Hart, 'Negligence, Mens Rea and Criminal Responsibility' in *Punishment and Responsibility Essays in the Philosophy of Law* (n 193) 136-157.

the capacity to act like a reasonable person. On this view D would be culpable where he possessed both the physical and moral capacity to abide by the law and had a fair opportunity to avoid criminal behaviour.²¹⁴ This position originally had support, but it has since been rejected because ‘it shifts the touchstone of responsibility from choice to capacity’ ... ‘relegating choice to a subsidiary role.’²¹⁵ This is because giving capacity such prominence would mean that there were two ways responsibility could be grounded based upon the agent’s capacity: he could choose to do wrong, or be inadvertent.

As an alternative, it has been posited by Moore that ‘what makes the intentional or reckless wrongdoer so culpable is not unexercised capacity’ but his choice not to exercise it.²¹⁶ Horder challenges Moore’s criticism of Hart’s approach to negligence as an inconsistency in Moore’s own argument because ‘the moral capacity to avoid wrongdoing, which ... Moore regards as an essential prerequisite for a culpability judgment, is the very basis...’ of liability for negligence as Hart realised.²¹⁷ This criticism is clearly correct, but that is not to say that all those who behave negligently would necessarily be regarded as morally blameworthy. In situations where the conduct is negligent it is surreal to suggest that a conscious choice has been made not to exercise one’s capacity. It is the absence of thought that is the hallmark of negligence.

It seems strange to suggest that a person can in any real sense ‘choose’ to behave in a negligent manner²¹⁸ as negligence connotes inadvertent action and if no thought is being given before acting in a particular way how can the subsequent act be ‘chosen’?²¹⁹ If

²¹⁴ Ibid.

²¹⁵ M. Moore, ‘Choice, Character, and Excuse’ (1990) 7 *Social Philosophy and Policy* 29 at 57.

²¹⁶ Ibid.

²¹⁷ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (n 24) at 200.

²¹⁸ M. Moore, ‘Choice, Character, and Excuse’ (n 215) at 56.

²¹⁹ R.A. Duff, *Criminal Attempts* (n 207) 149.

criminal liability should only lie where D is both responsible and culpable, for subjectivists this arises only where D has control which is limited to those things he chooses to do or causes to happen. This subjective view limits the influence of chance and luck that should be irrelevant to criminal liability.²²⁰ This is too restrictive however. A person can in a sense ‘choose’ to behave negligently in that he can consciously choose not to do a risk assessment before he acts, although this will be rare. Also, he could consciously undertake a risky activity in the knowledge that he may lack the relevant skill or expertise to undertake it or know that if unforeseen risks materialise he would lack the ability to deal with them. If this was the case, D could be properly deemed to be reckless and not negligent.

It is accepted that there is merit in the argument that usually one does not truly ‘choose’ to be inadvertent but if we accept that we can control our actions then we must accept that we can and do normally choose to take care to avoid harming others. This is even more important when we are engaging in activities that we know have the potential to cause harm, especially when serious harm may occur. This is not to suggest that on occasions when we do not consciously stop to consider possible risks that we are necessarily choosing not to do so but the more serious and obvious the risk, the more thought is required. It is acknowledged that the instances where the majority of negligent actors consciously choose not to undertake a risk assessment will be rare unless the circumstances clearly demand careful consideration, and where such a choice is made it is possibly an example of wilful blindness. The essential difference between intentional or subjectively reckless conduct and negligent acts is that the former are seen as wrongdoing, the latter as simply doing wrong.

²²⁰ Ibid. at 147-149.

The basis of choice theory, as enunciated by Hart, is that an agent should not be punished unless he had both the capacity and a fair opportunity to abide by the law.²²¹ His proposal for including the inadvertent risk taker as criminally culpable would allow individual capacity and circumstances to be taken into account. Accordingly, it would be a precondition of culpability that at the time of acting D had ‘the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.’²²² Those who were ‘culpably inadvertent’ would be identified by asking two questions: (1) Did D fail to take the precautions a reasonable man would have taken in the circumstances, and (2) Could D, given his capacities, have taken those precautions?²²³ This is close to the approach to recklessness advocated in the previous chapter, but where it differs from Hart’s is that it is contended here that account should also be taken of *why* D failed to exercise his capacities where he possessed them.

Taking Hart’s two questions as a starting point, it needs to be established in what circumstances D will be held to have the necessary “capacity” and “fair opportunity”. It would seem fair before attributing blame that an objective standard should only be applied to shortcomings for which D may truly be held morally culpable and any other shortcomings would be subject to subjective considerations, for example low intelligence.²²⁴ It is clear that Hart intended that both D’s mental and physical capacity should be taken into account.²²⁵ The first limb of Hart’s test is clearly objective in asking if the reasonable man would have taken precautions to avoid the harm, which covers the ‘fair opportunity’ part of his

²²¹ H.L.A. Hart, *Punishment and Responsibility Essays in the Philosophy of Law* (n 193).

²²² *Ibid.* at 152.

²²³ *Ibid.* at 154.

²²⁴ A.P. Simester, ‘Can Negligence be Culpable?’ (n 6) 91.

²²⁵ H.L.A. Hart, ‘Negligence, *Mens Rea* and Criminal Responsibility’ in *Punishment and Responsibility: Essays in the Philosophy of Law* (n 193) at 154.

analysis.²²⁶ The second question, (2), is the subjective limb considering the specific capacity of the particular defendant to assess whether D could and should have behaved better.

Hart's analysis has been challenged on the ground that it wrongly combines together two elements that serve different purposes. Hart's second limb is 'a condition of moral responsibility, not of culpability. As such, it excludes blame and cannot ground it.'²²⁷ If D lacks the necessary capacity and fails to satisfy the second limb he cannot be criminally liable but even where he does satisfy this requirement it will not mean that he is necessarily culpable.²²⁸

As a consequence, the method of establishing culpability seems to fall on the first (objective) limb of Hart's test which would compare D to a person of reasonable intelligence. As the test only considers whether, on the facts, there existed a fair opportunity for the reasonable man to avoid harm, no account is taken of why the defendant missed that chance.²²⁹ These considerations appear in the second limb but applying them both together does not solve the problem. By way of illustration an example is given. If D has a low cognitive capacity and is just capable of comprehending that a particular risk existed after much deliberation, a risk that a reasonable man would have seen immediately, Hart's test would convict D. Yet such a conviction should only be justified if it was 'reasonable, and not merely possible' for a person with such limited capacity to comprehend the risk. The fact that a 'normal' person would have avoided the harm says nothing about whether the defendant had a fair opportunity to do

²²⁶ A.P. Simester, 'Can Negligence be Culpable?', (n 6) 103.

²²⁷ Ibid. at 104.

²²⁸ Ibid.

²²⁹ Ibid.

so.²³⁰ It is only in situations that are exclusively focussed on the second limb of the test that work within Hart's analysis.²³¹

Criminal liability for negligence undoubtedly poses choice theorists some problems. Kant clearly distinguished between criminal and non-criminal conduct: 'An unintentional transgression that can be imputed is called mere neglect (*culpa*). An intentional transgression (that is, one accompanied by the consciousness that it is a transgression) is called a crime (*dolus*).'²³² On this basis, liability for negligence, as an unintentional transgression, would seem to be outside the remit of criminal sanctions.

Hampton²³³ talks in terms of 'advertent negligence' which easily fits with her defiance version of choice theory - not foresight of a risk but D knew of the risk involved; and inadvertent negligence - 'someone who did not know that she could have done otherwise, and yet (we think) could and should have known better.'²³⁴ On an Aristotelian view D's ignorance shows a faulty character formation and the 'defiant act' takes place during the character formation process.²³⁵ Hampton disapproves of conviction for those who are 'genuinely and reasonably unaware of the criminal nature' of their actions to deter harm. She acknowledges that the State might be able to justify conviction for criminal negligence in such circumstances because of its duty to protect its citizens through deterrence of certain

²³⁰ Ibid. at 104.

²³¹ There are further criticisms of Hart's test because of the conjugation of capacity and opportunity: a lack of capacity could reflect badly on an agent, and if opportunities exist, 'a lack of capacity to take them does not undermine responsibility.' See V. Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) 54-61.

²³² I. Kant, *The Metaphysical Elements of Justice. Part 1 of the Metaphysics of Morals* (n 204) at 16.

²³³ J. Hampton, 'Mens rea' (n 209).

²³⁴ Ibid. at 27.

²³⁵ Ibid. at 28.

behaviour even though it may offend our sense of justice as defiance is absent. The difficulties with this proposition, that D is culpable for developing a faulty character, are twofold. First it is ingenuous to suggest that those who have developed bad character traits have deliberately chosen to do so. Secondly, in order to justify any culpability for later negligence 'D's failure to rectify her character would have to be chosen in the knowledge that the very negligence that she later exhibits is the sort of consequence that might occur'.²³⁶

Problematically, as noted above in addressing utilitarianism, it is difficult to see how such behaviour is deterred. If the negligent acts were not done consciously how can we be encouraged not to be careless? Certainly, if a person is habitually careless due to a lack of concern for others, that would demonstrate a bad disposition and such an individual could be deterred by the imposition of criminal liability and start to behave more responsibly as a result. If, on the other hand, we want to encourage people not to be momentarily distracted we could be attempting the impossible. It is not a question of using the law to prevent dangerous behaviour or of removing those who pose a danger to others from society as both the criminal and the law abiding citizen will be negligent. Any theory of culpability that justified laws requiring citizens 'to be careful in all aspects of our daily lives on pain of punishment would seem totalitarian...and an extreme assertion of the right to punish in order to uphold social values.'²³⁷ In certain situations and environments there can be an obvious perception of danger and here punishment for inadvertence could be justified but only if the reason for the inadvertence was itself blameworthy.²³⁸

²³⁶ A.P. Simester, 'Can Negligence be Culpable?' (n 6) 89.

²³⁷ L.H. Leigh, 'Liability for Inadvertence: A Lordly Legacy?' (n 81) at 467.

²³⁸ *Ibid.* at 468.

It has been argued that negligence should be included within the criminal law because it makes the law more effective. This is because it is the role of the criminal law to prevent harm and it is 'socially desirable' for actions to be carried out safely 'if they are dangerous or may become so.'²³⁹ For negligence:

*it is no more difficult to conform one's conduct to the law than it is when a more serious crime is put on the books, for in general it is just as easy to do something in the right way as it is to do only what is right.*²⁴⁰

This proposition requires closer consideration to ascertain the merit of its claim. As a general statement, it is submitted, it would only be true in relation to advertent conduct. It is only when one is consciously aware that it can be said to be as easy to conform to the law's requirements, it becomes a straightforward matter of informed choice whether or not to comply. It is only easy to do something the right way if one is aware of/has knowledge of what the right way is, or why the particular way chosen is not the right way to do it in the current circumstances. It is also a matter of whether someone possesses the necessary skills to be able to perform a particular activity in the right way and has a fair opportunity to do so.

4.5.3. Negligence and character theory

Criminal liability for character theorists is properly grounded where D's action manifests an undesirable character trait, an enduring mental quality²⁴¹ that requires correction. Hume is clear that the role for punishment is only where its intended use is to alter a person's conduct.²⁴² He believed that mental qualities could sometimes be indicated better by *how* a

²³⁹ H. Gross, *A Theory of Criminal Justice* (n 119) at 422.

²⁴⁰ *Ibid.* at 423.

²⁴¹ M.D. Bayles, 'Hume on Blame and Excuse' (1976) 2 *Hume Studies* 17.

²⁴² *Ibid.* at 26.

person did something rather than by *what* he did and even if acts are manifestations of mental qualities, ‘it is only classes of actions which are so, not particular ones.’²⁴³ This is because an action can be the result of differing motives which shows that there is not necessarily a direct link between possession of a certain character trait and actions of a certain type.²⁴⁴

As noted in Chapter Two above, there is no accepted analysis of which traits and dispositions to act are included within the conception of moral character and those which are not.²⁴⁵ One accepted view is that relevant character traits are those which produce acts which are subject to D’s voluntary control, the exercise of his free will.²⁴⁶ In each case it will be a matter of assessing the ‘*degree* to which their manifestation is subject to voluntary control.’²⁴⁷ If then, with regard to a particular character flaw, a person cannot behave in any other way their flaw is not a character trait. An obvious example is that of stupidity in the sense of a lack of intelligence. This proposition was questioned on the basis that the level of control we generally exhibit surely forms part of our character,²⁴⁸ and a person’s level of self control is not an unfluctuating standard. Whether this latter point is correct may be open to question as external factors may cause changes to a person’s capacity for control, but if indeed the level is fixed, as a consequence, the theory may work with flaws like low intellectual capacity but not with others.

It has been argued that character theory can embrace negligent behaviour either because D was ‘careless and inattentive’ as a person or because D failed to ‘exercise their character

²⁴³ Ibid. at 28.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid. Hume held a contrary view, not restricting character traits in this way.

²⁴⁷ G. Vuoso, ‘Background, Responsibility, and Excuse’ (1987) 96 *Yale Law Journal* 1661 at 1671.

²⁴⁸ Discussed in Chapter 2 at 2.5.3.

strengths because of a momentary distraction.’²⁴⁹ Whilst it may seem appropriate to hold someone criminally liable for harm caused in circumstances where an individual is ‘careless and inattentive’ displaying an indifference to the welfare of those around them,²⁵⁰ it is hard as a general principle to justify criminal responsibility where someone has been momentarily distracted, simply because it can happen to us all.

Even though we may punish one negligent act such an isolated action does not signify that we are often careless, persistent carelessness signifying a bad character trait. To suggest that a consistently negligent actor demonstrates an attitude of indifference²⁵¹ may appear correct but this is not necessarily the case for all those who would fit this description, which could equally be attributable to ‘awkwardness and stupidity.’²⁵²

4.5.4. Negligence and Gardner’s ‘role’ theory

Gardner’s²⁵³ proposal is that culpability is determined in light of a person’s ability to fulfil their particular role in the way a reasonable person in that role should. On this model,²⁵⁴ responsibility only lies where we are fulfilling a role, for example a specific role like doctor, police officer, teacher, parent; or a non-specific role i.e. a human being, and we fall below an idealised standard of a reasonable person in the role we are fulfilling. All roles have standards of character, skills and knowledge attached to them and D should only be excused if his conduct fell within the boundaries of reasonableness for someone in that role. It is

²⁴⁹ P. Arenella, ‘Character, Choice And Moral Agency: The Relevance Of Character To Our Moral Culpability Judgments’ (n 211) at 75.

²⁵⁰ See the discussion of indifference in relation to recklessness in Chapter 3 at 3.3.3.6.

²⁵¹ N. Lacey, *State Punishment*, 66, cited by M. Moore, ‘Choice, Character, and Excuse’ (n 215) at 58.

²⁵² M. Moore, ‘Choice, Character, and Excuse’ (n 215) at 58.

²⁵³ J. Gardner, ‘The Gist of Excuses’ (1998) 1 *Buffalo Criminal Law Review* 575; *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) Chapter 6.

²⁵⁴ J. Gardner, ‘The Gist of Excuses’ (1998) 1 *Buffalo Criminal Law Review* 575 at 593-596.

irrelevant whether we have the capacity to achieve this idealised standard; a person's capacity to do better is immaterial.

Gardner's model fits well with liability for negligence as well as for non-advertent recklessness (as per *Caldwell* recklessness which covered both subjective and objective tests within its scope)²⁵⁵ advocating a stricter, more Aristotelian view of character theory.²⁵⁶ Yet currently the criminal law does acknowledge either a lack of responsibility or alternatively, for exculpation on capacity grounds. These are acknowledged, for example, in some defences in relation to status as in infancy, and in cases where the *mens rea* of the offence specified a specific cognitive mental element like 'wilful neglect' which becomes impossible to prove where D lacks the mental capacity to realise the harm being incurred.²⁵⁷ Following *Adomako*, it would appear that evidence regarding the capacity of D could be relevant in assessing whether, in the circumstances, D's negligence was 'gross' to allow a conviction for gross negligence manslaughter to stand.

Gardner's theory makes no allowance for the fact that some part of our character is dependent on the reasons that motivate us and the reasons we are indifferent to, and this could affect D's ability to practically reason, to control himself, or 'an alteration in his motivations ...the reasons that motivate his actions.'²⁵⁸ In the Aristotelian tradition, Gardner²⁵⁹ would state that if D is courageous he would see life through the courageous person's eyes, viewing danger as a challenge and not as the threat that more cowardly people would perceive it to be. In

²⁵⁵ See Chapter 3 above.

²⁵⁶ J. Gardner, 'The Gist of Excuses' (n 254); *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) Chapter 6.

²⁵⁷ See for example *R v Sheppard* [1980] 3 All ER 899 where the offence charged was 'wilful neglect' of a child.

²⁵⁸ V. Tadros, 'The Characters of Excuse' (2001) 21 *Oxford Journal of Legal Studies* 495 at 504.

²⁵⁹ J. Gardner, 'The Gist of Excuses' (n 254) at 582; V. Tadros, 'The Characters of Excuse' (n 258) at 511.

consequence D cannot have the virtue of courage if he does not act courageously or if he has to overcome the inclination to act as a coward.

Presumably, in a similar vein, the careful and considerate individual would always think of the interests of others, would always be attentive to what they were doing and to others that would be affected by his acts or omissions. It is contended here that such a paradigm of virtue simply does not exist, even if it is something to which we may all aspire for the majority of the time. Whether we attain such heights on any particular day depends upon both internal and external factors and whether the reasons to act or refrain from acting are sufficiently strong in a given instance. It is for these reasons that Gardner's theory spreads the net of culpability too widely.

4.5.5. Negligence and Vice

Although those who negligently cause harm may well warrant moral criticism, this does not necessarily mean that they also deserve the full force of the criminal law to be brought to bear. Not all harm doers should be punished in a criminal justice system worthy of respect. Although it has been suggested that the criminal law is simply concerned with our fitness for a particular role²⁶⁰ this is not the sole determinant of liability as the law targets punishment at those whose behaviour has shown possession of particular vices. The relevant manifested vices are those that cause D to be 'insufficiently motivated to act or not to act by the interests of others.'²⁶¹ It is clear that the criminal law does not concern itself with all character traits or flaws, it is:

²⁶⁰ J. Gardner, 'The Gist of Excuses' (n 254).

²⁶¹ V. Tadros, 'The Characters of Excuse' (n 258) at 517.

*centrally concerned with vices such as cruelty, wickedness, dishonesty, indifference and the like. Some vices, such as carelessness, may be sufficiently similar to this narrow range of vices to be appropriate targets for criminal liability. Other vices, such as cowardice, stupidity, obliviousness and clumsiness, whilst being reprehensible character traits in themselves, are not rightly the target of criminal liability.*²⁶²

Accordingly, this requirement of a manifestation of one or more of these core vices is necessary for criminal responsibility; where they are absent civil liability is more appropriate.²⁶³ Whilst this view has its appeal and is grounded in character theory, it is difficult to see how ‘carelessness’ fits in with the vices named above, unless it demonstrates, as a minimum, a lack of concern for the welfare of others, which might apply particularly in circumstances where D is engaging in a risky activity.

If carelessness is the same as negligence, negligence generally ‘does not reliably track the moral vice of insufficient concern that all the other legitimate forms of criminal culpability display.’²⁶⁴ Carelessness should only be included where D demonstrates a wanton disregard for the risk that his activity might cause to others to take proper care, particularly where the activity is a risky one. Any vices which do not show a total lack of regard for the interests of others should not be the concern of the criminal law.²⁶⁵ This is because criminal liability represents the State’s condemnation which is only appropriate where D’s vices cause harm

²⁶² Ibid. at 497-8.

²⁶³ Ibid. at 517.

²⁶⁴ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (2000) 88 *California Law Review* 931 at 932.

²⁶⁵ V. Tadros, ‘The Characters of Excuse’ (n 258) at 517.

and demonstrate a lack of concern for the interests of others.²⁶⁶ Many of those who are negligent do not portray such a lack of concern for the welfare of others, and although a mere lack of skill can be blameworthy, it does not follow that demonstrating a lack of skill automatically deserves criminal liability.²⁶⁷ The only acknowledged problem with this proposition is that it may be difficult to prove beyond doubt that D showed such disregard or was merely forgetful, preoccupied or distracted.

Following this view, there is a case for arguing that Adomako²⁶⁸ did not deserve criminal punishment as once he realised his patient was in serious trouble, he did everything he could think of to remedy the situation, showing appropriate concern rather than disregard or indifference.²⁶⁹ He clearly lacked the skill of a competent anaesthetist, but he may not have appreciated his limitations and those who trained and employed him must accept some responsibility for this.²⁷⁰ The contrary position is illustrated by the subsequent cases of *R v Misra and R v Srivastava*,²⁷¹ where two senior house officers ignored advice from other hospital staff in regard to a post-operative patient who was showing clear signs of infection, failed to order blood cultures as suggested by the ward sister, failed to check a blood test already ordered earlier by another doctor and misread the amount of urine passed by the patient. The patient died, but the inaction by the doctors in this instance showed a total lack of regard for the patient's welfare.²⁷² In such circumstances criminal liability is clearly appropriate and no difficulty arises in establishing the lack of concern required, so perhaps

²⁶⁶ Ibid.

²⁶⁷ V. Tadros, *Criminal Responsibility* (n 231) 81.

²⁶⁸ Above at 4.3.5.

²⁶⁹ V. Tadros, *Criminal Responsibility* (n 231) 84.

²⁷⁰ Ibid.

²⁷¹ [2004] EWCA Crim 2375.

²⁷² V. Tadros, *Criminal Responsibility* (n 231) 85.

differentiating between the callous and the forgetful, preoccupied or distracted may not be such a problem in practice.

4.5.5.1. The Vices of Stupidity and Obliviousness

If the argument that carelessness may be sufficiently similar to the other vices is correct, then it is not at all clear why ‘stupidity’ and ‘obliviousness’ should be automatically excluded.²⁷³

Much will depend, again, on what is meant by the use of these terms, as ‘stupidity’ could be demonstrated by an intelligent person’s practical joke that results in serious harm;

obliviousness could be the result of indifference to the needs of others, or wilful blindness.

Both could alternatively be caused by a lack of cognitive capacity and where D has no power

of control at all, as with clumsiness, such a trait is perhaps more aptly labelled unfortunate,

rather than reprehensible, and it is contended here that such capacity traits would properly be

excluded from the ambit of the criminal law. Possession of this second category of ‘vices’

may amount to unfitness for a particular role, but not an unfitness that stems from an

insufficient concern for the welfare of others. It has been postulated that ‘we ought not to

convict doctors merely for being bad doctors, we ought to convict them only if they are cruel

or indifferent doctors, or at least insufficiently motivated [by] the interests of their patients.

Merely having a vice, or displaying a lack of skill, does not show this in itself.’²⁷⁴

[O]nce in a while, our lack of information, failure to notice, or forgetfulness results in our underestimating the riskiness of our conduct and causing harm....An injunction to notice, remember, and be fully informed about anything that bears on risks to others

²⁷³ As suggested by Tadros, text to note 262, above.

²⁷⁴ V. Tadros, ‘The Characters of Excuse’ (n 258) at 517-518.

*is an injunction that no human being can comply with, so violating this injunction reflects no moral defect.*²⁷⁵

In the main, this view is laudable, but it must be said that where the activity creates an obvious risk of causing serious harm it cannot be said universally that ‘it reflects no moral defect’ even though as a general rule it should apply in everyday matters. This issue may well help to differentiate between the incompetent medical professional and an incompetent driver. So, for example, if a surgeon performing a high risk operation forgot to acquaint himself with the relevant patient notes or failed to notice he had ruptured an artery, in the absence of mitigating factors, we would surely find his conduct reflected a moral defect. On the other hand, a momentary lapse while driving is probably responsible for the majority of road traffic incidents. If such a driver unluckily causes another to swerve and a fatal injury is caused, this does not reflect the same moral defect even though it may attract a custodial sentence.²⁷⁶

It has been suggested that negligence can arise through D’s earlier reckless act, for example, if he knows he is forgetful and fails to write himself a reminder to get his brakes fixed, or D knows he is easily distracted whilst driving and yet enters into a heated argument with his passenger and fails to advert to a risk as a result.²⁷⁷ Even on this view, culpability would only apply to the earlier recklessness rather than the negligent act that has resulted in the harm.²⁷⁸ Certainly, inadvertence to risk can be the result of a character defect, but it could be difficult to show that D would have adverted to the risk had he not possessed that particular defect, since both those with good characters and bad can be negligent.

²⁷⁵ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (n 264) at 949-950.

²⁷⁶ S.20 Road Safety Act 2006.

²⁷⁷ L. Alexander, ‘Insufficient Concern: A Unified Conception of Criminal Culpability’ (n 264) at 950.

²⁷⁸ Ibid. at 952.

4.5.6. Negligence and Agency Theory

‘Agency’ theory,²⁷⁹ judges not ‘character’, but ‘conduct... by reference to its relative (lack of) success.’²⁸⁰ This theory has better links with degrees of *mens rea* as it allows us to rank harms. Starting with the paradigm of successful agency, i.e. when harm is intentionally caused in the way intended, an evaluation of D’s conduct depends on how close it comes to hitting this target directly, like the target in archery. Concentric circles further away from the centre would include endangerment and the ‘lower the risk of harm posed by the particular conduct, the further distance’ away it would be.²⁸¹ This would leave negligence in the outermost ring. In this manner ‘the way in which the victim is harmed, or subjected to the risk of harm, shapes culpability.’²⁸² The theory relies on the presumption that ‘agency’ means ‘sane, mature agency’ and is thus dependent on capacity or character theory to justify the exculpation of the young and the insane.²⁸³ With its focus on the way harm is brought about it, disregards D’s reasons for acting, which can be important and which would be relevant in determining culpability if the proposal advanced in this work was adopted.

4.6. Categories of negligence

It is not possible to have degrees of inadvertence, but obviously there can be degrees of fault in failing to perceive a particular risk. This is why enquiry into the reason why D was inadvertent is important. One person may depart slightly from the standard expected of a reasonable person, whereas another might fall far below what is expected. It is contended that the level of departure will be deemed ‘gross’ if the harm could have been avoided by

²⁷⁹ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (1993)12 *Law and Philosophy* 193 attributes the inspiration for this theory to the work of Antony Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) Chapter 5.

²⁸⁰ Ibid. Horder at 210.

²⁸¹ Ibid. at 212.

²⁸² Ibid. at 213.

²⁸³ Ibid. at 214.

taking simple precautions, ‘such as persons who are but poorly endowed with physical and mental capacities can easily take’.²⁸⁴ It has already been observed from earlier analysis of case law that other considerations can be relevant before a determination of gross negligence is made. It has been said that gross negligence²⁸⁵ cannot be reduced to a distinction between advertent and inadvertent conduct, it encompasses all conduct that displays a ‘wanton and reckless disregard’²⁸⁶ for others. Accordingly, it has been argued that gross negligence can be demonstrated either by indifference to the health and safety of others²⁸⁷ or by a gross departure from an expected standard where a positive duty of care is owed,²⁸⁸ rather than the ‘negative duty not to cause harm’.²⁸⁹ On this view, as the defendant in *Adomako*²⁹⁰ owed a positive duty of care, one between an anaesthetist and patient, his conviction was justified. It is said to be justified on the grounds that those who owe a positive duty of care have professional rules or codes of conduct to provide guidance on the standards expected.²⁹¹ It would be preferable for both of these distinct categories to require a manifestation of indifference to the victim before conviction for a serious offence.²⁹²

It was suggested in *R v Markuss*,²⁹³ that two forms of gross negligence exist: one arising through neglect of a positive duty to care, and the other when acting out of ignorant rashness. This proposition has been criticised on the basis that ignorant rashness is not a separate

²⁸⁴ H.L.A. Hart, *Oxford Essays in Jurisprudence* (n 144) 42.

²⁸⁵ J. Horder, ‘Gross Negligence and Criminal Culpability’ (n 24) at 496.

²⁸⁶ Canadian Criminal Code s.219.

²⁸⁷ A feature present in criminal recklessness.

²⁸⁸ It is argued in this work that such a gross departure would be insufficient, without more, to ground criminal liability.

²⁸⁹ J. Horder, ‘Gross Negligence and Criminal Culpability’ (n 24) at 496.

²⁹⁰ Discussed above at 4.3.5.

²⁹¹ J. Horder, ‘Gross Negligence and Criminal Culpability’ (n 24) at 517.

²⁹² V. Tadros, *Criminal Responsibility* (n 231).

²⁹³ (1864) 4 F. & F. 358 at 358-9 per Willes, J. Here D, an herbalist, prescribed colchicum seeds as a cold remedy and his customer died.

category, just a form of gross negligence.²⁹⁴ It has been further argued that where there is a great departure from the standard expected of the reasonable person in circumstances where there is a positive duty to act, gross negligence can be manifested in different ways: a lack of attentiveness, or skill, or knowledge, and a deficiency in virtue.²⁹⁵ These manifestations have given rise to criminal liability in the past, but it is only where there is a deficiency in virtue, such as ignorant rashness, indifference or some other moral failing demonstrated that future liability for serious offences should lie.

Professor Glanville Williams²⁹⁶ distinguished between ‘advertent’ and ‘inadvertent’ negligence; the former he equated with subjective recklessness and the latter with the more familiar objective form of negligence discussed here. This is an inappropriate distinction to make because although the ‘advertently negligent’ (subjectively reckless) agent clearly foresees the risk of harm he does not always underestimate the risk or unsuccessfully try to eliminate it. Only in such circumstances should he be deemed to be ‘advertently’ negligent and even then, it could be said that where D incompetently attempts to eliminate a risk or avoid the harm occurring and thinks he has accomplished this, he is no longer advertently negligent but has crossed the line, lapsing into inadvertence.

Simester contends:

[a] reasonable person, being a rational moral agent, can be expected to recognize reasons for behaving in various ways, to evaluate possible behaviour in the light of

²⁹⁴ J. Horder, ‘Gross Negligence and Criminal Culpability’ (n 24) at 499.

²⁹⁵ Ibid. at 500.

²⁹⁶ *Criminal Law: The General Part* (London: Stevens, 1953); *The Mental Element in Crime* (n 11) 30.

*those reasons, and to behave according to that evaluation. The negligent defendant will have failed to do one or more of those things.*²⁹⁷

What is important is why, in the particular circumstances, D failed to act in an appropriate manner. He identifies three different factors which could result in D's negligence. These are a failure:

- (i) *To pay attention to available information. In particular, to perceive that which one's physical senses register, and to recall that which one remembers;*
- (ii) *To remember that which one perceives or infers; and*
- (iii) *To apply intelligence to that which one perceives and recalls.*²⁹⁸

From (iii) it would seem that where D is of low intelligence or lacks experience then these factors should be taken into consideration. The majority of instances of negligent conduct are likely to fall within the first group, a lack of attention or forgetfulness. Simester posits that a failure to pay sufficient attention 'reflects an insufficient concern in our duty to avoid harm' whereas a 'failure to notice something is generally not deliberate.' In response to the suggestion that a failure to notice is just something that happens to D, he submits that the real question is not whether D 'chose' not to attend but whether D could have avoided this failure. Usually the answer would be yes.²⁹⁹

With regard to his first argument, a lack of sufficient attention does not necessarily equate to a conscious or subconscious demonstration of insufficient concern. Without knowing the full circumstances, it is impossible to judge whether the lack of attention is blameworthy. The

²⁹⁷ A.P. Simester, 'Can Negligence be Culpable?' (n 6) 92.

²⁹⁸ Ibid. at 96.

²⁹⁹ Ibid. at 97.

same can be said where D fails to notice something, especially where what he fails to perceive would have been blindingly obvious to anyone else. The more obvious the risk of harm was, the more likely it is that D will be deemed negligent if not subjectively reckless.

It is always possible that D could alter his behaviour and learn to become more attentive and caring, but whether criminal punishment for past errors is an appropriate means for incentivising D to change his ways seems unlikely. Where the lack of attention is due to momentary impulsiveness, preoccupation or distraction, it may be that the attribution of blame is warranted, especially where an agent is exhibiting a lack of self-control or acting in anger. Generally, if this is not the case it would be hard to justify imposing the full weight of the criminal law. Simester singles out ‘forgetfulness due to some distraction’³⁰⁰ as an exception to liability but this example is given in the context of an ill relative so, as argued here above, the context in which negligent action arises is all important.

As the standard against which D’s conduct is measured is that of the reasonable man, it has been propounded³⁰¹ that this is an inappropriate standard with regard to memory. This is because we cannot always choose what we remember and what we forget, often forgetting things that we hold important to remember whilst remembering things that we would prefer to forget.³⁰² To some extent this is clearly correct, but again it must be context dependent as we can usually take precautions lest we forget if something is clearly important, and the more important it is, the more care we should take. Forgetfulness could be a sign that something is not important enough to us unless there is some reason why blame would be unjustified.

³⁰⁰ Ibid. at 100.

³⁰¹ W.A. Seavey, ‘Negligence-Subjective or Objective?’ (n 179) at 20.

³⁰² Ibid.

Again, the inherent problem would be the difficulty in differentiating between the defendant who was paying insufficient attention because he did not care enough and the defendant who claims he forgot.³⁰³ This could clearly be an issue, but without some justification as to why D forgot something that he should have remembered, given his cognitive capacity and experience, such a claim is likely to be treated with the same scepticism as the subjectively reckless defendant with the requisite capacity who claims not to have foreseen an obvious risk.

It has been claimed that when present hazards are ignored there is a greater degree of culpability than when dangers are prospective and arise during the course of the activity. This is due to ‘the greater threat of harm that dangers already present represent.’³⁰⁴ Perhaps this could be because present hazards may be more avoidable and arise before any action commences on D’s part, but it may not be a question of them being ‘ignored,’ rather that they were missed. Within these two particular categories of negligence there are finer culpability distinctions to be made dependent on: how manifest the danger is, the imminency of the harm, its seriousness, the utility of the action and the feasibility of taking adequate precautions to prevent the harm occurring.³⁰⁵ Even taking such distinctions into account this cannot provide a full account of culpability. Without also considering the reasons for failing to notice an obvious risk, differentiating between the merely negligent and the reckless actor cannot be achieved.³⁰⁶

³⁰³ A.P. Simester, ‘Can Negligence be Culpable?’ (n 6) 101-102.

³⁰⁴ H. Gross, *A Theory of Criminal Justice* (n 119) at 420.

³⁰⁵ Ibid.

³⁰⁶ R.A. Duff, ‘Professor Williams and Conditional Subjectivism’ [1982] 41 *Cambridge Law Journal* 273 at 276.

Other distinctions between recklessness and negligence have been said to include a form of wilful blindness,³⁰⁷ where D is so intent on doing something that he excludes everything else from his mind.³⁰⁸ This may seem close to traditional *Cunningham* recklessness where D has deliberately closed his mind to the risk, but actually it is restricted to where D wilfully brings about his own unawareness. Clearly, to wilfully fail to consider risks involves, however briefly, consciously registering that there may be a risk involved, in which case subjective recklessness in the *Cunningham* sense is established. Recklessness is also said to be manifest where there are ‘kinds of excitement which ...involve an “evil intent.”’ These are ‘reprehensible conditions, which ‘people ought not to allow themselves to get into,’ and in which they ‘must not only stop to think but sober up and calm down in order to think’.’³⁰⁹

The ‘kind of excitement’ demonstrated by the defendant in *Caldwell* might be the focus of these views, but it is difficult to describe many of the actions of a truly reckless agent in terms of an “evil intent.” The defendants in *Parker, Brady* and in *CPS v Booth* were all deemed reckless, but if the jury had been directed that recklessness required evidence of an “evil intent” it would be lacking. Yet, although it is submitted that *Parker* and *Booth* should have been acquitted on a subjective test, the defendant in *Brady* was overexcited and should be deemed reckless even though an ‘evil intent’ was absent. What is not seen as recklessness is the normal kind of inattention that we all display because it would be unreasonable to require that we take such thorough care to notice every risk our actions may involve.³¹⁰

³⁰⁷ Ibid. at 277.

³⁰⁸ G. Williams, *Textbook of Criminal Law* (London: Stevens, 1978) 78.

³⁰⁹ R.A. Duff, ‘Professor Williams and Conditional Subjectivism’ [1982] 41 *Cambridge Law Journal* 273 at 277, citing G. Williams, ‘Recklessness Redefined’ *Cambridge Law Journal* 252 at 260 and 270.

³¹⁰ G. Williams, ‘Recklessness Redefined’ *Cambridge Law Journal* 252 at 270-271.

What does seem to be clear from *Caldwell/Lawrence* is that the difference between the two mental states is that recklessness requires moral turpitude, whereas mere negligence does not. An innate capacity to have appreciated an unseen risk would be essential for both fault states,³¹¹ although, as discussed above,³¹² there is some evidence to suggest that this is relevant only to recklessness. Where the fault element is simple negligence, D is compared to the standard of the reasonable man, an ideal unvarying standard that does not take into account the individual characteristics of the accused. It is a matter then of what D ‘should’ have been aware of rather than what he normally ‘would’ have been aware of. This is a position that is regarded as insufficient for both deterrence and retributive purposes.³¹³ Morally, it may still comply with our everyday ascription of blame but that is not necessarily advocating that criminal sanctions are appropriate in such circumstances.

4.6.1. Negligence - Liability for Stupidity or Incompetence?

As argued in Chapter Three, if a person has sufficient cognitive capacity, but acts stupidly or incompetently on a particular occasion he should be held culpable for any serious harm that results, but only if his behaviour demonstrates a bad attitude towards others.³¹⁴ Stupidity in this context should not be taken to mean intellectually ‘stupid’, but would certainly encompass the practical joker who caused serious harm whilst acting in a way that had no social utility whatsoever. It would apply, for example, to the defendant in *Brady*³¹⁵ who had to be deemed subjectively reckless, even though it is highly unlikely that he consciously appreciated the risk involved of balancing on the rail of a balcony above a dance floor. The Court of Appeal believed that by climbing on to the railings he had realised that he had taken

³¹¹ L.H. Leigh and J. Temkin, Notes of Cases, Recklessness Revisited’ [1982] 45 *Modern Law Review* 198 at 202.

³¹² At 4.4.1.

³¹³ M. Moore and H. Hurd, ‘Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence’ (2011) 5 *Criminal Law and Philosophy* 147 at 148.

³¹⁴ See also Tadros above at 4.5.5.

³¹⁵ [2007] EWCA Crim 2413.

a risk that he could fall and hurt someone so that even if his fall was entirely accidental it was sufficient to find him reckless.³¹⁶ Note that Brady was, perhaps fortunately for the court, intoxicated at the time. Had he not been voluntarily intoxicated and foresight of risk, subjective recklessness, was not found he would have escaped criminal responsibility as the Offences against the Person Act 1861 offences do not encompass negligence, even where the harm caused is serious. Had the victim died of her injuries, a charge of gross negligence manslaughter would have been apt under the current law.

This kind of action poses problems for choice theorists if they want to establish culpability as it may be difficult to argue that D made a conscious choice.³¹⁷ Certainly, Gardner sees stupidity as a vice and not as an excuse.³¹⁸ A lack of intelligence is a different matter as it is something that D has no power to control, a low cognitive capacity is neither reflective of an agent's character or his values. In consequence, a distinction can be drawn between a mistake made by a person with low intelligence, which is understandable, and a mistake 'stupidly made by one not stupid,'³¹⁹ especially when the latter is engaging in a risky activity that has no social utility and potentially serious consequences. He can be held accountable because he could and should have avoided causing harm. Thus, where an agent has acted stupidly, the stupidity itself is a moral failing. No manifestation of any other character flaw such as indifference is necessary to ground culpability as long as the agent had the innate intellectual capacity to appreciate the risk, there is no social utility in the act and no moral justification can be advanced as to why he should not be deemed reckless.

³¹⁶ J. Herring, *Criminal Law Text, Cases, and Materials*, 3rd Edn., (Oxford: Oxford University Press, 2008) 156.

³¹⁷ See the reference to stupidity in R v G & R, Chapter 3 above.

³¹⁸ J. Gardner *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 26.

³¹⁹ A.P. Simester, 'Can Negligence be Culpable?' (n 6) 103.

Where D's negligence arises from an arrogant, overconfident attitude which distorts his perception of the risk he is clearly culpable.³²⁰ Again this would be evidence of an undesirable character trait and would cover the example of the 'Greek Adonis' who honestly believed he was so irresistible that no woman could possibly not consent to having sex with him. These cases would be accommodated again through recklessness, as would the case of *Shimmen*.³²¹ This is because where the conduct is either highly risky as in the first example, or taking the risk is unjustified because it is done frivolously, it will be rare that D does not advert to the risk, or at least he will be deemed to have adverted to it by judge and jury.

For those who follow the subjectivist position that conscious awareness of risk is a minimum threshold requirement for criminal culpability,³²² it would seem that the clueless and heedless should be insulated from criminal responsibility. Yet there is evidence to suggest that much of our thinking and decision-making takes place on a subconscious rather than conscious level.³²³ It has been argued that: 'the boundaries between our conscious and subconscious are permeable, dynamic and interactive, and there is no valid scientific support for a sharp dichotomy'.³²⁴ Proof of all mental states employed by the criminal law are often external and approximate, fathomed by an examination of evidence of the agent's conduct and all the circumstances. Sometimes the conscious mind cannot recall reliably what D did/did not perceive before acting, a point made by Lord Diplock in *Caldwell*, as well as by others.³²⁵

³²⁰ L. Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (n 264) at 951, citing James Montmarquet, 'Culpable Ignorance and Excuses' (1995) 80 *Phil. Stud.* 41.

³²¹ *Chief Constable of Avon and Somerset Constabulary v Shimmen* (1986) 84 Cr App Rep 7; [1986] *Criminal Law Review* 800.

³²² For example, L. Alexander and K. Ferzan, with S. J. Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009).

³²³ S.A. Bandes, 'Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan, and Morse: Crime and Culpability' (2010) 29 *Law and Philosophy* 433 at 440.

³²⁴ *Ibid.* citing D. Denno, 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minnesota Law Review* 269 at 307.

³²⁵ S.A. Bandes, 'Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan, and Morse: Crime and Culpability' (n 323) at 445.

Furthermore, it has been argued that ‘what we think we are doing while consciously deliberating in actuality has no effect on the outcome of the judgment, as it has already been made through relatively immediate, automatic means’.³²⁶ If this is correct, there is no logical reason for insisting that advertence to risk is a prerequisite for criminal liability. What the criminal law should not do is automatically offer protection to those who are inadvertent as this sends out the wrong message to society and offers no incentive to take care.

What should be a prerequisite for inadvertent criminal culpability is not simply a general innate capacity that the particular agent possessed to advert to the given risk, but a specific capacity in the circumstances to have been conscious of the risk and a lack of any morally justifiable explanation of why he did not recognize the risk in this instance. This is because to truly distinguish between the criminally responsible and the excusable defendant, we need to make the distinction between an ability to do something in the abstract from an ability to do the same thing on a particular occasion.³²⁷

4.6.2. Accidental Harm or Negligence

It is not possible to clearly distinguish where accidental harm ends and negligent harm arises, which is another argument for removing liability for inadvertent minor harms. There is no clear cut boundary between the two. It has been observed³²⁸ that in our everyday lives our moral judgments and blaming practices are selective and could not survive if all harm-doers are blamed. This is clearly right and the civil law has an important role to play where

³²⁶ J.A. Bargh and T.L. Chartrand, ‘The Unbearable Automaticity of Being’ (1999) 54 *American Psychologist* 462 at 475, cited in S.A. Bandes, ‘Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan, and Morse: Crime and Culpability’ (n 323) at 445.

³²⁷ For further discussion on “capacity” see M. Moore and H. Hurd, ‘Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence’ (n 313) at 157; T. Honore’ *Can and Can’t* in *Responsibility and Fault* (Oxford: Hart, 1999) 143-160.

³²⁸ S. Kadish ‘Excusing Crime’ (1987) *California Law Review* 257.

blameworthiness is established as it is used to compensate victims and used where criminal liability and the stigma of a conviction are deemed inappropriate.

Where the criminal law excuses because of a lack of knowledge/cognitive deficiency, it is generally because the lack of knowledge itself is excusable in the sense that a reasonable person in D's situation would not have known. In these circumstances the outcome would be seen as accidental. If a lack of cognitive capacity is an individual characteristic of the agent, however, it can mitigate in sentencing but in general terms can only be raised as an excuse in terms of insanity or infancy, unless sufficient mental capacity forms part of the specified *mens rea* of an offence.

Criminal liability for negligence is clearly an area where the individual deficiencies of an agent should be taken into account. Although Hart accommodated liability for negligence within choice theory it was on the basis that D could have been aware of the risk and could have taken all precautions necessary to prevent harm occurring. A failure to allow for cognitive deficiency could result in injustice for 'unfortunate individuals who, through lack of intelligence, powers of concentration or memory, or through clumsiness' are criminally liable.³²⁹

The problem with such a proposition is that it would need to clearly distinguish between incapacities of cognition and incapacities of volition otherwise those who intentionally cause harm when they get very angry because they are naturally aggressive would argue that they could not have helped breaking the law's standards either. It could still leave difficulty in determining on a case by case basis which defendants were cognitively challenged and to

³²⁹ H.L.A. Hart, 'Negligence, Mens Rea and Criminal Responsibility in *Punishment and Responsibility Essays in the Philosophy of Law* (n 193) 152-157.

what degree.³³⁰ When drafting the American Model Penal Code and Commentaries it was concluded that ‘the heredity, intelligence or temperament of the actor would not be held material in judging negligence.’³³¹ The practical difficulties ‘reveal that the moral distinction between ability to know and ability to will is not entirely clear’ and is the rationale for the absence of an ‘incapacity to know better’ excuse.³³² This position is harsh and it is submitted that for serious crimes the intelligence of the accused should always be a relevant factor.

4.7. Conclusion to Chapter Four

This chapter has demonstrated the way the courts have often used the terms ‘negligence’ and ‘recklessness’ as though they were interchangeable and yet this should not be the case, given that there is general agreement that recklessness is a more serious fault element, and because most *mala in se* offences cannot be committed negligently. Following the analysis of *Adomako*, it was contended here that a capacity based modification to *Caldwell/Lawrence* would have been a preferable alternative to the finding that gross negligence was the preferred fault element in such cases of involuntary manslaughter. This would take the form of a broader, capacity based approach to recklessness which takes into consideration D’s cognitive capacity and knowledge. The proposed modification would also give consideration to D’s attitude at the time of acting and where a bad attitude was demonstrated, liability could lie. As far as the capacity of D is concerned, where there is evidence of incapacity exculpation will be dependent upon the extent to which it is manifest in the circumstances and the extent to which it is fault-free.

³³⁰ S. Kadish ‘Excusing Crime’ (n 328) at 277.

³³¹ §2.02 commentary at 242 (1985) cited in S. Kadish ‘Excusing Crime’ (n 328) at 278.

³³² *Ibid.* Kadish at 278.

To this end, a revised version of the *Caldwell/Lawrence* Model Direction on recklessness was advanced that would also encompass liability for inadvertent omission. It is proposed that a person will be deemed reckless for failing to act if he has a legal duty of care towards another³³³ and is, or should be, aware of a serious and obvious risk to the welfare of that other and yet fails to act to prevent or ameliorate harm. Therefore a person may be deemed reckless where:

- (1) he fails to act when there is an obvious and serious risk of death or serious harm to another when he is under a legal duty to that other person, and*
- (2) 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 ignored it or tried to eliminate it in a wholly incompetent manner; and*
- (3) if satisfied that an obvious and serious risk in such circumstances has not been considered or is dealt with in a wholly inappropriate manner by the defendant, the jury are entitled to infer that he has the state of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives which may displace the inference.*
 - (3)(i) evidence of a general or specific lack of capacity in the circumstances may be exculpatory;*
 - (3)(ii) evidence of a reprehensible attitude or other moral failing will not displace the inference.*

This proposal would extend inadvertent liability to causing someone serious injury making it apparently broader than the test for gross negligence which now requires a risk of death, but it is also more restrictive in that without evidence of a reprehensible attitude or moral failing, criminal liability will not be established. The extension of liability to cover an obvious risk

³³³ A duty of care is crucial to restrict criminal liability for omissions; otherwise a Good Samaritan law would be introduced whereby everyone owed a duty to the public at large which would conflict with the principle of autonomy.

of serious bodily harm will provide some symmetry with the law of murder as it is submitted that it is hard to justify liability for death whilst not providing a criminal sanction for someone who may cause irreparable serious harm. It also brings English law in to line with other western jurisdictions.

It was shown in the analysis above that ‘gross’ negligence is synonymous with recklessness and should be deemed to be recklessness, leaving negligence to mean mere inadvertence or everyday carelessness. Once the definition of recklessness encompasses both the advertent and inadvertent risk taker the problem with terminology disappears. Clearly from a subjectivist stance, such an argument would be untenable as they insist that by definition *mens rea* requires conscious awareness but this interpretation of the Latin maxim has been shown to be built upon insecure foundations. Further, the use of the ‘objective’ and ‘subjective’ labels has, once again, be shown to be inconsistent; even negligence can have both objective and subjective elements for consideration.

From the discussion of the main theories of culpability, if criminal liability for negligence can be justified at all, currently it can only be on weak utilitarian grounds.³³⁴ It must be acknowledged that the deterrence aspect may be limited in some instances. Deterrence can be effective when an agent deliberates upon taking a conscious risk, allowing him to weigh up the benefit of continuing to act against the possibility of harm and subsequent criminal punishment and thus be deterred from continuing. The inadvertent agent does not have these thought processes to effect his action.

³³⁴ M. Moore, *Placing Blame A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010) 591.

Inadvertent criminal responsibility cannot be founded upon culpable choice or culpable character unless such theories could be universally applied to all negligent actors. The latter theory comes close as it can often identify inferences of bad character where moral excuse fails, but unfortunately it cannot do this consistently. Neither choice nor character theory can cope with spontaneous and instinctive reactions where on the one hand there is no choice and on the other, there is no evidence of 'bad' character. Accordingly, based upon the main theories of culpability alone, the argument against liability for negligence (inadvertence) for serious crimes is strong.

Nevertheless, it is clear that an agent may deserve moral blame when he causes serious harm, even when the risk of harm arising from his conduct may never have crossed his mind. Indeed, even creating the risk of causing harm may give rise to attributions of blame. What needs to be determined is to what extent such inadvertent conduct is also deserving of criminal sanction. What is submitted here is that the breakpoint between criminal culpability and civil liability arises where D's conduct causes serious harm and demonstrates a reprehensible attitude (such as indifference or wanton disregard) towards the welfare of others. This will be evidenced by the possession of an innate general capacity to have appreciated the risk coupled with the failure to provide any moral justification for why he failed to realise the risk involved in his actions. In such circumstances, D will be deemed reckless rather than negligent. Where an agent has acted stupidly, the stupidity itself is the moral failing. No manifestation of any other character flaw such as indifference is necessary to ground culpability provided D had the innate intellectual capacity to appreciate the risk, there was no social utility in the act and no moral justification could be advanced as to why he should not be deemed reckless. This is because without also considering the reasons for

failing to notice an obvious risk, differentiating between the merely negligent and the reckless actor cannot be achieved. This is the result of recklessness being context dependent.

Chapter 5

5. Conclusion

5.1 Introduction to Chapter Five

As outlined in Chapter One, the overarching aim of this thesis was to redefine the appropriate limits of recklessness and negligence in the criminal law of England and Wales with regard to serious crimes. The boundaries between these two forms of *mens rea* have lacked clarity and have not been successfully correlated with the leading theories of criminal culpability that each claim to have universal application in justifying punishment. The link between *mentes reae* and culpability had not been fully explored and whereas others have focussed predominantly on the leading theories of choice and character, and in the context of exculpation, here the analysis included the ‘role’ and agency theories, and was undertaken with regard to inculcation. Given the rise in subjective approaches to the mental element in criminal law in the previous century, the objective was to examine the extent to which subjective/objective labels were useful and whether purely subjective approaches were appropriate to ground criminal culpability for most serious crimes. Given the remit of this work in its exposition of recklessness, negligence and moral culpability, it was not possible to include any meaningful discussion of strict liability or to general criminal liability for omissions. Neither was it possible to address cases where the mental element relates to possible defences rather than the offence itself.¹

¹ For example, s.160 Criminal Justice Act 1988 which criminalises the possession of an indecent photograph of a child, with s.160(2) containing a list of defences, all of which include a mental element.

5.2. *Mens rea* and culpability

Chapter Two verified that there has been a departure from the traditional view that *mens rea* must signify moral blameworthiness. What remained to be explored was the extent to which moral blameworthiness was still required in English criminal law and the relevance of the presence of *mens rea* in determining criminal culpability. What was established was that although the presence of *mens rea*, when required, can ground potential culpability, it is not the sole determinant.² It was also demonstrated that most of the theories of culpability addressed, utilitarianism,³ choice,⁴ character⁵ and agency,⁶ are founded upon the basis of moral blameworthiness, Gardner's 'role' theory⁷ being the exception. The link between these theories and the *mentes reae* of intention, recklessness and negligence was explored and it was found that none of the theories can fully justify all three forms of *mens rea*. The main theories of culpability, character and choice, are considered to be subjective in nature. Choice theory focuses on what the particular agent chose to do, requiring mental states of intention, foresight or belief. Consequently, choice theorists should require all approaches to culpability to be purely subjective.⁸

Character theory, although subjective as it directly judges the character of the individual agent, does so by comparison with a society's view of what it is to possess a good character. This external standard results in an 'objectivised' subjectivity. Choice theory cannot adequately provide a theoretical rationale for liability arising through inadvertence, but

² Chapter 2 at 2.9.

³ Ibid. at 2.3. and 2.4.9.

⁴ Ibid. at 2.4.

⁵ Ibid. at 2.5.

⁶ Ibid. at 2.7.4.

⁷ Ibid. at 2.7.1.

⁸ In relation to the criminal law excuses, choice theory employs the concept of the reasonable man, introducing an element of objectivity.

character theory can to the limited extent that such inadvertence manifests an indifference to the welfare of others.

‘Agency’ theory makes clear moral culpability distinctions between the intentional actor, the reckless person and someone who is negligent. The blameworthiness of such conduct is judged by reference to its success and its proximity to intentional harms. Employing this theory, D’s culpability is determined by considering ‘the way in which the victim is harmed, or subjected to the risk of harm.’⁹ This theory relies on the presumption that ‘agency’ means ‘sane, mature agency’ and thus requires supplementing by choice or character theory to justify the exculpation of the young and the insane.¹⁰ The theory does not address the situation where the resultant harm exceeds that envisaged by the defendant. These circumstances can still be theoretically justified by character theory where a bad character is manifested and by ‘role’ theory where D is judged by reference to the reasonable person performing the same role as D.

It was recognized that Gardner’s ‘role’ theory¹¹ works well with inadvertence, an objective test for recklessness and, potentially, liability for negligence if a purely objective stance was taken. This is because on Gardner’s¹² model, responsibility only lies where we are fulfilling a role, for example a specific role like doctor, or a non-specific role (a human being), and we fall below an idealised standard of a reasonable person in the role we are fulfilling. All roles have standards of character, skills and knowledge attached to them and D should only be excused if his conduct fell within the boundaries of reasonableness for someone in that role.

⁹ J. Horder, ‘Criminal Culpability: The Possibility of a General Theory’ (1993) 12 *Law and Philosophy* 193 at 213.

¹⁰ *Ibid.* at 214. With its focus on the way harm is brought about it disregards D’s reasons for acting, a potentially relevant factor for criminal defences, again requiring reliance on other theories to establish moral blameworthiness.

¹¹ Chapter 2 at 2.7.1.

¹² J. Gardner, ‘The Gist of Excuses’ (1998) 1 *Buffalo Criminal Law Review* 575 at 593-596.

It is irrelevant whether we have the capacity to achieve this idealised standard; a person's capacity to do better is immaterial. Thus Gardner supports a stricter, more Aristotelian view of character theory.¹³

Clearly, none of the theories above have universal application to the forms of *mentes reae* addressed in this work and it was posited that the criminal law's concern is predominantly with the character of our actions, rather than choice, character *per se*, or the role we are assessing. It was contended that a synthesis of character and 'role' theory would be an appropriate model of culpability,¹⁴ which is reflected in the subsequent proposals for reforming the law of recklessness¹⁵ and negligence¹⁶ advocated in Chapters Three and Four. Although such reform would not encompass intentional crimes, given that the focus has been on recklessness and negligence, there is no reason why this synthesis of character and 'role' theory should not be extended to underpin the *mens rea* of intention¹⁷ so that moral blameworthiness becomes a prerequisite for conviction for serious crimes.¹⁸ Reform would potentially assist defendants whose capacities are faultlessly undermined, such as the defendant in *Kingston*.

Objective and subjective approaches to *mens rea* were subject to critical evaluation, including what is understood by these labels, and a consistent interpretation was advocated.¹⁹

Conflicting subjective and objective approaches were analysed and it was demonstrated that

¹³ J. Gardner, 'The Gist of Excuses' (1998) 1 Buffalo Criminal Law Review 575; *Offences and Defences Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) Chapter 6.

¹⁴ Chapter 2 at 2.7.1.

¹⁵ Chapter 3 at 3.4.

¹⁶ Chapter 4 at 4.3.5.

¹⁷ However, further safeguards would be required to avoid a return to the objective test in *DPP v Smith* [1961] AC 290 which was inherently unjust, discussed above, Chapter 3 at 3.2.

¹⁸ There have been suggestions that the *mentes reae* terms should be unified but such proposals have been rejected as moral culpability distinctions are necessary to the extent that they can be incorporated into the criminal law, otherwise the requirements of justice cannot be adequately satisfied, see Chapter 2 at 2.2.

¹⁹ Chapter 2 at 2.2.

part of the problem with understanding this labelling lies in determining what is meant by ‘subjective’ or ‘objective’ when these terms are employed in any given instance. It is contended that more precision is required when the terms are used to explain whether they are to be comprehended in the sense of their purest form or whether elements of the both approaches are incorporated. Without synchronicity in their use the labels become meaningless.

5.3 Intention and Recklessness

Chapter Three began with a critical review of the development of the law on intention, and how intention had historically been equated with foresight of harm.²⁰ This led over time to defining the *mens rea* of intention as requiring either direct intent or oblique intent, with the latter being something that a judge or jury could find in circumstances where D had foreseen the particular risk of harm (death or serious bodily injury) as a virtually certain consequence of their conduct. This occurred in the context of homicide since murder cannot be committed recklessly. It was frequently the language of recklessness that was used in jury directions and in the judgments of the appellate courts to convict defendants on the basis that they obliquely intended the consequences in the absence of evidence of any direct intent. The need to distinguish intention from recklessness is important because these *mens rea* terms represent different degrees of moral turpitude, those found to have intentionally harmed others generally being deserving of more censure and punishment than those who behaved recklessly.

This chapter provided a more detailed critical analysis of the subjective/objective debate with regard to determining criminal recklessness. Once again, the difficulties with the

²⁰ Chapter 3 at 3.2.

subjective/objective distinction were highlighted,²¹ supporting the view of Lord Diplock in *Caldwell* that ‘questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective.’²² This is especially the case when it is unclear that these terms are being interpreted consistently. Therefore, where the labels ‘subjective’ and ‘objective’ are employed, it must be clear in what precise context they are being used. Some have rejected this criticism of labelling, arguing that these are straightforward terms that are convenient expressions of important legal distinctions.²³ It was established in this chapter that both in relation to character and choice theories, and with regard to recklessness, the labels are not necessarily as straightforward as has been claimed.²⁴ This is because the terms are rarely used in the purest sense.

With regard to recklessness, even if we adopt a ‘subjective’ definition such as that established in *Cunningham*,²⁵ it was clear that it would nevertheless have an ‘objective’ element to it, which is the taking of an unjustified risk. The determination of whether the risk was a reasonable one to take in the circumstances falls to the judge or jury, not the defendant. If this ‘subjective’ definition was truly subjective, the justifiability of the risk would have to be judged by whether D, *himself*, thought it was reasonable, not by the external objective standards of others. Further, it was contended that when the *Cunningham* ‘subjective’ test was held to encompass the deliberate closing of the mind to the risk, a purely objective test was being imposed in reality. This would only be avoided where D lacked the cognitive capacity to appreciate the risk, as in *Stephenson*.²⁶ Consequently, when applying the

²¹ Chapter 3 at 3.3.3-3.3.4.

²² [1982] AC 341 at 353 para.(E) and 354 para.(F)

²³ J.C. Smith, ‘Commentary on Caldwell’ [1981] *Criminal Law Review* 392 at 396; and G. Williams, ‘Recklessness Redefined’ [1981] *Cambridge Law Journal* 252.

²⁴ Chapter 3 at 3.3.3-3.3.4.

²⁵ Chapter 3 at 3.3.2.

²⁶ Chapter 3 at 3.3.2.

subjective approach in *Cunningham* and *G & R* to cases such as *Parker* and *Booth*, in reality an objective capacity based test is already in operation.

The ‘objective’ test advanced in *Caldwell/Lawrence*²⁷ was not entirely objective as it encompassed the *Cunningham* test (the subjective element of whether D was aware of the risk) as well as introducing an inadvertent strand. Also, it has been demonstrated that there is substantial evidence to support the contention that the objective limb of the Model Direction espoused by Lord Diplock in *Caldwell* and *Lawrence* was intended to be capacity dependent. The latest test from the Draft Criminal Code, adopted in *G & R*,²⁸ has been interpreted to be subjective and objective, akin to the *Cunningham* test, but it has the potential to be interpreted as entirely subjective given its wording. If a purely subjective interpretation was taken then it must be proven that D foresaw the relevant risk and that D knew it was an unreasonable one to take. This would make it extremely difficult to secure a conviction.

As noted above, it is argued that in reality an objective capacity based test for recklessness is already in operation, the subjective position being undermined to mete out the courts’ notion of justice. This is because it is recognised that a definition of recklessness that is purely subjective can allow those who are blameworthy to avoid criminal liability. Alternatively, a test that is purely objective can lead to injustice if it is not limited to a capacity-based analysis. It was advocated in this chapter that a synthesis of the two approaches is required. This could be achieved by openly developing a capacity-based test modelled upon the *Caldwell/Lawrence* Direction as advocated here,²⁹ or by introducing a form of practical indifference test. It was submitted that Glidewell J’s suggestion in *Elliott* would be a way of

²⁷ Chapter 3 at 3.3.3.

²⁸ Chapter 3 at 3.3.4.

²⁹ Chapter 3 at 3.4.

achieving a more appropriate approach to inadvertent recklessness. When applying the *Caldwell/Lawrence* Direction:

*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.*³⁰

Adopting such an approach will impose an evidential burden on the accused to give reasons for his inadvertence. Once the reasons why no thought was given to the risk are established, it would be relatively straightforward to assess the degree of moral blameworthiness and thus any criminal liability.³¹ This would look beyond the subjective/objective dichotomy and add another dimension, *why* the accused acted as he did. Thus, if the reason D did not foresee the risk displayed a reprehensible attitude or moral failing, for example, 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 manifest a bad character or other moral failing, for example, where he failed to 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. Thus, any determination of inadvertent recklessness becomes context dependent. This position is clearly grounded in character theory but it also incorporates a subjectivised form of 'role' theory.³²

³⁰ (1983) 77 Cr.App.R. 103 at 119

³¹ Chapter 3 at 3.4.

³² *Ibid.*

5.4 Negligence

Chapter Four undertakes an exhaustive analysis of the boundaries between criminal recklessness and negligence in an attempt to determine whether there is a distinction and, if so, where the line should be drawn between these two forms of *mens rea*. The analysis confirmed that the courts have often used the terms ‘negligence’ and ‘reckless’ interchangeably.³³ This is not appropriate given that there is general agreement that recklessness is a more serious fault element, and also because most *mala in se* offences cannot be committed negligently. Following the analysis of *Adomako*,³⁴ it was proposed here that a capacity based modification to *Caldwell/Lawrence* would have been a preferable alternative to the finding that gross negligence was the preferred fault element in such cases of involuntary manslaughter. This would take the form of a broader, capacity based approach to recklessness which takes into consideration D’s cognitive capacity and knowledge. The proposed modification would also give consideration to D’s attitude at the time of acting and where a bad attitude was demonstrated, criminal liability could ensue. As far as the capacity of D is concerned, where there is evidence of incapacity, exculpation will be dependent upon the extent to which such incapacity is manifest in the circumstances and the extent to which it is fault-free.

To this end, a revised version of the *Caldwell/Lawrence* Model Direction on recklessness was advanced that would also encompass liability for inadvertent omissions. It was proposed that a person will be deemed reckless for failing to act if he has a legal duty of care towards another and is, or should be, aware of a serious and obvious risk to the welfare of that other

³³ Chapter 4 at 4.2.

³⁴ Chapter 4 at 4.3.5.

and yet fails to act to prevent or ameliorate harm.³⁵ Therefore a person may be deemed reckless where:

(1) he fails to act when there is an obvious and serious risk of death or serious harm to another when he is under a legal duty to that other person, and

(2) 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 ignored it or tried to eliminate it in a wholly incompetent manner; and

(3) if satisfied that an obvious and serious risk in such circumstances has not been considered or is dealt with in a wholly inappropriate manner by the defendant, the jury are entitled to infer that he has the state of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives which may displace the inference.

(3)(i) evidence of a general or specific lack of capacity in the circumstances may be exculpatory;

(3)(ii) evidence of a reprehensible attitude or other moral failing will not displace the inference.

Such guidance would extend negligent/inadvertent liability to causing someone serious injury, making it apparently broader than the test for gross negligence which now requires a risk of death. In one respect it is more restrictive, as without evidence of a reprehensible attitude or other moral failing criminal liability will not be established. The extension of liability to cover an obvious risk of serious bodily harm will provide some symmetry with the law of murder as it is submitted that it is hard to justify liability for death whilst not providing

³⁵ Ibid.

a criminal sanction for someone who may cause irreparable serious harm. It also brings English law in to line with other western jurisdictions.³⁶

It was demonstrated in the analysis above that ‘gross’ negligence is synonymous with recklessness and it is submitted that no distinction should continue to be drawn between the two forms of *mens rea*, leaving negligence to mean mere inadvertence or everyday carelessness. Once the definition of recklessness is extended to encompass both the advertent and inadvertent risk taker, with some additional requirements, the problem with terminology disappears. Clearly, from a subjectivist stance such an argument would be untenable as following this theoretical approach by definition *mens rea* requires conscious awareness: but this interpretation of the Latin maxim has been shown to be built upon insecure foundations.³⁷ Further, the use of the ‘objective’ and ‘subjective’ labels has, once again, proven inconsistent; even negligence can have both objective and subjective elements for consideration.³⁸

From the discussion of the main theories of culpability, it appears from the majority of the academic literature that if criminal liability for negligence can be justified at all, it can only be on weak utilitarian grounds. This is because it can serve as deterrence to others. Yet it must be acknowledged that this deterrence aspect may be limited in some instances.

Deterrence can be effective when an agent deliberates upon taking a conscious risk. He can then weigh up the benefit of continuing to act against the possibility of harm and subsequent criminal punishment and potentially be deterred from continuing to act. The inadvertent agent does not have these thought processes to effect his action.

³⁶ Chapter 4 at 4.4.

³⁷ Chapter 4 at 4.4.1.

³⁸ Chapter 4 at 4.4.1. In some Continental jurisdictions they regard negligence as subjective, whereas others insist it is objective as D is compared with the external standard of the reasonable person. In English law, mere negligence appears purely objective whereas there are contrary views with regard to ‘gross’ negligence.

Criminal responsibility for inadvertence cannot be founded upon culpable choice or culpable character unless such theories could be universally applied to all negligent actors. The latter theory comes close to providing a theoretical explanation, as it can often identify inferences of bad character where moral excuse fails, but it cannot do this consistently. Neither choice nor character theory can cope with spontaneous and instinctive reactions where, on the one hand there is no choice and, on the other, there is no evidence of 'bad' character.

Accordingly, based upon the leading theories of culpability alone, the argument against the imposition of criminal liability for negligence (inadvertence) for serious crimes is strong.

'Role' theory can clearly ground criminal liability for inadvertent conduct, objective recklessness or negligence, but without taking individual capacity into account it could cause injustice as capacity can be relevant to both fault terms as suggested under the *Caldwell/Lawrence* Model Direction and demonstrated in the analysis of negligence in Chapter Four.

It is clear that an agent may deserve moral blame when he causes serious harm, even when the risk of harm arising from his conduct may never have crossed his mind. Indeed, even creating the risk of causing serious harm may give rise to attributions of blame. What needs to be determined is to what extent such inadvertent conduct is also deserving of criminal sanction. It is submitted here that the breakpoint between criminal culpability and civil liability arises where D's conduct causes serious harm and demonstrates a reprehensible attitude (such as indifference or wanton disregard) towards the welfare of others or other moral failing. This will be evidenced by the possession of an innate general capacity to have appreciated the risk coupled with the failure to provide any moral justification for why he failed to realise the risk involved in his actions. In such circumstances, D will be deemed reckless rather than negligent.

Where an agent has acted stupidly, the stupidity itself is the moral failing. No manifestation of any other character flaw, such as indifference, is necessary to ground culpability provided D had the innate intellectual capacity to appreciate the risk, there is no social utility in the act and no moral justification can be advanced as to why he should not be deemed reckless. This is because, without also considering the reasons for failing to notice an obvious risk, any differentiation between the merely negligent and the reckless actor cannot be achieved. This is the result of recklessness being context dependent. Following this line of reasoning, this work has demonstrated that liability for inadvertence is properly grounded by a synthesis of character theory and Gardner's role theory. Criminal liability for inadvertence can be justified for those who cause serious harm to others in circumstances where the risk of harm is both serious and obvious, unless they can show that their action or inaction displays no evidence of a bad character.

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