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CULPABLE CARELESSNESS:

Recklessness and Negligence in Scots and English Criminal Law

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A thesis presented for the degree of PhD in Law
2011

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Acknowledgments

This project was only made possible by the financial assistance I received from the Arts and Humanities Research Council and the Clark Foundation for Legal Education, as well as my parents (who have always encouraged me to continue my studies), and I begin by thanking them all.

Equally important were my excellent supervisors, James Chalmers and Sharon Cowan, who have encouraged and challenged me at every stage of the researching and writing process, addressing points from the philosophical to the mundane. In consequence, this thesis is clearer, deeper and less typo-ridden than it could ever have been without their input.

Fiona Leverick also read the entire thesis, and her comments were helpful in transforming the first draft into a completed text.

Over the last three years, I have received further enlightened comments from Zenon Bankowski, Josh Barton, Ross Carrick, Cormac Mac Amhlaigh, Claire McDiarmid, Johnnie Macleod, Gerry Maher, Claudio Michelon, Francisco Saffie, Paolo Sandro, Elizabeth Shaw and Neil Walker. Francisco, in particular, has never shied from telling me I am wrong. That I still disagree with him on many issues is perhaps testament to my naivety and his wisdom.

The participants at the second Gerald Gordon Seminar on Criminal Law helped further clarify the ideas which form the basis of chapter two (and “Rethinking recklessness” 2011 JR, forthcoming). The comments of Lindsay Farmer and Sandra Marshall specifically made me rethink a number of issues.

Although scrutiny of the ideas contained in a thesis is important, it is vital to have friends in the postgraduate community. Specific thanks for distracting me in times of need go to Karen Baston, Thomas Horsley, Chloë Kennedy, Anja Lansbergen, Katri Lõhmus, Wendy van der Neut, Ioannis Papageorgiou, Danielle Rached, Jill Robbie and Panagia Voyatzis.

Finally, in addition to offering moral support, my partner Shona Wilson has sat through practice presentations and read draft conference papers, draft articles and,

most heroically of all, this entire thesis. Throughout the last three years, Shona has also never hesitated in telling me that I was becoming a bore or too involved in my work. For that, I owe her my sanity, and much more. As a (vastly insufficient) token of my gratitude, this thesis is dedicated to her.

FGFS

Old College, 20 October 2011

Declaration

As per Regulation 2.5 of the Assessment Regulations for Research Degrees at the University of Edinburgh, I confirm:

- (a) That this thesis has been composed by me;
- (b) That the work contained in this thesis is my own; and
- (c) That the work contained in this thesis has not been submitted for any other degree or professional qualification.

Findlay Stark, 20 October 2011

Abstract

This thesis presents a normative yet practical account of how Scots and English criminal law should assess the culpability of careless persons. At present, the law in both jurisdictions distinguishes between two types of culpable, unjustified risk-taking: recklessness and negligence. In everyday language, these concepts have blurred edges: persons are labelled “reckless” or “negligent” with little thought to the difference, if any, that exists between these terms.

Although unproblematic in the “everyday” context, this laxity in definition is inappropriate in the criminal courtroom. Negligence is not usually a sufficient form of culpability for serious offences, whilst recklessness typically is. In the most serious crimes, recklessness thus marks the limit of criminal liability. The concept ought, therefore, to be well understood and developed. Unfortunately, courts both north and south of the border have had difficulty defining and distinguishing between recklessness and negligence. This thesis explores the resulting jurisprudential quagmires and contends that, in both jurisdictions, the absence of a visible theory of culpable carelessness accounts for the courts’ difficulties. It then looks to criminal law theory to construct a defensible account of culpable carelessness which can distinguish clearly between recklessness and negligence and explain the circumstances in which the latter ought to be criminally culpable. Finally, the thesis considers the practical implications of this theory.

List of Abbreviations

Alexander et al, <i>Crime & Culpability</i>	L Alexander and KK Ferzan with SJ Morse, <i>Crime and Culpability: A Theory of Criminal Law</i> (2009)
Ashworth, <i>Principles</i>	A Ashworth, <i>Principles of Criminal Law</i> , 6 th edn (2009)
Duff, <i>AFC</i>	RA Duff, <i>Answering for Crime: Responsibility and Liability in the Criminal Law</i> (2007)
Duff, <i>IACL</i>	RA Duff, <i>Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law</i> (1990)
Ferzan, “Opaque recklessness”	KK Ferzan, “Opaque recklessness” (2000-2001) 91 <i>Journal of Criminal Law & Criminology</i> 597
Garvey, “Involuntary manslaughter”	SP Garvey, “What’s wrong with involuntary manslaughter?” (2006-2007) 85 <i>Texas Law Review</i> 333
Gordon, <i>Criminal Law</i>	GH Gordon, <i>The Criminal Law of Scotland</i> , 3 rd edn by MGA Christie, Vol I (2000) and Vol II (2001)

Horder, "Gross negligence"	J Horder, "Gross negligence and criminal culpability" (1997) 47 UTLJ 495
Moore, <i>Placing Blame</i>	MS Moore, <i>Placing Blame: A Theory of the Criminal Law</i> (1997)
Pillsbury, "Crimes of indifference"	SH Pillsbury, "Crimes of indifference" (1997) 49 Rutgers Law Review 105
Tadros, <i>Criminal Responsibility</i>	V Tadros, <i>Criminal Responsibility</i> (2005)

1 Introduction

This thesis presents a normative yet practical account of how Scots and English¹ criminal law should assess the culpability of careless persons. At present, both jurisdictions distinguish between two types of culpable, unjustified² risk-taking: recklessness and negligence. In everyday language, these concepts have blurred edges:³ persons are labelled “reckless” or “negligent” with little thought to the difference – if any – that exists between these terms.

Although unproblematic in the “everyday” context, this laxity in definition is inappropriate in the criminal courtroom. Negligence is not usually a sufficient form of culpability for serious offences,⁴ whilst recklessness typically is.⁵ In the most serious crimes, recklessness thus marks the limit of criminal liability.⁶ The concept ought, therefore, to be well understood and developed.⁷ Unfortunately, Scots and English courts have had difficulty defining and distinguishing between recklessness and negligence. This thesis explores the resulting jurisprudential quagmires and contends that, in both jurisdictions, the absence of a clear theory of culpable carelessness accounts for the courts’ difficulties. It then looks to criminal law theory to construct a defensible account of culpable carelessness which can distinguish clearly between recklessness and negligence and explain the circumstances in which

¹ Hereinafter, “English law” is used as shorthand for the law of England and Wales. References to “England” should similarly be read to include Wales.

² Justification is explored below at §5.A(1). Hereinafter (unless otherwise stated), “risk” refers to an unjustified risk.

³ *Banditt v R* [2005] HCA 80 at para 108 per Callinan J. On the matter of whether settled meanings for “everyday” terms exist, see G Ryle, “Ordinary language” (1953) 62 *Philosophical Review* 167.

⁴ The exception to this rule in English law is “gross” negligence manslaughter (see §3.D, below). On negligence in Scots law, see §2.B, below.

⁵ Some crimes cannot be committed recklessly: e.g. assault requires “evil intent” in Scotland (*Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 43) and murder cannot be committed recklessly in England.

⁶ ATH Smith, “Law reform proposals and the courts”, in I Dennis (ed), *Criminal Law and Justice: Essays from the WG Hart Workshop 1986* (1987) 35 at 49; V Tadros, “Recklessness and the duty to take care”, in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 227 at 229. Again, the exception in English law is “gross” negligence manslaughter (see §3.D, below).

⁷ G Williams, *Textbook of Criminal Law*, 2nd edn (1983) 97.

the latter ought to be criminally culpable. Finally, the thesis considers the practical implications of this theory.

Section A of this chapter defines the scope of the thesis. Section B then offers a sketch of the argument. The thesis's original contributions to knowledge are considered in section C, before definitional matters are discussed in section D.

A. SCOPE

The following matters will not be considered at length here, but some short comments are necessary to give context to the subsequent chapters.

(1) Responsibility, culpability and liability

First, there is the relationship amongst criminal *responsibility*, criminal *culpability* and criminal *liability*. Responsibility “means different things to different people”,⁸ but some general points can be made. Theories of responsibility seek to demonstrate when an actor can be held accountable (to another) for various things, including her actions. At its most basic, responsibility entails answerability.⁹

The answer that an agent gives will depend on her reasons for action. This brings in consideration of “reason-responsiveness”, i.e. the agent's ability to notice and respond to the reasons which bear upon her in a situation.¹⁰ Theorists rarely say more than that responsibility requires responsiveness to reasons. It is not clear, for example, *which* reasons must be responded to for an agent to be responsible.¹¹ As responsibility is not the focus of the investigation here,¹² this question will not be addressed.¹³ It is sufficient to note that responsibility deals with calling a reason-responsive person to account, and that criminal responsibility is a special kind of this

⁸ P Hieronymi, “Responsibility for believing” (2008) 161 *Synthese* 357 at 359.

⁹ Duff, *AFC* 15.

¹⁰ See: *ibid* 39-40; JM Fischer, “Responsiveness and moral responsibility”, in F Schoeman (ed), *Responsibility, Character and the Emotions: New Essays in Moral Psychology* (1987) 81; G Watson, “Reasons and responsibility” (2001) 111 *Ethics* 374; Tadros, *Criminal Responsibility* 55-57; Alexander et al, *Crime & Culpability* 17.

¹¹ DN Husak, “Answering Duff: RA Duff's *Answering for Crime*” (2010) 29 *Law & Phil* 101 at 105-109.

¹² See, however, §5.C(3)(a), below.

¹³ See, however, the references in Duff, *AFC* 39 (n 2).

practice – i.e. the public calling to account of a citizen, before her fellow citizens, for her alleged wrongdoing.¹⁴

Much of the thesis will assume that a person is capable of being held to account: that she *is* reason-responsive and has perpetrated the sort of action which is declared criminal by the polity.¹⁵ It considers ways in which people can be blameworthy for performing such wrongs, which brings in considerations of *culpability*. Culpability is a neglected topic in Anglo-Scottish criminal law theory,¹⁶ and this thesis does not present a systemic account of it.¹⁷ The argument merely concerns two specific ways of being culpable: through recklessness and negligence. The thesis is not, therefore, too concerned with other ways of being culpable, such as intentional and knowing wrongdoing. These are considered only briefly¹⁸ to show how they relate to recklessness and negligence.

Finally, culpability must be separated from *liability*. Liability, Duff explains, can only be imposed where the (responsible) accused's answer for her wrongdoing is insufficiently exculpatory.¹⁹ It is possible for a citizen to be criminally responsible (i.e. answerable) for her conduct without being held liable for it. Defeaters of liability are institutionalised in the criminal law. For instance, self-defence might defeat a finding of liability entirely. A person who kills in legally-recognised²⁰ self-defence is still responsible for her conduct – she must answer for it – but her answer will defeat a finding of liability. Other answers for wrongdoing merely impact upon the amount of blame attached to the agent's conduct. For instance, provocation reduces murder to culpable homicide/manslaughter because provoked actors are apparently less blameworthy than cold-blooded killers.²¹

¹⁴ See, generally, *ibid.*

¹⁵ See §1.A(3), below.

¹⁶ Cf the situation in the US since GP Fletcher, *Rethinking Criminal Law* (1978) introduced comparative conceptions of culpability to American audiences.

¹⁷ See, however, L Zaibert, *Five Ways Patricia Can Kill Her Husband: A Theory of Intentionality and Blame* (2005).

¹⁸ At §6.C.

¹⁹ Duff, *AFC* 15-16, ch 11.

²⁰ On the requirements of self-defence in Scots and English law, see F Leverick, *Killing in Self-Defence* (2006).

²¹ D Hume, *Commentaries on the Law of Scotland Respecting Crimes*, Vol I, 4th edn with notes by BR Bell (1844) 239-240.

What these examples show is that culpability is linked to the matter of liability. Nevertheless, there might be considerations which militate against holding a culpable actor liable.²² For instance, the fact that evidence against her was extracted by torture (or other irregular means) might lead the court to cease the inquiry into liability in order to preserve the “moral legitimacy” of the criminal justice system.²³ Although culpability explains much about liability, it does not therefore explain the whole.

(2) Culpability as insufficient concern

Secondly, it must be asked what culpability *means*. Its dictionary definition – “responsibility for a fault or wrong; blame”²⁴ – is unhelpfully vague, and collapses the distinctions introduced above.

Culpability is no doubt connected to an understanding of responsibility and to the rationale(s) for punishment. It is, however, possible to separate out these concepts. For instance, Alexander, Ferzan and Morse and Tadros adopt different approaches to the matter of criminal responsibility (Alexander, Ferzan and Morse are choice theorists; Tadros is a character theorist) and punishment (Alexander, Ferzan and Morse are retributivists; Tadros supports (in *Criminal Responsibility*) a communication view of punishment).²⁵ They agree, however, that the element of culpability required for a criminal conviction is a demonstration of *insufficient concern for the interests of others*.²⁶ This basic understanding of culpability will be employed throughout the thesis, and will be expanded upon in chapters five and six.

(3) Crimes as “public wrongs”

Thirdly, persons are not held criminally liable for culpable conduct – i.e. an act demonstrating insufficient concern for others – alone. A person could, for instance,

²² Alexander et al, *Crime and Culpability* 8-9. Cf PH Robinson and M Cahill, *Law without Justice: Why Criminal Law Doesn't Give People What They Deserve* (2006).

²³ See, further, F Stark “Moral legitimacy and disclosure appeals” (2010) 14 EdinLR 205.

²⁴ See http://oxforddictionaries.com/view/entry/m_en_gb0979290#m_en_gb0979290.

²⁵ See: Alexander et al, *Crime & Culpability* 7-10; Tadros, *Criminal Responsibility* ch 3. Tadros's view on punishment have since changed: see V Tadros, “A human right to a fair criminal law?”, in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 103.

²⁶ Tadros, *Criminal Responsibility* 83-90; Alexander et al, *Crime & Culpability* ch 2.

buy a television knowing that doing so risks her being unable to pay her bills. This is unlikely to be a matter for the criminal courts, but it could be described as “reckless” (as that term is understood in chapter six). It could, however, be that the polity thinks that such fiscal carelessness is *so* wrong that it becomes the concern of the community and may be declared a “public wrong”; a concern of all citizens.²⁷ This is a matter of *criminalisation*, and will arise at various points of the thesis. The thesis does not, however, aim to give a complete account of the criminalisation of carelessness – it seeks only to outline some principles which could provide guidance to the polity in that task. Without these, there would be a significant hole in the theory presented in chapters five and six.²⁸

(4) Blame and Punishment

Fourthly, this thesis is concerned with two ways of establishing the amount of blameworthiness that a person’s act attracts in virtue of its demonstration of insufficient concern for the legally-protected interests of others. Such an account cannot be separated entirely from a theory of punishment, and it is useful to say something in this regard.

Although no account of blame will be given,²⁹ it is assumed that it is not the same as punishment.³⁰ Blame might be conceived of as private, based on personal relationships,³¹ whilst punishment is an institutionalised public, political enterprise.³² In consequence, a theory of culpability (concerned with blameworthiness) might be taken up by those who support different theories of punishment. For instance, retributivists might accept the points made in chapter six; as might some consequentialists. As long as culpability is seen as a necessary (if not sufficient)

²⁷ See: W Blackstone, *Commentaries on the Laws of England: Book IV* (1770) 5; RA Duff, *Trials and Punishments* (1986); SE Marshall and RA Duff, “Criminalization and sharing wrongs” (1998) 11 CJLJ 7; RA Duff, *Punishment, Communication and Community* (2001); Duff, *AFC* ch 6; RA Duff and SE Marshall, “Public and private wrongs”, in Chalmers, Leverick and Farmer (eds), *Essays in Criminal Law* (n 25) 70.

²⁸ I am grateful to Neil Walker for making this point.

²⁹ See, however, G Sher, *In Praise of Blame* (2006).

³⁰ Cf Duff, *Trials and Punishments* (n 27) ch 2.

³¹ See e.g. TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (2008) ch 4.

³² JER Squires, “Blame” (1968) 18 *Philosophical Quarterly* 54 at 54.

condition for punishing, then the insights in later chapters might be appropriated by various theoretical schools.³³

The thesis will nevertheless rely at various points on the communication theory of punishment.³⁴ This has both backward- and forward-looking aspects. It is backward-looking insofar as it concentrates on culpability for past acts.³⁵ It looks forward by seeking, through punishment, to communicate – to the offender, the victim and the public more generally – that the offender and her conduct should be condemned. This is done in the hope of communicating and cementing the limits of acceptable action in the community. It will be explained in chapters five and six how the theory of culpable carelessness defended there can be understood in light of communication theory.

(5) Free will and determinism

Fifthly, the debate over free will and determinism will be largely ignored. Although the resolution of this philosophical struggle would aid a deeper understanding of responsibility which could inform the criminal law,³⁶ there is not space to explore this issue in acceptable depth.

As a result, this thesis does not seek to add to the free will/determinism debate.³⁷ Various arguments made in the body of the thesis are open to objections from determinists, and no real answers are provided. For instance, the idea that persons are responsible for shaping their characters (the basis of the argument developed in chapter five) is open to the objection that, even if a person *can* change, such change will have been determined by pre-existing causes, and the actor is therefore not *really* responsible for changing.³⁸ The same might be said of actors who fail to change: this failure was determined, and is nothing to do with them. In order

³³ If culpability is not accepted as a necessary condition for punishment, theorists may still argue that this thesis identifies some particularly apt candidates for punishment. Strict liability, where culpability is less apparent (or absent) will be ignored here. See, however: AP Simester (ed), *Appraising Strict Liability* (2005); Duff, *AFC* ch 10.

³⁴ See, generally, Duff, *Punishment, Communication and Community* (n 27).

³⁵ This aspect of communication theory has led to it being labelled “enhanced retributivism”: AW Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (2000) 119.

³⁶ Tadros, *Criminal Responsibility* 69.

³⁷ For brief introductions, see: AJP Kenny, *Freewill and Responsibility* (1978) 22-25; Alexander et al, *Crime & Culpability* 13-15.

³⁸ G Strawson, “The impossibility of moral responsibility” (1994) 75 *Philosophical Studies* 5 at 18-19.

to avoid the force of these arguments which – at their strongest – seem to undermine the whole idea of moral (and therefore legal) responsibility, culpability and any attendant liability to punishment, the thesis necessarily assumes a compatibilist standpoint (i.e. a standpoint that assumes that responsibility is possible, even in a determined universe), but the content of this view will not be elaborated upon.

(6) Is risk-taking harmful?

Sixthly, there is the issue of whether imposing a risk on another person is harmful *even if* the risked consequence does not materialise (or circumstance exist). This issue is related to concerns of criminalisation if the “harm principle” is adhered to but, as noted above, the thesis does not concern itself overly with matters of criminalisation. It is therefore assumed that risk-taking is harmful, and no more will be said in this regard. The most plausible explanation for this conclusion is offered by Oberdiek, who argues that imposing a risk impacts upon the autonomy of others by limiting their safe options.³⁹ A person who carelessly fires a rifle limits the available safe options of bystanders: (presuming they are not suicidal) they are no longer free to stand safely in the path of the bullet when, without the careless firing of the rifle, they would have been. Alternative theses have been presented as to why risk-taking is,⁴⁰ and is not,⁴¹ harmful, but these will not be discussed further.

(7) Case law

Finally, the thesis states the laws of Scotland and England as of 1 June 2011.

B. CHAPTER OVERVIEW

The thesis is split into six substantive chapters, together with this introduction and a concluding chapter.

³⁹ J Oberdiek, “Towards a right against risking” (2009) 28 Law & Phil 367 (particularly at 373-374).

⁴⁰ E.g.: C Finkelstein, “Is risk a harm?” (2002-2003) 151 U Pa L Rev 963; J Steele, *Risks and Legal Theory* (2004) 116-117.

⁴¹ E.g. SR Perry, “Harm, history and counterfactuals” (2003) 40 San Diego L Rev 1283.

(1) Chapter two

Chapter two examines Scots criminal law's approach to recklessness and negligence. It begins with a brief literature review, which demonstrates that academic opinion on this topic is confused. The chapter then moves on to consider the Scots jurisprudence on recklessness and negligence.

It will be contended that the courts have developed five distinct types of culpable carelessness:

- (i) *Allan v Patterson*⁴² recklessness: recklessness is identified with careless conduct. It is unnecessary to consider the accused's mental state.
- (ii) *Quinn v Cunningham*⁴³ recklessness: recklessness consists of acting with an "utter disregard" for or "indifference" towards risk. Although the courts have stressed the importance of *mens rea* in such cases,⁴⁴ it is unclear whether it is necessary for the accused to have adverted consciously to a risk attendant upon her conduct.⁴⁵
- (iii) *Jamieson*⁴⁶ recklessness: recklessness is understood in a "subjective"⁴⁷ sense: the accused must have either been "indifferent" to the risk that his partner was not consenting to sex, or have acted in spite of his belief that she might not be consenting.⁴⁸ This definition of recklessness is superseded by the Sexual Offences (Scotland) Act 2009, which does not utilise the concept of recklessness in relation to consent.⁴⁹
- (iv) "Wicked" recklessness: recklessness accompanies an intentional physical attack which demonstrates "indifference" towards whether the victim lives or dies.⁵⁰ "Wicked" recklessness is exclusive to murder.

⁴² 1980 JC 57.

⁴³ 1956 JC 22.

⁴⁴ E.g. *Transco plc v HM Advocate* 2004 JC 29.

⁴⁵ See TH Jones and MGA Christie, *Criminal Law*, 4th edn (2008) para 3.30.

⁴⁶ *Jamieson v HM Advocate* 1994 JC 88.

⁴⁷ *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 at para 29 per the Lord Justice-General (Cullen). "Subjective" and "objective" are discussed below at §1.D(1).

⁴⁸ These gender terms are consistent with the law when *Jamieson* was decided.

⁴⁹ Instead, the accused must have lacked a "reasonable belief" in consent to be convicted: s 1(1)(b). For discussion, see §2.E(2), below.

⁵⁰ See *HM Advocate v Purcell* 2008 JC 131.

- (v) *Brennan*⁵¹ recklessness: recklessness is found in the act of becoming acutely, voluntarily intoxicated. If the accused commits an offence of recklessness⁵² whilst in this state, she is to be convicted, even if – at the time of acting – she lacked the capacity to form *mens rea*.

Little thought, if any, has gone into how these categories inter-relate. Decisions within each category seem mutually contradictory: some hint at a need for advertence to risk in order to be reckless; others point in the opposite direction; others still remain equivocal on the advertence/inadvertence issue. The chapter thus concludes that the law is intolerably confused and suffers for its lack of a coherent theory of culpable carelessness.

(2) Chapter three

Scots criminal law is undeveloped:⁵³ judgments concerning *mens rea* tend to be vague and infrequent; few academics write extensively about them.⁵⁴ It might, therefore, be doubted that chapter two's examination of the Scottish jurisprudence has uncovered anything beyond the appeal court's inconsistent approach to core criminal law terms. This would undermine the contention that the absence of a theoretical understanding of culpability for risk-taking is the cause of Scots law's problems.

This necessitates chapter three's examination of a more developed system of criminal law to see if it has encountered similar difficulties. The jurisdiction chosen is England – primarily because of the availability of English materials to the researcher, but also because of the tumultuous history of recklessness and negligence in English criminal law.

In the early twentieth century, the English courts adopted a “subjective” understanding of recklessness in relation to most offences,⁵⁵ requiring the Crown to establish that the accused consciously foresaw the relevant risk and acted in spite of

⁵¹ 1977 JC 38.

⁵² This approach is also adopted in crimes requiring intention – e.g. assault (*Ebsworth v HM Advocate* 1992 SLT 1161).

⁵³ See V Tadros, “Review of Chalmers and Leverick, *Criminal Defences*” 2006 SCOLAG 230.

⁵⁴ This situation has improved over time: see Gordon, *Criminal Law* viii.

⁵⁵ *R v Cunningham* [1957] 2 QB 396.

this awareness.⁵⁶ In the 1980s, the decisions in *R v Caldwell*⁵⁷ and *R v Lawrence*⁵⁸ introduced an “objective” test for recklessness: if, even though the defendant did not foresee it, the risk would have been foreseen and avoided by the reasonable person in the defendant’s circumstances, the defendant would be reckless for taking it. Academic reaction to these decisions was resoundingly negative⁵⁹ and, for a time, English law was thrown into the same confusion that Scots law presently finds itself in. *Caldwell* never influenced much of the criminal law, however,⁶⁰ and so it was easy enough for the House of Lords to finally remove its influence in 2003 (in *R v G*).⁶¹

This “subjectivist” victory is, as chapter three demonstrates, hollow: *Lawrence* is still authoritative in relation to road traffic offences;⁶² “gross” negligence is still employed in involuntary manslaughter, and it is unclear how it differs from recklessness; the Sexual Offences Act 2003 employs a “mixed” approach to recklessness;⁶³ certain statutory offences necessitate an “objective” approach; and becoming acutely, voluntarily intoxicated is still necessarily “reckless”. In short, there remain multiple understandings of recklessness (some of which are difficult to distinguish from negligence) in English criminal law. England’s positive criminal law⁶⁴ does not therefore adhere to pure “subjective” theory.⁶⁵ Adding to this doctrinal doubt, there are still those who are dissatisfied with the “subjective” approach in theory.⁶⁶ This means that – in spite of some

⁵⁶ Foresight of risk is usually inferred from the circumstances. If a risk was so obvious that any ordinary person would have appreciated it, the accused will have difficulty convincing the court that she was, in fact, unaware of it. Exceptions are imaginable: e.g. the accused might be young and/or of limited intelligence – see: *Elliott v C (A Minor)* [1983] 1 WLR 939; *S v HM Advocate*, unreported, High Court of Justiciary, 15 Oct 1999.

⁵⁷ [1982] AC 341.

⁵⁸ [1982] AC 510.

⁵⁹ See §3.C(2), below.

⁶⁰ See *ibid.*

⁶¹ [2004] 1 AC 1034.

⁶² For reasons explored in §3.E(4), this is relatively unimportant in practice.

⁶³ “Mixed” approaches are introduced below at §2.E(2).

⁶⁴ “Positive law” is used as shorthand for the law declared by the courts or set out in legislation.

⁶⁵ Although there has been a recent trend towards “subjective” *mens rea*, some areas of English criminal law (e.g. implied malice in murder) defy it.

⁶⁶ See §3.F, below.

“subjectivist” tendencies in English criminal law – it would not be impossible for *Caldwell’s* brand of inadvertent recklessness to reappear in the future.⁶⁷

English law is thus also in want of a coherent theory of culpable carelessness which could be used by the courts when defining the *mens rea* terms recklessness and negligence. At the close of chapter three, Scots and English law will thus have been diagnosed as suffering from the same disease. The thesis then moves on to consider if a common cure is available.

(3) Chapter four

Chapter four investigates “subjectivism”, which is pervasive in theoretical approaches to recklessness and negligence. The chapter distinguishes between three different schools of “subjective” thought, all of which are related – in some way – to the accused’s choices. First, there is “strict choice” theory, which holds that a person can only be culpable for her conscious choices to do wrong. On this view, recklessness is defined by reference to the accused’s decision to take an unjustified risk and negligence is identified with non-culpable inadvertence.⁶⁸

After some popular arguments against negligence liability which stem from strict choice theory are shown to be weak, the chapter moves on to contrast the “correspondence principle”⁶⁹ and Ferzan’s critique of the need for “conscious” awareness in cases of recklessness.⁷⁰ These two approaches show the flexible limits of strict choice theory and that there exists disagreement over what strict choice theory actually requires. This diminishes its attractiveness as a theory to inform reform of Scots and English criminal laws’ approach to culpable carelessness.

Given its potential malleability, strict choice theory has been warped by some authors to accommodate instances of inadvertent risk-taking within the criminal law. The second type of choice theory to be discussed is “choice and capacity” theory, which concentrates on whether an inadvertent actor *could have chosen* to act

⁶⁷ Cf AP Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 4th edn (2010) 144.

⁶⁸ See e.g. Alexander et al, *Crime & Culpability* ch 3.

⁶⁹ See Ashworth, *Principles* 76-77.

⁷⁰ Ferzan, “Opaque recklessness”.

differently in the circumstances. This approach has some appeal, but it is still tied (somewhat unconvincingly) to the idea that only choices are truly culpable.

A third approach – “choice and character” theory – explains culpable negligence by reference to the actor’s previous choices concerning her character development. It requires both an implausible view of character development and an illiberal approach to criminal fault. It too must be rejected.

(4) Chapter five

Having rejected “subjectivism” in its three forms, chapter five adopts a different approach to culpability for inadvertent risk-taking, i.e. negligence. Negligence tends to connote the breaching of societal expectations about acceptable risk-taking. In the civil law,⁷¹ this is certainly how liability for negligence is understood. The strict choice theorist’s worry is not that there is nothing *faulty* in failing to meet a standard of care that society demands. Rather, it is that such failures are not viewed as *culpable* in the sense required for criminal fault.⁷² This view is most defensible in cases where there was no clear duty of care owed by the accused to the complainer (for instance, that which arises in the context of a doctor/patient relationship). Where there are such duties, which have been taken on voluntarily and are governed by well-publicised standards of conduct, the situation seems to be different. In such cases, it will be argued that a form of culpable negligence – *negligence as failure of conduct* – may arise where the actor acts incompatibly with her duties.

Chapter five also explains another form of culpable inadvertence – *negligence as failure of belief*. This manifests itself where the accused has failed to form the belief that a certain risk is attendant upon her conduct where she had the opportunity to do so. Most such failures of belief will result from a failure to exercise control over desire. A desire to get home quickly to watch a football game⁷³ might, for example, prevent an actor from combining her background knowledge about risks in general and her perceptions to form beliefs about the safety of her conduct. This sort of desire might be one which the accused may legitimately be expected by

⁷¹ “Civil law” is used as shorthand for the laws of delict and tort.

⁷² A Brudner “Is negligence blameless?”, in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (2009) 285.

⁷³ See Tadros, *Responsibility* 260.

society to control, and thus the accused's failure to advert to risk – which makes her conduct nonetheless dangerous – can be a basis for finding culpability.

This failure to control desire ought to be the focus of any criminal inquiry into culpable negligence where the accused does not owe clear duties to others. It is nevertheless possible that the desire which motivated the accused was not truly a reflection of her settled character. In searching for culpability, it should further be asked whether the accused had accepted the relevant desire as part of her character. This is because, although we blame for actions, not character, it is the accused – *as an agent of character* – that we punish.⁷⁴ This exercise seems pointless if the action was not truly a reflection of the accused's character.⁷⁵ Negligence as failure of belief thus lends itself to a character-based approach to inadvertent risk-taking.

Once negligence has been explained, the thesis moves on to consider recklessness.

(5) Chapter six

“Subjectivists” accept that recklessness is culpable, but deny that it exists in the absence of conscious, chosen risk-taking. This focus has been criticised by philosophers of the criminal law, and chapter six considers these objections.

Wider conceptions of recklessness, which found on the attitude of “indifference”, are analysed at the beginning of the chapter. Some of these rely on the accused's earlier choices concerning what to pay attention to; others employ counter-factual estimations of what the accused would have done had she been consciously aware of the risks she was taking. Both of these approaches struggle to distinguish recklessness from negligence. A different approach is defended by Duff, who contends that the concentration should be on the accused's attitude (of “practical indifference”) as revealed *through* her conduct.⁷⁶ Although “practical indifference” is a robust theoretical account of recklessness, it also encounters difficulty in distinguishing between recklessness and negligence in all but a limited class of cases.

⁷⁴ See Tadros, *Criminal Responsibility*. Cf KK Ferzan, “Act, agency and indifference: the foundations of *Criminal Responsibility*” (2007) 10 *New Crim LR* 441 at 444.

⁷⁵ See, further, below at §5.C(3)(a).

⁷⁶ Duff, *IACL* ch 7.

Indifference-based theories are not, therefore, commendable as models for reform of the law on culpable carelessness. It will again be argued that a character-based, belief-centred conception of culpability better distinguishes between different types of culpable carelessness. Just as desire can prevent the formation of a belief concerning risk in certain circumstances, it can stop a person's beliefs concerning risk from motivating her to (for instance) investigate risks which she is dimly aware of. Negligence as failure of belief and recklessness thus share the same core; they are both failures to be motivated sufficiently in the formation of beliefs about risk. Importantly, recklessness does not therefore require a conscious *choice* to take a concrete risk.

At the end of chapter six, then, a theory of negligence and recklessness will have been presented. Chapter seven moves on to consider how this theory could inform reform of Scots and English law.

(6) Chapter seven

It would be naive to assume that the courts would be able to adopt wholeheartedly a character-based, belief-centred conception of recklessness and negligence to solve the problems identified in chapters two and three. There are, nevertheless, some core lessons from this thesis which the courts should take seriously, and chapter seven examines them.

First, the thesis aims to separate out negligence and recklessness as distinct motivational failures. They should therefore be kept separate in the criminal law as – in most cases – being negligent is less blameworthy than being reckless with regard to the same risk.⁷⁷

Secondly, chapters five and six tease out the central wrongs inherent in being negligent and reckless. It will be contended that these wrongs do not change depending on the crime charged, so there should only be *one* understanding of recklessness and negligence in the criminal law. The positive law denies this, and requires rethinking. Chapter seven explains, with statutory definitions and jury

⁷⁷ See, further, §6.B(4), below.

instructions, how the theory developed in chapters five and six provides a defensible model for reform.

The realities of the criminal trial mean that some theoretical concessions are nevertheless necessary. For one thing, the rules on admissibility of character evidence (particularly *bad* character evidence) might prohibit the Crown from proving that the accused's act of negligence or recklessness was truly a reflection of her settled character. The solution defended in chapter seven is that there should be a presumption that acts *were* in character. The accused may rebut this presumption by presenting evidence, and the human rights implications of this reverse burden are considered towards the end of the chapter.

C. ORIGINAL CONTRIBUTIONS TO KNOWLEDGE

It is submitted that this thesis makes four original contributions to knowledge.

(1) Analysis of the Scottish jurisprudence

First, chapter two is, to date, the most extensive treatment of Scots law's approach to recklessness and negligence.⁷⁸ At present, the most useful account is contained in Gordon's landmark text.⁷⁹ The latest edition (published in 2000-2001) is beginning to show its age and, despite being superior to anything else in the existing literature, Gordon's treatment of culpable carelessness is still too brief.

Chapter two is also original in its attempt to categorise the Scottish decisions and apply structure to them. Although an improvement on existing accounts of the law, chapter two's approach nevertheless only papers over cracks in the jurisprudence, since the Scottish courts have failed to develop a coherent approach to recklessness and negligence.

⁷⁸ J Barton, "Recklessness in Scots criminal law: subjective or objective?" 2011 JR, forthcoming considers only a few cases, largely ignoring the bigger (more confused) picture.

⁷⁹ Gordon, *Criminal Law* paras 7.35-7.77.

(2) Comparison of Scots and English law

A second original contribution to knowledge is the comparison of Scots and English laws' approaches to recklessness and negligence. Chapter three explores the English jurisprudence and relates it back to the discussion of Scots law in chapter two. Such a comparison is useful to academic debate, as the differences between Scots and English law are rarely studied in detail. There is, however, much that the two systems could learn from each other.

(3) Use of modern criminal law theory

It was mentioned above that Gordon's *Criminal Law* contains the most useful study of recklessness and negligence in Scotland. Since the last edition (2000-2001), much theoretical work on recklessness and negligence has been produced, and this is useful in analysing both Scots and English law. Chapters four, five and six thus make a third original contribution to knowledge in their analysis of this theory, particularly in relation to Scots law.

Although some theorists make use of Scottish authority in relation to their arguments concerning recklessness and negligence (for instance Duff⁸⁰ and Tadros),⁸¹ their accounts – despite being useful – discuss only a fraction of the existing jurisprudence considered in chapter two and are wholeheartedly normative, rather than descriptive. The theory propounded in this thesis aims at being both.

(4) The practicalities of character theory

A final original contribution to knowledge concerns the important role that character, desire and belief play in the account of culpable risk-taking developed in chapters five and six. Such a theory has not yet been developed in detail, and so there has been no consideration of how various procedural difficulties might need to be overcome. Chapter seven sketches answers to these difficult procedural questions.

⁸⁰ Duff, *IACL* ch 7.

⁸¹ Tadros, *Criminal Responsibility* ch 9.

D. DEFINITIONAL MATTERS

There are two definitional points to be made before proceeding.

(1) “Subjective” and “objective”

References to “subjective” and “objective” accounts of *mens rea* are common.⁸² Put simply, “subjective” accounts focus on the accused’s mental state at the time of acting, whilst “objective” accounts concentrate on external standards such as the reasonable person.⁸³ This leads to talk of “subjective” definitions of culpable carelessness (which concentrate on the accused’s awareness of risk) and “objective” definitions (which concentrate on what the reasonable person would have been aware of). As will be seen throughout the thesis, the “subjective”/“objective” dichotomy is neither descriptively nor normatively useful. There are three further reasons why the labels “subjective” and “objective” are more problematic than is usually recognised.

First, even “subjective” accounts of culpable carelessness require unjustifiable risk-taking. Justification is typically assessed with reference to “objective” standards.⁸⁴ Recklessness is, therefore, rarely truly “subjective”.⁸⁵ If it were, the Crown would have a difficult time proving any offender had been reckless. It would be easy for the accused to argue that *she* thought the instance of risk-taking was justifiable and escape conviction. This would have important ramifications for the effectiveness of – and the respect accorded to – the law.

Those who are wedded to the idea that culpability turns on the accused’s perceptions⁸⁶ might reply that the merit of their theory is its concentration solely on the actor (hence the label “subjective”). This raises a second problem: “subjectivists” are not the only theorists concerned with the actor. Character theorists concentrate on *the accused’s* character traits; indifference theorists focus on *the accused’s* attitude.

⁸² GH Gordon, “Subjective and objective *mens rea*” (1974-1975) 17 Crim LQ 355 at 368.

⁸³ Whilst appearing to be gender neutral, the change from “reasonable man” to “reasonable person” has been labelled superficial by some feminists, who contend that the standard is still (male) gendered. See, further, M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003) ch 6.

⁸⁴ See §5.A(1), below.

⁸⁵ D Stuart, “*Mens rea*, negligence and attempts” [1968] Crim LR 647 at 652; C Wells, “Swatting the subjectivist bug” [1982] Crim LR 209 at 210.

⁸⁶ E.g. Alexander et al, *Crime & Culpability* 63.

These matters are surely just as “subjective” as the accused’s mental state.⁸⁷ In consequence, the label “subjectivist” is typically misleading, providing another reason to use it sparingly.

Thirdly, the terms “subjective” and “objective” are used by different authors to mean different things. Over and above the usages mentioned thus far, reference to “objective” ways of proving “subjective” mental states is common.⁸⁸ The Crown could point to (“objective”) external evidence of how obvious a certain risk was and ask the court to draw the appropriate inference (that the accused foresaw the risk, or *ought to have*) without the need to establish what happened in the accused’s mind at the time she acted.⁸⁹ This method, although epistemologically questionable, is necessitated because of the presumption of innocence and the connected right to silence. If the accused chooses to exercise this right, the Crown must rely on “objective” facts. Even if the accused does give evidence, she surely has good reason to lie about her state of awareness.⁹⁰ The judge or jury might therefore prefer “objective” inferences of culpability over a “subjective” claim of innocence.

For these reasons, the terms “subjective” and “objective” will continue to appear in inverted commas. Typically, these terms will be replaced with more accurate ones. For instance, in chapter four, “subjectivists” become various species of “choice theorist”; “objective” recklessness will be referred to as “inadvertent recklessness” (or, sometimes, “negligence”), and so on.

(2) The accused

One final point concerns the label given to the citizen accused of a crime. As the thesis covers both Scots and English jurisprudence, terminological clashes will occur. Care has been taken to use the appropriate label (accused in Scotland; defendant in England) when discussing individual cases. Where no specific jurisdiction is being referred to, the term “accused” will be used.

⁸⁷ Cf Duff, *IACL* 157.

⁸⁸ See Gordon (n 82) at 368.

⁸⁹ If such a demonstration is possible: it is beyond the scope of this thesis to discuss whether risk perception could be measured by scientific methods (e.g. brain-scanning).

⁹⁰ J Chalmers, “*Lieser* and misconceptions” 2008 SCL 1115 at 1119.

Now that the structure, scope and definitions of the thesis have been explained, it is time to turn to the substantive argument. It begins by exploring the Scottish courts' problems defining recklessness and negligence.

2 An “Utter Disregard” for Clarity: the Scottish Approach

This chapter argues that recklessness¹ and negligence are unclear concepts in Scots criminal law.² This is due to the absence of a coherent theoretical framework for the courts to work within.³ Demonstrating this will act as a prelude to theoretical consideration of culpability for carelessness which will be used to appraise Scots (and English)⁴ law’s approach,⁵ before reforms can be proposed.⁶

Section A considers the views of Scottish writers concerning recklessness and negligence, to show up some deficiencies in approach. In order to demonstrate that Scots law’s approach to these terms is incoherent, section B moves on to discuss the troublesome concept of “negligence” in the criminal law. Then, sections C-G identify five separate forms of “recklessness” in the Scots jurisprudence:

- i) *Allan v Patterson* recklessness (employed in most statutory offences);
- ii) *Quinn v Cunningham* recklessness (used in most common-law offences);
- iii) *Jamieson* recklessness (found, at common law, in rape);
- iv) “Wicked” recklessness (exclusive to murder); and
- v) *Brennan* recklessness (utilised in cases where the accused was voluntarily intoxicated to the extent that she was unable, at the time of performing an *actus reus*,⁷ to form *mens rea*).

¹ Recklessness as to *circumstances* will not be distinguished from recklessness as to *consequences*. This dichotomy has not developed in the Scots jurisprudence.

² There is not space to deal here with recklessness and negligence in attempts and art and part liability.

³ V Tadros, “Recklessness, consent and the transmission of HIV” (2001) 5 EdinLR 371 at 376.

⁴ See ch 3, below.

⁵ See chs 5-6, below.

⁶ See ch 7, below.

⁷ Strictly, an action cannot be an *actus reus* if *mens rea* is absent: Gordon, *Criminal Law* para 3.04.

The courts have put little, if any, thought into how these categories interrelate.⁸ There are also contradictory decisions within each category: some hint at advertence to risk as being necessary for recklessness; some point in the opposite direction; and others are equivocal on the advertence/inadvertence issue. The categorisation exercise undertaken in this chapter does not, therefore, add much clarity to the concepts of recklessness and negligence in Scots criminal law – the cases are simply too disjointed to make that aim attainable. The chapter instead seeks merely to expose the problems in the Scots jurisprudence, so that later chapters can propose a way to resolve them.

A. COMMENTARY

It is helpful to first consider the early Scots writers, before examining modern treatments.

(1) The early writers

The works of the early Scots writers are largely unhelpful when considering modern *mens rea* terms like recklessness and negligence. Some of these writers nevertheless continue to exert influence on the development of the law, and so the following brief overview justifies largely ignoring them from hereinafter.

Mens rea was not discussed by Scottish writers until relatively recently. Mackenzie (1699) introduces the alternative concept of *dole* – a “wicked design” which must be present to make an action criminal.⁹ Dole was inferred from the circumstances and, in *serious* offences, negligence was not equivalent to it.¹⁰ This much is clear, but matters are complicated by Mackenzie’s view that, if the accused’s act was viewed as wrongful enough in itself (for instance, sodomy), *dole* need not be proved.¹¹

⁸ See, similarly, *ibid* para 7.48.

⁹ G Mackenzie, *The Laws and Customs of Scotland in Matters Criminal Wherein it is to be Seen how the Civil Law, and the Laws and Customs of Other Nations doth Agree with, and Supply, Ours*, 2nd edn (1699) 5. The first edition (1678) speaks in identical terms.

¹⁰ *Ibid*.

¹¹ *Ibid*.

Bayne’s account (1730) is similar, describing dole as “a malevolent Intention... an essential Ingredient to constitute an Action criminal; but no Negligence is equal to [dole]... Unless the Negligence is so extremely supine, as can hardly be conceived without implying Dole”.¹²

Both Mackenzie and Bayne mention negligence, then, but it remains unclear what role it undertook. Was negligence a form of *acting*, from which a(n intentional?) mental state could be inferred, or an alternative head of blameworthiness meriting punishment?

Hume’s discussion of dole (1844)¹³ is hardly more helpful in establishing the origins of recklessness and negligence. Dole is an inference from the circumstances that the accused possessed “a corrupt and malignant disposition, a heart contemptuous of order, and regardless of social duty”.¹⁴ This description goes beyond the accused’s thoughts at the time of acting, and countenances a wider, normative judgement of the accused’s motives and whether she had any defences.¹⁵ Dole was not, therefore, a synonym for *mens rea*. It was a much broader concept,¹⁶ concerned more with the circumstances of the offence than the mental state of the accused.¹⁷

After Hume, discussions of culpability do not appear in many Scottish works. Burnett’s *Treatise* (1811) begins with the crime of murder, and he requires a specific element of *intention* in order for that crime to be complete.¹⁸ Burnett’s focus is on how this is to be proved by inference from the circumstances. A similar approach is adopted by Alison (1832), who also allows for “utter *recklessness* as to the life of the

¹² A Bayne, *Institutions of the Criminal Law of Scotland: For the Use of the Students Who Attend the Lectures of Alexander Bayne, JP* (1730) 9-10. See, similarly, J Erskine, *The Principles of the Law of Scotland: In the Order of Sir George Mackenzie’s Institutions of that Law*, Vol II (1754) 469-470.

¹³ D Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 4th edn with notes by BR Bell (1844) 21. The discussion remains largely unaltered from the first edition (1797).

¹⁴ *Ibid* 22.

¹⁵ See: *ibid* 254; *HM Advocate v Maclean*, February 1710 (see J MacLaurin, *Arguments and Decisions, in Remarkable Cases, Before the High Court of Justiciary, and the Other Supreme Courts, in Scotland* (1774) 24).

¹⁶ V Tadros, “Insanity and the capacity for criminal responsibility” (2001) 5 *EdinLR* 325 at 328.

¹⁷ L Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (1997) 150-151.

¹⁸ J Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (1811) 4-5.

sufferer, whether he live or die” to satisfy the fault element of murder.¹⁹ This might suggest a move towards consideration of recklessness as a mental state, but the discussion is almost immediately related back to Hume’s wider discussion of dole, which does not mention recklessness.²⁰ This makes the drawing of any settled conclusions unwise:²¹ even though the terms “recklessness” and “negligence” appear in writings from the mid-nineteenth century, it is unclear what they meant or if they were terms of legal art.

The next major writer, Macdonald (1948),²² deals with individual culpability quickly, concentrating on the moralistic notion of wickedness, with copious reference to Hume’s discussion of dole.²³ Anderson’s account (1904) similarly cites Hume and emphasises considerations of motive and the role of intention in the criminal law.²⁴ Nothing specific is said about risk-taking – either in the guise of recklessness or negligence.

From these early texts, it is clear that, until at least the mid-twentieth century, the concepts of recklessness and negligence (and the notion of culpability in general) remained opaque in Scotland. There were no clear distinctions between act, mind and character. This is indicative of the broader point, that nobody knows what relevance dole has for modern lawyers.²⁵ It is safer to discard the concept and proceed on the assumption that the early writers can offer no assistance in clarifying the meanings of recklessness and negligence in Scots criminal law.

Modern accounts are slightly more helpful in this regard.

¹⁹ A Alison, *Principles of the Criminal Law of Scotland* (1832) 1 (emphasis added). The quoted text comes from the case of *Colin Telfer* (1815) (see Hume, *Commentaries* (n 13) 257 (n 3)).

²⁰ Alison, *Principles* (n 19) 2 (n 1).

²¹ Cf J Barton, “Recklessness in Scots criminal law: subjective or objective?” 2011 JR, forthcoming.

²² The first and second editions of Macdonald’s work aim to concentrate on offences which imply “malice or criminal recklessness”: JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 2nd edn (1877) 1. This ambition is expressed in later editions.

²³ JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn by J Walker and DJ Stevenson (1948) 1-2.

²⁴ AM Anderson, *The Criminal Law of Scotland*, 2nd edn (1904) 1-4.

²⁵ RS Shiels, “The unsettled relevance of dole” 2010 SCL 421.

(2) Modern treatments

The word “modern” is used loosely, as a detectable sea-change occurred in the 1960s, with the publication of works by Smith²⁶ and Gordon.²⁷

Smith (1962) is the first author to use *mens rea* as a synonym for dole²⁸ and identifies it with a “guilty intention or negligence”.²⁹ These elements are familiar, but Smith also states that the culpable accused’s “mind must have intended or been reckless with regard to the *actus reus*”.³⁰ Again, recklessness is not defined and it becomes clear that dole cannot exist where the accused had a defence.³¹ Dole was thus still not the same as *mens rea*. This makes Smith’s account unhelpful for present purposes.

Gordon’s text (1967) is more original. Gordon is critical of most of the Scottish writers since Hume,³² and addresses the matter of culpability afresh, with reference to the Anglo-American understanding of *mens rea*. He thus dispenses with talk of “dole”³³ and separates out *mens rea* and the defences that do not impact upon it.³⁴ This approach has proved influential: modern Scottish authors³⁵ shy away from talk of dole³⁶ and employ Anglo-American commentary, typically to good effect.

Gordon’s treatment of recklessness and negligence is relatively extensive – totalling thirty-four pages in the most recent edition³⁷ – and is clear on the *mental* aspects of these terms. Gordon’s account is also noteworthy in its use of criminal law theory. Unfortunately, the works cited now look dated. Gordon’s views on the case

²⁶ TB Smith, *A Short Commentary on the Law of Scotland* (1962) chs 5-6.

²⁷ GH Gordon, *The Criminal Law of Scotland* (1967).

²⁸ Taylor equated *mens rea* with dole in his lectures. See J Chalmers, “Thomas Taylor’s lectures on criminal law”, in HL MacQueen (ed), *Miscellany Five by Various Authors* (2006) 189 at 198-200.

²⁹ Smith, *A Short Commentary* (n 26) 132.

³⁰ *Ibid.*

³¹ *Ibid* 133, 137-153.

³² See, particularly, GH Gordon, *The Criminal Law of Scotland*, 2nd edn (1978) para 0.02.

³³ GH Gordon, “Cawthorne and the *mens rea* of murder” 1969 SLT (News) 41 at 44-45; Gordon, *Criminal Law* para 7.02.

³⁴ Some “defences” (e.g. mistake) might impact upon *mens rea*.

³⁵ The judiciary has not always followed suit. See e.g.: *Transco plc v HM Advocate* 2004 JC 29 at para 3 per Lord Osborne, para 42 per Lord Hamilton; *Docherty v Brown* 1996 JC 48 at 54 per the Lord Justice-Clerk (Ross); *Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 43 at 47-48 per the Lord Justice-Clerk (Ross); *Ross v HM Advocate* 1991 JC 210 at 213 per the Lord Justice-General (Hope); *Roberts v Hamilton* 1989 JC 91 at 94 per the Lord Justice-Clerk (Ross); *Dean v John Menzies (Holdings) Ltd* 1981 JC 23 at 29 per Lord Cameron.

³⁶ See Shiels (n 25) at 424-427.

³⁷ Gordon, *Criminal Law* paras 7.35-7.77.

law are also showing their age. For instance, the important decision in *Transco plc v HM Advocate*³⁸ (discussed below) post-dates the most recent edition by three years.³⁹

Since Gordon, there has been little in-depth treatment of recklessness and negligence in the Scottish literature. Christie (2005)⁴⁰ undertakes a lengthy discussion of *dole*,⁴¹ and considers recklessness specifically.⁴² He views mental awareness of risk as irrelevant to recklessness, which blurs the line he draws between recklessness and negligence. Christie's view nevertheless relies almost exclusively on cases which – as explained below – should be used with caution.⁴³ The same criticism may be made of the Scottish Law Commission (1983)⁴⁴ and the authors of the *Draft Criminal Code for Scotland* (2003),⁴⁵ both of whom endorse wholeheartedly an “objective” approach to recklessness on the basis of some vague decisions, with little or no normative argument marshalled in their support.⁴⁶

There have been only a few articles on recklessness and negligence (although “wicked” recklessness has been discussed more often).⁴⁷ An early work by Ferguson (1985)⁴⁸ draws parallels from murder cases which (again, as demonstrated below)⁴⁹ is unsafe. A more contemporary article by Chalmers (2008) is refreshingly critical of the influence of some decisions on recklessness, demonstrating their limitations.⁵⁰ This insight is taken forward in a recent essay – again by Ferguson (2010) – which seeks to draw principled distinctions in the law of recklessness.⁵¹ The cases discussed

³⁸ 2004 JC 29.

³⁹ *Transco* is mentioned briefly in GH Gordon, *The Criminal Law of Scotland: Third Edition Supplement* by MGA Christie (2005) para 7.59.

⁴⁰ See his contributions to the chapter “Criminal law”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2005).

⁴¹ *Ibid* at paras 56-59.

⁴² *Ibid* at paras 81, 89.

⁴³ Prime offenders are *Allan v Patterson* 1980 JC 57 and *Ward v Robertson* 1938 JC 32.

⁴⁴ The Mental Element in Crime (Scot Law Com No 80, 1983) paras 4.29-4.39.

⁴⁵ See E Clive et al, *A Draft Criminal Code for Scotland with Commentary* (2003) 32-33. Recklessness is defined in section 10 of the Code.

⁴⁶ See, also, the Judicial Studies Committee's *Jury Manual* (2011), available at http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManual_1.pdf, which describes recklessness as “objective” throughout, without adverting to the decisions that cast doubt upon that contention.

⁴⁷ See §2.F, below.

⁴⁸ PW Ferguson, “Recklessness and the reasonable man in Scots criminal law” 1985 JR 29.

⁴⁹ At §2.F.

⁵⁰ J Chalmers, “*Lieser* and misconceptions” 2008 SCL 1115 at 1116-1120.

⁵¹ PW Ferguson, “The mental element in crime”, in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 141 at 153-157.

by Ferguson are, nevertheless, drawn very selectively⁵² and, because he looks at the mental element in crime more generally, the discussion of recklessness is extremely brief. Finally, Barton has argued recently (2011) that recklessness was always understood in an “objective” sense in Scots law before the decision in *Transco*.⁵³ His survey is limited to statutory and common law forms of recklessness and is thus not as expansive as that conducted below. Furthermore, the cases Barton relies on are mostly vague, and do not support his strong conclusions.

That leaves the textbooks.⁵⁴ These give the impression that recklessness is a monolithic (“objective”) concept in Scots law,⁵⁵ before qualifying that statement to a greater,⁵⁶ or lesser,⁵⁷ extent. Some accounts of the law are utterly confused. For example, a recent student textbook reports that: “Recklessness requires that the actor should have been aware of the existence of the risk. It is difficult to see how one can be reckless in relation to a risk which had escaped one’s attention.”⁵⁸ These sentences seem contradictory concerning the accused’s awareness of risk, which is an important consideration in discussions of culpable carelessness. The first sentence suggests that recklessness does not require awareness of risk (*should have been aware*), whilst the second suggests that a person cannot be reckless if unaware of a risk (*escaped... attention*). The confusion that these sentences evidence is, however, somewhat understandable: the law is in such disarray that saying anything concrete about recklessness in Scots criminal law requires an in-depth analysis of the jurisprudence, such as that undertaken below in sections C-G. It certainly requires more than a few pages in a generalist textbook, or the posing of a simple question regarding whether recklessness is “subjective” or objective”.

⁵² This chapter does not analyse *all* decisions on recklessness and negligence. It is, nevertheless, more thorough than anything else in the existing literature.

⁵³ Barton (n 21).

⁵⁴ Recklessness is mentioned briefly in some monographs: e.g. C McDiarmid, *Childhood and Crime* (2007) 80-81.

⁵⁵ TH Jones and MGA Christie, *Criminal Law*, 4th edn (2008) paras 3.30, 3.32.

⁵⁶ See: PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2009) para 6.15.1; CHW Gane, CN Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law*, 4th edn (2009) para 2.29; C McDiarmid, *Criminal Law Essentials* 2nd edn (2010) 85.

⁵⁷ See e.g. Jones and Christie, *Criminal Law* (n 55) para 3.31.

⁵⁸ AM Cubie, *Scots Criminal Law*, 3rd edn (2010) 42. See, similarly, S Christie, *Introduction to Scots Criminal Law*, 2nd edn (2009) 40-41.

Before embarking on the survey of the Scots decisions on *recklessness*, it is necessary – for reasons which will become apparent – to discuss briefly the place of *negligence* in the criminal law.

B. “GROSS” NEGLIGENCE

Ferguson and McDiarmid suggest that talk of “negligence” is unhelpful in the context of Scots criminal law, as it confuses matters.⁵⁹ Other authors are similarly dismissive, dealing with negligence in a few pages,⁶⁰ or ignoring it entirely.⁶¹ This makes sense if recklessness can exist where the accused *ought to have* foreseen the risk. This allows for the possibility that the accused was inadvertent, which is usually the mark of negligence. Recklessness and negligence can, therefore, be collapsed together if an “objective” approach towards culpable carelessness is adopted.⁶²

In some contexts, the view that Scots law collapses recklessness and negligence is defensible. As seen below, in statutory offences, there is arguably no *practical* distinction between recklessness and “gross” negligence.⁶³ In some cases, the courts have treated the two as synonyms, with “mere” negligence being confined to the civil courts.⁶⁴

Common law crimes have also, at times, been defined with reference to negligence. At one point, the standard of fault required for a conviction of “lawful act” culpable homicide was: “gross, or wicked, or criminal negligence, something amounting, or at any rate analogous to a criminal indifference to consequences”.⁶⁵ This was accepted, for some time, as being the standard of *recklessness* required for many common law offences.⁶⁶ It was, however, criticised by Lord Osborne in

⁵⁹ Ferguson and McDiarmid, *Scots Criminal Law* (n 56) para 6.17.1.

⁶⁰ Negligence is dealt with in a single paragraph in Jones and Christie, *Criminal Law* (n 55) para 3.34.

⁶¹ See e.g. Gane, Stoddart and Chalmers, *Casebook* (n 56).

⁶² Cf the provisions on criminal negligence (defined with reference to “reckless disregard” for life or safety) in the Criminal Code of Canada s 219.

⁶³ Cf: *Connell v Mitchell* 1913 SC (J) 13 at 17 per Lord Guthrie ; Ferguson (n 48) at 32 (both of which try to explain such a distinction).

⁶⁴ See: *HM Advocate v Smillie* (1883) 5 Coup 287 at 292 per Lord Young; *Dalzell v Dickie and Murray* (1905) 4 Adam 693; *Waugh v Campbell* 1920 JC 1 at 16-17 per Lord Salveson.

⁶⁵ *Paton v HM Advocate* 1936 JC 19 at 22 per the Lord Justice-Clerk (Aitchison). Cf *Charles v HM Advocate*, unreported, High Court of Justiciary, 2 April 2002.

⁶⁶ *Quinn v Cunningham* 1956 JC 22 at 24-25 per the Lord Justice-General (Clyde).

Transco.⁶⁷ This is primarily because the definition employs the term “criminal negligence” when that was what it sought to define. It is thus partially circular.⁶⁸ Once the offending parts of the definition have been removed, in substance all that is left is “gross or wicked... indifference to consequences”.⁶⁹ Although this might still be conceived of as a standard that can be satisfied even where the accused was unaware of the relevant risk, the court in *Transco* was clear that, to be guilty of culpable homicide, the actor must have a “state of mind” in relation to the risks she was taking with the lives of others.⁷⁰

The law’s development suggests that “gross” negligence and recklessness are not always collapsible, particularly in common law offences. This causes problems for the normal tendency to ignore negligence, as recklessness is not necessarily synonymous with it. Although the label “gross negligence” is now rare,⁷¹ there is still arguably widespread use of negligence liability (i.e. inadvertent risk-taking) in Scotland. This will become clear during the discussion in the rest of the chapter concerning the jurisprudence of the Scottish courts on the meaning of “recklessness”.

C. *ALLAN v PATTERSON* RECKLESSNESS

When considering most statutory offences capable of reckless commission, the Crown need not prove that the accused adverted to the risks attendant upon her conduct, *as long as* a reasonable person in the accused’s position would have adverted to the relevant risk and chosen not to take it (or would, at least, have taken additional precautions).

This position is stated in *Allan v Patterson*,⁷² where the appeal court had to decide whether the (now repealed) offence of reckless driving⁷³ required the Crown

⁶⁷ At para 4.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See §2.D(3), below.

⁷¹ This development began before *Transco*: L Farmer, “Debatable land: an essay on the relationship between English and Scottish criminal law” (1999) 3 *EdinLR* 32 at 43.

⁷² 1980 *JC* 57.

⁷³ Road Traffic Act 1972 s 2 (as amended). Reckless driving was abolished by the Road Traffic Act 1991 s 1 and replaced with dangerous driving (Road Traffic Act 1988 s 2).

to show that the accused had adverted to the risks upon his driving. In deciding that it did not, the Lord Justice-General (Emslie) reasoned that:⁷⁴

Inquiry into the state of knowledge of a particular driver accused of the offence... is not required... The statute diverts attention to the quality of the driving in fact but not the state of mind... of the driver... Parliament requires the court or the jury to consider and determine... the degree to which the driver in question falls below the standard to be expected of a careful and competent driver in all circumstances of the particular case, and whether the degree is such as properly to attach... the epithet 'reckless'... [This] requires a judgment to be made quite objectively.

From this judgment, it is “crystal clear”⁷⁵ that, unless the accused can offer a suitable explanation for her conduct,⁷⁶ then her mental state is ignored entirely. As such explanations are rarely (if ever) accepted,⁷⁷ an (“objectively”) unjustified act of risk-taking will suffice. “Reckless” thus qualifies an action,⁷⁸ not the actor.⁷⁹

Allan v Patterson recklessness has been employed most often in statutory offences, and their regulatory nature has meant that the use of inadvertent recklessness has proved uncontroversial. For example, *Allan v Patterson* recklessness has been used in causing death by reckless driving,⁸⁰ unlawfully and maliciously causing an explosion likely to endanger life or cause serious injury to property,⁸¹ vandalism,⁸² and dangerous driving.⁸³

This is in contrast to common law offences. There, as will be seen shortly, the description of recklessness in *Allan v Patterson* has been disapproved of. It will be argued that the common law test for recklessness appears to turn more on whether or not the accused was aware, mentally, of risk. Chalmers is thus correct that “*Allan v*

⁷⁴ At 60.

⁷⁵ *McNab v Guild* 1989 JC 72 at 76 per the Lord Justice-Clerk (Ross).

⁷⁶ *Allan v Patterson* at 60 per the Lord Justice-General (Emslie).

⁷⁷ An immediate threat of death or serious injury *might* be a suitable explanation for dangerous conduct: *McNab v Guild* at 75 per the Lord Justice-Clerk (Ross) (the accused’s plea of necessity was, however, rejected in that case).

⁷⁸ See, also, *Skeen v Peacock* 1970 SLT (Sh Ct) 66. Cf *HM Advocate v Campbell* 1994 SLT 502 (to drive “recklessly” with defective brakes would require knowledge of the fault). *Campbell* suggests a dichotomy between cases where it is *the manner of driving* which is complained of, as opposed to *driving at all*. This distinction has not appeared in subsequent cases.

⁷⁹ For criticism of this approach, see S Cunningham, “Recklessness: being reckless and acting recklessly” (2010) 21 KLJ 445.

⁸⁰ Under the Road Traffic Act 1972 s 1 (repealed): *Crowe v HM Advocate* 1990 JC 112.

⁸¹ Under the Explosives Act 1883 s 2: *McIntosh v HM Advocate* 1994 SLT 59.

⁸² Under the Criminal Justice (Scotland) Act 1980 s 78 (repealed): *Black v Allan* 1985 SCCR 11. See now the Criminal Law (Consolidation) (Scotland) Act 1995 s 52.

⁸³ Under the Road Traffic Act 1988 s 2: *McDowall v HM Advocate* 1998 JC 194.

Patterson is a case which is cited... far more often than it should be.”⁸⁴ That case’s conduct-based approach to recklessness is confined to certain regulatory, statutory offences. Its influence should not stretch beyond this.

D. QUINN v CUNNINGHAM RECKLESSNESS

The approach adopted in relation to recklessness in common law crimes is far from clear. Early cases of “lawful act” culpable homicide demonstrate the widespread use of negligence liability in a serious common law crime.⁸⁵ The role that the accused occupied – and her failure to fulfil any associated duties – appears to have been more relevant than her mental state.⁸⁶ This perhaps has more to do with the process of industrialisation (and a desire to “send a message” to those who showed undue regard for the risks involved in it),⁸⁷ rather than a considered view of individual culpability.⁸⁸

As noted above, this has been reflected in a move away from talk of negligence, in favour of “objective”, inadvertent recklessness. “Gross” negligence and recklessness are treated as synonyms. This might, however, be a misconception, because the courts have expressed a “wave of disfavour”⁸⁹ over applying the “objective” test in *Allan v Patterson* to common law crimes. This means that the understanding of recklessness in common law offences is different from that in the majority of statutory crimes. Unfortunately, the courts have struggled to explain why this is the case, with three possible ways of limiting the ambit of *Allan v Patterson* recklessness being presented. These will be considered in turn.

⁸⁴ J Chalmers, “Lieser and misconceptions” 2008 SCL 1115 at 1117.

⁸⁵ See e.g.: *HM Advocate v McHaffie* 1827 Syme 38; *HM Advocate v Young* (1839) 2 Swin 376. There appears to have been a presumption of culpability in certain cases, e.g. where boats collided: *HM Advocate v MacPherson and Stewart* (1861) 4 Irv 85 at 87 per Lord Neaves.

⁸⁶ This is similar to “negligence as failure of conduct”, introduced below at §5.B.

⁸⁷ See e.g. *HM Advocate v Latto* (1857) 2 Irv 732 at 737 per the Lord Justice-Clerk (Hope).

⁸⁸ L Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (1997) ch 5.

⁸⁹ J Chalmers, “Fireraising: from the ashes?” 2000 SLT (News) 57 at 61.

(1) The limits of *Allan v Patterson* recklessness

(a) Conduct *v mens rea*

First, in *Carr v HM Advocate*,⁹⁰ the Lord Justice-General (Hope) opined that the definition of recklessness in *Allan v Patterson*:⁹¹

[I]s entirely in point... where the accused is charged with doing something which is otherwise lawful but with doing it in a manner which can be described as reckless. But in a case of fire-raising it is not the manner of doing an act which would otherwise be lawful which is in issue but... [instead] whether the accused had the *mens rea* necessary for the commission of a crime.

Lord Hope highlights an important distinction between a careless *act* and a reckless or negligent *agent*.⁹² This distinction might be better put as being between wrongdoing (the taking of an unjustified risk) and culpable wrongdoing (the taking of an unjustified risk combined with a further, “subjective” element of fault). On first blush, *Allan v Patterson* dealt with the former, whilst *Carr* – being concerned with a common law crime – focussed on the latter.⁹³

This is questionable, because there is surely more than *just* wrongful conduct present in cases of *Allan v Patterson* recklessness. There *is* a personal element of fault insofar as the accused *could have* acted in the proper way. Two things merely obfuscate matters. First, the elements of wrongdoing and culpability are largely indistinguishable, assuming the accused was capable of performing better than she did. In the majority of cases, the concentration will thus simply be on conduct. Secondly, if *mens rea* is understood to simply mean a state of (conscious) awareness then, arguably, the element of personalised fault in inadvertent risk-taking is not *mens rea*. This argument has, in fact, been made by a number of Anglo-American authors.⁹⁴ The problem is that, as noted above, *mens rea* is not understood terribly well in Scots criminal law.

⁹⁰ 1994 JC 203.

⁹¹ At 208.

⁹² Gordon, *Criminal Law* para 7.35.

⁹³ Cf *HM Advocate v S*, unreported, High Court of Justiciary, 5 October 1999, where Lord Caplan suggested that “[t]he crime of reckless conduct requires not only recklessness but culpability”.

⁹⁴ See §4.A(2)(a), below.

It is thus difficult to decide whether the court in *Carr* was correct to draw a distinction between the definitions of recklessness in offences requiring conduct alone and those requiring *mens rea*. Further doubts arise when consideration is given to the fact that *Allan v Patterson* recklessness has been applied almost exclusively to statutory offences. Although *most* statutory offences fall into the conduct-only category, some do not.⁹⁵ It is also not the case that *only* statutory offences are concerned with careless *action* – some common law crimes (e.g. reckless injury and reckless endangerment) are concerned with conduct alone. Should these offences be dealt with on *Allan v Patterson* grounds? The answer appears to be no,⁹⁶ which makes the distinction drawn in *Carr* questionable.

Finally, as there is no list of crimes and offences which require only conduct and those which require *mens rea* (whatever this term is taken to mean), the definition of recklessness to be employed will be established on an *ad hoc*, case-by-case, basis. This seems intolerably uncertain given the serious consequences which might flow from conviction, and so this potential limit on *Allan v Patterson* recklessness should be dispensed with.

(b) The court’s knowledge

Secondly, it has been pointed out that the behaviour to be expected of the accused in many statutory contexts (most obviously, driving), is within the common knowledge of the court, meaning that *Allan v Patterson*’s “objective”, conduct-based approach is acceptable. Where the conduct expected of the accused is specialist, “objective” recklessness is apparently inappropriate.

This argument was presented in *Cameron v Maguire*,⁹⁷ which involved the culpable and reckless discharge of firearms. The trial judge, following an earlier case (*Gizzi v Tudhope*),⁹⁸ directed the jury in terms of *Allan v Patterson*. On appeal, Lord Marnoch doubted this approach, noting “that while the standard of driving to be

⁹⁵ Consider the offence of being reckless as to the truth of a statement under the Marine (Scotland) Act 2010 s 42(1)(b), which surely relates to the accused’s appreciation of the veracity (or falsity) of a statement, rather than the conduct of making the statement itself.

⁹⁶ On reckless injury, see *HM Advocate v Harris* 1993 JC 150. On reckless endangerment, see *MacPhail v Clark* 1983 SLT (Sh Ct) 37.

⁹⁷ 1999 JC 63.

⁹⁸ 1983 SLT 214.

expected of a competent and careful driver may... be within the knowledge of judge or juror, the matter of the discharge of a firearm may not be so familiar to either”.⁹⁹ Again, the court preferred a different definition of recklessness in cases where the court might need expert evidence to assess the gravity of the accused’s risk-taking (see below).¹⁰⁰

This account of the boundaries of *Allan v Patterson* recklessness is, again, dependant on the individual crime charged. It is therefore unclear whether the court will focus on the accused’s conduct alone, or also consider her mental state. Again, this uncertainty is unsettling in the context of the criminal law, and the second possible limit on the extent of *Allan v Patterson* recklessness must be rejected.

(c) Statutory offences v common law crimes

A third distinction was drawn in *Transco*, where Lord Hamilton (as he then was) noted that the crime of culpable homicide required the Crown to show a higher standard of fault than that described in *Allan v Patterson*.¹⁰¹ The implication of this is that statutory offences can allow for criminal liability in circumstances where the standard of recklessness required for a common law crime (particularly one of the severity of culpable homicide) would not be met.¹⁰² His Lordship thus decided to “respectfully question” the reasoning in an earlier case which had suggested that “the statutory and common law tests are interchangeable”.¹⁰³

This distinction between statutory and common law offences demarcates clearly where *Allan v Patterson* recklessness is, and is not, to be employed. It cannot, however, continue sensibly. Consider the Sexual Offences (Scotland) Act 2009 (discussed below),¹⁰⁴ which legislates on many (though not all)¹⁰⁵ sexual offences. If recklessness is a component of these offences, is it now to be understood in a

⁹⁹ At 65.

¹⁰⁰ At §2.D(2).

¹⁰¹ At para 39.

¹⁰² See, similarly, *Dunn v HM Advocate* 1960 JC 55 at 59 per the Lord Justice-Clerk (Thomson).

¹⁰³ *Transco plc v HM Advocate* 2004 JC 29 at para 39 (referring to comments made in *Gizzi v Tudhope*). See, further, *McIntosh v HM Advocate* 1994 SLT 59 at 62 per the Lord Justice-General (Ross).

¹⁰⁴ At §2.E(3).

¹⁰⁵ Some sexual offences are still found in other statutes, e.g. the Criminal Law (Consolidation) (Scotland) Act 1995 pt 1.

conduct-based manner? The answer, at least in relation to consent, must be no, as the legislature has outlined the approach the court should take in assessing the accused’s risk-taking (the position with regard to other elements of the offences is, however, less clear). If more common law offences are to be legislated upon, it would be best to avoid a sharp distinction between statutory and common law offences in terms of when *Allan v Patterson* recklessness is, and is not, to be applied. The distinction might be reconceptualised as mirroring that between *mala prohibita* and *mala in se*,¹⁰⁶ but this is, at points, a fine line. Furthermore, the court has not relied upon it in discussing recklessness and so it will not be considered further.

This means that none of the three suggested limits on *Allan v Patterson* recklessness are workable. Of course, this would not matter if the understanding of recklessness applied in other criminal offences was qualitatively similar, but it is unclear whether or not this is the case.

(2) The test in *Quinn v Cunningham*

The definition of recklessness employed in most common law crimes comes from *Quinn v Cunningham*,¹⁰⁷ a case involving reckless cycling causing injury to a pedestrian. There, the Lord Justice-General (Clyde) opined that recklessness requires “an utter disregard of what the consequences of the act in question may be” and “indifference to the consequences for the public generally”.¹⁰⁸

Insofar as it appears to necessitate public endangerment, the judgment in *Quinn v Cunningham* may now be doubted.¹⁰⁹ Nevertheless, the qualities of “indifference” and “utter disregard” are now accepted as forming the basis of common law recklessness.¹¹⁰ This suggests two things. First, the reckless accused must have acted extremely carelessly.¹¹¹ In this respect, *Quinn v Cunningham*

¹⁰⁶ See, classically, H Wechsler, “Note: the distinction between *mala prohibita* and *mala in se* in criminal law” (1930) 30 Colum L Rev 74.

¹⁰⁷ 1956 JC 22.

¹⁰⁸ At 24-25.

¹⁰⁹ *Quinn v Cunningham* was expressly overruled on this point, in the context of reckless injury, by a full bench in *Harris*.

¹¹⁰ See e.g. *RHW v HM Advocate* 1982 SLT 420 at 420.

¹¹¹ *Paton v HM Advocate* 1936 JC 19 at 22 per the Lord Justice-Clerk (Aitchison); *Thomson v HM Advocate* 1995 SLT 827 at 829 per the Lord Justice-Clerk (Ross). “Accidents”, however careless, are not “reckless”, and cannot become so through what the accused does (or does not do) afterwards: *HM*

recklessness is similar to *Allan v Patterson* recklessness. This seems appropriate given that – once more – it was harm attendant on *conduct* (careless cycling) under examination in *Quinn v Cunningham*. Secondly, in spite of this similarity, the requirements of “utter disregard” and “indifference” hint at the need for some *additional* element of fault. Exactly what this element consists of has proved controversial: some cases suggest that it is the accused’s disregard of a risk of which she was aware; others suggest that it is the same as in *Allan v Patterson* recklessness (i.e. the accused *could have* foreseen the relevant risk and acted more safely). It is useful to consider the arguments for each position separately.

(3) *Quinn v Cunningham* recklessness and advertence

A more advertence-based approach to *Quinn v Cunningham* recklessness can be detected in *Transco*, where Lord Osborne noted that:¹¹²

[W]here there is an issue of involuntary culpable homicide, the resolution of the issue [of guilt] depends, not upon some objective assessment of the conduct of the perpetrator alone, but upon an assessment of his “*state of mind at the time of the accident*”, in other words, an enquiry into whether he possessed the necessary criminal intent at the material time, namely a “complete disregard of potential dangers and of the consequences of his driving for the public”.

This *dictum* points to the need for *mental fault*, although it is slightly confusing that the notion of “utter disregard” (associated, in *Quinn v Cunningham*, with recklessness) is referred to as a form of intention.¹¹³ It is submitted that Lord Osborne should be read as referring to recklessness, and the need for awareness of *risk*, rather than intention.

In his judgment in *Transco*, Lord Hamilton gave further support to the view that a mental state is required for recklessness in culpable homicide:¹¹⁴

Advocate v Smillie (1883) 5 Coup 287; *McCue v Currie* 2004 JC 73 at paras 24-25 per Temporary Judge Nicholson.

¹¹² At para 4 (emphasis added). The text in inverted commas is from *McDowall v HM Advocate* 1998 JC 194 at 198 per the Lord Justice-General (Rodger).

¹¹³ This was not the first time that intention and recklessness were confused by the courts. See e.g. *Allenby v HM Advocate* 1938 JC 55 at 59 per Lord Wark. Lord Wark suggests that intention can be inferred from recklessness, but see *Byrne v HM Advocate* 2000 JC 155.

¹¹⁴ At para 38.

[T]he mental element in crime (*mens rea*) is and remains a necessary and significant element in the crime of (“lawful act”) culpable homicide. That element may... be proved in various ways, including proof by inference from external facts. But it is... erroneous to suppose that the actual state of mind of a person accused of culpable homicide of this kind can be ignored and guilt or innocence determined solely on the basis of proof that the conduct in question fell below an objectively set standard.

Taken together, Lord Osborne and Lord Hamilton’s statements suggest that the Crown must prove (from the circumstances, usually) that the accused possessed a level of awareness of a risk of death.¹¹⁵ To show “utter disregard” of or “indifference” towards that risk – and thus be reckless as to it – the accused must be aware of that risk.¹¹⁶

It might be objected immediately that *Transco* is unrepresentative. This is for three main reasons.

(a) Authority and advertence?

First, it might be alleged that the court in *Transco* was simply wrong, and that fault in culpable homicide may be proved by reference to the accused’s conduct alone. Support for this proposition might be taken from *Sutherland v HM Advocate*¹¹⁷ and *McDowall v HM Advocate*.¹¹⁸ In *Sutherland*, the court dwelt on the actions of the accused (setting fire to a property in order to defraud insurers) and the obvious risks attendant thereon, rather than his mental state regarding the obvious risk of death he was posing to his co-conspirator. The trial judge linked this focus to the idea of reckless disregard for life in his charge to the jury and the appeal court spoke in terms of “criminal negligence”.¹¹⁹

In *McDowall*, the court concentrated again upon what the accused *did*.¹²⁰ It is, however, plain that this was done in aid of discovering what the accused’s *state of*

¹¹⁵ J Chalmers, “Corporate culpable homicide: *Transco plc v HM Advocate*” (2004) 8 EdinLR 262 at 263. This awareness could not be proven in relation to *Transco*’s management. A review of the law was undertaken (Scottish Government, *Corporate Homicide: Expert Group Report* (2004)), which resulted in the creation of a new offence of (negligent) corporate homicide: Corporate Manslaughter and Corporate Homicide Act 2007 s 1.

¹¹⁶ Difficult questions can arise over whether the accused must have foreseen the *exact* risk that materialised. These questions have not arisen in the Scots jurisprudence, but see §4.A(3)(a), below.

¹¹⁷ 1994 JC 62.

¹¹⁸ 1998 JC 194.

¹¹⁹ At 67-69 per the Lord Justice-General (Hope).

¹²⁰ At 198 per the Lord Justice-General (Rodger).

mind was at the time of acting. That aspect of *McDowall* casts doubt on *Sutherland*, rather than *Transco*. The Lord Justice-General (Rodger)'s statements in *McDowall* were, in fact, relied on expressly by Lord Osborne in *Transco*.¹²¹

What this demonstrates is that previous modern culpable homicide cases did not exclude the need for awareness of risk in cases of recklessness: they were vague on this issue because it never arose directly. The court in *Transco* undertook an extensive review of the existing case law, and it would therefore be a glaring omission to overlook binding "objective" decisions if these had existed. Furthermore, if this oversight had occurred, the comments in *Transco* would presumably have been attacked in a subsequent reported case. This has not happened.

(b) Corporate confusion?

A second assault on the comments in *Transco* might be based upon the fact that the court was concerned, in that case, with corporate criminal liability, and the need for the Crown to establish *mens rea* in the company's "directing mind".¹²² This might have confused the judges and led them to imply that recklessness required awareness of risk.

Although there are elements of the charge in *Transco* which refer explicitly to what the company's management knew, this argument seems weak: the court carefully split the discussion of culpable homicide specifically and corporate liability generally.¹²³ This, it is submitted, significantly minimises (if not excludes) the possibility of confusion.

(c) A "special" case?

Thirdly, it might be argued that culpable homicide is a "special" case, and that the court's judgment in *Transco* should be confined to the context of that specific crime.¹²⁴ If *Transco* is simply authority in relation to culpable homicide, the court did not make this clear. The frequent references to culpable homicide in the judgment are

¹²¹ See the text accompanying n 112, above.

¹²² I am grateful to Claire McDiarmid for raising this point.

¹²³ Lord Osborne split the relevant parts of his judgment using headings. Lord Hamilton's judgment clearly has separate elements concerning culpable homicide (paras 35-45) and corporate criminal liability (paras 46-63).

¹²⁴ Cf J Chalmers, "Lieser and misconceptions" 2008 SCL 1115 at 1119 (n 29).

explainable on the basis that the court was dealing with that particular crime in the case before it. Furthermore, the *Transco* court endorsed the *Quinn v Cunningham* definition of recklessness,¹²⁵ which was developed in a case of reckless cycling, not culpable homicide. It would be peculiar (and detrimental to the accessibility of the law) if one definition of recklessness were to be employed in different circumstances to mean different things.

There is, then, a strong case for arguing that *Quinn v Cunningham* recklessness requires that the actor was aware of the risks that she was taking.¹²⁶ Unfortunately there is an equally strong (if not stronger) argument pointing to the opposite conclusion.

(4) *Quinn v Cunningham* recklessness and inadvertence

One case presented as evidence of *Quinn v Cunningham* recklessness’s “objective” approach is *Cameron v Maguire*.¹²⁷ There, the accused had discharged a rifle in his back garden without checking to see if this would endanger people walking nearby. In questioning, the accused admitted that he thought his conduct was safe,¹²⁸ which suggests that he was not aware of the *unjustifiable* risk that he was taking. In that case, recklessness was ascribed to the accused when he was – on one view – unaware of the risk that he was posing to the lives of others.

There is, however, an aspect of *Cameron v Maguire* that is often overlooked.¹²⁹ The accused’s admission might, for instance, be taken to mean that he had thought about the risks (in which case, he *was* aware of them) and discounted them, incorrectly, as being of marginal importance. This is different from the accused being found reckless for failing to think at all.¹³⁰

There are, nevertheless, other cases where the accused gave absolutely no thought to the risk attendant on her conduct and was still found to have been

¹²⁵ At para 4 per Lord Osborne.

¹²⁶ Exactly what “awareness” might entail is discussed below at §4.A(3)(b).

¹²⁷ 1999 JC 63. See e.g. TH Jones and MGA Christie, *Criminal Law*, 4th edn (2008) para 3.30.

¹²⁸ At 66.

¹²⁹ I am grateful to Josh Barton for emphasising this point.

¹³⁰ Cf the discussion of the “*Caldwell* lacuna”, below at §3.C(4).

reckless.¹³¹ An example that is relied upon occasionally is *Ward v Robertson*,¹³² which dealt with the common law offence of malicious mischief. The court concentrated on the accused's conduct in deciding whether or not he was culpable. In *McIntosh v HM Advocate*¹³³ (which dealt with a statutory offence),¹³⁴ the Lord Justice-Clerk (Ross) suggested that it was plain from *Ward v Robertson* that "the test of recklessness to be applied is an objective one".¹³⁵

Lord Ross's view points to two separate confusions in the case law. First, he suggests that the same test *could* be used in statutory and common law offences (a matter which, as seen above, has proved controversial). Secondly, Lord Ross implies that a focus on conduct necessarily involves ignoring the accused's mental state. With regard to the second of these points, the judgments in *Ward v Robertson* do not appear to advocate an approach to recklessness which is premised on the reasonable person's (rather than the accused's) ascertainment of risk. At best, the judgments are ambiguous,¹³⁶ focussing more on whether or not the magistrate was entitled to infer *mens rea* from the accused's acts.¹³⁷ In other words, the judges concerned themselves with the inference of a "subjective" mental state from "objective" facts (conduct, the wider circumstances, etc).¹³⁸

In fact, the accused's mental state in *Ward v Robertson* still appears to have borne upon the question of culpability. As Lord Pitman remarked, "[a] person who thinks he is doing no harm cannot rightly be convicted of doing something maliciously."¹³⁹ One problem with this statement is that it is difficult to discern

¹³¹ A good example of this is *Robson v Spiers* 1999 SLT 1141. The accused had chased some bullocks in a field. The animals subsequently escaped onto roads, causing mayhem. The accused thought "it had only been a game" (at 1143). His appeal was refused. See, also, the discussions of: "wicked" recklessness in *HM Advocate v S*, unreported, High Court of Justiciary, 5 October 1999; culpable and reckless conduct in *Normand v Robinson* 1994 SLT 558; and reckless shameless indecency in *Usai v Russell* 2000 JC 144 at 147-148 per Lord McCluskey (shameless indecency was abolished in *Webster v Dominick* 2005 JC 65, but the courts' understanding of recklessness has remained unchanged – see *DF v Griffiths* 2011 SLT 192).

¹³² 1938 JC 32.

¹³³ 1994 SLT 59.

¹³⁴ Under the Explosives Act 1883 s 2.

¹³⁵ At 61.

¹³⁶ Gordon, *Criminal Law* para 7.55; Chalmers (n 124) at 1118 (n 24).

¹³⁷ See e.g. at 36 per the Lord Justice-Clerk (Aitchison), 37 per Lord Mackay.

¹³⁸ The "dualist" leanings of this sentence might be objected to by some philosophers. See §6.A(4)(a), below.

¹³⁹ At 39.

whether malice was co-extensive with recklessness¹⁴⁰ – the term malice was never understood well in Scots law.¹⁴¹ On reflection, this does not matter: if malice is the same as recklessness, then Lord Pitman’s statement suggests the need for awareness of risk; if malice is different, then *Ward v Robertson* has nothing to do with recklessness, and so “objectivists” ought not to rely on it. *Ward v Robertson* is thus not useful for those who argue that inadvertent recklessness applies in common law crimes.

Another point that harms the “objectivists” perspective relates back to the discussion of *Transco* above. If homicide is a “special case”, much of the commentary which holds that “objective” recklessness is applicable in common law offences appears to be based on unsound authority.¹⁴² For example, Ferguson has relied on the “objective” approach adopted in “wicked” recklessness (which only applies in murder)¹⁴³ to argue that recklessness, in general, is not “subjective” in Scots law.¹⁴⁴ Jones and Christie also base their assertion that recklessness is assessed “objectively” upon a murder case.¹⁴⁵

Admittedly, these points damage, but do not silence, the “objectivists” argument: it remains unclear what “utter disregard” requires. The most extensive modern discussion of recklessness in relation to common law offences indicates how vague the law is. In *HM Advocate v Harris*,¹⁴⁶ Lord Prosser made the following lengthy¹⁴⁷ comment, worthy of repetition:¹⁴⁸

I see no need here to embark upon a definition of recklessness: in relation to reckless conduct causing injury or danger it has... the same meaning as it has in relation to culpable homicide, where death has been caused by reckless conduct, and is not a crime of intent, with the death being caused by an assault. Whether one uses the word recklessness, or such descriptions as gross negligence, that is a familiar

¹⁴⁰ For an argument that recklessness demonstrating a “wicked disposition” is a component of malice, see Gordon, *Criminal Law* para 7.31.

¹⁴¹ For brief discussion, see Christie’s contributions to the chapter “Criminal law” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2005) at para 79.

¹⁴² Chalmers (n 124) at 1119 (n 29).

¹⁴³ See §2.F, below.

¹⁴⁴ PW Ferguson, “Recklessness and the reasonable man in Scots criminal law” 1985 JR 29 (particularly at 30 and 36). See, also, PW Ferguson, “Reasonable mistakes” 2008 SCL 971 at 974.

¹⁴⁵ Jones and Christie, *Criminal Law* (n 127) para 3.32. The case cited there is *Miller and Denovan v HM Advocate*, unreported, High Court at Edinburgh, 7 December 1960 (see the appendix to *Parr v HM Advocate* 1991 SLT 208 at 211).

¹⁴⁶ 1993 JC 150.

¹⁴⁷ Perhaps *too* lengthy: see *Harris* at 160 per Lord McCluskey.

¹⁴⁸ At 165.

concept which I think is readily conveyed to and understood by juries. But it involves an assessment of duties owed to others, which... depend upon the foreseeability of harmful consequences. Analysis probably becomes unreal; but I think that... in deciding that some conduct has been reckless, one will always be at least very close to saying that it involved a failure to pay due regard to foreseeable consequences of that conduct, which were foreseeably likely to cause injury to others, and which could correspondingly reasonably be called dangerous in relation to them.

Five points should be noted. First, Lord Prosser expresses an unwillingness to define recklessness. This judicial reluctance to define core *mens rea* terms is, it is submitted, the root cause of the confusion over culpable carelessness in Scots criminal law.¹⁴⁹ Secondly, Lord Prosser obviously thought that recklessness meant the same thing in reckless injury and culpable homicide – again suggesting the latter is not a “special case”. Thirdly, nothing in this long quote actually requires or does away with advertence. Lord Prosser talks of “failure to pay due regard to foreseeable consequences” and, admittedly, discusses “gross negligence”, but that does not necessarily endorse full-blooded “objectivism”. It could instead relate to the regard that the accused pays to the reasonably foreseeable consequences of a risk that she *has* foreseen.¹⁵⁰ Fourthly, Lord Prosser’s conflation of recklessness and “gross” negligence – although hinting at support for inadvertent recklessness – proves only that the law is utterly confused. Furthermore, given the discussion of “gross” negligence above,¹⁵¹ it is difficult to know what to make of the use of this term. Fifthly, Lord Prosser is doing much to clarify what *kind of risks* matter for recklessness, which is a matter entirely independent of the actor and her state of awareness or unawareness.

In short, the case law following *Quinn v Cunningham* is vague and apparently inconsistent, with the question of what recklessness requires in terms of awareness being raised indirectly in a handful of cases. Further evidence for this point is present in a branch of case law concerning the “reckless” supply of drugs. There, a more “subjective” approach might be alleged, and it is thus necessary to consider these cases in detail.

¹⁴⁹ See §7.A(1), below.

¹⁵⁰ See ch 6, below.

¹⁵¹ See §2.B, above.

(5) The drug supply cases: a new frontier?

It might be objected that grouping many common law offences together in this part of the chapter is disingenuous. Perhaps more distinctions should be drawn. A likely candidate for a new (more “subjective”) category might be thought to arise from the case law on the “reckless” supply of drugs,¹⁵² and this section makes the case for *not* considering these as different from other common law offences that employ *Quinn v Cunningham* recklessness.

The difficulty posed by the drug supply cases is, again, that they concern recklessness only indirectly. Primarily, they are concerned with causation. *Khaliq v HM Advocate*¹⁵³ established that the voluntary act of a purchaser (in that case, children) in ingesting a drug (solvent, sold as part of a “glue-sniffing kit”) did not break the causal chain: the suppliers could be held liable for any adverse results of the ingestion of the substances, provided they had been “culpable and reckless” in relation to the risk of harm to the purchasers. At the preliminary diet, Lord Avonside concentrated upon: how much control the accused persons possessed over whether or not the children abused the drugs; the criminal act of giving another drugs in knowledge of their intentions; that the public knew about solvent abuse and should be concerned; and that the accused’s knowledge should have made them desist from profiting.¹⁵⁴ Nowhere is knowledge related to the question of recklessness; it merely seems to make the circumstances seem (for want of a better expression) more criminal.

A similar approach was adopted on appeal. The Lord Justice-General (Emslie) considered separately the matters of culpable and reckless supply and knowledge.¹⁵⁵ Again, Lord Emslie dealt with the charge as the Crown had set it out and identified correctly the core relevance of the accused’s knowledge: the matter of whether or not the accused had *caused* the children to inhale the solvents.¹⁵⁶ Lord Emslie moved on to consider the “purpose and intention” behind supplying the

¹⁵² I am grateful to Lindsay Farmer for putting this argument to me.

¹⁵³ 1984 JC 23.

¹⁵⁴ At 25-27.

¹⁵⁵ At 29.

¹⁵⁶ *Ibid.*

kits,¹⁵⁷ which does not sound like discussion of recklessness. Again, the relevance of this *purpose* was to establish that the accused had *caused* the children to abuse solvents.

When read carefully, *Khaliq* thus says little of worth concerning recklessness. It certainly cannot stand for the proposition that, as a matter of law (rather than charging practice), certain common law offences of recklessness require awareness of risk, as opposed to the (confused) form of recklessness explained first in *Quinn v Cunningham*. In fact, the court in *Khaliq* is clear that, without the matter of causation being included in the charge, the offence of “wilful and reckless conduct to the danger of the lieges”¹⁵⁸ would not be made out. This adds force to the submission that *causation*, not *recklessness*, is all that *Khaliq* is instructive with regard to.

*Ulhaq v HM Advocate*¹⁵⁹ extended the principles in *Khaliq* to cover the supply of copious amounts of lighter fluid to adults. The Lord Justice-General (Hope) again concentrated on the accused’s knowledge (as inferred from the frequency with which lighter fluid was being bought and the accused’s admissions).¹⁶⁰ As in *Khaliq*, this knowledge was important to establishing causation; that the supply of substances was equivalent to their administration.

The next decision in this line of cases is *Lord Advocate’s Reference (No 1 of 1994)*,¹⁶¹ which concerned a charge of culpable homicide arising from the supply of proscribed drugs, which resulted in the user’s death. It was held that the same principles at work in *Khaliq* and *Ulhaq* applied: a supplier of drugs could still have caused the ingestion of those drugs *even if* a voluntary act on the part of the drug-user would be required.¹⁶² Importantly, the requirement for culpable and reckless *conduct* was emphasised, with the court holding that the supply of proscribed drugs was “equivalent to” it.¹⁶³ Nothing useful is said about recklessness as a form of *mens rea*.

¹⁵⁷ At 33.

¹⁵⁸ At 34.

¹⁵⁹ 1991 SLT 614.

¹⁶⁰ At 615.

¹⁶¹ 1996 JC 76.

¹⁶² At 79.

¹⁶³ At 81.

The final case, *MacAngus v HM Advocate; Kane v HM Advocate*¹⁶⁴ also fails to reveal anything helpful about recklessness, particularly as a “subjective” mental state. This case narrowed the ambit of the *Reference* decision.¹⁶⁵ The Lord Justice-General (Hamilton) maintained that, contrary to the *Reference* court’s view, the Crown must libel¹⁶⁶ and prove that the supply of drugs was “culpable and reckless” (rather than “equivalent to” it).¹⁶⁷ In such cases, the reckless *conduct* of the accused is a circumstance that weighs against any breaks in the chain of causation which may otherwise arise from the voluntary decision of the deceased to ingest the drugs.¹⁶⁸ Again, the focus is on *causation*, not the accused’s *mens rea*.

All of this means that, although the drugs supply cases are apparently concerned with recklessness and the accused’s (“subjective”) knowledge of risk, they do not shed any light on the definition of that term in Scots law, and so they do not necessitate the formation of a new category in this chapter. With this conclusion in mind, it is useful to draw together the discussion concerning *Quinn v Cunningham* recklessness.

(6) Summary: the law in common law offences

The understanding of recklessness in *Quinn v Cunningham* is unclear. The difficulty is that the question of what it means to show “utter disregard” for, or “indifference” towards, risk has rarely been touched upon by the courts. This leads to a confusing situation, where the courts apply the same test in seemingly different ways – sometimes apparently requiring advertence to risk; other times not.

As Gordon cautions, deciding whether the accused has been “reckless” is a matter of guilt or innocence – it is important not to read too much into what is strictly *obiter dicta*, or read a judge’s opinion too literally.¹⁶⁹ There are, however, some general points which can be discerned from the cases discussed above. First, there is consensus that the test for common law recklessness is different from that employed

¹⁶⁴ 2009 SLT 137.

¹⁶⁵ See L Farmer, ““Practical, but nonetheless principled”? *MacAngus and Kane*” (2009) 13 EdinLR 502.

¹⁶⁶ Usually, this is implicit: Criminal Procedure (Scotland) Act 1995 sch 3 para 3.

¹⁶⁷ At para 26.

¹⁶⁸ At para 45.

¹⁶⁹ GH Gordon, “Subjective and objective *mens rea*” (1975) 17 Crim LQ 356 at 382.

in statutory offences – it is just not clear where this distinction lies. Secondly, it is unclear what *Quinn v Cunningham* recklessness requires in terms of awareness of risk; any firm conclusions are unsafe. It might be thought that this shows that the courts simply do not, in practice, bother themselves with what is, again, a moral judgement regarding culpability. That said, the confusion and contradiction pointed to above might explain why the courts sometimes concentrate on what the accused “must have known”¹⁷⁰ from the circumstances – an unhappy compromise between “subjectivity” and “objectivity”.

The courts have, however, been somewhat clearer in relation to recklessness in the offences of rape and murder. These approaches are considered in the next two sections.

E. JAMIESON RECKLESSNESS

The Scots law on rape has recently undergone reform following the passing of the Sexual Offences (Scotland) Act 2009.¹⁷¹ On paper, the 2009 Act removes talk of recklessness from many offences, including rape. As will become apparent, however, recklessness might still have a role to play in that offence.

It is useful to start by considering the common law of rape. This is for two reasons: first, recklessness in rape was distinct from recklessness in other common law offences; and, secondly, it gives context to the 2009 Act’s provisions.

(1) The common law

The common law of rape was described most authoritatively in *Lord Advocate’s Reference (No 1 of 2001)*.¹⁷² This case concerned the *actus reus* of rape (and, in particular, whether force was required), but the Lord Justice-General (Cullen) noted that rape could be committed recklessly. It was important, nevertheless, to:¹⁷³

¹⁷⁰ See e.g. *Macphail v Clark* 1983 SLT (Sh Ct) 37 at 37-38 per Sheriff McInnes at 37-38.

¹⁷¹ The 2009 Act entered into force on 1 December 2010.

¹⁷² 2002 SLT 466.

¹⁷³ At para 29.

[D]istinguish between the man who failed to think about, or was indifferent as to, whether the woman was consenting (... subjective recklessness); and the man who honestly or genuinely believed that the woman was consenting but had failed to realise that she was not consenting when there was an obvious risk that this was the case. The latter might be described as objective recklessness.

Only the former type of recklessness was sufficient for conviction.¹⁷⁴

Lord Cullen was clearly influenced by the approach towards errors about consent adopted in *Jamieson v HM Advocate*.¹⁷⁵ There, the appeal court held that a man¹⁷⁶ who had sexual intercourse with a woman could not be found guilty of rape if he *honestly believed* she was consenting.¹⁷⁷ This belief did not have to be reasonable.¹⁷⁸

The concentration in rape, at common law, was therefore on the accused’s beliefs and thought processes. It is important to note, however, that Lord Cullen’s distinction between “subjective” and “objective” recklessness is peculiar. “Subjective” recklessness is usually understood as requiring advertence to risk, but Lord Cullen identifies it with a *failure to think about* consent. This sounds like inadvertence, which tends to be the mark of “objective” recklessness, or negligence. Admittedly, “indifference” can be read so as to require, or do away with, awareness of risk.¹⁷⁹

Lord Cullen’s distinction is thus unhelpful. It is submitted that *Jamieson* was – however – *more* “subjective” than previous case law, because the accused could argue that he thought there was no risk of non-consent and be acquitted. This is contrary to the approach taken in relation to *Quinn v Cunningham* recklessness. For instance, the accused in *Cameron v Maguire* thought his conduct was safe, but was still found to have been reckless with regard to the safety of others.

This “subjective” aspect of *Jamieson* proved extremely controversial. First, it was inconsistent with the general Scottish approach to error, which has tended – historically – to require that the accused’s mistake be *reasonable* for it to

¹⁷⁴ Cf. Duff, *IACL* 168-169; §6.A(4), below.

¹⁷⁵ 1994 JC 88.

¹⁷⁶ Rape was a gender-specific crime at common law.

¹⁷⁷ *Jamieson* at 92 per the Lord Justice-General (Hope).

¹⁷⁸ *Ibid.* *Jamieson* imported the House of Lords’ decision in *DPP v Morgan* [1976] AC 182 into Scots law. See, further, *Meek v HM Advocate* 1983 SLT 280 at 281 per the Lord Justice-General (Emslie).

¹⁷⁹ See §6.A, below.

exculpate.¹⁸⁰ *Jamieson* was therefore anomalous.¹⁸¹ Secondly, commentators pointed out the moral indefensibility of the decision.¹⁸² As Ashworth notes in the context of the equivalent English decision of *DPP v Morgan* (itself now overruled by statute):¹⁸³ “even if [it] is defensible as a case on general principles [of “subjective” *mens rea*], it is unacceptable as a rape decision.”¹⁸⁴

It was argued that the law should take a more “objective” approach when considering whether the accused was mistaken or reckless as to the matter of consent.¹⁸⁵ Points raised by commentators were: that the (physical and psychological) consequences of risking non-consensual sex were sometimes severe;¹⁸⁶ that the accused could easily have checked if there was any doubt over the matter of consent;¹⁸⁷ and that the accused could not “undo” the consequences of his mistake. Given these arguments, Ferguson and Raitt supported the approach of the Draft Criminal Code for Scotland,¹⁸⁸ which included inadvertent recklessness as to consent in the fault element of rape.¹⁸⁹

Soon after this argument was made, the Scottish Law Commission (SLC) published its Report on Rape and other Sexual Offences.¹⁹⁰

¹⁸⁰ Gordon, *Criminal Law* para 9.27.

¹⁸¹ *Lieser v HM Advocate* 2008 SLT 866 at para 12 per Lord Kingarth.

¹⁸² See: CHW Gane, *Sexual Offences* (1992) 45; PR Ferguson, “Controversial aspects of the law of rape: an Anglo-Scottish comparison”, in RF Hunter (ed), *Justice and Crime: Essays in Honour of the Right Honourable, the Lord Emslie* (1993) 180 at 189-193; V Tadros, “No consent: a historical critique of the *actus reus* of rape” (1999) 3 EdinLR 317 at 339; PR Ferguson and FE Raitt, “Reforming the Scots law of rape: redefining the offence” (2006) 10 EdinLR 185. Cf PW Ferguson, “Recklessness and the reasonable man in Scots criminal law” 1985 JR 29 at 39.

¹⁸³ Sexual Offences Act 2003 s 1(1).

¹⁸⁴ Ashworth, *Principles* 341.

¹⁸⁵ As Chalmers notes, the “subjectivity” apparent in *Transco plc v HM Advocate* 2004 JC 29 (described above) appears to bolster the *Jamieson* rule: J Chalmers, “Corporate culpable homicide: *Transco plc v HM Advocate*” (2004) 8 EdinLR 262 at 264. As a serious offence, “subjectivity” might be favoured in rape to avoid “cast[ing] the net too wide”, but there are clear protective principles which support the contrary position: Gane, *Sexual Offences* (n 182) 44.

¹⁸⁶ Ferguson and Raitt (n 182) at 194. See, similarly, C Wells, “Swatting the subjectivist bug” [1982] Crim LR 209 at 212-213.

¹⁸⁷ T Pickard, “Culpable mistakes and rape: relating *mens rea* to the crime” (1980) 30 UTLJ 75 at 83; Gane, *Sexual Offences* (n 182) 45; Ferguson, “Controversial aspects of the law of rape: an Anglo-Scottish comparison” (n 182) at 193; J Temkin, *Rape and the Legal Process*, 2nd edn (2002) 125.

¹⁸⁸ Professor Ferguson was part of the Draft Criminal Code’s drafting party.

¹⁸⁹ Ferguson and Raitt (n 182) at 194. See, further: Draft Criminal Code for Scotland ss 10, 61; E Clive et al, *A Draft Criminal Code for Scotland with Commentary* (2003) 125.

¹⁹⁰ (Scot Law Com No 209, 2007).

(2) The Sexual Offences (Scotland) Act 2009

In its Report, the SLC sought to ensure that the law on sexual offences showed adequate respect for sexual autonomy.¹⁹¹ Given this goal, it was perhaps inevitable that the Commission would propose to supersede the rule in *Jamieson*¹⁹² (which paid more attention to the accused’s beliefs than whether the complainer’s sexual autonomy has been respected) – a view reflected in the resulting Sexual Offences (Scotland) Act 2009.

Rather than requiring *mens rea* in the form of an intention to have sexual intercourse without consent, or recklessness as to consent, the 2009 Act indicates that the accused may only be *acquitted* of rape if he possessed a reasonable belief in consent.¹⁹³ Section 16 states that, “[i]n determining... whether a person’s belief as to consent... was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent... and if so, to what those steps were”.

This means that, instead of the accused’s belief in consent being unassailable if it were “honest”, the trier of fact has to assess the *reasonableness* of that belief. This is a departure from the rule in *Jamieson* and introduces a level of “objectivity” into the Scots law of rape. The SLC, which drafted this provision, certainly felt it was introducing such an element, but emphasised the “subjective” focus on *the accused’s* actions. This apparently leads to a “mixed” test for recklessness (even though the word “recklessness” is nowhere mentioned).¹⁹⁴

It is important to probe this idea of a mixed test further, as it is a novel approach to recklessness in Scots criminal law. A good starting point is *why* a mixed test was preferred over a purely “subjective” or “objective” approach. The SLC’s Report disapproved of *Jamieson*, noting that its “subjectivity” was inappropriate in rape cases.¹⁹⁵ The SLC was, however, against a fully “objective” test, because such an approach “moves attention too far from the actual accused.”¹⁹⁶ There was a concern, in other words, that the accused might be found guilty of rape – a very

¹⁹¹ Ibid 8.

¹⁹² Ibid 55-57.

¹⁹³ Sexual Offences (Scotland) Act 2009 s 1(1)(b).

¹⁹⁴ Report on Rape (n 190) 56.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

serious crime – on the basis of acting in a sub-standard way, which was felt to be inappropriate.

The SLC therefore wanted to tread a middle ground between “subjectivism” and “objectivism”. It is clear that “objective” concerns were, nevertheless, in the ascendency. The SLC intentionally distanced itself from “subjectivism” by omitting reference to the circumstances of the sexual encounter from its reasonable belief provision, for fear that the accused’s characteristics would influence unjustifiably the question of reasonableness in certain cases.¹⁹⁷ This was in response to a worry, raised in relation to similar English provisions, that the accused’s “subjective”, abhorrent beliefs about consent might unduly sway the trier of fact’s decision regarding what was “reasonable” for the accused to do in the circumstances,¹⁹⁸ leading to unmerited acquittals. Consequently, all reference to the surrounding circumstances was removed from what is now section 16 of the 2009 Act. An element of “subjectivity” remains, however, in that it is *the accused’s* actions, and how these relate to the formation of a belief in consent, which must be considered.

This is fine in theory, but there are two related scenarios which might defeat the spirit of the Scots reforms. First, despite the emphasis on the accused’s actions, there is still a danger that the trier of fact, in assessing whether the steps the accused took led his belief to be “reasonable”, makes (explicit or implicit) reference to what *they themselves* (or the reasonable person/man)¹⁹⁹ would have done in the circumstances. If so, the Commission’s “mixed” test might, in fact, be applied in a fully “objective” manner.

The SLC (and the legislature) might not object to this turn of events, but there are doubts over the efficacy of applying external standards of conduct in circumstances where there is little social consensus about what is expected of a citizen.²⁰⁰ This idea is returned to at various points later in the thesis.

¹⁹⁷ Ibid.

¹⁹⁸ J Temkin and A Ashworth, “The Sexual Offences Act 2003: (1) rape, sexual assaults and the problem of consent” [2004] Crim LR 328 at 340-342.

¹⁹⁹ It is perhaps more realistic that the jury would ask what *they*, rather than the reasonable person, would have done. The reasonable person, being a legal fiction, is presumably more typically reached for by lawyers.

²⁰⁰ AW Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn (2001) 73-74.

Of more concern, for present purposes, is a second way in which section 16 might be misapplied. Although, cosmetically, the 2009 Act emphasises the role of communication regarding consent,²⁰¹ it does not answer the vital question of *to whom* a belief in consent must appear reasonable.²⁰² As a result of this omission, it is possible that the jury will be swayed unduly by the accused’s views on consent, which might be (“objectively”) outrageous.²⁰³ Furthermore, research on mock rape trials has demonstrated that juries tend to be biased against the complainant, particularly where she was voluntarily intoxicated and an acquaintance of the accused.²⁰⁴ A belief in consent that appears “reasonable” to the average jury might, accordingly, seem quite unreasonable to others.²⁰⁵ It might therefore be that, in practice, the 2009 Act’s provisions on beliefs in consent continue to over-emphasise the accused’s views on consent and “rape myths”, despite the SLC’s (and the legislature’s) goal of achieving reasonableness and increased “objectivity” in the law of sexual offences.²⁰⁶

The 2009 Act’s approach to recklessness in rape (and related offences)²⁰⁷ is, thus, liable to go in a “subjective” or “objective” direction. Neither option seems unproblematic.

(3) Summary: the law in rape

From the above discussion, it is clear that the question of whether the accused was reckless as to the matter of consent was assessed somewhat “subjectively” at common law, though it is important to be clear about what this means. If the accused thought his conduct was safe, he could not be convicted of rape. This rule was

²⁰¹ Which has been under-represented in previous approaches to sexual offences: S Cowan, “‘Freedom and the capacity to make a choice’: a feminist analysis of consent in the criminal law of rape”, in VE Munro and C Stychin (eds), *Sexuality and the Law: Feminist Engagements* (2007) 51 at 60.

²⁰² Ibid 60-61. See, similarly, CM MacKinnon, *Towards a Feminist Theory of the State* (1989) 183.

²⁰³ See, further, RHS Tur, “Subjectivism and objectivism: towards synthesis”, in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (1993) 213 at 220-222.

²⁰⁴ For overviews, see: L Ellison and VE Munro, “Reacting to rape: exploring mock jurors’ assessments of complainant credibility” (2009) 49 BJ Crim 202; L Ellison and VE Munro, “Jury deliberation and complainant credibility in rape trials”, in C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2010) 281.

²⁰⁵ This is why expert evidence on the realities of rape might be helpful in educating the jury.

²⁰⁶ See, similarly, S Cowan, “All change or business as usual? Reforming the law of rape in Scotland”, in McGlynn and Munro (eds), *Rethinking Rape Law* (n 204) 154 at 164-165.

²⁰⁷ Section 16 applies to all of the offences in part 1 of the 2009 Act.

undesirable and the 2009 Act's more "objective" approach is laudable, at least on paper.

The test of section 16 will be its application in practice. There is nothing preventing a purely "objective" approach, which considers what a person other than the accused would have done, from being employed. Furthermore, the legislation does not, in removing talk of the "circumstances", remove the danger that the accused's "subjective", abhorrent beliefs about sexual intercourse (and other "rape myths") are taken into account. If either of these approaches influences the jury's consideration of whether the accused was reckless with regard to consent, the legislative wording becomes largely irrelevant.

Again, then, it is clear that – no matter what the law on recklessness *is* "on the books" – in emotive crimes such as rape, the jury might reach conclusions based on intuition and/or preconception. This moves consideration from the *doctrinal* content of the law to its *moral content*. The difficulty that this poses for orthodox thought is that the "subjective"/"objective" dichotomy so often used to analyse culpable carelessness does not map these moral concerns particularly well. As will be seen in the next section, in murder committed by "wicked recklessness", this is particularly apparent.

F. "WICKED" RECKLESSNESS

Macdonald holds that murder is "constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such *wicked recklessness* as to imply a disposition depraved enough to be regardless of consequences".²⁰⁸ The second aspect of this definition – "wicked recklessness" – appears only in the law of murder.²⁰⁹ Unfortunately, it is rather opaque.

²⁰⁸ JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn by J Walker and DJ Stevenson (1948) 89 (emphasis added). It is now necessary to show the accused acted with "wicked" intent: *Drury v HM Advocate* 2001 SLT 1013 at para 17 per the Lord Justice-General (Rodger).

²⁰⁹ Cf *McKearney v HM Advocate* 2004 JC 87 at para 2 per the Lord Justice-Clerk (Gill) (where wicked recklessness was mentioned in the context of rape). See, also, the reckless discharge of firearms case, *HM Advocate v Smith and McNeil* (1842) 1 Broun 240.

Four explanations can be given for this. First, the courts have been reluctant to define wicked recklessness neatly.²¹⁰ Secondly, as a plea of the Crown, murder is always heard by juries, which means the factors that determine whether or not a person was wickedly reckless are never made public. Thirdly, the Crown might be persuaded, on the basis of the available evidence, to take a guilty plea for culpable homicide, rather than risk the accused’s acquittal of murder at trial.²¹¹ The boundaries of wickedly reckless murder have thus never been pushed too severely. Fourthly, wicked recklessness has classically been seen as a *moral* issue, meaning it defies classification in terms of the “subjective”/“objective” dichotomy which is often employed to explain the law on culpable carelessness.

The sections below expand upon this fourth point, and argue that wicked recklessness is nevertheless reliant on *some* “subjective” mental elements being present.

(1) The need for intention

Following *HM Advocate v Purcell*,²¹² the wickedly reckless accused must at least intend to do physical injury to the deceased. Mere carelessness is not enough,²¹³ but it is otherwise unclear what will satisfy the test in *Purcell* and if – in particular – “physical injury” should be read as “assault”, or a similar action.²¹⁴ In *Petto v HM Advocate*,²¹⁵ a bench of three judges remitted the question of whether wilful fire-raising could count as an act intended to cause physical injury (assuming the answer to be “yes”).²¹⁶ At the time of writing, a full bench is considering the issue.

²¹⁰ See e.g. *Scott v HM Advocate* 1996 JC 1 at 6 per the Lord Justice-Clerk (Ross).

²¹¹ GH Gordon, *The Criminal Law of Scotland*, 2nd edn (1978) para 0.04; L Farmer, “Debatable land: an essay on the relationship between English and Scottish criminal law” (1999) 3 EdinLR 32 at 43-44.

²¹² 2008 JC 131.

²¹³ *Cowie v HM Advocate* 2010 SCL 81 at para 21 per the Lord Justice-Clerk (Gill).

²¹⁴ Murder was described as a form of aggravated assault in *McAdam v HM Advocate* 1960 JC 1 at 4 per the Lord Justice-General (Clyde), but it is difficult to find much other authority for the view that an *assault* is necessarily required for wicked recklessness to exist.

²¹⁵ 2009 SLT 509.

²¹⁶ At para 12 per Lord Wheatley. See Gordon, *Criminal Law* para 23.32. Cf *Purcell* at para 7 per Lord Eassie.

What *is* clear is that an intention to do physical injury is not, in itself, sufficient *mens rea* for murder.²¹⁷ The wickedly reckless accused must also have displayed “a wicked disregard of fatal consequences.”²¹⁸ Once again, there is debate over what this means, particularly in terms of the accused’s awareness of risk.

(2) Is wicked recklessness *advertent* recklessness?

Prior to *Purcell*, wicked recklessness was commonly viewed as “objective”.²¹⁹ This belief was typically²²⁰ premised on *Cawthorne v HM Advocate*,²²¹ where the Lord Justice-General (Clyde) opined that:²²²

[T]he reason [wicked recklessness is accepted as *mens rea*] is that in many cases it may not be possible to prove what was in the accused’s mind at the time, but the degree of recklessness in his actings, as proved by what he did, may be sufficient to establish proof of the wilful act on his part which caused the loss of life.

This quotation is instructive in two respects. First, it points at the vagueness of the concept of wicked recklessness: is it an independent form of *mens rea* or merely evidence from which an intention to kill can be inferred? Secondly, Lord Clyde endorses an approach which concentrates to such an extent upon the accused’s acts that what the accused *really* thought becomes irrelevant.

The first point above has proved controversial, but need not be dealt with here.²²³ The second contention does find support in older cases such as *Cawthorne*

²¹⁷ It might be that an intention to do grievous bodily harm is sufficient *mens rea* for murder in certain circumstances. See: *HM Advocate v McCallum and Corner* (1853) 1 Irv 259; *HM Advocate v Paterson* (1897) 5 SLT 13; Gordon, *Criminal Law* para 23.22; *Arthur v HM Advocate* 2002 SCCR 796 at para 12 per Lord Hamilton.

²¹⁸ *Purcell* at para 16 per Lord Eassie, endorsing the view in Gordon, *Criminal Law* para 23.33.

²¹⁹ See e.g.: TH Jones, “The Scottish law of murder” (1989) 105 LQR 516 at 518-520; TH Jones and S Griffin, “Serious bodily harm and murder” 1990 SLT (News) 305 at 308; *Broadley v HM Advocate* 1991 JC 108 at 114 per the Lord Justice-Clerk (Ross).

²²⁰ See, also, *Hartley v HM Advocate* 1988 SLT 135.

²²¹ 1968 JC 32. *Cawthorne* is also authority for the view that attempted murder can be committed recklessly. See, also: *Brady v HM Advocate* 1986 JC 68 at 76 per Lord Ross; and the trial judge’s charge to the jury in *Strachan v HM Advocate* 1995 SLT 178 (reported at 1994 SCCR 341 at 342). Reckless attempts will not be dealt with further here, but see: S Christie, *Inchoate Crime: Incitement, Conspiracy and Attempts in Scottish Criminal Law* (2001) paras 6.14-6.15.

²²² At 35-36.

²²³ See: GH Gordon, “*Cawthorne* and the *mens rea* of murder” 1969 SLT (News) 41 at 41; Gordon, *Criminal Law* para 23.20.

and *Miller and Denovan v HM Advocate*,²²⁴ where the accused were found to be wickedly reckless in striking the deceased on the head with a piece of wood. The accused were, apparently, so focussed on their plan to steal from the deceased that the risk of death did not enter their minds. Taken together,²²⁵ these cases might suggest that murder could be committed through inadvertence (i.e. negligence),²²⁶ which might be thought troubling.²²⁷

Now that an intention is required on the part of the accused, however, it should be²²⁸ impossible to ignore what the accused actually thought about what she was doing.²²⁹ This might not be particularly revolutionary: wicked recklessness was always a moral judgement and, consequently, perhaps never could ignore fully what the accused thought (or failed to think) about her acts and her attitudes towards the interests she threatened (surely a “subjective” matter).²³⁰ For instance, if the accused was an experienced “heavy”, and thought – on the basis of previous “jobs” – that shooting a person through the kneecap would injure – but not kill – her, then this would be relevant to the question of whether the accused was wickedly reckless. It is assumed that she would not be (though she would have committed culpable homicide).²³¹

If there ever was a question, then, of “whether the objective dangerousness of... conduct... compelled findings of wicked recklessness”,²³² the answer must be

²²⁴ Unreported, High Court of Justiciary, 7 December 1960. See the appendix to *Parr v HM Advocate* 1991 SLT 208 at 211. See, similarly, *HM Advocate v Byfield and Others*, unreported, High Court of Justiciary, January 1976, cited in PW Ferguson, “Recklessness and the reasonable man in Scots criminal law” 1985 JR 29 at 36.

²²⁵ See also the directions in *Hartley* at 136 per Lord Sutherland.

²²⁶ Duff regards *Miller and Denovan* as a case of inadvertent recklessness: Duff, *IACL* 173-174.

²²⁷ See Forensis, “Murder, attempted murder and recklessness” (1986) 31 JLSS 354 at 355.

²²⁸ The jury might not, of course, analyse this issue neatly: PW Ferguson, “Wicked recklessness” 2008 JR 1 at 8.

²²⁹ The attitude of the accused was considered important before the decision in *Purcell*, again suggesting that wicked recklessness was never really “objective”: *Halliday v HM Advocate* 1999 SLT 485 at 487 per the Lord Justice-General (Rodger).

²³⁰ See: RAA McCall Smith and D Sheldon, *Scots Criminal Law*, 2nd edn (1997) 175-177; V Tadros, “The Scots law of murder”, in J Horder (ed), *Homicide Law in Comparative Perspective* (2007) 187 at 196.

²³¹ On the basis that she had committed an assault which resulted in death. See *Bird v HM Advocate* 1952 JC 23.

²³² M Plaxton, “Foreseeing the consequences of *Purcell*” 2008 SLT (News) 21 at 22.

“no” unless the accused intended to – at least – do physical injury. *Purcell* has thus added a level of clarity to the law on unintentional murder.²³³

The decision in *Purcell* appears sensible because wicked recklessness is supposed to (implicitly) refer to a *state of mind* that deserves to be treated as being as depraved as the intentional killer's.²³⁴ As a form of *mens rea*, then, wicked recklessness is heavily dependent on the circumstances (and the “objective” *inferences* which can be drawn from them), but not “objective” *standards* such as the “reasonable person”.

(3) The law in murder

It might come as a surprise that so little can be said about the *mens rea* of unintentional murder in Scots law, a matter which ought really to be clear.²³⁵ Wicked recklessness is, however, a very flexible²³⁶ (or, less charitably, vague)²³⁷ concept and this owes much to the lack of clarity in its definition.²³⁸ As its function is to equate unintentional – yet extremely culpable – killers with their intentional counterparts, it is difficult to analyse wicked recklessness in terms of foresight of risk; of “subjectivity” and “objectivity”. This is one reason why wicked recklessness in murder is “very different from ‘recklessness’ encountered elsewhere in the criminal law and in particular... as it relates to... culpable homicide”.²³⁹

The next type of recklessness to be considered is, however, closely related to wicked recklessness – indeed, it was developed in a murder case, *Brennan v HM*

²³³ “Unintentional” excludes *accidental* killings.

²³⁴ *Scott v HM Advocate* 1996 JC 1 at 5 per the Lord Justice-Clerk (Ross); Gordon, *Criminal Law* para 23.19. See, further, Tadros (n 230) at 193-194.

²³⁵ Cf E Clive, “Codification of the criminal law”, in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 54 at 63.

²³⁶ Gordon, *Criminal Law* para 23.21.

²³⁷ See Gordon's commentary to *Parr* (1991 SCCR 180 at 189). See, further, House of Lords Select Committee, Report on Murder and Life Imprisonment, Vol 1 (Session 1988-1989, HL Paper 78) paras 74-76.

²³⁸ This does not appear to have been a problem in practice: R Goff, “The mental element in the crime of murder” (1988) 104 LQR 30 at 57-58.

²³⁹ Gordon, *Criminal Law* para 7.60.

Advocate.²⁴⁰ *Brennan* recklessness has, however, stretched into other contexts where the accused attempts to rely on the “defence”²⁴¹ of voluntary intoxication.

G. BRENNAN RECKLESSNESS

Brennan had stabbed his father repeatedly and was convicted of his murder.²⁴² He argued that as, prior to the violence, he had consumed between twenty and twenty-five pints of beer, a microdot of LSD and – possibly – a glass of sherry,²⁴³ he lacked the *mens rea* for murder and should have been convicted instead of culpable homicide.²⁴⁴ In repelling this argument, the Lord Justice-General (Emslie) opined that:²⁴⁵

Self-induced intoxication is itself a continuing element and therefore an integral part of any crime of violence, including murder, the other part being the evidence of the actings of the accused who uses force against his victim. Together they add up or may add up to that *criminal recklessness* which it is the purpose of the criminal law to restrain in the interests of all the citizens of this country.

This suggests a form of “transferable” recklessness, which exists from the moment the accused becomes acutely, voluntarily intoxicated until she commits a criminal act. This is objectionable for four reasons.

(1) Problems with *Brennan* recklessness

First, as Chalmers and Leverick note, Lord Emslie “assumes that recklessness is a single, interchangeable concept. While the concept of recklessness is not well-developed in Scots law, it is at least possible (and appropriate in principle) that it requires that the accused is reckless as to a particular circumstance or

²⁴⁰ 1977 JC 38.

²⁴¹ Voluntary intoxication, to whatever degree, is no “defence” to any crime based on consequences. For discussion of the law in crimes concerned with circumstances, see: J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 8.13; F Stark, “Breaking down *Brennan*” 2009 JR 155 at 163-165.

²⁴² Much of this section is based upon Stark (n 241) at 156-160.

²⁴³ Compare the rubric of the Justiciary Cases version of the report with that of the Scots Law Times report (1977 SLT 151).

²⁴⁴ Brennan also argued that he was temporarily insane at the time he killed his father. See: *HM Advocate v Aitken* 1975 SLT (Notes) 86; Chalmers and Leverick, *Criminal Defences* (n 241) para 8.07.

²⁴⁵ At 51 (emphasis added).

consequence.”²⁴⁶ They use the example of rape to illustrate their point. At common law, the *mens rea* of rape was existed where “the man... [knew] that the woman is not consenting or... [was] reckless as to whether she is consenting”.²⁴⁷ Rape, then, required that the accused was reckless *as to the matter of consent*. If such a focal point was absent, it appears intuitively wrong to hold that recklessness in relation to another circumstance (for example, whether the woman with whom the accused was having unprotected sexual intercourse had a sexually transmitted infection) would justify his conviction.²⁴⁸

It is submitted that it is similarly unfair to hold that Brennan’s “recklessness” in becoming acutely, voluntarily intoxicated should suffice as *mens rea* for a murder conviction. Unless he foresaw that, as a consequence of getting into such a state, he would be likely to do another person serious physical harm, such a conclusion is troubling.²⁴⁹ Although there is a strong – common sense – correlation between (particularly alcoholic) intoxication and violence,²⁵⁰ it is untenable to argue that everybody who drinks or takes drugs tacitly accepts the risk that they might kill someone.²⁵¹ An inference of “recklessness” is only plausible where the accused has past experience of a particularly adverse, violent reaction to a state of intoxication.²⁵² Even in these circumstances, however, it is difficult to see how the accused has been more than *negligent* in failing to exercise self-control and abstain from drink and/or drugs.²⁵³

²⁴⁶ Chalmers and Leverick, *Criminal Defences* (n 241) para 8.11 (footnotes omitted).

²⁴⁷ *Lord Advocate’s Reference (No 1 of 2001)* 2002 SLT 466 at para 44 per the Lord Justice-General (Cullen).

²⁴⁸ This sense of injustice is sometimes attributed to the “correspondence principle” being breached. See §4.A(3)(a), below.

²⁴⁹ See, similarly: AJP Kenny, *Freewill and Responsibility* (1978) 66. Cf Pillsbury, “Crimes of indifference” at 182-191; S Dimock, “The responsibility of intoxicated offenders” (2009) 43 J Value Inquiry 339 at 356-357. See, further, Gordon, *Criminal Law* para 12.03, where it is suggested that the absence of such foresight ought to result in the accused being found guilty of a “lesser” offence (e.g. culpable homicide rather than murder). *Brennan* does not appear to allow this.

²⁵⁰ See G Dingwall, *Alcohol and Crime* (2006) ch 2.

²⁵¹ RA Duff, “Professor Williams and conditional subjectivism” (1982) 41 CLJ 273 at 277; Dimock (n 249) at 356-357.

²⁵² Cf *Finegan v Heywood* 2000 JC 444, where the accused’s past experiences of sleepwalking following the consumption of alcohol were considered important. Whilst in such an autonomous state, the accused took his friend’s car and drove a short distance. His conviction for “drink driving” was upheld on appeal.

²⁵³ See ch 5, below.

Secondly, a conception of “wicked” recklessness that does not require that the accused intended to do physical injury to the deceased is incompatible with *Purcell*.²⁵⁴ As noted above, that case states that an intention to do physical injury must be coupled with a “wicked disregard of fatal consequences” if the accused is to be found guilty of reckless murder.²⁵⁵ The point of Brennan’s argument was that he was too intoxicated to form *mens rea*, and that presumably included an intention to do physical injury. The view that inducing a state of acute, voluntary intoxication is *itself* wickedly reckless thus appears difficult – if not impossible – to reconcile with *Purcell*.²⁵⁶

It could again be argued that the “common sense” link between intoxication and violence means that the accused accepts that causing another physical injury is an inevitable “side effect” of her intention to risk becoming acutely, voluntarily intoxicated.²⁵⁷ This argument must again be judged implausible where the accused has no prior knowledge of a tendency towards intoxicated violence.²⁵⁸

Thirdly, if *mens rea* is found to exist at the time the accused became acutely, voluntarily intoxicated, this offends the requirement that *actus reus* and *mens rea* occur contemporaneously. As Gordon notes:²⁵⁹

There will always be something unsatisfactory in convicting A of murder because he killed someone at his home at midnight as a result of embarking on a drunken spree at a public house hours earlier and miles away... If principle requires that the accused be shown to have had *mens rea* at the time of the killing, then the decision in *Brennan* is to that extent in breach of it.

Despite Lord Emslie’s insistence in *Brennan* that a state of acute, voluntary intoxication is a “continuing element”,²⁶⁰ Gordon’s point is persuasive. The only circumstances in which it appears necessary to extend the “timeframe” under

²⁵⁴ See: J Chalmers, “The true meaning of ‘wicked recklessness’: *HM Advocate v Purcell*” (2008) 12 EdinLR 298 at 301; M Plaxton, “Foreseeing the consequences of *Purcell*” 2008 SLT (News) 21 at 23.

²⁵⁵ *HM Advocate v Purcell* 2008 JC 131 at para 16 per Lord Eassie.

²⁵⁶ This is not the fault of the court in *Brennan*: at the point when it was considering the law of wicked recklessness (1977), the situation was less clear than it is following *Purcell*. The full bench in *Petto* has apparently been presented with the argument that *Brennan* and *Purcell* are irreconcilable.

²⁵⁷ For brief consideration of intention and “side effects”, see §6.C(3), below.

²⁵⁸ See, similarly, Plaxton (n 254) at 24.

²⁵⁹ Gordon, *Criminal Law* para 12.13 (footnotes omitted).

²⁶⁰ Possibly to argue that the events in *Brennan* were “one transaction” and, accordingly, the “timeframe” under examination was correctly extended: *Meli v R* [1954] 1 WLR 228.

investigation are: first, where the accused (soberly) intended to commit a crime and got drunk/high to steel herself;²⁶¹ and secondly where the accused knew that she was prone to criminality (most probably violence) whilst acutely intoxicated and nevertheless continued to (voluntarily) get into that state.

Finally, if inducing a state of voluntary intoxication is “reckless”, the rule in *Brennan* has no application in crimes which require intention.²⁶² Given the court’s concern about intoxicated violence in *Brennan*,²⁶³ it would be strange if assault – which requires “evil intent”²⁶⁴ – were to be excluded from the “no excuse” voluntary intoxication rule. As Gane, Stoddart and Chalmers ask rhetorically: “Does this mean... [that] a person who... while acutely intoxicated, stabs someone with a knife, can only be guilty of reckless injury?”²⁶⁵ Subsequent cases have not been decided on this basis, suggesting that Lord Emslie’s remarks have not been read literally by the courts.²⁶⁶

These points support Ferguson’s belief that *Brennan* is “the most prominently unreflective of criminal appeals in the history of the mental element in crime.”²⁶⁷ The problem with *Brennan* recklessness is that it appears to be *beyond* “objective”, inadvertent recklessness. It is not so much a matter of what the reasonable person would have foreseen as emanating from the act of inducing a state of extreme intoxication. Instead, “recklessness” seems to be an amorphous concept, which exists from the moment that the accused could no longer form *mens rea* until she commits the *actus reus* of an offence. This is, of course, to misuse the term “recklessness” which is understood as *mens rea* (and the rule in *Brennan* of course only applies where the accused cannot form *mens rea*).

²⁶¹ This would be an instance of *actio libera in causa*. See Gordon, *Criminal Law* para 12.03.

²⁶² It is admittedly misleading to refer to “crimes of recklessness” and “crimes of intention”, as offences might contain elements of both intention and recklessness: DM Treiman, “Recklessness and the Model Penal Code” (1981) 9 Am J Crim L 281 at 291.

²⁶³ E.g. *Brennan* at 42, 51 per the Lord Justice-General (Emslie).

²⁶⁴ See *Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 33.

²⁶⁵ CHW Gane, CN Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law*, 4th edn (2009) para 7.53.

²⁶⁶ See *Ebsworth v HM Advocate* 1992 SLT 1161. Another offence which can only be committed intentionally is theft. *Finegan v Heywood* perhaps indicates that voluntary intoxication would not be a defence to this crime, but this point was not considered directly by the appeal court.

²⁶⁷ PW Ferguson, “Recklessness and the reasonable man in Scots criminal law” 1985 JR 29 at 35.

(2) An alternative foundation

Given the concerns over the court’s (ab)use of “recklessness” in *Brennan*, it is encouraging that subsequent decisions suggest a more transparent rationale for Scots law’s voluntary intoxication rule. In *Ross v HM Advocate*,²⁶⁸ the Lord Justice-General (Hope) suggested that *Brennan* was an “exception based on public policy where the condition which has resulted in an absence of *mens rea* is self-induced. In all such cases the accused must be assumed to have intended the natural consequences of his act”.²⁶⁹

In other words, the denial of a “defence” of voluntary intoxication is justified on “policy” concerns, presumably over public protection from intoxicated violence or the view that intoxication is itself an alternative species of fault.²⁷⁰ Talk of recklessness was therefore misleading. Accordingly, the “recklessness” encountered in cases involving an acutely, voluntarily intoxicated accused can largely be ignored. *Brennan* is, nevertheless, a decision by seven judges on the meaning of “wicked” recklessness and is further support for the argument that recklessness is an incoherent concept in Scots criminal law.

(3) The law in voluntary intoxication cases

The law on voluntary intoxication is justified on grounds other than the “recklessness” involved in getting intoxicated, but the fact remains that Lord Emslie’s description of how the refusal of an intoxication “defence” interacts with the law on recklessness has not been expressly overruled. In fact, it has continued to be followed even after *Ross*.²⁷¹ As *Brennan* was a murder case, the court’s judgment is inextricably bound to the law on wicked recklessness, but it now appears to run counter to the High Court’s conception of that form of *mens rea* in *Purcell*. It certainly defies categorisation as either “objective” or “subjective” in a unique way.

Now that the five forms of Scots criminal recklessness have been identified, the conclusions of this chapter can be drawn together.

²⁶⁸ 1991 JC 210.

²⁶⁹ At 214.

²⁷⁰ For discussion, see F Stark, “Breaking down *Brennan*” 2009 JR 155 at 165-169.

²⁷¹ *Donaldson v Normand* 1997 JC 200.

H. CONCLUSION

This chapter has shown that viewing recklessness as a monolithic concept in Scots law is misguided. There are (at least) five forms of recklessness, which fall on both sides of the “subjective”/“objective”, advertent/inadvertent dichotomy, or – as in murder and voluntary intoxication cases – are not susceptible to being explained in such terms.

What the murder and intoxication (and, to a degree, common law rape) cases demonstrate is that Scots law’s approach to recklessness might be bolstered or undermined by moral and/or policy judgements, and that the “subjective” or “objective” orthodoxy distracts attention from this. This has allowed Scottish courts and commentators to tie themselves in knots when trying to explain culpable carelessness.

What is required is a coherent, unifying theory of culpability for risk-taking, which would be capable of explaining better the role of negligence (the elephant in the room when the alleged “objectivity” of Scots recklessness is seen through) and provide a solid foundation upon which to build an understanding of recklessness which is clear and capable of being translated to the jury. Such a theory is presented in chapters five and six.

Before embarking on this theoretical exercise, it is pertinent to deal with a potential objection to the argument made thus far. Although Scots law is incontrovertibly confused, this might just be a result of poor judicial decision-making, rather than the lack of a theory of culpable carelessness. To demonstrate that this objection is misguided, it is helpful to consider a more developed system of criminal law to see if it has encountered similar problems to Scotland. In the next chapter, it will be argued that English law has also suffered for want of a coherent theory of culpable risk-taking.

3 Calm in the Storm: The English Experience

This chapter argues that English criminal law has, like its Scottish counterpart, struggled to define recklessness¹ and negligence consistently.² This conclusion should allay any concerns that Scots law's difficulties in explaining culpable carelessness are simply a side-effect of its generally undeveloped nature.

English law is more developed than Scots law for numerous reasons. Most obviously, England has a larger population than Scotland (which produces a greater number of criminal appeals *per annum*). There are also more appeal stages south of the Tweed³ (Scots procedure allows for only one appeal). Furthermore, England has a larger, theoretically-minded academy. The criminal law has thus been analysed in greater depth.

None of these factors has led to the development of stable accounts of recklessness and negligence in English criminal law. The presence of many “subjectivist” theorists (who understand conscious choices as central to culpability)⁴ in England has not resulted in the adoption, by the courts, of a wholly advertence-based understanding of culpable risk-taking.⁵ The chapter thus serves as an empirical demonstration of how “subjectivism” has not been accepted universally in English law, which gives a practical context to chapter four's normative evaluation of “subjectivism”.

¹ Again, a distinction between recklessness as to consequences and recklessness as to circumstances will not be drawn here. This has developed most clearly in relation to attempts, which deserve separate consideration. See: R Buxton, “The working paper on inchoate offences: (1) incitement and attempt” [1973] Crim LR 656 at 662-664; G Williams, “The problem of reckless attempts” [1983] Crim LR 365; R Buxton, “Circumstances, consequences and attempted rape” [1984] Crim LR 25; RA Duff, “The circumstances of an attempt” (1991) 50 CLJ 100; RA Duff, *Criminal Attempts* (1996) (particularly 371-374).

² The chapter does not focus on the exact language employed in the various “model” directions that have been drafted by the higher courts. See, however, A Halpin, *Definition in the Criminal Law* (2004) ch 3.

³ The number of appeals available to the defendant will depend upon which court she is originally convicted in.

⁴ See ch 4, below.

⁵ Cf CMV Clarkson, HM Keating and S Cunningham, *Clarkson and Keating: Criminal Law: Text and Materials*, 7th edn (2010) 177-178.

The simplest way to explain the “jungle”⁶ of authority on recklessness and negligence in English law is chronologically, following the leading cases. As background to this inquiry, Section A explains the development of recklessness and negligence in the nineteenth and early-twentieth centuries. Section B considers the attempted concretisation of recklessness – and its demarcation from negligence – in *R v Cunningham*,⁷ before section C discusses the mayhem caused during the 1980s, when the House of Lords changed the law’s approach to recklessness in *R v Caldwell*⁸ and *R v Lawrence*.⁹ Sections D and E explain the retreat back to “gross” negligence in involuntary manslaughter¹⁰ (in *R v Adomako*),¹¹ and advertent recklessness in many other offences (following *R v G*).¹² Finally, section F questions the stability of recklessness and negligence in modern English law.

A. THE NINETEENTH AND EARLY TWENTIETH CENTURIES

In the mid-nineteenth century, English law’s approach to culpable carelessness was unclear.¹³ As the Scots had “dole”,¹⁴ their English contemporaries had general *mens rea* and, later, “malice”. Recklessness and negligence grew uneasily out of these vague terms.

When the courts did discuss recklessness and negligence expressly, a variety of descriptions of those terms were offered. Recklessness was most commonly identified with “carelessness” or “not caring”¹⁵ and seemed indistinguishable from negligence, insofar as mental awareness of risk on the part of the defendant seemed unnecessary.

⁶ See JC Smith, “Commentary: *Large v Mainprize*” [1989] Crim LR 213 at 214.

⁷ [1957] 2 QB 396.

⁸ [1982] AC 341.

⁹ [1982] AC 510.

¹⁰ Involuntary manslaughter excludes cases where the defendant has a partial-defence to murder.

¹¹ [1995] 1 AC 171.

¹² [2004] 1 AC 1034.

¹³ On the history of recklessness and negligence in English criminal law, see KJM Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence* (1998) (particularly chs 5, 9). Given Smith’s thorough treatment of early English writers (and the fact that they have not had much effect on English law’s treatment of culpable carelessness), it is unnecessary to consider them here.

¹⁴ See §2.A(1), above.

¹⁵ See e.g.: *R v Holroyd* (1841) 2 M&R 339 at 341 per Maule J; *R v Welch* (1875-1876) LR 1 QBD 23 at 24 per Lindley J; *Williams Brothers Direct Supply Stores, Limited v Cloote* [1944] 60 TLR 270 at 272 per Viscount Caldecote CJ.

Further confusion was caused by the courts' treatment of negligence in involuntary manslaughter, where the level of fault required for conviction was sometimes left to the jury's discretion.¹⁶ This meant that the standard of culpable carelessness required could be extremely low,¹⁷ even if various emphatic epithets were attached to the word "negligence" in charges to the jury.¹⁸

In consequence, recklessness and negligence were opaque notions in English criminal law at the turn of the twentieth century. Decisions were presumably reached – as it is assumed they still are in many modern Scottish cases – on the basis of intuition, rather than the application of a concrete understanding of culpable carelessness.¹⁹

This situation remained largely unchanged throughout the early twentieth century. Recklessness continued to be defined with reference to "carelessness" (an "otiose synonym for negligence")²⁰ or "indifference"²¹ until the 1950s,²² making it difficult to distinguish from negligence.²³ This problem was exacerbated when it was decided in *Andrews v DPP*²⁴ that involuntary manslaughter was made out where the defendant had acted with "gross" negligence which had caused the death of another. "Gross" negligence did not require awareness of risk,²⁵ but Lord Atkin nevertheless suggested that a useful synonym for it was "recklessness".²⁶

This confused situation (familiar to the Scots lawyer) began to be addressed in the mid-twentieth century.

¹⁶ *R v Docherty* (1887) 16 Cox CC 306 at 309 per Stephen J.

¹⁷ *Andrews v DPP* [1937] AC 576 at 582 per Lord Atkin.

¹⁸ See: *R v Williamson* (1807) 3 C&P 635 at 635 per Lord Ellenborough CJ ("criminal"); *R v Noakes* (1866) 4 F&F 921 ("complete"); *R v Spencer* (1867) 10 Cox CC 525 at 526 per Willes J ("gross"); *R v Pittwood* (1902) 19 TLR 37 at 38 per Wright J ("gross and criminal"). Cf *R v Crick* (1859) 1 F&F 519 ("rashly and carelessly" preferred over "negligent").

¹⁹ Smith, *Lawyers, Legislators and Theorists* (n 13) 193-194.

²⁰ G Williams, "Recklessness in criminal law" (1953) 16 MLR 234 at 235.

²¹ See e.g. JL Edwards, *Mens Rea in Statutory Offences* (1955) 202. Edwards cites the civil case of *Hudston v Viney* [1921] 1 Ch 98 as authority for his view on criminal recklessness, demonstrating that the term originally had identical meanings in both civil and criminal contexts. See, further: *Derry v Peek* (1889) LR 14 App Cas 337 at 350 per Lord Bramwell; *In Re City Equitable Fire Insurance Company, Limited* [1925] Ch 407 at 434.

²² *R v Bates and Russell* [1952] 36 Cr App R 175.

²³ Attempts were, however, occasionally made to separate the "criminal mind" from negligence. See e.g. *Lee v Dangar Grant & Co* [1982] 2 QB 337 at 350 per Fry LJ.

²⁴ [1937] AC 576.

²⁵ See e.g. *R v Burdee* (1917) 12 Cr App R 153.

²⁶ At 583. See, further: *R v Bonnyman* (1943) 28 Cr App R 131; *R v Larkin* (1944) 29 Cr App R 18 at 23 per Humphreys J. Where "recklessness" was not present, this might have secured an acquittal: e.g. *R v Lowe* [1973] QB 702.

B. *R v CUNNINGHAM*

The first significant case is *R v Cunningham*,²⁷ which was not actually a decision on recklessness,²⁸ but instead sought to define malice in relation to the Offences against the Person Act 1861.²⁹ The trial judge had directed the jury that “maliciously” simply meant “wickedly”.³⁰ On appeal, this was deemed a misdirection. The Court of Appeal preferred³¹ the definition of malice in Turner’s reworking³² of Kenny’s *Outlines of Criminal Law*, which provides that:³³

[I]n any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either: (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the relevant kind of harm might be done and yet has gone on to take the risk of it).

“Malice” thus included intention and recklessness, and recklessness required foresight of the relevant risk on the part of the defendant (distinguishing it from inadvertent negligence).

The *Cunningham* definition of recklessness brought a new level of clarity to the law on culpable carelessness, and it was soon applied to other offences under the 1861 Act.³⁴ There, directions that suggested recklessness was a synonym for “carelessness” – or “not caring” – were potential misdirections.³⁵ This forced judges to be clearer on the matter of advertence when directing juries.³⁶ *R v Stephenson*,³⁷ an

²⁷ [1957] 2 QB 396.

²⁸ Horder thinks *Cunningham* should not have impacted upon recklessness at all: J Horder, “Two histories and four hidden principles of *mens rea*” (1997) 113 LQR 95 at 118-119.

²⁹ On the importance of this point, see §3.C(2), below.

³⁰ This was apparently the traditional understanding of the term – see CS Kenny, *Outlines of Criminal Law*, 16th edn by JWC Turner (1952) 20. Cf Horder (n 28) at 117.

³¹ At 399 per Byrne J.

³² Turner substantially reworked the text to suit his “subjectivist” leanings, so the definitions relied on in *Cunningham* are properly attributable to him. See, further, Smith, *Lawyers, Legislators and Theorists* (n 13) 301-304.

³³ Kenny, *Outlines of Criminal Law* (n 30) 186. The requirement of foresight of risk appears for the first time in the sixteenth edition. Previous editions did not speak in terms of recklessness, or – if they did – did not define the term: see e.g. CS Kenny, *Outlines of Criminal Law*, 15th edn by GG Phillips (1947) 171, 189.

³⁴ E.g. *R v Venna* [1976] QB 421 (s 47 (assault occasioning actual bodily harm)).

³⁵ See, also, *R v Briggs* [1977] 1 WLR 605.

³⁶ If foresight was not in issue, “malice” did not require definition: *R v Mowatt* [1968] 1 QB 421 at 427 per Diplock LJ.

³⁷ [1979] QB 695.

arson case,³⁸ demonstrates this point. The defendant was a schizophrenic, and it was thus unclear if he would (at the time of acting) have been capable of appreciating the risks attendant upon starting a fire in a large haystack. The Queen's Bench Division upheld his appeal against conviction: recklessness in criminal damage required that the Crown had proved awareness of risk beyond reasonable doubt, and it had failed to do so.

Despite this renewed focus on advertent risk-taking in certain contexts, the law still faced difficulties. In some areas of the law, recklessness continued to be defined in different ways that did not necessarily fit the advertence model adopted in *Cunningham*.³⁹ Recklessness was also still used in its "ordinary" – apparently *inadvertent* – sense in involuntary manslaughter.⁴⁰ It was thus unclear, in some contexts, whether recklessness required that the defendant had foreseen the relevant risk. There was accordingly no single "true" definition of recklessness by the 1950s.⁴¹ Instead, decisions were taken on a case-by-case basis, resulting in the same variation in approach which still exists in Scots law.⁴²

Further difficulties for advertent recklessness arose following the passing of section 8 of the Criminal Justice Act 1967,⁴³ which provides that:

A court or jury... – (a) shall not be bound in law to infer that [the defendant] intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

³⁸ Criminal Damage Act 1971 ss 1(1), 1(3).

³⁹ See e.g. *R v Mackinnon and Others* [1959] 1 QB 150 at 155 per Salmon J, where recklessness in the Prevention of Fraud (Investments) Act 1939 s 12 (now repealed) was interpreted to mean "not caring" (which is non-committal on the point of awareness of risk). See, also, *R v Grunwald and Others* [1963] 1 QB 935 at 939-940 per Paull J.

⁴⁰ *R v Lamb* [1967] 2 QB 981 at 990 per Sachs LJ; *R v Cato* [1976] 1 WLR 110 at 114 per Lord Widgery CJ.

⁴¹ *R v Stephenson* [1979] QB 695 at 699 per Geoffrey Lane LJ.

⁴² See ch 2, above.

⁴³ The 1968 Act was passed as a response to *DPP v Smith* [1961] AC 290. For explanation, see JC Smith, "The trend towards subjectivism in English criminal law", in D Mendes da Costa (ed), *The Cambridge Lectures 1979* (1981) 176 at 178-180.

This enactment meant that *mens rea* became a central issue in a greater number of trials and appeals, resulting in a rise in the number of appellate decisions concerning the definition of *mens rea* terms during the 1970s and 1980s.⁴⁴

In relation to recklessness, these appeals focussed upon cases where advertence was not apparent, but (at least to the courts) it seemed that culpability was. Three examples illustrate the perceived shortcomings of *Cunningham* recklessness. These are:

- (i) Where the defendant acted impulsively;
- (ii) Where the defendant “could not care less” about the riskiness of her conduct; and
- (iii) Where the defendant was unable to foresee risks at the time of acting because she was acutely, voluntarily intoxicated.

Each will be considered in turn.

(1) Impulsive defendants

*R v Parker*⁴⁵ provides a good example of an impulsive actor who failed to think about the risks attendant upon his conduct. The defendant had suffered a series of mishaps and took out his anger by slamming down the receiver of a public telephone, damaging it. His response to a charge of criminal damage⁴⁶ was that – in his excited state – he did not think about the risk he posed to the phone.

The problem with this explanation was that it put Parker outwith the scope of *Cunningham* recklessness. If he was to be believed, the defendant had not foreseen the risk of breaking the telephone at the time of acting. Accordingly, if the requirement of advertence (recognised in the context of criminal damage in *R v Briggs*)⁴⁷ were applied strictly, Parker should have been acquitted.

⁴⁴ J McEwan and SJ Robilliard, “Recklessness: the House of Lords and the criminal law” (1981) 1 LS 267 at 276.

⁴⁵ [1977] 1 WLR 600.

⁴⁶ Criminal Damage Act 1971 s 1(1).

⁴⁷ [1977] 1 WLR 605.

Clearly wanting to avoid the situation where a state of ignorance brought about by the defendant's (unreasonably)⁴⁸ excited emotional state could exculpate him, the Court of Appeal explained that Parker should be considered as "reckless" because a:⁴⁹

[M]an is reckless in the sense required [by the Criminal Damage Act 1971] when he carried out a deliberate act knowing *or closing his mind to the obvious* fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act.

Insofar as this statement deals with the defendant *knowing* that there was a risk, it simply repeats what was said in *Cunningham* and *Briggs*. Of more importance is the court's belief that a person who closes her mind to obvious risks is reckless. Two points fall to be considered in more detail. First, what constitutes an "obvious" risk? Secondly, what does it mean to "close one's mind" to a risk?

(a) An "obvious" risk?

A matter left unaddressed by the court in *Parker* is to *whom* the risk taken by the defendant must appear obvious. Is it the defendant, or the "reasonable person"? If the question of whether a risk is obvious is determined by asking whether the reasonable person in the defendant's circumstances would have foreseen it, the standard becomes *external* (or "objective"). The matter of whether a risk was "obvious" need not, however, rely on the adoption of an external standpoint. It could, for example, be asked whether the defendant would, had she thought about it, have recognised the risk as being "obvious". This would be an *internal* ("subjective") standpoint. As will be seen, neither of these perspectives preserves the focus on advertence adopted in *Cunningham* and *Briggs*.

Given the allegedly "subjective" nature of those judgments, it makes sense to begin with the internal perspective. If concentrating on a risk that the defendant *could have foreseen*, the law would still require "subjectivity" insofar as the defendant must, generally, be able (i.e. have the "general capacity") to foresee the unjustifiable risks

⁴⁸ Not all failures to foresee risk because of a strong desire or emotion will necessarily be culpable. See §5.C(3)(a), below.

⁴⁹ *Parker* at 604 per Geoffrey Lane LJ (emphasis added).

attendant on her conduct, even if she failed to do so (have the “*specific capacity*”) at the time of acting.⁵⁰

Although this approach remains focussed on the defendant, it distorts the situation by asking what Parker *would* have foreseen had he *not* been angry. This requires artificially extending the “timeframe” under investigation in order to establish his calm character and (hypothetically) ask what he might have done had the circumstances been different. This approach is dubious when it is compared with the understanding of recklessness in *Cunningham* and *Briggs*. The very point of the defendant’s argument in *Parker* was that *he could not foresee risk at the time of acting*;⁵¹ that the matter was beyond his control.⁵² To hold him responsible and liable on the basis of suppositions about how he might have acted in an alternative reality is, Parker could contend, to convict him on the basis of conjecture, not culpability. This argument is strong, for reasons that are explored in more depth below.⁵³ It is thus appropriate to abandon the internal perspective for now.

The external perspective is also unacceptable. Under this approach, it would be reckless to fail to notice a risk, which – although “objectively” obvious to the reasonable person – did not (or *could not*) occur to the defendant when acting. This might give rise to injustice if, through no fault of her own, the defendant was unable to appreciate risks. There are clear concerns – considered below – about treating those who were not, at the time of acting, “reasonable people” as being such.⁵⁴ Nevertheless, this issue was not aired in *Parker* (presumably because the defendant *was* at fault for becoming *that* angry).⁵⁵

The internal perspective thus seems to depart from *factual* culpability, whilst the external position seems conducive to injustice if the defendant is, in some meaningful sense, not a reasonable person. Furthermore, neither approach remains true to the spirit of advertent recklessness (i.e. conscious risk-taking).

⁵⁰ See T Honoré, *Responsibility and Fault* (1999) ch 7.

⁵¹ Cf *Briggs* at 608 per Jones J.

⁵² See Duff, *AFC* 59.

⁵³ At §6.A(2)(c).

⁵⁴ See §3.C(3), below.

⁵⁵ E Fruchtmann, “Recklessness and the limits of *mens rea*: beyond orthodox subjectivism” (1986-1987) 29 *Crim LQ* 315, 421 at 444-445.

Given these points, it has been assumed that the fiction in *Parker* was intended for use only in certain circumstances – primarily, where the risk (inadvertently) taken by the defendant was inherent in her action.⁵⁶ To understand this point, it is useful to consider *Briggs* in more detail. The defendant, a landlord, had entered into a dispute with his tenants. He set about removing their property from a garage. One tenant’s car was obstructing the garage door and the defendant pushed the vehicle towards the garage wall. One of the car’s door handles was later found to be broken and Briggs was charged with criminal damage.

The trial judge directed the jury in terms of whether the defendant had been “careless” in his treatment of the car, which is non-committal on the matter of awareness.⁵⁷ The Court of Appeal deemed this a misdirection: as the risk of damage to the car’s door handle was not *inherent in* the defendant’s action, the jury had to be convinced beyond reasonable doubt that he had been “subjectively” aware of it. An “objectively” obvious risk was not itself sufficient, and this meant that the trial judge’s charge was unclear on a crucial point concerning culpability. Briggs’ conviction was, accordingly, quashed.

It is not clear why this “inherent risk” approach is compatible with *Cunningham*’s brand of advertent recklessness. For one thing, *Briggs* seems to allow a conviction where the defendant failed to foresee an “inherent” risk – and such unawareness is the *antithesis* of advertent recklessness. Even if this objection is overcome, there is surely scope for reasonable disagreement about whether a risk is “inherent” in a certain type of conduct, making the approach in *Briggs* questionable.⁵⁸ For instance, just as the risk of breakage is inherent in slamming down a phone’s receiver, so is the risk of damage to a car in pushing it against a wall. Arguing about *which part* of the car was damaged seems to split hairs to save a defective theoretical standpoint.

Matters are further complicated by the fact that the way that an action is described surely impacts upon the question of whether a risk was inherent in it. Was Parker “acting out” or “taking out” his anger? The first indicates no structure to his

⁵⁶ AP Simester et al, *Simester and Sullivan’s Criminal Law*, 4th edn (2010) 142.

⁵⁷ *Briggs* at 607.

⁵⁸ See §6.A(4)(c), below.

action (and therefore the matter of an inherent risk of damage seems less clear), whilst the latter does (indicating a strong connection between Parker's action and the risk of damage).⁵⁹ The courts did not deal with these points, but they undermine any theoretical headway that could be made by adopting the "inherent risk" approach in *Briggs*, leaving it unclear what constitutes an "obvious" risk.

Further doubts are raised by the view that the defendant in *Parker* had "closed his mind" to the risk he was taking with the phone.

(b) Closed minds

Again, there are two possible interpretations of the "closed mind" aspect of the judgment in *Parker*. First, it might mean that the defendant *deliberately* chose not to ascertain the risks attendant on his conduct, as he did not want to think about the possible consequences.⁶⁰ It must be asked, however, how Parker could (meaningfully) have chosen to avoid investigating whether he was taking an unjustified risk of damage if he was *genuinely* unaware of the presence of *any* risk of such harm.⁶¹

Whether a person ought to investigate a risk depends on whether the context demands such action. Whilst reading this thesis, the reader is presumably not wondering if there is a risk that the building is on fire. Such an investigation would require a number of prompts (the smell of smoke, a fire alarm going off, etc). If the court is correct, and Parker *could* have a-contextually decided to ignore a risk of property damage, then a great many people are "recklessly", and deliberately, closing their minds to unjustified risks on a daily basis.⁶² The reader is presently *choosing* not to investigate a risk of fire (which might, in the circumstances, be unjustifiable), and this is apparently culpable if, despite a lack of evidence, there *is* a fire somewhere in the building.

⁵⁹ *Ibid.*

⁶⁰ See, further: *Roper v Taylor's Central Garages (Exeter) Limited* [1951] 2 TLR 284 at 289 per Devlin J; *Westminster City Council v Croyalgrange Ltd and Another* [1986] 1 WLR 674 at 684 per Lord Bridge; §6.C(1), below.

⁶¹ See: DJ Galligan, "Responsibility for recklessness" (1978) 31 CLP 55 at 68; *R v Caldwell* [1982] AC 341 at 358 per Lord Edmund-Davies; *R v Crabbe* [1985] HCA 22 at para 12; Fruchtmann (n 55) at 328-329; DJ Birch, "The foresight saga: the biggest mistake of all?" [1988] Crim LR 4 at 7.

⁶² Cf §6.A(3), below.

Given how bizarre this conclusion seems, it might alternatively be contended that Parker was culpable for getting into a state of anger that prevented him from noticing the prompts which would have urged him to assess the risks involved in his actions.⁶³ This approach lacks the aspect of deliberate evasion of knowledge, avoiding the problems mentioned above. It is still not quite correct to say that he “closed his mind” to risk, however. It is surely preferable to say that Parker *surrendered his capacity* to foresee risks at a time before risk-perception was called for.

In this case, Parker failed to live up to societal expectations about self-control and, as a result, missed an “obvious” risk (whatever this means). Although he might, if challenged, have been able to appreciate that his conduct carried certain dangers, he was – in virtue of his angered state – unable to think enough about them *at the time of taking the risk* to have enough reason for not acting. This would put Parker in no better a position than a person asked, at random, what the risks of slamming a phone down might be.⁶⁴ Both would have to stop and think, engaging their knowledge about risks in general and applying it to the instant circumstances. This seems far removed from recklessness as defined in *Cunningham* or *Briggs*. If anything, it is negligence and it is advisable – for reasons explored in more detail later⁶⁵ – to distinguish this concept from recklessness.

Accordingly, the court in *Parker* did not approach recklessness in a helpful or convincing manner. The defendant was either (consciously) wilfully blind or (more conceivably) negligent.⁶⁶ Negligence – i.e. inadvertent risk-taking – cannot satisfy advertent recklessness, even if *Parker* is “a good advertisement for [an] objective test”.⁶⁷ Ibbetson is thus right that, if the courts wish to convict actors like Parker, they “have no choice but to recognise that the purely subjective analysis of recklessness is not in itself enough”.⁶⁸ The court in *Parker* did recognise this, but was presumably unhappy with the notion that a negligent actor can be convicted of a (fairly serious) criminal offence. It therefore extended the notion of “awareness” to accommodate an actor who did not fit the *Cunningham/Briggs* model.

⁶³ G Williams, “The unresolved problem of recklessness” (1988) 8 LS 74 at 86.

⁶⁴ Cf Ferzan, “Opaque recklessness” at 631.

⁶⁵ At §6.B(4).

⁶⁶ See, similarly, Fruchtmann (n 55) at 335.

⁶⁷ W Wilson, *Criminal Law: Doctrine and Theory*, 3rd edn (2008) 140.

⁶⁸ DJ Ibbetson, “Recklessness restored” (2004) 63 CLJ 13 at 15.

The court was assisted in this enterprise by the fact that, following *Cunningham*, the law did not have a clear understanding of what “awareness” of risk entailed. This meant that the decision in *Parker* could be neither manifestly “right” nor “wrong” in its approach. Perhaps all that was clear following *Parker* was that the courts were dissatisfied with the consequences of advertent recklessness.

A similar unease is detectable in the second problem case: where the accused “could not care less” about the risks attendant on her conduct.

(2) Defendants who “could not care less”

In *R v Murphy*,⁶⁹ the defendant – who had been racing in his car – collided with another vehicle, killing the driver. At Murphy’s trial for causing death by reckless driving,⁷⁰ the jury was not directed on the meaning of recklessness, even when it asked the recorder to clarify the meaning of that term. Murphy was convicted and argued on appeal that the jury may have reached its verdict without being convinced that he had foreseen the risk he posed to the other driver at the time of acting. That risk had not occurred to him, he contended, because he was too engrossed in racing.

Murphy’s argument caused further problems for the “subjective” understanding of recklessness which had been employed (albeit hesitantly) in an earlier case on reckless driving.⁷¹ This is due largely to the context of the case: because driving soon becomes habitual, awareness of the attendant risks slips from the forefront of a driver’s mind. The Court of Appeal got around this difficulty in *Murphy* by extending the law’s understanding of “knowledge” of risk: knowledge was information which *could* be called upon by the defendant, and did not need to be at the forefront of his mind.⁷² If the defendant was indifferent to this “knowledge” of risk, then he was reckless.⁷³

Just as “awareness” had been extended in *Parker*, the notion of “knowledge” of risk was thus extended in *Murphy*. Again, *conscious* awareness of risk became a sufficient, but not a necessary, ingredient of recklessness.

⁶⁹ [1980] QB 434.

⁷⁰ Road Traffic Act 1972 s 1 (substituted by the Criminal Law Act 1977 s 50(1)) (now repealed).

⁷¹ *R v Davis* [1979] RTR 316.

⁷² At 440 per Eveleigh J.

⁷³ See, further, Duff, *IACL* 144-145.

What this meant, in practice, was that *conduct* became important, as background knowledge of the risks of the roads could readily be assumed (because driving is licensed and (legal) drivers must pass a driving test). This view was bolstered (as it was in *Allan v Patterson*)⁷⁴ by consideration of the specific offence in *Murphy*, which dealt with reckless *conduct* (driving), rather than a reckless *state of mind*.⁷⁵

Murphy expanded the law's understanding of recklessness considerably. At first blush, the Court of Appeal's approach and the "internal" perspective described above have much in common. What was important was that (somewhere)⁷⁶ in the defendant's mind, there was information relevant to the risks he was taking. Taking an unjustifiable risk in spite of this knowledge was reckless, even if the defendant was *consciously* ignorant of risk at the time of acting. This is difficult to distinguish from negligence, perhaps leading to the view that *Murphy* did not offer an understanding of recklessness at all.⁷⁷ The fact remains, however, that *Murphy* is a decision on the definition of recklessness.

Murphy again demonstrates that the search for one definition of recklessness that applied across the criminal law was being frustrated in the late 1970s and early 1980s. *Cunningham*'s (conscious) advertence-focussed approach was not suited to habitual activities such as driving, and new conceptions of recklessness were being turned to in order to avoid (what the courts saw as) unmerited acquittals.

These efforts to get around the implications of advertent recklessness were taken to extremes in the final problematic case: the acutely, voluntarily intoxicated offender.

(3) Acutely, voluntarily intoxicated defendants

A person can drink alcohol, or consume other drugs, to the point where she *cannot* foresee the risks attendant upon her conduct. This poses significant problems for

⁷⁴ 1980 JC 57 (discussed above at §2.C).

⁷⁵ Cf §2.D(1), above.

⁷⁶ The court was not clear on the level of (sub)consciousness that the defendant's knowledge of risk must be stored at for it to impact upon culpability. This issue is, however, important: see §4.A(3)(b), below.

⁷⁷ See S Cunningham, "Recklessness: being reckless and acting recklessly" (2010) 21 KLJ 445.

advertent recklessness: it seems inevitable that intoxicated actors must be acquitted if they could not foresee relevant risks at the time of acting.⁷⁸

In attempting to overcome this difficulty, English law adopted the same approach as Scots law.⁷⁹ In fact, this is to misrepresent the situation: the court in *Brennan v HM Advocate*⁸⁰ borrowed liberally from the House of Lords' decision in *DPP v Majewski*.⁸¹ There, it was decided that:⁸²

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition... supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases... The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness.

This statement is almost identical to Lord Emslie's observations in *Brennan*, leaving it open to many of the objections raised above⁸³ in relation to Scots law. Those difficulties are, however, more pronounced in the English context, because Scots law lacks a coherent approach to recklessness. Post-*Cunningham*, English law had a clear view of what recklessness required in many (though not all) offences. Included in this list was assault occasioning actual bodily harm,⁸⁴ one of the crimes with which *Majewski* was charged.

This meant that Lord Elwyn-Jones's views on intoxication were strikingly peculiar.⁸⁵ Through holding that recklessness could be supplied by the act of becoming acutely, voluntarily intoxicated, *Majewski* introduced further complexity into the definition of recklessness in English criminal law, once again in order to escape the consequences of *Cunningham*.

⁷⁸ This reasoning has found favour around the Commonwealth: *R v Kamipeli* [1975] 2 NZLR 610; *R v O'Connor* (1980) 146 CLR 64; *S v Chretien* 1981 (1) SA 1097; *R v Daviault* [1994] 3 SCR 63. Many of these decisions were, however, superseded by statutes creating offences of "committing a crime whilst intoxicated" or holding that intoxication is incapable of negating *mens rea* for certain offences.

⁷⁹ See §2.G, above.

⁸⁰ 1977 JC 38.

⁸¹ [1977] AC 443.

⁸² At 474-475 per Lord Elwyn-Jones LC.

⁸³ At §2.G(1).

⁸⁴ *R v Venna* [1976] QB 421.

⁸⁵ See E Macdonald, "Reckless language and *Majewski*" (1986) 6 LS 239.

The situation in England is slightly better than that in Scotland, however, insofar as only “basic” intent offences (understood, typically, as crimes of recklessness)⁸⁶ can be committed by acutely, voluntarily intoxicated actors. If the crime is one of “specific” intent (usually understood as requiring an additional element of intention beyond the basic act) then the defendant’s intoxication will negate *mens rea* and result in an acquittal. Helpfully, most “specific” intent offences have “basic” intent partners, meaning voluntary intoxication will rarely result in a full acquittal.⁸⁷ For instance, a charge of murder, a “specific” intent offence, will be defeated by proof that the defendant was too intoxicated to form “malice aforethought” (essentially, an intention to kill or do grievous bodily harm).⁸⁸ The same is not true of manslaughter – a basic intent offence – where evidence of voluntary intoxication is not allowed to negate *mens rea*.⁸⁹ Intoxication does not, therefore, offer much of a “defence”.⁹⁰

This mitigates, though does not remove, the impact of the intoxication rule in English law. Again, it seems that the rationale for it is “policy”,⁹¹ or a view that intoxication is another variety of fault which defies classification in the normal *mens rea* typology. Whatever its basis, *Majewski* introduced another interpretation of recklessness into English criminal law, further clouding matters. In fact, *Majewski* might be seen as a hiatus in the quest for a singular definition of recklessness in England.⁹² The *definition* of recklessness in *Cunningham* was becoming one possible *description* of that term. As the next sections explain, the House of Lords capitalised upon this idea in the early 1980s.

(4) *R v Cunningham*: summary

It is useful, before proceeding, to summarise the argument thus far. By the 1950s, a more “subjective”, advertence-based approach to recklessness had been adopted in

⁸⁶ The “basic”/“specific” intent dichotomy is more complicated than this paragraph suggests. See: A Ward, “Making some sense of self-induced intoxication” (1986) 45 CLJ 247; T Quigley, “Specific and general nonsense?” (1987-1988) 11 Dal LJ 75.

⁸⁷ Ashworth, *Principles* 199.

⁸⁸ *DPP v Beard* [1920] AC 479.

⁸⁹ *Ibid.*

⁹⁰ It is strictly incorrect to refer to intoxication as a “defence” as it removes *mens rea* (an *offence* element). See AP Simester, “Intoxication is never a defence” [2009] Crim LR 3.

⁹¹ *Majewski* at 476 per Lord Simon, 483 per Lord Salmon, 498 per Lord Russell.

⁹² LH Leigh and J Temkin, “Recklessness revisited” (1982) 45 MLR 198 at 204.

certain contexts, but had failed to take hold across the criminal law. This is because of the courts' unhappiness with the consequences of the approach to recklessness in *Cunningham*. The understanding of recklessness as advertent, unjustified risk-taking seemed to be overstretched in some cases (*Parker* and *Murphy*) and completely abandoned in others (*Majewski*). This once again collapsed the distinction between recklessness and negligence in the criminal law⁹³ and led to a view in some cases that "recklessness" covered both cases of advertence and inadvertence.⁹⁴ The continuing influence of *Andrews* (with its "ordinary" recklessness) on the law of involuntary manslaughter exacerbated matters.⁹⁵

Recklessness had, then, scarcely moved forward by the 1980s. In a 1981 case,⁹⁶ recklessness was equated with "not caring" and the term "recklessly regardless" was employed.⁹⁷ These concepts were contrasted with actual awareness of risk, indicating that the House of Lords did not view *Cunningham* recklessness as being applicable to all contexts. This was confirmed as the 1980s progressed and the law of recklessness entered a new era of uncertainty.⁹⁸

C. *R v CALDWELL; R v LAWRENCE*

By passing the Criminal Damage Act 1971, Parliament aimed at modernising the law on property offences.⁹⁹ Part of this project involved removing the outdated language of "malice" and – as Turner had – replacing it with modern *mens rea* terms, such as intention and recklessness.¹⁰⁰ In *Briggs, Parker* and *Stephenson*, it was assumed that

⁹³ This makes the view that *Caldwell* ruined a pure "subjective" law doubtful. Cf G Williams, "Intention and recklessness again" (1982) 2 LS 189 at 197.

⁹⁴ *R v Stone; R v Dobinson* [1977] QB 354 at 363 per Geoffrey Lane LJ.

⁹⁵ See: *ibid*; *R v Cato* [1976] 1 All ER 260; C Wells, "Perfectly simple English manslaughter" (1976) 39 MLR 474.

⁹⁶ *R v Shepherd* [1981] AC 394.

⁹⁷ At 412 per Lord Diplock.

⁹⁸ Theoretical doubts about *Cunningham* had already been raised by the early 1980s (e.g. RA Duff, "Recklessness" [1980] Crim LR 282 – on which, see §6.A(4), below).

⁹⁹ See, previously, the Malicious Damage Act 1861.

¹⁰⁰ The first statutory mention of "recklessness" in England appears in the Motor Car Act 1903 s 1. Cf the Criminal Procedure (Scotland) Act 1887 Sch A.

advertent recklessness was required. In *R v Caldwell*,¹⁰¹ the correctness of these decisions was questioned before the House of Lords.

In order to settle a grudge, the defendant – who had been drinking – started a fire at his previous place of employment (a hotel). The fire was extinguished quickly, but ten guests were staying in the hotel at the time, and their lives had apparently been put in danger by Caldwell’s actions.

Given the unconvincing treatment of recklessness in *Majewski*, it is wise to leave Caldwell’s voluntary intoxication to one side and concentrate on the House of Lords’ treatment of the meaning of “recklessness” under the 1971 Act. For the majority, Lord Diplock remarked that Turner had chosen recklessness in his edition of Kenny’s *Outlines of Criminal Law* as a term for describing an aspect of malice, and that one proper meaning of recklessness was “careless”.¹⁰² Recklessness thus:¹⁰³

[P]resupposes that if thought were given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequence; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognising the existence of the risk and nevertheless deciding to ignore it.

In other words, *Cunningham* had concentrated on one understanding of recklessness, whereas other cases (such as *Parker*, *Murphy* and *Majewski*) had concentrated on others, such as where: risks were “implicit” in the defendant’s conduct; the defendant possessed background knowledge of risks that she might have called upon; or the defendant had voluntarily surrendered her risk-perception abilities. There were still further ways of being reckless, including giving “no thought at all” to risk.

Lord Diplock thought these various ways of taking an unjustified risk were *equally blameworthy*,¹⁰⁴ and clearly felt the law was being unduly constrained from recognising *moral* wrongs by a focus on conscious risk-taking.¹⁰⁵ His views on

¹⁰¹ [1982] AC 341.

¹⁰² Cf Leigh and Temkin (n 92) at 200.

¹⁰³ At 351.

¹⁰⁴ At 352.

¹⁰⁵ AW Norrie, *Law and the Beautiful Soul* (2005) 85; AW Norrie, *Law, Ideology and Punishment: Retrieval and Critique of the Liberal Idea of Criminal Justice* (1991) 176.

recklessness may thus be seen as the logical conclusion of the gradual erosion of advertent recklessness that had begun in the 1970s.

Another familiar theme in Lord Diplock's judgment is his belief that the distinction between advertence and inadvertence – however theoretically attractive – was difficult for juries to apply in practice¹⁰⁶ and ought, therefore, to be abandoned. This view is substantiated by comments about the difficulty of establishing the “subjective” mental state of another person, and – again – the problematic cases of angry and/or intoxicated actors.¹⁰⁷

These matters of course cause problems in relation to *all* mental states and do not seem to cause significant problems for the day-to-day running of courts in Scotland and England. Nevertheless, in Lord Diplock's opinion, the line between advertence and inadvertence had become an “obsession”¹⁰⁸ and it was preferable to dispense with it in the law of recklessness. Parliament had aimed at *revising* the law on property offences, and – as a result – advertent recklessness was not to be assumed (as it had been in *Briggs and Parker*).¹⁰⁹

Instead, the jury was to be directed that a person charged under the 1971 Act was reckless if:¹¹⁰

(1) He does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.

This “model direction” was to be the subject of contention over the next twenty years. Importantly, Lord Diplock was providing just that: a *direction*. He was not really *defining* recklessness, viewing that activity as fruitless. As Halpin points out, *Caldwell* thus heralded a definitional hiatus: the courts simply ceased to define recklessness in general terms.¹¹¹

¹⁰⁶ *Caldwell* at 352.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ At 353.

¹¹⁰ At 354.

¹¹¹ A Halpin, *Definition in the Criminal Law* (2004) 79.

Lord Diplock's model direction on recklessness in *Caldwell* was, however, applied stringently. In criminal damage cases (including those involving danger to life), foresight of risk on the part of the defendant was not required. All that the Crown had to establish was that an "ordinary prudent bystander would have perceived an obvious risk that property would be damaged and that life would thereby be endangered".¹¹² It became clear that this test ignored entirely the individual defendant's state of mind.

In the following sections, various facets of the decision in *Caldwell* will be discussed. It is prudent to first consider the dissenting opinion, before moving on to explain the limits of *Caldwell* recklessness that developed in the 1980s and 1990s.

(1) Dissent and driving

Although *Caldwell* was seen as "the destruction of recklessness",¹¹³ it was not a unanimous decision: the Lords were split three to two. In his dissent (concurring with Lord Wilberforce), Lord Edmund-Davies focussed on the reliance placed by Lord Diplock on the "ordinary" meaning of recklessness, and argued that "[t]he law... compiles its own dictionary. In time, what was originally the common coinage of speech acquires a different value in the pocket of the lawyer... [*Outlines of Criminal Law*] used lawyer's words in a lawyer's sense".¹¹⁴

Although plausible in the context of some offences, it is – for the reasons indicated above – doubtful that English law possessed *one* "lawyer's" understanding of recklessness before *Caldwell*. This weakens Lord Edmund-Davies's first point, but it remains noteworthy for its strong belief in the need for definition of core *mens rea* terms such as recklessness.

Lord Edmund-Davies's second argument is more convincing. The Law Commission – whose proposals¹¹⁵ led to the 1971 Act – had defended *Cunningham's* approach to recklessness at length.¹¹⁶ It was therefore inconsistent with the

¹¹² *R v Sangha* [1988] 1 WLR 519 at 525 per Tucker J.

¹¹³ C Wells, "Swatting the subjectivist bug" [1982] Crim LR 209 at 210.

¹¹⁴ At 357.

¹¹⁵ Criminal Law: Offences of Damage to Property (Law Com No 29, 1970).

¹¹⁶ Codification of the Criminal Law: The Mental Element in Crime (Law Com Working Paper No 31, 1970) 47-54; A Criminal Code for England and Wales (Law Com No 177, 1989) cl 18(c), paras 8.17-8.21).

Commission (and, by extension, Parliament)'s intention to decide that the word "reckless" included inadvertent, unjustified risk-taking. Although powerful and clear, it was twenty-four years before this aspect of Lord Edmund-Davies's dissent gained favour in the Lords.¹¹⁷

Dissent was not raised when, almost immediately after *Caldwell* was decided, Lord Diplock delivered another speech on recklessness. In *R v Lawrence*,¹¹⁸ the defendant had been convicted of causing death by reckless driving.¹¹⁹ This time, a differently-constituted¹²⁰ panel decided unanimously that driving "recklessly" included inadvertent, unjustified risk-taking. Lord Diplock again relied upon the "ordinary" understanding of recklessness and referred extensively to his earlier judgment in *Caldwell*.¹²¹ The model direction presented in *Lawrence* was, accordingly, worded in almost identical terms. The jury had to be satisfied:¹²²

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person... or doing substantial damage to property; and, second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it.

The effect of this judgment was clear: "recklessness" (at least in the contexts of criminal damage and driving offences) was to be understood in at least two, equally culpable, senses: advertent and inadvertent.

The decisions in *Caldwell* and *Lawrence* meant that the definition of recklessness in *Cunningham* looked to become largely irrelevant. The crucial matter became whether *Caldwell* and *Lawrence* would impact on other areas of the law in due course. This was the subject of debate during the 1980s and 1990s.

¹¹⁷ See §3.E, below.

¹¹⁸ [1982] AC 510.

¹¹⁹ Road Traffic Act 1972 s 1 (now repealed).

¹²⁰ Lord Diplock and Lord Roskill heard both appeals.

¹²¹ At 525-526.

¹²² At 526-527.

(2) The extent of inadvertent recklessness

Contemporary academic reaction to *Caldwell* and *Lawrence* was resoundingly negative. Smith (a devout “subjectivist”) asked whether English law could “really afford the House of Lords as an appellate court”¹²³ and criticised the approach in *Lawrence* as paying “the merest lip-service” to the mental element in crime.¹²⁴ Williams (another “subjectivist”) abhorred the “fine conceptual mess” that Lord Diplock had left behind.¹²⁵ Some writers even wondered whether Lord Diplock’s failure to give effect to Parliamentary intent was unconstitutional.¹²⁶

This academic debate was rarely alluded to by the courts, which continued to deal inconsistently with recklessness. *Caldwell* and *Lawrence* were accepted in some contexts: most usually in relation to little-known statutory offences.¹²⁷ More significant victories did, however, occur in time. In *R v Miller*,¹²⁸ inadvertent recklessness was found to exist where the defendant had failed to notice the risks attendant upon leaving a fire (which he had started accidentally) unattended. This gave rise to a conviction under the 1971 Act, widening the scope of inadvertent recklessness in arson significantly.¹²⁹ In *R v Seymour*,¹³⁰ inadvertent recklessness was employed in relation to “motor” manslaughter,¹³¹ essentially heralding the end of “gross” negligence manslaughter:¹³² as soon as it was clear that the defendant had created an obvious risk to life, it was open to the jury to convict her.¹³³ This made the offence of manslaughter extremely broad, but this did not stop *Seymour* from being followed consistently.¹³⁴

¹²³ JC Smith, “Commentary: *R v Caldwell*” [1981] Crim LR 392 at 393.

¹²⁴ JC Smith, “Commentary: *R v Lawrence*” [1981] Crim LR 409 at 410.

¹²⁵ G Williams, “Recklessness redefined” (1981) 40 CLJ 252 at 262. See, also, G Williams, “Recklessness and the House of Lords” [1981] Crim LR 580.

¹²⁶ ATH Smith, “Law reform proposals and the courts”, in I Dennis (ed), *Criminal Law and Justice: Essays from the WG Hart Workshop 1986* (1987) 35 at 50.

¹²⁷ See e.g. the charge to the jury in *R v Warburton-Pitt* (1991) 92 Cr App R 136 (repeated at 141 per Tucker J), a case concerned with the Air Navigation Order 1980, SI 1980/1965. See, further, the treatment of the Data Protection Act 1984 s 5 (now repealed) in *Data Protection Registrar v Amnesty International* [1995] Crim LR 633.

¹²⁸ [1983] 2 AC 161.

¹²⁹ See, further, *R v Cullen* [1993] Crim LR 936.

¹³⁰ [1983] 2 AC 493.

¹³¹ See, also, *Kong Cheuk Kwan v R* (1986) 82 Cr App R 18.

¹³² Until 1994: see §3.D, below.

¹³³ It is unclear how major a change this was: G Syrota, “*Mens rea* in gross negligence manslaughter” [1983] Crim LR 776 at 786.

¹³⁴ *Kong Cheuk Kwan; R v Madigan* (1982) 75 Cr App R 145; *R v Goodfellow* (1986) 83 Cr App R 23.

There were, however, limits placed on *Caldwell* and *Lawrence*. Although the inadvertence-based approach adopted in those cases was applied in rape¹³⁵ and indecent assault,¹³⁶ it was quickly reconceived of as an “indifference” or “couldn’t care less”¹³⁷ test, which omitted reference to the “ordinary” or “reasonable” person.¹³⁸ This made the law of reckless rape an outlier in the *Cunningham/Caldwell*, “subjective”/“objective” debate.

Further rebellion against “objective” recklessness can be detected in the case reports. Despite decisions indicating that the *Lawrence* direction should be quoted *ipsissima verba*,¹³⁹ some charges and judgments where it ought to have been applied continued to speak in terms of knowledge of risk, implicitly rejecting inadvertent recklessness.¹⁴⁰ In other areas, the impact of *Caldwell* and *Lawrence* was expressly denied.¹⁴¹ Crimes under the Offences against the Person Act 1861 still required advertent recklessness – a proposition that was reaffirmed (somewhat)¹⁴² consistently by the higher courts on the basis that *Caldwell* did not amend the understanding of “malice”¹⁴³ (where *Cunningham* applied).¹⁴⁴ Accomplice liability also still required “subjective” foresight of risk.¹⁴⁵

In *R v Morrison*,¹⁴⁶ Lane LCJ despaired that this mess of conflicting decisions meant that “[u]nhappily, there are now in the law of this country two types of

¹³⁵ *R v Pigg* [1982] 1 WLR 762.

¹³⁶ *R v Kimber* [1983] 1 WLR 1118.

¹³⁷ *R v Thomas* (1983) 77 Cr App R 63; *R v Bashir* (1983) 77 Cr App R 59; *R v Satnam*, *R v Kewal* (1984) 78 Cr App R 149; *R v Breckenridge* (1984) 79 Cr App R 244; *R v Taylor* (1985) 80 Cr App R 327; *R v Khan* [1990] 1 WLR 813; *R v Gardiner* [1994] Crim LR 455. On this line of cases, see: J Temkin, “The limits of reckless rape” [1983] Crim LR 5; S Gardner, “Reckless and inconsiderate rape” [1991] Crim LR 172 at 172-175.

¹³⁸ See, similarly: *R v Paine* [1998] 1 Cr App R 36; *Vehicle Inspectorate v Nuttall* [1999] 1 WLR 629.

¹³⁹ *Madigan* at 148 per Stocker J.

¹⁴⁰ E.g. *R v Crossman* (1986) 82 Cr App R 333 at 336 per Lane LCJ.

¹⁴¹ See, further, A Ashworth, *Principles of Criminal Law*, 4th edn (2003) 183-187.

¹⁴² Cf *DPP v K (A Minor)* [1990] 1 WLR 1067.

¹⁴³ Assault occasioning actual bodily harm is, however, defined (1861 Act s 47) without reference to malice. See: K Campbell and A Ashworth, “Recklessness in assault: and in general?” (1991) 107 LQR 187 at 189; R Stone, “Reckless assaults after *Savage and Parmenter*” (1992) 12 OJLS 578 at 582.

¹⁴⁴ Advertent recklessness was assumed in *R v Venna* [1975] 3 All ER 788 (s 47) and *Flack v Hunt* (1980) 70 Cr App R 51 (s 20). It was then affirmed throughout the *Caldwell/Lawrence* era: *W (A Minor) v Dolbey* (1983) 88 Cr App R 1 (s 20); *R v Grimshaw* [1984] Crim LR 108 (s 20); *R v Morrison* (1989) 89 Cr App R 17 (s 18); *R v Farrell* [1989] Crim LR 376 ((presumably) s 18); *R v Rainbird* [1989] Crim LR 505 (s 20); *R v Spratt* [1990] 1 WLR 1073 (s 47); *R v Savage*; *DPP v Parmenter* [1992] 1 AC 699 (ss 20, 47).

¹⁴⁵ *R v Gilmour* [2000] 2 Cr App R 407.

¹⁴⁶ (1989) 89 Cr App R 17 at 19.

recklessness according to the nature of the crime which is charged.”¹⁴⁷ This sense of “indefensible” confusion was captured well in an example used by Smith and Hogan.¹⁴⁸ If the defendant unthinkingly shot an air rifle at a person wearing glasses, she would be guilty of criminal damage if she broke the glasses (*Caldwell*), but not of an offence against the person if she hit the victim’s eye (which would require *Cunningham* recklessness). If the victim died, the defendant would be guilty of manslaughter (*Seymour*).

Adding to this confusion are the facts that the “indifference” test in rape surely constituted its own category¹⁴⁹ and, in other contexts, some judges continued to use the term “negligence” as an alternative (presumably) to *Cunningham* recklessness.¹⁵⁰ This made the law on culpable carelessness utterly incomprehensible, having implications for some doctrines developed under *Cunningham*. For instance, it became unclear how evidence of voluntary intoxication was to be considered in criminal cases. If basic intent offences were crimes of “recklessness”, then which *type* of recklessness was required and how did intoxication interact with it?¹⁵¹

At least some of this confusion resulted from the various interpretations of recklessness presented in judicial opinions, and it is important to bear in mind that these should not be read as statutes.¹⁵² Despite this, even where *Caldwell* and *Lawrence* were clearly the applicable source of authority (most clearly under the Criminal Damage Act 1971 and the Road Traffic Acts), there were still decisions that demonstrated judicial disquiet with Lord Diplock’s model direction. Such criticism was most vocal in cases where the defendant was, for some reason, not an “ordinary” or “reasonable” person.

¹⁴⁷ At 19.

¹⁴⁸ The example appears until JC Smith, *Criminal Law*, 10th edn (2002) 84, though the law on manslaughter had by then moved on (see §3.D, below).

¹⁴⁹ Cf JC Smith, “Commentary: *R v Farrell*” [1989] Crim LR 376 at 376.

¹⁵⁰ E.g. *R v Whitehouse* [2000] Crim LR 172.

¹⁵¹ See S White, “Offences of basic and specific intent” [1989] Crim LR 271.

¹⁵² *R v Cooke* [1986] 2 All ER 985 at 987-988 per Lord Bridge.

(3) Recklessness and (in)capacity

As noted above,¹⁵³ the defendant's (non-culpable) lack of capacity to foresee risk could ground an acquittal under *Cunningham*. For instance, in *Stephenson*, the defendant's schizophrenia raised reasonable doubt over whether he had foreseen a risk of property damage when he set fire to a haystack to keep warm. His conviction for arson was thus quashed.

It was doubtful whether *Stephenson* would be followed after *Caldwell*, as the "ordinary prudent bystander" would presumably not have characteristics peculiar to the defendant. There were, however, hopes that an incapacity exception was built in by consideration of the "ordinary person".¹⁵⁴ It was envisaged that the defendant would be able to secure an acquittal by showing that, although an "ordinary" or "reasonable" person would have foreseen the risk, she could not (through no fault of her own).¹⁵⁵

These hopes were soon dashed. The Queen's Bench Division confirmed that *Caldwell* did not include an incapacity exception in *Elliott v C (A Minor)*.¹⁵⁶ The defendant was fourteen and of low intelligence. After spending the night wandering the streets, she happened upon a shed, which contained white spirit. She decanted the spirit onto the floor and set fire to it. The shed was destroyed.

Because of her limited intelligence, there were doubts over C's ability to foresee risks. As a result, she was acquitted and the prosecution appealed. On appeal, the court denied that C's incapacity made a difference to the matter of recklessness.¹⁵⁷ If the "ordinary" person would have foreseen the relevant risk, then the defendant was reckless for taking it.

Other cases involving young¹⁵⁸ or mentally-incapable¹⁵⁹ defendants were decided similarly. This was unsurprising given the terms of Lord Diplock's directions

¹⁵³ At §3.B.

¹⁵⁴ These hopes were founded on comments in *R v Caldwell* [1982] AC 341 at 354 per Lord Diplock. See: JS Fisher, "'Driving recklessly' defined" (1981) 131 NLJ 694 at 695; G Syrota, "Recklessness and *Caldwell* (letter)" [1981] Crim LR 658; G Williams, "Recklessness redefined" (1981) 40 CLJ 252 at 269; G Syrota, "A radical change in the law on recklessness?" [1982] Crim LR 97; RA Duff, "*Caldwell* and *Lawrence*: the retreat from subjectivism" (1983) 3 OJLS 77 at 90.

¹⁵⁵ If the defendant was at fault, then it is possible she would be adjudged reckless. This is clearest in cases of acute, voluntary intoxication. See: §3.B(3), above; *R v Bennett* [1995] Crim LR 877.

¹⁵⁶ [1983] 1 WLR 939.

¹⁵⁷ At 947 per Robert Goff LJ.

¹⁵⁸ *Stephen v R* (1984) 79 Cr App R 334; *K (A Minor)*; *R v Coles* [1995] 1 Cr App R 157.

in *Caldwell* and *Lawrence*. What is surprising is the vocal reluctance with which the court in *C* reached its decision. Goff LJ explained his “unhappiness” about reaching the conclusion that *C* was properly convicted.¹⁶⁰ He was aware of the academic commentary to *Caldwell* which suggested that an exception, where the accused could not have foreseen the risk (even if she had paused to consider it), was consistent with Lord Diplock’s judgment in that case. Goff LJ nevertheless regarded it as improper for a lower court to impose a capacity exception on Lord Diplock’s model direction.¹⁶¹

The decision in *C* meant that the law “admitted of no exceptions”.¹⁶² This situation was criticised strongly by academics,¹⁶³ and the Law Commission.¹⁶⁴ Glanville Williams referred to *C*’s conviction as “scandalous”,¹⁶⁵ Stannard claimed it made “a mockery of the whole concept of *mens rea*”,¹⁶⁶ and Mitchell argued that the decision defied “common sense”.¹⁶⁷ The imposition of criminal liability (for a relatively serious offence) on a child of low intelligence further seemed to communicate little to the individual defendant (other than she was expected to act better than she *could* have done), the shed’s owner, or the public more generally. It thus seemed fruitless.¹⁶⁸

Other criticisms of the result in *C* concentrated upon its intuitive injustice. Goff LJ had reached his conclusion on the basis of interpretation, but it must be wondered why the “gravitational pull”¹⁶⁹ of *Caldwell* excluded a distinction “on the facts”. This “would surely not have stretched any consciences or raised any eyebrows”.¹⁷⁰ As

¹⁵⁹ See e.g. *R v Bell* [1985] RTR 202 (where the defendant did not foresee the risks attendant upon driving erratically because he thought he was being driven by God to attack “evil” Butlins holiday camps).

¹⁶⁰ At 947.

¹⁶¹ At 950.

¹⁶² Ashworth, *Principles* 181. See, further, *R v Stephens*, unreported, Auckland High Court, 8 December 1983 (cited in *R v Harney* [1987] 2 NZLR 576 at 579 per Cooke P).

¹⁶³ See: PR Glazebrook, “Criminal negligence” (1984) 43 CLJ 1; S Field and M Lynn, “The capacity for recklessness” (1992) 12 LS 74.

¹⁶⁴ Legislating the Criminal Code: Offences against the Person and General Principles (Law Com No 218, 1993) para 14.22.

¹⁶⁵ G Williams, “The unresolved problem of recklessness” (1988) 8 LS 74 at 78.

¹⁶⁶ JE Stannard, “Subjectivism, objectivism and the Draft Criminal Code” (1985) 101 LQR 540 at 547.

¹⁶⁷ B Mitchell, “Recklessness could still be a state of mind” (1988) 52 J Crim L 300 at 303.

¹⁶⁸ Duff, *IACL* 164.

¹⁶⁹ Cf R Dworkin, *Taking Rights Seriously* (1977) 111-115.

¹⁷⁰ See NP Metcalfe and A Ashworth, “Arson: *mens rea* – recklessness whether property destroyed or damaged” [2004] Crim LR 369 at 371.

noted above, Lord Diplock provided a *direction*, rather than a wholesale *definition* of recklessness.¹⁷¹ Goff LJ's hands were not, therefore, tied.

It has further been pointed out that *C* could have been decided on the basis that the defendant was not *at fault* for being of low intelligence.¹⁷² She was not, as in *Caldwell*, voluntarily intoxicated or, as in *Parker*, unreasonably angry. Such distinctions might well have explained why *Caldwell* and *Parker* should have been convicted but *C* (and others like her)¹⁷³ should have been acquitted. They were not, however, made.

In consequence, *C* remained an unwelcome side-effect of inadvertent recklessness until 2003.¹⁷⁴ The only glimmer of hope was offered in *R v Coles*,¹⁷⁵ where it was suggested that “meritorious cases” would attract lenience.¹⁷⁶ No reported case indicates that this discretion was ever exercised.

The controversy over *C* meant that an important escape route from inadvertent recklessness was cut off. There was, however, another possibility: where the defendant had thought about her conduct – and the attendant risks – and (wrongly) come to the conclusion that there was no unjustifiable risk involved before proceeding to act.¹⁷⁷ This was dubbed the “*Caldwell* lacuna”,¹⁷⁸ and it never arose directly in a reported case.¹⁷⁹ The decision in *Chief Constable of Avon and Somerset Constabulary v Shimmén*¹⁸⁰ nevertheless showed its limits.

¹⁷¹ A Halpin, *Definition in the Criminal Law* (2004) 94.

¹⁷² K Amirthalingam, “*Caldwell* recklessness is dead: long live *mens rea*'s fecklessness” (2004) 67 MLR 491 at 500.

¹⁷³ Some argue that the reduced ability of young children to appreciate consequences provides a strong reason for treating them as incapable of recklessness: C McDiarmid, *Childhood and Crime* (2007) 81; H Keating, “Reckless children?” [2007] Crim LR 546. The situation of older children is more complicated.

¹⁷⁴ Which might explain why *Caldwell* failed to take hold across the criminal law: W Wilson, *Criminal Law: Doctrine and Theory*, 3rd edn (2008) 142.

¹⁷⁵ [1995] 1 Cr App R 157.

¹⁷⁶ At 169 per Hobhouse LJ.

¹⁷⁷ If the defendant had acted in the face of a foreseen risk, and resolved to address the risk after it had been created, she would not have fallen into the “lacuna”: *R v Merrick* [1996] 1 Cr App R 130.

¹⁷⁸ See: E Griew, “Reckless damage and reckless driving: living with *Caldwell* and *Lawrence*” [1981] Crim LR 743; G Williams, “Divergent interpretations of recklessness III” (1982) 132 NLJ 313 at 313-314.

¹⁷⁹ Cf *MJJ (A Minor) v Cooper*, unreported, Divisional Court, 2 July 1987 (cited in DJ Birch, “The foresight saga: the biggest mistake of all?” [1988] Crim LR 4 at 15).

¹⁸⁰ (1987) 84 Cr App R 7.

(4) The “*Caldwell* lacuna”

Shimmen was an accomplished martial artist, and – to impress his friends – aimed to demonstrate that he could stop a kick just short of a shop window. The feat failed, the window was broken, and Shimmen was charged with criminal damage. *Caldwell* was thus directly in point.

At trial, Shimmen argued that he *had* thought about the risk of breaking the window and taken steps to mitigate it (he moved further away from the window). This was not enough to avail him of criminal liability: the court found that the presence of even a reduced risk of damage rendered his action unjustifiable.¹⁸¹ The court specifically reserved opinion on cases where the defendant had satisfied himself that his conduct was *entirely* safe.

In the early 1990s, the lacuna was again considered in *obiter* statements in *R v Reid*.¹⁸² Lord Goff suggested that “if... the defendant is addressing his mind to the possibility of risk and suffers from a *bona fide* mistake [of] fact which if true would have excluded the risk, he cannot be described as reckless”.¹⁸³ It is unclear what to make of this exception, given the above discussion of *C*. An actor who thought about risk and excluded it could not be reckless unless her mistake was *mala fide*, but a child who could not hope to foresee a risk was doomed to be adjudged reckless. There is clearly something wrong with these two propositions¹⁸⁴ and it is unlikely that Lord Diplock intended either of them when crafting the model direction in *Caldwell*.¹⁸⁵

It is further unclear what a *bona fide* mistake is. Is it a mistake that most people might make?¹⁸⁶ Or is it something more “subjective”? In rape, until the Sexual Offences Act 2003, a man could not be guilty of rape if he honestly (even if unreasonably) believed his partner was consenting.¹⁸⁷ If this is a *bona fide* mistake,

¹⁸¹ At 12 per Taylor J.

¹⁸² [1992] 1 WLR 793.

¹⁸³ At 812.

¹⁸⁴ See, similarly: R Taylor, “Recklessness – ruling out the risk” (1987) 137 NLJ 231 at 232; LH Leigh, “Recklessness after *Reid*” (1993) 56 MLR 208 at 213.

¹⁸⁵ LH Leigh, “Liability for inadvertence: a Lordly legacy?” (1995) 58 MLR 457 at 466-467; D Kimel, “Inadvertent recklessness and the criminal law” (2004) 120 LQR 548 at 554; AW Norrie, *Law and the Beautiful Soul* (2005) 83.

¹⁸⁶ Cf *R v Lamb* [1967] 2 QB 981, where the defendant satisfied himself that there was no bullet in the firing chamber before firing a revolver at his friend, with fatal consequences. An expert testified that most people would make this mistake. Lamb’s appeal against conviction was allowed.

¹⁸⁷ *DPP v Morgan* [1976] AC 182.

then it seems that a person who – completely unreasonably – came to the conclusion that there is no risk attendant on her activity cannot be reckless.¹⁸⁸ If *Caldwell* and *Lawrence* were decisions about recognising equivalent levels of culpability, it must again be wondered how a capable, but epistemically callous,¹⁸⁹ adult came to be regarded as less blameworthy than a child of limited intelligence.¹⁹⁰

Despite these difficulties, the lacuna at least provided a means of escaping the unabashed “objectivity” which had become synonymous with *Caldwell* and *Lawrence*. Beyond these cases, it was clear that wholesale inadvertent recklessness had unappealing, unforeseen consequences. This made another change in approach seem inevitable.

(5) *R v Caldwell; R v Lawrence*: conclusion

Caldwell and *Lawrence* had the potential to revolutionise English criminal law. That they failed to do so is testament to strong academic and judicial misgivings about the culpability of inadvertent risk-takers. As a result of these doubts, *Caldwell* and *Lawrence* were interpreted in a variety of ways, resulting in “inconsistent and contradictory”¹⁹¹ decisions, which failed to explain why recklessness was understood differently in different contexts.¹⁹² By 1992, Lord Diplock’s *model* directions were “emasculated”,¹⁹³ and became *specimen* directions.¹⁹⁴ “Indifference” was again making frequent appearances in the case law,¹⁹⁵ and the line between recklessness in manslaughter and certain other offences remained unclear, despite the clarifications in *Seymour*.¹⁹⁶

¹⁸⁸ It has been doubted that this was what Lord Goff intended: Leigh (n 184) at 213.

¹⁸⁹ Cf Birch (n 179) at 5.

¹⁹⁰ It is worth noting, in this regard, that *Caldwell* was assumed to threaten, not reinforce, *Morgan*: D Cowley, “The retreat from *Morgan*” [1982] Crim LR 198 at 205-206.

¹⁹¹ Norrie, *Law and the Beautiful* (n 185) 83.

¹⁹² K Oliphant, “Mind the gap (recklessness in the Lords)” (1994) 4 KCLJ 69 at 71.

¹⁹³ MC Davies, “Shifting the fault lines in unintentional crime” (1995) 17 Liverpool LR 115 at 122.

¹⁹⁴ *Reid* at 796 per Lord Keith, 805 per Lord Ackner, 813-814 per Lord Goff, 819 per Lord Browne-Wilkinson.

¹⁹⁵ See e.g. *R v Millard and Vernon* [1987] Crim LR 393.

¹⁹⁶ See *R v West London Coroner, ex p Gray and others* [1988] QB 467.

This chaos was enabled by Lord Diplock's focus on "ordinary" language. As Smith noted – "[t]he fact is that there is no single ordinary meaning of 'recklessly'".¹⁹⁷ Even in the relatively isolated context of the criminal law, there were vast differences in opinion about what this word meant.

The areas of the law that continued to apply *Cunningham* were, therefore, relative islands of calm for pessimists (such as Williams) who could not conceive of the House of Lords overruling *Caldwell*.¹⁹⁸ These bastions of advertence were bolstered by the fact that *Caldwell* and *Lawrence* failed to spark a revolution in recklessness around the Commonwealth.¹⁹⁹ The quest for a universal approach to recklessness was again being compromised, and cracks soon began to show in inadvertent recklessness. This began with the re-emergence of "gross" negligence as an independent form of *mens rea* in the law of involuntary manslaughter.

D. *R v ADOMAKO*

Seymour had made "gross" negligence a largely irrelevant concept by the 1990s.²⁰⁰ The House of Lords' decision²⁰¹ in *R v Adomako*²⁰² changed things. Adomako was a hospital anaesthetist who had failed to notice that a ventilator tube had come undone during an operation.²⁰³ This resulted in the death of the patient and Adomako was convicted of manslaughter.

When Adomako's appeal reached the House of Lords, his counsel argued that *Seymour* should be applied in *all* forms of manslaughter.²⁰⁴ The Lords decided against this path (again consigning Lord Diplock's direction in *Lawrence* to the "specimen direction" scrap heap) and instead returned to the definition of involuntary

¹⁹⁷ JC Smith, "Commentary: *Large v Mainprize*" [1989] Crim LR 213 at 214 (see also [1990] 1 All ER 331.)

¹⁹⁸ G Williams, "Divergent interpretations of recklessness I" (1982) 132 NLJ 289 at 290.

¹⁹⁹ *Caldwell* was rejected in Canada (*Sansregret v R* [1985] 1 SCR 570), Australia (*R v Smith* (1982) 7 A Crim R 437) and New Zealand (*R v Harney* [1987] 2 NZLR 576 (doubting *R v Howe* [1982] 1 NZLR 618)).

²⁰⁰ G Virgo, "Back to basics: reconstructing manslaughter" (1994) 53 CLJ 44 at 46.

²⁰¹ Arguably, the Court of Appeal's decision (reported as *R v Prentice* [1993] 3 WLR 927) had already revived "gross" negligence manslaughter.

²⁰² [1995] 1 AC 171.

²⁰³ Various features of Adomako's situation make this mistake seem largely understandable. See: Davies (n 193) at 125-126; S Gardner, "Manslaughter by gross negligence" (1995) 111 LQR 22 at 26.

²⁰⁴ *Adomako* at 183 per Lord Mackay LC.

manslaughter in *Andrews*: there must have been a duty of care between the defendant and the victim, the “grossly” negligent breach of which must have caused the death of the victim.²⁰⁵ This “gross” negligence standard applied in *all* cases of involuntary manslaughter.

Following *Adomako*, the law on involuntary manslaughter had gone full circle, largely ameliorating the difficulties encountered in the 1980s and early 1990s. The decision did, however, exhume two problematic areas: the matter of when a duty of care exists; and the issue of what “gross” negligence means. Both of these are crucial to an understanding of “gross” negligence as a *mens rea* standard, and will therefore be considered further. This inquiry also has relevance for the discussion in chapter two, where it was noted that the Scottish courts had, on occasion, discussed the need for consideration of the duties owed by citizens to each other when deciding whether a person was “reckless” or “grossly negligent”.²⁰⁶ Not much has been made of this idea in Scotland, which is in sharp contrast to the position in English law.

(1) Duties of care

Three points should be made concerning duties of care in the English law of manslaughter.

(a) Establishing and extinguishing a duty

First, “ordinary principles of negligence” apply when determining whether the defendant owed the deceased a duty of care.²⁰⁷ The standard civil law test for establishing whether a duty existed – from *Caparo Industries v Dickman*²⁰⁸ – will thus be applied.²⁰⁹ Death must be foreseeable, the defendant and the deceased must be in a proximate relationship and it must be “fair, just and reasonable”²¹⁰ to impose a duty of

²⁰⁵ At 187-188.

²⁰⁶ See §2.D(4), above.

²⁰⁷ *Adomako* at 187.

²⁰⁸ [1990] 2 AC 605.

²⁰⁹ See *Winter v R* [2010] EWCA Crim 1474. For discussion, see J Herring and E Palser, “The duty of care in gross negligence manslaughter” [2007] Crim LR 24.

²¹⁰ See: *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175; *Rowling v Takaro Properties Ltd* [1988] AC 473; *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

care upon the defendant. In the absence of specific statutory duties,²¹¹ this general guidance is all the judge and jury are left with.

Some have doubted whether the “pragmatic” approach of the civil law to establishing duties – which deals with distributing loss, rather than liability to punishment – is appropriate in the criminal context.²¹² There are also obvious concerns over fair notice regarding when a duty of care might be found to exist, which are far more pertinent when it is imprisonment, not damages, in question.

Furthermore, confusion exists concerning whether a duty of care would be found in *both* a civil and a criminal context.²¹³ There are some cases in which a criminal duty of care has been found to exist (e.g. *R v Stone; R v Dobinson*)²¹⁴ where civil liability might not have arisen and *vice versa*.²¹⁵ The principles and policies at work in each area of the law are different,²¹⁶ and this usually makes analogies between the two areas unhelpful.²¹⁷ Lord Prosser’s discussion of duties of care in the context of recklessness in *HM Advocate v Harris*²¹⁸ thus seems overambitious.

Establishing the existence of a duty of care in the criminal law is, despite Lord Prosser’s short treatment, thus a complicated matter. In England, it has been done on a case-by-case basis, using seemingly arbitrary factors. In one case, a duty was found to exist where the defendants were friends with the deceased.²¹⁹ Other persons, who were not the deceased’s friends (but were present), were not found to owe a duty of care. This probably does not, however, give rise to a general duty of care to assist friends in distress – everything will depend on the facts, which is again unsatisfactory from the perspective of legal certainty.

²¹¹ On which, see *R v Willoughby* [2005] 1 WLR 1880 at para 23 per Rose LJ.

²¹² G Virgo, “Reconstructing manslaughter on defective foundations” (1995) 54 CLJ 14.

²¹³ See, further, *Involuntary Manslaughter* (Law Com No 237, 1996) para 3.13.

²¹⁴ [1977] QB 354.

²¹⁵ See D Ormerod, “Commentary: *R v Willoughby*” [2005] Crim LR 389 at 391.

²¹⁶ Cf *R v Wacker* [2003] QB 1207 at para 33 per Kay LJ; *Willoughby* at para 20 per Rose LJ. See, also, P Cane, “*Mens rea* in tort law” (2000) 20 OJLS 533.

²¹⁷ See, further, Virgo (n 212) at 15.

²¹⁸ 1993 JC 150.

²¹⁹ *R v Sinclair* (1998) 148 NLJ 1353.

There is also the question of when a duty of care is extinguished.²²⁰ Exactly *what* must a person do in order to ensure that she is not opening herself up to potential manslaughter liability? An answer to this question has not been forthcoming.

It must be accepted that, as manslaughter covers a wide range of factual situations, judges must take care not to overgeneralise. The points above should, nevertheless, make legislators and judges wary of premising criminal liability for inadvertent risk-taking on duties of care as understood in the civil law.

(b) Defeaters of liability

A second point, which again hints at the different policies at work in criminal and civil law, is that certain civil law doctrines are not applicable in the context of involuntary manslaughter.

For instance, a civil action for negligence is incompetent (on “public policy” grounds) where the two parties were engaged in a joint criminal enterprise.²²¹ This is the doctrine of *ex turpi causa non oritur actio*, and it has not been applied in the context of involuntary manslaughter. In *R v Willoughby*,²²² the defendant and the deceased were both involved in an attempt to defraud insurers by burning down a pub. The deceased’s participation in this action did not prevent a manslaughter charge against his co-conspirator.²²³

The refusal to apply the *ex turpi causa...* doctrine in manslaughter is apparently based on the “policy” that the law is seeking to advance through the criminal law.²²⁴ It is unclear what this policy *is*, or exactly *how* it differs from that at work in the civil law of negligence.²²⁵

²²⁰ See *R (on the Application of Lewin) v Crown Prosecution Service* [2002] EWHC 1049 (Admin).

²²¹ *Saunders v Edwards* [1987] 1 WLR 1116.

²²² [2005] 1 WLR 1880. See, similarly, *R v Wacker* [2003] QB 1297.

²²³ Cf the similar facts in *Sutherland v HM Advocate* 1994 JC 62. The *ex turpi causa* argument was not raised there, but culpable homicide has never been based on civil law principles.

²²⁴ *Wacker* at paras 32-33 per Kay LJ.

²²⁵ The vagueness in the courts’ treatment of “policy” in “gross” negligence manslaughter cases has led some commentators to suspect that the courts are (mis)using the concept to ensure that the jury has the flexibility to deal with “hard cases”. See A Reed, “*Ex turpi causa* and gross negligence manslaughter” (2005) 60 J Crim L 132 at 139.

(c) Questions of law and fact

Thirdly, it should be noted that the question of whether there was a duty of care is one of *law*. The judge should not let a case go to the jury unless there is sufficient evidence to warrant a finding of duty, and the jury should be directed only to find a duty of care existed if certain facts are proved.²²⁶ This has been emphasised in order to ensure that the offence of manslaughter is compliant with the certainty provisions of Article 7 of the European Convention on Human Rights (ECHR).

This suggests that, if duties of care were used more widely in the criminal law (as Lord Prosser would have it), judges would have to take responsibility for deciding when a duty exists. Simply leaving the matter to the jury, with little or no guidance, would potentially breach the ECHR.

Duties of care are not, therefore, as straightforward as they might first seem. A second general area of concern arising in law on involuntary manslaughter is the meaning of the term “gross” negligence.

(2) “Gross” negligence

The re-emergence of “gross” negligence in *Adomako* reignited doubts over the line between civil and criminal liability for death.²²⁷ The courts have been vague over this distinction for some time. For instance, Lord Hewart CJ suggested in *R v Bateman*²²⁸ that “gross” negligence exists where:²²⁹

[I]n 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 of punishment.

More guidance is needed to assist the judge or jury in distinguishing civil and criminal negligence, and to avoid the danger of potential inconsistency²³⁰ (which is surely inherent in the Scottish approach to culpable carelessness).

²²⁶ *R v Khan and Khan* [1998] Crim LR 83; *R v Singh* [1999] Crim LR 582; *Sinclair*; *R v Evans* [2009] 1 WLR 1999 at para 21 per Lord Judge CJ.

²²⁷ *Virgo* (n 212) at 15.

²²⁸ (1925) 19 Cr App R 8.

²²⁹ At 11-12.

²³⁰ See V Tadros, “The limits of manslaughter”, in CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 35 at 49. Cf: G Virgo, “Back to basics: reconstructing

Such inconsistency is fostered by the view in *Adomako* that, in directing the jury on the meaning of “gross” negligence, it is “perfectly appropriate that the word ‘reckless’ should be used”, in the “ordinary” sense that it was employed in *Andrews*.²³¹ To complicate matters further, the “objective” direction in *Lawrence* may, but need not, be used.²³² Once again, then, the law on culpable carelessness scarcely seems further ahead than it was in the 1950s.

The practical result of this confusion is that “reckless” has continued to be used by trial judges to explain “gross” negligence.²³³ It is not clear what meaning is to be attributed to recklessness in this context today, but the decision in *G* (discussed below) appears irrelevant here.²³⁴ This suggests that involuntary manslaughter still has its own understanding of recklessness, which judges are unwilling to define. Any clarity that *Adomako* apparently brought to the *mens rea* of involuntary manslaughter is thus limited by the vagueness of the terminology employed to replace *Lawrence*. One non-definition of recklessness has been replaced by another.

Attorney-General’s Reference (No 2 of 1999) demonstrates the results of this approach.²³⁵ There, it was decided that the “gross” negligence test in *Adomako* was “objective” and that inquiry into the defendant’s state of mind was unnecessary.²³⁶ The Court of Appeal nevertheless went on to say that, in certain circumstances, proof of advertent recklessness would be crucial.²³⁷ This suggest that the word “reckless” might be used in two different senses – “ordinary” (which can exist in cases of inadvertence) and advertent – in relation to one crime, which is potentially confusing.

manslaughter” (1994) 53 CLJ 44 at 49; S Gardner, “Manslaughter by gross negligence” (1995) 111 LQR 22 at 26.

²³¹ At 187 per Lord Mackay LC.

²³² At 188. See, similarly, *R v Lidar*, unreported, Court of Appeal, 11 November 1999 (discussed in C Elliot, “What direction for gross negligence manslaughter? *R v Lidar* and *Attorney-General’s Reference (No 2 of 1992)*” (2001) 65 J Crim L 145).

²³³ See e.g.: *R v Mark and Nationwide Heating Services Ltd* [2004] EWCA Crim 2490 at para 22; *Winter v R* [2010] EWCA Crim 1474.

²³⁴ *Mark* at para 31 per Scott Baker LJ. Some authors do point out that advertent recklessness is an alternative form of fault for manslaughter: e.g. B Mitchell and RD Mackay, “Investigating involuntary manslaughter: an empirical study of 127 cases” (2011) 31 OJLS 165 at 166.

²³⁵ [2000] QB 796.

²³⁶ At 809 per Rose LJ. See, further: *R v DPP, ex p Jones* [2000] IRLR 373; *R v DPP* [2003] EWHC 693 (Admin) at para 29 per Kennedy LJ.

²³⁷ At 809 per Rose LJ.

Smith argued in his commentary to *R v DPP, ex p Jones*²³⁸ that proof of advertence might convince the jury to convict in cases where it is not entirely clear that, “objectively”, the defendant’s breach was “grossly” negligent. This might be taken to mean that advertent recklessness might act as a substitute in cases where “ordinary” recklessness is not clear on the facts. If this is the true state of the law following *Adomako*, then the law is incomprehensible.

One way of saving the logic of *Adomako*, and subsequent cases, might be to hold that it is possible that very many seemingly inadvertent, “grossly” negligent/“ordinarily” reckless actors were, in fact, aware of the risk of death (i.e. advertently reckless).²³⁹ If “ordinary” (apparently inadvertent) recklessness is made out on the facts, then advertent recklessness might be inferred (and *vice versa*, presumably). It is, of course, open to the jury to disbelieve the defendant’s claim of inadvertence, or the Crown’s claim of advertence, and make a contrary inference from the circumstances. The point remains, however, that it is potentially confusing that, in the law of involuntary manslaughter, the concept of recklessness is interpreted in two apparently different ways.

With the abdication of definitional responsibility by the courts, the jury is, of course, required to take up the slack. This has given rise to human rights challenges (on the basis of Article 7 of the ECHR) concerning the fact that the jury is, in effect, to decide what is criminal. Primarily, this is of concern because it is unlikely that juries can declare something criminal legitimately, given that they do not give public reasons for their decisions.²⁴⁰ It was, nevertheless, held in *R v Misra*²⁴¹ that the definition of “gross” negligence is *sufficiently* certain to be compliant with the Convention.²⁴² Given the discussion immediately above, this is hardly convincing.²⁴³

The court’s treatment of the second issue in *Misra* was slightly better. The appellant argued that, even if the jury was capable of defining the standard of fault

²³⁸ [2000] Crim LR 858 at 860.

²³⁹ Murder, Manslaughter and Infanticide (Law Com No 304, 2006) para 3.55.

²⁴⁰ Cf Tadros (n 230) at 50. Jury verdicts are, nevertheless, compatible with the ECHR provided certain conditions are met: App No 962/05 *Taxquet v Belgium*, 16 Nov 2010; *Judge v United Kingdom* (2011) 52 EHR SE17.

²⁴¹ [2005] 1 Cr App R 21.

²⁴² At para 34 per Judge LJ.

²⁴³ Cf O Quick, “Medicine, mistakes and manslaughter: a criminal combination?” (2010) 69 CLJ 186 at 192-193.

required, “gross” negligence was not a proper basis upon which to pin criminal liability. This is apparently because “gross” negligence did not require a positive mental state, and thus offends the principle that *actus non facit reum nisi mens sit rea*; “[a]n act does not make a man guilty of a crime, unless his mind be also guilty”.²⁴⁴ This argument was rejected (properly) on the basis that *mens rea* can refer to *fault*, rather than simply a “subjective” mental state.²⁴⁵ “Gross” negligence is apparently a form of fault which demonstrates *mens rea*.²⁴⁶

The discussion of “gross” negligence above demonstrates two things. First, the law on involuntary manslaughter remains intolerably vague and the confusion of recklessness and “gross” negligence is unfortunate when trying to state the meaning of those terms. Secondly, as in Scotland, *mens rea* is not a particularly well-understood concept in English criminal law, a theme returned to in section F, below.

(3) *R v Adomako*: conclusion

The decision in *Adomako* raised a number of questions that have not been answered satisfactorily. This is instructive, as it points to the shortcomings of approaches to recklessness (such as that proposed by Lord Prosser in *Harris*) premised on “gross” negligence and duties of care.

The main problem has been the tendency of the higher courts to leave decisions to trial judges and juries and for “recklessness” to be used to mean different things in different instances. Occasionally, it is given its “ordinary” (apparently inadvertent) meaning; at other times it requires advertence. One can supply the other, and in some cases advertence will be all-important. The fact that the courts have not elucidated clearly *when* (or *why*) advertence matters adds further doubt as to whether the law on involuntary manslaughter makes sense, particularly when compared with the law on other serious crimes. The virtue of Lord Diplock’s direction in *Lawrence* was, perhaps, its comparative clarity.²⁴⁷

²⁴⁴ *Haughton v Smith* [1975] AC 476 at 491 per Lord Hailsham (emphasis removed).

²⁴⁵ See, further: AP Simester et al, *Simester and Sullivan’s Criminal Law*, 4th edn (2010) 151; §4.A(2)(a), below.

²⁴⁶ *Misra* at para 57 per Judge LJ.

²⁴⁷ MC Davies, “Lawmakers, Law Lords and legal fault: two tales from the (Thames) river bank: Sexual Offences Act 2003; *R v G and Another*” (2004) 68 J Crim L 130 at 139.

Fortunately, *Adomako*'s treatment of recklessness and negligence has had no influence beyond the context of involuntary manslaughter. In relation to other offences, the war over the meaning of recklessness has nevertheless waged on, culminating in the 2003 decision by the House of Lords in *R v G*.²⁴⁸

E. *R v G*

By the early 2000s, the difficulties described in this chapter meant that *Caldwell*'s influence was, in practice, limited to cases of criminal damage.²⁴⁹ *G* provided the House of Lords with the opportunity to reassess this last stronghold of inadvertent recklessness. There, two children had set fire to some newspapers. They had placed the burning paper in a bin and left, expecting the fire to extinguish itself on the concrete floor beneath. The fire took hold and destroyed a number of buildings. The defendants were convicted of criminal damage.

Following their unsuccessful appeal,²⁵⁰ the defendants proceeded to the House of Lords to take on the “ambitious”²⁵¹ target of *Caldwell*. Given their past reluctance to tamper with Lord Diplock's model direction,²⁵² the Law Lords' “determination to hear the appeal” made it “apparent that *Caldwell*'s days were... numbered”.²⁵³ The Lords proceeded on the assumption that *Caldwell* required at least modification. Accordingly, three options were considered:

- (i) A capacity exception for children;
- (ii) A test that asked if the defendant *could* have foreseen the risk had she thought about it; and
- (iii) Departing from *Caldwell*.

Each option will be dealt with in turn.

²⁴⁸ [2004] 1 AC 1034.

²⁴⁹ A Reed, “Objective recklessness and criminal damage” (2003) 67 J Crim L 109 at 112.

²⁵⁰ *R v G* [2003] 3 All ER 206 (subsequent references to “*G*” refer to the House of Lords' decision).

²⁵¹ *G* at para 44 per Lord Steyn.

²⁵² See e.g. *R v Reid* [1992] 1 WLR 793.

²⁵³ Davies (n 247) at 138.

(1) The capacity of children

The first proposed modification of *Caldwell* would have meant that, in the case of children, the risk the defendant failed to foresee would have to be one which would have been obvious to the “normal reasonable child” of the same age, rather than the reasonable adult.²⁵⁴ This option, advocated by some commentators,²⁵⁵ was rejected by Lord Bingham.

First, under this test, the defendant could still be convicted despite lacking *mens rea*, because it would be unnecessary for *her* to have foreseen the risk at the time of acting.²⁵⁶ All that would be required would be that children of the defendant’s age would be able to foresee risks of that type. This would still result in injustice in cases such as *C*. *C* was fifteen, and a “normal reasonable” fifteen year old would presumably have seen the risk of destroying the shed. *C* would thus still have been convicted, and that result would have remained unacceptable for the reasons discussed above.²⁵⁷

This problem could have been resolved by considering *C*’s individual attributes that differentiated her from a “normal” child of the same age. Lord Bingham wisely rejected this option, as it would open up a complicated debate concerning the characteristics of the defendant that should be taken into account when asking what the “reasonable normal child” would have foreseen.²⁵⁸ It is notoriously difficult to decide – in a consistent way – on principles for differentiating one form of incapacity (e.g. stupidity) from another (e.g. a medical condition).²⁵⁹ Similar problems were encountered in deciding which of the (allegedly) provoked defendant’s characteristics were to be ascribed to the “reasonable person”, which resulted in a voluminous, and unstable, jurisprudence.²⁶⁰

Furthermore, Lord Bingham argued, any such exception for children would be anomalous, and he found that nothing in the Criminal Damage Act 1971 or the

²⁵⁴ *G* at para 37 per Lord Bingham.

²⁵⁵ E.g. S Field and M Lynn, “The capacity for recklessness” (1992) 12 LS 74.

²⁵⁶ At para 37.

²⁵⁷ At §3.C(3).

²⁵⁸ At para 37.

²⁵⁹ See Smith’s reply, as editor, to a letter by Syrota at [1981] Crim LR 661-662. See, further, §4.B(1), below.

²⁶⁰ See, ultimately: *Attorney-General for Jersey v Holley* [2005] 2 AC 580; *R v James*; *R v Karimi* [2006] QB 588. Provocation was abolished under the Coroners and Justice Act 2009 s 56 and replaced with a “loss of control” defence (ibid s 54).

relevant preparatory materials that warranted this. It would therefore be a(nother) misinterpretation of Parliamentary intent to create a capacity exception.²⁶¹ Given that Parliament could not have possibly foreseen Lord Diplock's attack on advertent recklessness in *Caldwell*, it is unsurprising that they did not include a capacity-exception for children in the 1971 Act, but Lord Bingham's point is a good one.

For these reasons, the House felt that more substantial inroads into *Caldwell* were required.

(2) *Could* the defendant have foreseen the risk?

In "Recklessness redefined",²⁶² Williams presented a modification of *Caldwell* which would have held, in Lord Bingham's words, "that a defendant should only be regarded as having acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged, where such risk would have been obvious to him if he had given any thought to the matter."²⁶³

This option appears attractive in that the defendant's individual capacities and knowledge, rather than the class of actor to which she belongs (child, schizophrenic, etc), matter in terms of culpability.²⁶⁴ This, however, hints at the reason why the House of Lords rejected this option in *G*: the defendant will have good reason to lie about her capacities for thought and foresight, and extensive expert evidence might be required. This would likely overcomplicate the fact-finder's task, increasing the risk of unreliable verdicts.²⁶⁵

Furthermore, Lord Bingham argued, allowing for hypothetical decisions about what the defendant might have thought had she been prompted to do so would again misinterpret Parliament's intention in enacting the 1971 Act.²⁶⁶ Williams' thesis apparently also did not "meet the objection of principle" to *Caldwell*: it caught actors who, although capable of foreseeing the risk – if they had thought about it – did not, in fact, foresee that risk before acting. Such actors could not, therefore, have *mens rea*

²⁶¹ At para 37.

²⁶² (1981) 40 CLJ 252 at 270-271.

²⁶³ *G* at para 38.

²⁶⁴ See, further, K Amirthalingam, "Caldwell recklessness is dead: long live *mens rea*'s fecklessness" (2004) 67 MLR 491 at 500.

²⁶⁵ *G* at para 38 per Lord Bingham.

²⁶⁶ *Ibid*.

and convicting them of a criminal offence would be contrary to the *actus non facit reum...* principle described above.²⁶⁷ The wider interpretation of *mens rea* as meaning “fault”, which has been accepted in the context of involuntary manslaughter (see above), was not considered.

Accordingly, the third option available to the House – to depart entirely from *Caldwell* – fell to be considered. Although the Law Lords took this route unanimously, support was not unwavering.

(3) Departing from *Caldwell*

Of the Law Lords who gave full opinions, Lord Rodger evidenced the most trepidation over departing from *Caldwell*. His Lordship suggested,²⁶⁸ with reference to Hart,²⁶⁹ that “subjectivism”, as enshrined in *Cunningham*, might not be the best solution to the problem of recklessness. Lord Rodger concentrated on the fact that the exceptions mentioned above²⁷⁰ (where foresight was absent, but culpability appeared to be present) would still be required to avoid (supposedly) unmerited acquittals.²⁷¹ For him, these *ad hoc* responses merely addressed particularly distressing side-effects of the underlying problem: that “subjectivism” is too constrained in its appreciation of *moral* culpability, and this – combined with problems of proving advertence – suggested that an alternative approach should be adopted.²⁷²

Unfortunately, Lord Rodger’s misgivings did not prevent him from giving his (qualified) blessing to the departure from *Caldwell*. His doubts nevertheless hint at the shortcomings of “subjectivism” which have not, to date, troubled Scots law. This attitude towards “subjectivism” might suggest Lord Rodger’s preferred approach, “[involving] the addition of a subtle but important gloss to the [*Caldwell*] direction, requiring the risk to have been obvious to the accused if he had stopped to think about it”.²⁷³ It is unfortunate that this argument, explicitly rejected by Lord Bingham, was

²⁶⁷ See the text accompanying nn 244-246, above.

²⁶⁸ At paras 68-69.

²⁶⁹ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) ch 6. See §4.B, below.

²⁷⁰ At §§3.B(1)-3.B(3).

²⁷¹ *G* at para 68.

²⁷² See, further, MC Davies, “Lawmakers, Law Lords and legal fault: two tales from the (Thames) river bank: Sexual Offences Act 2003; *R v G and Another*” (2004) 68 J Crim L 130 at 142.

²⁷³ *Ibid* at 141 (emphasis removed).

not the basis of a dissent.²⁷⁴ As Lord Rodger concurred that *Caldwell* should be departed from and replaced with flood-blooded “subjective” recklessness, the argument concerning “objective” recklessness, circumscribed by a capacity exception, appears to have been taken less seriously than it perhaps deserved. The House of Lords appears to have wholeheartedly endorsed advertent recklessness for no fewer than seven reasons.

First, it is apparently unjust to convict those without a guilty mind (unless this resulted from voluntary intoxication).²⁷⁵ Again, the wider meaning of *mens rea* as “fault” was ignored.

Secondly, “[i]t is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension”.²⁷⁶ A lenient sentence apparently does not solve this problem,²⁷⁷ but surely the difficulty of convicting a person when, at the time of acting, she did not apprehend risk remains present in cases like *Parker* (which is presumably again good authority on the interpretation of the 1971 Act).²⁷⁸

Thirdly, the Lords held that the criticisms of eminent judges and academics who have deplored *Caldwell* should not be ignored.²⁷⁹ Although encouraging to academics, this argument is hardly compelling. Many areas of English criminal law are criticised relentlessly by academics, and the courts rarely take notice.

Fourthly, the Lords noted correctly that the majority in *Caldwell* misinterpreted the will of Parliament. Materials prepared by the Law Commission²⁸⁰ (not laid before the House in *Caldwell*) demonstrate that “reckless” in the Criminal Damage Act 1971 was supposed to be interpreted in the way it had been in *Cunningham*.²⁸¹ Accordingly, the House in *G* felt that the majority’s decision in *Caldwell* had foundered on a misinterpretation and should therefore be departed from.²⁸²

²⁷⁴ See, similarly, H Keating, “Reckless children?” [2007] Crim LR 546 at 557.

²⁷⁵ *R v G* [2004] 1 AC 1034 at para 32 per Lord Bingham; *DPP v Majewski* [1977] AC 443.

²⁷⁶ *G* at para 33 per Lord Bingham.

²⁷⁷ *G* at para 52 per Lord Steyn.

²⁷⁸ See §3.E(4), below.

²⁷⁹ *G* at para 34 per Lord Bingham, para 57 per Lord Steyn.

²⁸⁰ Criminal Law: Offences of Damage to Property (Law Com No 29, 1970).

²⁸¹ *G* at para 29 per Lord Bingham, paras 46-50 per Lord Steyn, para 64 per Lord Rodger. See e.g. Damage to Property (n 280) para 44.

²⁸² *G* at paras 30, 35 per Lord Bingham, para 64 per Lord Rodger.

Fifthly, it was noted that *Caldwell* was an intoxication case and – given moral intuitions about acquitting those who lack *mens rea* because they are voluntary intoxicated²⁸³ – makes perfect sense *in its individual circumstances*.²⁸⁴ This is an obvious attempt to preserve the fiction advanced in *Majewski*.

Sixthly, the Lords felt that no one (other, presumably, than acutely, voluntarily intoxicated or unreasonably angry offenders) acquitted under an advertent model of recklessness requires, in the interests of public policy, to be convicted.²⁸⁵ If the defendant is young, for instance, there are allegedly compelling reasons for acquittal.²⁸⁶ How are these compelling reasons to be identified? Tribunals of fact will, apparently, bring “common sense” to their role and answer this question.²⁸⁷ This might be objected to as overly optimistic. Furthermore, if inadvertent risk-taking is culpable (and chapter five argues that it can be), then the House of Lords should have presented a stronger moral case for moving from “objectivism” and endorsing “subjectivism” than it did in *G*.

Finally, the Law Lords were guided by the fact that English law was, by the early 2000s,²⁸⁸ gradually becoming more “subjective”.²⁸⁹ The decision in *Caldwell* was contrary to this trend and that anomaly was to be removed.

For these seven reasons, *Cunningham*’s brand of advertent recklessness was revived in the context of criminal damage. If the defendant did not foresee a risk of damage, then she should be acquitted.²⁹⁰

(4) After *G*

Since *G* was decided, there have been clarifications of the content and scope of recklessness. It was argued in *R v Brady*²⁹¹ that the decision in *G* meant that the

²⁸³ Cf *Majewski*.

²⁸⁴ *G* at para 36 per Lord Bingham. Other cases of culpable incapacity can be imagined (for example, inexcusable rage): *Amirthalingam* (n 264) at 499.

²⁸⁵ *G* at para 39 per Lord Bingham (see, similarly, para 58 per Lord Steyn).

²⁸⁶ See, further, *RSPCA v C* [2006] EWHC 1069.

²⁸⁷ *G* at para 39 per Lord Bingham.

²⁸⁸ *G* at paras 55-56 per Lord Steyn. See e.g.: *DPP v Morgan* [1976] AC 182; *DPP v B (A Minor)* [2000] AC 428; *R v K* [2002] 1 AC 462; *R v Smith* [2001] 1 AC 146. As Ibbetson notes, “it is ironic that three of the four cases relied upon to show this trend (*Morgan*, *B (A Minor)* and *K*) were reversed or qualified by statute within weeks of the decision in *G*”: DJ Ibbetson, “Recklessness restored” (2004) 63 CLJ 13 at 15. See Sexual Offences Act 2003 ss 1, 9 and 10.

²⁸⁹ Cf J Horder, “Two histories and four hidden principles of *mens rea*” (1997) 113 LQR 95.

²⁹⁰ Cf *R v Cooper* [2004] EWCA Crim 1382.

defendant must have foreseen “an obvious and significant risk” in order to have been reckless. The defendant in that case had (whilst voluntarily intoxicated) perched upon the railings of a balcony in a nightclub. He (claimed that he had) slipped²⁹² and landed on a woman, breaking her neck and rendering her quadriplegic. The defendant was convicted of inflicting grievous bodily harm (GBH).²⁹³ On appeal, Brady’s argument was that he had not foreseen an “obvious and significant risk” of injury (whatever these terms mean)²⁹⁴ and ought, therefore, to be acquitted. The Court of Appeal rejected this argument: the Crown only had to prove foresight of *a* risk of harm, which apparently had existed in the circumstances.

This is consistent with the approach taken towards GBH throughout the *Caldwell/Lawrence* era,²⁹⁵ but it does raise the question: of *which* risk(s) must an advertently reckless actor be aware?²⁹⁶ This matter is yet to be settled definitively in English law.

As *Brady* (which concerned the Offences against the Person Act 1861) demonstrates, although the House of Lords in *G* dealt with recklessness under the Criminal Damage Act 1971, “general principles were laid down”.²⁹⁷ Despite this, the spectre of inadvertent recklessness looms large in certain contexts. The decision in *Lawrence* remains good law in road traffic offences,²⁹⁸ although this does not matter much anymore as dangerous,²⁹⁹ and careless and inconsiderate,³⁰⁰ driving have their own definitions, which do not refer to recklessness. It is also still possible for Parliament to create offences that are expressly capable of commission through inadvertent recklessness.³⁰¹ It is thus clear that although inadvertent recklessness is *almost* gone from English criminal law, it is yet to be eradicated entirely.

²⁹¹ [2006] EWCA Crim 2413.

²⁹² Though one witness thought Brady had jumped deliberately: *ibid* at para 3 per Hallett J.

²⁹³ Offences against the Person Act 1861 s 20.

²⁹⁴ See §3.B(1)(a), above.

²⁹⁵ *R v Mowatt* [1968] 1 QB 421; *R v Rushworth* (1992) 95 Cr App R 252.

²⁹⁶ This is a matter of “correspondence”. See §4.A(3)(a), below.

²⁹⁷ *Attorney-General’s Reference (No 3 of 2003)* [2005] QB 73 at para 12 per Pill J. See, similarly: *Brady* at para 13 per Hallett J; *R v C* [2007] EWCA Crim 1068 at para 20 per Hughes LJ.

²⁹⁸ *G* at para 28 per Lord Bingham.

²⁹⁹ Road Traffic Act 1988 s 2A.

³⁰⁰ *Ibid* s 3ZA.

³⁰¹ See e.g. the Enrichment Technology (Prohibition on Disclosure) Regulations 2004, SI 2004/1818 reg 2 (cited in D Ormerod, *Smith and Hogan: Criminal Law*, 12th edn (2008) 109 (n 86)).

Further doubts about the wisdom of “subjective” recklessness are raised when consideration is given to the fact that *G* has raised afresh the problematic issues discussed at the beginning of the chapter.³⁰²

(5) A problematic revival?

In *Booth v Crown Prosecution Service*,³⁰³ the defendant had (drunkenly) run out in front of a car, and the driver could not avoid a collision. Booth was charged with recklessly causing damage to the vehicle.³⁰⁴

Although the defendant argued he had not foreseen the risk of collision (he had not looked before crossing the road), the magistrates found that he had “deliberately closed his mind completely to the risks” involved in walking into the road.³⁰⁵ This is a clear nod to the decision in *Parker*, but did not resolve the problems associated with that case.

Whilst hearing Booth’s appeal, the Divisional Court argued that “if [the defendant] was aware of the risk of a collision, inherent in that risk... was not only the risk of personal injury but the risk of damage to property”.³⁰⁶ This view was reached by considering the defendant’s knowledge of the risks of crossing the road generally (a reference to *Murphy*), rather than what he actually foresaw at the time.³⁰⁷

As in *Parker* and *Murphy*, it appears that, in refusing Booth’s appeal, the Divisional Court punished him for what he *should* have taken the time to foresee even if, at the time, he would have been incapable of thinking rationally because of his state of intoxication (which brings in elements of *Majewski*). *Booth* therefore demonstrates that the various devices developed during the *Cunningham* era to avoid the perceived shortcomings of “subjective” recklessness have once again been brought to the fore. The English courts continue, where possible, to avoid the unsavoury side-effects of advertent recklessness.

³⁰² MC Davies, “Lawmakers, Law Lords and legal fault: two tales from the (Thames) river bank: Sexual Offences Act 2003; *R v G and Another*” (2004) 68 J Crim L 130 at 146; Ibbetson (n 287) at 14.

³⁰³ [2006] EWHC 192 (Admin).

³⁰⁴ Criminal Damage Act 1971 s 1(1).

³⁰⁵ *Booth v Crown Prosecution Service* [2006] EWHC 192 (Admin) at para 10.

³⁰⁶ At para 20 per Hallett J.

³⁰⁷ At para 23 per Hallett J.

(6) *R v G*: conclusion

Given the argument in this chapter, it is perhaps unsurprising that the decision in *G* has not been praised universally. Advertence, as Davies notes, is occasionally an inept “barometer of *culpa*”:³⁰⁸

[I]t is likely... that the inclination of the ordinary person would be that the law ought to recognise [inadvertent] actors as being equally culpable... this can be achieved only by dint of the jury adopting an objective, “he must have appreciated the risk (perhaps to then block it from his mind)” approach (“we would have done”). Those actors who we feel sympathy for will... be acquitted by application of the same... reasoning.

In other words, *G*'s requirement of actual foresight of risk might be under-inclusive and act as a catalyst for inconsistent judgments based on intuition. It is not implausible that a jury might decide that a defendant is guilty because she is advertently reckless – as *G* requires – or, alternatively, reach the same conclusion based on their gut instinct *even where* the defendant did not foresee the relevant risk. If these cases of inadvertent culpability exist (and the history of recklessness in English criminal law, together with the argument in chapter five, suggests that they *do*), this means that the test in *G* may not be consistent with at least some conceptions of moral blameworthiness.³⁰⁹ This was, of course, the catalyst for Lord Diplock's destruction of advertent recklessness in *Caldwell*. The impression is, then, that *G* represents victory in a battle, not a war.

F. SOME DOUBTS

“Subjectivists” have, however, celebrated the fact that, since *G*, “it is possible once again confidently to draw a clear distinction between recklessness and negligence”.³¹⁰ The decision in *G* might be clear on the need for advertence, but statements such as this are misleading. English law on culpable carelessness is not clear, uniform and consistent.³¹¹ There are, as noted in this chapter, at least three *avowed* approaches to recklessness in English criminal law (advertent, inadvertent and “ordinary” (which

³⁰⁸ Davies (n 302) at 140, 143.

³⁰⁹ K. Amirthalingam, “*Caldwell* recklessness is dead: long live *mens rea*'s fecklessness” (2004) 67 MLR 491 at 492.

³¹⁰ Ormerod, *Smith and Hogan* (n 301) 116.

³¹¹ See, similarly, C. Crosby, “Recklessness – the continuing search for a definition” (2008) 72 J Crim L 313.

seems to be related to inadvertent recklessness)). When consideration is given to “mixed” tests, such as those discussed in chapter two,³¹² matters get further complicated. Although these tests – employed throughout the Sexual Offences Act 2003 – have replaced indifference-based approaches to recklessness, they add a layer of complexity to the law on culpable carelessness which commentators often ignore.

This shows that, although clearer than Scots law in many respects, English law’s approach to recklessness and negligence remains multifaceted. Cunningham accounts for this fact by arguing that “recklessness” is being misused in road traffic offences and other crimes where only *conduct* is involved (where, she argues, *negligence* is really at issue).³¹³ The solution she proposes is to remove talk of recklessness in conduct-only crimes and reserve it for crimes concerned with consequences or circumstances.

Cunningham’s proposals would remove some of the law’s difficulties, but it is doubtful that the English courts, having grown used to “reckless” conduct and “reckless” minds, will adopt them. Furthermore, Cunningham cannot explain the law on manslaughter using her theory³¹⁴ and so she cannot solve *all* of the problems identified above. This means that other approaches (such as calling for advertent recklessness to be the *mens rea* for manslaughter)³¹⁵ would have to supplement Cunningham’s distinction. The merit of her account is its simplicity, and this is lost when she considers its practicalities.

Added to the law’s inconsistent approach is the fact that nothing prevents the Supreme Court (which has assumed the House of Lords’ jurisdiction) from changing the law’s approach *again* and re-establishing the understanding of recklessness in *Caldwell*.³¹⁶ As Lord Rodger noted in *G*, were it not for Lord Diplock’s misinterpreting the will of Parliament, *Caldwell* was a “legitimate choice between two

³¹² At §2.E(2).

³¹³ S Cunningham, “Recklessness: being reckless and acting recklessly” (2010) 21 KLJ 445 at 460.

³¹⁴ *Ibid* at 465.

³¹⁵ See: N Padfield, “Manslaughter: the dilemma facing the law reformer” (1995) 59 J Crim L 291 at 296; O Quick, “Medicine, mistakes and manslaughter: a criminal combination?” (2010) 69 CLJ 186 at 199-202.

³¹⁶ This option was left open in *G* at para 28 per Lord Bingham, para 60 per Lord Rodger. The chances of the Supreme Court taking this path are, however, described as “remote” in AP Simester et al, *Simester and Sullivan’s Criminal Law*, 4th edn (2010) 144.

legal policies”: “subjectivism” and “objectivism”; advertence and in advertence.³¹⁷ Absent a specific legislative enactment, such as that proposed in the Draft Criminal Code,³¹⁸ recklessness (and, connectedly, negligence) will thus continue to have an unsure foundation in English criminal law.

Again, this uncertainty is – it is submitted – attributable to the lack of a coherent theory of culpability for risk-taking. In *G*, for instance, Lord Rodger doubted that advertent recklessness was truly an apt indicator of culpability in all cases,³¹⁹ and similar reservations have been expressed by academics in the aftermath of that decision.³²⁰ Lord Diplock certainly thought he was engaging *morality* in his definition of recklessness in *Caldwell*, rather than simply clothing a moral term in politically-neutral legal language concerned with conscious mental states.³²¹ The retreat behind this veil in *G* has only given English law the *vener* of a system that has overcome the difficulties that have baffled Scottish lawyers and judges for so long. Both systems suffer from the same disease. The remaining chapters establish that a common cure is available.

G. CONCLUSION

This chapter has shown two things. First, in comparison with their Scottish counterparts, the English courts have confronted more directly and openly the issue of what it means to be reckless or negligent. Secondly, although authoritative definitions of recklessness and negligence have been offered, English law’s treatment of culpable carelessness has been inconsistent. It would be foolish to think that *Adomako* and *G* represent the conclusion of this saga: “gross” negligence is still a very unclear type of fault; multiple definitions of recklessness still exist.

³¹⁷ At para 70. See, similarly, FG Davies, “Where have we got to with recklessness?” (1990) 54 J Crim L 370 at 373.

³¹⁸ A Criminal Code for England and Wales (Law Com No 177, 1989) cl 18.

³¹⁹ See the text accompanying nn 268-272, above.

³²⁰ See JR Spencer and M Brajeux, “Criminal liability for negligence – a lesson from across the Channel?” (2010) 59 ICLQ 1.

³²¹ Cf R Dworkin, *Justice in Robes* (2006) 73.

English law is not, therefore, much further forward than Scots law in tackling the problem of criminal risk-taking. It is submitted that this is because both systems lack a clear theoretical understanding of what it means to be culpable in taking a risk.

Once again, this argument gives rise to an obvious objection, which must be dealt with before progressing. English law *has* been influenced, at some times more strongly than at others, by a theory of culpability: “subjectivism”. This chapter has demonstrated that “subjectivist” theorists, although influential, have failed to assert dominion over the full extent of English law’s approach to culpable carelessness. It will be demonstrated in the next chapter that this is fortunate, given “subjectivism’s” normative shortcomings.

4 Untangling “Subjectivism”

The previous two chapters have demonstrated the doctrinal mess that results when a theory of culpable carelessness is not adopted consistently by the criminal courts. A case has therefore been made for proposing a theory of culpability that the courts could use to gain stability and coherence in their approach. The next three chapters build to such a theory.

This chapter considers the dominant theory of culpable carelessness: “subjectivism”.¹ Although this is normally treated as a monolithic theory, it will be contended that “subjectivists” typically adopt three distinct theoretical positions on culpable carelessness. These theories (discussed in sections A-C) will be referred to as:

- (i) Strict choice theory;
- (ii) Choice and capacity theory; and
- (iii) Choice and character theory.

The main distinction between these theories is their treatment of inadvertent risk-taking (or “negligence”).² Strict choice theorists do not sanction criminal liability for inadvertent, unjustified risk-taking. Choice and capacity, and choice and character theorists do (in limited circumstances), but for different reasons.

It will be argued that strict choice theorists fail to explain compellingly why *only* conscious choices to do wrong are culpable.³ Choice and capacity theory fares better because it emphasises the unfairness of holding actors to a standard they

¹ The label “subjectivism” is misleading. Some theories, such as Duff’s, do not fall into one of the categories below, yet may properly be described as “subjective” insofar as they concentrate on *the accused’s* attributes (see §1.D(1), above). The focus on *choice* (albeit to different extents) is what the theories discussed in this chapter have in common.

² This might mean that the latter two theories are not “subjectivist” at all: negligence liability is seen as being the heart of the debate between “subjectivists” and “objectivists”. See e.g. J Gardner and H Jung, “Making sense of *mens rea*: Antony Duff’s account” (1991) 11 OJLS 559 at 559. This again calls into question the usefulness of the label “subjectivism”.

³ See, similarly, J Horder, “Cognition, emotion and criminal culpability” (1990) 106 LQR 469 at 474.

cannot reach – a problem English law encountered following *Elliott v C (A Minor)*.⁴ It is, nevertheless, still tied unconvincingly to the idea that choice is the be-all-and-end-all of culpability, making it seem misguided. Choice and character theory is unrealistic and/or illiberal and ought to be discarded.

The chapter thus concludes that “subjectivism” is not the impressive theory of culpable carelessness it is sometimes held out to be. Accepting this point allows for the consideration of non-choice-based theories of criminal risk-taking in subsequent chapters.

A. STRICT CHOICE THEORY

As its name suggests, strict choice theory is concerned only with an accused’s conscious choices to do wrong.⁵ The standard strict choice view of criminal recklessness thus holds that a reckless person *consciously chooses* to disregard an unjustifiable risk that a circumstance exists or a consequence will result.⁶ Although there are modifications of this view (discussed below), the choice to take a foreseen, unjustified risk is the essence of recklessness in strict choice theory.⁷

If accepted, strict choice theory causes problems for negligence liability in the criminal law: negligent (i.e. inadvertent) actors do not usually⁸ choose to do wrong. On the strict choice view, they cannot – therefore – be culpable.⁹ Strict choice theorists thus argue that advertent recklessness is the baseline of criminal fault.

⁴ [1983] 1 WLR 939 (see §3.C(3), above).

⁵ See Moore, *Placing Blame* 590. See, more recently: MS Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford: OUP, 2009) 203; MS Moore and HM Hurd, “Punishing the awkward, the stupid, the weak and the selfish: the culpability of negligence” (2011) 5 *Crim Law & Philos* 147. Some “subjectivist” authors have considered the subconscious aspects of risk-taking: see §4.A(3)(b), below.

⁶ See Alexander et al, *Crime & Culpability* ch 2; Model Penal Code s 2.02(c).

⁷ Some strict choice theorists think that advertent recklessness explains *the entirety* of culpability, making other *mens rea* terms superfluous: Alexander et al, *Crime & Culpability* ch 2. Cf J Dressler, “Does one *mens rea* fit all? Thoughts on Alexander’s unified conception of criminal culpability” (2000) 88 *Cal L Rev* 955.

⁸ It is theoretically possible to *choose* to risk being inadvertent at a future time. Accepting this point would allow strict choice theorists to accommodate some cases where, at the time of acting, the accused was inadvertent. See, further: *People v Decina* 138 NE 2d 799 (1956); Alexander et al, *Crime & Culpability* 80.

⁹ See Alexander et al, *Crime & Culpability* ch 3.

Given this strong claim, strict choice theorists need to explain convincingly why conscious choices explain the whole – and not merely a part – of culpability. As seen below, such explanations (when given) are unconvincing.

(1) The importance of choice

Alexander and Ferzan’s view is fairly typical:¹⁰

An actor is culpable when he exhibits insufficient concern for others. Actors demonstrate insufficient concern for others when they (irrevocably) decide to harm or risk harming other people (or their legally protected interests) for insufficient reasons.

Alexander and Ferzan present no real argument as to why insufficient concern is manifest *only* where the actor chooses to do wrong, but this view permeates the remainder of their article¹¹ and their subsequent book.¹² The correctness of this position is simply assumed, as though it was self-evident,¹³ but it is not. There is nothing in the definition of culpability as “insufficient concern for others” that ties a theorist to the view that only conscious choices to do wrong are culpable.¹⁴ Other authors who conceive of culpability as insufficient concern have avoided this conclusion.¹⁵

Alexander and Ferzan look, therefore, to be declaring – rather than arguing – that culpability is coextensive with conscious choices to do wrong. Without explaining the basis of this decision, Alexander and Ferzan’s view seems arbitrary, making their argument that negligence cannot be culpable seem ill-conceived.¹⁶

¹⁰ L Alexander and KK Ferzan, “Culpable acts of risk creation” (2007-2008) 5 Ohio St J Crim L 375 at 378 (footnotes omitted).

¹¹ Ibid at 378-388.

¹² Alexander et al, *Crime & Culpability* chs 2-3.

¹³ Strict choice theorists also assume that “choice” has a settled meaning, which is disputable: SH Pillsbury, “The meaning of deserved punishment: an essay on choice, character and responsibility” (1991-1992) 67 Ind LJ 719 at 738.

¹⁴ In fact, the notion of insufficient concern for others might suggest that culpability should be understood (at least partially) by reference to the relationship between the accused and others: VF Nourse, “Hearts and minds: understanding the new culpability” (2002-2003) 6 Buff Crim L Rev 361.

¹⁵ E.g. Tadros, *Criminal Responsibility* 61-66.

¹⁶ See Alexander et al, *Crime & Culpability* ch 3.

Alexander and Ferzan might reply by pointing to their commitment to retributivism.¹⁷ Conscious choices, the argument goes, are connected uniquely to desert. This is not terribly edifying: one of the problems for retributivist¹⁸ theories of punishment is that it is debatable what constitutes negative desert.¹⁹ Desert need not *necessarily* be determined only on the basis of conscious choices, and it is thus possible to argue that inadvertent wrongdoing *deserves* to be punished.²⁰ Again, if strict choice theorists think that desert *can* only exist where a conscious choice to do wrong has been made, a substantive argument explaining *why* this is the case must be presented. If it is not, then it again appears that a concept (desert) is being defined restrictively to fit underlying assumptions about culpability.

Thus far, the strict choice theorist's explanation of why conscious choices explain the full extent of culpability is the equivalent of declaring that oranges are not simply a *type* of fruit, but instead the be-all-and-end-all of fruit. Apples, on this account, are not fruit. Such a position would be manifestly arbitrary and irrational. This same criticism can be made of certain accounts of strict choice theory and their commitment to denying that inadvertent, unjustified risk-taking may be culpable. Some strict choice theorists have, however, defended their brand of "subjectivism" in a more developed manner.

(a) Choice and alignment

One approach is to emphasise that consciously choosing to risk a certain consequence (or take the risk that a certain circumstance exists) aligns the actor with that consequence or circumstance in a special way.²¹ On this view, conscious choices make actions (and their consequences) *belong* to the actor.²² In relation to culpable carelessness, a choice to take an unjustified risk demonstrates clearly the accused's

¹⁷ Alexander, Ferzan and Morse are "moderate retributivists": *Crime & Culpability* 7-10. Moore defends retributivism in *Placing Blame* chs 2-4.

¹⁸ For others, see D Boonin, *The Problem of Punishment: A Critical Introduction* (2008) ch 3.

¹⁹ See PH Robinson, *Distributive Principles of Criminal law: Who Should be Punished, How Much?* (2008) ch 7.

²⁰ KW Simons, "Culpability and retributive theory: the problem of criminal negligence" (1994) 5 J Contemp Legal Issues 365 at 365.

²¹ See: Duff, *LACL* 154; AP Simester, "Responsibility for inadvertent acts" (2004-2005) 2 Ohio St J Crim L 601 at 603.

²² G Sher, *Desert* (1987) 161; CT Sistare, "Models of responsibility in criminal theory: comment on Baker" (1988-1989) 7 Law & Phil 295 at 301-302.

agency and attitude towards the interests of others. Holding her responsible and, if necessary, liable for that act of risk-taking – and perhaps its consequences – is accordingly unproblematic.

This approach will be dubbed “the alignment view”. It may be defended by reference to the relationship between practical reasoning and choices.²³ In order to understand this argument, it is necessary to take a brief detour into the realm of responsibility. As noted in chapter one,²⁴ to be a proper candidate for criminal responsibility, an actor must have the capacity to appreciate the reasons for and against conduct that bear upon her. She must, in other words, be capable of engaging in practical reasoning.²⁵ Such actors may be referred to as “status-responsible”.²⁶

Absent status-responsibility, a person is not an apt candidate for the communicative process of the criminal trial. If the accused cannot appreciate reasons for and against acting, it seems impossible to explain the community’s disavowal of her conduct, just as it would be pointless to explain to a cat why it had reason to do otherwise than it did. Although others might learn from the punishment of a non-status-responsible person, this would be to (presumably illegitimately) use her as a means to an end (communication to others).

The alignment view builds on the relationship between conscious choices and practical reasoning in status-responsible actors. In every action she performs, a status-responsible actor is presented with reasons for and against acting in a certain way. She is faced with a *choice* that requires her to exercise her capacity to reason: do the reasons against acting outweigh those for acting, or *vice versa*? It is this aspect of decision-making, of choosing on the basis of the reasons open to an agent, which the alignment view links to culpability. As Moore explains, “one is culpable if he chooses to do wrong in circumstances when that choice is freely made”.²⁷ The intrinsic culpability in such a choice, he argues, is the intending or believing that one’s conduct is wrongful (i.e. there is reason not to do it).²⁸

²³ Moore, *Placing Blame* ch 9. See, similarly, Pillsbury (n 13) at 727-729.

²⁴ At §1.A(1).

²⁵ For an introduction, see J Raz, *Practical Reason and Norms* (revised edn, 1999) ch 1.

²⁶ Tadros, *Criminal Responsibility* 21, 55-57.

²⁷ Moore, *Placing Blame* 404.

²⁸ *Ibid* 404-405.

Moore seems now to be in a familiar bind: *why* is culpability only demonstrated when there is a culpable choice? The answer lies in what choices demonstrate. “Culpable choice” presupposes that the chooser was *aware* of the possible wrongful consequences of her actions – that she adverted to them²⁹ – and could have chosen to act otherwise. For Moore, this awareness demonstrates that the accused’s course of conduct was the product of her will,³⁰ providing a vital link between the accused’s agency, her behaviour, the risks it involves and the options that she consciously discounted in deciding what to do.³¹ Furthermore, the fact that the accused made a conscious choice to do wrong ensures that she acted freely as an autonomous agent committed to a course of action, rather than being coerced into acting against her will.³²

To emphasise the accused’s demonstration of autonomy, strict choice theorists tend to argue that freedom requires that the actor could have chosen other than she in fact did (assuming this was possible).³³ This seems intuitively sensible, because it is difficult to conceive of a meaningful choice being made in a situation where the accused was presented with only one acceptable option (consider the extreme example of an agent with a gun to her head). Referring to such choices as “autonomous” seems wrong.³⁴ If there are no acceptable options available to the accused, she of course still makes a “choice” in deciding what to do.³⁵ But this “choice” does not reveal much about the chooser’s will (other than suggesting, in a gun-to-the-head situation, that she is not suicidal). As a result, strict choice theorists do not count un-free choices as an aspect of responsibility. This holds for risk-taking as much as it does for intentional wrongdoing.

This account of freedom and choice is controversial, but it at least goes some way to explaining why strict choice theorists ascribe such a high value to conscious

²⁹ Duff, *IACL* 44-47.

³⁰ See, similarly, BM Baker, “*Mens rea*, negligence and criminal law reform” (1987-1988) 6 *Law & Phil* 53 at 69.

³¹ T Baldwin, “Foresight and responsibility” (1979) 54 *Philosophy* 347 at 354.

³² See, further, RA Duff, “Choice, character and criminal liability” (1993) 12 *Law & Phil* 345 at 346.

³³ Cf HG Frankfurt, *The Importance of What We Care About* (1988) ch 1. The conflict between free will and determinism which this argument raises cannot be resolved here (see §1.A(5), above).

³⁴ See: J Raz, “Autonomy, freedom and the harm principle”, in R Gavison (ed), *Issues in Contemporary Legal Philosophy: the Influence of HLA Hart* (1987) 313 at 316-318; J Raz, *The Morality of Freedom* (1988) 373. See, also, Duff (n 32) at 351.

³⁵ Tadros, *Criminal Responsibility* 65.

choices. When the discussion is related back to the context of risk-taking, it nevertheless becomes clear that there has been a sleight of hand which seeks to unravel the core contention of strict choice theory.

(b) Freedom and responsibility

To see this, consider the following example, which emphasises the value of free choice in the context of risk-taking. In deciding to speed through a red light, the *conscious* risk-taker has demonstrated clearly her attitude towards the risks that she poses to the interests of others (and, indeed, to herself).³⁶ Absent extraordinary circumstances (see below), the driver had the *free* option – which, in making her conscious choice, she will have appreciated and discounted – of driving safely and stopping at the red light. In these circumstances, a clear line may be drawn from the accused (as an agent), through the insufficient concern that her action demonstrates, to the consequences of her risk-taking (if any). The inquiry into culpability is relatively sanitised,³⁷ with difficult moral and political questions sidestepped.³⁸ Where the driver was *inadvertent*, however, strict choice theorists argue that this exercise of will – and thus culpability – is not apparent.

The sleight of hand becomes plain when attention is paid to the way in which some strict choice theories use freedom to choose to draw a connection between an actor and wider aspects of her agency. Ferzan, for instance, points out that – when faced with a free choice between alternative courses of conduct – agents might hold conflicting *desires* about how to act.³⁹ For instance, the accused might have had a strong desire to kill (she wants an inheritance) and a strong desire not to (she values the relationship she has with her parent). In such situations, a free, conscious decision to act in a certain way indicates the desire which relates most closely to the

³⁶ This should not be read to mean that *all* drivers who run through red lights are conscious of the risks involved in that action. It is far more likely that they are not, and this idea is explored below and in the next two chapters.

³⁷ KW Simons, “Rethinking mental states” (1992) 72 BUL Rev 463 at 482-483. Cf J Horder, “Questioning the correspondence principle: a reply” [1999] Crim LR 206 at 208.

³⁸ J Gardner and H Jung, “Making sense of *mens rea*: Antony Duff’s account” (1991) 11 OJLS 559 at 575; AW Norrie, “Subjectivism, objectivism and the limits of criminal recklessness” (1992) 12 OJLS 45 at 58.

³⁹ KK Ferzan, “Don’t abandon the Model Penal Code yet! Thinking through Simons’s rethinking” (2002-2003) 6 Buff Crim L Rev 185 at 209.

accused's agency and her preferences.⁴⁰ Free, conscious choices exhibit the agent's "psychological feeling about the harm she is imposing".⁴¹

In drawing this connection between the accused, her feelings towards harm, and the harm actually risked, Ferzan is again able to make the matter of culpability seem simple. She has, however, cast off the shackles of strict choice theory. If attitudes and desires are what matter, then what lies *behind* choices (capacities, character, etc) seems important in questions of culpability. The alignment explanation of culpability for conscious choices (at least as Moore and Ferzan have explained it) has thus not justified the *sole* concentration on conscious choices in some modern theories of culpable carelessness.

(c) Beyond strict choice

In fact, the alignment view simply makes some fairly uncontroversial points about responsibility and liability generally. Few would deny that choices are *important* in drawing links between acts and actors; they are perhaps paradigm instances of responsible agency.⁴² Nor, in a liberal society, would the notion of individual autonomy be taken lightly. It is nevertheless plain that the arguments discussed above show only that a choice to do wrong may draw a *particularly strong connection* between the actor and her acts. It does not explain why choice is the *sole* mark of culpability.⁴³

On examination, it appears that conscious choices are reflections of deeper aspects of the agent's will, feelings and attitudes. This does not sound like a promising basis for strict choice theory, but rather undermines it. If agency, feelings and attitudes are what matters, it is not clear why these can only be demonstrated through advertent risk-taking.⁴⁴ As will be argued in the next two chapters, a failure

⁴⁰ Cf Moore, *Placing Blame* 551.

⁴¹ KK Ferzan, "Holistic culpability" (2006-2007) 28 *Cardozo L Rev* 2523 at 2534.

⁴² See §6.B(4), below.

⁴³ Cf KW Simons, "Culpability and retributive theory: the problem of criminal negligence" (1994) 5 *J Contemp Legal Issues* 365 at 389.

⁴⁴ Cf: Duff, *IACL* ch 7 (discussed below at §6.A(4)); V Tadros, "Recklessness and the duty to take care", in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 227 at 233.

to notice or investigate a risk can show just as strong an attitude towards the interests of others as a conscious choice to do wrong.

There are also questions over the strict choice theorist’s view of individual autonomy. On one view, emphasising individual autonomy through requiring conscious, chosen wrongdoing is sensible: individuals ought to be able to exercise their freedom and control over the matter of whether they open themselves up to the “authoritative disavowal”⁴⁵ of criminal liability.⁴⁶ It is still not clear, however, how the argument from individual autonomy supports the view that choice is the *sole* mark of culpability. Individual autonomy is not a definite concept: it can be understood in wider senses⁴⁷ which encompass aspects of a person’s capacities and character, and her relationships with others, etc. In fact, it might be objected that viewing autonomy simply in terms of conscious choice “would treat human beings as unreflective, nose-to-the-ground seekers of satisfaction incapable of meeting expectations of foresight premised on a capacity for thought”.⁴⁸ In other words, individual autonomy could involve taking responsibility for the kind of individual one is, and the aspects of a situation that one *could have* (but did not) advert to.⁴⁹

The possibility of this wider understanding of autonomy has, in fact, won over some “subjectivists”. For instance, Ashworth (a “subjectivist”)⁵⁰ understands that, although individual autonomy is respected through concentrating on advertence, it is also given due weight when an inadvertent actor is punished for failing to reach a standard of care she *could have* reached.⁵¹ This makes him a different kind of theorist (namely, a choice and capacity theorist – see section B, below) and suggests that the concept of individual autonomy cannot, in itself, justify choice’s place as the sole mark of culpability.

⁴⁵ J Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (1970) 101.

⁴⁶ On choice and control, see: E Fruchtman, “Recklessness and the limits of *mens rea*: beyond orthodox subjectivism” (1986-1987) 29 Crim LQ 315, 421 at 334-336; Duff, *IACL* 155; RA Duff, *Criminal Attempts* (1996) 332.

⁴⁷ See, further, P Allmark, “An Aristotelian account of autonomy” (2008) 42 J Value Inquiry 41.

⁴⁸ A Brudner, *Punishment & Freedom: A Liberal Theory of Penal Justice* (2009) 63.

⁴⁹ See: BM Baker, “*Mens rea*, negligence and criminal law reform” (1987-1988) 6 Law & Phil 53 at 68; N Lacey, *State Punishment: Political Principles and Community Values* (1988) 77.

⁵⁰ See Ashworth, *Principles* 75.

⁵¹ *Ibid* 185-188.

To draw the threads of the argument thus far together, the strict choice theorist's claim that conscious choices explain the entirety of culpability – and ought, therefore, to dominate the criminal law's approach to culpable carelessness – lacks a convincing rationale. Interpreting concepts such as culpability, desert, freedom and individual autonomy in a way that suits deeper commitments to choice is insufficient. Those commitments themselves require justification. It has been noted already that strict choice theorists rarely offer such an account, but one notable exception will be considered.

(d) Brudner: saving strict choice theory?

For Brudner, a choice to infringe the rights of others is central to culpability because – again – of what it represents. His starting point is a Hegelian conception of social interaction,⁵² which holds that the limits of a person's autonomy (and her rights) are determined by the limits on the autonomy (and rights) of others. Under such a system, one person's freedom ends where another's begins:⁵³ for instance, a person's right to walk where she pleases is circumscribed by the property and privacy rights of others. It is, for Brudner, a fundamental duty of citizenship to respect these boundaries of autonomy and rights, and to only cross them with the consent of those whose autonomy and rights will thereby be infringed.⁵⁴

Given this view of society, Brudner can explain the centrality of conscious choices to culpability. A conscious, knowing⁵⁵ choice to non-consensually go beyond the reciprocal confines of autonomy, and impact upon the freedom of others, is a symbolic disavowal of the impeded party's status as an end, the duties of citizenship, and the bonds of society.⁵⁶ Punishment is a necessary evil, which reasserts the social boundaries of autonomy that the offender has threatened. It does so by limiting *the*

⁵² See GWF Hegel, *Philosophy of Right* (S W Dyde trans, 1896).

⁵³ Brudner, *Punishment & Freedom* (n 48) 59.

⁵⁴ See, also, R Nozick, *Anarchy, State and Utopia* (1974) 58.

⁵⁵ If the accused is mistaken concerning the bounds of autonomy, defiance presumably cannot be shown: SP Garvey, "Passion's puzzle" (2004-2005) 90 Iowa L Rev 1677 at 1728. Despite this, Brudner only admits of exculpatory mistakes where the "Thinking Agent" would have made the same error: Brudner, *Punishment & Freedom* (n 48) 82.

⁵⁶ See, further: J Hampton, "Mens rea", in EF Paul, FD Miller and J Paul (eds), *Crime, Culpability and Remedy* (1990) 1; WE Conklin, *Hegel's Laws: The Legitimacy of a Modern Legal Order* (2008) 142-143.

offender’s autonomy.⁵⁷ Through this process, one failure to respect the socially-protected thresholds of individual autonomy breeds another,⁵⁸ apparently reinforcing the social structure that the offender’s advertent wrongdoing threatens to undermine.

This account of punishment means that the State is involved, necessarily, in the violation of offenders’ rights.⁵⁹ In imprisoning an offender, for instance, the State ensures that she is no longer free to exercise her individual autonomy as she could before offending.⁶⁰ Without the offender’s consent, this would – for Brudner – be just as wrong as the offender’s wrongful conduct against her fellow citizen(s).⁶¹ This explains why *conscious* choice is the cornerstone of his theory: it is only when an offender has knowingly *chosen* to do wrong that she can be said to have implicitly consented to (or *chosen*) punishment.⁶² In such cases, the offender⁶³ is “treated in accordance with his dignity and honour” rather than “as a dog”.⁶⁴ Absent this consent, punishment is an unjustifiable raising of “a cane against a dog”.⁶⁵

Advertent wrongdoing and risk-taking is thus viewed as the core of culpability in a (Hegelian) liberal society.⁶⁶ Brudner therefore supports only the use of advertent recklessness in the criminal law.⁶⁷

Brudner’s defence of strict choice theory is intimidating. This is because it is linked so thoroughly to a view of the proper boundaries of autonomy, the place of punishment and the relationship between citizens in a liberal democracy. The difficulty is, however, that the liberal democracy Brudner writes about does not exist

⁵⁷ Brudner, *Punishment & Freedom* (n 48) 77.

⁵⁸ Importantly, Brudner thinks that the unforeseen, but foreseeable, consequences of a choice to do wrong may impact on the level of punishment: *ibid* 62.

⁵⁹ Cf DN Husak, *Overcriminalization: The Limits of the Criminal Law* (2008) 96.

⁶⁰ Punishment thus contains an element of “dominance” over the offender. See, further, GP Fletcher, “What is punishment imposed for?” (1994) 5 J Contemp L Issues 101 at 110-111.

⁶¹ See, also: Nozick, *Anarchy, State and Utopia* (n 54) 51-52; CS Nino, “A consensual theory of punishment” (1983) 12 Philosophy & Public Affairs 289.

⁶² Brudner, *Punishment & Freedom* (n 48) 78.

⁶³ Brudner does not require *the offender* to choose to be punished. Instead, he relies on an “objective” “Thinking Agent” who would draw the connection between offending and consent to punishment: *ibid* 3-5.

⁶⁴ Hegel, *Philosophy of Right* (n 52) §99.

⁶⁵ *Ibid*.

⁶⁶ Importantly, Brudner views negligence as *blameworthy*; it simply does not fit his view of criminal fault: A Brudner, “Is negligence blameless?”, in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (2009) 285.

⁶⁷ The same is true of welfare offences, which Brudner distinguishes from “real” crimes. See Brudner, *Punishment & Freedom* (n 48) ch 5.

here, or in his native Canada. His theory creates a “map of imaginary terrain”,⁶⁸ a criminal law that is so removed from doctrinal situations like those described in chapters two and three that it seems alien.⁶⁹ This makes his efforts to save strict choice theory seem devoid of descriptive merit. In fact, it might be wondered whether Brudner’s theory is *too* grand, and that implicit theoretical allegiances cloud his treatment of specific issues such as recklessness and negligence.⁷⁰ He might have *assumed* (wrongly) that a person cannot inadvertently threaten the bonds of society by failing to acknowledge a risk that any properly-motivated citizen would have foreseen.⁷¹

These points mean that Brudner’s thesis is not a compelling account of why *only* conscious choices matter when assessing culpability. It is thus not a threat to the wider notion of culpable carelessness defended in later chapters. This is fortuitous, as addressing Brudner’s theory would go beyond crafting an understanding of culpable carelessness *for* Scots and English law – the avowed purpose of the next two chapters. It would mean arguing about the societal infrastructure that Brudner constructs his theory around, which would take the thesis far away from law. Accordingly, Brudner’s theory will be left to one side.

The discussion above shows that, when applied as a normative *and* descriptive theory of culpable carelessness, strict choice theory still begs a fundamental question and places conscious choice on a pedestal it does not, without argument, deserve. This undermines strict choice theory’s more radical consequences, including its denial of culpability for negligence.

(2) Why negligence is not culpable

Given the deficiencies detailed above, it is not worth considering the argument that negligence is not culpable because negligent actors do not choose to do wrong.

⁶⁸ N Lacey, “Contingency, coherence and conceptualism: reflections on the encounter between ‘critique’ and ‘the philosophy of the criminal law’”, in RA Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (1998) 9 at 16.

⁶⁹ See, also: R Dworkin, *Law’s Empire* (1986) 65; DN Husak, “Retribution in criminal law theory” (2000) 37 San Diego L Rev 959 at 969.

⁷⁰ GP Fletcher, *The Grammar of Criminal Law: American, Comparative and International* (2007) 57-58.

⁷¹ *Ibid* 313.

Furthermore, it should be noted that most modern strict choice accounts of why negligence is not culpable present various objections to arguments *for* negligence liability.⁷² This makes discussing many strict choice objections to negligence difficult without introducing the arguments they are designed to undermine. As a result of this, most strict choice arguments against negligence liability will be held over until the next chapter. For present purposes, it is necessary to explore only two objections to negligence liability that emerge from strict choice theory.

(a) Negligence is not a form of *mens rea*

The first objection rests on the principle that *actus non facit reum nisi mens sit rea*; that “[a]n act does not make a man guilty of a crime, unless his mind be also guilty”.⁷³ If the negligent actor has not adverted to an unjustifiable risk, then that risk cannot be in her conscious deliberation and she cannot, the argument goes, have a culpable mental state – *mens rea* – at the time of taking the risk. She cannot, therefore, be held criminally liable for her inadvertence and/or its consequences.

The popularity of this argument has waned⁷⁴ – perhaps because it relies upon an understanding of the *actus non facit reum...* principle that is not settled.⁷⁵ As Fletcher points out, although that “principle is widely quoted, no one seems entirely sure of its relevance”.⁷⁶ It first appeared in the work of Coke,⁷⁷ and is used in relation to two examples: where a person has committed what would now be embezzlement⁷⁸ (which was not a crime whilst Coke was writing) and where a person has killed himself whilst *non compos mentis*.⁷⁹ In both examples, the accused would not be

⁷² See e.g. Alexander et al, *Crime & Culpability* ch 3.

⁷³ *Haughton v Smith* [1975] AC 476 at 491 per Lord Hailsham LC (emphasis removed).

⁷⁴ For early examples of this argument, see: JC Smith, “The guilty mind in the criminal law” (1960) 76 LQR 78 at 90; RP Fine and GM Cohen, “Is negligence a defensible basis for penal liability?” (1966-1967) 16 Buff LR 749 at 750; R Cross, “The mental element in crime” (1967) 83 LQR 215 at 219.

⁷⁵ MJ Zimmerman, “Negligence and moral responsibility” (1986) 20 *Noûs* 199 at 213.

⁷⁶ GP Fletcher, “The theory of criminal negligence: a comparative analysis” (1970-1971) 119 Pa L Rev 401 at 411.

⁷⁷ E Coke, *Third Part of the Institutes of the Laws of England* (1648).

⁷⁸ *Ibid* 107.

⁷⁹ *Ibid* 54.

guilty of an offence, but the reason why seems to be different in each case. As Fletcher explains:⁸⁰

The first actor did not have the requisite intent to be guilty of larceny; the second was not accountable for his act of suicide. It is tempting to focus solely on the larceny hypothetical and argue that in invoking the concept of *mens rea*, Coke meant merely to say that the actor must have the intent proscribed by law in order to be guilty of the offence... Yet this interpretation of Coke is hardly compatible with his analysis of suicide by a nonresponsible [*sic*] actor. In the latter case, the absence of *mens rea* is the absence of responsibility, not the absence of a particular intention or mental state proscribed by law.

Mens rea can therefore be understood in a more general sense meaning “responsibility”, rather than just “(conscious) mental state”. This would allow negligence to be understood as a form of *mens rea*.⁸¹ Admittedly, this understanding of *mens rea* depletes the descriptive significance of that term in modern scholarship,⁸² but it is clearly still at work in parts of English criminal law (e.g. “gross” negligence manslaughter).⁸³

This suggests two things. First, if negligence is demonstrated (as it will be in the next chapter) to be culpable – in the sense that it shows insufficient concern for the interests of others – then the wider understanding of *mens rea* could be marshalled in its support.⁸⁴ Secondly, even if “*mens rea*” is now understood in a “subjective” sense, this is another selective definition. There is nothing in the history of *mens rea* that suggests that it *must* be understood as “culpable, ‘subjective’ mental state”.⁸⁵

One response is to cease using the term *mens rea*, and instead hold that criminal culpability only exists where the accused possesses a culpable mental state. If this approach is adopted, strict choice theory is back where it started: why are *only* culpable mental states sufficient for culpability? Furthermore, surely *not* having

⁸⁰ Fletcher (n 76) at 411-412.

⁸¹ See, similarly: HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 139-140; DN Husak, *Philosophy of Criminal Law* (1987) 135; BM Baker, “*Mens rea*, negligence and criminal law reform” (1987-1988) 6 *Law & Phil* 53 at 78; K Huigens, “Virtue and criminal negligence” (1997-1998) 1 *Buff Crim L Rev* 431 at 439.

⁸² JWC Turner, “The mental element in crimes at common law” (1938) 6 *CLJ* 31 at 32; G Williams, *Textbook of Criminal Law*, 2nd edn (1983) 91 (n 5).

⁸³ See §3.D(2), above.

⁸⁴ Cf GP Fletcher, *Rethinking Criminal Law* (1978) 262.

⁸⁵ Cf KK Ferzan, “Holistic culpability” (2006-2007) 28 *Cardozo L Rev* 2523 at 2527.

certain thoughts can be conceived of as a type of “culpable mental state”.⁸⁶ The first strict choice objection to negligence liability can thus be met.

(b) Negligent acts are involuntary

A second, flawed argument from strict choice theory holds that negligent action is not culpable because it is involuntary.⁸⁷ Hall argues that this is because actions are only voluntary when the actor is consciously aware of their possible consequences.⁸⁸

This argument can be dealt with quickly as Hall misinterprets his main source, Aristotle.⁸⁹ Aristotle argues that ignorance cannot excuse *if* it stems from the actor’s own wickedness.⁹⁰ As an example of this point, Aristotle states that voluntary intoxication should not excuse if it was in the offender’s power not to become drunk.⁹¹ In this example, Aristotle is indeed concerned with the actor’s *control* over her ignorance: the voluntarily intoxicated offender can avoid becoming intoxicated, and so has to answer for the consequences of choosing to drink.⁹²

If matters were left there, Hall might have a valid point concerning voluntariness. Aristotle requires a conscious choice to lose self-control in order for intoxicated ignorance to be culpable.⁹³ Negligent actors do not *choose*, Hall contends, to be ignorant at a later time.⁹⁴ If this is correct, then negligent actors do not appear to be acting voluntarily when they take an unjustified risk, and it is fairly uncontroversial that involuntary actions should not attract criminal liability.

Unfortunately, for Hall, Aristotle undermines this view of voluntariness through his second example of culpable ignorance: the negligent actor. Aristotle contends that negligent actors are responsible where “it was in their power not to be

⁸⁶ Cf. Hart, *Punishment & Responsibility* (n 81) 148; G Williams, “Recklessness redefined” (1981) 40 CLJ 252 at 256.

⁸⁷ J Hall, “Negligent behaviour should be excluded from criminal liability” (1963) 63 Colum L Rev 532 at 636; R Urowsky, “Negligence and the general problem of criminal responsibility” (1972) 81 Yale LJ 949 at 955; Duff, *IACL* 154.

⁸⁸ Hall (n 87) at 634.

⁸⁹ See, further, Huigens (n 81).

⁹⁰ Aristotle, *Nicomachean Ethics* (R Crisp trans, 2000) III.5.1113b-1114a.

⁹¹ *Ibid* III.5.1113b.

⁹² In fact, voluntarily intoxicated offenders were punished *doubly*: once for their act of wrongdoing and once for surrendering self-control: *ibid*. See, also, *Reniger v Fogossa* (1552) 1 Plowd 1.

⁹³ This might be termed a “broad prior-choice theory”, insofar as the choice is to surrender the capacity to foresee risks in general – rather than *specific* risks – at a later time. See Garvey, “Involuntary manslaughter” at 351-357.

⁹⁴ Cf below at §6.A(3).

ignorant, because it was up to them whether they took care”.⁹⁵ He believes that a person, in shaping her character, can foster careless habits or, alternatively, endeavour to perform the actions of a careful person (habituating herself to perform further careful actions and, ultimately, become a careful person). Aristotle is thus interested in whether a person’s “chosen” character explains her ignorance.⁹⁶ If a person develops her character in such a way that she fails to foresee risks that she ought to (if she were properly motivated), then Aristotle would hold her responsible for her ignorance.

Hall’s voluntariness argument is thus built on a misunderstanding of Aristotle. Although authority is not terribly important here (Aristotle might be wrong), Hall should have presented a more developed theory concerning why voluntary action requires conscious awareness, that could overcome the Aristotelian objection that aspects of a careless character might be “chosen”.⁹⁷ In the absence of such a theory, the argument that negligent actions cannot be culpable because they are involuntary is spurious.

It is worth noting that Hall’s doubts concerning negligence (once again) arise because he has defined a term (voluntariness) so as to accommodate only conscious choices to do wrong and exclude inadvertent risk-taking. Wider conceptions of culpability for inadvertent risk-taking, which do not share Hall’s underlying assumptions (and find Aristotelian support), are therefore possible.⁹⁸

Two popular, strict choice arguments against negligence liability have thus been found to be superficial, showing up further instances of arbitrary definition. By means of a further example of how definition can affect a strict choice theorist’s view on culpable carelessness, the next section juxtaposes two strict choice arguments concerning culpable recklessness: the “correspondence principle” and “opaque recklessness”.

⁹⁵ Aristotle, *Nicomachean Ethics* (n 90) III.5.1114a.

⁹⁶ Cf below at §4.C(1).

⁹⁷ Huigens (n 81) at 445.

⁹⁸ See e.g. J Raz, “Responsibility and the negligence standard” (2010) 30 OJLS 1 at 15-18.

(3) The inconsistent boundaries of strict choice theory

(a) The “correspondence principle”

The correspondence principle is described by Campbell and Ashworth as follows: “if the offence is defined in terms of certain consequences and certain circumstances, the mental element ought to correspond with that by referring to those consequences or circumstances.”⁹⁹

This principle may be read narrowly, holding that the accused must have foreseen an *exact* consequence or circumstance and chosen to risk its materialisation in order to be culpable.¹⁰⁰ On this view, an actor who foresaw the risk of mild property damage in throwing a stone at a window to get the attention of someone inside would be culpable for choosing to take that risk and would be potentially liable for that particular consequence if it materialised. If the window smashed, injuring a bystander, a narrow reading of the correspondence principle would exclude liability for that injury. Although culpable for taking a risk of *a* consequence (damage), the actual consequences go beyond what the accused chose to risk and, accordingly, go beyond the extent of her blameworthiness.

The connection correspondence apparently draws between foresight and individual culpability is important. It again suggests that conscious choices are the sole determinant of blameworthiness. Ashworth contends that the correspondence principle is, in fact, an extension of the “subjectivist” focus on individual autonomy and control,¹⁰¹ which leads almost inexorably to a “subjectivist” understanding of correspondence.¹⁰² There are, nevertheless, other approaches to the correspondence principle.

Some of these alternative perspectives stem from doubts concerning the matter of *control*. As Horder notes, on some views, control over events ceases once a

⁹⁹ K Campbell and A Ashworth, “Recklessness in assault – and in general?” (1991) 107 LQR 187 at 192.

¹⁰⁰ This approach encounters difficulty when considering *which* circumstances and consequences must be foreseen in relation to each specific crime. See J Horder, “How culpability can, and cannot, be denied in under-age sex crimes” [2001] Crim LR 15 at 16-19.

¹⁰¹ Ashworth, *Principles* 76-77.

¹⁰² Cf Tadros, *Criminal Responsibility* 94.

risk is unleashed on the world.¹⁰³ If individual autonomy and control were taken as seriously as proponents of a narrow correspondence principle seem to want, it would seem that nobody is ever fully responsible for the results of their risk-taking. In the example above, the fate of the window was beyond the accused's control once she let go of the stone. If correspondence is *really* about control, only the throwing of the stone itself seems a proper target for liability. The consequences must be ignored entirely.¹⁰⁴

If read this restrictively, the correspondence principle makes the question of culpability *very* "subjective". Horder contends that this is unwise, because the accused who unleashes a risk changes her "normative position" with regard to the world;¹⁰⁵ she "makes her own luck" in *surrendering* full control over events, and the (un)lucky results of her conduct should be attributable to her, even if she did not advert to these prior to acting.¹⁰⁶ This is apparently still a demonstration of respect for individual autonomy because the accused's choice to release a risk upon the world is given due weight.

To meet Horder's argument about *narrow* readings of the correspondence principle, a wider understanding might be adopted. It might be asked whether the accused foresaw a harm *of the sort* that resulted from her conduct, which is something of a halfway house between Ashworth and Campbell's "subjective" understanding of correspondence and Horder's "normative position" argument. For instance, if the accused foresaw *some* element of bodily harm resulting from her conduct, then a weaker reading of the correspondence principle is satisfied if bodily harm (even if much more serious than that envisaged) results.¹⁰⁷

¹⁰³ J Horder, "A critique of the correspondence principle in criminal law" [1995] Crim LR 759 at 760.

¹⁰⁴ The debate over "moral luck" in the criminal law is beyond the scope of this thesis. See, however: T Nagel, *Mortal Questions* (1979) ch 3; B Williams, *Moral Luck: Philosophical Papers: 1973-1980* (1981) ch 2.

¹⁰⁵ See, also: J Gardner, "Rationality and the rule of law in offences against the person" (1994) 53 CLJ 502; A Ashworth, "A change of normative position: determining the contours of culpability in criminal law" (2008) 11 New Crim LR 232.

¹⁰⁶ Horder (n 103) at 764.

¹⁰⁷ See *R v Mowatt* [1968] 1 QB 421.

Strict choice theorists might balk at this reading of the correspondence principle,¹⁰⁸ but more “objective” interpretations are available.¹⁰⁹ It could be argued that the accused may be held liable for an act of risk-taking if she *ought to* have been aware of the specific risk concerned or, going further still, *a similar* risk. For example, if the accused ought to have been aware of an unjustified risk of serious bodily harm (or something like it), a looser principle of correspondence is respected if she is found liable for inadvertently taking *that* risk.

Correspondence can, therefore, be divorced entirely from conscious choice, demonstrating that this principle is not, in fact, thoroughly “subjectivist”. The matter of how strictly or liberally the correspondence principle is understood depends on the strength of a theorist’s commitment to choice, and not on the concept of culpability as insufficient concern for others.

This leads to consideration of “opaque” recklessness, which perhaps implicitly represents an attempt to save “subjective” understandings of correspondence from “objectivism”.

(b) “Opaque” recklessness

Opaque recklessness is a response by Ferzan to accused persons who are not in possession of concrete knowledge of risk at the time they act.¹¹⁰ Consider the driver who decides to accelerate, even though the upcoming traffic light is turning from green to amber. At this moment, the driver might not think “this is dangerous because...” – particularly if she is used to speeding through red lights.¹¹¹ Instead, a more abstract sense of risk or danger might be all that she experienced psychologically.

Such actors are not “reckless” in the strict choice theory sense – particularly if the correspondence principle is read conservatively – and thus they cannot be culpable or punished. Ferzan is unhappy about this result because accused persons like the red light-running driver *will* usually be aware that they are engaging in “risky” behaviour – they will simply have failed to investigate this dim sense of risk

¹⁰⁸ See e.g. Campbell and Ashworth (n 99) at 193.

¹⁰⁹ Tadros, *Criminal Responsibility* 95.

¹¹⁰ Ferzan, “Opaque recklessness”; Alexander et al, *Crime & Culpability* 51-58.

¹¹¹ Cf Tadros, *Criminal Responsibility* 257.

and become fully aware of the *specific* risks they are taking. Ferzan therefore proposes to extend the law's understanding of "awareness" of risk by concentrating on this "opaque", "preconscious" sense of awareness.¹¹²

To understand preconscious awareness, it is necessary to explain the terminological hierarchy within which Ferzan is working.¹¹³ First, consciousness is usually understood¹¹⁴ in terms of what the actor is paying attention to; of what she *experiences*, mentally.¹¹⁵ The reader is (hopefully) consciously aware of the words on this page because they are the focus of attention.

The preconscious is a subconscious state; the information contained within it does not occupy the forefront of the actor's mind.¹¹⁶ It is, however, distinct from lower levels of unconsciousness¹¹⁷ (repressed beliefs, etc) because the actor can, with an act of will, access the information in her preconscious.¹¹⁸ For instance, the reader will be "aware" of the fact that s/he is sitting in a chair (in a library, office, etc) but these features of the situation were not being concentrated upon whilst reading (until now, presumably). Similarly, the act of turning the page will not normally be deliberated over with full conscious awareness.¹¹⁹ An act of will can, however, make these features of a situation the focus of conscious attention. The same is true of most complex actions.¹²⁰ For instance, although learning to drive requires concentration,¹²¹ the movements involved soon become habitual, so the thought "time to change

¹¹² Ferzan, "Opaque recklessness" at 629.

¹¹³ The use of the term "hierarchy" should not be taken to mean that consciousness does not exist on a *spectrum*, with interactions between stages of awareness. See: DW Denno, "Crime and consciousness: science and involuntary acts" (2002-2003) 97 Minn L Rev 269; DW Denno, "Criminal law in a post-Freudian world" [2005] U Ill L Rev 601.

¹¹⁴ The following section relies on an understanding of consciousness which might be scientifically inaccurate, but "[o]ur reliance on folk psychology is fundamental to our understanding and blaming of each other": L Alexander and KK Ferzan, "Culpable acts of risk creation" (2007-2008) 5 Ohio St J Crim L 375 at 383. See, also, SJ Morse, "Brain overclaim syndrome and criminal responsibility: a diagnostic note" (2005-2006) 3 Ohio St J Crim L 397.

¹¹⁵ MS Moore, *Act and Crime: The Philosophy of Action and its Implications for the Criminal Law* (1993) 151; Garvey, "Involuntary manslaughter" at 344-345.

¹¹⁶ Cf DC Dennett, *Content and Consciousness*, 2nd edn (1986) 128.

¹¹⁷ On which, see: JR Searle, *Mind: A Brief Introduction* (2004) 167-168; Garvey "Involuntary manslaughter" at 343-344.

¹¹⁸ See Garvey, "Involuntary manslaughter" at 344.

¹¹⁹ Ferzan uses the example of typing, an action which does not usually involve focussing on the keys being pressed (at least for an advanced typist): Ferzan, "Opaque recklessness" at 628.

¹²⁰ Moore, *Act & Crime* (n 115) 154.

¹²¹ J McCrone, *Going Inside: A Tour Round a Single Moment of Consciousness* (1999) 135.

gear...” does not occupy the driver’s conscious mind.¹²² Her conscious intention is simply “to drive to work”, or something like it. If the driver wishes to, however, she can access the individual aspects of her conduct and make conscious decisions about them (consider driving in snow, where such increased concentration is required).¹²³ But the actor need not do this in order to act successfully. Life would be lived at a much slower pace if she did.¹²⁴

To return to the example of a driver approaching a changing traffic light – and presuming that it is safe to do so – she could, accordingly, stop and think and “immediately prattle off the reasons why running the light is dangerous”.¹²⁵ She therefore has a dim sense of awareness of risk (she *knows* she ought not to run the red light, on a preconscious level) and can access – almost instantly – why this is the case. Presumably, if they were aware (on a preconscious level) that there was something amiss with their conduct, the racing driver in *R v Murphy*¹²⁶ and the foolish rifleman in *Cameron v Maguire*¹²⁷ were in this position.

Ferzan is clear that cases such as these – where the actor has preconscious awareness of risk – are at the boundaries of recklessness.¹²⁸ They certainly push narrow readings of the correspondence principle to breaking point. The actor needs to be aware of “risk”, but not a *specific* (or even a *similar*) risk. Even those who subscribe to a liberal “subjective” interpretation of correspondence might find this troubling. What Ferzan’s treatment of “opaquely” reckless actors demonstrates, then, is that there are significant disagreements amongst strict choice theorists (and “subjectivists”, generally), about what their choice-based theory actually requires in cases of culpable carelessness. This is a result of their shaky grasp of why choice is pivotally important in the first place.

¹²² Duff, *IACL* 159.

¹²³ DC Dennett, *Consciousness Explained* (1991) 277.

¹²⁴ C Hookway, “Epistemic norms and theoretical deliberation” (1999) 12 *Ratio* 380 at 384-386; McCrone, *Going Inside* (n 121) 135; MC Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001) 72.

¹²⁵ Ferzan, “Opaque recklessness” at 630.

¹²⁶ [1980] QB 434 (see §3.B(2), above). Cf Duff, *IACL* 144-145.

¹²⁷ 1999 JC 63 (see §2.D(4), above).

¹²⁸ See, similarly: Duff, *IACL* 160-166; Tadros, *Criminal Responsibility* 257; Garvey, “Involuntary manslaughter” at 345 (n 55) (and the sources cited there).

Ferzan still believes, however, that conscious choice *is* the gist of culpability and thus ties preconscious and conscious awareness together. She finds culpability in the “opaquely” reckless accused’s *conscious* choice to not investigate her *preconscious* awareness of risk further and query whether her conduct is justifiable.¹²⁹ Through this manoeuvre, Ferzan maintains her anti-negligence stance. She distinguishes the “opaquely” reckless actor from her negligent counterpart on the basis that the latter does not have even a dim awareness of risk when acting (but *ought* to have).¹³⁰ Although a negligent driver might *know* why her conduct is risky – and *could* stop and think about why this is the case – nothing about her situation has put her “on notice” that such an inquiry is necessary. The negligent actor is thus apparently in the same position as a person asked, randomly, to explain the risks attendant upon running a red light.¹³¹ Although she might perceive the light, the negligent driver is not engaged enough in what she is doing to appreciate (on a conscious or preconscious level) its significance.¹³²

In the next chapter, it will be argued that Ferzan is wrong to oppose negligence liability. For now, it is sufficient to point out that she has gone quite far in unravelling the notion of “awareness” and widened the acceptable range of conscious choices which might ground culpability. This poses difficulties for (allegedly) strict choice tenets such as the correspondence principle.

Ferzan has done this because of an intuitive feeling regarding “opaquely” reckless actors – the sense that they demonstrate insufficient concern for others.¹³³ Her unease about advertent recklessness stems, it is submitted, from the fact that culpability is simply *not* co-extensive with conscious wrongdoing. Ferzan’s efforts to tie preconscious awareness to conscious choice are also instructive in this regard, as they demonstrate the bind that strict choice theory creates for its adherents. Although Ferzan is still concerned, ultimately, with conscious choices it is – as always – difficult to discern exactly *why*.

¹²⁹ Ferzan, “Opaque recklessness” at 633-635.

¹³⁰ *Ibid* at 631-632.

¹³¹ *Ibid*.

¹³² Cf DM Treiman, “Recklessness and the Model Penal Code” (1981) 9 Am J Crim L 281 at 355.

¹³³ Ferzan, “Opaque recklessness” at 600.

(4) Strict choice theory: conclusion

The above treatment of strict choice theory has been detailed. This is because strict choice theory is dominant in the Anglo-American literature, and is therefore the main competitor to the theories discussed hereinafter.

Strict choice theorists seem consistent only in their denial of liability for negligence, though arguments such as Ferzan’s show that the line between recklessness and negligence is occasionally strained. The reasons for Ferzan’s manoeuvring deserve repetition. She was confronted with a case where culpability seemed present even though conscious disregard of risk was not. Why was culpability at issue here? It is submitted that Ferzan’s efforts to accommodate actors who were not *fully* advertent with regard to the riskiness of their conduct arise from “deeply held”¹³⁴ or “rooted”¹³⁵ intuitions about blame.¹³⁶ People *are* blamed for their inadvertent carelessness far more than even Ferzan admits.¹³⁷

In morality, then, negligence can be culpable. Although they are not co-extensive,¹³⁸ it seems sensible that moral and criminal culpability should not be worlds apart.¹³⁹ The question is, then, why negligence is not culpable in the sense required for criminal punishment.

It was noted above that, absent a choice-based, Hegelian society such as that envisaged by Brudner, strict choice theorists often find it difficult to answer this question without simply restating that choice is co-extensive with culpability. This makes it entirely possible that fruitful argument about culpability with strict choice theorists is impossible. Strict choice theorists disagree with each other (as demonstrated above in relation to the correspondence principle and opaque recklessness), and wider engagement with them is inhibited by their approach to defining key terms. Although the words used by choice theorists are familiar, their

¹³⁴ HM Hurd, “Introduction: symposium on *Crime and Culpability*” (2010) 29 *Law & Phil* 371 at 371.

¹³⁵ AD Leipold, “A case for criminal negligence” (2010) 29 *Law & Phil* 455 at 456.

¹³⁶ CT Sistare, “Models of responsibility in criminal theory: comment on Baker” (1988-1989) 7 *Law & Phil* 295 at 313; BM Baker, “Theorizing about responsibility and criminal liability” (1992) 11 *Law & Phil* 403 at 428.

¹³⁷ See: G Sher, *Who Knew? Responsibility without Awareness* (2009); L Zaibert, “For negligence liability”, in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (2009) 281 at 282.

¹³⁸ J Gardner, “Criminal law and the uses of theory: a reply to Laing” (1994) 14 *OJLS* 217 at 219.

¹³⁹ See, similarly, C Finkelstein, “Responsibility for unintended consequences” (2004-2005) 2 *Ohio St J Crim Law* 579 at 599.

meanings are warped, such that talking past each other is a real possibility.¹⁴⁰ Strict choice theorists might put this down to misunderstandings about culpability on the part of non-strict choice theorists, rather than a reason to give up on their commitment to conscious choice. There does not appear to be much that can be done to convince these theorists that the narrowness of their account of culpability is the real problem.

Some choice theorists have, however, “switched horses”¹⁴¹ in order to accommodate negligence. Their responses will be considered in the remainder of this chapter.

B. CHOICE AND CAPACITY

Hart proposes one alternative to strict choice theory. Free choices are of pinnacle importance to Hart’s view of culpability,¹⁴² but he nevertheless contends that punishment for negligence is appropriate where – at the time of taking the risk – it was within the accused’s power to exercise control and get into the state of mind required (i.e. *carefulness*).¹⁴³ The important question is whether the accused was presented with a fair opportunity, given her capacities, to *choose* to do otherwise than she in fact did.¹⁴⁴

From these points, Hart constructs a two-part test for culpable negligence:¹⁴⁵

- (i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?
- (ii) Could the accused, given his mental and physical capacities, have taken those precautions?

These are referred to as the “invariant standard of care” and the “individualised standard of care”, respectively.

¹⁴⁰ Cf R Dworkin, *Law’s Empire* (1986) 45; R Dworkin, *Justice for Hedgehogs* (2011) 158-160.

¹⁴¹ KK Ferzan, “Don’t abandon the Model Penal Code yet! Thinking through Simons’s rethinking” (2002-2003) 6 *Buff Crim L Rev* 185 at 193.

¹⁴² HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 120-121.

¹⁴³ *Ibid* 153.

¹⁴⁴ *Ibid* 152-155.

¹⁴⁵ *Ibid* 154.

The influence of Hart’s test can be seen in the acceptance – by Williams – of a test, in recklessness, which asks whether the accused could have foreseen a risk had she stopped and thought about it.¹⁴⁶ As noted in the previous chapter,¹⁴⁷ this test was rejected in *R v G*¹⁴⁸ in favour of a more strict choice view of recklessness. This might make Hart’s theory seem unappealing, but that would be unfortunate. Some of its aspects indicate its strength.

Primarily, the use of the “reasonable man” standard (in the invariant standard of care) ensures that criminal liability for negligence is circumscribed.¹⁴⁹ It is not culpably negligent, on Hart’s view, to fail to exercise a capacity to appreciate a risk unless the accused could be expected – as a member of the community¹⁵⁰ – to have done better. This should stave off doubts about inadvertent risk-taking being far too widespread to be criminalised legitimately.¹⁵¹

Furthermore, the “individualised standard of care”, when read together with Hart’s requirement of a *fair opportunity* to exercise capacity, ensures that the accused is still treated as a rational being with the capacity and autonomy for thought.¹⁵² It is not, therefore, only strict choice theory which can claim to respect individual autonomy.¹⁵³ In fact, it seems that choice and capacity theory accords *more* respect to individual autonomy; it treats citizens as capable of further thought, rather than as self-interested, unreflective automatons.¹⁵⁴

These points combine to make Hart’s theory seem attractive. There are, nevertheless, difficulties with it.

¹⁴⁶ G Williams, “The unresolved problem of recklessness” (1988) 8 LS 74 at 86.

¹⁴⁷ At §3.E(2).

¹⁴⁸ [2004] 1 AC 1034.

¹⁴⁹ There are, nevertheless, problems with the “objective” standard: see M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003).

¹⁵⁰ See §5.A, below.

¹⁵¹ See §5.D, below.

¹⁵² TM Scanlon, *What We Owe to Each Other* (1998) 256; J Rawls, *A Theory of Justice* (revised edn, 1999) 212.

¹⁵³ See §4.A(1)(a), above.

¹⁵⁴ See the text accompanying n 48, above.

(1) Objections to Hart's theory

First, although Hart's theory can deal with cases such as *Elliott v C (A Minor)*¹⁵⁵ in a sensible manner (by considering the accused's individual shortcomings),¹⁵⁶ there remains a question over *which* of the accused's attributes are relevant to the question of capacity. For example, C was both of subnormal intelligence and extremely tired (having spent the night wandering the streets). Both of these factors could impact upon her capacity to appreciate risk. Are both equally relevant to the question of culpability?

Any answer to this question is likely to be controversial. It might be assumed that a tired person is less alert to risk than a rested one, which might count in favour of considering C's tiredness as relevant to her culpability. It could be countered, however, that C was free to have slept at home. She was not forced into being tired, or breaking into the shed and setting fire to the white spirit she found inside.

Even taking C's low level of intelligence into account might provoke controversy. If C *knew*, for instance, that she did careless things and took risks with the interests of others without noticing, it might be argued that she was at fault for going out unaccompanied in the first place. C's decisions, in light of her knowledge about her capacities with regard to risk-perception, might well have showed a facet of her agency which merits a criminal sanction.

The boundaries of capacity are thus difficult to draw,¹⁵⁷ and Hart does little to clarify what he envisions them as being.¹⁵⁸ It might be thought that, in view of the value pluralism that permeates modern British society, it is unlikely that real consensus could be reached on when "incapacity" should excuse.¹⁵⁹

A second difficulty is that there is a danger of conflating Hart's "invariable" standard (the reasonable man) with the "individualised" standard (the individual accused's capacities). Hart asks what the reasonable person would have done *in the*

¹⁵⁵ [1983] 1 WLR 939 (discussed above at 3.C(3)).

¹⁵⁶ Cf OW Holmes, *The Common Law* (1881) 108.

¹⁵⁷ SH Pillsbury, "The meaning of deserved punishment: an essay on choice, character and responsibility" (1991-1992) 67 Ind LJ 719 at 748.

¹⁵⁸ Furthermore, Hart thinks only "gross forms of incapacity" (whatever these are) could be demonstrated in practice: Hart, *Punishment & Responsibility* (n 142) 155.

¹⁵⁹ N Lacey, *State Punishment: Political Principles and Community Values* (1988) 65.

accused's circumstances.¹⁶⁰ Which circumstances matter? Is the circumstance that the accused is a sociopath to be considered? If it is, the finder of fact is left asking – somewhat paradoxically – which risks the reasonable sociopath (i.e. an *unreasonable* person) would have noticed and attended to.¹⁶¹ Inevitably, the invariable standard would be in danger of individualised contamination and no accused would ever be adjudged culpably negligent.¹⁶² The accused's conduct will never vary from the reasonable person's because the reasonable person will *be* the accused.¹⁶³

What is more, although Hart differentiates clearly between his two standards (by holding that only the individualised standard of care would consider the accused's peculiar characteristics),¹⁶⁴ this distinction may prove unsustainable. Without modification – such as the drawing of a distinction between circumstances relating to the *situation* and those relating to the *actor*¹⁶⁵ – Hart's test might, in the hands of a jury, lead to the acquittal of both those who intuitively deserve it (e.g. C) as well as those who perhaps do not (e.g. the defendant in *R v Parker*).¹⁶⁶

Thirdly, Hart establishes culpability by means of a hypothetical “what if...?” test. Strict choice theorists argue (again, without much explanation as to *why*)¹⁶⁷ that the important matter is simply what *was* chosen, rather than what *might have been* chosen.¹⁶⁸ The worry is that Hart's test distracts attention from the individual accused and her actual situation.

The problem with Hart's theory is not, however, that it fails to link actors with the harm that they cause inadvertently – he makes this connection through

¹⁶⁰ Hart, *Punishment & Responsibility* (n 142) 154.

¹⁶¹ JB Brady, “Punishment for negligence: a reply to Professor Hall” (1972-1973) 22 Buff LR 107 at 115.

¹⁶² For similar concerns in the context of provocation, see *R v Dryden* [1995] 4 All ER 987 at 997 per Lord Taylor CJ.

¹⁶³ G Williams, *Textbook on Criminal Law*, 2nd edn (1983) 94-95; L Alexander, “Reconsidering the relationship among voluntary acts, strict liability and negligence in criminal law”, in EF Paul, FD Miller and J Paul (eds), *Crime, Culpability and Remedy* (1990) 84 at 98.

¹⁶⁴ Hart, *Punishment & Responsibility* (n 142) 155.

¹⁶⁵ Or, alternatively, between the accused's attributes which relate to the matter of reasonable respect for the law (which ought not to be considered) and those which relate to other matters (which ought to be taken into account). See: K Greenawalt, *Law and Objectivity* (1992) 104; RA Duff, *Criminal Attempts* (1996) 175.

¹⁶⁶ Assuming, contrary to the Court of Appeal's judgment, that Parker was negligent rather than wilfully blind/reckless. See §3.B(1)(b), above.

¹⁶⁷ Cf §6.A(2)(c), below.

¹⁶⁸ Cf A Brudner, *Punishment & Freedom: A Liberal Theory of Penal Justice* (2009) 72.

focussing upon the *individual accused's* capacities. Rather, the difficulty is that Hart is, like all of the theorists discussed thus far, attached too strongly to the idea that conscious choices are the defining mark of culpability: capacity is relevant insofar as it suggests a better choice could have been made. If capacity is divorced from conscious choice, it is a far more useful concept. This will be seen in the proceeding chapters.

(2) Choice and capacity: conclusion

The choice and capacity theory espoused by Hart is significant in its acceptance of culpability in the absence of a conscious choice to do wrong. It does not excuse automatically persons who fail to live up to standards of carefulness expected by the community. Rather, Hart's approach is to ask whether the accused *could have* done better. This is an important advance, as it incorporates "objective" aspects of culpable carelessness without surrendering the opportunity to deal with cases like *C* on a just basis.

Hart's theory is nevertheless open to objections, and it is clear that his viewpoint suffers for its lack of precision. Primarily, he is unclear on the issue of what qualifies as a non-culpable "incapacity", and this vagueness has led some "subjectivists" to adopt a third approach which concentrates on choice and *character*.

C. CHOICE AND CHARACTER THEORY

Choice and character theories are concerned with a person's responsibility for developing her capacities and abilities. Its proponents believe that the law should inquire into *why* the accused chose, or *why* she lacked the relevant capacity to foresee risk at the time of acting by looking at the accused's *earlier* choices concerning her character formation. This approach allows for liability where the accused was inadvertent as a result of her faulty character choices.

There are, however, two main difficulties with choice and character theory which suggest it should be discarded.

(1) Choosing character

First, choice and character theories adopt a strange view of character formation. This difficulty is clear in Hampton’s work.¹⁶⁹ She contends that culpability consists in choosing to defy the law’s commands, and that punishment is the means of educating¹⁷⁰ defiant offenders in what society requires of them.¹⁷¹ This defiance is demonstrated typically in conscious choices to do wrong, in the knowledge that the law deems the conduct wrong and with the freedom to choose to do otherwise.¹⁷²

This does not, however, lead Hampton to the conclusion – reached by Brudner¹⁷³ – that inadvertent risk-taking is not culpable in the sense required by the criminal law. Hampton argues that negligence can be culpable if defiance is evidenced “not at the time of the act [of inadvertent risk-taking], but earlier, during the process of character formation”.¹⁷⁴

Hampton’s theory thus maintains a focus on (conscious?)¹⁷⁵ choices, but recognises that there might be blameworthiness attendant upon later, inadvertent, unjustified risk-taking. Her view is, nevertheless, based on a bizarre notion of character development. To see this, it is necessary to return to Aristotle’s theory of character formation. It will be remembered that Aristotle admitted of liability for inadvertent risk-taking and harm-doing where it was “in the power” of the accused to have developed her character differently and been more careful.¹⁷⁶ If the accused could have possessed a different character (understood as a set of stable traits concerning conduct and value),¹⁷⁷ then she could be held responsible and liable for the consequences of her inadvertence.

Any resemblance to Hampton’s theory is fleeting. On Aristotle’s view, virtuous traits (such as acting with appropriate care in the circumstances) were internalised through the performance of careful actions: repeated careful action

¹⁶⁹ J Hampton, “*Mens rea*”, in EF Paul, FD Miller and J Paul (eds), *Crime, Culpability and Remedy* (1990) 1.

¹⁷⁰ See, also, J Hampton, “The moral education theory of punishment” (1984) 13 *Phil & Pub Aff* 208.

¹⁷¹ Hampton (n 169) at 5, 12.

¹⁷² *Ibid* at 14.

¹⁷³ See §4.A(1)(d), above.

¹⁷⁴ Hampton (n 169) at 27.

¹⁷⁵ Hampton is unclear on the *type* of choices involved in character formation.

¹⁷⁶ See §4.A(2)(b), above.

¹⁷⁷ There is not space here to discuss the best definition of character.

begets careful character (which, in turn, leads to the consistent performance of careful action).¹⁷⁸ Aristotle did not contend, as Hampton appears to, that a person chooses to act in such a way as to demonstrate cruelty, or carefulness, or bravery, and that this choice immediately transforms a person into a cruel, careful or brave person who will defy the law's commands.¹⁷⁹ Instead, Aristotle required a long commitment to certain types of action, and it is not entirely clear that becoming vicious (for instance, becoming cruel) required a conscious *choice* to do vicious acts. Although it is difficult to become virtuous,¹⁸⁰ it seems possible, in theory, for an actor to become vicious inadvertently. Perhaps this happens entirely by chance,¹⁸¹ where – for instance – the accused was brought up in a community that simply does not exhibit virtue.¹⁸²

The problem for Hampton is therefore that her theory “adopts the eccentric notion that people choose the characters... and the dispositions that they want to have, almost as if these were goods in a shop.”¹⁸³ It is very unlikely that this sort of control over character – and, in particular, *vicious* character traits – exists.¹⁸⁴

This strikes a large blow for choice and character theorists. If they are to maintain their focus on choice, then this comes at the price of a convincing view of character formation.

¹⁷⁸ This gives rise to arguments concerning the potential deterrent value of punishing negligence: if inadvertent actors were punished, this would encourage them (and others) to develop more careful characters to ensure that they do not miss unjustified risks in the future. See: HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 156-157; SJ Schulhoffer, “Harm and punishment: a critique of emphasis on the results of conduct in the criminal law” (1973-1974) 122 Pa L Rev 1497 at 1541.

¹⁷⁹ See, also: R Hursthouse, *On Virtue Ethics* (1999) 12; SR Moreau, “Reasons and character” (2005) 115 *Ethics* 272 at 277.

¹⁸⁰ See §5.C(6)(b), below.

¹⁸¹ EL Pincoffs, “Legal responsibility and moral character” (1972-1973) 19 *Wayne L Rev* 905 at 919.

¹⁸² Such actors might be “ethically disabled”: see J Jacobs, *Choosing Character: Responsibility for Virtue and Vice* (2001) 3. This situation would be almost unimaginable in the modern (Western) world, but it is plausible that certain remote communities might cultivate vice and persons brought up in that environment might simply fall, ignorantly, into following that example. These situations pose special problems for the acceptance view of responsibility (discussed below at §5.C(3)), which will be ignored here. See, however, S Wolf, “Sanity and the metaphysics of responsibility”, in F Schoeman (ed), *Responsibility, Character and the Emotions: New Essays in Moral Psychology* (1987) 46.

¹⁸³ J Horder, “Criminal culpability: the possibility of a general theory” (1993) 12 *Law & Phil* 193 at 197.

¹⁸⁴ PJT O’Hearn, “Criminal negligence: an analysis in depth” (1964-1965) 7 *Crim LQ* 27, 407 at 421; SH Pillsbury, “The meaning of deserved punishment: an essay on choice, character and responsibility” (1991-1992) 67 *Ind LJ* 719 at 749; Moore, *Placing Blame* ch 5; Moreau (n 179) at 277. Cf ch 5, below.

A second doubtful aspect of choice and character theory concerns an attack on the choice and capacity theory described above.

(2) Attacking capacity

To understand this assault, it is useful to appropriate an argument made (in a different context)¹⁸⁵ by Tadros.

Tadros contends that:¹⁸⁶

[A]n agent’s capacities with regard to action are generally the subject of his responsibility. And in that case, a lack of capacity cannot be sufficient to undermine responsibility. For an agent’s lack of capacity may simply be a facet of his agency, and hence an appropriate target for responsibility.

Building on this, Tadros contends that capacity development is related inextricably to the taking – or passing up – of various opportunities.¹⁸⁷ For instance, a person gains the capacity to *x* through choosing to take the opportunity to enhance that capacity; a person can only take the opportunity to *x* if she has the capacity to *x*. This is visible in the context of risk-perception. People gain, for example, the capacity to foresee a risk of serious illness through fostering that capacity (reading up on the signs of illness, etc). Those who choose to take these steps have the capacity to foresee the risk of illness in themselves and others; those who do not take these steps do not.

Taking this example further, it is clear that a person who fails to foresee the risk that a child who is vomiting persistently is ill, because she failed to learn the relevant signs, is not yet automatically beyond the cusp of (at least moral) responsibility or liability for failing to, say, call for an ambulance.¹⁸⁸ She still has to answer for *why* she failed to learn the signs of illness and form the capacity to recognise it, and – if the criminal law becomes involved – the matter of culpability

¹⁸⁵ Tadros is concerned with freedom and capacity, which is different from choice and capacity. To be clear, Tadros is *not* a choice theorist. His views on culpable carelessness are explored below at §6.B(3).

¹⁸⁶ Tadros, *Criminal Responsibility* 58.

¹⁸⁷ *Ibid.*

¹⁸⁸ It is assumed that there is a legal duty upon the accused to assist the child.

should depend in part on whether her reasons for not gaining such a capacity were sufficient to defeat a finding of insufficient concern for others (culpability).

It is certainly possible that the accused could offer such an explanation: perhaps the information was not readily available in the small, closed off community in which she lived;¹⁸⁹ or she had had a very basic education and was afraid the child would be taken into care if she contacted a doctor.¹⁹⁰ Nevertheless, it might be that a failure by, for instance, a parent to learn to spot the signs of serious illness in her child demonstrates insufficient concern for that child's interests (and the responsibilities attendant upon the role of parenthood).¹⁹¹ In such a case, the parent lacked a capacity to foresee risk, but this does not appear to prohibit a finding of culpability.

This suggests that, as it can be up to a person to *choose* to take various opportunities open to her, she can be held responsible and liable if (as a result of passing up an opportunity for reasons which demonstrate insufficient concern for others) she lacks a certain capacity.¹⁹² If this is correct, then the inquiry into responsibility and fault should not – as Hart has it – stop at the point of capacity. It should further be asked whether the agent was culpable for failing to have chosen to foster a certain capacity.¹⁹³ This is the further stage of investigation that choice and character theory proposes.

It is important to state again that Tadros's argument is being appropriated here for purposes other than those he intended. He is not concerned with choice and character theory.¹⁹⁴ It is nevertheless clear that choice and character theory adopts a similar view of capacity, and risks taking matters too far. It verges on the illiberal to say that actors are bound (legally) to constantly test the bounds of their capacities (physical and mental) in case these require development, and it is difficult to see how this is consistent with a life that is, in a meaningful sense, "free".¹⁹⁵ If the State may

¹⁸⁹ Cf. G Vuoso, "Background, responsibility and excuse" (1986-1987) 96 Yale LJ 1661; MM Moody-Adams, "Culture, responsibility and affected ignorance" (1993-1994) 104 Ethics 291.

¹⁹⁰ See: *State v Williams* 484 P 2d 1167 (1971); §5.C(5), below.

¹⁹¹ Cf Duff, *IACL* 166.

¹⁹² Tadros, *Criminal Responsibility* 59.

¹⁹³ *Ibid* 61.

¹⁹⁴ For Tadros's views on choice, see *ibid* 61-66.

¹⁹⁵ See Pincoffs (n 181) at 915-916; G Williams, *Textbook of Criminal Law*, 2nd edn (1983) 91.

interfere when a person is – in a distant sense – at *fault* for not forming a capacity (for instance, to act carefully and pay attention to risks), criminal law seems a didactic tool rather than a mechanism for communicating shared social values which have been seriously violated by the accused’s “public” wrongdoing.¹⁹⁶ It is for this reason that choice and character theory must again be recognised as misguided.

The objections continue. Later in *Criminal Responsibility*, Tadros cautions against exploring the reasons behind an accused’s ignorance too deeply in the criminal context.¹⁹⁷ As well as obvious empirical difficulties connected with proving that the accused made a choice to be ignorant of risk at a later time,¹⁹⁸ there are complicated questions concerning the foresight that attaches to such a choice. Must the accused have chosen to be incapable of perceiving *specific* risks, or are more general choices satisfactory?¹⁹⁹ Must the accused choose to “be a jerk” (and thus lack capacity for sympathy), or choose to be the type of person who is rude to people when firing them (a specific instance of incapacity)?²⁰⁰ However this question is answered, problems remain. As Zimmerman points out, “it is... often the case that when people engage in precipitate actions... there is no such cognitive connection between these precipitate actions and their consequences”.²⁰¹ This is why the rules on “reckless” intoxication, both north and south of the border,²⁰² are troubling and ought to be reserved for cases where the accused knew – from previous experience – that she was, for instance, prone to becoming *violent* whilst intoxicated.

Even if there is foresight of the consequences of a character choice, there might be significant problems in showing causation.²⁰³ Consider the tenuous

¹⁹⁶ There is not space here to resolve the issue of whether the criminal law may legitimately be used to instil virtue in citizens. Compare K Huigens, “Virtue and inculpation” (1994-1995) 108 Harv LR 1423 with RA Duff, “Virtue, vice and criminal liability: do we want an Aristotelian criminal law?” (2002-2003) 6 Buff Crim L Rev 147.

¹⁹⁷ Tadros, *Criminal Responsibility* 251-252.

¹⁹⁸ See N Lacey, *State Punishment: Political Principles and Community Values* (1988) 65.

¹⁹⁹ See, further, Garvey, “Involuntary manslaughter” at 352-357.

²⁰⁰ Compare M Vargas, “The trouble with tracing” (2005) 29 Midwest Studies in Philosophy 269 with JM Fischer and NA Tognazzini, “The truth about tracing” (2009) 43 Noûs 531.

²⁰¹ MJ Zimmerman, “Moral responsibility and ignorance” (1996-1997) 107 Ethics 410 at 421.

²⁰² See §§2.G, 3.B(3), above.

²⁰³ Lacey, *State Punishment* (n 198) 65.

connection between a choice at age fourteen to not develop a careful character²⁰⁴ and an action of inadvertent, unjustified risk-taking at age thirty.²⁰⁵ Between these stages, there is the possibility that the “choice” to be a certain way has been reformed (perhaps through another choice) by the time that the relevant trait is manifested in action, and it is difficult (if not impossible) to investigate this possibility.²⁰⁶ This might mean that the inadvertence was *not*, in fact, the outcome of the earlier character choice – thus muddying the waters in terms of culpability. This might be enough to break any causal link that the criminal law would seek to draw. It is certainly enough to allow extreme epistemic doubt to infiltrate the criminal process.

Finally, in order for the accused to be *culpable* for her earlier character choices, those choices would themselves have to demonstrate insufficient concern for others. Absent exceptional circumstances,²⁰⁷ it is difficult to see how this would be possible. There might also be a significant mismatch between the culpability of the character choice (for instance, becoming a jerk) and the culpability which is attributed to the actor for her later inadvertent risk-taking (for instance, the culpability attached to the failure to notice signs of non-consent in a sexual partner).²⁰⁸ This makes choice and character theory seem merciless in its approach to culpability. If the choice and character view is accepted, it comes at the cost of sensible appraisals of culpability for inadvertence.

(3) Choice and character theory: conclusion

It is commendable to draw a link between the accused’s conscious choices and her wider character in a blatant manner, rather than try and hide these facets of decision-making (like strict choice theorists who subscribe to the alignment view).²⁰⁹ The difficulty is that this has been done backwards: choices surely demonstrate character,

²⁰⁴ It is perhaps more accurate to speak of various *aspects* of a careful character (e.g. attentiveness to detail) being chosen: EL Pincoffs, “Legal responsibility and moral character” (1972-1973) 19 Wayne L Rev 905 at 914.

²⁰⁵ See, similarly, Ferzan, “Opaque recklessness” at 640.

²⁰⁶ Cf H Smith, “Culpable ignorance” (1983) 92 Philosophical Review 543 at 559.

²⁰⁷ Perhaps the decision to “be a jerk” – to be the kind of person who, by definition, shows insufficient concern for others – is one such exceptional circumstance. The problem for the choice and character theorist is that this choice still has to manifest itself in the performance of a “public wrong” for the criminal law to intervene.

²⁰⁸ Garvey, “Involuntary manslaughter” at 356.

²⁰⁹ See §4.A(1)(a), above.

not the other way around. This explains the difficulties experienced by choice and character theorists. They are blinded by a focus on conscious choice, leading them to endorse unrealistic views of character formation, and miss wider aspects of a person’s character – her attitudes, her beliefs and her desires. As will be demonstrated in the next two chapters, these should be central to the criminal law’s understanding of culpable carelessness.

D. CONCLUSION

This chapter has reduced “subjectivism” to three connected schools of thought. Strict choice theory cannot justify its stance that *only* conscious, chosen wrongdoing is blameworthy. On one view, choice and character theory is a response to this point, but it relies on a conception of character formation which seems bizarre. Furthermore, the choices on which it relies seem disconnected from the eventual act of wrongdoing which concerns the criminal law. This leaves choice and capacity theory. It was contended that Hart’s approach remains too connected to the idea of conscious choice as the mark of culpability. Although it will be argued in the next two chapters that capacity ought to be central to any defensible theory of culpability for risk-taking, it is important that choice not be placed on an undeserved pedestal. It is only through considering choice, capacity and character together as equal partners that a more defensible theory of culpable carelessness can be developed.²¹⁰ This is the task of chapters five and six.

²¹⁰ Cf J Horder, “Criminal culpability: the possibility of a general theory” (1993) 12 Law & Phil 193.

5 Two Ways of Being Culpably Negligent

This chapter argues that, in certain instances, inadvertence/negligence can be culpable in the sense required by the criminal law. After explaining some preliminary points in section A, the chapter outlines two types of culpable negligence: negligence as failure of conduct (section B) and negligence as failure of belief (section C).¹ Section D then asks to what extent criminal liability for negligence is compatible with individual autonomy. The chapter concludes that addressing doubts concerning autonomy and negligence requires consideration of both culpability and criminalisation. When both of these matters are given sufficient attention, it becomes clear that negligence liability should be employed in Scots and English criminal law.

A. GETTING PERSONAL

Negligence liability is typically presented² as being about a failure to act as the reasonable person would have. This is how it is understood in civil law,³ subject to the proviso that it is “fair, just and reasonable” that the defender owed a duty of care to the pursuer.⁴

If negligence is understood similarly in the criminal context, it is plain why many authors doubt it is properly punishable:⁵ if the accused is censured simply for not acting as another (hypothetical) person would, the criminal inquiry seems anti-individualised.⁶ Punishing the accused thus tells her (and others) little about *herself* and the concern that *she* failed to show for others’ interests. Without this

¹ The distinctions drawn here resemble those in KW Simons, “Rethinking mental states” (1992) 72 BUL Rev 463 (particularly at 547), but this thesis does not aim to restructure *mens rea* in the way Simons does.

² See e.g.: PT Smith, “Recklessness in *dolus eventualis*” (1979) 96 SALJ 81 at 90; G Williams, *Textbook of Criminal Law*, 2nd edn (1983) 88; Alexander et al, *Crime & Culpability* 81-85; MS Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (2009) 178.

³ See, further, KW Simons, “Dimensions of negligence in criminal and tort law” (2002) 3 Theo Inq L 283 at 292.

⁴ *Caparo Industries v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge.

⁵ See §4.A, above.

⁶ See, similarly, GP Fletcher, “The fault of not knowing” (2002) 3 Theo Inq L 265 at 277.

personalised message of condemnation,⁷ the communicative aspect of punishment⁸ is diluted or absent. The same criticism can be levied at other “objective” standards, such as Horder’s “ideal agent”.⁹

The challenge for proponents of criminal liability for negligence is thus to “get personal”¹⁰ and demonstrate that punishment for inadvertent, unjustified risk-taking communicates something meaningful about not only the standards of conduct expected of “reasonable persons”, but also about the accused, her culpability and the community criticism her wrongdoing attracts. This means, from the outset, distinguishing two matters: whether taking a risk was justifiable; and whether the accused was criminally culpable in failing to notice an unjustified risk attendant upon her actions.

These will be considered in turn.

(1) Justification and risk

Justification has not yet been considered expressly.¹¹ The opportunity has not, however, presented itself until now: there is scant judicial discussion of justification in Scots or English law; “subjectivists” seldom mention the matter.¹² Justification is nevertheless crucial to a defensible theory of culpable carelessness and will therefore be examined here.

It is contended that the question of justification should be resolved by asking what can legitimately be expected *of* citizens *by* other citizens in terms of risk-

⁷ Condemnation might be too strong a term for the reactive attitude attendant upon conviction: Tadros, *Criminal Responsibility* 82. Tadros prefers the term “moral indignation”, but there are myriad other terms that might be employed: see J Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (1970) 98-118. The difference between them seems mainly semantic.

⁸ See §1.A(4), above.

⁹ J Horder, “Criminal culpability: the possibility of a general theory” (1993) 12 *Law & Phil* 193 at 207.

¹⁰ J Gardner, “On the general part of the criminal law”, in RA Duff (ed), *Philosophy and the Criminal Law: Principles and Critique* (1998) 205 at 236.

¹¹ There are political aspects to justification which, for concerns of space, this thesis ignores. See AW Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn (2001) 79-80.

¹² Cf Alexander et al, *Crime & Culpability* 59-63.

taking.¹³ This approach is captured well in Fletcher's conception of unjustified risk-taking as non-reciprocal risk imposition.¹⁴

The basis of this view is the oft-neglected, point that "[w]e... live in a dangerous world":¹⁵ social interaction necessitates the imposition of some risk on all citizens.¹⁶ To facilitate movement of persons and goods, for instance, driving is tolerated despite the substantial associated risk to life. Risk-taking only properly becomes the concern of the criminal law when it goes beyond this "essential", socially-sanctioned level (for instance through driving too quickly). It is only then that the act of risk-taking becomes unjustified and an instance of *wrongdoing*. Then, the question of culpability can be posed.¹⁷

In employing Fletcher's conception of unjustifiable risk-taking, the "reasonable person" is a helpful heuristic device. It can be asked whether the reasonable person (or citizen)¹⁸ would view the relevant act of risk-taking as socially justifiable. It is important to stress that this is a *normative*, not empirical, standard.¹⁹ An act of risk-taking might be "objectively" unjustifiable even if a majority of people in society perform it.²⁰

This switches focus from conduct to what could legitimately be expected of the accused in the circumstances surrounding her action.²¹ More scientific approaches have been proposed, but these remain reliant on normative, indeterminate standards. Consider approaches which appraise the social costs of risk-taking and its

¹³ See, similarly, P Cane, *The Anatomy of Tort Law* (1997) 42.

¹⁴ GP Fletcher, "Fairness and utility in tort theory" (1971-1972) 85 Harv L Rev 537 at 548. Cf Rawls's conception of "reasonable" conduct as honouring fair terms of cooperation and interaction (J Rawls, *Political Liberalism* (1993) 49-50) and Scanlon's "contractualist" approach to justification (TM Scanlon, *What We Owe to Each Other* (1998)).

¹⁵ G Williams, "The unresolved problem of recklessness" (1988) 8 LS 74 at 89.

¹⁶ See: H Gross, *A Theory of Criminal Justice* (1979) 86; HM Hurd, "The deontology of negligence" (1996) 76 BUL Rev 249 at 264; J Steele, *Risks and Legal Theory* (2004) 35.

¹⁷ Culpability can exist independently of wrongdoing. A person might take a risk which she believes to be unjustifiable and be mistaken. Here, the accused is culpable if she showed insufficient regard for others, but not a wrongdoer. Such free-floating culpability is ignored here.

¹⁸ The term "reasonable citizen" reflects better the fact that the accused is called to account *as* a citizen before *other* citizens (not merely "persons"). See Duff, *AFC* ch 2.

¹⁹ See, further, C Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003) 12.

²⁰ Cf DN Husak, *Philosophy of Criminal Law: Selected Essays* (2010) 342.

²¹ DC Hubin and K Haely, "Rape and the reasonable man" (1999) 18 Law & Phil 113 at 136.

social benefits.²² Social costs and benefits cannot readily be broken down into determinate units (such as monetary value), and so this approach will also have to rely upon “objective”, indeterminate notions such as community expectations about the social worth of risk-taking.²³ Even economical, cost/benefit approaches to justification cannot avoid controversial value judgements²⁴ – they merely cloak these behind the rhetoric of economics. This distraction is unnecessary: the matter of justification ought to be transparent in its consideration of “objective” value judgements concerning the limits of socially-acceptable risk-taking.

It cannot be denied that this approach to justification is, to a degree, “impersonal”,²⁵ and this might make a “subjective” approach to justification, which asks what *the accused* thought with regard to the justification of her action, and allows this to be determinative, seem attractive. It is clear, however, that this approach would leave the law (and citizens’ interests) “subject to the views of heretics and fanatics”.²⁶ To see this, consider if the accused “subjectively” believes it is justifiable to shoot a shotgun out of her window without first looking to see if this might put anybody in danger. *The very fact* that she believes she is justified in acting in this way might demonstrate her insufficient concern for others.²⁷ Such an actor, although “subjectively” innocent, seems to overstep the “objective” boundaries of socially acceptable risk-taking. The “subjective” view misses this point. In order to capture it, the question of justifiability of risk-taking should be answered “objectively”: to be acting *wrongly*, the accused must have taken an “objectively” unjustified risk.

Although, for ease of reading, the thesis will continue to talk in terms of justification (or a lack thereof), a further requirement exists. The accused must also

²² See G Williams, *Criminal Law: The General Part*, 2nd edn (1961) para 26. Cf JC Coffee, “Paradigms lost: the blurring of the criminal and civil law models – and what can be done about it” (1992) 101 Yale LJ 1875 at 1876.

²³ JL Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) 11.

²⁴ C Finkelstein, “The inefficiency of *mens rea*” (2000) 88 Cal L Rev 895 at 905. Cf CF Cranor, “Towards a non-consequentialist approach to acceptable risks”, in T Lewens (ed), *Risk: Philosophical Perspectives* (2007) 36 at 45.

²⁵ Insofar as it bars the accused from relying on *her own* preferences to argue that her act of risk-taking was justified: L Katz, “Harm and justification in negligence” (2003) 4 Theo Inq L 397 at 408.

²⁶ E Fruchtman, “Recklessness and the limits of *mens rea*: beyond orthodox subjectivism” (1986-1987) 29 Crim LQ 315, 421 at 321.

²⁷ Duff, *IACL* 163.

have taken a *substantial* risk.²⁸ This is because the criminal law's demands should concentrate upon the most serious instances of wrongdoing, not "minor" lapses.²⁹ Thus, in order to evidence negligence as failure of conduct or negligence as failure of belief (or, indeed, recklessness), the accused must, through her action or inaction, have first taken an "objectively" unjustifiable *and* substantial risk.³⁰

The question of justifiability will now be left to one side. The matter of culpability is approached more directly in the next sections, which introduce two forms of culpable negligence.

B. NEGLIGENCE AS FAILURE OF CONDUCT

It is sensible to begin with negligence as failure of conduct, as it is relatively straightforward. Consider Shelly – a doctor – who is treating a patient, Martin. There is no emergency, but Martin has an infection. Shelly omits to check if he is allergic to penicillin and administers the drug to him. Martin dies.

When called to account for Martin's death,³¹ Shelly accepts that the risk that Martin might die from the penicillin was substantial and, given the circumstances and interests involved, unjustifiable to take. She does not, however, accept that she was criminally culpable. She agrees that it would have been obvious to the reasonable doctor that Martin might have an allergy, but contends that – as this risk did not occur³² to her at the time of acting – it could not play a part in her practical reasoning. Being a strict choice theorist, Shelly thinks this should exculpate her, and prepares to be sued by Martin's relatives. The argument of this chapter is that civil damages would be insufficient recognition of Shelly's fault. The message of criminal

²⁸ H Wechsler, "On culpability and crime: the treatment of *mens rea* in the Model Penal Code" (1962) 339 *Annals Am Acad Pol & Soc Sci* 24 at 29; J Dressler, "Does one *mens rea* fit all? Thoughts on Alexander's unified conception of criminal culpability" (2000) 88 *Cal L Rev* 955 at 957-958. See, further, the requirement of a "gross deviation" from expected risk-taking in Model Penal Code ss 2.02(c)-(d).

²⁹ DN Husak, "Reasonable risk creation and overinclusive legislation" (1997-1998) 1 *Buff Crim L Rev* 599 at 606.

³⁰ Cf Alexander et al, *Crime & Culpability* 25-27.

³¹ Shelly would be charged with manslaughter in England (*R v Adomako* [1995] AC 171 – see §3.D, above). The position in Scotland with regard to inadvertently-caused death is unclear following *Transco plc v HM Advocate* 2004 JC 29 (see §2.B, above).

³² The word "occur" is necessarily vague as to the standard of *awareness* required. Cf §4.A(3)(b), above.

culpability ought to be expressed to her, Martin's family and the community more generally.³³

This culpability might take a number of forms. Shelly may have evidenced negligence as failure of belief³⁴ or even recklessness, but it should first be asked whether Shelly's failure to meet the standard of conduct expected of the "reasonable doctor" is itself culpable. To answer this question, it is necessary to consider Horder's work on negligent conduct.

(1) The assumption of responsibility

Horder argues that failing to meet a set standard of conduct *can* demonstrate something about the actor's culpability.³⁵ This becomes clear when certain other features of Shelly's situation are emphasised. First, presumably Shelly came to be in charge of Martin's care as a result of voluntarily choosing to become a doctor.³⁶ Although she might occasionally face emergency decisions, this does not undermine the fact that Shelly *chose* to become a doctor. It can be assumed that, when making this choice, she was aware of the practical and ethical responsibilities attendant upon that role (if not, Shelly surely became aware of these as her studies progressed).³⁷ This means that she had "fair warning" of the responsibilities she would assume if she ultimately became a doctor (rather than, say, a medical researcher).³⁸ By choosing to become a doctor, Shelly has therefore fairly assumed the prospective responsibilities associated with that role³⁹ and agreed to be governed by a well-known code of conduct and ethics. This, it is submitted, fixes responsibility (i.e. answerability)⁴⁰ upon her.

³³ Few doubt that some medical errors should give rise to manslaughter convictions. Disagreement centres over whether "gross" negligence is the appropriate standard of fault. See O Quick, "Medicine, mistakes and manslaughter: a criminal combination?" (2010) 69 CLJ 186.

³⁴ See §5.C, below.

³⁵ Horder, "Gross negligence". Horder also describes a form of negligence which concentrates upon the accused's attitude of *indifference*: see §6.A(2)(a), below.

³⁶ Shelly must have made a *series* of choices to become a doctor (taking the correct exams at school, applying to medical schools, etc), demonstrating her commitment to that goal.

³⁷ Cf the term "role responsibility" in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 212-214.

³⁸ See Horder, "Gross negligence" at 516-517.

³⁹ On prospective responsibilities, see: P Cane, *Responsibility in Law and Morality* (2002) 31-35; Tadros, *Criminal Responsibility* 21-22; Duff, *AFC* 30-36.

⁴⁰ See §1.A(1), above.

What exactly has Shelly accepted she will be answerable for? The code of conduct and ethics that governs her profession gives rise to certain restrictions on action. For instance, if a procedure is not carried out in the accredited way, this might be cause for professional (and perhaps legal)⁴¹ censure. This is the sort of conduct element that some theorists concentrate on in their denials of culpability for negligent risk-taking. Up until this point, it could even be argued that – if punished for Martin’s death – Shelly is being held *strictly liable* for the consequences of an omission to follow guidelines: the polity has decided to declare certain conduct – and its consequences – criminal and Shelly has (for whatever reason) fallen short of its expectations. Understood this way, the element of *personal* culpability demonstrated by Shelly’s action is unclear.⁴²

There is, however, another aspect of Shelly’s assumption of the responsibilities of being a doctor which shows more transparently the root of her culpability for Martin’s death. This wider aspect of responsibility comes from the voluntary undertaking of a doctor to act in the patient’s best interests at all times.

(2) The provision of exclusionary reasons

This commitment to patients permeates the codes of conduct to which doctors subscribe, and it ought to motivate a doctor’s reasoning and make her act in selfless ways which would not be required of other citizens.⁴³ Although the hospital janitor may leave Martin alone, Shelly *must* treat him in line with his best interests. Walking away is not an option for her in virtue of her role – she would have to answer (to her colleagues, to Martin and/or his family, perhaps to the criminal courts)⁴⁴ for acting in that manner. Shelly’s assumption of responsibility for others has thus done more than simply provide her with accredited ways of carrying out medical procedures – it has also provided her with what Raz calls “exclusionary reasons”.⁴⁵

⁴¹ Cf *Hunter v Hanley* 1955 SC 200; *R v Adomako* [1995] AC 171.

⁴² Strict liability is ignored in this thesis.

⁴³ Horder, “Gross negligence” at 515. Whether citizens should have legal duties to assist others is a difficult question. See A Ashworth, “The scope of criminal liability for omissions” (1989) 105 LQR 424.

⁴⁴ On the matter of to *whom* a person is responsible, see Duff, *AFC* ch 2.

⁴⁵ See J Raz, *Practical Reason and Norms* (revised edn, 1990) 37-45.

As their name suggests, exclusionary reasons exclude certain other reasons from consideration.⁴⁶ For example, that a person has promised to lend her car to her mother ought to exclude reasons which would point towards selling the car.⁴⁷ Even though selling the car would normally be a viable option (it might, on the balance of reasons, be the right thing to do), the exclusionary reason – the promise – changes things. Exclusionary reasons can thus “tip the scales” against the balance of reasons.⁴⁸

Similarly, Shelly’s assumption of responsibility over Martin’s healthcare alters her situation by excluding certain reasons and closing off options that would otherwise be open to her (walking away, etc).⁴⁹ A prohibition on giving a patient a drug without – when the opportunity presented itself – checking for allergies would exist *because* acting in that way would be detrimental to that patient’s best interests. Through taking exactly that course of conduct (even if for the first time),⁵⁰ Shelly has done more than *merely* act contrary to an “objective” standard. She has also acted on reasons that ought to be excluded; that should not even have occurred to her.⁵¹ In doing so, Shelly “has betrayed her very role as a doctor”,⁵² because the thought “I will just give him the drug” *should never have entered her mind* without the caveat “... if he is not allergic” and the attendant motivations (to check for allergies, etc). The fact that it did suggests that Shelly was insufficiently motivated, in her reasoning, by Martin’s legally-protected interest in bodily integrity and life.⁵³ This is so even though Shelly did not consciously disregard the risk that Martin had a penicillin allergy.

⁴⁶ Ibid 190.

⁴⁷ Ibid 39.

⁴⁸ Ibid 41. Clashes between exclusionary reasons are resolved by weight: J Raz, “Facing up: a reply” (1988-1989) 62 S Cal L Rev 1153 at 1168.

⁴⁹ Cf Raz, *Practical Reason* (n 45) 39.

⁵⁰ Cf: MD Bayles, “Character, purpose and criminal responsibility” (1982) 1 Law & Phil 5 at 10-11; MD Bayles, *Principles of Law: A Normative Analysis* (1987) 299.

⁵¹ B Williams, *Ethics and the Limits of Philosophy* (1985) 185; Raz, *Practical Reason* (n 45) 181; Horder, “Gross negligence” at 514-515.

⁵² Horder, “Gross negligence” at 516.

⁵³ Cf Tadros, *Criminal Responsibility* 85.

Not all failures of conduct are thus “minor moral lapses” to be dealt with through strict liability offences or the civil courts.⁵⁴ They *can* be culpable in the sense that criminal law usually requires.

The caveat “can” requires explanation.

(3) Avoiding culpability

Shelly might be able to rebut the inference of culpability for Martin’s death by offering an excuse for her failure to check for allergies which explains why, despite appearances, she showed sufficient regard for Martin’s interests.

Such an excuse will be difficult to make out in Shelly’s circumstances. There was no emergency, so she had time to stop and consider Martin’s best interests. Even if Shelly was distracted with thoughts of other, sicker patients, she would still show herself to be insufficiently motivated by *Martin’s* interests in failing to act in line with the exclusionary reasons which bore upon her. Her duty was to Martin *and* her other patients – not *just* her sickest patients. It is Shelly’s demonstration of insufficient concern for Martin’s interests which matters for criminal culpability, and – unless she can rebut the inference of insufficient concern – she ought therefore to be convicted of a criminal offence (such as manslaughter) for her part in Martin’s death.

Two points should be made before proceeding. First, as her culpability related to Martin’s interest in life, a weak sense of “correspondence” appears satisfied even in the absence of a *conscious choice* to do wrong. This reinforces the argument in the last chapter that correspondence need not be a “subjectivist” doctrine.⁵⁵ Secondly, the culpability outlined above surely *is* personal to Shelly in that *she* voluntarily accepted a standard of conduct and failed to act in line with the exclusionary reasons that flowed from it. Although these reasons come from an external body (such as the General Medical Council), it is still *Shelly’s* reasoning and the way she conducted *herself* – not the reasonable doctor’s imagined reasoning or conduct – which matters.

⁵⁴ KW Simons, “Culpability and retributive theory: the problem of criminal negligence” (1994) 5 Journal of Contemporary Legal Issues 365 at 386.

⁵⁵ See §4.A(3)(a), above.

It is useful to consider the boundaries of negligence as failure of conduct, before proceeding to introduce negligence as failure of belief.

(4) The boundaries of negligence as failure of conduct

It is envisaged that negligence as failure of conduct is applicable to a range of social interactions undertaken daily by non-specialist citizens. For instance, (legal) drivers voluntarily assume a range of responsibilities, in line with a well publicised (and examined) code of conduct,⁵⁶ which fosters the demonstration of sufficient regard for the interests of other road-users, thus providing drivers with exclusionary reasons which ought, in normal circumstances,⁵⁷ to prohibit the contemplation of selfish conduct. Options which would otherwise be open to a person are excluded by virtue of her assumption of the responsibilities of being a driver.⁵⁸

This show of consideration for others is essential to being a proper driver.⁵⁹ By not following the legal regulations surrounding driving, a driver thus demonstrates her attitude towards those regulations and, more importantly, her lack of concern for the values that they promote. This close connection between responsibility, conduct and culpability is perhaps the source of the misconception that negligence is *just* about action. Through separating out these elements in cases of negligence as failure of conduct, this view is exposed as simplistic.

It is important, however, to be mindful of the limitations of negligence as failure of conduct. Its boundaries arise from the six criteria which must be satisfied before responsibility, wrongdoing and culpability are present:

- (i) A voluntary decision to undertake an activity (responsibility);
- (ii) A well publicised code of conduct governing that activity (responsibility);
- (iii) Exclusionary reasons arising from the code of conduct (responsibility);

⁵⁶ The Highway Code and the various pieces of Road Traffic legislation.

⁵⁷ Cf *McNab v Guild* 1989 JC 72, where the accused thought his passenger needed medical attention. This motivation might suggest that he *did* show sufficient concern for others in driving as he did, despite “objective” signs to the contrary.

⁵⁸ Even an unlicensed (and/or uninsured) driver could have assumed these responsibilities, implicitly, by driving on public roads. The same argument could be made where the accused has undertaken a regulated activity without expertise (e.g. “fixing” a faulty gas fire – see *R v Singh* [1999] Crim LR 582).

⁵⁹ Horder, “Gross negligence” at 517.

- (iv) The opportunity to act in accordance with those exclusionary reasons (capacity);
- (v) A failure to act in accordance with exclusionary reasons resulting in substantial, unjustified risk-taking (wrongdoing); and
- (vi) A demonstration of insufficient concern for the interests of others (culpability).

These criteria mean that, although negligence as failure of conduct explains well the blameworthiness in failing to drive safely, or follow medical procedure, it fares less well in other situations⁶⁰ – making a general, duty-based approach to culpable carelessness seem overambitious.⁶¹ This is for a number of reasons.

First, some activities are not regulated sufficiently to give rise to responsibility, wrongdoing and culpability. Consider walking on the pavement.⁶² there is not a system of legal regulation (or, presumably, sufficient social consensus) on whether it is acceptable to, for instance, walk along engrossed in reading a text message to make doing so wrong and a matter of responsibility and culpability, *even if* this conduct puts other people at risk of injury or worse.⁶³

Secondly, it might be wondered whether citizens have any real *choice* in entering certain spheres of conduct. Is it possible to avoid using a pavement? If not, then the element of “voluntariness” (and, consequently, the assumption of responsibility) appears to be vitiated. There is, therefore, no basis for premising *criminal* responsibility and liability upon any associated failures of conduct.

Problems are also encountered when citizens have no acceptable choice but to enter areas of specialist expertise. Consider laypersons forced, by the circumstances, into giving medical aid.⁶⁴ although there are well publicised expectations concerning how this should be undertaken, which promote values and provide exclusionary

⁶⁰ Cf the discussion of rape in *ibid* at 518. See, further, RHS Tur, “Rape, reasonableness and time” (1981) 1 OJLS 432 at 437.

⁶¹ See §§2.D(4), 3.D(1)(a)-(c), above.

⁶² Cf *Evgeniou v R* (1964) 37 ALJR 508, where the deceased had wandered into the road – without looking – and was run over by a speeding driver. Although the defence of contributory negligence was rejected at the driver’s trial for manslaughter, the deceased *was* arguably negligent in acting as he did *if* it was inconsistent with the responsibilities attendant on crossing the road.

⁶³ Cf driving whilst using a mobile phone, which is now criminalised: Road Traffic Act 1988 s 41D.

⁶⁴ Cf *R v Stone; R v Dobinson* [1977] QB 354.

reasons, the layperson has not (meaningfully) “volunteered” to enter that sphere of regulation and meet its expectations. Negligence as failure of conduct should not, therefore, be in issue.⁶⁵

Negligence as failure of conduct is thus a *special* case of negligence. It relies upon the voluntary assumption of responsibilities, a well publicised code of conduct (and/or ethics) and the provision of exclusionary reasons, rather than simply a failure to act (or omit to act) as others might have. Furthermore, through asking which reasons motivated the accused – and which reasons ought *not* to have motivated her – the criminal inquiry is centred upon *her*, rather than a hypothetical “reasonable person” (embodying community expectations).⁶⁶ It might, therefore, be termed “subjective” – demonstrating (again) that this label is unhelpful in seeking to draw useful distinctions in relation to culpable carelessness.

Given its limited sphere of application, some opponents of criminal liability for negligence might accept the argument made above.⁶⁷ It seems appropriate that those who adopt special roles (which might mean the difference between another person living or dying) are held, on pain of punishment, to a high standard of conduct and reasoning. Negligence as failure of belief is a wider realm of culpability which possesses different preconditions for responsibility and liability. It will, therefore, be more controversial.

C. NEGLIGENCE AS FAILURE OF BELIEF

As its name suggests, the second form of culpable negligence concerns the failure by the accused to form a belief – specifically, that an unjustified risk exists in the circumstances – when she was able, and could legitimately be expected, to have done so.⁶⁸

⁶⁵ Horder, “Gross negligence” at 519.

⁶⁶ It should be noted that the reasonable person probably does not accurately reflect community standards. See, generally, M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003).

⁶⁷ See e.g. JC Smith, “Subjective or objective? Ups and downs of the test of criminal liability in England” (1981-1982) 27 *Vill L Rev* 1179 at 1204.

⁶⁸ The account below owes much to Tadros, *Criminal Responsibility* ch 9. Tadros discusses negligence *and* recklessness in the relevant chapter (perhaps collapsing the two): see §6.B(3), below.

Faulty beliefs are envisaged here as being central to many cases of negligence,⁶⁹ and – again – it is possible to conceive of this idea in purely “objective” terms: “the defendant was not aware of a risk, but a reasonable person would have been”.⁷⁰ It will be contended that this is, again, a simplistic view.

It is useful to begin by considering an example.

(1) Unjustified beliefs in safety

The accused in *Cameron v Maguire*⁷¹ thought he was acting safely in firing his rifle in his back garden; he had a positive belief that he was not acting in a way that unjustifiably risked the interests of others.⁷² The argument here is that this belief should not, without more, exculpate him. The same applies to actors who, when acting, held no positive beliefs about safety.

To see this, it is necessary to consider the process of belief formation itself. It will be assumed that beliefs are formed through a process of combining information gleaned from perception⁷³ and background beliefs (or “background knowledge”)⁷⁴ to form additional beliefs. For instance, if a person smells rotting cabbage upon entering a room, and has the background belief that gas smells like rotting cabbage, then the ingredients are there for the formation of a belief that there is a risk of a gas leak. Assuming additional background knowledge, a further belief that turning on the light would be unjustifiably risky may be formed.⁷⁵ The matter is whether, and – if so – when, a person would be responsible for failing to form this belief. That is the subject of the following sections.

⁶⁹ AP Simester, “Can negligence be culpable?”, in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 85 at 95; Tadros, *Criminal Responsibility* ch 9.

⁷⁰ KW Simons, “Culpability and retributive theory: the problem of criminal negligence” (1994) 5 J Contemp Legal Issues 365 at 373.

⁷¹ 1999 JC 63.

⁷² The accused’s admission can be interpreted in two ways: (i) he did not think about the risks involved in his conduct at all; or (ii) that he had thought about the risks and discounted them as marginal.

⁷³ Here, “perception” simply means the process of receiving information from sensory organs, even though some perceptions might emerge from elsewhere (e.g. cases of brain manipulation). See DM Armstrong, “Perception and belief”, in J Dancy (ed), *Perceptual Knowledge* (1988) 127 at 129. It might be objected that perception is a matter over which agents can exercise control, meaning a failure to perceive might be culpable. Consideration of this issue is deferred until §6.A(3), below.

⁷⁴ Some writers prefer the term “latent knowledge” (e.g. Duff, *IACL* 159-160).

⁷⁵ It is accepted that perceptions and background information may exist in degrees. See, further, Pillsbury, “Crimes of indifference” at 141.

Before getting to this point, it is important to emphasise that the two ingredients for belief – perception and background knowledge – are essential.⁷⁶ A person who did not know that gas smells that way, or has a blocked nose, would be missing a vital part of the belief formation puzzle involved in the example above.⁷⁷ Holding a person responsible and liable for her failure to form a belief in these circumstances would be unfair insofar as the agent could not have done otherwise. Assuming “ought” implies “can”,⁷⁸ criminal responsibility would be inappropriate here.⁷⁹

It is submitted that this holds even if it is the accused’s *fault* that she lacks a background belief.⁸⁰ Consider Tadros’s example of a person who does not know that water conducts electricity.⁸¹ She would not be able to form a belief that she was putting others at risk by leaving a plugged-in radio close to the bath *because* she lacks the necessary background knowledge.⁸² Accordingly, attributing responsibility or culpability to her for her failure to form a belief in risk would be unmerited.

It might be countered that this absence of knowledge was the person’s “fault”. For instance, she might have played truant from school when the conductivity of water was covered. Had she not, she would have had the relevant knowledge (provided she had not forgotten it) and been able to form a belief in risk and put it into action.

Although this might be true, connecting this type of “fault” to the eventual failure to form a belief will be problematic. The difficulties which arose in chapter four in relation to choice and character theories of culpable carelessness are encountered again here: there are significant problems involved in showing adequate freedom, foresight and culpability in an earlier decision not to gain a piece of

⁷⁶ See, similarly: ER Keedy, “Ignorance and mistake in the criminal law” (1907-1908) 22 Harv LR 75 at 81; PJT O’Hearn, “Criminal negligence: an analysis in depth” (1964-1965) 7 Crim LQ 27, 407 at 419. Cf Simester (n 69) at 99-100.

⁷⁷ Keedy (n 76) at 81.

⁷⁸ This principle will be used as though it was an uncontroversial premise. It is not – see: JW Smith, “Impossibility and morals” (1961) 70 Mind 362; S Ryan, “Doxastic compatibilism and the ethics of belief” (2003) 114 Philosophical Studies 47.

⁷⁹ See *Elliott v C (A Minor)* [1983] 1 WLR 939 (see §3.C(3), above).

⁸⁰ Cf Simester (n 69) at 96.

⁸¹ Tadros, *Criminal Responsibility* 251-252. See, also, J Dancy, *Practical Reality* (2002) 57.

⁸² Cf *R v Whybrow* (1951) 35 Cr App R 141 (it is “common knowledge” that water conducts electricity).

knowledge.⁸³ Did the accused know what was on the lesson plan the day that she played truant? Did her decision to miss the class on electricity and conductivity demonstrate insufficient concern for others? These questions, and many more politically-charged ones (Can the State legitimately expect that citizens obtain and store certain information, on pain of criminal punishment?), cannot easily be resolved in the criminal courtroom. For the sake of feasibility, the focus ought, therefore, to be on the background beliefs the accused *had*, rather than those that she *should have had*.⁸⁴

Knowledge that has been irretrievably forgotten can be considered similarly.⁸⁵ The actor must be able to *actualise* her background knowledge, employing it to form new beliefs, for it to be relevant to culpability. She must, therefore, have the knowledge stored on at least a preconscious level.⁸⁶ If not, she has no immediate control over accessing the knowledge, and this should negate responsibility, making the question of culpability void.

Belief formation thus requires a combination of extant background knowledge and perception. The next matter for consideration concerns a person's control over the formation of beliefs.

(a) Beliefs and the will

The need for *control* has been emphasised in the discussion thus far, but it poses problems for any theory premised on culpable beliefs. This is because belief formation often does not seem to require a positive exercise of will.⁸⁷ On entering a room smelling of rotting cabbage, a person might immediately believe that there is a risk of a gas leak and that turning on the lights would be unjustifiably risky. In such

⁸³ See §4.C(2), above.

⁸⁴ One objection is that a person's ignorance might routinely endanger others. Consider if the accused was a bathroom installer who might routinely endanger herself and others through her ignorance of conductivity. Assuming this trade is regulated, it is possible that such actions demonstrate negligence as failure of conduct. They cannot, however, demonstrate negligence as failure of belief, because the accused lacks a vital ingredient for forming a belief in risk.

⁸⁵ Cf the treatment of accused persons whose capacities to retain information and form justified beliefs in risk have deteriorated, subtly, over time in RL Rabin, "The fault of not knowing: a comment" (2003) 4 *Theo Inq L* 427 at 431-432.

⁸⁶ See JR Searle, *Mind: A Brief Introduction* (2004) 167.

⁸⁷ J Raz, *Engaging Reason: On the Theory of Value and Action* (2002) 13; Tadros, *Criminal Responsibility* 240-241.

circumstances it seems peculiar to speak of that person having to *try* and form the beliefs that she in fact formed.⁸⁸ There seems little role for the conscious will or deliberation here.⁸⁹ This type of belief formation will be called “cognitive”.⁹⁰

This automatic aspect of belief formation and action might cause difficulties for an examination of the connection between beliefs and culpability.⁹¹ If the actor had no *control* over what she believed (or did not believe), then any finding of responsibility, culpability or liability seems illegitimate.⁹² Again, “ought” implies “can”.

There are, nevertheless, cases where the will plays a more pronounced role in belief formation. These beliefs are described by Tadros as “evaluative”. Tadros gives the example of forming the belief that a garden of roses is beautiful.⁹³ The formation of this belief requires consideration of the actor’s perceptions – the sensory information available to her – and her other beliefs (about what constitutes beauty, for instance).

The actor who deliberates over an evaluation is clearly exercising her will in the process of belief formation when she considers – or is asked to consider – whether the garden of roses is beautiful (contrast this with the formation of the belief that the roses in the garden are red or white). She engages her capacity for reason based on the (perceptive and background) evidence available to her, meaning that evaluative beliefs need not simply “happen upon” a person.⁹⁴ A person *can* will herself to form a new *evaluative* belief, making any general claim that the formation of a belief is utterly beyond the control of a person – and therefore not a matter of responsibility – too strong.⁹⁵ There is still a plausible basis for a theory of culpable negligence that is premised on the accused’s beliefs (or lack thereof).

It is important not to overstate the claim made here, however. It is not being suggested that persons can control the *content* of their beliefs.⁹⁶ Without remarkable

⁸⁸ Cf B Williams, *Problems of the Self: Philosophical Papers 1956-1972* (1973) 143.

⁸⁹ Raz, *Engaging Reason* (n 87) 10.

⁹⁰ Tadros, *Criminal Responsibility* 241.

⁹¹ *Ibid* 239. Cf B Winters, “Believing at will” (1979) 76 *J Phil* 243.

⁹² Duff, *AFC* 59.

⁹³ Tadros, *Criminal Responsibility* 241.

⁹⁴ See, further, Raz, *Engaging Reason* (n 87) 9-10.

⁹⁵ Tadros, *Criminal Responsibility* 241.

⁹⁶ Cf *ibid* 240.

self-deception,⁹⁷ a person who believes (after reflection) that the garden of roses is not beautiful is not in control of *that* feature of her belief.⁹⁸

(b) Evaluating beliefs

If a person can exercise control over the formation of her evaluative beliefs, then it is possible to sketch an argument that she be held responsible, and potentially found culpable and liable, for the evaluative beliefs that she has and does not have which then manifest themselves in wrongdoing. This is particularly true in the context of risk-taking, as beliefs about whether it is unjustifiably risky to act in a certain way are inherently evaluative.⁹⁹ The question is how to decide whether a belief is suitable for praise or, alternatively, criticism, including the special criticism implied by a criminal conviction.

Beliefs can be evaluated in a number of ways. First, on the assumption that beliefs aim at truth, it might be asked whether a belief is true or false.¹⁰⁰ A belief that the Supreme Court sits in Liverpool is false, and this might lead to a negative evaluation of those who hold it. They might *want* the Supreme Court to sit in Liverpool (viewing State power as unduly centred on London), but this does not make their belief beyond criticism. In cases such as this, it seems legitimate that the agent be expected to make her beliefs fit the world as it *is*, not how she would like it to be.¹⁰¹ In light of this expectation, a number of questions follow logically when asking if the belief-holder deserves censure. Why did the agent come to her belief? Did she demonstrate some form of epistemic or investigatory failings in doing so?¹⁰²

⁹⁷ Assuming that self-deception can successfully result in the formation of false evaluative beliefs. Some argue that the content of beliefs is simply beyond an agent's control: e.g. D Scott-Kakures, "On belief and the captivity of the will" (1994) 54 *Journal of Philosophy & Phenomenological Research* 77.

⁹⁸ Tadros, *Criminal Responsibility* 241. See, further: Williams, *Problems of the Self* (n 88) 149-151; P Hieronymi, "Responsibility for believing" (2008) 161 *Synthese* 357.

⁹⁹ It might be objected that the agent might not experience deliberation over a belief (she immediately recognises danger). This does not, however, seem fatal to the use of deliberation as an analytical device in negligence as failure of belief. See Tadros, *Criminal Responsibility* 247.

¹⁰⁰ See, further, Williams, *Problems of the Self* (n 88) 136-137.

¹⁰¹ MC Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2003) 48.

¹⁰² This question brings in consideration of the intellectual virtues and vices, which are beyond the scope of this thesis. See, however, LT Zagzebski, *Virtues of the Mind: An Inquiry Into the Nature of Virtue and the Ethical Foundations of Knowledge* (1996).

Already, the discussion has moved away from talk of truth or fallacy alone.¹⁰³ Reconsider Tadros's garden example: beauty is not a fact, like the Supreme Court's location. It is a judgement. Although in ordinary discourse¹⁰⁴ it is sometimes assumed that evaluative opinions and judgements simply are "true" or "false", "right" or "wrong", this language might be misleading.¹⁰⁵ It is preferable to talk of whether a belief in the beauty of a garden is *justified* or *unjustified*.¹⁰⁶ The question again then becomes *how* the belief came about (in terms of the evidence that was considered to weigh in its favour), not whether that belief was empirically true or false.¹⁰⁷

Truth and justification can, therefore, come apart.¹⁰⁸ A person can have a belief which is true, but nonetheless unjustified (she guessed);¹⁰⁹ or *vice versa* (she is – through no fault of her own – ignorant of information which would have led her to a different conclusion).¹¹⁰ It is submitted that the criminal law ought to be concerned only with the justification (rather than the truth) of a belief in risk or safety¹¹¹ when assessing culpability. This is because empirical truth is an "objective", impersonal matter, whereas justification "gets personal" in the way that culpability ought to require.

To see the importance of justification, it is useful to consider *Jamieson v HM Advocate*.¹¹² The accused apparently believed the complainer was consenting to sex. He was wrong, but this should not, in itself, make him culpable for rape.¹¹³ The resolution of that question depends on whether Jameson was *justified* in forming his

¹⁰³ Cf S Shute, "Knowledge and belief in the criminal law", in S Shute and AP Simester (eds), *Criminal Law: Doctrines of the General Part* (2002) 171 at 183-184.

¹⁰⁴ See P Pettit and M Smith, "Freedom in belief and desire" (1996) 93 J Phil 429 at 430. Similar arguments have been made in philosophy: see e.g. R Dworkin, *Justice for Hedgehogs* (2011).

¹⁰⁵ C Elliot, "Beliefs and responsibility" (1991) J Value Inquiry 233 at 240.

¹⁰⁶ Tadros, *Criminal Responsibility* 244; Duff, *AFC* 267.

¹⁰⁷ See, similarly, Hieronymi (n 98) at 359.

¹⁰⁸ MC Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (2004) 25; Tadros, *Criminal Responsibility* 244.

¹⁰⁹ Cf AP Simester, "Can negligence be culpable?", in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 85 at 105.

¹¹⁰ TM Scanlon, *What We Owe to Each Other* (1998) 26.

¹¹¹ Simester (n 109) at 106. The matter of whether the beliefs that led to the formation of the ultimate belief are *themselves* justified is left to the side here. See, however, J Dancy, *An Introduction to Contemporary Epistemology* (1985) 55-57, 127-130.

¹¹² 1994 JC 88 (see §2.E(1), above).

¹¹³ See, similarly, Tadros, *Criminal Responsibility* 245.

belief in consent. However convinced or deluded the accused was in his belief,¹¹⁴ the question should be whether it was based on adequate grounds to show that he was sufficiently motivated by the interests of the complainer.

The question of sufficiency of evidence is, accordingly, central to justification.¹¹⁵ Ultimately, the issue is resolved by asking what it means to be a responsible citizen in forming beliefs.¹¹⁶ In most contexts, and certainly those with which the criminal law is concerned, it is submitted that there should – at least – be *some* evidential basis for a belief which would justify holding it.¹¹⁷ The quality of the evidence required will change with the circumstances and the gravity of the consequences of any failure to form a justified belief. For instance, more can be expected of those assessing whether there is consent to sex than those who are investigating whether they might damage a non-valuable piece of property.¹¹⁸ Connectedly, as the importance of forming a justified belief increases, the inferences that the accused draws from the available evidence should demonstrate a greater regard for the interests of others.¹¹⁹

Jamieson argued that the complainer removing her boots and tights was sufficient evidence upon which to premise his belief in consent.¹²⁰ This evidence might be sufficient in certain contexts (a relationship where such conduct is a normal prelude to sex), but there were outward signs of non-consent: the complainer – a stranger to the accused – said repeatedly that she did not want “that” (i.e. sex) and had screamed at and bitten him.¹²¹ In the light of this conflicting evidence, more could legitimately be expected of Jamieson in forming his belief in consent. Assuming he had background knowledge that women do not *always* consent to sex,¹²² and perceived the complainer’s signs of unwillingness, he should have “put

¹¹⁴ Cf *Rusk v State* 406 A 2d 624 (1979), where the defendant’s (in fact incorrect) belief in consent was so strong that he asked whether he could see a woman again after having (non-consensual) sex with her. See Pillsbury, “Crimes of indifference” at 163-165.

¹¹⁵ It is assumed that Jamieson’s belief in consent was *not* justified.

¹¹⁶ See, similarly, Simester (n 109).

¹¹⁷ Tadros, *Criminal Responsibility* 245.

¹¹⁸ Simester (n 109) at 105.

¹¹⁹ Tadros, *Criminal Responsibility* 248.

¹²⁰ *Jamieson* at 89.

¹²¹ *Ibid.*

¹²² As noted above, if Jamieson lacked this background knowledge, he could not have been culpably negligent in his failure to form a belief in non-consent.

two and two together” and formed a belief that there was a risk of non-consent which called for further investigation.¹²³ That he did not makes his belief unjustified and the conduct which he carried out in light of it open to potential criticism, including the specialist criticism at issue in a criminal trial. The resolution of that matter depends, ultimately, on *why* Jamieson failed to form the relevant belief,¹²⁴ and that subject is returned to again below.¹²⁵

(2) Reasonableness and justification

Negligence as failure of belief can, thus far, be categorised as the demonstration of an “intellectually irresponsible attitude” with regard to belief formation.¹²⁶ It is present in familiar cases of mistake in defences¹²⁷ – for instance in self-defence¹²⁸ – and is generally captured in a legal requirement of *reasonableness*. Reasonableness calls for justification,¹²⁹ which in turn calls for sufficient grounds for belief.¹³⁰

The difference between a person faced with an immediate decision over whether to kill an aggressor and the accused in *Jamieson* is that nothing prevented the latter from taking time to consider his beliefs more carefully.¹³¹ The law can afford to be more forgiving to the former, as the situation forces her to act with less reflection.¹³²

Returning to *Cameron v Maguire*, it is plain that the accused had the time to be more critically reflective in forming his belief in safety (considering his

¹²³ If he had formed this belief, the question would be whether he was *reckless*. See ch 6, below.

¹²⁴ Cf PJ Fitzgerald and G Williams, “Carelessness, indifference and recklessness: two replies” (1962) 25 MLR 49 at 51.

¹²⁵ At §5.C(3).

¹²⁶ See JA Montmarquet, “Culpable ignorance and excuses” (1995) 80 Philosophical Studies 41 at 43.

¹²⁷ Garvey excludes mistakes from his analysis, but does not explain clearly *why*: Garvey, “Involuntary manslaughter” at 346 (n 58). Cf S Sverdlik, “Pure negligence” (1993) 30 American Philosophical Quarterly 137 at 139-142.

¹²⁸ For an overview, see: F Leverick, *Killing in Self-Defence* (2006) ch 9; F Leverick, “Unreasonable mistake in self-defence: *Lieser v HM Advocate*” (2009) 13 EdinLR 100.

¹²⁹ D Archard, “The *mens rea* of rape: reasonableness and culpable mistakes”, in K Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (1999) 213 at 219; J Gardner, “The mysterious case of the reasonable person” (2001) 51 UTLJ 273 at 273.

¹³⁰ “Reasonableness” is a gendered concept: CM MacKinnon, *Toward a Feminist Theory of the State* (1989) 183. Justification might be similarly flawed, but that issue cannot be resolved here.

¹³¹ EM Curley, “Excusing rape” (1976) 5 Philosophy and Public Affairs 325 at 346.

¹³² See, similarly: C Wells, “Swatting the subjectivist bug” [1982] Crim LR 209 at 214; J Horder, “Cognition, emotion and criminal culpability” (1990) 106 LQR 469 at 477-478; Simester (n 109) at 99.

perceptions and background knowledge). Given the risks attendant upon his activity, this much could legitimately be expected of him. His failure to form a belief that he was posing a risk to the lives of others was, therefore, *potentially* unreasonable, unjustifiable and culpably negligent (though not necessarily “reckless”, as the Scottish courts thought).

To establish whether Cameron and Jamieson *were* culpably negligent, in the sense that ought to be required for a criminal conviction, it is necessary to consider the reason *why* they failed to form a belief in unjustified risk.

(3) The influence of desire

To summarise, two cases of faulty belief formation are envisaged as being relevant to negligence as failure of belief: those where the accused formed an incorrect belief that she was acting justifiably; and those where no belief about risk or justification was formed. The discussion thus far has centred on the former, but it is submitted that, in both cases, the accused has similarly failed to put “two and two together” when she could be expected to have done so.

As Garvey explains, such omissions typically result from the failure to control a desire which then overwhelms the actor’s belief formation process.¹³³ The agent is prevented, by an aspect of her motivational set-up, from putting the pieces together in the way that she *could*, given her perceptions and background knowledge, have done.¹³⁴

Garvey summarises his argument as follows:¹³⁵

An actor who creates a risk of causing death but who was unaware of that risk is fairly subject to retributive punishment if he was *nonwillfully* [sic] *ignorant* or *self-deceived* with respect to the existence of the risk, and if such ignorance or self-deception was due to the influence of a desire he should have controlled. The culpability of such an actor does not consist in any choice to do wrong, but rather in the culpable failure to exercise [sic] *doxastic self-control*, i.e. control over desires that influence the formation and awareness of one’s beliefs... the actor could and should have controlled his wayward desire, thereby allowing the relevant belief to form and surface into awareness.

¹³³ Garvey, “Involuntary manslaughter”.

¹³⁴ See, similarly, G Sher, *Who Knew? Responsibility without Awareness* (2009) 21.

¹³⁵ Garvey, “Involuntary manslaughter” at 337-338 (emphasis in original).

To apply Garvey's argument to *Cameron v Maguire*, a strong desire to fire his rifle may have prevented the accused from forming a belief that he was (unjustifiably) putting the lives of others at risk. Similarly, Jamieson's desire to have sex may have led him to give insufficient weight to obvious prompts that the complainant was not consenting.¹³⁶ Even if he had formed an unconscious belief in non-consent, Jamieson's desire may have warped his perception of the facts so that this belief was unable to surface into preconscious or conscious awareness, putting him "on notice" that investigation into the matter of consent was required.¹³⁷

Garvey is correct to emphasise the aspect of control over desires which might prevent the formation of a justified belief¹³⁸ through hiding aspects of the situation from the accused's conscious deliberations, or leading to reliance being placed on what might be called "non-evidential reasons" for belief (e.g. biases).¹³⁹ He nevertheless underplays the role of *culpability*. The matter of *when* a failure to exercise self-control is culpable is not addressed convincingly. At one stage, Garvey argues that a failure to maintain control over desires is culpable *in itself*.¹⁴⁰ This does not seem right: consider a person on a diet who allows her desire to eat cake to prevent her from forming the belief that eating cake would be inconsistent with her losing weight. Such a person is surely not "culpable" in the sense required for the criminal law (her "fault" does not even appear to implicate the interests of others), but she has failed to exercise doxastic control in the manner that Garvey describes. She has failed to turn her attention away from her desire, and towards features of her situation which would encourage her to abstain.¹⁴¹

It is thus necessary to add a further condition to Garvey's treatment of doxastic self-control. To be culpable, a negligent agent must – through her failure to

¹³⁶ See, similarly, Horder (n 132) at 476-477.

¹³⁷ Cf I Haji, "An epistemic dimension of blameworthiness" (1997) 57 *Journal of Philosophy & Phenomenological Research* 523 at 537.

¹³⁸ See, similarly: P Arenella, "Character, choice and moral agency: the relevance of character to our moral culpability judgments", in EF Paul, FD Miller and J Paul (eds), *Crime, Culpability and Remedy* (1990) 59; Sverdlik (n 127).

¹³⁹ This is not always wrong – blindness to others' failings may be virtuous: Tadros, *Criminal Responsibility* 249.

¹⁴⁰ Garvey, "Involuntary manslaughter" at 360.

¹⁴¹ See J Kennett, *Agency and Responsibility: A Common-Sense Moral Psychology* (2001) 163.

control her desires – manifest *insufficient concern for the interests of others*.¹⁴² When modified appropriately, Garvey’s account switches focus from the actual beliefs a person *has* (and their justification), towards the management of her desires and her attitude towards the interests of others. This point about the accused’s control over her desires immediately complicates matters, because it raises the question of which desires the accused *could* have controlled.

(a) “Alien” desires

Consider Lindsay, who has never been tempted to steal. One day, a sudden desire to steal a necklace comes over her. Caught off guard by this desire, Lindsay decides – somewhat hesitantly – to act upon it.

On the strict choice view discussed in the previous chapter, Lindsay appears culpable: she has made a conscious choice to engage in wrongdoing and has shown insufficient concern for a legally-protected interest (in property) of another (the shop owner). A finding of culpability should, however, be troubling: although Lindsay did make a choice to do wrong, it does not seem to be “truly representative” of her character;¹⁴³ to belong to her “in the deepest sense”.¹⁴⁴

It is submitted that this disassociation ought to matter, because it is not Lindsay’s choice or action which will be punished and condemned.¹⁴⁵ Rather, it is *Lindsay* that is punished. Aspersions will be cast on *her character* and *she* will bear the criminal record.¹⁴⁶ To reflect this, it is submitted that there should be some connection drawn between Lindsay’s choice, her desire and her wider character to make the exercise of punishment an honest communication of moral indignation

¹⁴² Garvey might accept this condition – see Garvey, “Involuntary manslaughter” at 365.

¹⁴³ J Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (1970) 36. Cf EN Yankah, “Good guys and bad guys: punishing character, equality and the irrelevance of moral character to criminal punishment” (2003-2004) 25 *Cardozo L Rev* 1019 at 1060.

¹⁴⁴ SR Moreau, “Reasons and character” (2005) 115 *Ethics* 272 at 275.

¹⁴⁵ KK Ferzan, “Act, agency and indifference: the foundations of *Criminal Responsibility*” (2007) 10 *New Crim LR* 441 at 444.

¹⁴⁶ J Gardner, “On the general part of the criminal law”, in RA Duff (ed), *Philosophy and the Criminal Law: Principles and Critique* (1998) 205 at 236. See, further: L Fields, “Moral beliefs and blameworthiness” (1994) 69 *Philosophy* 397 at 408; Haji (n 137) at 529.

towards *her*. Otherwise, the message of liability is shallow and worthless, addressing orphaned choices and actions rather than the agent who made and performed them.¹⁴⁷

It is submitted that the same conclusion holds if no connection is drawn between an actor, her desires and her beliefs. If a person is alleged to have failed to form a belief because she failed to control a desire, it is important that this desire is not “alien” to her.¹⁴⁸

This is because “alien” desires are not susceptible to control in the way that – at least in *enkratic* (self-controlled) actors – other desires are, because they are not woven into the agent’s more general motivational system.¹⁴⁹ This point concerning control might undermine any contention that the actor was able to manage her desires, and this would again make asking the question of culpability illegitimate. “Alien” desires thus pose a problem for desire-based accounts of culpability such as that proposed by Garvey and adopted here. If a desire may be “alien” (i.e. unrepresentative of the agent that acts upon it), then the accused’s failure to form a justified belief concerning the riskiness of her conduct might be nothing to do with *her*.

One way to overcome this difficulty would be to disregard “alien” desires and claim that they are not an aspect of character at all. This is difficult: absent any external forces,¹⁵⁰ alien desires must spring from *somewhere* within the agent;¹⁵¹ they may surely properly be described as part of her “character” in a *general* sense.¹⁵² This leads to an alternative, more compelling, strategy, which is to deny that “alien” desires are representative of a person’s *true* character.¹⁵³ This latter approach is adopted in this thesis. A desire should only give rise to a finding of culpability if it

¹⁴⁷ Arenella (n 138) at 83.

¹⁴⁸ This is how “out of character” acts should be understood in this thesis. See also Fields (n 146) at 411.

¹⁴⁹ G Sher, *Desert* (1987) 172-173. Cf J Raz, *Engaging Reason: On the Theory of Value and Action* (2002) 20.

¹⁵⁰ E.g. subliminal messaging.

¹⁵¹ Perhaps her subconscious: see AE Taslitz, “Forgetting Freud: the courts’ fear of the subconscious in date rape (and other) cases” (2006-2007) 16 BU Pub Int LJ 145 at 179.

¹⁵² G Sher, *Who Knew? Responsibility without Awareness* (2009) 135.

¹⁵³ Cf HG Frankfurt, *The Importance of What We Care About: Philosophical Essays* (1988) ch 2. Frankfurt thinks that a desire only reflects upon the agent if it is backed up by a “second-order” desire (a desire about having a desire). Frankfurt’s theory will not be discussed further, as it suffers from the problem of infinite regress: presumably, “second-order” desires need to be backed by “third-order” desires and so on (Tadros, *Criminal Responsibility* 33).

has been *accepted* as being representative of, and in-line with, the accused's wider motivational framework.¹⁵⁴

"Alien" desires are, at least initially, outwith this framework. When an actor is confronted with such a desire, it seems appropriate that she engage in self-reflection about how she is motivated towards it.¹⁵⁵ If the agent recognises the desire as inconsistent with her values – those interests she views as important to promote – then she might try and remove the desire (or prevent it from habitually occurring to her),¹⁵⁶ to show her commitment to those values.¹⁵⁷ She might fail no matter how hard she tries,¹⁵⁸ but such a failure is not acceptance. It is submission, and this should not be enough for blameworthiness to attach to a failure to exercise doxastic self-control and form a justified belief concerning risk.¹⁵⁹

Acceptance may, nevertheless, take a number of forms. For example, the agent might realise that a desire is inconsistent with her values, and yet not attempt to remove it.¹⁶⁰ This is surely acceptance through acquiescence. Alternatively, the agent might realise that she is simply deceiving herself, and that her *true* character is revealed by the "alien" desire. This is surely a comprehensive form of acceptance, which might lead the agent to change *other* aspects of her character to accommodate the new desire.

The method of acceptance does not matter, and in many cases it will be subtle. The issue of concern is whether the desire *has* been accepted – in some sense – into the agent's wider system of desires and values prior to the act of risk-taking.¹⁶¹ Only then can it be subject to control and the proper basis for a finding of culpability

¹⁵⁴ See, similarly, Arenella (n 138) at 76.

¹⁵⁵ See, similarly, G Watson, "Free agency", in G Watson (ed), *Free Will*, 2nd edn (2003) 337.

¹⁵⁶ JJ Kupperman, *Character* (1991) 53.

¹⁵⁷ RB Brandt, "Traits of character: a conceptual analysis" (1970) 7 *American Philosophical Quarterly* 23 at 27; Fields (n 146) at 413-414; N Arpaly and T Schroeder, "Praise, blame and the whole self" (1999) 93 *Philosophical Studies* 161 at 184; AP Simester, "Can negligence be culpable?", in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 85 at 97; HG Frankfurt, *The Reasons of Love* (2004) 19. Cf Aristotle, *Nicomachean Ethics* (Roger Crisp trans, 2000) III.5.1114a.

¹⁵⁸ Cf Frankfurt, *What We Care About* (n 153) ch 2.

¹⁵⁹ Admittedly, the line between laziness and submission might sometimes be difficult to draw.

¹⁶⁰ Kupperman, *Character* (n 156) 50; J Jacobs, *Choosing Character: Responsibility for Virtue and Vice* (2001) 32; Tadros, *Criminal Responsibility* 37.

¹⁶¹ See, similarly, Arpaly and Schroeder (n 157) at 173.

for beliefs.¹⁶² This is because the beliefs the accused will hold in these circumstances will be unjustified and *could have* been avoided had she performed better in the management of her desires.¹⁶³

Even if a desire is accepted, uncontrolled and able to prevent the accused from forming a justified belief in risk, culpability is not yet established. Again, capacity seems important. It must be asked whether the accused had the capacity and an opportunity to exercise doxastic self-control and form a belief in risk.¹⁶⁴ If this capacity – and the opportunity to exercise it – were not present, then the law’s demand that the accused exercises self-control is illegitimate, as discussed above.¹⁶⁵ If the law’s demand *was* legitimate, and there *was* an opportunity to exercise control, then the final matter is whether the accused showed – in her failure to exercise self-control – insufficient regard for the interests of others. If she did, then there is no obvious bar to attributing culpability to her.

The above account of negligence as failure of belief has been detailed in order to address some familiar objections to approaches such as Garvey’s. In the next section, further objections will be considered and some clarifications made.

(4) Objections and clarifications

Thus far, the concentration has been on factors internal to the accused: her beliefs, her desires, etc. It is necessary to now consider the physical element of negligence as failure of belief.

(a) Significance *in action*

The first matter of concern is what is referred to as the “significance in action” problem.¹⁶⁶ Those who raise this difficulty suggest that, in theories such as Garvey’s

¹⁶² Note that if a desire is not accepted, then the beliefs that spring from it will also not be accepted. There is thus cause for holding that the actor is not responsible for them. See C Elliot, “Beliefs and responsibility” (1991) *J Value Inquiry* 233.

¹⁶³ Cf Raz, *Engaging Reason* (n 149) 16.

¹⁶⁴ S Sverdlik, “Pure negligence” (1993) 30 *American Philosophical Quarterly* 137 at 142, 146.

¹⁶⁵ Garvey, “Involuntary manslaughter” at 367.

¹⁶⁶ See: KW Simons, “Culpability and retributive theory: the problem of criminal negligence” (1994) 5 *J Contemp Legal Issues* 365 at 391-393; KW Simons, “Does punishment for ‘culpable indifference’ simply punish for bad character? Examining the requisite connection between *mens rea* and *actus reus*” (2002-2003) 6 *Buff Crim L Rev* 219; Alexander et al, *Crime & Culpability* 72-73.

(and, therefore, in the account offered above), there is a gap between the accused's act of wrongdoing (the taking of an unjustified risk) and her culpability (her failure to exercise doxastic self-control and form a justified belief). This apparently makes it illegitimate to hold an actor responsible and liable for the *actions* she performs in light of her beliefs (and their consequences).¹⁶⁷

The significance in action problem is most clearly associated with accounts of culpable carelessness which deal with attitudes. For instance, Simons concentrates on the attitude of "indifference".¹⁶⁸ As Alexander, Ferzan and Morse explain,¹⁶⁹ an attitude of indifference plays no part in an accused's practical reasoning, and so is disconnected from action. Indifference is not a reason for acting; it is a mood contemporaneous with action. It can thus only explain *behaviour*, and not why that behaviour was culpable.¹⁷⁰ Allegedly, character-based approaches to negligence (such as that defended above) suffer from the same problem.¹⁷¹

At the most basic level, as Madden Dempsey points out, there is nevertheless a necessary connection between actions and (accepted) character: "[a]n actor is not properly criminalised for being a jerk: but he might properly be subject to criminal liability because, *in virtue of being such a jerk*, he ended up killing someone".¹⁷² The same connection may be drawn between an actor who is negligent in her beliefs and the wrongful actions which she performs as a result. Jamieson would not properly be blamed for the belief accompanying his action. He is, instead, blamed for the fact that – *as a result* of his failure to intervene in the belief formation process and control his desire to have sex – he had non-consensual sex with another person.¹⁷³ On this account, there is no problem connecting Jamieson's culpability with the act of wrongdoing. The connection between the two is more than simply explanatory. It is – if anything – causal.

¹⁶⁷ See: Alexander et al, *Crime & Culpability* 72-73; Simester (n 157) at 88.

¹⁶⁸ See §6.A(2)(b), below.

¹⁶⁹ Alexander et al, *Crime & Culpability* 72.

¹⁷⁰ See MS Moore, "Responsibility and the unconscious" (1980) 53 S Cal L Rev 1563 at 1631.

¹⁷¹ Alexander et al, *Crime & Culpability* 74-75.

¹⁷² MM Dempsey, "The object of criminal responsibility", in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (2009) 283 at 284. See, similarly, Kupperman, *Character* (n 156) 60.

¹⁷³ See, similarly, Sher, *Who Knew?* (n 152) 87.

Drawing this connection between character and action endorses properly the expectations that bore upon Jamieson with regard to his self-management and belief formation, and emphasises his culpable failure to meet them (which resulted in an inadvertent act of wrongdoing). “[T]he ultimate judgment of fault concerns the actor’s conduct *in light of his beliefs*”¹⁷⁴ and punishment is for that *action*, not a contemporaneous character trait.¹⁷⁵

If this point is accepted, a further objection presents itself. It was noted above that even “alien” desires can ground findings of responsibility if the bar of acceptance is overcome. This means, Ferzan suggests, that punishing failures of doxastic control is simply punishing for omitting to remove desires that are inconsistent with the agent’s wider character.¹⁷⁶ This omission is again apparently divorced from action.¹⁷⁷

This restatement of the “significance in action” objection is not compelling. Arguably, it misses the point, which concerns what could legitimately be expected of the accused in terms of doxastic self-control. The contention is that only desires which have been accepted – in some sense – by the accused are susceptible to control. Agents are not faulted for failing to remove a desire but rather for, once this desire has been accepted, failing to exercise control over it when this was possible and expected, and – as a result – engaging in wrongdoing. Ferzan’s objection conflates these two issues.

The “significance in action” problem can now be left behind. A separate concern arises from confusion over the significance *of* action in character formation.

(b) Significance *of* action

Actions might be seen as evidence of existing character traits.¹⁷⁸ On this view, a character trait can exist even if it has never been manifest in action¹⁷⁹ – a person is

¹⁷⁴ KW Simons, “Dimensions of negligence in criminal and tort law” (2002) 3 *Theo Inq L* 283 at 300.

¹⁷⁵ See, similarly, Kupperman, *Character* (n 156) 60-64.

¹⁷⁶ KK Ferzan, “Act, agency and indifference: the foundations of *Criminal Responsibility*” (2007) 10 *New Crim LR* 441 at 452.

¹⁷⁷ *Ibid.*

¹⁷⁸ G Williams, “A reply to Mr Duff” (1982) 41 *CLJ* 286 at 288.

¹⁷⁹ H Smith, “Culpable ignorance” (1983) 92 *The Philosophical Review* 543 at 555.

first a callous character and then, when given the opportunity, performs callous actions.

The difficulty, it might be suggested, is that surely it is not clear from *one* callous action that a person has a callous character. Acts might give rise to ambiguous estimations of character, making them of dubious evidential worth. As a result, it might be argued, talk of character should be abandoned, and chosen wrongdoing concentrated upon when considering isolated acts of wrongdoing.¹⁸⁰

This conclusion is too rash. To begin with, actions provide more than just evidence of an existing character trait: they are partially constituent of character. Duff gives the example of a person performing a dishonest act.¹⁸¹ Before the act is performed, the accused has dispositions to act in a certain way but is not *yet* a dishonest person. It is only through performing a dishonest action that, as well as *evidencing* a trait, the actor *confirms* that trait as part of her character. In short, a person cannot be dishonest without acting dishonestly.¹⁸²

Actions are not therefore simply evidence of character, but play an important part in confirming that the accused is insufficiently motivated by the interests of others in the management of her desires.¹⁸³ Acts can secure culpability, strengthening the connection between character, desire, belief and action which – the strict choice theorist alleges – cannot exist absent advertent wrongdoing.¹⁸⁴ Although they can give rise to dubious estimations of the accused's motivational structure, it is submitted that epistemic uncertainty around the inferences drawn from action is not fatal to character theories of culpable carelessness. If they were, then “objective” means of proving “subjective” mental states also seem indefensible.¹⁸⁵

¹⁸⁰ EN Yankah, “Good guys and bad guys: punishing character, equality and the irrelevance of moral character to criminal punishment” (2003-2004) 25 *Cardozo L Rev* 1019 at 1052.

¹⁸¹ RA Duff, *Criminal Attempts* (1996) 188.

¹⁸² The reverse is not true: to steal is not to be a dishonest person, as this action might not stem from a dishonest character trait.

¹⁸³ Cf MS Moore and HM Hurd, “Punishing the awkward, the stupid, the weak and the selfish: the culpability of negligence” (2011) 5 *Crim Law & Philos* 147 at 176.

¹⁸⁴ Cf Duff, *Criminal Attempts* (n 181) 191.

¹⁸⁵ See: §1.D(1), above; S Bandes, “Is it immoral to punish the heedless and clueless? A comment on Alexander, Ferzan and Morse: *Crime and Culpability*” (2010) 29 *Law & Phil* 433 at 447.

The two prominent objections concerning the role of character in action have thus been dispensed with. A final criticism to be considered at this stage concerns the role of “objectivity” in negligence as failure of belief.

(c) The role of “objectivity”

At the outset of the chapter, it was noted that standards such as the “reasonable person” are viewed as impersonal. “Objective” standards will have a role to play in assessing culpability as well as justification under the theory presented here. The court will have to establish whether the accused demonstrated, in her failure to control her desires, *insufficient* concern for the interests of others. This assumes a standard of sufficiency, which will presumably be set by “objective”, impersonal standards for largely the same reasons that justification must be “objectively” assessed. It might, therefore, be objected that the theory of negligence as failure of belief presented here is not in fact as “personalised” as it claims to be.

Although this point is sometimes missed by theorists,¹⁸⁶ relying on concepts such as insufficient concern or “indifference” veils the “objective” elements of culpable carelessness, but cannot eradicate them. Even if *choice* is the mark of culpability, Alexander, Ferzan and Morse only admit of culpability where insufficient concern was demonstrated, necessitating an “objective” estimation of sufficient concern for others. “Objectivity” is inescapable.¹⁸⁷

It is not envisaged that this “objective” aspect of negligence as failure of belief is troubling. Absent a strong attachment to “subjectivity” – which, as chapter four showed, requires justification – the presence of some “objectivity” is not fatal to a defensible theory of culpable carelessness. Where there is disagreement over the proper social expectations concerning risk-taking and belief formation, important moral and political questions are, of course, raised.¹⁸⁸ But these exist under the current approach to culpable carelessness in both Scotland and England, and it is not the aim of this thesis to remove them from the attribution of criminal responsibility

¹⁸⁶ See e.g. M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003) ch 8.

¹⁸⁷ GP Fletcher, *Basic Concepts of Criminal Law* (1998) 119.

¹⁸⁸ AW Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn (2001) 79-80.

and liability. If anything, through considering “objective” matters beyond “subjective” foresight, the thesis makes these considerations more transparent.

Even with these clarifications made and objections considered, negligence as failure of belief remains a sketch. It is therefore helpful to apply it to some concrete examples.

(5) Examples

From the discussion thus far, negligence as failure of belief has five components beyond the taking of a substantial, “objectively” unjustified risk (i.e. wrongdoing):

- (i) Background knowledge concerning the risks involved in conduct (capacity);
- (ii) Perception of indicators of risk (capacity);
- (iii) An accepted desire that prevents the formation of a belief (responsibility);
- (iv) A fair opportunity to exercise doxastic control over that desire and form a belief (capacity); and
- (v) A failure to exercise doxastic control over that desire and form a belief, which demonstrates insufficient concern for the interests of others (culpability).

To see these elements in action (and how difficult decisions about negligence can be), it is useful to consider *State v Williams*.¹⁸⁹

The defendants’ child became seriously ill. Despite obvious indicators of this fact, the Williamses decided that their son had toothache and failed to take him to a doctor. He died and his parents were charged with manslaughter which, under Washington law, required “simple”, civil negligence.¹⁹⁰ With just these facts, it remains unclear whether capacity, responsibility, wrongdoing and culpability were present.

Assuming wrongdoing, the first important matter is whether the defendants had the relevant background knowledge and perceptions to form a belief that there was a risk of serious illness. With regard to knowledge, the defendants had received

¹⁸⁹ 484 P 2d 1167 (1971). See: SH Kadish, *Blame and Punishment: Essays in the Criminal Law* (1987) 95-98; Pillsbury, “Crimes of indifference” at 193-198; Garvey, “Involuntary manslaughter” at 333-339; Alexander et al, *Crime & Culpability* 76.

¹⁹⁰ *Williams* at 1171 per Chief Judge Horowitz.

only a basic education.¹⁹¹ Although they had perceived that the child was sick, there is thus a possibility that the Williamses lacked background knowledge concerning *how* sick their child was. This makes it questionable whether they had the ingredients required to form a belief that their child might die if *medical attention* was not sought. If they did not possess the relevant background knowledge, then negligence as failure of belief cannot be made out. Once again, “ought” implies “can”.

If it is assumed that the Williamses *did* have the relevant background knowledge and perceptions to form a belief that seeking medical attention was warranted, consideration turns to the reason(s) why a justified belief to that effect was not formed. The Williamses were of Native American ancestry, and feared that their child would be taken by social services if they took him to a doctor.¹⁹² This fear was apparently well founded.¹⁹³ The primary desire that prevented the Williamses from seeking medical attention was, thus, to ensure that they remained connected to their son. The question is, then, whether this desire was accepted as consistent with the values of the parents. It is assumed that it was,¹⁹⁴ and it might also be assumed that the Williamses could have exercised self-control, meaning that their failure to do so could be a potential basis for a finding of responsibility.

The matter of culpability can then be addressed: did the Williamses – in their failure to exercise doxastic self-control and form a belief in risk – show insufficient concern for the interests of their son? This is a complicated question, but it seems that the Williamses were deeply concerned with their child’s welfare. Although this (ironically) led to the child’s death,¹⁹⁵ it is submitted that the Williamses showed sufficient regard for his interests.¹⁹⁶ They ought not, therefore, to have been adjudged culpably negligent and declared manslaughterers.

¹⁹¹ Ibid at 1169-1170.

¹⁹² Ibid at 1170.

¹⁹³ Garvey, “Involuntary manslaughter” at 334-335.

¹⁹⁴ It is envisaged that desires will, in practice, be assumed to be part of the agent’s accepted character and that she will bear the burden of establishing otherwise. See §7.B, below.

¹⁹⁵ This may give rise to the suspicion that the Williamses showed a greater regard for *their* enjoyment of the child than *the child’s* welfare: Pillsbury, “Crimes of indifference” at 197.

¹⁹⁶ Moran, *Rethinking the Reasonable Person* (n 186) 313. More difficult cases are imaginable – e.g. *Walker v Superior Court* 763 P 2d 852 (1988), where a mother refused to take her child to the doctor because she believed – wrongly, yet consistently with her religious beliefs – that prayer would lead to the child’s recovery.

Williams is no doubt a powerful example because of its emotive facts.¹⁹⁷ It is thus prudent to consider a less highly-charged case, *Cameron v Maguire*. Assuming, again, that Cameron had the background knowledge of the risks of firing his rifle and that someone might be in the woods around his home, etc, and perceived that he was firing a gun in the direction of the woods, the question becomes whether his desire to fire his rifle was accepted as part of his character. Was it the first time he had had this urge? Had he just bought the rifle and got carried away? If the desire was “alien”, then it does not appear that Cameron evidenced negligence as failure of belief (given that his conduct is regulated and licensed,¹⁹⁸ however, it is plausible that he evidenced negligence as failure of *conduct*).

If Cameron had accepted his desire and could control it, then the question is whether his failure to do so and form a belief in risk demonstrated insufficient concern for the interests of others. It is unclear why, other than wanting to check the accuracy of his rifle, Cameron was shooting in his back garden. As a result, it does not seem that his failure to control his desire demonstrated *any* regard for the lives of others. In such circumstances, it is submitted that he ought to have been convicted of a crime. As he believed it was *safe* for him to be shooting in his back garden,¹⁹⁹ however, it is again difficult to conceive of his crime as one of “recklessness”, rather than negligence.

These two examples explain how, in principle, negligence as failure of belief establishes culpability for wrongdoing. In practice, some assumptions might need to be made, and chapter seven explains these.²⁰⁰ For now, it is important to consider some final objections to the argument above.

¹⁹⁷ Cf Pillsbury, “Crimes of indifference” at 111.

¹⁹⁸ Firearms Act 1968.

¹⁹⁹ *Cameron v Maguire* 1999 JC 63 at 66 per Lord Marnoch.

²⁰⁰ At §7.B.

(6) Further objections

(a) “Fatal circularity”

Alexander and Ferzan worry that Garvey’s account of culpable negligence is “fatally circular”.²⁰¹ This is because, if the accused was inadvertent at the time of acting, there was no psychological prompt to urge her to engage in doxastic self-control.²⁰² For instance, the accused in *Jamieson* was inadvertent with regard to the risk of non-consent – he believed that the complainer was consenting – and Alexander and Ferzan worry that there was nothing to put him “on notice” that he needed to control his desires.

This objection is weak. Assuming he was not in a state of automatism, Jamieson was presumably aware that he was engaged in sexual intercourse. Consent is a core component in sexual relations.²⁰³ Furthermore, the risks of non-consensual intercourse are grave; it is an inherently risky activity.²⁰⁴ These features of Jamieson’s situation put him “on notice” that he ought to consider the possibility that his desire to have sex might prevent him from forming a justified belief about consent.²⁰⁵ Although “subjectively” Jamieson’s desire may have dominated his mind to the extent that he did not investigate his beliefs,²⁰⁶ the point of negligence as failure of belief is that he could legitimately be expected to have controlled that desire. The same reasoning can be applied in relation to the other examples above, and there is nothing “circular” about it. Alexander and Ferzan again seem blinkered by their focus on *conscious choices*.²⁰⁷ Once wider features of situations (and characters) are considered, culpability becomes transparent.

This leads, however, to a second complaint concerning this chapter’s reliance on character.

²⁰¹ Alexander et al, *Crime & Culpability* 77.

²⁰² Ibid.

²⁰³ Duff, *IACL* 168-169; T M Scanlon, *What We Owe to Each Other* (1998) 175.

²⁰⁴ Cf Tadros, *Criminal Responsibility* 257.

²⁰⁵ See, further: S Sverdlik, “Pure negligence” (1993) 30 *American Philosophical Quarterly* 137 at 142; AR Mele, *Autonomous Agents: From Self-Control to Autonomy* (2003) 98.

²⁰⁶ Cf Garvey, “Involuntary manslaughter” at 369 (n 117).

²⁰⁷ See §4.A, above.

(b) Does character exist?

Doris, for instance, argues that character – understood as a set of stable traits concerning conduct and value – does not exist and that philosophy (and, presumably, the law) should look to other concepts when discussing responsibility and liability.²⁰⁸ Doris's argument is premised on empirical evidence, which suggests that *circumstances*, rather than character, determine conduct. Asking whether a person has a certain character, and whether a desire fits in a wider nexus of desires and values, is thus useless.

This conclusion is too strong. First, it is not required that *every* opportunity to perform an in-character act is taken by agents. Someone with the trait of dishonesty does not have to lie at every given opportunity. This means that, even if a focus on character is maintained, circumstances can play an important explanatory role in demonstrating why a person disposed to perform action *x* performed action *y*.²⁰⁹ Secondly, the studies relied upon by Doris surely show only that *few* (as opposed to *no*) people have a virtuous character which will defy authority when told to, for instance, electrocute another person or animal. Some test subjects did, after all, defy authority in Milgram's infamous experiments.²¹⁰ It cannot, therefore, be objected that the theory presented above relies on an illusory notion. The fact that it is *difficult* to exercise self-control over desires and form justified beliefs concerning risks does not detract from the fact that failing to do so sometimes shows insufficient regard for others.

This segues into a third complaint: that the approach defended above aims to punish those who do not display *virtue*, rather than those who display *vice*.

(c) Virtue ethics?

Negligence as failure of belief might be alleged to enforce virtue ethics through the criminal law, which is controversial.²¹¹ This objection is, however, misguided,

²⁰⁸ JM Doris, *Lack of Character: Personality and Moral Behaviour* (2005).

²⁰⁹ JJ Kupperman, *Character* (1991) 59.

²¹⁰ S Milgram, *Obedience to Authority: An Experimental View* (1974). See Doris, *Lack of Character* (n 208) 39-53.

²¹¹ Compare K Huigens, "Virtue and inculcation" (1994-1995) 108 *Harvard Law Review* 1423 with RA Duff, "Virtue, vice and criminal liability: do we want an Aristotelian criminal law?" (2002-2003) 6 *Buff Crim L Rev* 147.

because culpability is only *legally* relevant where an agent shows insufficient concern for the *legally-protected* interests of others in failing to form a belief in risk. There are, therefore, two limitations on negligence as failure of belief. First, *insufficient concern* should be imagined as quite a high standard to meet, given the serious consequences attendant upon a criminal conviction. This will ensure that punishment is for obvious displays of viciousness, rather than mere failures to attain virtue.²¹² Secondly, the ambit of negligence as failure of belief can be circumscribed by limiting the range of legally-protected interests which become relevant. This idea is developed in the next part of the chapter.

(7) Negligence as failure of belief: summary

This section has demonstrated a second way in which a failure to notice an “objectively” unjustified risk can be culpable in the sense required for criminal liability. Given that it is not connected to a specific context, this aspect of negligence liability is wide-ranging and likely to be controversial, necessitating the above, deliberately comprehensive discussion. An issue has, however, been left to one side. This concerns the efficacy of punishing culpable negligence and the connected relationship between negligence liability and liberal notions like individual autonomy. The next, final section considers these matters.

D. NEGLIGENCE IN A LIBERAL STATE

Although it *is* found in the positive law, negligence liability is relatively rare. This makes a *wide-ranging* argument for negligence liability seem suspicious.²¹³ It is submitted that the main reasons for negligence’s limitations in the positive law come from “policy” arguments and (more importantly) from principled concerns about autonomy. The interaction between these concerns and the account of culpable negligence defended in this chapter is discussed below.

²¹² See, similarly, Tadros, *Criminal Responsibility* 89.

²¹³ GP Fletcher, *Basic Concepts of Criminal Law* (1998) 117. Cf J Horder, “Criminal culpability: the possibility of a general theory” (1993) 12 *Law & Phil* 193 at 196.

(1) "Policy"

Some proponents of culpability for negligence doubt that it would be good *policy* to criminalise negligent risk-taking.²¹⁴ First, expanding the criminal law to cover inadvertent, unjustified risk-taking would – particularly in England, where “objective” recklessness/negligence is used less frequently – result in a greater number of trials, leading to higher costs for the criminal justice system.²¹⁵ This argument means that limiting the ambit of negligence liability to *severe* instances of inadvertent risk-taking should be taken seriously (see below).

Secondly, some authors doubt that punishing negligence could deter potential wrongdoers.²¹⁶ This argument assumes that convicting and punishing citizens for their negligent risk-taking would not encourage them (and others)²¹⁷ to alter their motivational structure to ensure that they take more care in the future.²¹⁸ This assumption requires empirical backing, which is never presented.²¹⁹

This objection also relies on deterrence being the purpose of punishment. It thus dissipates if communication of *culpable* wrongdoing and community standards concerning risk-taking is adopted as an alternative rationale.²²⁰ There remain concerns over the use of such a severe sanction against inadvertent wrongdoers,²²¹

²¹⁴ S Bandes, “Is it immoral to punish the heedless and clueless? A comment on Alexander, Ferzan and Morse: *Crime and Culpability*” (2010) 29 Law & Phil 433 at 434, 447; AD Leipold, “A case for criminal negligence” (2010) 29 Law & Phil 455 at 462.

²¹⁵ JC Smith, “Subjective or objective? Ups and downs of the test of criminal liability in England” (1981-1982) 27 Vill L Rev 1179 at 1204; G Williams, “Intention and recklessness again” (1982) 2 LS 189 at 189-190; G Williams, *Textbook of Criminal Law*, 2nd edn (1983) 97.

²¹⁶ See e.g.: J Hall, *General Principles of Criminal Law*, 2nd edn (1960) 137-139; H Gross, *A Theory of Criminal Justice* (1979) 351.

²¹⁷ A distinction may be drawn between *specific* and *general* deterrence: A Ashworth, *Sentencing and Criminal Justice*, 5th edn (2010) 78-79.

²¹⁸ See: EM Curley, “Excusing rape” (1976) 5 Philosophy and Public Affairs 325 at 345; DC Dennett, *Elbow Room: The Varieties of Free Will worth Wanting* (1984) 142-143.

²¹⁹ “[C]onjectures about deterrence abound” in debates over negligence liability: DN Husak, *Philosophy of Criminal Law* (1985) 132. Although no empirical data is ever presented for this proposition, it has been argued before that punishing negligence would deter potential risk-takers. See: HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 134; SJ Schulhoffer, “Harm and punishment: a critique of the emphasis on the results of conduct in the criminal law” (1974) 122 U Penn L Rev 1497 at 1541; AD Woozley, “Negligence and ignorance” (1978) 53 Philosophy 293 at 301; JM Morris, “The structure of criminal law and deterrence” [1986] Crim LR 524 at 531.

²²⁰ See §1.A(4), above.

²²¹ PW Low, “The Model Penal Code, the common law and mistakes of fact: recklessness, negligence or strict liability?” (1987-1988) 19 Rutgers LJ 539 at 554.

but these can be allayed by limiting punishment to particularly egregious instances of negligence as failure of conduct or belief (again, see below).

Thirdly, there might be concern over using negligence liability too liberally as it relies on the court's estimation of what *sufficient concern* is, which might allow excessive jury/judicial discretion.²²² If this is a real concern, then surely it cuts deeper than negligence liability. As noted above,²²³ even advertent recklessness relies on estimations about the concern that citizens should show to others in considering the risks attendant upon their conduct. If this gives the jury undue discretion, then advertent recklessness liability is also problematic in the criminal context, and nobody makes this argument.

Many of the “policy” arguments that might be raised against the theory in this chapter are thus weak. Of more concern is a final, more principled point: that punishing negligence too zealously would result in an overly intrusive criminal law, which requires citizens to investigate aspects of their conduct at all times to ensure that there are no attendant, unjustifiable risks that (because of their desires) they are failing to form beliefs about. This seems to be the logical conclusion of Gardner's view that – as a “concomitant of their partaking in the life of the planet” – citizens should investigate all possible dangers attendant upon their activities.²²⁴

This proposal is fraught with difficulties.²²⁵ Primarily, it is incompatible with any meaningful conception of individual autonomy.²²⁶ In fact, it would surely stymie (to quite a large extent) personal development. How many citizens would have time for hobbies, leisure activities and other aspects of a “good life” if their lives were spent incessantly testing their beliefs?²²⁷

²²² KW Simons, “Culpability and retributive theory: the problem of criminal negligence” (1994) 5 *Journal of Contemporary Legal Issues* 365 at 377.

²²³ At §5.C(4)(c).

²²⁴ S Gardner, “Recklessness redefined” (1993) 109 *LQR* 21 at 27. See, similarly: S Shute, “Second Law Commission consultation paper on consent: (1) something old, something new, something borrowed: three aspects of the project” [1996] *Crim LR* 684 at 686-688; K Amirthalingam, “*Caldwell* recklessness is dead, long live *mens rea*'s fecklessness” (2004) 67 *MLR* 491 at 500.

²²⁵ See Tadros, *Criminal Responsibility* 246-247.

²²⁶ Cf Pillsbury, “Crimes of indifference” at 127.

²²⁷ T Pickard, “Culpable mistakes and rape: relating *mens rea* to the crime” (1980) 30 *UTLJ* 75 at 88; G Williams, “Recklessness redefined” (1981) 40 *CLJ* 252 at 272; LT Zagzebski, *Virtues of the Mind: An Inquiry Into the Nature of Virtue and the Ethical Foundations of Knowledge* (1996) 154; C Hookway, “Epistemic norms and theoretical deliberation” (1999) 12 *Ratio* 380 at 386; Tadros, *Criminal Responsibility* 248.

Furthermore, there are instances where investigating a risk will be impractical. Consider Tadros's example of a substance which might be poison, but the only way to be sure is to conduct "an expensive ten-year study".²²⁸ Surely a citizen is not duty-bound (in virtue of her citizenship or participant "in the life of the planet") to carry out this study, assuming she had the tools available to do so.

Connectedly, it is possible that being overcautious when carrying out some activities might increase their riskiness.²²⁹ Driving at ten miles per hour might be a display of commendable caution on a blind bend,²³⁰ but adopting the same strategy on a motorway – for fear that driving faster would allow certain desires to prevent the formation of justified beliefs about risk – is likely only to *increase* the risk of a collision.

These objections are all good ones, but the most critical reason for not adopting a duty to investigate all potentially unjustifiable risks at all times is that it would result in many people being punished.²³¹ It would be difficult for citizens – however well meaning – to avoid being culpably negligent. This would dilute substantially the message of the criminal sanction, and cause undue, widespread hardship through punishment.²³²

For all of these reasons,²³³ negligence liability (for failures of conduct *and* belief) should be used *sparingly* in the criminal law. As noted above, negligence as failure of conduct readily suggests limits on criminalisation.²³⁴ Negligence as failure

²²⁸ Tadros, *Criminal Responsibility* 247.

²²⁹ See, similarly, Hookway (n 227) at 385.

²³⁰ Cf HA Prichard, *Moral Writings* (J MacAdam (ed), 2002) 93.

²³¹ Alexander et al, *Crime & Culpability* 71.

²³² AW Mewett, "The shifting basis of criminal law" (1963) 9 McGill LJ 124 at 135; D N Husak, *Overcriminalization: The Limits of the Criminal Law* (2008) 12.

²³³ Tadros further argues that autonomous agents have the *right* not to know about some risks (Tadros, *Criminal Responsibility* 247). He is let down by his example: somebody who has the results of an HIV test in an envelope which she does not open. This person might be exercising autonomy at this stage, but surely if she continues to engage in (unprotected) intercourse with others, it is legitimate to expect her to be appraised of her HIV status if she has gone to the extent of having a test. There is a clash of autonomy here, and it seems to over-privilege one party to hold – on the grounds of *her* individual autonomy – that she should not investigate her HIV status when it is easy for her to do so and the consequences for her sexual partners might be severe. Such ignorance might demonstrate insufficient concern for the interests of others.

²³⁴ See §5.B(4), above.

of belief is more difficult to limit, but the next subsection considers how this might be done.²³⁵

(2) Limiting negligence as failure of belief

The key to limiting negligence as failure of belief is to consider the interests being (inadvertently) put at risk.²³⁶ For instance, citizens could be put under a legal duty to form justified beliefs about whether their conduct endangers unjustifiably²³⁷ interests *x*, *y* or *z*, rather than interests in general.

Identifying interests *x*, *y* and *z* will, naturally, be difficult for any polity. In effect, it must decide which interests are important enough that risks to them must be paid attention to by all citizens at all times. *Some* common ground is, surely, imaginable. For instance, life, bodily integrity and sexual autonomy are sacrosanct in the criminal law.²³⁸ It would therefore appear sensible to start with these interests,²³⁹ making it a crime to – for instance – take an unjustified risk with the life,²⁴⁰ bodily integrity²⁴¹ or sexual autonomy of another through acting on negligently-formed beliefs. It is instructive that Scots and English law arguably possess some of these offences already,²⁴² and some Continental systems contain more wide-ranging offences of negligence.²⁴³

²³⁵ That the two types of negligence are appropriate in different instances confirms Simons' suspicion that the question "whether 'negligence' is an appropriate minimum standard of liability... is ill-formed": KW Simons, "Dimensions of negligence in criminal and tort law" (2002) 3 *Theo Inq L* 283 at 329.

²³⁶ HM Hurd, "What in the world is wrong?" (1994) 5 *J Contemp L Issues* 157 at 198.

²³⁷ Importantly, it is only criminal to *unjustifiably* put interests at risk inadvertently, which speaks to consequentialist reasoning. Without this focus, the law would become a set of deontological imperatives to not, e.g., put life at risk, which seems to prohibit a number of socially-useful activities (e.g. driving). See, further: *ibid*; HM Hurd, "The deontology of negligence" (1996) 76 *BULR* 249 at 261.

²³⁸ Perhaps the interest in life is protected *too* vehemently (consider the debate over euthanasia).

²³⁹ The proposal here is to make it a crime to put these interests at risk through negligently-formed beliefs, rather than simply to put them at risk. The latter proposal is objectionable because of its breadth: CH Schroder, "Rights against risks" (1986) 86 *Colum L Rev* 495 at 519.

²⁴⁰ See, similarly, A Ashworth, "Manslaughter: general or nominate offence?", in CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 235 at 236.

²⁴¹ See, similarly, PH Robinson, *Structure and Function in Criminal Law* (1997) 225.

²⁴² Cf Sexual Offences Act 2003 s 1(1)-(2); Sexual Offences (Scotland) Act 2009 ss 1, 16.

²⁴³ See the discussion of French law's approach to negligently-caused death and personal injury in JR Spencer and M Brajeux, "Criminal liability for negligence – a lesson from across the Channel?" (2010) 59 *ICLQ* 1.

Beyond these cases, the situation seems less clear. Consider property – another important interest in the criminal law. Should it be a crime to inadvertently put property at unjustifiable risk of damage or destruction? Intuitively, the answer might appear to be yes, but there is reason for deeper inquiry.²⁴⁴ Are risks to *all* property serious enough to be investigated by citizens when engaging in *any* activity? The answer will surely depend on the property: consider the negligent burning of a copy of Heat magazine as opposed to the negligent burning of the Mona Lisa.

The question thus becomes which factors are relevant to discovering whether a piece of property is important enough to be protected from negligently-caused damage. A number of factors might be imagined: cost, purpose, uniqueness, sentimental attachment, etc. However easy it is to imagine these criteria, it is clear that they would be impractical. Consider cost: if it were a crime to inadvertently (and without justification) put property of a value above £1000 at risk, it might be difficult for a non-expert citizen to assess whether she should stop and form a belief about the riskiness of her actions, and attempt to engage in doxastic self-control if necessary. She would have to do an investigation into monetary value *prior to* her risk investigation, which sounds even *more* burdensome and potentially illiberal.²⁴⁵ Furthermore, given the difficulty of predicting accurately the financial worth of an item of property (Is *that* television worth over £1000?), it is possible that virtually all mistakes would be “reasonable” and this would presumably negate any finding of culpability.²⁴⁶

For these reasons, it is submitted that *criminal* negligence liability would be inappropriate in cases of property damage or destruction.²⁴⁷ If a legal remedy is to be available, it should be extracted via the civil courts or insurance.²⁴⁸

²⁴⁴ Cf L Katz, “Harm and justification in negligence” (2003) 4 Theo Inq L 397 at 407.

²⁴⁵ Note that the envisaged crime is to take a risk with property over a certain value. If it were also a crime to take a risk that the property in danger was over a certain value, this would capture actors who make unreasonable mistakes about monetary value.

²⁴⁶ If reasonable mistakes did not negate culpability, it is unclear what purpose punishment would be serving, other than compensation – the hallmark of (corrective justice conceptions of) the civil law.

²⁴⁷ Cf Simons (n 235) at 293. One possible exception might be where property damage negligently endangers life or bodily integrity, but this would be caught under the measures envisaged above.

²⁴⁸ It is assumed that the criminal law does not exist solely for when compensation is unavailable. Cf R Posner, “An economic theory of the criminal law” (1985) 85 Colum L Rev 1193 at 1204-1205.

It is possible, through debates such as these, to limit the impact of negligence as failure of belief on the criminal law. This is, however, a question of criminalisation, rather than of culpability. This demonstrates that issues of culpability and criminalisation cannot be considered in isolation. Not all culpable negligence ought to be criminal, and the debate sketched immediately above shows the process by which the polity should decide where to draw the line.

E. CONCLUSION

This chapter has outlined two forms of culpable negligence and sketched an answer to the question of when a display of negligence should result in a criminal conviction. This has crossed the boundary between criminalisation and culpability, indicating that – at least in the context of culpable carelessness – these two topics cannot exist entirely separately. When understood in terms of insufficient concern for the interests of others, culpability is – after all – capable of being deployed in a variety of contexts. All kinds of actions demonstrate insufficient concern for the interests of others, but are not criminal (consider barging in front of others in a queue).²⁴⁹

The only limit on outright legal moralism (understood as the prosecution and punishment of all culpable actors)²⁵⁰ is to require that the accused demonstrated a *serious* lack of concern for the interests of others, and classify the specific interests which the polity declares²⁵¹ it would be “publicly wrong” to put at inadvertent, unjustified risk.²⁵² In the context of negligence as failure of conduct, these limits are defined by the voluntary decision to enter a regulated sphere of activity; in

²⁴⁹ This, it is submitted, accounts for Tadros’s unwillingness to define clearly the “moral vices” (vices which demonstrate insufficient concern for others). See: Tadros, *Criminal Responsibility* 86-89, 252-254; M Plaxton, “Review of Victor Tadros, *Criminal Responsibility*” (2007) 1 *Crim Law & Philos* 223 at 226. For this reason, the thesis prefers to rely simply on the notion of insufficient concern itself. This standard has rarely been developed in criminal law theory, but for a sketch of its possible meanings, see KW Simons, “Retributivism refined – or run amok?” (2010) 77 *U Chi L Rev* 551 at 556-558.

²⁵⁰ Admittedly, this is a caricature of legal moralism.

²⁵¹ The language of declaration is preferred over the language of “prohibition”, for the reasons explained in RA Duff, “Crime, prohibition and punishment” (2002) 19 *Journal of Applied Philosophy* 97.

²⁵² See §1.A(3), above.

negligence as failure of belief, they must be set by the polity in defining its public wrongs. When these limits are respected, there is nothing “unethical”²⁵³ about criminal liability for negligence.

Negligence will now be left to one side. The next chapter explains the element of culpability in recklessness.

²⁵³ J Hall, “Negligent behaviour should be excluded from criminal liability” (1963) 63 Colum L Rev 632 at 634.

6 Reconsidering Recklessness

This chapter presents a non-choice-based conception of recklessness. Section A examines a popular approach to reconceptualising “subjective” recklessness which concentrates on the accused’s attitude of indifference towards (rather than her conscious choices concerning)¹ risk. The various “indifference theories” – which count at least *some* inadvertent risk-takers as reckless – have weaknesses, making them unsuitable as theoretical explanations of recklessness. Section B thus takes a different tack, and presents a belief-centred account of recklessness. In common with indifference theories, this approach considers the accused’s attitude (of insufficient concern) towards her beliefs in risk and the interests threatened by her actions. It nevertheless avoids the problems exposed in section A, making it a preferable account of recklessness.

To demonstrate the coherence of the theory of culpable carelessness developed in this thesis, the chapter then explains the connections and distinctions between negligence as failure of belief and recklessness.² Thereafter, Section C examines how recklessness and negligence as failure of belief interact with other *mens rea* terms such as wilful blindness, knowledge and intention.

A. INDIFFERENCE THEORIES

Indifference theories of recklessness possess alleged explanatory appeal: as seen in chapters two and three, the language of indifference has occasionally appeared in directions on recklessness in Scots³ and English criminal law.⁴ It has also been

¹ Cf §6.A(3), below.

² As explained in ch 5, negligence as failure of conduct is a special case. It is thus largely ignored in this chapter.

³ See §2.D(2), above.

⁴ See §3.C(2), above.

employed in other jurisdictions, such as Australia.⁵ Indifference theories might therefore be thought superior to the choice theories discussed in chapter four when explaining theory *and* doctrine. This part of the chapter undermines that view by pointing out the shortcomings of various indifference theories.

Before this examination can begin, three general points should be made.

(1) General points

First, indifference theories are rarely labelled accurately. To be indifferent is to have “no particular interest or sympathy”; to be “unconcerned”.⁶ Most indifference theorists do not in fact require that the actor was utterly unconcerned with the interests she put at risk.⁷ Rather, they tend to focus on actors who do not care *enough* about the interests of others.⁸ Simons, for instance, is concerned with “whether the actor cared much less than he should about bringing about a harmful result”;⁹ Pillsbury with the vice of “not caring enough”.¹⁰ Of the indifference theorists discussed below, perhaps¹¹ only Duff talks truly of indifference – of actors who “cared nothing for” the consequences of their actions.¹²

Given this lack of fit between label and theory, Tadros suggests that most indifference theorists are actually interested in culpability in general; in actors who

⁵ See: D Lanham, “Murder, recklessness and grievous bodily harm” (1978) 2 Crim LJ 255 at 263-265; I Leader-Elliott, “Recklessness and moral desiccation in the Australian law of murder”, in J Horder (ed), *Homicide Law in Comparative Perspective* (2007) 143.

⁶ See http://oxforddictionaries.com/view/entry/m_en_gb0407440#m_en_gb0407440.

⁷ WJ Winslade, “Recklessness” (1970) *Analysis* 135 at 136; JB Brady, “Recklessness” (1996) 15 *Law & Phil* 183 at 190-191.

⁸ See Winslade (n 7). Accepting this point allows most indifference theorists to explain cases where the actor took an acknowledged risk, whilst apparently caring *somewhat* about whether harm resulted or not. See PJ Fitzgerald and G Williams, “Carelessness, indifference and recklessness: two replies” (1962) 25 *MLR* 49 at 54-55. Cf JB Brady, “Recklessness, negligence, indifference and awareness” (1980) 43 *MLR* 381 at 387-388.

⁹ KW Simons, “Culpability and retributive theory: the problem of criminal negligence” (1994) 5 *J Contemp Legal Issues* 365 at 390. See also: KW Simons, “Rethinking mental states” (1992) 72 *BUL Rev* 273 at 487; KW Simons, “Does punishment for ‘culpable indifference’ simply punish for ‘bad character’? Examining the requisite connection between *mens rea* and *actus reus*” (2002-2003) 6 *Buff Crim L Rev* 219 at 226.

¹⁰ Pillsbury, “Crimes of indifference” at 107.

¹¹ Horder’s “strongly indifferent” actors might be utterly unconcerned with risk, but this is far from clear: as explained below, “strongly indifferent” actors fail to show *adequate respect* to “agent-neutral” values. This surely allows an actor to be “strongly indifferent” through not caring *enough*.

¹² Duff, *IACL* 163 (though see R A Duff, “Recklessness” [1980] *Crim LR* 282 at 284). See, further, AR White, “Carelessness, indifference and recklessness” (1961) 24 *MLR* 592.

show “insufficient difference” to the interests of others.¹³ Although an improvement, Tadros’s term still does not capture accurately the wrong with which indifference theorists are concerned. They deal with actors who show insufficient concern for others in a particular way, through their specific attitude towards the risks (and the associated circumstances and consequences) attendant upon their conduct. No logical shorthand presents itself,¹⁴ and so “indifference theorists” will continue to be used in this chapter. The point is that – absent the caveat presented here – this label might mislead.

Secondly, the indifference theorists discussed here¹⁵ do not all aim to explain recklessness: Horder views indifference as the mark of “gross” negligence;¹⁶ Pillsbury is equivocal on the recklessness/negligence issue;¹⁷ and Simons claims that – as the criminal law’s traditional *mens rea* categories (including recklessness and negligence) are “seriously inadequate” – indifference should be understood as a completely new aspect of culpability.¹⁸ Only Duff aims at explaining recklessness, as distinct from negligence.¹⁹

It might, then, be wondered why indifference theories are being considered only in the context of recklessness. The answer is that the account of culpable negligence offered in chapter five is envisaged as being the most defensible one available. Horder’s attempt to explain “gross” negligence in terms of indifference is less compelling in comparison, and his theory will consequently be dealt with as though it concerned recklessness.²⁰ Furthermore, it is assumed that existing *mens rea* terms can continue to do useful work if their attitudinal and desire-based elements

¹³ Tadros, *Criminal Responsibility* 259 (n 24).

¹⁴ Cf the clunky “insufficient moral aversion” label alluded to in KK Ferzan, “Don’t abandon the Model Penal Code yet! Thinking through Simons’s rethinking” (2002-2003) 6 *Buff Crim L Rev* 185 at 214.

¹⁵ Some indifference theories are not discussed here because they are either undeveloped (e.g. B Mitchell, “Culpably indifferent murder” (1996) 25 *Anglo-American L Rev* 64) or insufficiently distinct from the other theories discussed here (e.g. White’s theory, mentioned in various footnotes below).

¹⁶ Horder, “Gross negligence”. See, similarly, HW Edgerton, “Negligence, inadvertence and indifference: the relation of mental states to negligence” (1925-1926) 39 *Harv LR* 849.

¹⁷ Pillsbury, “Crimes of indifference” at 106.

¹⁸ KW Simons, “Culpability and retributive theory: the problem of criminal negligence” (1994) 5 *J Contemp Legal Issues* 365 at 371.

¹⁹ Duff, *IACL* ch 7.

²⁰ It is doubtful that Horder would object to this, given the doctrinal confusion over “gross” negligence and recklessness in the law on manslaughter (the subject of his article). See §3.D, above.

are emphasised. Pillsbury and Simons' attempts to avoid or explode the existing *mens rea* hierarchy can thus be ignored.

Thirdly, some indifference theories are relations of the choice theories discussed in chapter four. Pillsbury, for instance, is concerned with conscious choices pertaining to perception and what these demonstrate about the accused's attitude to others' interests. This feature of his theory reinforces the point that "bright lines" between the theories of culpable carelessness discussed in this thesis are difficult – if not impossible – to maintain.²¹

Now these preliminary points have been made, attention will be turned to substantive indifference theories. As noted already, these differ in approach and will accordingly be dealt with in stages.

(2) Horder and Simons: counterfactual scenarios

It is helpful to consider Horder and Simons' arguments together, as they adopt a similar approach to identifying culpable indifference.²² Both focus upon how the inadvertent accused would have reacted to risk if, at the time of acting, she *had been aware* of its existence.

(a) Horder's "strong" and "weak" indifference

Horder's account of indifference is – like his theory of negligent conduct²³ – built on Razian foundations.²⁴ He begins by exploring the distinction between "agent-relative" and "agent-neutral" values, and their impact upon practical reasoning.²⁵ Raz explains that everybody has reason to respect agent-neutral values when deciding what to do; they ought *always* to count in practical reasoning.²⁶ Agent-relative

²¹ See, similarly, J Horder, "Criminal culpability: the possibility of a general theory" (1993) 12 Law & Phil 193.

²² See, also, A Micheals, "Acceptance: the missing mental state" (1997-1998) 71 S Cal L Rev 953.

²³ See §5.B, above.

²⁴ J Raz, *Practical Reason and Norms* (revised edn, 1990) 34.

²⁵ Horder, "Gross negligence" at 502. Raz calls agent-neutral values "objective", but Horder recognises that employing this term would be confusing in the context of culpable carelessness (ibid at 501 (n 31)). Cf §1.D(1), above.

²⁶ Raz, *Practical Reason* (n 24) 34.

values, by contrast, need only be respected by the person who holds them.²⁷ This means that agents may ignore the agent-relative values of others in deciding what to do.

Holder thinks this distinction is important because indifferent actors will, contrary to what Raz's morality requires, place their agent-relative values ahead of the agent-neutral values of others. To make this less abstract, it is useful to consider an example. In *Transco plc v HM Advocate*,²⁸ the accused company had failed to maintain a gas supply to a house, resulting in an explosion which killed a family, the Findlays. Assume, for the moment, that this failure occurred because it would have harmed Transco's profits to check the supply as often as would be ideal. This profiteering would seem an agent-relative value: only Transco (i.e. its management and employees) had reason to promote the making of as much profit as possible. It was not the case that *everybody* had reason to promote Transco's profit-making enterprise when considering what to do.

The interests of the Findlay family in life were, by contrast, agent-neutral values. Everybody has reason to promote the interests of others in life, and to place this interest above their own, self-centred values.²⁹ Transco's management, in the counterfactual turn of events proposed here, appears to have confused this situation, and put an agent-relative value (profit) above the agent-neutral values involved in their activities (the lives of the Findlays and other people whose gas supplies were maintained by Transco).

What matters, for Holder, is what would have happened had this fact been pointed out to Transco's management. The company's board might have been persuaded to change the company's policies, accepting that the business *had* – as a point of morality – to be less profitable. This would reflect a proper recognition of the agent-neutral values at stake and show Transco plc's management to be, in Holder's terms, "weakly indifferent".³⁰ They had failed to react according to the

²⁷ Ibid. Persons other than the agent may, of course, promote her agent-relative values (consider family members supporting and furthering one another's interests).

²⁸ 2004 JC 29.

²⁹ There are difficult questions concerning how far this interest should be promoted, as the discourses around alleviating poverty and assisted dying demonstrate. These cannot be resolved here.

³⁰ Holder, "Gross negligence" at 502.

reasons that bore upon them, but would have corrected that error had it been pointed out to them.

Weakly indifferent actors can be contrasted with “strongly indifferent” ones.³¹ Horder explains that:³²

The strongly indifferent person is not swayed by agent-neutral values, such as the victim’s interests, but is moved only by his own agent-relative values... like the weakly indifferent person, the strongly indifferent person is usually too obsessed by his agent-relative values to appreciate the existence of the agent-neutral values at stake... But, even if the strongly indifferent person discovers agent-neutral values giving rise to reasons not to act on his agent-relative values, they make no difference to his practical reasoning.

In short, the strongly indifferent actor would not have been persuaded to act differently if she had been consciously aware of the risks attendant upon her conduct. She was both ignorant *and* indifferent,³³ a person who – if aware of the interests that she threatened – would view them as obstacles to getting what she wanted rather than reasons worthy of respect.³⁴ In consequence, if Transco’s management had been strongly indifferent, they would not have endeavoured to check the gas supply more frequently, even if consciously aware of the significant risk that this posed to the lives of others.

Horder concludes that “gross” negligence in manslaughter³⁵ should be understood as strong indifference: to convict, the court should be convinced that the actor would have acted in the same way even if she had been aware of the risk of death.³⁶

³¹ See D Ruimschotel, “The psychological reality of intentional and negligent criminal acts”, in PJ van Koppen, DJ Hessing and G van den Heuvel (eds), *Lawyers on Psychology and Psychologists on Law* (1988) 83. Ruimschotel distinguishes between knowledge (weak indifference) and value (strong indifference) deficits. For further use of this distinction, see: Mitchell (n 15) at 72-78; C Wells, *Corporations and Criminal Responsibility*, 2nd edn (2001) 116-117.

³² Horder, “Gross negligence” at 503.

³³ It might be objected that Horder (and Simons) fails to tie culpable indifference and the accused’s ignorance concerning risk to her act of wrongdoing. This might give rise to a “significance in action problem”. On such problems, see §5.C(4)(a), above. Some suggest that ignorance must arise *through* indifference for the accused to be culpable (e.g. RA Duff, “*Caldwell and Lawrence: the retreat from subjectivism*” (1983) 3 OJLS 77 at 97). This avoids the “significance in action” difficulty.

³⁴ See, similarly, J Kennett, *Agency and Responsibility: A Common-Sense Moral Psychology* (2001) 179-180.

³⁵ See §3.D(2), above. Horder is equivocal on whether his indifference theory applies to other contexts.

³⁶ Horder, “Gross negligence” at 504.

(b) Simons' "culpable indifference"

Simons also believes that the indifferent actor is culpable, even if she was not consciously aware of the risks she was taking.³⁷ He does not rely on Raz, but instead seeks to distinguish amongst "the different cognitive (belief-related), conative (desire-related), and conduct-related senses of both negligence and recklessness".³⁸ He identifies "culpable indifference"³⁹ as the conative state which best explains blameworthy inadvertence. This:⁴⁰

[I]s often described as a form of recklessness (though it could also be categorized as a form of negligence). An actor who is culpably indifferent to a harmful result neither desires the result nor desires to avoid it. Rather, she cares much less than she should about bringing it about. This... attitude could genuinely be described as "unreasonable" or "negligent", since it is explicitly linked to the attitudes and desires that a reasonable person would have.

This riddle-like explanation of culpable indifference is not particularly helpful, and Simons complicates matters by suggesting that indifference can be present in *both* recklessness and negligence. The distinction between these two types of indifference is, apparently, that the former "is a more aggravated degree of blameworthy indifference".⁴¹ This was not edifying in distinguishing civil and criminal negligence,⁴² and it is scarcely more helpful in discerning Simons' thoughts concerning culpable carelessness.

Simons might reply that the line between negligence and recklessness is unimportant. After all, he argues that traditional *mens rea* categories are misconceived.⁴³ Accepting this point, for now,⁴⁴ it becomes clear that Simons believes – in common with Horder – that culpability is present where the accused's conduct demonstrates "that he would not have avoided the risk even if he had

³⁷ Simons thinks he is following Duff: KW Simons, "Culpability and retributive theory: the problem of criminal negligence" (1994) 5 J Contemp Legal Issues 365 at 370. Their theories are, however, distinct.

³⁸ *Ibid* at 366.

³⁹ Simons initially distinguished three forms of reckless indifference: KW Simons, "Rethinking mental states" (1992) 72 BUL Rev 463 at 486-487.

⁴⁰ *Ibid* at 377-378.

⁴¹ *Ibid* at 378.

⁴² See §2.B, above. Cf KW Simons, "Deontology, negligence, tort and crime" (1996) 76 BULR 273.

⁴³ See n 18, above.

⁴⁴ Cf §6.B(4), below.

appreciated it”.⁴⁵ This “callous insensitivity”⁴⁶ to the interests of others seems synonymous with “strong” indifference.

Now that the theory underlying Horder and Simons’ counterfactual approach to culpable indifference has been explained, its shortcomings can be considered.

(c) Criticisms

First, there is room for significant epistemic doubt concerning what the accused might have done *had she* been aware of the risks involved in her conduct.⁴⁷ Consider Simons’ example of a babysitter who “departs the children’s house for her boyfriend’s as soon as the parents have left”.⁴⁸ Simons contends that the babysitter’s “willingness to abandon the children entirely may suggest that, had she been present in the house and heard noises calling for further inquiry and action, she would not have inquired further”.⁴⁹ The operative word in this sentence is surely “may” – with these bare facts, there is no reliable basis upon which to infer what the babysitter would have done had she been aware of indicators that the children might, for instance, have fallen and injured themselves. Her irresponsible attitude might stem from naive overconfidence in the maturity of the children left in her care, rather than indifference towards their welfare. There is therefore, in one of Simons’ few concrete examples of culpable indifference, little upon which to hang culpability. The same difficulty infects Horder’s account, though (perhaps tellingly) he provides fewer concrete examples of “strong” indifference.

The obvious reply is that mental states are almost always evidenced in epistemologically-questionable ways.⁵⁰ A jury might interpret conduct as pointing towards awareness of a risk, when features of the situation, of which the jury cannot be certain (perhaps the accused’s own memory), point to the opposite conclusion.

⁴⁵ Simons (n 37) at 381.

⁴⁶ *Ibid.*

⁴⁷ AJP Kenny, *Freewill and Responsibility* (1978) 62; L Alexander, “Inculpatory and exculpatory mistakes and the fact/law distinction: an essay in memory of Myke Bayles” (1993) 12 *Law & Phil* 33 at 63; AP Simester, “Can negligence be culpable?”, in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 85 at 89; KK Ferzan, “Don’t abandon the Model Penal Code yet! Thinking through Simons’s rethinking” (2002-2003) 6 *Buff Crim L Rev* 185 at 212.

⁴⁸ Simons (n 37) at 381.

⁴⁹ *Ibid.*

⁵⁰ See: B Mitchell, “Culpably indifferent murder” (1996) 25 *Anglo-American L Rev* 64 at 81-82; C Crosby, “Recklessness – the continuing search for a definition” (2008) 72 *J Crim L* 313 at 325.

Unless the jury is told (honestly) of *all* features of a situation – if this is even possible – their verdict is always going to be epistemologically imperfect. The means by which juries reach verdicts are, however, accepted as appropriate in matters of criminal justice. The bare presence of epistemic doubt cannot, therefore, undermine Horder and Simons’ theories. It is nevertheless clear that there are *greater* epistemological difficulties involved in conducting counterfactual enquiries than there are in interpreting factual behaviour, and that Horder and Simons would presumably need to propose changes to the law of evidence for their theory to work properly in practice.⁵¹ They do not.⁵²

A second difficulty is that it is unclear *why* the criminal courts should be involved in inquiries into what the actor would have done had the circumstances been different. The nature of this objection becomes clear through consideration of an example. In asking whether the accused in *Cameron v Maguire*⁵³ might have acted more carefully, it could be asked whether he in fact had the background knowledge of the risks involved in his action, the relevant perceptive information to prompt recall of that knowledge, and the opportunity to consequently form a new belief concerning risk.⁵⁴ This is relatively straightforward compared to asking what Cameron might have done had the weather conditions been different; or a walker wearing a high-visibility jacket had been nearby (perhaps waving and shouting a warning); or an officious bystander had asked Cameron to reflect further on what he was doing; and so on. Such pure speculation about what might have been is inappropriate in the context of a criminal trial: citizens should be called to account for what they *do*, and their *actual* capacities, beliefs and (accepted) desires at the time of acting, rather than what they might have done, been capable of, believed or

⁵¹ G Williams, “A reply to Mr Duff” (1982) 41 CLJ 286 at 287-288; DJ Birch, “The foresight saga: the biggest mistake of all?” [1988] Crim LR 4 at 13.

⁵² With regard to Horder’s thesis, changes to the law on bad character evidence in England might allow the prosecution to adduce evidence to show that, even if the defendant had been aware of risk, she would have carried on regardless: Criminal Justice Act 2003 s 101; Crosby (n 50) at 325. The Scottish Law Commission is presently considering changes to the law of bad character evidence in Scotland: Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine (Scot Law Com DP No 145, 2010).

⁵³ 1999 JC 63.

⁵⁴ See §5.C(1)(b), above.

desired.⁵⁵ Otherwise, the criminal inquiry risks becoming an unreal journey into pure fiction, rather than a personalised assessment of wrongdoing and blameworthiness.

A third, connected, concern is raised by Ferzan: if hypothetical inquiries into what the actor would have done were she aware of risk are worthwhile, why stop there?⁵⁶ Why not ask what Cameron would have done had he not only been aware that a person was walking in the woods, but that it was his enemy and there were unlikely to be any witnesses around? In this alternative universe, Cameron might have *intended* to kill when he fired his rifle.

Other than an intuitively sensible desire to keep as close to reality as possible when speculating about what might have been,⁵⁷ nothing in Horder or Simons' theories prevents the rampant supposition that Ferzan envisages. Given these concerns, it seems epistemologically safer – and normatively more appropriate – to return to a more definite, personal inquiry into culpable indifference. This is the approach taken by Pillsbury, whose theory will now be analysed.

(3) Pillsbury's perception choices

Pillsbury aims to dispel the “moral magic” of awareness in contemporary debates concerning culpable carelessness.⁵⁸ He starts by considering the limits on perception that are imposed upon human beings. It is obvious that human beings cannot consciously perceive every aspect of their situation. This is primarily because of the limitations of the sensory organs:⁵⁹ without technology, for instance, it is impossible to see further than eyesight allows.

It would be wrong, Pillsbury contends, to think that these physiological features of perception set boundaries on culpability; that all failures to consciously perceive an aspect of a situation are accidents of biology and thus not an instantiation of agency. Instead, he notes that “the gathering and selecting of relevant information represents an affirmative mental activity. Information processing is something we *do*,

⁵⁵ See, similarly, A Brudner, *Punishment & Freedom: A Liberal Theory of Penal Justice* (2009) 96.

⁵⁶ Ferzan, “Opaque recklessness” at 622-623.

⁵⁷ See L Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (1987) 232-233.

⁵⁸ Pillsbury, “Crimes of indifference” at 141. See, also, SH Pillsbury, *Judging Evil: Rethinking the Law on Murder and Manslaughter* (1998) ch 9. For a philosophical account which shares Pillsbury's ambitions (but not his approach), see G Sher, *Who Knew? Responsibility without Awareness* (2009).

⁵⁹ Pillsbury, “Crimes of indifference” at 142.

not something that is *done* to us.”⁶⁰ By this, Pillsbury is appealing to the idea that, even given their limitations, the sensory organs take in far more information than can be appraised consciously. He explains that the filtering of information is thus necessary to avoid becoming overwhelmed, and argues that this is a “learned activity”.⁶¹ Human beings avoid clouding their conscious mind with sensory information by making “decisions about what to hear or see and what to ignore”.⁶²

For Pillsbury, these perception choices apparently “follow our interests”,⁶³ they reflect what the chooser cares about.⁶⁴

A kind, sensitive person is kind and sensitive because she places a high priority on addressing the needs of others... Callous individuals set a low priority on respecting others’ needs, explaining why they may consciously disregard the harmful consequences of their actions...

By drawing these connections between perception, value and agency, Pillsbury is able to explain culpable indifference. He contends that blame is appropriate where the accused’s perception choices show indifference towards (or insufficient concern for)⁶⁵ the interests of others.⁶⁶ In such circumstances, the accused is blamed not for her eventual inadvertence, but for her prior *choices* about what to perceive and what these demonstrate about her values.⁶⁷ Pillsbury’s account of culpable indifference is thus another example of a choice-based theory which attempts to accommodate inadvertent risk-taking by pointing to decisions made *prior* to the act of wrongdoing.⁶⁸ This type of theory was rejected in chapter four, and Pillsbury’s view is susceptible to the same criticisms.

⁶⁰ Ibid at 143. See, further, JR Searle, *Mind: A Brief Introduction* (2004) 179.

⁶¹ Pillsbury, “Crimes of indifference” at 143. See, similarly, H Gross, *A Theory of Criminal Justice* (1979) 92.

⁶² Pillsbury, “Crimes of indifference” at 144. See, also, DC Dennett, *Consciousness Explained* (1991) 308.

⁶³ Pillsbury, “Crimes of indifference” at 144.

⁶⁴ Ibid at 151. See, similarly, the text accompanying n 99, below.

⁶⁵ See the text accompanying n 10, above.

⁶⁶ Pillsbury, “Crimes of indifference” at 151.

⁶⁷ Ibid.

⁶⁸ See §4.C, above.

(a) Criticisms

The first problem is that – as Pillsbury accepts – not all perception preferences are chosen by the agent.⁶⁹ It might be a person's genetics or environment (rather than her values) which determine what she pays (and does not pay) attention to. This raises the spectre of determinism, and suggests that accused persons will be adjudged responsible, culpable and liable when they could not have done otherwise than they did. As assumed consistently throughout this thesis, such absences of control seem fatal to any meaningful conception of criminal culpability. Worryingly, Pillsbury does not appear to view this deterministic slant as a problem for his theory.⁷⁰ It nevertheless undermines severely the plausibility of his thesis.⁷¹

Other criticisms are perhaps less damaging, but still make Pillsbury's view on indifference look unworkable. In his examples of culpable perception choices, Pillsbury tends to concentrate on actors who decide not to perceive certain matters almost immediately before acting.⁷² This might be telling: if a choice to not perceive a certain fact is made immediately before inadvertence takes hold, then responsibility for inadvertence, and any attendant finding of culpability, seems relatively straightforward. The situation becomes complicated when the perception choice was made hours, days or even years before the relevant act of inadvertent, unjustified risk-taking. This problem of linking historical choices (and attendant attitudes) to future inadvertence – which dogged choice and character theory⁷³ – is not dealt with by Pillsbury, but it poses significant difficulties for his account. Without showing a meaningful connection between historical perception choices and contemporary unjustified risk-taking, it seems that his indifference theory explains only a small percentage of cases.

Another (by now familiar) problem concerns the nature of perception choices themselves. Pillsbury is clear that such choices need not be made consciously⁷⁴ (again raising concerns over control), but – if they are – what exactly does the actor

⁶⁹ Pillsbury, "Crimes of indifference" at 151.

⁷⁰ *Ibid.*

⁷¹ Ferzan, "Opaque recklessness" at 640.

⁷² See e.g. Pillsbury, "Crimes of indifference" at 151-152.

⁷³ See §4.C(2), above.

⁷⁴ Pillsbury, "Crimes of indifference" at 151.

have to *choose* in order to demonstrate her culpable indifference?⁷⁵ Does the choice have to be specific (such as the choice to never perceive the signs of non-consent in a sexual partner), or more general (such as the choice to not perceive social signs in others)?

Pillsbury does not reach a settled view on this issue. At points, he suggests that culpable indifference must relate to a specific interest – such as the signs of non-consent in sex, rather than simply social signs generally.⁷⁶ If this *is* the case, then Pillsbury’s account seems to encounter difficulties. The question is whether many alleged rapists can be said to have *consciously chosen*, during their character development, not to perceive the signs of non-consent to the extent that these fail to register with them at all at a later time.⁷⁷ Is it not more likely that no such conscious choice is made, and that it is rather the accused’s indifferent *attitude*, divorced from conscious choices, that prevents such signs from registering properly with him?⁷⁸

Even if a specific perception choice is made, Pillsbury does not give an adequate account of why such actors are indifferent, as opposed to advertently reckless (i.e. consciously aware of the unjustified risk that the other person is not going to consent, and choosing to disregard it) or wilfully blind (i.e. consciously aware of the significant likelihood of non-consent, but – for self-interested reasons – not taking steps to confirm or deny that suspicion).⁷⁹ In other words, Pillsbury’s indifference theory seems to unnecessarily complicate matters which seem relatively straightforward.

Finally, in order for the accused to be blameworthy for her inadvertence, surely a *culpable* perception choice is required.⁸⁰ Ferzan points out that this element of culpability might be absent in the majority of perception choices: “[w]hen an actor learns to be selfish, to what extent does he appreciate that he might cause future

⁷⁵ See, further, Ferzan, “Opaque recklessness” at 639.

⁷⁶ Pillsbury, “Crimes of indifference” at 171-173.

⁷⁷ See, similarly: Alexander et al, *Crime & Culpability* 57; Sher, *Who Knew?* (n 58) 25. Note that this objection relates to choices made some time before the relevant act of risk-taking takes place. If Pillsbury means to concentrate on actors who choose not to perceive aspects of a specific situation, then his theory is more acceptable, but it is then unclear how indifference is different from wilful blindness.

⁷⁸ Compare the discussion of “negligent rape”, above (at §5.C(1)(b)) and Duff’s account of “reckless rape”, below (at §6.A(4)(c)).

⁷⁹ See §6.C(1), below.

⁸⁰ G Sher, *Who Knew?* (n 58) 37.

harm?”⁸¹ The answer, it is assumed, is rarely.⁸² This makes Pillsbury’s account seem weaker still: only exceptional cases of inadvertent risk-taking are going to be caught by his expanded choice-based view of culpability, raising questions about the wisdom of bothering about “reckless” indifference (as he conceives of it).

For these reasons, it is sensible to leave Pillsbury’s account behind and move to consider Duff’s more defensible account of “practical indifference”.

(4) Duff’s practical indifference

Duff’s account of recklessness⁸³ does not suffer from the difficulties identified above. This is because Duff does not (unlike Horder and Simons) rely upon counterfactual estimations about fault or (unlike Pillsbury) historical, conscious choices to perceive or ignore risks. Instead, he builds his account on the basis of actions and what these reveal about the actor’s knowledge of, and attitude towards, risk. This means rejecting the philosophical school of “dualism” and adopting a fresh view of culpable action.

(a) Dualism and “subjectivism”

It is necessary to consider Duff’s objections to dualism, as these explain his position on recklessness. Dualism is the belief “that human beings consist of two distinct elements: a physical body, which occupies and moves in space, and a non-physical mind, which thinks and feels”.⁸⁴ It holds that the only way for an external observer to ascertain the content of another’s intentions or attitudes is to observe her physical actions, in their context, and make inferences *back to* the mental processes that accompanied them. For instance, if Duncan hits Allan, it might be inferred from Duncan’s actions that he had the attendant psychological experience of the intention to hit Allan or, alternatively (if the circumstances suggest it), that the “punch” was an

⁸¹ Ferzan, “Opaque recklessness” at 640.

⁸² Compare M Vargas, “The trouble with tracing” (2005) 29 *Midwest Studies in Philosophy* 269 with JM Fischer and NA Tognazzini, “The truth about tracing” (2009) 43 *Noûs* 531.

⁸³ See, most comprehensively, Duff, *IACL* ch 7. For earlier versions of Duff’s theory, see his: “Recklessness” [1980] *Crim LR* 282; “Recklessness and rape” (1981) 3 *Liverpool L Rev* 49; “Professor Williams and conditional subjectivism” (1982) 41 *CLJ* 273; “*Caldwell* and *Lawrence*: the retreat from subjectivism” (1983) 3 *OJLS* 77.

⁸⁴ Duff, *IACL* 116.

accidental movement or an involuntary spasm, unaccompanied by mental deliberation.⁸⁵

This dualist approach to intentionality and action has clearly influenced the criminal trial in Scotland and England: the judge or jury are asked to draw inferences from conduct (*actus reus*) and other “objective” evidence to ascertain the “subjective” thoughts (*mens rea*) accompanying the accused’s actions (or the lack thereof).⁸⁶ Despite its pervasiveness in the practice of criminal law, Duff thinks that dualism is a “deeply mistaken doctrine”.⁸⁷ This is a problem for most “subjectivists”, as Duff sees their theories as dualist.⁸⁸

Duff’s main difficulty with dualism (and therefore “subjectivism”) is that he believes there is more to discovering a person’s attitudes and intentions than asking what thoughts happen to go (or not go) through her head at the time of acting. The external observer should thus not understand her role as trying to uncover a “hidden mental realm to which only the agent has direct access”.⁸⁹ Instead, inferences should be drawn “from the actions, or aspects of action, which we observe, to the broader patterns of meaning of which they are part”.⁹⁰ On this view, an actor’s intentions are revealed as much through her actions, in their context, as through her occurrent mental states.⁹¹ It does not therefore matter whether, in the example above, Duncan thought “I intend to hit Allan” when he threw the punch. The context of the action (in a crowded bar, following the spilling of Duncan’s drink) might reveal that intention, even if it did not figure in Duncan’s conscious deliberations over his conduct.

This point about dualism and intentional action is taken forward by Duff into the context of risk-taking. In deciding whether a person was culpable for taking an unjustified risk, Duff suggests that the question should not – as “subjectivists” have it – be simply whether the accused adverted, consciously, to the risk.⁹² Instead, the

⁸⁵ See GH Gordon, “Subjective and objective *mens rea*” (1974-1975) 17 Crim LQ 355 at 359-361.

⁸⁶ AW Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (2000) 133.

⁸⁷ Duff, *IACL* 119. See, further, E Fruchtmann, “Recklessness and the limits of *mens rea*: beyond orthodox subjectivism” (1986-1987) 29 Crim LQ 315, 421 at 323.

⁸⁸ Duff, *IACL* 159.

⁸⁹ *Ibid* 131.

⁹⁰ *Ibid*.

⁹¹ See, similarly: H Oberdiek, “Intention and foresight in criminal law” (1972) 81 *Mind* 389 at 399; Gordon (n 85) at 361.

⁹² Duff, *IACL* 160.

accused's *latent* (or background) knowledge about risk, as exposed through her actions, ought to be emphasised.⁹³ Sometimes, the manner in which actions are carried out will demonstrate latent knowledge of risks. This knowledge, and how the accused's actions further demonstrate her attitude towards it, is what matters for culpability.⁹⁴

By looking to action, rather than just the accused's mental state, Duff argues that the law would be able to better reflect a form of moral equation because:⁹⁵

[T]here is... no significant moral difference between one who does and one who does not notice that his action endangers [others] ... the latter's very failure to notice that risk displays just the kind of practical indifference which is displayed in the former's conscious risk-taking.

For Duff, indifference can – therefore – be a mental attitude which is associated with conscious appreciation of risk⁹⁶ *or* an aspect of conduct.⁹⁷ In some instances, this will not make a (moral) difference to the question of culpability for unjustified risk-taking. The law should not, therefore, draw a sharp distinction between conscious advertence (recklessness) and inadvertence (negligence).

This means that (contrary to the “strict choice theory” discussed above)⁹⁸ a person who does not consciously consider the risks attendant upon her conduct may still be reckless. In a similar vein to Pillsbury, Duff contends that the need to extend recklessness beyond the choice-based paradigm arises because of what a failure to notice risk demonstrates about the practically indifferent accused's values: “[w]hat I notice or attend to reflects what I care about; and my very failure to notice something can display my utter indifference to it”.⁹⁹ If the accused *cared* adequately, she would have actualised her background knowledge concerning risk (which is displayed

⁹³ Ibid 159-160. Duff used to distinguish between “explicit”, “tacit” and “latent” knowledge: Duff, “Caldwell and Lawrence: the retreat from subjectivism” (n 83) at 80. This tripartite categorisation disappears from Duff's later work.

⁹⁴ To demonstrate non-culpable inadvertence, Duff suggests that the actor would be surprised when a risky feature of her conduct is pointed out to her: *ibid* at 88.

⁹⁵ Duff, *IACL* 162. See, similarly: Gordon (n 85) at 384; GP Fletcher, *The Grammar of Criminal Law: American, Comparative and International* (2007) 315. Cf AR White, *Grounds of Liability: An Introduction to the Philosophy of Law* (1985) 109; AR White, *Misleading Cases* (1991) 37.

⁹⁶ It has been doubted that advertent recklessness *always* displays indifference: J Gardner and H Jung, “Making sense of *mens rea*: Antony Duff's account” (1991) 11 *OJLS* 559 at 577.

⁹⁷ Duff, *IACL* 163.

⁹⁸ At §4.A.

⁹⁹ Duff, *IACL* 163.

through her action) and consciously noticed the dangers inherent in her action.¹⁰⁰ She would then have been in a position to choose whether to take those risks or not. The absence of choice is thus an indicator, rather than (as the strict choice theorist would have it) a defeater, of culpability.¹⁰¹

Importantly, Duff does not view all instances of unawareness of risk as the product of practical indifference. If he did, then his theory would seem over-inclusive, and recklessness would be indistinguishable from negligence (a point returned to below). Furthermore, a simple attitude of insufficient concern for the flourishing of others which is not connected intimately with action would seem indistinguishable from culpable carelessness, making “practical indifference” a broad category of fault.¹⁰² Instead, Duff argues that – when further context is given to an act of inadvertent, unjustified risk-taking – it might become clear that the actor’s failure to notice a risk resulted from something other than indifference, such as stupidity or inexperience,¹⁰³ or that her indifference was detached from, rather than bound up in, her action. In these circumstances, the accused’s risk-taking does not demonstrate indifference in the right way.¹⁰⁴ What is important, therefore, are the reasons *why* the accused failed to notice the relevant risk, and what attitude was demonstrated *by her actions*.¹⁰⁵

It is useful to dispose of some general objections to Duff’s theory in general, before moving to consider more specific difficulties with his argument.

(b) Criticisms

First, Duff – in common with the other theorists mentioned above – adheres to the view that “indifference” can exist where the actor was unaware of risk. Other authors

¹⁰⁰ The phrase “inherent in” is used in preference to “attendant upon” because of the distinction Duff draws between intrinsic and contingent risks (see §6.A(4)(c), below).

¹⁰¹ See §4.A, above.

¹⁰² RA Duff, “Recklessness” [1980] Crim LR 282 at 284.

¹⁰³ Duff, *IACL* 164-165.

¹⁰⁴ See, similarly: RA Duff, *Criminal Attempts* (1996) 179; Tadros, *Criminal Responsibility* 252-253. It might be argued that an actor who continues to take risks in spite of her knowledge that she is, e.g., stupid, could be negligent with regard to her beliefs. See §5.C, above.

¹⁰⁵ RA Duff, “Professor Williams and conditional subjectivism” (1982) 41 CLJ 273 at 276.

have doubted this.¹⁰⁶ White presents the example of fearlessness to demonstrate this point:¹⁰⁷ it would be peculiar to think of an actor as being fearless if she was not aware of the features of her situation which ought to inspire fear. If Sophie walks into a building which is susceptible to collapse to investigate the cry of a child, and rescues the child from imminent death, she can surely only be described as fearless if she was aware of the danger she was in. Otherwise, what appears to be an act of fearlessness might simply be an act carried out through ignorance – had Sophie been aware of the danger, she might not have entered the building.

The same might be alleged in cases of indifference:¹⁰⁸ without being consciously aware of the features of her situation which make it risky, the accused could not be described as “indifferent” to risk. The person who is utterly unaware (on a conscious or preconscious level) of risk might be better described as ignorant.

Two responses are available to Duff. First, as noted above, indifference is defined as “having no particular interest or sympathy; unconcerned”.¹⁰⁹ Nothing in that definition suggests that Duff is wrong about the inadvertent actor being “indifferent” in the sense of being unconcerned. Secondly, it has already been noted that Duff argues that the *acts* of the accused, in their context, tell the external observer everything about her attitude towards the risks she is taking. White could be alleged to have concentrated too much on the cognitive aspects of various traits, and ignored their attitudinal components.¹¹⁰ In the example immediately above, Sophie might not notice the features of her situation which call for fear *precisely because* she is fearless – fear simply does not register with her.¹¹¹

¹⁰⁶ See White, *Misleading Cases* (n 95) 38. See, also: JB Brady, “Recklessness, negligence, indifference and awareness” (1980) 43 MLR 381 at 381; G Williams, “The unresolved problem of recklessness” (1982) 8 LS 74 at 83. Cf EW Hautamaki, “The element of *mens rea* in recklessness and ‘criminal negligence’” (1951-1952) 2 Duke Bar J 55 at 63.

¹⁰⁷ White, *Misleading Cases* (n 95) 38.

¹⁰⁸ It is assumed that virtues (such as fearlessness) and vices (such as indifference) may be compared to one another.

¹⁰⁹ See http://oxforddictionaries.com/view/entry/m_en_gb0407440#m_en_gb0407440.

¹¹⁰ If Duff’s response is accepted, this makes indifference different from “disregard” – a term employed frequently in Scots discussions of recklessness. It seems impossible to *disregard* a matter without first regarding it, consciously: G Williams, “A reply to Mr Duff” (1982) 41 CLJ 286 at 287; *State v Olsen* 462 NW 2d 474 (1990) at 476-477 per Sabers J; J Chalmers, “*Lieser* and misconceptions” 2008 SCL 1115 at 1118.

¹¹¹ C Hookway, “Epistemic norms and theoretical deliberation” (1999) 12 Ratio 380 at 395.

This reply has intuitive appeal, and fits with Duff's wider view of responsibility. This point concerning responsibility is, however, important: the dispute between White and Duff seems irresolvable because they endorse very different theories of agency and responsibility. This philosophical debate is not the topic of this thesis, and so White's objection to Duff's theory will be left to the side.¹¹²

A second, more fruitful, objection concerns the matter of establishing the accused's attitude, particularly in the context of a criminal trial.¹¹³ Fruchtman contends that:¹¹⁴

Attitudes... are inherently personal, the result of the accused's particular background and history. Ironically, indifference can be seen as so radically subjective that ordinary principles of evidence may not provide a satisfactory basis for the requisite inferences.

This may be contrasted with cognitive mental states, which are more capable of "objective" demonstration in the courtroom.

This argument might cast doubt on some of Duff's examples of practical indifference, such as a parent omitting to get medical care for his child: "if the child's need was sufficiently obvious and lasting, we may discern in the parent's failure to notice that need his indifference to the child's health (he did not notice because he did not care)".¹¹⁵ A comparison with the facts of *State v Williams*¹¹⁶ – discussed in the previous chapter¹¹⁷ – shows how this type of case is not necessarily clear-cut when it comes to assessing attitudes (accounting, perhaps, for Duff's use of the word "may"). It will be remembered that fear, not indifference, meant the Williamses did not seek medical attention for their son. Fruchtman might marshal this case in support of his argument that Duff's theory is impractical and/or likely to lead to intuitively unjust results.

¹¹² For criticism of Duff's "shaky metaphysical assumptions", see Ferzan, "Opaque recklessness" at 611-617.

¹¹³ Ibid at 617-618; J Temkin, "The limits of reckless rape" [1983] Crim LR 5 at 11.

¹¹⁴ E Fruchtman, "Recklessness and the limits of *mens rea*: beyond orthodox subjectivism" (1986-1987) 29 Crim LQ 315, 421 at 440. See, also, DJ Birch, "The foresight saga: the biggest mistake of all?" [1988] Crim LR 4 at 9.

¹¹⁵ Duff, *IACL* 166.

¹¹⁶ 484 P 2d 1167 (1971).

¹¹⁷ At §5.C(5).

This objection would, however, be too strong. Just as a judge or jury might misinterpret certain conduct as giving rise to an inference of indifference (when, in fact, the accused failed to advert to a risk because she is stupid), they could surely “objectively” misinterpret some accidental conduct as intentional or advertently reckless. Again, this element of uncertainty has not prevented the “objective” proof of mental states from being employed in criminal trials in the United Kingdom.

Furthermore, it is possible to distinguish the example Duff provides from *Williams*: once the relevant background facts (the parents’ level of intelligence; their motivations) are brought into consideration, these give further context to the act of risk-taking. The Williamses’ failure to notice the need for medical attention would then take on a different meaning when placed in its context and perhaps would not demonstrate a practical indifference towards their child’s interests. Again, context and meaning are determinative *if* the jury is given the relevant information. This information will surely be available in many cases, meaning that Duff’s theory is not too “subjective” to be useful, even if it requires the jury to ask slightly harder questions than they consider at present.¹¹⁸

A third, connected, objection levelled at Duff (and applicable to all of the theories discussed thus far)¹¹⁹ concerns the use of “indifference” in his theory.¹²⁰ The concept is not well defined¹²¹ and it is entirely possible that a judge or jury could share a completely different view of “indifference” from the accused and other members of society.¹²² This opens Duff’s theory up to the objection that it allows unmitigated jury discretion on the question of culpability. This is problematic

¹¹⁸ It should be noted that juries are often asked difficult questions (e.g. What constitutes a “reasonable” belief in consent?) and seem to cope: D Kimel, “Inadvertent recklessness and the criminal law” (2004) 120 LQR 548 at 552-553.

¹¹⁹ See, similarly, DJ Galligan, “Responsibility for recklessness” (1978) 31 CLP 55 at 72.

¹²⁰ See: A Ashworth, “Principles, pragmatism and the Law Commission’s recommendations on homicide law reform” [2007] Crim LR 333 at 338; AW Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn (2001) 72; G Williams, “The unresolved problem of recklessness” (1988) 8 LS 74 at 83.

¹²¹ “Duff... tells us remarkably little about what he understands by [indifference]”: Horder, “Gross negligence” at 501.

¹²² Norrie, *Crime, Reason & History* (n 120) 74-76; W Wilson, *Criminal Law: Doctrine and Theory*, 3rd edn (2008) 145.

because juries do not give public reasons for their decisions and (particularly in Scotland)¹²³ their verdicts are virtually unassailable.¹²⁴

An obvious response to this criticism is that the concept of recklessness is vague in Scots law and certain areas of English law (for instance, involuntary manslaughter),¹²⁵ but juries still manage to reach decisions (although it is not clear how consistent these decisions are, which is troubling).¹²⁶

A more developed response is to attempt to concretise the concept of indifference through providing examples.¹²⁷ Some examples might already be found in the positive law. In Scotland, the fact that a death followed an assault involving “lethal” weapons provides strong evidence of wicked recklessness,¹²⁸ a concept premised on indifference to life.¹²⁹ The inference is that using a “lethal” weapon against another is almost necessarily to demonstrate indifference towards life.¹³⁰ Similarly, in order to avoid the vagueness of “indifference” in rape cases,¹³¹ the Scottish¹³² and UK¹³³ Parliaments have replaced that standard with a range of indicators¹³⁴ of where the complainer is incapable of giving consent to sex. These could be taken as examples of when having sexual intercourse with someone almost necessarily indicates an indifference to the matter of consent.¹³⁵

¹²³ See: Criminal Procedure (Scotland) Act 1995 s 106(3)(b); F Leverick, “The return of the unreasonable jury: *Rooney v HM Advocate*” (2007) 11 EdinLR 426.

¹²⁴ A point seemingly missed in *Judge v United Kingdom* (2011) 52 EHRR SE17.

¹²⁵ See §3.D, above.

¹²⁶ A recent study into involuntary manslaughter did not consider this issue, but did find that “gross” negligence manslaughter is rare in comparison to its unlawful, dangerous act and (advertently) reckless counterparts: B Mitchell and RD Mackay, “Investigating involuntary manslaughter: an empirical study of 127 cases” (2011) 31 OJLS 165 at 190. This makes investigating jury decisions regarding “gross” negligence difficult.

¹²⁷ See, similarly, GR Sullivan, “Intent, subjective recklessness and culpability” (1992) 12 OJLS 380 at 390-391. Duff’s examples of practical indifference are discussed below at §6.A(4).

¹²⁸ *HM Advocate v McGuinness* 1937 JC 37 at 40 per the Lord Justice-Clerk (Aitchison); Gordon, *Criminal Law* para 23.23 (n 20).

¹²⁹ See: §2.F, above; *HM Advocate v Purcell* 2008 JC 131 at para 16 per Lord Eassie.

¹³⁰ Cf AW Norrie, “Between orthodox subjectivism and moral contextualism: intention and the consultation paper” [2006] Crim LR 486 at 492.

¹³¹ See §§2.E(1) and 3.C(2), above.

¹³² Sexual Offences (Scotland) Act 2009 ss 13-14.

¹³³ Sexual Offences Act 2003 ss 75-76.

¹³⁴ The matter of whether these indicators give rise to evidential or conclusive presumptions is ignored here.

¹³⁵ Admittedly, this is a stretch: the presumptions concerning consent relate to the *actus reus* of rape, not *mens rea*.

Both of these examples illustrate that the concept of indifference can be firmed up. There are, of course, limits on how definite it can become: recklessness is employed in relation to a wide range of offences, and it would be difficult (if not impossible) to provide a list of examples of indifference for each context.¹³⁶ Some jury/judicial discretion would therefore have to remain.

Duff's general theory of practical indifference is, therefore, defensible against popular objections. It will be argued in the next section that recklessness should not, however, be understood in terms of practical indifference. This is because Duff has difficulty distinguishing recklessness from negligence in a compelling manner.¹³⁷

(c) Distinguishing recklessness and negligence

It is useful to consider Duff's treatment of recklessness and negligence as it appears in *Intention, Agency and Criminal Liability*. Duff begins by discriminating between the actor who has no thoughts about the risks that she is taking, and the actor who positively believes there is no risk attendant upon her conduct. In relation to the former, the distinction between negligence and recklessness is not particularly clear.¹³⁸ Duff explains that:¹³⁹

What makes a reckless agent more culpable, more fully responsible for the risk she creates, is that she displays a gross indifference to that particular risk or to the *particular interests* which she threatens: negligence, however, involves a *less specific kind of carelessness* or inattention which does not relate the agent so closely, as an agent, to the risk which she creates. To show that I recklessly endangered someone's life it must be shown that my action manifested a culpable indifference to her life: but negligently endangering her life need involve only a lack of attention to what I am doing – not a specific indifference to that particular risk.

This distinction may seem too abstract to apply easily,¹⁴⁰ but things become clearer through Duff's consideration of examples. The risk of death is apparently specific to

¹³⁶ As seen below, "practical indifference" can only exist in *some* cases of inadvertence, and so this point about the widespread use of recklessness should not be taken too far when considering Duff's theory. Other theorists are, however, less restrictive in their use of reckless indifference.

¹³⁷ See, similarly: JB Brady, "Recklessness" (1996) 15 Law & Phil 183 at 197; Horder, "Gross negligence" at 501.

¹³⁸ A Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (2009) 95.

¹³⁹ Duff, *IACL* 165 (emphasis added).

¹⁴⁰ LH Leigh, "Recklessness after *Reid*" (1993) 56 MLR 208 at 216; Brady (n 137) at 197; CMV Clarkson, "Aggravated endangerment offences" (2007) 60 CLP 278 at 279.

and “inseparable” from a serious physical assault.¹⁴¹ Therefore, “the assailant’s failure to notice [a risk of death] cannot but manifest an utter indifference to his victim’s life”.¹⁴² A parent failing to notice obvious signs of illness in her child *may* (see above)¹⁴³ display indifference: “he did not notice because he did not care”.¹⁴⁴ A driver failing to foresee the risks attendant upon driving at high speed in a busy urban street is sometimes practically indifferent to the safety of others; the threat to their safety is bound up in her careless conduct.¹⁴⁵

It is clear that these are *extreme* examples. The parent who fails to notice obvious signs that her child needs medical attention might fail to notice because she does not care, but – as noted above – also because she fears social services might take the child from her.¹⁴⁶ Her action does not seem to be structured around ignoring or threatening the child’s interests. Similarly, the driver who speeds in an urban area does not seem automatically indifferent to the lives of others. Endangering life does not necessarily structure the actor’s intentional action. She might be evading pursuit, rather than seeking, through her actions, to threaten the interests of others (and, indeed, herself)¹⁴⁷ in life and bodily integrity.¹⁴⁸ As noted above, Duff holds that context is everything.

The possibility of explaining away some of Duff’s examples is also present in some of the cases where risks are allegedly not “specific” in the sense required for inadvertent recklessness. The defendant in *R v Caldwell*¹⁴⁹ apparently “intended only to damage property, not to cause injury: his intended action was not so closely related to the risk of death which it in fact created; it did not by itself show him to be reckless as to that risk”.¹⁵⁰ It may, however, be alleged that, through adopting the *means* that he did to achieve property damage, Caldwell necessarily (and

¹⁴¹ Duff, *IACL* 166.

¹⁴² *Ibid.*

¹⁴³ See the text accompanying nn 115-117, above.

¹⁴⁴ Duff, *IACL* 166.

¹⁴⁵ *Ibid* 166-167.

¹⁴⁶ Cf *State v Williams* 484 P 2d 1167 (1971).

¹⁴⁷ CMV Clarkson, HM Keating and S Cunningham, *Clarkson and Keating: Criminal Law: Text and Materials*, 7th edn (2010) 177.

¹⁴⁸ Cf *Purcell*.

¹⁴⁹ [1982] AC 341 (see §3.C, above).

¹⁵⁰ Duff, *IACL* 166.

intentionally) unleashed the risk of death upon the hotel guests.¹⁵¹ His intentional action was to damage property through setting *fire* to it, and it is not too difficult to draw – from Caldwell’s conduct, rather than simply his thoughts – the inference that his posing a risk to the interests in bodily integrity and life of those within the hotel was intrinsic to his action (that it structured his act of “revenge”) and that he simply did not care if they materialised.¹⁵²

These disagreements about Duff’s examples are not nitpicking – they are legitimate doubts about the way that actions are described, interpreted and understood in their context. The fact that alternative readings of Duff’s examples are available suggests that the specific/general line he draws between recklessness and negligence lacks structural integrity.

This leads to consideration of Duff’s treatment of cases where the accused believed positively that there was no risk involved in her conduct. Here, Duff’s approach seems far clearer and more defensible. Duff begins from the premise that “[t]here is sometimes a significant difference between one who does what he realizes will probably cause some harm, and one who does what he realizes might, but probably will not, cause such harm”.¹⁵³ This can be the dividing line between recklessness and negligence in Duff’s view. A person who throws debris off a roof without checking for passers-by below, for instance, is negligent, not reckless:¹⁵⁴ the risk of harming another person in this situation is *contingent* upon, rather than *intrinsic* to, the activity.¹⁵⁵ Apparently, this risk would be intrinsic if the debris was thrown in order to frighten a neighbour. In such circumstances, a failure to notice a risk of injury could be reckless, rather than simply negligent.

Duff gives other examples of intrinsic circumstances which, when ignored by an agent, can give rise to an inference of practical indifference. For instance, as consent is central to a proper understanding of sexual intercourse,¹⁵⁶ a person who

¹⁵¹ The fact that Caldwell was voluntarily intoxicated will be ignored.

¹⁵² See, further, AW Norrie, *Crime, Reason & History: A Critical Introduction to Criminal Law*, 2nd edn (2001) 72. *Hyam v DPP* [1975] AC 55 can be analysed similarly.

¹⁵³ Duff, *IACL* 168.

¹⁵⁴ *Ibid.* See, similarly, HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) 147, 149.

¹⁵⁵ Duff, *IACL* 168. See, similarly, GP Fletcher, *Basic Concepts of Criminal Law* (1998) 116.

¹⁵⁶ TM Scanlon, *What We Owe to Each Other* (1998) 175.

fails to notice obvious signs of non-consent is practically indifferent – and reckless – as to consent, even if he believes that consent exists.¹⁵⁷ Consent is not a circumstance which floats in the ether (as the circumstance of a neighbour being below floats alongside the act of throwing debris off a roof to dispose of it): “his action is structured by a disregard for (an indifference to) *her* integrity, and *her* right to make up and express her own mind about her sexual partners, which does not differ significantly from that displayed by one who persists with intercourse realizing that the woman might not consent”.¹⁵⁸

These examples lead to the conclusion that the distinction between *attacks* and *endangerments*¹⁵⁹ (a theme Duff has returned to in later work)¹⁶⁰ is central to separating inadvertent recklessness from negligence. A person who aims at causing serious bodily injury (even if she believes that this will not kill), for instance, engages in an attack against the interests of the victim; she acts for the very reason that the attack puts the victim’s life in peril.¹⁶¹ A person who engages in the same conduct – and fails to be guided by reasons which ought to motivate her¹⁶² – but does not have the same aim of causing serious injury, merely endangers the victim; her action is not structured by the end of causing serious injury or death, and she will be happy (even relieved)¹⁶³ if those consequences are avoided.¹⁶⁴

It is thus only the attacker who is, through her inadvertence, practically indifferent to the “intrinsic” risks she is imposing.¹⁶⁵ The endangerer is not connected so closely through her intentional action to those risks, and so does not demonstrate

¹⁵⁷ RA Duff, “Recklessness and rape” (1981) 3 *Liverpool L Rev* 49; Duff, *IACL* 168-171.

¹⁵⁸ Duff, *IACL* 170.

¹⁵⁹ *Ibid* 176.

¹⁶⁰ See: RA Duff, “Criminalizing endangerment”, in RA Duff and S Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 43; Duff, *AFC* ch 7; RA Duff, “Whose luck is it anyway?”, in CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008) 61.

¹⁶¹ Duff, *IACL* 177.

¹⁶² See: J Kennett, *Agency and Responsibility: A Common-Sense Moral Psychology* (2001) 177; Clarkson (n 140) at 286; Duff, *AFC* 151.

¹⁶³ Duff, “Criminalizing endangerment” (n 160) at 68.

¹⁶⁴ Duff, *IACL* 61.

¹⁶⁵ The fact that this connection exists in limited circumstances has led some to conclude that recklessness is not what Duff is describing. For instance, it has been suggested that his example of assaults and death describes *implied malice* (in fact, that is the title of the section in which his thoughts on murder are expressed (Duff, *IACL* 173)), not recklessness: J Gardner and H Jung, “Making sense of *mens rea*: Antony Duff’s account” (1991) 11 *OJLS* 559 at 578.

practical indifference through her failure to note them. This means that, for Duff, inadvertent recklessness is quite a slim category, where the risk is bound up in the actor's intentional conduct, or flows naturally from it.¹⁶⁶ Endangerments require awareness of risk – i.e. advertent recklessness – in order to be culpable.¹⁶⁷

Again, this reasoning sounds compelling,¹⁶⁸ but some of Duff's examples have proved controversial. It was noted above that Duff views practical indifference as relevant in cases of rape.¹⁶⁹ Although it is obvious to Duff (and others)¹⁷⁰ that a person who engages in sexual intercourse without advertent to obvious signs of non-consent is misunderstanding what sex *ought* to be about: mutual respect, communication, etc, Norrie points out that there is no real coherence in social conceptions of what is (and is not) inherent in the practice of ("proper") sex.¹⁷¹ This suggests that explaining what is, and is not, intrinsic to sex (properly understood) is a difficult enterprise, making Duff's example concerning rape at least debatable.

Even if such social agreement about the "proper" content of sex existed (and few would deny that proper consideration of the matter of *consent* is crucial), it is clear that the rape and serious physical attack examples used by Duff are not making the same point. Where the accused does not intend non-consensual intercourse (and despite Duff's best efforts to say otherwise),¹⁷² it is difficult to conceive of his action as an *attack* on interests in the way that a serious physical assault attacks the life of another person.¹⁷³ Unless the accused intended to have non-consensual intercourse, he surely only *endangers* his partner's sexual autonomy; he will not have failed in his action if – consistent with his belief – the complainant was, in fact, consenting. Contrary to what Duff argues, it appears that the matter of consent is – in the relevant sense – contingent, rather than intrinsic, and this leads to the suggestion reached in

¹⁶⁶ See, further, Clarkson (n 140) at 293.

¹⁶⁷ Duff, *AFC* 157.

¹⁶⁸ Cf KK Ferzan, "The structure of criminal law" (2009) 28 *Crim Just Ethics* 223 at 227-230.

¹⁶⁹ See the text accompanying nn 156-158, above.

¹⁷⁰ See e.g. PR Ferguson, "Controversial aspects of the law of rape: an Anglo-Scottish comparison", in RF Hunter (ed), *Justice and Crime: Essays in Honour of the Right Honourable the Lord Emslie* (1993) 180 at 194.

¹⁷¹ AW Norrie, "Subjectivism, objectivism and the limits of criminal recklessness" (1992) 12 *OJLS* 45 at 51.

¹⁷² See, also, RA Duff, *Criminal Attempts* (1996) 374.

¹⁷³ This perhaps accounts for the restatement of the rape example (in a footnote) in Duff's later work: see Duff, "Criminalizing endangerment" (n 160) at 54 (n 38). There, Duff suggests that "the actualisation of the risk" of non-consent turns sexual intercourse "into an attack".

chapter five: that the accused who fails to note obvious signs of non-consent is possibly *negligent*, but not reckless.

Perhaps Duff has warped the rape example to fit his model of inadvertent recklessness.¹⁷⁴ This move is, to a degree, understandable: negligence is perceived as being non-serious by most theorists,¹⁷⁵ and it is therefore more palatable to extend the concept of recklessness to accommodate cases of seeming culpable inadvertence. If negligence as failure of belief (outlined in the previous chapter)¹⁷⁶ were taken seriously in the criminal law, this manoeuvre would be unnecessary. It would be possible to argue that the accused failed to form a belief in risk where he could legitimately be expected to take more care and *this* (rather than practical indifference) is why he ought to be convicted of rape. This argument is taken up again below.¹⁷⁷

For now, it is clear that when the rape example (and the other examples criticised above) are examined in detail, Duff's account of practical indifference is even narrower than his views in *Intention, Agency and Criminal Liability* suggest. In the assault example (and others like it), the core points that Duff makes about attacks, endangerments and risks are defensible in theory.¹⁷⁸ It might nevertheless be wondered whether a better distinction between recklessness and negligence might be proposed. In the next part of the chapter, it will be argued that a belief-centred approach to recklessness would reinvigorate this important distinction.

Before proceeding to the substantive account of recklessness, it is useful to summarise the arguments made above concerning indifference theories.

(5) Indifference theories: summary

The language of indifference has appeared at times in Scots and English law's treatment of recklessness. It is clear from the discussion above that this term is vague, allowing theorists to conceive of different ways of manifesting culpable

¹⁷⁴ There are hints of this argument in Gardner and Jung (n 165) at 578. They postulate that Duff might have to employ different *mens rea* terms in contexts where recklessness-as-indifference does not "fit".

¹⁷⁵ See §4.A, above.

¹⁷⁶ At §5.C.

¹⁷⁷ At §7.A(1).

¹⁷⁸ Cf Ferzan, "Opaque recklessness" at 615 (n 62).

indifference. Simons and Horder adopted a counterfactual test, which was objectionable insofar as it moved the focus of inquiry far from the actual accused. Pillsbury's "perception choices" seem unhelpful insofar as they explain culpable inadvertence in a vanishingly small class of cases. Finally, Duff's theory of practical indifference is attractive insofar as it looks beyond the accused's conscious choices and engages with wider aspects of her agency. It nevertheless falls down when trying to distinguish inadvertent recklessness from negligence in all but a small range of cases.

One aspect of indifference theories which is nevertheless laudable is the desire to extend the ambit of reckless risk-taking beyond the strict choice model explained in chapter four. This ambition is shared by the belief-centred theory of recklessness explained in the next part of the chapter.

B. RECKLESSNESS: A BELIEF-CENTRED APPROACH

The discussion in chapter four demonstrated that conscious choices have been placed on an undeserved pedestal in contemporary accounts of criminal risk-taking. This excludes liability for inadvertent risk-taking, usually identified as being the mark of negligence. In chapter five, it was contended that a better approach to most negligent wrongdoing is to concentrate upon the accused's beliefs about risk (or lack thereof) and how these related to her desires and her character more generally. In the sections below, these *foci* will be maintained, meaning that much of what was said about responsibility and fault in chapter five need not be repeated. For instance, it is again envisaged that character plays an important role in explaining culpability;¹⁷⁹ that beliefs are subject to evaluations which reflect upon those who hold them;¹⁸⁰ and that certain desires which interfere with the formation of justified beliefs can be recognised as part of a person's character.¹⁸¹

A consequence of the belief-centred approach to recklessness defended below is that it allows for a theory of culpable carelessness which does not depend

¹⁷⁹ See §5.C(3), above.

¹⁸⁰ See §5.C(1)(b), above.

¹⁸¹ See §5.C(3), above.

exclusively upon (though includes) a distinction between conscious decisions to take risks and their absence. It will be contended below that full conscious appreciation of risk is not, contrary to what some strict choice theorists think, necessary for recklessness (though it is *sufficient*). If “advertence” is taken to mean “consciousness”, then it is possible – as Duff and others have demonstrated – to be inadvertently reckless. In contrast to the approaches discussed above, however, the account presented below can explain the distinction between recklessness and negligence in a more satisfactory manner.

It is sensible to begin by explaining how the understanding of recklessness defended here grows from the concept of negligence as failure of belief.¹⁸²

(1) Beyond negligence as failure of belief

It will be remembered that negligence as failure of belief describes the failure by a person to form a belief in risk where she possessed the relevant background information, perceptions and opportunity to do so.¹⁸³ Recklessness, it will be argued, concerns beliefs that the accused *has* formed about risk in the circumstances: the reckless agent has managed to combine her background knowledge and her perceptions to reach a belief about the safety or dangerousness of her conduct.¹⁸⁴ It is what happens after this point that matters for culpability, and that element of fault is dealt with further below.

Before proceeding, it must be asked *where* the reckless actor’s belief in risk is held once it is formed. Is it on a conscious, preconscious or deeper level?¹⁸⁵ The deeper levels of subconsciousness should be excluded from consideration immediately. It will be remembered that a belief held at a level below preconscious awareness will not easily be accessible in the accused’s conscious deliberations over action.¹⁸⁶ If the belief in risk is repressed, for instance, the accused might even deny

¹⁸² The approach here is to build *up* from negligence to recklessness. Cf Duff, *IACL* 139-142.

¹⁸³ See §5.C, above.

¹⁸⁴ See, similarly: Garvey, “Involuntary manslaughter” at 342-343; DN Husak, “Negligence, belief, blame and criminal liability: the special case of forgetting” (2011) 5 *Crim Law & Philos* 199.

¹⁸⁵ See §4.A(3)(b), above.

¹⁸⁶ E Colvin, “Recklessness and criminal negligence” (1982) 32 *UTLJ* 345 at 362; JR Searle, *Mind: A Brief Introduction* (2004) 166-167.

holding it until counselling can expose her error.¹⁸⁷ Absent specialist assistance, the accused cannot hope easily to actualise her belief and let it play a part in her practical reasoning.¹⁸⁸ If “ought” implies “can”,¹⁸⁹ then beliefs in risk held at a deep level of unconsciousness cannot be proper bases upon which to premise a belief-centred finding of culpable recklessness.¹⁹⁰

It thus seems necessary that – to be relevant for the purposes of recklessness – the accused’s belief in risk is held at a *preconscious or conscious level*.¹⁹¹ It is assumed that, in the case of conscious awareness of risk, strict choice theorists have *almost* identified correctly the element of culpability, i.e. the accused’s failure to be sufficiently concerned, in light of her beliefs about risk, to take steps to mitigate or remove the danger to others’ interests. Their error is assuming that this requires a conscious choice to ignore risk. It is envisaged below that a *failure* to make a choice concerning risk can, in itself, demonstrate culpability.

Where there is preconscious awareness of risk, it is envisaged that much of what Ferzan says concerning “opaque” recklessness (discussed in chapter four)¹⁹² applies. It will be remembered that Ferzan requires the accused to have conscious awareness of preconscious belief in risk (which is then consciously ignored) in order to be considered (opaquely) reckless.¹⁹³ In other words, the accused must have some nagging, psychological experience of abstract risk or danger stemming from her preconscious beliefs and fail to do anything to investigate the safety of her conduct. Absent this experiential element of recklessness, it is difficult to see how a reckless agent could usefully be distinguished from a negligent one. The discussion above of Duff’s approach to the negligence question (and the analysis of Tadros’s theory, below) demonstrates this point well.

¹⁸⁷ Searle, *Mind* (n 186) 167.

¹⁸⁸ *Ibid.*

¹⁸⁹ The veracity of the “ought” implies “can” principle is assumed.

¹⁹⁰ There might be a question of whether, in failing to form a preconscious or conscious belief in risk, the accused was negligent with regard to belief formation. See §5.C, above.

¹⁹¹ It is assumed that this is what some authors refer to as “tacit knowledge”: e.g. GR Sullivan, “Knowledge, belief and culpability”, in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 207 at 210. The distinction between knowledge and recklessness is discussed below at §6.C(2).

¹⁹² At §4.A(3)(b).

¹⁹³ Ferzan, “Opaque recklessness” at 641.

Beliefs in risk must be formed and held on at least a preconscious level for an actor to be reckless. It must now be asked what a person, if properly motivated, ought to do when she becomes consciously aware of a conscious or preconscious belief in risk.

(2) After belief

If the accused consciously believes that a risk exists, then she seems faced (absent exceptional circumstances such as an emergency) with a choice. She can either take steps to investigate, mitigate or avoid the threatened danger, or she can proceed with her conduct without addressing the risk. It is assumed that mostly properly motivated actors will adopt the former course, whilst mostly culpable actors will take the latter.¹⁹⁴ It should, however, be noted that it is not required for culpability that an actor *chooses* to ignore risk, in terms of having a thought such as “I will not take steps to address this risk...”. The failure to face up to a conscious belief in risk, and make a choice about what to do, seems just as culpable.

If the agent is properly motivated, and considers the risks in more detail, she might make a mistake and still engage in unjustified risk-taking (i.e. wrongdoing). If this occurs, then the actor is not *reckless*, for she has shown herself to be properly motivated by her conscious beliefs in risk. As far as she knows, she has taken the necessary steps to avoid wrongdoing. The difficulty is that that belief is flawed: the accused has failed to form properly a belief about the extent of the risks she is imposing and their justification. On that basis, the mistaken actor might be *negligent* (in her beliefs), as discussed in chapter five. It is assumed, therefore, that the defendant in *Chief Constable of Avon and Somerset Constabulary v Shimmen*,¹⁹⁵ in failing to reach a justified belief about the dangers involved in his martial arts display, was probably negligent, rather than reckless (as the court thought). “*Caldwell* lacuna” cases – where the accused is satisfied (wrongly) that there is *no* risk at all¹⁹⁶ – should be dealt with similarly.

¹⁹⁴ See, similarly: RJ Wallace, *Responsibility and the Moral Sentiments* (1994) 138; C Tappolet, “Rational capacities, or how to distinguish recklessness, weakness and compulsion”, in S Stroud (ed), *Weakness of Will and Practical Irrationality* (2003) 17.

¹⁹⁵ (1987) 84 Cr App R 7.

¹⁹⁶ See §3.C(4), above.

The situation in cases where the accused is consciously aware of her preconscious beliefs in risk (cases of “opaque” recklessness, in Ferzan’s parlance) is broadly similar to that in cases of fully conscious beliefs in risk. Again, such actors seem faced (absent an emergency) with a decision: they can either “actualise” their preconscious belief, making it the focus of their conscious deliberations about conduct;¹⁹⁷ or they can ignore the preconscious belief, failing to investigate its content further on a conscious level.¹⁹⁸ Ferzan realises this,¹⁹⁹ but it is submitted that she is wrong to require a *conscious choice* to ignore the risk attendant upon behaviour in order for the accused to have been reckless. Again, the absence of such a decision – and the simple failure to be motivated sufficiently to investigate beliefs in opaque “risk” or “danger” – may demonstrate the accused’s lack of concern for the interests of others.²⁰⁰ A positive choice to ignore a preconscious sense of risk and danger is thus a sufficient, but not necessary, condition for recklessness. All that is required is that the actor, in light of her preconscious beliefs, comes to engage in wrongdoing when she could have better exercised her practical judgement.²⁰¹

This suggests that Duff’s example of inadvertent “practical indifference” in murder – discussed above – should be departed from, even if (employing the attack/endangerment distinction) it makes sense. It is submitted that finding a person was reckless as to life is acceptable only where she had a (preconscious or conscious) belief that there was a risk of death attendant upon her action. Duff might be read to assume the presence of such a belief, as the attacker’s belief that the complainer’s life is under threat gives structure to, and is inherent in, her actions. As noted above, however, Duff does not require a psychological experience of that belief.

Duff’s example might, however, be attractive precisely because it seems incredible that a person could engage in a serious violent assault on another without realising (however fleetingly) that there was a risk that the victim might die. Surely, absent exceptional circumstances, this belief would be formed, at least on a

¹⁹⁷ Cf Duff, *IACL* 159.

¹⁹⁸ Cf “rashness”, described in J Austin, *Lectures on Jurisprudence; or The Philosophy of Positive Law*, Vol 1 (1873) 444.

¹⁹⁹ Ferzan, “Opaque recklessness” at 633-634.

²⁰⁰ J Kennett, *Agency and Responsibility: A Common-Sense Moral Psychology* (2001) 170, 173.

²⁰¹ See, similarly, *ibid* 154-155.

preconscious level, by those who severely assault others.²⁰² This intuitive belief that the actor *must be* aware of risk (and that this awareness has made it into the accused's conscious deliberations) is, it is submitted, part of the appeal of Duff's example of inadvertent recklessness.²⁰³ This should not, however, undermine the utility of concentrating on the accused's *actual* conscious and preconscious beliefs at the time of acting. The important question is whether, in disregarding or failing to investigate her conscious awareness of beliefs in risk, the accused demonstrates insufficient concern for the interests of others.

In answering this question, it is useful to consider *why* the accused failed to respond to or investigate her beliefs in risk. In common with negligence as failure of belief, it seems that desire and character have a role to play here. The question is whether the accused's lack of motivation was the result of a desire that was accepted as part of her character. If so, the culpability question may legitimately be posed: did the accused's failure, in line with her accepted desires, to respond appropriately to her conscious or preconscious beliefs about the risks attendant upon her conduct show her to be insufficiently concerned with the interests of others?

This account goes beyond most "subjective" conceptions of recklessness, and even Ferzan would not endorse it (as no conscious *choice* to ignore risk is required). It is also distinct from another, popular belief-focussed account of recklessness, presented by Tadros. In order to demonstrate why the view of recklessness presented in the previous sections should be employed over that developed by Tadros, it is necessary to engage in detailed analysis of his chapter in *Criminal Responsibility* on the "Ethics of belief".²⁰⁴ It will be contended that, in common with Duff, Tadros does not distinguish adequately between recklessness and negligence. After this, it will be demonstrated why making this distinction plain is important.

²⁰² See, further: D Lanham, "Murder, recklessness and grievous bodily harm" (1978) 2 Crim LJ 255 at 271; B Mitchell, "More thoughts about unlawful and dangerous act manslaughter and the one-punch killer" [2009] Crim LR 502 at 507.

²⁰³ See, similarly, Ferzan, "Opaque recklessness" at 615 (n 62).

²⁰⁴ Tadros, *Criminal Responsibility* ch 9.

(3) Tadros's belief-centred account of recklessness (or negligence?)

It is not clear from Tadros's discussion of culpable risk-taking whether he is talking consistently about recklessness, or whether negligence is introduced at points.²⁰⁵ Tadros begins by outlining the belief formation process (which was dealt with earlier in this thesis),²⁰⁶ before moving on to give an account of carelessly-formed beliefs resulting in the commission of an *actus reus*. For instance, he describes *Cameron v Maguire* as a case where the accused failed to evaluate properly the risks attendant upon his activity (firing a rifle) when such investigation would have been appropriate, given the accused's knowledge about risks in general.²⁰⁷

Tadros then considers possible limitations on such a duty to investigate risks (mainly whether the accused knew that the activity was the sort that involved risks),²⁰⁸ which informed the discussion of the limitations of negligence as failure of belief in chapter five.²⁰⁹ Following from this, Tadros presents his "negative account" of culpability for false beliefs. He refers to cases where the accused simply lacked the ingredients to form a belief that her conduct was risky,²¹⁰ and concludes – as this thesis did²¹¹ – that such actors cannot evidence culpable carelessness.

After this, Tadros moves on to consider a "positive account" of culpable beliefs. For present purposes, the most important part relates to careless actors.²¹² He begins by stating that:²¹³

A defendant may form a belief that there is no risk because he is too careless or lazy to investigate the risks. The defendant fails to think about the risks or fails to investigate them adequately and so does not realise that there is a risk that the *actus reus* of an offence will be performed. In doing so the defendant clearly shows that he has insufficient regard for the interests of those who might suffer from the risk materialising.

²⁰⁵ "The ethics of belief" is developed from V Tadros, "Recklessness and the duty to take care", in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 227. From the title and content of that chapter, it is clear that Tadros is concerned with recklessness. "Objective" recklessness is nevertheless treated as synonymous with negligence (e.g. at 227).

²⁰⁶ At §5.C.

²⁰⁷ Tadros, *Criminal Responsibility* 245, 255.

²⁰⁸ *Ibid* 246.

²⁰⁹ At §5.D(1).

²¹⁰ Tadros, *Criminal Responsibility* 250-252.

²¹¹ At §5.C(1).

²¹² Tadros, *Criminal Responsibility* 255-258. Tadros also considers wilful blindness and prejudice (*ibid* 258-263), but these are less relevant here.

²¹³ *Ibid* 255.

It is submitted that, in this quote, Tadros is continuing to describe something akin to negligence as failure of belief, rather than recklessness. The accused, perceiving that she is engaging in an activity she knows (in a background sense) to be risky, fails to apply her background knowledge about the risks involved in that activity and form appropriate beliefs for the circumstances. In such circumstances, the accused cannot be psychologically aware of the presence of risk, and so can be distinguished from the actor who *does* have conscious awareness that she holds such a belief on a preconscious or conscious level (in other words, the “opaquely” reckless or the consciously reckless actor). Again, for reasons explored below, this distinction in terms of belief is important in terms of culpability.

Returning to Tadros’s chapter, it should be noted that, until this point, Tadros does not put a name to the form of culpability that he is describing, but there are frequent references to “objective” recklessness in the opening pages.²¹⁴ Beyond this, Tadros describes the type of fault he is discussing as “carelessness”, which could apply to either reckless or negligent wrongdoing.²¹⁵ Things become slightly clearer, however, when Tadros deals with the “subjectivist” objection that carelessness can only be culpable where the accused was consciously aware of the relevant risks.²¹⁶ This “subjectivist” position sounds like advertent recklessness.

Tadros’s hypothetical “subjectivist” suggests that the accused in *Cameron v Maguire*, knowing that somebody might be coming and, furthermore, knowing that there was a risk that that person might get shot, should have carried out further investigation.²¹⁷ This description of the case suggests that the accused *did* have the belief that his action was unsafe which is, firstly, contrary to what the accused said²¹⁸ (although he had good reason to lie), and, more importantly, suggests that the accused had not *failed* to form a belief in risk – the position Tadros discusses in the body of his chapter. If Cameron had a belief in risk held on the preconscious level (and was consciously aware of this), or was focussed fully on the belief at the

²¹⁴ See, particularly, Tadros, *Criminal Responsibility* 237-239.

²¹⁵ *Ibid* 255.

²¹⁶ *Ibid*.

²¹⁷ *Ibid*.

²¹⁸ *Cameron v Maguire* 1999 JC 63 at 66 per Lord Marnoch.

conscious level, then he was quite properly called reckless for the reasons given above.

Tadros's hypothetical "subjectivist" is thus describing at least "opaque" recklessness, if not the wider sense of recklessness defended above. In his response, Tadros nevertheless dispenses with any need for a belief in actual risk, which Ferzan and this thesis require:²¹⁹

If the defendant shows carelessness in failing to investigate a particular risk, he need not have been aware that there was a risk that this particular instance of the *actus reus* of an offence would come about... His failure to investigate the risks where it is appropriate to do so shows only that he has an awareness that his activity is risky to a degree and in a way that ought to lead him to investigate.

It might be wondered (especially by the "subjectivist" critic) what Tadros means by "awareness". It is not clear from *Criminal Responsibility*, but he does refer to Ferzan's account of "opaque" recklessness in relation to the text quoted above.²²⁰ This might suggest that Tadros thinks the reckless accused needs to be consciously aware of at least a preconscious belief that her conduct was risky in general. If this is the case, then it is agreed (contrary to what the "correspondence principle" might be taken to mean)²²¹ that a *further* belief about the exact consequences of taking that risk is not required for culpability. What matters is that the accused, in her failure to investigate her preconscious sense of risk, showed insufficient concern for the interests of others; that her failure to be motivated to think harder about her beliefs demonstrated culpability. Such a culpable lack of concern does not require awareness of the exact risk being taken or, indeed, of its likely consequences.²²² This is where Ferzan and Tadros are correct, and "subjectivist" supporters of the "correspondence" principle are wrong.

Can it therefore be concluded that Tadros *is* considering recklessness as understood in this thesis? No: once again, he returns to consideration of something like negligence as failure of belief in his view that the culpable accused is aware, in

²¹⁹ Tadros, *Criminal Responsibility* 257.

²²⁰ Ibid (n 22).

²²¹ See §4.A(3)(a), above.

²²² S Shute, "Knowledge and belief in the criminal law", in Shute and Simester (eds), *Criminal Law Theory* (n 205) 171 at 181.

terms of her background knowledge, only that her action is of the type that risks are associated.²²³ All he requires is that – “passively” – the activity is the type with which risks are associated – for instance, driving.²²⁴ This sounds like the mere presence of background knowledge which the accused could, but has failed to, actualise in her belief formation processes, i.e. negligence as failure of belief.²²⁵

This detailed analysis of “The ethics of belief” suggests that, like Duff, Tadros has difficulty distinguishing recklessness and negligence. This is a more cutting criticism than it was in relation to Duff’s theory of practical indifference: Duff at least finds a way to explain the distinction between negligence and recklessness in a *small category of cases* (attacks, as opposed to endangerments). Tadros’s difficulty is more pronounced: it is submitted that *Criminal Responsibility* leaves the distinction between recklessness and negligence entirely unaddressed. It is not clear what Tadros thinks negligence is, or, indeed, whether a distinction between recklessness and negligence is worth having.²²⁶

It is open to Tadros to complain that this thesis has drawn a distinction (between negligence as failure of belief and recklessness) that is unimportant or overly fussy in terms of assessing culpability. In the next section, it will be pointed out that this distinction draws an important line in terms of relative culpability. This is why theories which cannot explain this distinction clearly (such as Duff and Tadros’s) ought to be abandoned.

(4) Why distinguish recklessness from negligence?

The difficulty posed by approaches such as Tadros’s is that – at least for choice theorists – there is a significant moral line between chosen and unchosen wrongdoing. Chapter four did not threaten this conclusion; it merely pointed to the fact that “subjectivists” have not provided a convincing reason why conscious,

²²³ Tadros, *Criminal Responsibility* 257.

²²⁴ Ibid.

²²⁵ Ferzan also thinks that Tadros is considering negligence, not recklessness: KK Ferzan, “Act, agency and indifference: the foundations of *Criminal Responsibility*” (2007) 10 *New Crim LR* 441 at 450-454. See, also, Garvey, “Involuntary manslaughter” at 359 (n 87).

²²⁶ Talk of negligence is largely absent from “The ethics of belief”. It is mentioned only briefly: Tadros, *Criminal Responsibility* 245. There is only one reference to negligence in *Criminal Responsibility*’s index, which directs the reader to a page where Tadros equates it with “objective” recklessness: *ibid* 30.

chosen wrongdoing explains the *whole* of culpability. Is the line between “advertence” and “inadvertence” which has dominated the recklessness/negligence question for at least the last century thus an important one to maintain? No: instead the distinction should be drawn on the basis of the actor’s beliefs about the risks attendant upon her conduct and her management of them.

It was argued above that the reckless actor is consciously aware of her preconscious or conscious belief that her conduct is risky or dangerous and has either: (i) failed to be motivated sufficiently to investigate that belief to ascertain the true extent of the risk (which is beyond “opaque” recklessness); or (ii) consciously decided to ignore a preconscious belief in risk and continue with her action (which is “opaque” recklessness). To be culpable, this failure of motivation must stem from the accused’s accepted character and demonstrate insufficient concern for the interests of others.

The actor who is culpably negligent in forming her beliefs has, by contrast, no conscious or preconscious belief about risk in the particular circumstances.²²⁷ As the result of a controllable desire, she has not reached that stage, but had the tools, the capacity and the opportunity to do so.

When recklessness and negligence (as failure of belief) are reconceived of in this way, the line between them focuses more readily on the accused’s beliefs about risks and what these demonstrate about her attitudes regarding the interests of others. This account sees more of the spectrum of culpable carelessness than the widest choice theories do, and it is submitted that it marks an important distinction in terms of the ease with which the actor could have adverted consciously to the unjustified risks attendant upon her conduct and avoided them. The reckless actor has only to focus consciously upon her preconscious beliefs about risk (if she is not “purely” reckless, already) to be in a position where she can appraise it clearly and decide what to do. The negligent actor is a step behind, having not yet formed the belief in risk on a conscious or preconscious level.

²²⁷ See §5.C, above.

It is submitted that this difference in terms of belief impacts upon the extent of the accused's culpability.²²⁸ This is because of a persuasive aspect of strict choice theory: a person is most able to *control* that over which they exercise conscious deliberation, which gives choice "obvious and immediate moral significance".²²⁹ On this view, culpability might be conceived of as a sliding scale, which is related to the amount of conscious control that the actor had over her actions and their consequences.²³⁰ The strict choice theorist is correct that agents are *most* culpable for what they consciously decide to do to, and inflict upon, others, for this most clearly shows their lack of sufficient concern for the interests of others. But other forms of culpability stem from choice, like ripples emanating from a stone dropped into a pool of water.²³¹

Although there are steps between intended wrongdoing and reckless wrongdoing (see section C, below), it is plain that reckless actors are closer to the paradigm case of culpability – the conscious choice to do wrong – than negligent actors. Acquiring full conscious awareness of the risks attendant upon her conduct is easier for the reckless than the negligent actor, and it is submitted that this makes her more to blame for her failure to respond appropriately to the element of unjustified risk attendant upon her conduct.²³² Similarly, a person who is negligent with regard to her beliefs seems closer to the paradigm of culpable choice than the person who is negligent in terms of her conduct.

Although it is grand and impressive (and its insights have informed the explanation of culpable carelessness in chapters five and six), Tadros's approach to culpable carelessness misses the above important points concerning culpability, while Duff's distinction between attacks and endangerments distracts attention from

²²⁸ See, similarly, DN Husak, "Negligence, belief, blame and criminal liability: the special case of forgetting" (2011) 5 *Crim Law & Philos* 199 at 215-216.

²²⁹ TM Scanlon, "The significance of choice", in SM McMurrin (ed), *The Tanner Lectures on Human Values, VIII* (1988) 149 at 151.

²³⁰ See, further, J Jacobs, *Choosing Character: Responsibility for Virtue and Vice* (2001) 53. Cf Duff, *IACL* 139-142.

²³¹ See J Gardner, "On the general part of the criminal law", in RA Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (1998) 205 at 230-231. Gardner ultimately rejects this view of culpability (ibid at 231), for reasons which can be ignored here.

²³² See: AJP Kenny, *Freewill & Responsibility* (1978) 89; PW Low, "The Model Penal Code, the common law and mistakes of fact: recklessness, negligence or strict liability?" (1987-1988) 19 *Rutgers LJ* 539 at 552.

them. Through paying heed to the connection between control and culpability, however, it is submitted that the theory of culpable carelessness presented in this thesis is able to better explain the boundaries of blameworthy, unjustified risk-taking than courts and theorists have tended to in the past.

After the argument of this section has been summarised, the chapter will move on to consider how the varieties of culpable carelessness described in this thesis relate to other *mens rea* terms.

(5) Recklessness: summary

This section has given a belief-centred account of recklessness. Essentially, recklessness is the failure to be motivated sufficiently to investigate conscious or preconscious beliefs in risk (when the actor is consciously aware that these exist) and, if necessary, alter her conduct. The argument has demonstrated how this view differs from similar theories, such as those presented by Ferzan and Tadros. It has also been argued that recklessness and the two forms of negligence described in chapter five ought to be kept distinct from one another to recognise their relative seriousness in terms of culpability.

In the final part of the chapter, the lines between culpable carelessness and other forms of *mens rea* will be sketched to show the overall coherence of the theory presented in this thesis.

C. THE BOUNDARIES OF CULPABLE CARELESSNESS

The distinction between recklessness and negligence has already been analysed. The most important remaining distinctions are between recklessness and wilful blindness, recklessness and knowledge, and recklessness and intention.²³³

²³³ For concerns of space, attempts to collapse the existing *mens rea* categories (e.g. Alexander et al, *Crime & Culpability* ch 2) are not considered. Other *mens rea* terms (such as “maliciously”, “wilfully”, “fraudulently”, etc) and proposals to create new ones (such as mere suspicion: see S Matthiesson, “Should the law deal with reckless HIV infection as a criminal offence or as a matter of public health?” (2010) 21 KLJ 123 at 127) are also ignored.

(1) Wilful blindness

Wilful blindness is employed in both Scots and English criminal law as a proxy²³⁴ for knowledge²³⁵ (or, perhaps more accurately, a means of circumventing difficulties in proving knowledge).²³⁶ It is nevertheless a close relation of recklessness, a fact that has led some commentators²³⁷ and judges²³⁸ to conflate the two concepts.²³⁹

The reckless and the wilfully blind actor will both be consciously aware of a (conscious or preconscious) belief that there is a risk of a certain consequence or circumstance materialising. The important difference, which is often underplayed, is the motivational set-up of these two actors. The reckless accused is insufficiently motivated with regard to the risks attendant upon her conduct because she does not value sufficiently the interests that she threatens. The wilfully blind actor is *positively* motivated to avoid the confirmation of her suspicions;²⁴⁰ she will neglect to investigate the risks attendant upon her conduct where a properly-motivated person would, for fear that she will acquire knowledge that she would rather not have.²⁴¹ In the criminal context, this is usually knowledge that the accused is participating in criminal behaviour (for instance, drug smuggling).²⁴²

²³⁴ Wilful blindness was referred to historically as “connivance” by the courts and early cases suggested that the conniving accused actually *did* have knowledge. See R Charlow, “Wilful ignorance and criminal culpability” (1991-1992) 70 *Tex L Rev* 1351 at 1363. Cf *Roper v Taylor’s Garage* [1951] 2 *TLR* 284 at 288 per Devlin J. The absence of knowledge in cases of wilful blindness has, however, been emphasised in modern times: e.g. Anon, “Wilful blindness as a substitute for criminal knowledge” (1977-1978) 63 *Iowa L Rev* 466 at 473.

²³⁵ See: *Giorgianni v R* (1985) 59 *ALJR* 461; Gordon, *Criminal Law* paras 7.64, 8.82-8.85; Ashworth, *Principles* 184-185.

²³⁶ DN Husak and CA Callender, “Wilful ignorance, knowledge and the ‘equal culpability’ thesis: a study of the deeper significance of the principle of legality” [1994] *Wis L Rev* 29 at 58.

²³⁷ See e.g.: C Howard and ID Elliot, “The concept of recklessness”, in N Morris and M Perlman (eds), *Law and Crime: Essays in Honour of Sir John Barry* (1972) 50 at 52; S Shute, “Knowledge and belief in the criminal law”, in S Shute and AP Simester (eds), *Criminal Law: Doctrines of the General Part* (2002) 171 at 198; Ashworth, *Principles* 184-185.

²³⁸ See §3.B(1)(b), above.

²³⁹ Scots law might even admit of liability where the accused was *negligent* in failing, in line with her working commitments, to pursue avenues of inquiry which would have put her in a position where she would become suspicious: *Mackay Brothers v Gibb* 1969 *JC* 26 at 33 per Lord Wheatley.

²⁴⁰ See e.g.: *Redgate v Haynes* (1875-1876) *LR* 1 *QBD* 89; *Ross v Moss* [1965] 2 *QB* 396; *Westminster City Council v Croyalgrange Ltd and Another* [1986] 1 *WLR* 674 at 684 per Lord Bridge.

²⁴¹ *The Zamora No 2* [1921] 1 *AC* 801 at 812 per Lord Sumner; RM Perkins, “‘Knowledge’ as a *mens rea* requirement” (1977-1978) 29 *Hastings LJ* 953 at 962-963; Husak and Callendar (n 236) at 54.

²⁴² Less exotic instances of wilful blindness may be found in the case reports: e.g. *Friel v Docherty* 1990 *SCCR* 351, where the accused had (apparently inadvertently) received stolen HGV test certificates.

This element of “cheating”²⁴³ is not present in cases of recklessness.²⁴⁴ This explains one way²⁴⁵ in which wilful blindness can be conceptually distinguished from recklessness²⁴⁶ (and also why the defendant in *R v Parker* was not wilfully blind).²⁴⁷

Recklessness can therefore be separated from wilful blindness – a *proxy* for knowledge. It is far more difficult to distinguish recklessness from *actual* knowledge.

(2) Knowledge

Superficially, recklessness requires the taking of an unjustified risk for insufficient reasons, whilst knowledge does not.²⁴⁸ Despite this difference, it has been suggested that knowledge is the “essence” of (advertent) recklessness,²⁴⁹ which collapses the two concepts together.²⁵⁰ Criminal law writers²⁵¹ have thus suggested that the distinction between recklessness and knowledge is simply one of degree:²⁵² the reckless actor has a belief that a certain possibility of risk exists;²⁵³ the knowing actor holds that same belief but with greater certainty.²⁵⁴ It is difficult to get much further than this: some reckless actors will have a clear idea of the risks they are imposing,²⁵⁵ others will not,²⁵⁶ some knowing actors will have a great deal of

²⁴³ D Lanham, “Wilful blindness and the criminal law” (1985) 9 Crim LJ 261 at 267.

²⁴⁴ A point missed in Alexander et al, *Crime & Culpability* 33-35.

²⁴⁵ For another account, which focuses on the accused’s justification for staying ignorant of certain facts, see D Hellman, “Wilfully blind for good reason” (2009) 3 Crim Law & Philos 301.

²⁴⁶ See the summary of wilful blindness in Charlow (n 234) at 1429. See further: Husak and Callender (n 236) at 42; D Luban, “Contrived ignorance” (1998-1999) 87 Geo LJ 957 at 969.

²⁴⁷ See §3.B(1), above.

²⁴⁸ Alexander et al, *Crime & Culpability* 32.

²⁴⁹ JE Stannard, “Subjectivism, objectivism and the Draft Criminal Code” (1985) 101 LQR 540 at 541. See, similarly, Alexander et al, *Crime & Culpability* 33. Cf GR Sullivan, “Knowledge, belief and culpability”, in Shute and Simester (eds), *Criminal Law Theory* (n 237) 207 at 207 (arguing *belief*, not knowledge, is central to recklessness).

²⁵⁰ See, also, Shute (n 237) at 179-182.

²⁵¹ In philosophy, knowledge tends to be taken to mean *true* belief. This has not informed many legal treatments of knowledge, but see: *ibid* at 185; *R v Montila* [2004] 1 WLR 3141 at para 27 per Lord Hope; Ashworth, *Principles* 183.

²⁵² See e.g.: H Weschler, “On culpability and crime: the treatment of *mens rea* in the Model Penal Code” (1962) 339 Annals Am Acad Pol & Soc Sci 24 at 29; Alexander et al, *Crime & Culpability* 32.

²⁵³ It has been argued that reckless actors have an *opinion*, whilst knowing actors (unhelpfully) have *knowledge*, but this does not cohere with the theoretical account of culpable carelessness discussed in this thesis. See IP Robbins, “The ostrich instruction: deliberate ignorance as a criminal *mens rea*” (1990-1991) 81 J Crim L & Criminology 191 at 220-222.

²⁵⁴ Charlow (n 234) at 1380.

²⁵⁵ Cf the discussion of “reckless knowledge” in Ashworth, *Principles* 184-185. Ashworth appears to be discussing wilful blindness, which – as seen above – *is* distinguishable from recklessness.

confidence in a proposition, whilst others might “know” a fact, but hold some reservations.

A bright line between recklessness and knowledge thus seems unobtainable. Distinguishing recklessness and intention is similarly difficult.

(3) Intention

Again, superficially there are differences between recklessness and intention. The concepts are clearly distinct even in everyday speech: the former is pejorative, whilst the latter is not.²⁵⁷ A person may be praised for her (good) intentions, but not for her recklessness, or indeed her negligence (as opposed to her risk-taking). Despite this fact, the line between recklessness and intention has proved controversial in criminal law theory.

The difficulty is that, as suggested in the previous section, some reckless actors will have a clear idea of the risks they are imposing on others and what the likelihood is that the threatened consequence or circumstance will materialise. Some writers have (perhaps overly pessimistically) assumed that this means there can be no meaningful distinction between intention and foresight of risk, and doubted that there would be a significant moral distinction between a (very) reckless and an intentional actor.²⁵⁸

This view stands opposed to the growing consensus amongst criminal law theorists that (reckless) foresight can be distinguished from intention. The popular view²⁵⁹ is to distinguish between the accused’s desired ends and the “side-effects” of her action.²⁶⁰ On this account, the accused who intends a result aims positively to bring it about; it structures her action and she will be disappointed – and have

²⁵⁶ Furthermore, it is not clear that knowledge requires conscious awareness of the fact that the accused allegedly knows. Cf *R v Bello* (1978) 67 Cr App R 288 at 290 per Lord Lane CJ, where it was suggested that the defendant “knew” a fact if he had the capacity to bring it to the forefront of his mind. For criticism, see Sullivan (n 249) at 210.

²⁵⁷ JA Laing, “The prospects of a theory of criminal culpability: *mens rea* and methodological doubt” (1994) 14 OJLS 57 at 76-77; W Wilson, *Criminal Law: Doctrine and Theory*, 3rd edn (2008) 138.

²⁵⁸ See H Oberdiek, “Intention and foresight in criminal law” (1972) 81 Mind 389.

²⁵⁹ For an alternative account, which concentrates on the role of justification in foresight and intention, see AP Simester, “Why distinguish intention from foresight?”, in AP Simester and ATH Smith (eds), *Harm and Culpability* (1996) 71.

²⁶⁰ WJ Winslade, “Brady on recklessness” (1972) 33 Analysis 31 at 31; T Baldwin, “Foresight and responsibility” (1979) 54 Phil 347 at 350. Cf GA Ferguson, “*Mens rea* evaluated in terms of the essential elements of a crime, specific intent and drunkenness” (1971) 4 Ottawa L Rev 356 at 366.

*failed*²⁶¹ – if the relevant consequence or circumstance does not materialise.²⁶² This may be contrasted with consequences and circumstances that the accused has foreseen as mere potential “side-effects” of her intended conduct. Because these do not structure the accused’s action, she will not be disappointed – and will still have succeeded – if they do not materialise.

This analysis allows a distinction to be drawn between (desired) intended ends and (undesired) side-effects of action.²⁶³ The line between recklessness and intention is, on this account, that between foresight and desire.²⁶⁴ Simple as this test appears in theory, it cannot be denied that the lines around intention and side-effects are “fuzzy”.²⁶⁵ It might be that a person desires a certain end without her actions being structured around bringing it about. Consider Kenny’s example of a soldier who is ordered to blow up a bridge that her personal enemy is guarding: the soldier acts to follow her orders (which thus structure her action), yet desires the side-effect (her enemy’s incidental death) be brought about.²⁶⁶

Examples such as this have led theorists and judges to propose alternative approaches to the dilemma over intention and foresight. In common with the treatment of knowledge (see above), some have specified various degrees of reckless foresight that will qualify for intention. For instance, Williams distinguishes “moral certainty” (intention) from “strong probability” (recklessness).²⁶⁷ This approach is inherently malleable and, as a result, the English courts have managed to vacillate between various levels of foresight that qualify for intention.²⁶⁸ This distinction has

²⁶¹ Duff, *IACL* 61-63.

²⁶² See: DJ Galligan, “Responsibility for recklessness” (1978) 31 CLP 55 at 74; J Finnis, “Allocating risks and suffering: some hidden traps” (1990) 38 Clev St L Rev 193 at 201-202.

²⁶³ J Finnis, “Intention and side effects”, in RG Frey and CW Morris (eds), *Liability and Responsibility: Essays in Law and Morals* (1991) 32 at 33-35. It should not be assumed that the distinction between intended ends and side-effects explains the *whole* of intention: J Horder, “Varieties of intention, criminal attempts and endangerment” (1994) 14 LS 335 at 335. It nevertheless explains the most relevant *part* of intention for present purposes.

²⁶⁴ G Williams, *The Mental Element in Crime* (1965) 27; Finnis (n 263) at 49; Duff, *AFC* 152.

²⁶⁵ Oberdiek (n 258) at 393.

²⁶⁶ AJP Kenny, *Action, Emotion and Will* (1963) 238.

²⁶⁷ Williams, *The Mental Element* (n 264) 35.

²⁶⁸ See, ultimately, *R v Woollin* [1999] AC 82. For a helpful overview, see MC Kaveny, “Inferring intention from foresight” (2004) 120 LQR 81. It is not clear whether the debate over intention is restricted to the context of murder (see Ashworth, *Principles* 176) – the line between recklessness and intention has also proved controversial elsewhere: see e.g. *R v Belfon* [1976] 1 WLR 741 (Offences against the Person Act 1861 s 18).

not been relied upon in Scotland – largely because intention has never been defined there²⁶⁹ – and it is certainly “blurry”.²⁷⁰ It is submitted that this approach is too dependent on fine distinctions to be useful in the criminal law.

An interesting alternative solution to the intention problem is to make a motivational distinction beyond the simple desire/side-effect dichotomy discussed above.²⁷¹ It has been argued that a consequence of action is intended if the actor *accepts* its occurrence, rather than shying away from or not caring about it (as the reckless actor would).²⁷² This is one understanding of the concept of “conditional intention” (*dolus eventualis* in South Africa;²⁷³ *Bedingter Vorsatz* in Germany).²⁷⁴

Conditional intention requires two elements. First, the actor must have foreseen that it was “a not entirely distant possibility” that a certain risk would materialise.²⁷⁵ This means that recklessness (as understood in Anglo-American systems) would continue to have something in common with intention. The distinctiveness of conditional intent arises from its second element: the accused must have accepted (i.e. be reconciled to) the fact that the foreseen risk might materialise.²⁷⁶ This volitional element of acceptance is not present in recklessness because the accused, even if fully aware of the relevant risks attendant upon her conduct, need not have accepted those risks as a necessary element of her conduct.

What this demonstrates is that the line between conditional intent and conscious negligence/recklessness is not dissimilar from that between desired ends and side-effects.²⁷⁷ It is nevertheless slightly more robust. In Kenny’s example,

²⁶⁹ Cf *Sayers v HM Advocate* 1981 SCCR 312, where the trial judge adopted the definition of intention in *Cunliffe v Goodman* [1950] 2 KB 237 at 253 per Asquith LJ. Cf E Clive et al, *A Draft Criminal Code for Scotland with Commentary* (2003) 29. Intention is defined (“without restricting [its] ordinary meaning”) in section 9 of the Draft Code.

²⁷⁰ L Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (1987) 187. See, further, AW Norrie, *Crime, Reason & History: A Critical Introduction to the Criminal Law*, 2nd edn (2001) ch 3.

²⁷¹ See A Pedain, “Intention and the terrorist example” [2003] Crim LR 579.

²⁷² See: *ibid* at 591-592; M Gorr, “Should the law distinguish between intention and (mere) foresight?” (1996) 2 LT 359 at 366.

²⁷³ See PT Smith, “Recklessness in *dolus eventualis*” (1979) 96 S African LJ 81.

²⁷⁴ See M Bohlander, *Principles of German Criminal Law* (2009) 63-65.

²⁷⁵ G Taylor, “Concepts of intention in German criminal law” (2004) 24 OJLS 99 at 108.

²⁷⁶ *Ibid* at 109.

²⁷⁷ L Zaibert, *Five Ways Patricia Can Kill Her Husband: A Theory of Intentionality and Blame* (2005) 107.

presumably the soldier would have accepted the death of her adversary even if it was a “side-effect” given her orders. She therefore (conditionally) intended to kill.

There is, however, reason for caution. Various competing accounts of the volitional element in conditional intention exist,²⁷⁸ and this means that it will not provide an easy solution to the problem of distinguishing recklessness from intention. In fact, some German theorists have called for the creation of a concept akin to recklessness to bridge the gap between conscious negligence and (direct) intention.²⁷⁹ Although conditional intent *seems* like a suitable solution to the intention/recklessness problem, the lines it could draw between these *mens rea* terms remain “blurry” at the edges.²⁸⁰

(4) The boundaries of culpable carelessness: summary

This section has demonstrated that distinctions between negligence, recklessness and other *mens rea* terms can usefully be made. Although some of the distinctions are vague at the margins, it is submitted that this is to be expected.²⁸¹ Relationships between culpability terms are complicated. Ultimately, assessments of culpability involve a host of moral and political issues and so neat distinctions are eschewed in favour of some overlap between concepts. There is, arguably, little moral difference between a person who foresees, as a virtual certainty, that a side-effect of her action will materialise and one who has reconciled herself with its materialisation.

²⁷⁸ See: GP Fletcher, *Rethinking Criminal Law* (1978) 445-446; J Burchell, *Principles of Criminal Law*, 3rd edn (2005) 481.

²⁷⁹ Taylor (n 275) at 126. German law recognises conscious negligence (*bewusste Fahrlässigkeit*), which is virtually identical to advertent recklessness, so this might be unnecessary: see DW Morkel, “On the distinction between recklessness and conscious negligence” (1982) 30 Am J Comp L 325. Confusingly, the volitional element of *dolus eventualis* is, in South Africa, identified with a “reckless disregard”: *S v Sethoga* 1990 (1) SA 270 at 276 per Smalberger JA. Recklessness apparently just means “consent”: *S v Ngubane* 1985 (3) SA 677 at 685 per Jansen JA.

²⁸⁰ After reviewing the South African case law, Burchell concludes that the vagueness of the volitional element (and its relative practical unimportance) makes it “at best a confusing and, at worst, an irrelevant inquiry”: Burchell, *Principles* (n 278) 484-485. He concludes that foresight of a certain level of probability (i.e. the tack adopted by the English courts when considering the *mens rea* of murder) is a preferable means of discriminating between *dolus eventualis* and conscious negligence. See, further, Morkel (n 279) at 328.

²⁸¹ Arguments concerning the usefulness of concepts with “blurred edges” are left to one side here, but see LJJ Wittgenstein, *Philosophical Investigations*, 3rd edn (GEM Anscombe trans, 1967) (particularly at §§67-71).

For the reasons indicated above, however, the *mens rea* terms found in Anglo-American law do useful work in *most* cases which are not at the borderlines. In *most cases*, the intentional actor is (*mutatis mutandi*) more culpable than the wilfully blind actor, who is more culpable than the reckless actor, and so on. The fact that some cases force difficult questions upon a judge or jury is not reason to give up on culpability distinctions altogether and simply have one form of *mens rea*, such as “insufficient concern for others”.²⁸² That would, itself, be an exercise in wilful blindness.

D. CONCLUSION

This chapter has argued that recklessness is best understood in terms of the accused’s failure to be motivated by her conscious beliefs that there is a (“pure” or “opaque”) risk attendant upon her conduct. It has shown that many “indifference” theories, despite emphasising the attitudinal aspect of recklessness (a lack of concern for others), are misguided insofar as they do not connect the attitude to the actor’s beliefs, preferring to look at hypothetical questions (Horder, Simons), perception choices (Pillsbury) or attitudes as demonstrated through conduct (Duff). Linking the attitude of insufficient concern to the accused’s beliefs ensures a link between the accused and her culpability, and that any communication of condemnation is personal and worthwhile. The belief-centred view of recklessness in this chapter is thus preferred over rival conceptions, including the impressive arguments presented by Ferzan and Tadros.

This chapter has also shown that the understandings of recklessness and negligence as failure of belief can usually be demarcated from each other and other common *mens rea* terms, indicating the bounds of culpable carelessness in theory.

In the next chapter, some lessons which Scots and English law could learn from this theory will be considered.

²⁸² Cf Alexander et al, *Crime & Culpability* ch 2.

7 Lessons and Compromises

This chapter considers how the theory developed in chapters five and six could inform reform of Scottish and English approaches to culpable carelessness. It also contemplates the practical challenges that will require theoretical compromises. Section A considers possible changes to the substantive criminal law both north and south of the border. Section B then addresses evidential matters. Finally, section C discusses the “subjective”/“objective” dichotomy, criticism of which has permeated the thesis. The chapter concludes that the dichotomy is neither descriptively nor normatively useful, and should be discarded.

A. THE SUBSTANTIVE LAW

This part of the chapter asks what changes to the substantive law flow from the theory defended in chapters five and six, before considering whether the understandings of negligence and recklessness developed in this thesis could be translated into jury directions and statute.

The first important questions are whether there should be *one* definition of recklessness in the criminal law and – if so – what role negligence should play in establishing culpability.

(1) Recklessness: one or many forms?

Chapters two and three demonstrated that many distinct conceptions of recklessness continue to pervade Scots and (to a lesser extent) English criminal law. Some sit awkwardly with (“gross”) negligence – the elephant in the room in Scots law,¹ and a visible problem in the English law of involuntary manslaughter.²

¹ See §2.B, above.

² See §3.D(2), above.

The approach defended in chapters five and six was, by contrast, to argue that it is possible to understand and distinguish amongst the central elements of fault involved in negligence as failure of conduct,³ negligence as failure of belief⁴ and recklessness.⁵

It will thus not come as a surprise that a coherent, unitary approach to *mens rea* terms such as recklessness and negligence will be argued for over the present, scattered approach.⁶ This is due primarily to the failure by the Scottish and English courts to define *mens rea* terms sensibly. This is (most transparently in England)⁷ because of the courts' reluctance to discuss *mens rea* in general terms: most decisions do not express a clear view beyond the context of the specific offence under consideration. In Scots law, decisions also tend to be fact-specific, meaning that even less of general importance can be gleaned.

On one view, this conservative approach is acceptable: courts must decide the case before them.⁸ There is much to be said, however, for a more holistic approach (perhaps best not undertaken by the judiciary)⁹ which aims at simplifying the law and ensuring its overall coherence; incorporating elements of the current law which “fit” together and abandoning those that do not.¹⁰ This would be preferable to trying (as Scottish and English writers have, in vain) to explain the existing jurisprudence on recklessness and negligence *in its entirety* as though it had been constructed rationally when it clearly has not.

Although this sounds straightforward, there is nevertheless a counterargument which requires to be addressed.

³ See §5.B, above.

⁴ See §5.C, above.

⁵ See §6.B, above.

⁶ See, similarly, N Metcalfe and A Ashworth, “Arson: *mens rea* – recklessness whether property destroyed or damaged” [2004] Crim LR 369 at 371. For a similar argument concerning “consent”, see C Elliott and C de Than, “The case for a rational reconstruction of consent in criminal law” (2007) 70 MLR 225.

⁷ See e.g.: *R v Adomako* [1995] 1 AC 171 at 188 per Lord Mackay (“gross” negligence); *R v Woollin* [1999] 1 AC 82 at 90 per Lord Steyn (intention); *R v G* [2004] 1 AC 1034 at para 28 per Lord Bingham (recklessness).

⁸ Cf the “judicial minimalism” defended in C Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

⁹ This is, at least theoretically, the function of the law commissions: Law Commissions Act 1965 s 3.

¹⁰ See, similarly: R Dworkin, *Law's Empire* (1986) ch 6; DN MacCormick, “Reconstruction after deconstruction: a response to CLS” (1990) 10 OJLS 539. Cf J Gardner, “Criminal law and the uses of theory: a reply to Laing” (1994) 14 OJLS 217 at 217-218.

(a) The argument against a unitary approach

The present, confused state of the law might be explained on the basis of distinct principles and policies¹¹ at work in different areas of the criminal law.¹² Perhaps recklessness should be understood differently in rape, for example, because taking a risk with the sexual autonomy of another is categorically distinct from taking risks with other interests (a principled argument).¹³ Or perhaps the law looks so dimly on non-consensual sex that, in this particular context, a focus on advertence would get in the way of the law's goals of protecting sexual autonomy (a policy argument). The courts have simply not been clear enough about what kind of argument they were endorsing (if they thought about this matter), and the legislatures in Scotland and England have buried this distinction between general principle and specific policy through removing talk of "recklessness" from the sexual offences legislation.¹⁴

A similar explanation might be given of the Scottish concept of "wicked" recklessness.¹⁵ It defies classification on the "subjective"/"objective", advertent/inadvertent dichotomy because murder – "the most heinous of all crimes"¹⁶ – can only be defined in outwardly moral terms such as "wickedness".¹⁷ Again, the appeal court has simply not sought to explain clearly the distinction between "wicked" and other forms of recklessness (most relevantly the form employed in culpable homicide),¹⁸ or what this distinction relies upon (a principle or a policy, or a mixture of the two).

¹¹ The principle/policy distinction is rarely elaborated on – and there is not space to do so here – but see R Dworkin, *Taking Rights Seriously* (1977) 22.

¹² See e.g.: C Wells, "Swatting the subjectivist bug" [1982] Crim LR 209; J Temkin, "The limits of reckless rape" [1983] Crim LR 5 at 15; J Gardner and H Jung, "Making sense of *mens rea*: Antony Duff's account" (1991) 11 OJLS 57 at 578; Gardner (n 10); J Gardner, "On the general part of the criminal law", in RA Duff (ed), *Philosophy and the Criminal Law: Principles and Critique* (1998) 205; V Tadros, "The system of criminal law" (2002) 22 LS 448 at 455 (Tadros nevertheless accepts that "we can make some general claims about the role of recklessness in the criminal law, and even generate some general tests" (at 462)); J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) 27. Cf M Bohlander, *Principles of German Criminal Law* (2009) 117.

¹³ See §6.A(4)(c), above.

¹⁴ See §2.E(2), above.

¹⁵ See §2.F, above.

¹⁶ Gordon, *Criminal Law* para 23.19.

¹⁷ Cf Duff, *IACL* 157-167 (see §6.A(4)(c), above).

¹⁸ Prior to *HM Advocate v Purcell* 2008 JC 131, this line was "at best unclear": Gordon, *Criminal Law* para 7.60. Now that an intention to do physical injury is required for wicked recklessness, matters might be different – but this will depend on the appeal court's treatment of "intention" in future cases.

This way of explaining the decisions concerning recklessness has an intuitive appeal, because it seems opposed to a “grand theory” that would explain the *entirety* of the criminal law (not simply the law’s approach to culpability). It is popular (and perhaps wise) to be suspicious of such all-encompassing explanations:¹⁹ any “grand theory” is likely to be unhelpfully vague (or simply lead to absurd results in individual cases) because its rules will be abstract and insensitive to “local” concerns, such as the difficulties of dealing with certain offences (sexual offences, etc).

Scepticism about grand theorising does not, however, explain why words found throughout the criminal law (such as recklessness) must bear different meanings when used in different contexts. For instance, the fact that inadvertently taking a risk with the sexual autonomy of another is a serious display of insufficient concern for her interests might explain why such inadvertence ought to be criminal. It does not, however, explain why “recklessness” should cover inadvertent risk-taking in the specific context of sexual offences, but not others. The English courts in the 1980s, and the Scottish courts of the mid 1990s,²⁰ were misguided to think that it did.

Rather than treating *mens rea* terms as mere words which can be given various shades of meaning, it is preferable to keep their definitions concrete and create a full arsenal of fault concepts to deploy in different circumstances. The main reasons for this are coherence and comprehensibility. Unless “recklessness” just means “fault” (in which case, it makes little sense to have differentiated *mens rea* terms),²¹ and is therefore malleable to the purposes of the criminal courts, the vacillating boundaries of that term are only likely to confuse. A central understanding of recklessness should thus be developed and adhered to. It is not useful to make the law’s terminology confusing and inaccessible, particularly when one purpose that might be avowed for having the criminal law is deterrence,²² and –

¹⁹ See: RA Duff, “Theorizing criminal law: a 25th anniversary essay” (2005) 25 OJLS 353; Duff, *AFC* 7-8.

²⁰ See §§2.E(1), 3.C(2), above.

²¹ See Alexander et al, *Crime & Culpability* ch 2.

²² Sentencers are occasionally obliged to take specific account of deterrence. See e.g. the Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2 (as amended by the Convention Rights (Compliance) (Scotland) Act 2001 s 1).

as assumed in this thesis – the criminal process is supposed to be a communicative endeavour.²³ It also raises concerns of fairness: if the law is inaccessible, then the serious consequences that might follow from conviction might be sprung on citizens without warning.

This argument supports the contention that it was illegitimate to expand the law's understanding of recklessness solely in the context of rape, but it is quite clear why the Scots and English courts turned from advertent recklessness to inadvertent (or at least not *necessarily* advertent)²⁴ “indifference” in the 1980s and 1990s. (Advertent) recklessness was a *mens rea* for rape, but negligence was not. This no doubt motivated the courts in developing the law's understanding of recklessness – in rape, at least – to cover inadvertent risk-taking with regard to consent. If faced with a choice between destabilising a *mens rea* term or allowing (what were felt, by the courts, to be) culpable accused persons to go free, it is understandable that the court went for the former option. If negligence were accepted as being culpable, however, such judicial activism would be unnecessary.

This leads to a second complication. As seen in chapter four,²⁵ negligence is not viewed as particularly serious by some writers, and to hold that a negligent accused person could be liable for a serious crime like rape might be thought to do two sorts of injustice. First, it might be seen to punish those who – although blameworthy – do not *deserve* the criminal sanction. As argued in chapter five, this argument fails in the context of rape. The compromise made towards the end of that chapter²⁶ – that widespread use of negligence liability might be illiberal – does not stop it from being employed legitimately where the risks involved in the accused's conduct could easily be eradicated (by, for instance, asking about consent)²⁷ and the consequences are potentially severe and irremediable. Non-consensual sexual intercourse is one such instance.

Secondly, and more compellingly, admitting of negligence liability in the context of rape might be to devalue the “wrongness” of that crime. If negligence is

²³ See §1.A(4), above.

²⁴ See §6.A(4)(b), above.

²⁵ Particularly at §4.A.

²⁶ At §5.D.

²⁷ T Pickard, “Culpable mistakes and rape: relating *mens rea* to the crime” (1980) 30 UTLJ 75 at 81.

not viewed as serious, then the wrong done to the complainer in a case of “negligent rape” might be viewed similarly. This objection is an important one, but it is submitted that it can be marshalled *in support* of recognising negligence as failure of belief²⁸ as seriously culpable in the context of non-consensual sexual intercourse. If a serious offence such as rape can be committed through negligence as failure of belief, then that communicates clearly the polity’s attitude towards those who do not show adequate self-control and epistemic thoroughness in the formation of their beliefs about consent.²⁹

This point goes beyond the context of rape. Both forms of negligence ought to be recognised for what they are: appropriate heads of culpability (though in different contexts) which indicate forms of blameworthiness distinct from recklessness. Accepting this point would ease the definitional strain that has been placed on recklessness both north and south of the border over the last century. Rather than having various different types of recklessness – some of which are indistinguishable from negligence as failure of conduct (e.g. *Allan v Patterson/Lawrence* recklessness)³⁰ and others which seem to involve negligence as failure of belief (e.g. *Quinn v Cunningham* recklessness)³¹ – a central nub of reckless culpability could be detected and exposed. This could be distinguished, as it has been in this thesis, from the two forms of negligence, allowing distinct forms of culpability to be identified and punished accordingly.

As noted at the end of chapter six,³² there is good reason (in terms of relative culpability) in distinguishing recklessness from negligence as failure of belief and negligence as failure of conduct: the reckless accused is closer to the paradigm of culpable agency – the culpable choice – than the accused who is negligent with regard to her beliefs. Similarly, an accused person who exhibits negligence as failure of conduct is further away from the culpable choice than one who is negligent with regard to her beliefs. As a result, she is less blameworthy.

²⁸ Negligence as failure of conduct is not appropriate for use in sexual offences (see §5.C(4), above).

²⁹ This is why crimes such as “negligent sexual invasion” – see T Honoré, *Sex Law* (1978) 78-79 – are objectionable. They label accurately the accused’s mental state at the time of the offence, but undermine the severity of his wrongdoing by failing to give it an appropriately odious label.

³⁰ See §§2.C, 3.C(1), above.

³¹ See §2.D, above.

³² At §6.B(4).

Recklessness, negligence as failure of belief and negligence as failure of conduct should, therefore, be understood as general terms which can be applied to specific offences by relating them to a specific risk (of damage, of injury, of fire, etc). This means that they belong properly to the “general part” of the criminal law and, as a result, general descriptions of them are possible. In the next sections, statutory definitions of, and jury instructions relating to, each form of culpable carelessness will be presented.

(2) Culpable carelessness: statutory formulations

Criminal law theorists rarely present statutory formulations of *mens rea* terms. This is problematic because an increasing amount of the criminal law in both Scotland and England is being legislated upon, and thus theory which cannot be translated into statute is of diminishing worth. Even if codification in both jurisdictions seems, at present, an unattainable aim,³³ it is still a fundamental goal of the law commissions.³⁴ A codified criminal law should contain codified *mens rea* terms.

It is thus important that the definitions of negligence and recklessness provided in chapters five and six could be put into statutory form. It is submitted that they could be. One caveat must, however, be made clear from the beginning. No translation from theory to practice is ever going to be perfect: judges and jurors are not philosophers or criminal law theorists.³⁵ There are also complicated matters concerning proof which pose practical problems for basic and ornate theories alike. Given these concerns, it is necessary to try and explain *mens rea* concepts in “everyday” language and allow the judge or jury to use inferences where features of the crime (the accused’s beliefs, desires, etc, at the time of acting) cannot easily be demonstrated.³⁶

³³ See: T Bingham, *The Business of Judging: Selected Essays and Speeches* (2000) 295-297; I Dennis, “RIP: the criminal code (1968-2008)” [2009] Crim LR 1; E Clive, “Codification of the criminal law”, in J Chalmers, F Leverick and L Farmer, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 54.

³⁴ Law Commissions Act 1965 s 3. The Law Commission’s tenth programme of law reform nevertheless abandoned the aim of codifying the criminal law – see Dennis (n 33).

³⁵ GH Gordon, “Subjective and objective *mens rea*” (1974-1975) 17 Crim LQ 355 at 375.

³⁶ Even if the accused gives evidence, there are still issues of credibility that might make her representation of her beliefs, desires, etc, untrustworthy. Inferences will still, therefore, be necessary.

The argument in the following sections is not, therefore, that the theory in chapters five and six can be implemented directly. Rather, the contention is that the positive criminal law in Scotland and England can be *improved upon* in line with that theory, but that certain pragmatic compromises must be made. The theory defended in this thesis will, however, help to explain and justify the law's approach in individual cases, and help to stymie the divergence in approach detailed in chapters two and three.

Attention can now turn to the statutory definitions of the concepts described in chapters five and six. It is sensible, for reasons which will become clear, to start by considering the concept of justification.

(a) Justification

Justification of risk-taking: The accused can only be reckless or negligent with regard to a substantial risk that a consequence or circumstance may obtain when it was unjustifiable for him³⁷ to take that risk.³⁸ A lack of justification is established where, given social expectations concerning risk-taking, the dangers posed by the accused's actions went beyond acceptable limits. The accused's views concerning justification are relevant but not determinative: it is possible for the accused to be convicted of an offence of negligence or recklessness even if he thought – at the time of acting – that he was justified in taking the relevant risk.

This section sets out the view of justification discussed in chapter five.³⁹ As lack of justification and the taking of a substantial risk⁴⁰ permeate all forms of culpable carelessness, they should be set out in their own section, rather than inserted into the definition of each form of culpable carelessness.⁴¹ This simplifies the wording of the substantive sections concerning culpability and gives courts specific guidance on the issue of justification.

As noted above,⁴² the court may – in determining the matter of justification – have regard to the “reasonable person's” views on risk-taking. It is not, however,

³⁷ Statutory language has historically employed “he”, not “she”, in the United Kingdom.

³⁸ The language employed in these definitions deals with singular risks. It is – of course – possible to be taking more than one substantial and unjustifiable risk at a time.

³⁹ At §5.A(1).

⁴⁰ It was argued above that the risk the accused takes must be substantial for it to be the concern of the criminal law: *ibid.*

⁴¹ Cf Model Penal Code s 2.02(2).

⁴² At §5.A(1).

necessary to set this standard out in statutory form. It is a heuristic device, rather than a formal legal requirement. The “reasonable person” could, however, be referred to in jury directions (on which, see below).

(b) Negligence as failure of conduct

Negligence as failure of conduct: The accused had voluntarily entered a sphere of activity which was regulated by ethical and/or practical codes of conduct. Thereafter, the accused acted in a manner contrary to the ethical and regulatory framework provided for that activity, and took a substantial and unjustified risk with the interests of others, which demonstrated insufficient concern for those interests.

This section sets out the criteria for negligence as failure of conduct which were considered in chapter five.⁴³ The term “exclusionary reason”, relied upon in chapter five, is not mentioned as it might complicate the statutory language. The court is only concerned with *when* the accused was culpable, and need not – for practical purposes – have a detailed philosophical explanation concerning *why*. Exclusionary reasons answer the “why”, but not the “when”, question and are thus more relevant to lawyers (and, in particular, law students).

The notion of “insufficient concern” is left undefined, but it could be explained to a jury that *they* must decide on the standard, as representatives of the community.⁴⁴ This approach is adopted in the model directions below.

(c) Negligence as failure of belief

Negligence as failure of belief: The accused had the background knowledge that his conduct presented substantial and unjustified risks to life *and/or* bodily integrity *and/or* sexual autonomy of another/others and was conscious that he was about to engage in that conduct. The accused then failed to form a belief about the justifiability of his conduct and, through continuing to act in this ignorance, showed insufficient concern for the interests of another/others in life *and/or* bodily integrity *and/or* sexual autonomy. The accused may avoid liability by raising reasonable doubt concerning:

- (1) His possession of the relevant background knowledge required to form a belief in the relevant risk(s); or

⁴³ At §5.B.

⁴⁴ The idea that juries are representative of their community is probably not empirically accurate, but there is not space to pursue this matter here.

- (2) The fact that his failure to form a belief was caused by a feature of his character or situation which did not reflect his character as a whole (i.e. was “out of character”).

This section concerns only risks taken with the life, bodily integrity and/or sexual autonomy of another. It was conceded at the close of chapter five that a polity might reach the conclusion that negligence as failure of belief which threatens other interests should be criminal.⁴⁵ If this occurs, the section could be amended suitably.

It should also be emphasised that the section allows the accused to have been negligent with regard to *all three* interests (consider the accused who fails to form a belief in non-consent whilst engaged in violent sexual intercourse which threatens the complainer’s bodily integrity and life).

The point about belief and desire at the end of the definition is necessary to ensure that the accused can argue that she either lacked the relevant background knowledge (e.g. that water conducts electricity)⁴⁶ or that she was motivated by an “alien desire”.⁴⁷ The (evidential) burden of proof with regard to these points is on the accused, for the reasons discussed below.⁴⁸

(d) Recklessness

Recklessness: The accused:

- (1) Consciously believed he was posing a substantial and unjustifiable risk to the interests of others and failed to alter his behaviour;

OR

- (2) The accused believed consciously that his conduct was risky or dangerous – even though he did not advert consciously to the specific reasons why, or to the substantiality of the risks that he was taking – and, despite the opportunity to do so, failed to stop and inquire further and/or alter his behaviour.

In both (1) and (2), the accused’s failure to alter his behaviour must demonstrate insufficient concern for the interests of others.

⁴⁵ See §5.D(2), above.

⁴⁶ See §5.C(1), above.

⁴⁷ See §5.C(3)(a), above.

⁴⁸ At §7.B.

The challenge with regard to recklessness is defining it in an accessible manner. Chapter six relied on the notions of preconscious and conscious awareness and these terms are not suited for statutory language as they might confuse a judge or jury. Ferzan similarly removes them from her definition of “opaque” recklessness:⁴⁹

Where the evidence does not establish that the actor consciously disregarded the risk, but the actor (1) consciously recognized that her conduct was dangerous; (2) at some level appreciated that the reasons why her conduct was dangerous was because it presented a substantial and unjustifiable risk that a material element existed or would result from her conduct; and (3) she nevertheless chose to engage in the conduct, the actor is reckless. The actor is not reckless where she (1) did not realize her action was dangerous but should have; (2) realized it was dangerous, but thought the risk of harm was not substantial or unjustifiable; or (3) realized it was dangerous but defined dangerous in a way that did not include harm that occurred.

It is submitted that this definition is unhelpful in two respects, which is why it is not followed here. First, the language of “at some level” appreciating a risk is ambiguous. A person might, in theory, appreciate the risks attendant upon her conduct at a level which she cannot access consciously.⁵⁰ This appreciation cannot suffice for recklessness (a fact Ferzan acknowledges).⁵¹ Secondly – Ferzan attempts, in the latter part of her definition – to exclude negligence from her analysis. This causes difficulties because, primarily, definitions should be positive: the court should not have to work out what culpability *is* through excluding what it is *not*.⁵² Additionally, if negligence is defined as a culpability term in its own right (something Ferzan would not support,⁵³ but see the definitions above) then discussing it in relation to recklessness becomes unnecessary and, once again, liable to confuse.

(e) Statutory formulations: summary

The sections above have demonstrated that statutory definitions of culpable carelessness are possible. It is clear, however, that the explanations of recklessness and negligence in earlier chapters require explanation in “everyday” language for

⁴⁹ Ferzan, “Opaque recklessness” at 644.

⁵⁰ See §6.B(1), above.

⁵¹ See §4.A(3)(b), above.

⁵² G Williams, *The Mental Element in Crime* (1965) 16.

⁵³ See Alexander et al, *Crime & Culpability* ch 3.

them to be useful in criminal trials. As mentioned above, this is mainly because lay jurors might become confused by complex legal concepts. Assuming juries are to be maintained, then the statutory provisions imagined above would have to become even more basic. This matter is taken up in the next section.

(3) The jury

There is not space to consider the merits and demerits of the jury system.⁵⁴ It will therefore be assumed that Scots and English juries will continue to grapple with *mens rea* concepts, including recklessness and negligence, even if they were reconceptualised in the manner proposed in this thesis.

Given this concession, it might be thought that – as a matter of pure pragmatism – the current “subjectivist” dichotomy between awareness and unawareness is easy to explain to the jury, and is therefore superior to the more nuanced approach to these terms defended in chapters five and six. It will be argued that this is not the case and that jury instructions can be written which explain (with some simplification) culpable carelessness in the way described in this thesis.

It is useful to explain briefly why this “pragmatic” argument fails. If the argument is that “subjectivism” *is* in fact a coherent account of culpable carelessness, then the inconsistent approaches described in chapter four seem to undermine it. “Subjectivists” disagree about what it means to be reckless, and the law does not adhere to any one understanding over the others. If, alternatively, the argument is that theory is worthless, and that – as a matter of pure pragmatism – the “subjective”/“objective” dichotomy is the least-worst option available, then two responses might be offered. First, that dichotomy is not an accurate description of the positive law (hinting at its limitations – and the fact that the courts are aware of them). Secondly, this anti-theoretical standpoint is precisely what has resulted in the doctrinal mess discussed in chapters two and three. It cannot be argued that the current approach “works” as a system of law even if, through gut feeling, judges and

⁵⁴ For useful discussion, see: M Redmayne, “Theorising jury reform”, in RA Duff et al (eds), *The Trial on Trial: Volume 2 – Judgment and Calling to Account* (2006) 99; T Hörnle, “Democratic accountability and lay participation in criminal trials” in the same volume (135).

juries seem able to reach conclusions regarding whether the accused was reckless with scant direction.

A further preliminary point that is often neglected – but should, nevertheless, be addressed before proceeding – concerns the usefulness of “everyday” terms in defining *mentes reae* for lay jurors. Recklessness does not have a settled, “ordinary” meaning which resembles the understanding of that concept presented in chapter six. Members of the public – i.e. potential jurors – who label each other reckless do not usually conduct inquiries into awareness, belief and desire.⁵⁵ This lack of a colloquial understanding of recklessness allowed Lord Diplock to expand the understanding of that term in *R v Caldwell*,⁵⁶ and led Williams to (presumably cynically) propose that a better term for advertent, unjustified risk-taking might be “conchneg” (a play on conscious negligence).⁵⁷ As conchneg is not an “everyday” word, Williams wondered if the courts might define it more clearly. An important consideration is whether Williams had a worthwhile point: should the word recklessness (and, for that matter, the word negligence) be used in the criminal law, or could new terms be thought up to describe the concepts described in chapters five and six?

The difficulties with changing the language of the criminal law in the context of culpable carelessness are readily apparent. Primarily, there does not appear to be reason to stop at recklessness: there are myriad other legal terms which do not have settled meanings in “everyday” language (“consent”,⁵⁸ “dishonesty”,⁵⁹ etc) and, if recklessness and negligence are too difficult to use, then these other terms might also have to be dispensed with. Law would then require quite literally its own language – which would presumably bewilder laypersons – thus making the law inaccessible in the absence of legal guidance. This would make it difficult to convince citizens that the criminal law is *their law* (rather than that of the sovereign or ruling elite) and *this* is why they are obliged to follow it.⁶⁰ It would also make unduly parochial the

⁵⁵ Cf G Williams, “Recklessness redefined” (1981) 40 CLJ 252 at 265.

⁵⁶ [1982] AC 341 (see §3.C, above).

⁵⁷ PJ Fitzgerald and G Williams, “Carelessness, indifference and recklessness: two replies” (1962) 25 MLR 49 at 56.

⁵⁸ See C Elliott and C de Than, “The case for a rational reconstruction of consent in criminal law” (2007) 70 MLR 225.

⁵⁹ See A Halpin, *Definition in the Criminal Law* (2004) ch 4.

⁶⁰ See, further, Duff, *AFC* 49-51.

communicative enterprise that the criminal trial ought to further. Adopting new terminology to avoid talking at cross purposes thus threatens to frustrate an important purpose of the criminal process.

A better response to the problem concerning “everyday” language is to make clear to juries that the law develops its own (precise)⁶¹ understanding of terms for use in a specific context (the trial).⁶² Although they may *think* they know what “recklessness” means – and this gives them a useful starting point – they must listen to the instructions of the judge as to what recklessness *should be*, in law.⁶³ Although it is possible that a jury might ignore such guidance and apply its own biases and presuppositions⁶⁴ concerning the meaning of recklessness and negligence, this is not an argument against using “everyday” language in the criminal law. If anything, it is an argument against using juries, a matter beyond the scope of this discussion.

With these points in mind, it is prudent to briefly examine attempts by criminal law theorists to explain culpable carelessness in a form appropriate for use with a jury, to see if any lessons can be learned from them.

(a) Previous theoretical attempts

Very few criminal law theorists take seriously the practical implications of their work, perhaps because of the difficulties in translation spoken to above. Fewer still give detailed jury instructions based on their arguments.⁶⁵ Two notable exceptions are the draft jury directions given by Alexander, Ferzan and Morse⁶⁶ and Pillsbury.⁶⁷

Alexander, Ferzan and Morse suggest an “initial instruction” which provides, as far as relevant, that:

It is criminal for an actor to take an unjustified risk of causing harm to a legally protected interest or to take an unjustified risk that his conduct constitutes prohibited behaviour... For behaviour to be justified, the reasons that the actor has for engaging

⁶¹ JB Brady, “Recklessness, negligence, indifference and awareness” (1980) 43 MLR 381 at 382.

⁶² See, similarly: *Caldwell* at 357 per Lord Edmund-Davies; Fitzgerald and Williams (n 57) at 55.

⁶³ Cf RA Duff, “*Caldwell* and *Lawrence*: the retreat from subjectivism” (1983) 3 OJLS 77 at 87.

⁶⁴ Some studies have, however, indicated that directions can make a difference to a jury’s verdict. See, famously, RJ Simon, *The Jury and the Defense of Insanity* (1967) 74-76.

⁶⁵ It is proposed, in the sections below, to deal with theoretical approaches to jury instructions, rather than existing model directions. As seen in chapters two and three, existing model directions do not speak to a general theory of culpability and are therefore unhelpful.

⁶⁶ Alexander et al, *Crime & Culpability* 327-329.

⁶⁷ Pillsbury, “Crimes of indifference”.

in his behaviour should be weighed against the risk that the actor perceives that his conduct will cause a prohibited result or results... The actor's reasons for action include not only the reason or reasons that motivate his conduct but also any other reason that might justify his conduct of which he is aware. These reasons should be accorded weight by (1) their positive or negative force and (2) the actor's perception of the likelihood that the facts underlying the reasons do or will obtain.

This "subjective" direction on recklessness (which the authors think explains *the whole* of culpability)⁶⁸ requires the jury to ask themselves some overwhelmingly difficult questions. Justification must be assessed on the basis of the actor's (presumably inferred, unless he gives evidence) reasons (themselves to be weighed in terms of their force and ("subjective") likelihood) against the actor's perception (again, presumably inferred from "objective" evidence) of the risks his conduct involves. It is likely that a jury will simply be confused by this direction and go with "gut feeling". This, it was contended in earlier chapters, is perhaps what jurors do when asked whether the accused showed an "utter disregard" for, or "indifference" towards risks.⁶⁹ Although more detailed, Alexander, Ferzan and Morse's directions still provide the jury with little additional assistance.

Pillsbury's direction is much longer, and contextualised because he is concerned with "depraved heart" murder (an equivalent of "wicked" recklessness employed in some United States jurisdictions) and involuntary manslaughter.⁷⁰ What Pillsbury demonstrates is that juries will need detailed guidance concerning the various elements of culpable carelessness, preferably with examples and indications of the type of heuristic devices (such as the "reasonable person") that they may employ in reaching a decision.⁷¹ He also shows that the jury can be informed of matters which need not figure in the statutory definition of *mens rea* terms. For instance, Pillsbury includes a reminder about the accused's capacities in his directions,⁷² which is helpful in ensuring that the accused was able to conform to community expectations regarding risk-taking.

⁶⁸ See Alexander et al, *Crime & Culpability* ch 2.

⁶⁹ See e.g. Judicial Studies Committee, *Jury Manual: Some Notes for the Guidance of the Judiciary* (2011) 37/2 (on culpable and reckless conduct), available at http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManual_1.pdf.

⁷⁰ See Pillsbury, "Crimes of indifference" at 209-212.

⁷¹ Pillsbury actually refers to "one in the defendant's position", which is ambiguous: *ibid* at 209.

⁷² *Ibid* at 210.

In the following jury instructions, Pillsbury's detailed approach will be preferred. At first, the directions will not be fleshed out, but – after the instruction on recklessness – there is an example of how the jury would be directed if the facts of *Cameron v Maguire*⁷³ (a case discussed throughout the thesis) were under consideration. It should further be noted that questions of evidence (such as the requirement of corroboration) are ignored in the directions given below. Their concern is primarily with the *mens rea* component of the offence charged.

(b) Negligence as failure of conduct

POSSIBLE DIRECTION ON NEGLIGENCE AS FAILURE OF CONDUCT

Charge [*charge number*] is of [*name of offence*].

It is a crime to, through substandard, negligent conduct,⁷⁴ culpably risk that [*consequence or circumstance*].⁷⁵ I shall break down these elements for you.

First, you must be convinced beyond reasonable doubt that the accused [*set out alleged act of wrongdoing*]. If you are not, then you must acquit.

To be negligent, the accused must be unjustified in her taking of a substantial risk. You must be satisfied that, taking the substantial risk that [*consequence or circumstance*] went beyond the bounds of socially-accepted risk-creation. You – as representatives of the community⁷⁶ – must ask whether it was socially acceptable for the accused to put others at risk in the manner that she did. If not, you may proceed. If you are not convinced that the accused's risk-taking was unjustified, you must acquit.

If the accused gives evidence as to justification:

In reaching a conclusion concerning the justification of the accused's risk-taking, you must consider the accused's evidence. This is important, but should not be determinative: it can be unjustifiable to take a risk even if the

⁷³ 1999 JC 63.

⁷⁴ It is not necessary, in these directions, to distinguish negligence as failure of conduct and negligence as failure of belief, because it is unlikely that a case would arise where both were relevant. If they were, then specific directions on each form (with the relevant label) would be necessary.

⁷⁵ It would be preferable if the law were codified and the circumstance(s) or consequence(s) that the accused must be reckless as to was specified clearly. See, however, the text accompanying nn 33-34, above.

⁷⁶ See n 44, above.

accused believes that she is justified in doing so. *[Thereafter give an example.]*

If you are satisfied that the accused carried out the alleged action, and that it was unjustifiably risky to do so, you must ask whether the accused was charged with the responsibility to *[set out exclusionary reason]*. The Crown alleges that the accused failed in that responsibility through acting negligently. Negligent conduct is that which falls below the conduct expected of a person in the accused's position and with the accused's level of experience. You have heard evidence concerning this standard of conduct,⁷⁷ and you may base your verdict upon it. If you do not find the evidence credible or reliable, you must acquit.

If satisfied that the accused acted negligently, you must then consider whether she voluntarily entered the *[relevant sphere of activity]* and knew of the standards expected of her. You must also be convinced that the accused's failure to act safely displayed insufficient concern for those standards and *[the victim's]* interests. You, as representatives of the community, must decide on the level of sufficient concern which was appropriate in the circumstances *[taking into account the expert evidence you have heard in this case (if relevant)]*.

If you are convinced beyond reasonable doubt of all of these points, then you should convict. If reasonable doubt exists over all or any of these elements, you must acquit. Remember that it is not for the accused to raise reasonable doubt over her guilt; the Crown bears the only burden of proof in this case.

(c) Negligence as failure of belief

POSSIBLE DIRECTION ON NEGLIGENCE AS FAILURE OF BELIEF

Charge *[charge number]* is of *[name of offence]*.

It is a crime to negligently take a risk that *[consequence or circumstance]*.⁷⁸

[Set out parts of the actus reus which do not concern justification of risk-taking or mens rea].

There is a mental element to this crime *[set out mens rea]*.⁷⁹

To be negligent, the accused must take a substantial and unjustified risk. You must be satisfied that, taking the substantial risk that *[consequence or*

⁷⁷ It is assumed that expert evidence will be required in most cases involving negligence as failure of conduct.

⁷⁸ It should be remembered that only a limited number of interests should be considered relevant to negligence as failure of belief – see §5.D, above.

⁷⁹ Some offences will have more than one form of *mens rea* (e.g. recklessness and intention).

circumstance] went beyond the bounds of socially-accepted risk-creation. You – as representatives of the community – must ask whether it was socially acceptable for the accused to put others at risk in the manner that she did, and it might be helpful to consider what you imagine the “reasonable person” would think of the accused’s risk-taking. If you find that the accused’s risk-taking was unjustified, you may proceed to consider the other matters I will direct you towards. If you are not convinced that the accused’s risk-taking was unjustified, you must acquit.

If the accused gives evidence as to justification:

In reaching a conclusion concerning the justification of the accused’s risk-taking, you must consider the accused’s evidence. This is important, but should not be determinative: it can be unjustifiable to take a risk even if the accused believes that she is justified in doing so. *[Thereafter give an example.]*

If you are satisfied that the accused’s risk-taking was substantial and unjustifiable, you can approach the question of whether she was culpably negligent with regard to that risk. A person is culpably negligent when she knew – in terms of her background knowledge – that the conduct she engaged with was risky, but failed to apply this knowledge to her action. *[Thereafter give an example.]*

If the accused had background knowledge, the question becomes why she failed to apply this in the instant circumstances to form a belief in risk or danger. If you find this failure resulted from a factor which shows the accused to be insufficiently motivated by *[interest]* then she was culpably negligent and you ought to convict. If you are not convinced beyond reasonable doubt that the accused’s failure to recognise consciously the risks attendant upon her conduct demonstrated insufficient concern for *[interest]* then you must acquit. Again, you – as representatives of the community – must decide on the level of sufficient concern for others which was appropriate in the circumstances.

If the accused gives evidence as to capacity:

You have heard evidence from the accused that, because of *[name factor]*, she was unable to form the belief that *[circumstance or consequence]*. This must be taken into consideration – and assigned what you feel to be an appropriate weight – when you ask whether the Crown has discharged its burden of proving guilt beyond reasonable doubt.⁸⁰

⁸⁰ Self-induced incapacities to form beliefs (e.g. that which results from acute, voluntary intoxication) are left to one side. As argued above (at §2.G), intoxication cases are *not* cases of recklessness except in limited circumstances (e.g. where, prior to drinking/taking drugs, the accused believes that there is a (substantial and unjustifiable) risk that she will kill another whilst intoxicated). It would be better to

If the accused gives evidence as to background knowledge:

You have heard evidence from the accused that, because she did not know [relevant fact], she was unable to form the belief that [circumstance or consequence]. You must consider this evidence – and decide on its weight – in reaching your decision concerning guilt.

If the accused gives evidence as to character:

You have heard evidence from the defence which suggests that the accused failed to form a belief in risk because of [factor]. The law assumes that the accused's character is formed voluntarily, and that her belief formation processes work properly, but it might be that the accused's evidence has raised reasonable doubt concerning her ability to appreciate the riskiness of her conduct. If this is the case, then you should acquit. I should point out that the accused does not need to *prove* anything; the question for you is simply whether – taking all evidence into consideration – you are satisfied beyond reasonable doubt that the accused committed the offence and did so negligently.

(d) Recklessness

POSSIBLE DIRECTION ON RECKLESSNESS

[Set out elements of negligence as failure of belief (but replace that term with “recklessness” until the matter of justification.)]

If the accused gives evidence as to justification:

In reaching a conclusion concerning the justification of the accused's risk-taking, you must consider her evidence. This is important, but should not be determinative: it can be unjustifiable to take a risk even if the accused believes that she is justified in doing so. *[Thereafter give an example.]*

If you decide that the accused's risk-taking was substantial and unjustifiable, you must ask whether she acted culpably. Reckless is an everyday word, but it has a specific legal meaning. To be culpably reckless, the accused must have been consciously aware that her conduct was – in some sense – risky or dangerous, and must have failed to take an opportunity to stop and investigate

regard the denial of a “defence” of voluntary intoxication in Scotland and England as being concerned with not allowing the accused to profit from her self-induced lack of self-control, or to do with public protection, and not conflate it with issues of *mens rea*.

why. In colloquial terms, she must have had a “flash of awareness” concerning risk, and yet failed to think further about it or take steps to mitigate or exclude it. *[Thereafter give an example.]*

If the accused gives evidence as to capacity:

You have heard evidence from the accused that, because of *[name factor]*, she was unable to investigate the risk that *[circumstance or consequence]*. This must be taken into consideration when you ask whether the Crown has discharged its burden of proving guilt beyond reasonable doubt.

Caldwell Lacuna-type cases:

If there exists reasonable doubt over whether the accused was consciously aware that the risk existed, then you must acquit. If, for instance, the accused has investigated the risk that *[consequence or circumstance]* and come to the conclusion that she has removed it, she cannot be reckless. *[If relevant, give direction on negligence as failure of belief.]*

In establishing the accused’s awareness of risk, you must rely on the evidence presented by the Crown and the defence. If you have reasonable doubt concerning the accused’s awareness of risk, you must acquit.

Finally, if you find that the accused had a “flash of awareness” – in the sense I have described to you – of the risks attendant upon her conduct, the final question is whether her failure to investigate the risk further or alter her behaviour appropriately demonstrated insufficient concern for the interest in *[interest]*. You, as representatives of the community, must decide on the level of concern that might legitimately be expected of the accused in the circumstances in which she found herself.

(e) An example

The directions above are sketches, and they would need fleshed out in individual cases. It is therefore useful to demonstrate how they would work in the context of a specific offence, for instance culpable and reckless discharge of firearms. The facts of *Cameron v Maguire* will be used.

POSSIBLE DIRECTION FOR *CAMERON V MAGUIRE*

Charge number one is of reckless discharge of firearms.

It is a crime to take a risk that, through discharging firearms, the bodily integrity and/or lives of others will be endangered.

[Here, the judge would set out the parts of the actus reus which do not concern justification of risk-taking or mens rea].

There is a mental element to this crime: the accused must have been reckless with regard to the risk that someone might be injured or killed by the discharge of a firearm.

To be reckless, the accused must take a substantial and unjustified risk. You must be satisfied that Mr Cameron, in taking the risk that somebody would be injured or killed by a stray shot from his rifle, took a substantial risk which went beyond the bounds of socially-accepted risk-creation. You – as representatives of the community – must ask whether it was socially acceptable for the accused to put others at risk in the manner that he did, and it might be helpful to consider what you imagine the “reasonable person” would think of the accused’s risk-taking. If you find that the accused’s risk-taking was unjustified, you may proceed to consider the other matters I will direct you towards.⁸¹ If you are not convinced that the accused’s risk-taking was unjustified, you must acquit him.

In reaching a conclusion concerning the justification of the accused’s risk-taking, you must consider the accused’s evidence that he thought the situation was “safe”. This is important, but should not be determinative: it can be unjustifiable to take a risk even if the accused believes that he is justified in doing so. Even if the accused thinks it is justifiable to shoot in the direction of the woods without checking to see if anybody was there, you do not have to reach the same conclusion.

If you decide that the accused’s risk-taking was unjustifiable, you must ask whether he acted recklessly. Reckless is an everyday word, but it has a specific legal meaning. To be culpably reckless, the accused must have been consciously aware that his conduct was – in some sense – risky or dangerous, and must have failed to take an opportunity to stop and investigate why. In colloquial terms, he must have had a “flash of awareness” concerning risk, and yet failed to think further about it or take steps to mitigate or exclude it. For instance, if you are convinced beyond reasonable doubt that the accused thought “this is risky...” but did not stop to think why, he is legally reckless. Again, you may have recourse to Mr Cameron’s evidence concerning what he thought about his activity at the time.

If there exists reasonable doubt over whether the accused was aware that the risk existed, then you must acquit. If, for instance, you find that the accused had investigated the risk that somebody might be killed or injured by his conduct and come to the conclusion that he had removed it, he cannot be

⁸¹ The possibility of a majority verdict is ignored here.

reckless in law, even if you consider him to have been “reckless” in everyday language. [*A charge on negligence as failure of belief might be given here, if appropriate.*]

In establishing the accused’s awareness of risk, you must rely on all of the evidence presented by the Crown and the defence; the accused’s own testimony is important, but it should be stressed that it is not determinative if you do not find it credible or reliable. You must also bear in mind that, if you have reasonable doubt concerning the accused’s awareness of risk, you must acquit him.

It is submitted that this direction would be comprehensible to lay jurors, and makes clear that recklessness – although an “everyday” term – has a specific legal meaning to which they must adhere. The direction also points jurors to the specific questions they must ask. This is preferable to the present model direction on recklessness that is given in the (Scottish) Judicial Studies Committee’s *Jury Manual*: “[t]he accused must have acted with an utter disregard of the consequences of his conduct on the public, with total indifference to their safety.”⁸² The direction proposed above also captures a wider sense of recklessness than “subjective” directions based solely on “awareness of risk”. The direction explains in more detail the type and duration of awareness required for criminal liability. It is, for these reasons, an improvement on the *status quo* and “subjectivist” theory.

(4) The substantive law: summary

The sections above have argued that one understanding of recklessness, negligence as failure of belief and negligence as failure of conduct should be developed for use across the criminal law. Statutory definitions and jury instructions based on these concepts have been proposed, showing that practical reform of the law in line with the theory presented in this thesis is – with suitable concessions – possible.

The next section considers evidential matters which bear upon reforms which might flow from chapters five and six.

⁸² Judicial Studies Committee, *Jury Manual: Some Notes for the Guidance of the Judiciary* (2011) 37/2 (available at http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManual_1.pdf).

B. THE LAW OF EVIDENCE

It was contended in chapter five that difficulties are encountered when a person is punished for actions which do not reflect upon her agency in the correct manner.⁸³ An “alien” desire, not integrated into the agent’s wider system of desires and values, should not be viewed as part of her responsibility and any actions performed because of it should not ground a finding of criminal responsibility of liability.

This point raises difficulties in the trial environment. How is the Crown to prove that the desire that motivated the accused’s failure to pay proper attention to the risks she believed to exist (or prevented her from forming a justified belief in risk) was accepted, and not “alien”? This would presumably be a hard task for the Crown to undertake in the majority of cases and might result in unmerited acquittals.

The pessimistic answer to this problem is to give up on a character-based theory of culpability. A more optimistic response is to propose a presumption that the accused was responsible for her character and the desires that motivated her or prevented her from forming justified beliefs concerning risks.

This proposal is not meant as an empirical claim that agents *are* usually responsible for their character.⁸⁴ Rather, it is a normative one.⁸⁵ A useful comparison can be drawn with the law on insanity: the law assumes that the accused was sane, and this is – at least in part – a normative stance which respects properly the accused as a citizen. To, by default, conduct an enquiry into whether the accused is an appropriate participant in the criminal trial would be disrespectful to the accused’s agency in the vast majority of cases (i.e. cases where it is not immediately apparent that the accused is incapacitated). It is submitted that it is important to respect the accused – to take her seriously as a full, rather than potential, moral agent – even if this means that the accused must (in Scots and English law, at least) overcome the presumption of sanity⁸⁶ by satisfying a reverse (persuasive) burden of proof.⁸⁷

⁸³ See §5.C(3), above.

⁸⁴ Doris’s work – discussed above at §5.C(6)(b) – suggests that character does not exist. Again, Doris shows that virtuous character is *rare* – he does not show that character does not exist at all.

⁸⁵ I am grateful to Elizabeth Shaw for pressing me on this point.

⁸⁶ The Scottish accused also bears a persuasive burden of proof in diminished responsibility. See: Criminal Procedure (Scotland) Act 1995 s 51B(4); *Lilburn v HM Advocate* [2011] HCJAC 41.

⁸⁷ On the defensibility of this burden, see D Hamer, “The presumption of innocence and reverse burdens: a balancing act” (2007) 66 CLJ 143 at 162-163.

Taking this analogy further, it might be presumed that the accused is responsible for her character and identified with the desires that motivated her.⁸⁸ To overcome this presumption, she would have to bring evidence (presumably character witnesses) concerning her ability to form justified beliefs about risk or, alternatively, to attest to her general propensity to not take risks of which she is aware. There is no obvious bar to this evidence in Scotland⁸⁹ or England⁹⁰ as it would certainly be regarded as relevant to the issue of culpability.⁹¹ Of more concern are worries over reverse burdens of proof. It might be imagined that the accused would have to satisfy the jury on the balance of probabilities that the desires that motivated her were “alien” and that she should not, in consequence, be held liable for her risk-taking. As noted above, this is the approach taken towards insanity. It must, however, be asked whether imposing a persuasive burden on the supposedly reckless or negligent accused would be compatible with her human rights – particularly her right to a fair trial.

(1) Reverse burdens and the right to a fair trial

Whether a reverse persuasive burden would be compatible with Article 6 the European Convention on Human Rights’ guarantee of a fair trial⁹² is determined by the test in *Salabiaku v France*.⁹³ There, the European Court of Human Rights decided that reverse burdens of proof were compatible with the accused’s Article 6 right *provided that* they are confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.⁹⁴ It should be noted from the outset that this decision – and the vast majority of those

⁸⁸ See, similarly, EL Pincoffs, “Legal responsibility and moral character” (1972-1973) 19 Wayne L Rev 905 at 922. Note that the prosecution would still have to prove the other substantive elements of *mens rea*, as at present. It might be objected that, in removing part of the Crown’s responsibility to prove moral fault, this thesis endorses an illegitimate reverse burden. See I Dennis, “Reverse onuses and the presumption of innocence: in search of principle” [2005] Crim LR 901 at 919-920. Dennis does not consider a character-based theory of criminal responsibility/liability. His thinking might be different if one were adopted.

⁸⁹ See ML Ross and J Chalmers, *Walker and Walker: The Law of Evidence in Scotland*, 3rd edn (2009) para 7.8.1.

⁹⁰ See P Roberts and A Zuckerman, *Criminal Evidence*, 2nd edn (2010) 636-638.

⁹¹ It is being assumed that the *mens rea* issue is really concerned with culpability.

⁹² On which, see V Tadros and S Tierney, “The presumption of innocence and the Human Rights Act” (2004) 67 MLR 402 at 416-420.

⁹³ (1991) 13 EHRR 379.

⁹⁴ At para 28.

that have followed it – was made in the context of a reverse burden forming part of a criminal offence. In the paragraphs below, the focus is on a reverse burden which concerns the accused's *responsibility* for her character, which – although important in explaining culpability in the circumstances of an offence – is not tied to a specific criminal offence.⁹⁵

It is submitted that a reverse burden in terms of character would satisfy the “reasonable limits” spoken of in *Salabiaku*, particularly given the normative justification underlying the presumption of responsibility for character.⁹⁶ This is not simply a case of a difficult Crown task being eased by placing a burden of proof upon the defence;⁹⁷ it is a matter of respect for citizens that are called to account for their alleged wrongdoing. It is thus envisaged that there is a difference between asking the accused to defeat an inference of *mens rea*, or the lack of a defence (something that, usually, the accused knows about but the Crown may prove by reference to the circumstances of the offence),⁹⁸ and asking her to show that she acted “out of character” (something that the accused knows about but the Crown will presumably have great difficulty in showing, even by external evidence relating to the specific alleged wrongdoing).⁹⁹ The latter approach shows adequate respect both to the public's interest in having factually guilty offenders convicted *and* the accused's interest in self-respect. The former does not.

Tadros and Tierney demonstrate the dangers of taking the “difficulty of proof” argument too far: rape is difficult to prove, so should elements of that offence be presumed to be present, and the accused bear a reverse burden?¹⁰⁰ No: the Crown should prove the elements of the offence. The argument here is that proving that desires were consistent with the accused's character is beyond the competence of the

⁹⁵ This means that the seriousness of the offence under consideration ceases to be crucial in deciding whether a reverse burden is acceptable. For discussion, see: Hamer (n 87) at 149-151; Tadros and Tierney (n 92) at 430-432.

⁹⁶ It would be for the State to justify the reverse burden: *R v Lambert* [2002] 2 AC 545 at para 37 per Lord Steyn.

⁹⁷ See, further, Hamer (n 87) at 159.

⁹⁸ “Usually” because some *mens rea* terms (e.g. negligence) do not relate to matters which, at the time of the offence, the accused was consciously aware of: Tadros and Tierney (n 92) at 427 (n 66).

⁹⁹ See Hamer (n 87) at 161.

¹⁰⁰ See Tadros and Tierney (n 92) at 427.

Crown in most cases. This would lead to (unmerited) acquittals, which would be contrary to the public's interest in the conviction of the factually guilty.

An important consideration is, however, whether this burden upon the accused would be a *persuasive* one (requiring the accused to meet the “balance of probabilities” standard) or an *evidential* one (requiring the accused to present evidence to make an issue “live” in proceedings). Answering this question requires asking whether the accused can realistically bring evidence to meet the standard required by a persuasive burden.¹⁰¹ If not, the practice has been to “read down” the burden from persuasive to evidential.¹⁰²

It should be practicable to bring character witnesses to attest to the accused's normal tendency towards, for instance, care.¹⁰³ It might be more difficult for the Crown to discover these witnesses, making the case for a reverse burden of proof seem compelling. This does not, however, distract too much from the difficulties that the accused might encounter in trying to meet the standard of a persuasive burden (i.e. proof on the balance of probabilities). These practicalities might lead to imbalance in the trial proceedings, rendering them unfair to the accused.¹⁰⁴ Just because the accused has peculiar knowledge of her character does not mean that it is easy for her to establish this in court,¹⁰⁵ and it therefore appears that an evidential burden – i.e. the presentation of *some* evidence that the accused acted “out of character” – is all that can be imposed.¹⁰⁶

A connected consideration is whether the Crown should be able to counter the accused's evidence of good character by relying on her past misdeeds, including any relevant convictions. At present, the eliciting of bad character evidence is permitted in Scots and English law to the extent that it is necessary to correct a

¹⁰¹ This factor was emphasised in *DPP v Sheldrake; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264. See, also, *R v Hunt* [1987] AC 352 at 374 per Lord Griffiths. This is a negative proposition: a burden will be illegitimate if it is difficult for the accused to satisfy it. See, further, P Roberts, “The presumption of innocence brought home: *Kebilene* deconstructed” (2002) 118 LQR 41 at 65-66.

¹⁰² *Sheldrake; Attorney-General's Reference (No 4 of 2002)*.

¹⁰³ This appears to have been acceptable in early cases of culpable homicide, e.g. *HM Advocate v McHaffie* 1827 Syme 33.

¹⁰⁴ For discussion of when, in principle, a reverse burden is justified on the basis of ease of proof, see Hamer (n 87) at 158.

¹⁰⁵ Tadros and Tierney (n 92) at 427.

¹⁰⁶ See, similarly, Hamer (n 87) at 159.

wrong impression left by the accused.¹⁰⁷ This should continue, as it prevents a culpable accused from escaping liability by presenting questionable evidence of the good parts of her character whilst withholding more negative facets of her past conduct. Importantly, however, the accused must *first* raise the issue of character for any negative evidence of past misconduct to be brought forward. This, it is submitted, respects the (or at least Scots) law's present and justified reluctance to allow the indiscriminate admission of bad character evidence and its commitment to protecting the privacy of the accused.¹⁰⁸ If the accused does not mention her character, the Crown cannot do so either.

(2) Reverse burdens and absent knowledge

It is submitted that a similar procedural approach to that adopted above should be employed where the accused claims to not possess a piece of background information which would be necessary to form a belief in risk.¹⁰⁹ This ignorance is likely to be peculiar knowledge of the accused and – in the majority of cases – it will not be difficult for her to present evidence to point to ignorance. This might justify a rebuttable presumption that the accused knew the relevant background fact.

Again, however, it appears that a persuasive burden would be unmerited. Primarily, the issue of background belief is one of *mens rea*, and it is inappropriate to put the accused in the position of disproving such an integral part of the crime to the “balance of probabilities” standard. Furthermore, there are issues of credibility involved in having the accused placed under a burden that requires her to do more than bring evidence of her knowledge. If the piece of knowledge is particularly widely-held, then the accused may have a difficult time convincing the jury that she did not possess it, particularly if she is not a compelling witness.

These difficulties are nevertheless nothing compared to the difficulties involved in requiring the Crown to prove beyond reasonable doubt that the accused possessed the relevant information (e.g. that water conducts electricity). In cases

¹⁰⁷ Criminal Procedure (Scotland) Act 1995 s 270; Criminal Justice Act 2003 ss 101(1)(f), 105. The Scottish Law Commission is presently considering the law on bad character evidence: Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine (Scot Law Com DP No 145, 2010).

¹⁰⁸ This right is itself protected under Art 8 of the ECHR.

¹⁰⁹ See §5.C(1), above.

where the information is specialist, the Crown might be able to rebut the accused's evidence by pointing to, for instance, the fact that she attended a course where the information was passed on to her, or held a licence which implies knowledge. In other cases, however, it would appear that inquiring into knowledge in every case would unduly prejudice the Crown. Furthermore, as the Crown's attempt to prove knowledge of a certain fact is different from its introducing "bad character" evidence, the safeguards discussed above are not required.

(3) The law of evidence: summary

The above discussion has demonstrated that the law of evidence would not require much change to accommodate the understandings of culpable carelessness developed in this thesis. It has also shown that the practicalities of the criminal trial require a balance between competing interests and this will sometimes require compromises. The theory of culpability developed in chapters five and six, if left unaltered, would allow the Crown to prove guilt in a frustratingly small number of cases if no presumptions were put in place. This would be contrary to the public's interest in the conviction of the factually guilty.¹¹⁰

This chapter has thus shown that the theory defended in this thesis could help to improve the coherence of the concepts of recklessness and negligence in the criminal law, ameliorating the confusion caused by the existing, chaotic Scots and English jurisprudence. A final lesson which permeates the entire thesis does not concern the substantive criminal law or criminal procedure, but is instead aimed at academic lawyers. It focuses on the usefulness of the "subjective"/"objective" dichotomy in theoretical discussions around culpable carelessness.

¹¹⁰ The presence of presumptions concerning character and knowledge no doubt opens the door to unmerited convictions, but this risk is inherent in all systems of criminal law. It is not, therefore, fatal to the argument in this thesis.

C. THE “SUBJECTIVE”/“OBJECTIVE” DICHOTOMY

The usefulness of the terms “subjective” and “objective” was doubted in the introduction to the thesis,¹¹¹ and chapters two and three showed how the approach of the Scots and English courts have seldom adhered properly to the strictures of the “subjective”/“objective”, advertence/inadvertence dichotomy. This finding reduces the descriptive utility of the dichotomy in relation to those jurisdictions, which led to the suggestion that British writers would be better to abandon it when trying to explain the positive law on recklessness and negligence.

Subsequent chapters have demonstrated the normative shortcomings of the “subjective”/“objective” dichotomy. Chapter four examined the pitfalls of “subjective” theory and chapters five and six adopted an approach which, although “objective” in some respects (relying on the conception of insufficient concern for others) was “subjective” in others (examining *the accused’s* beliefs, desires and character). Although this thesis admits of liability for inadvertent risk-taking (the hallmark of “objective” approaches), it does not do so where the accused was “subjectively” incapable of performing any better; although it requires “subjective” conscious awareness of (a conscious or preconscious belief in) “risk” for recklessness, it still appraises the actor’s reasons and conduct in light of what might “objectively” legitimately be expected of her in terms of respect for the interests of others. Such approaches – like the “mixed” approaches to carelessness found in UK sexual offences legislation – are inexplicable in terms of the classical dichotomy.

It should be taken from this that the “subjective”/“objective” dichotomy is neither descriptively nor normatively useful when considering recklessness and negligence. It would be better to accept that approaches to culpable carelessness (and, indeed, *mens rea* in general) lie on a *spectrum* which runs from “subjectivity” to “objectivity” and that advertence and inadvertence tell only part of the story. The point – made by Norrie¹¹² – is that neither end of this spectrum provides a “superior” approach to culpable carelessness. Any defensible account of criminal risk-taking

¹¹¹ At §1.D(1).

¹¹² AW Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn (2001) ch 4; AW Norrie, *Law and the Beautiful Soul* (2005) ch 5.

must contain “subjective” and “objective” elements;¹¹³ it must achieve balance – the virtue of the mean¹¹⁴ – rather than be “hijacked”¹¹⁵ by dogmatic adherence to extreme theoretical standpoints.¹¹⁶ The theory developed in chapters five and six strives for this mediating position. The positive law ought to do so too, and this chapter has demonstrated how this could happen.

D. CONCLUSION

This chapter has addressed how, with appropriate compromises to pragmatism, the theory of culpable carelessness defended in chapters five and six can inform reform of Scots and English criminal law. Three main lessons can be learned.

First, the substantive law should be clarified and simplified, with the recognition of both forms of negligence as acceptable forms of criminal fault – not outliers to be shoehorned in with recklessness when this suits intuitive feelings about culpability and blame. This would allow distinct statutory definitions of each form of culpable carelessness to be constructed. However clear the law becomes, it is nevertheless plain that – if lay persons are to be involved in trials – *mens rea* terms concerning culpable risk-taking must be translated into accessible jury directions. It was shown that this is possible.

Secondly, it was argued that the laws of evidence would not require to be changed markedly to accommodate a greater reliance on character, or knowledge, evidence in some cases, and that a reverse (evidential) burden of proof upon the accused in these circumstances would not breach the European Convention on Human Rights.

Thirdly, it was argued that a consequence of the argument in this thesis is that the “subjective”/“objective” dichotomy, which runs through many contemporary

¹¹³ See, similarly: HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 153; NP Metcalfe and A Ashworth, “Arson: *mens rea* – recklessness whether property destroyed or damaged” [2004] Crim LR 369 at 372.

¹¹⁴ See Aristotle, *Nicomachean Ethics* (Roger Crisp trans, 2000) II.6.1106a-1107a.

¹¹⁵ K Amirthalingam, “Caldwell recklessness is dead: long live *mens rea*’s fecklessness” (2004) 67 MLR 491 at 495.

¹¹⁶ RHS Tur, “Subjectivism and objectivism: towards synthesis”, in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (1993) 213.

debates about culpable carelessness and is alleged (tenuously) by some to explain the positive law in Scotland and England, is liable to confuse rather than edify. “Subjectivism” and “objectivism” are two extreme positions on a spectrum and the law must attempt to mediate these two positions, rather than endorse one to the exclusion of the other. Accepting this point would help advance the debate over culpable carelessness in law and in theory.

In the next, final, chapter, the argument of the thesis will be summarised.

8 Conclusion

This chapter restates the arguments in the thesis's six substantive chapters.

A. CHAPTER TWO

Chapter two examined the doctrinal treatment of recklessness in Scots criminal law. It began by outlining the sparse, and largely disingenuous, treatment of the topic by academic writers. In order to support the claim that the apparent academic consensus is misguided, the argument moved on to consider the history of recklessness in the criminal law, beginning with its origins in the concept of “gross” negligence. Although the language of negligence has disappeared from the law, it is clear that the courts have failed to distinguish it clearly from recklessness in some contexts (for example, in relation to statutory and most common law offences), leading to confusion.

It was contended that the route out of this quagmire was to recognise that there are at least five forms of recklessness in Scots criminal law, and that – far from being wholly “objective” in their approach – these fall on both sides of the “subjective”/“objective”, advertent/inadvertent dichotomy or are incapable of being placed within it. This undermines the explanatory usefulness of that dichotomy in the Scottish context, and it was suggested that a preferable approach is to accept that utter confusion reigns in the appeal court's jurisprudence on culpable carelessness. The courts have not pursued a consistent approach, and are badly in want of a theory of culpability to guide the development of the law.

B. CHAPTER THREE

English academics have found more success when employing the “subjective”/“objective” dichotomy, but chapter three revealed that, in common with

their Scottish counterparts, the English courts struggled to distinguish recklessness from “gross” negligence in the eighteenth and nineteenth centuries.

Although the concept of advertent recklessness had by the mid twentieth century solidified in relation to offences requiring malice, “gross” negligence (itself identified as a form of recklessness) survived in the law on manslaughter. This dual approach culminated in the 1980s when the House of Lords dismantled the “subjectivity” of recklessness and made it largely indistinguishable from “gross” negligence. The journey back to an advertence/inadvertence dichotomy began in the 1990s with the re-emergence of “gross” negligence as a form of *mens rea* in involuntary manslaughter, and in 2003 the House of Lords re-endorsed advertent recklessness in criminal damage cases, largely extinguishing the fire of inadvertent recklessness. Nevertheless, chapter three concluded that there still exist at least *three* forms of recklessness in English criminal law (again diminishing the explanatory worth of the “subjective”/“objective” dichotomy). The situation should still be viewed as volatile, rather than resolved.

C. CHAPTER FOUR

Given the findings of chapters two and three, the thesis moved on to consider theoretical treatments of recklessness and negligence, to see if these offered a clear solution to the problems evident in the Scots and English jurisprudence. Chapter four began by untangling “subjectivism”, and argued that there were three prominent “subjectivist” theories in the existing literature: strict choice theory; choice and capacity theory; and choice and character theory. Strict choice theorists typically fail to explain why *only* conscious choices can give rise to culpability and, when such an explanation is offered (for instance, Brudner’s argument), it relies on a reimagining of society. This provides a poor foundation for strict choice theory’s objection that inadvertent risk-taking can never involve choice and can therefore never be culpable.

Choice and capacity theory is more defensible as it widens the scope of culpability to more intuitively acceptable extents. It nevertheless suffers for its commitment to conscious choices.

Finally, choice and character theorists rely on a peculiar conception of character formation and their insights might be taken to attack capacity in a wholly illiberal way, premising liability on the failure to (at all times) test capacity, rather than on culpability.

For these reasons, “subjectivism” was rejected as a theoretical foundation for culpable carelessness.

D. CHAPTER FIVE

Moving beyond “subjectivism” allowed the thesis to defend liability for inadvertent risk-taking (identified with *negligence*). Chapter five outlined two forms of culpable negligence: negligence as failure of conduct and negligence as failure of belief. The former was recognised as a *special* form of negligence which exists where the accused had voluntarily entered a sphere of regulated conduct which gave rise to exclusionary reasons which should exclude certain options of conduct from consideration. Given the need for voluntariness and regulation, negligence as failure of conduct was not advanced as *the* theory of negligence, but rather as a limited case.

Negligence as failure of belief is more wide-reaching, and relies upon an assessment of the accused’s beliefs concerning risk (or lack thereof) and how these came about. The argument was that an accused person who had background knowledge about a risk, and could perceive the signs that that risk might exist in the circumstances, should – if properly motivated and capable – have formed a belief in risk which would have played a part in her practical reasoning. Her failure to do so, far from excluding culpability, secured it *if* it resulted from an accepted aspect of the accused’s character and demonstrated insufficient concern for the interests of others.

Chapter five concluded by considering the limits that would need to be placed on negligence as failure of belief in a liberal democracy. It was argued that a limited number of interests should be protected from this variety of negligent risk-taking to ensure that citizens are not overburdened with risk investigation. Bodily integrity, life and sexual autonomy were mooted as a starting point. It was concluded that these

interests were important enough that citizens should (on pain of criminal punishment) always pay attention to risks to them.

E. CHAPTER SIX

Once negligence as failure of conduct and negligence as failure of belief had been outlined, chapter six was free to examine recklessness. The chapter began by considering popular, non-choice-based approaches to recklessness which concentrate on the accused's indifference towards risk. It was demonstrated that indifference theories possess various weaknesses which make them unappealing explanations of recklessness. Even the strongest indifference theory (Duff's) fails to explain compellingly the distinction between recklessness indifference and negligence, and this makes it unattractive.

The chapter thus moved on to develop a belief-centred account of recklessness, which bore much in common with negligence as failure of belief. It was contended that recklessness involves actors who *have* formed a conscious or preconscious belief in "risk" or "danger" attendant upon their conduct, but have not examined this sufficiently in order to avoid engaging in wrongdoing. This account of recklessness was able to explain the line between recklessness and negligence, and the chapter concluded by distinguishing it from other belief-centred views of recklessness, such as that presented by Tadros, and from other *mens rea* terms such as wilful blindness and intention.

F. CHAPTER SEVEN

The final substantive chapter of the thesis considered how the theory of culpable carelessness developed in chapters five and six could inform reform of Scots and English criminal law. The chapter first examined necessary changes to the substantive law, including the preference for *one* understanding of recklessness and the recognition of culpability for negligence (as failure of conduct and belief). Statutory and jury direction forms of recklessness and negligence were then

presented, demonstrating that the theory defended in this thesis could be applied in practice.

Next, the chapter considered evidential challenges to the theory defended in chapters five and six, and concluded that these would not require an overhaul of the existing system.

Finally, chapter seven returned to a theme that ran throughout the thesis: the usefulness of the “subjective”/“objective”, advertent/inadvertent dichotomy. It was contended that this dichotomy did more harm than good in debates over culpable carelessness and should, in consequence, be abandoned.

G. OVERALL CONCLUSION

The moral and political questions at the core of the debate over culpable carelessness are complex, and are not answered by taking refuge in extreme “subjectivist” or “objectivist” positions. The jurisprudence of the Scots and English courts is testament to the fact that recklessness and negligence are complicated *mens rea* terms and that any theory which aims to explain them must address some core concerns about culpable risk-taking. It has been argued in this thesis that this theory should consider not simply the accused’s conscious awareness of risk (or lack thereof), but also the role of her character, desires, beliefs and other aspects of her agency. Although the resulting theory of culpable carelessness is more complex than the “subjective” and “objective” caricatures so often relied upon in textbook accounts of the criminal law, it is *necessarily* so. The law’s approach to culpable carelessness must address the moral and political concerns surrounding unjustified risk-taking, rather than shying away from them. Only then can the criminal law hope to approach culpable risk-taking in a coherent and defensible – rather than a careless and haphazard – manner.

Appendix 1: Table of Legislation

UNITED KINGDOM PARLIAMENT

- Air Navigation Order 1980 SI 1980/1965.
- Coroners and Justice Act 2009 ss 54-56.
- Corporate Manslaughter and Corporate Homicide Act 2007 s 1.
- Criminal Attempts Act 1981 s 1(1).
- Criminal Damage Act 1971 ss 1(1), 1(3).
- Criminal Justice Act 2003 ss 101(f), 105.
- Criminal Justice (Scotland) Act 1980 s 78.
- Criminal Law (Consolidation) (Scotland) Act 1995 s 52, pt 1.
- Criminal Procedure (Scotland) Act 1995 ss 41, 51B(4), 106(3)(b), 270, sch 3 para 3.
- Data Protection Act 1984 s 5.
- Enrichment Technology (Prohibition on Disclosure) Regulations 2004, SI 2004/1818, reg 2.
- Explosives Act 1883 s 2.
- Firearms Act 1968.
- Human Rights Act 1998 s 3.
- Law Commissions Act 1965 s 3.
- Malicious Damage Act 1861.
- Motor Car Act 1903 s 1.
- Offences against the Person Act 1861 ss 18, 20, 23, 47.
- Prevention of Fraud (Investments) Act 1939 s 12.
- Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2 (as amended by the Convention Rights (Compliance) (Scotland) Act 2001 s 1).
- Road Traffic Act 1972 ss 1 (substituted by the Criminal Law Act 1977 s 50(1)), 2.
- Road Traffic Act 1988 ss 2, 2A, 3ZA, s 41D.
- Road Traffic Act 1991 s 1.
- Sexual Offences Act 2003 ss 1(1), 75, 76.

SCOTTISH PARLIAMENT

- Marine (Scotland) Act 2010 s 42(1)(b).
- Sexual Offences (Scotland) Act 2009 ss 1, 13, 14, 16.

CRIMINAL CODES

- Criminal Code of Canada s 219.
- Draft Criminal Code for England and Wales cl 18.
- Draft Criminal Code for Scotland ss 9, 10, 61.
- Model Penal Code s 2.02(2)(a)-(c).

Appendix 2: Table of Cases

AUSTRALIA

- *Banditt v R* [2005] HCA 80.
- *Evgeniou v R* (1964) 37 ALJR 508.
- *Giorgianni v R* (1985) 59 ALJR 461.
- *R v Crabbe* [1985] HCA 22.
 - *v O'Connor* (1980) 146 CLR 64.
 - *v Smith* (1982) 7 A Crim R 437.

CANADA

- *R v Daviault* [1994] 3 SCR 63.
- *Sansregret v R* [1985] 1 SCR 570.

ENGLAND AND WALES

- *Andrews v DPP* [1937] AC 576.
- *Attorney-General for Jersey v Holley* [2005] 2 AC 580.
- *Attorney-General's Reference (No 3 of 2003)* [2005] QB 73.
- *Booth v Crown Prosecution Service* [2006] EWHC 192 (Admin).
- *Caparo Industries v Dickman* [1990] 2 AC 605.
- *Chief Constable of Avon and Somerset Constabulary v Shimmen* (1987) 84 Cr App R 7.
- *Cunliffe v Goodman* [1950] 2 KB 237.
- *Data Protection Registrar v Amnesty International* [1995] Crim LR 633.
- *Derry v Peek* (1889) LR 14 App Cas 337.
- *DPP v B (A Minor)* [2000] AC 428.
 - *v Beard* [1920] AC 479.
 - *v K (A Minor)* [1990] 1 WLR 1067.
 - *v Majewski* [1977] AC 443.
 - *v Morgan* [1976] AC 182.
 - *v Sheldrake; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.
- *Elliott v C (A Minor)* [1983] 1 WLR 939.
- *Flack v Hunt* (1980) 70 Cr App R 51.

- *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210.
- *Haughton v Smith* [1975] AC 476.
- *Hill v Chief Constable of West Yorkshire* [1989] AC 53.
- *Hudston v Viney* [1921] 1 Ch 98.
- *Hyam v DPP* [1975] AC 55 (*sub nom R v Hyam*).
- *In Re City Equitable Fire Insurance Company, Limited* [1925] Ch 407.
- *Kong Cheuk Kwan v R* (1986) 82 Cr App R 18.
- *Large v Mainprize* [1990] 1 All ER 331.
- *Lee v Dangar Grant & Co* [1982] 2 QB 337.
- *Meli v R* [1954] 1 WLR 228.
- *MJJ (A Minor) v Cooper*, unreported, Divisional Court, 2 July 1987.
- *R (on the Application of Lewin) v Crown Prosecution Service* [2002] EWHC 1049 (Admin).
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 - *v Bashir* (1983) 77 Cr App R 59.
 - *v Bates and Russell* [1952] 36 Cr App R 175.
 - *v Belfon* [1976] 1 WLR 741.
 - *v Bell* [1985] RTR 202.
 - *v Bello* (1978) 67 Cr App R 288.
 - *v Bennett* [1995] Crim LR 877.
 - *v Bonnyman* (1943) 28 Cr App R 131.
 - *v Brady* [2006] EWCA Crim 2413.
 - *v Breckenridge* (1984) 79 Cr App R 244.
 - *v Briggs* [1977] 1 WLR 605.
 - *v Burdee* (1917) 12 Cr App R 153.
 - *v C* [2007] EWCA Crim 1068 (*sub nom R v Mbagwu*).
 - *v Caldwell* [1982] AC 341 (*sub nom Commissioner of Police for the Metropolis v Caldwell*).
 - *v Cato* [1976] 1 WLR 110.
 - *v Coles* [1995] 1 Cr App R 157.
 - *v Cooke* [1986] 2 All ER 985.
 - *v Cooper* [2004] EWCA Crim 1382.
 - *v Crick* (1859) 1 F&F 519.
 - *v Crossman* (1986) 82 Cr App R 333.
 - *v Cunningham* [1957] 2 QB 396.
 - *v Davis* [1979] RTR 316.
 - *v Director of Public Prosecutions, ex p Jones* [2000] IRLR 373.
 - *v Docherty* (1887) 16 Cox CC 306.
 - *v DPP* [2003] EWHC 693 (Admin).
 - *v Dryden* [1995] 4 All ER 987.
 - *v Evans* [2009] 1 WLR 1999.
 - *v Farrell* [1989] Crim LR 376.
 - *v G* [2004] 1 AC 1034 (*sub nom R v G and Another*).
 - *v Gardiner* [1994] Crim LR 455.
 - *v Gilmour* [2000] 2 Cr App R 407.

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 - v *Grimshaw* [1984] Crim LR 108.
 - v *Grunwald and Others* [1963] 1 QB 935.
 - v *Holroyd* (1841) 2 M&R 339.
 - v *Hunt* [1987] AC 352.
 - v *James; R v Karimi* [2006] QB 588.
 - v *K* [2002] 1 AC 462.
 - v *Khan* [1990] 1 WLR 813.
 - v *Khan and Khan* [1998] Crim LR 83.
 - v *Kimber* [1983] 1 WLR 1118.
 - v *Lamb* [1967] 2 QB 981.
 - v *Lambert* [2002] 2 AC 545.
 - v *Larkin* (1944) 29 Cr App R 18.
 - v *Lawrence* [1982] AC 510.
 - v *Lidar*, unreported, Court of Appeal, 11 November 1999.
 - v *Lowe* [1973] QB 702.
 - v *Mackinnon and Others* [1959] 1 QB 150.
 - v *Madigan* (1982) 75 Cr App R 145.
 - v *Mark and Nationwide Heating Services Ltd* [2004] EWCA Crim 2490.
 - v *Merrick* [1996] 1 Cr App R 130.
 - v *Millard and Vernon* [1987] Crim LR 393.
 - v *Miller* [1983] 2 AC 161.
 - v *Misra* [2005] 1 Cr App R 21.
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 - v *Morrison* (1989) 89 Cr App R 17.
 - v *Mowatt* [1968] 1 QB 421.
 - v *Murphy* [1980] QB 434.
 - v *Noakes* (1866) 4 F&F 921.
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 - v *Satnam; R v Kewal* (1984) 78 Cr App R 149.
 - v *Savage; DPP v Parmenter* [1992] 1 AC 699.
 - v *Seymour* [1983] 2 AC 493.
 - v *Sinclair* (1998) 148 NLJ 1353.
 - v *Singh* [1999] Crim LR 582.
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 - v *Spencer* (1867) 10 Cox CC 525.
 - v *Spratt* [1990] 1 WLR 1073.
 - v *Stephenson* [1979] QB 695.
 - v *Stone; R v Dobinson* [1977] QB 354.

- v *Taylor* (1985) 80 Cr App R 327.
- v *Thomas* (1983) 77 Cr App R 63.
- v *Venna* [1976] QB 421.
- v *Wacker* [2003] QB 1207.
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- v *Welch* (1875-1876) LR 1 QB 23.
- v *West London Coroner, ex p Gray and Others* [1988] QB 467.
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- v *Whybrow* (1951) 35 Cr App R 141.
- v *Williamson* (1807) 3 C&P 635.
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- *Roper v Taylor's Central Garages (Exeter) Limited* [1951] 2 TLR 284.
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- *The Zamora No 2* [1921] 1 AC 801.
- *Vehicle Inspectorate v Nuttall* [1999] 1 WLR 629.
- *W (A Minor) v Dolbey* (1983) 88 Cr App R 1.
- *Westminster City Council v Croyalgrange Ltd and Another* [1986] 1 WLR 674.
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- *Winter v R* [2010] EWCA Crim 1474.
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- *Salabiaku v France* (1991) 13 EHRR 379.
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- v *Howe* [1982] 1 NZLR 618.
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- v *Stephens*, unreported, Auckland High Court, 8 December 1983.

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 - *v Maclean*, February 1710 (mentioned in J MacLaurin, *Arguments and Decisions, in Remarkable Cases, Before the High Court of Justiciary, and the Other Supreme Courts, in Scotland* (Edinburgh: J Bell and E & C Dilly, 1774) 24).
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 - *v Young* (1839) 2 Swin 376.
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- *Black v Allan* 1985 SCCR 11.
- *Brady v HM Advocate* 1986 JC 68.
- *Brennan v HM Advocate* 1977 JC 38.
- *Broadley v HM Advocate* 1991 JC 108.
- *Byrne v HM Advocate* 2000 JC 155.
- *Cameron v Maguire* 1999 JC 63.
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