FATE MANAGEMENT:
The Real Target of Modern Criminal Law

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ABSTRACT

There are a number of criminal law doctrines that evade the ‘doctrine of conjunction’ – the precondition for culpability that the commission of a prohibited act be proven as accompanied by the intention to achieve the unlawful consequence. In general, they do so by ignoring, presuming, imputing or fictionally creating either actus reus or mens rea. This thesis contends that these are techniques which are deliberately constructed to manage incidental harm and which, together with the inchoate or anticipatory offences, form a patchwork of methods to supervise the citizen’s choices to inflict risks. It further argues that, by artificially converting secondary or incidental intention into malice, the doctrines disguise that modern criminal law has fate-management as its primary focus.

The thesis illustrates that there are significant gaps in this regime. For instance, the inchoate offences can generally only address direct intention, and the outcome-based prohibitions cannot intercept fate. The thesis also maintains that fictions such as objective and constructive liability offend the rule of law, in that they modify fact rather than place values on it.

The work suggests that current criminal law is an interim step towards a fully subjective fate-managing law. It proposes a radical revision to the existing approach: that the core criminal offence be ‘conscious disproportionate endangerment of the legal rights of others’.

1 Also termed the doctrines of ‘coincidence’, ‘correspondence’, or ‘duality’.
2 Often distinguished as ‘specific’ or ‘ulterior’, as opposed to ‘basic’ or ‘general’ intention.
3 I would prefer the term ‘coincidental’, since it better expresses that the harm was not the objective of the activity. However since I intend to argue that virtually all harm intended is merely as a means of overcoming a barrier to the sought objective, I will leave this semantic issue to another occasion.
4 While the primary offence may be only incidentally harmful, the person who aids it must have direct intention to do so: see Chapter II – Inchoate Offences: Complicity.
5 When discussing the use of fictions in Hanafi Islamic law, Sayed Amin notes that such hiyal – ‘legalistic devices’ – are referred to as ‘fraud in law’: Amin SH, Islamic Law and its Implications for The Modern World (Glasgow: Royston, 1989) 184.
PREFACE

This thesis introduces the ‘fate-management theory of law’, which has criminal law as its central agent. The core of the theory is that criminal law has the primary purpose of encouraging its subjects to exercise diligent control over their encounters with fate, where the danger they create is transferred to other citizens. While civil law (for our purposes, all that is not punitive law) can also claim to manage the risks people inflict on the welfare of their peers, it is restricted to secondary methods: that is, as a response to the first infliction of a specified harm, thus delivering a warning. Criminal law, on the other hand, can intercept a nominated harm. It can also set its response at whatever level will achieve adequate deterrence, unrestricted by quantification of harm done.

The central question this thesis raises is whether the traditional view of criminal law, as centred on inhibiting malice rather than on deterring endangerment, is inverted and even unnecessary. As Samuel Pillsbury observes, ‘[i]n the United States we have a strong tendency to see evil as an aggressive, intentional force. For historical and other reasons, we assume that our basic social obligations are limited to the duty to refrain from attacking others. This assumption may blind us to the more passive, but more common evils of callous indifference.’ Yet given the long history of absolute liability, deliberate offending has never been the sole focus of criminal law. Indeed, I will argue that the focus on intent is a recent refinement to harm management.

By exploring the range of current doctrines that override (or artificially satisfy) the doctrine of conjunction – the requirement that active offending be accompanied by guilty choice – the thesis will demonstrate that, whatever greater moral repugnance there may be towards the premeditated infliction of harm – over that directed at incidental offending – it is the choice to gamble with imposing harm that attracts the most vigorous response from the criminal justice system. The thesis will show that, not only are the penalties available

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for malice and recklessness often equivalent, the doctrines in question make it more easy to establish the unlawful election to take a chance than to prove malice. Also, I will suggest that those prohibitions specifically created to intercept the infliction of danger, the anticipatory regulations and inchoate offences, are prone to becoming instruments of factional oppression.

I will propose, as an alternative approach, that the substantive law prohibit chosen activity at the point where there has been a demonstrable decision to inflict risk to a legal interest, on the basis that the behaviour in question is unacceptable for the disproportionate danger it creates alone – when balanced against any potential social benefit – and not because it is prohibited per se, or has done harm. The goal of this thesis is therefore fourfold:

1. To demonstrate that the main function of criminal law is fate-management; and
2. That this function is masked under the pursuit of malice; and
3. That the existing doctrines do not cover the field of imposed hazard; and accordingly
4. To propose a more overt and complete regime for fate-management.

The Thesis History

The thesis has travelled through a number of inquiries. It began with a feeling of unease about the range of doctrines that resist mens rea as the ultimate test of modern culpability, and thereby thwart the final step towards guilt residing solely in the citizen’s designs. An issue encountered was the conflict between the modern focus on subjective guilt and the historical focus on results. It soon became apparent that this was well-travelled territory.

Next came a study of the problems caused by the doctrine of conjunction when applied to consequence-based offences – the use of ‘wait-and-see’ prohibitions that deny criminal law one major weapon against harm: the capacity to intercept dangerous activity prior to damage. To pursue this inquiry, I embarked from the traditional idea that criminal justice is assigned
two distinct controlling roles: that it exercises punitive supervision over either deliberate predatory behaviour against protected interests; or over one citizen gambling, without consent, with another’s rights. The journey went looking into JS Mill’s notion of harm being essential, to reconcile the focus on malice with that on ‘incidental’ intention. There appeared to be some artificiality about this sub-division of the citizen’s unlawful design. In order that criminal law control actors willing to inflict prohibited harm if they regard that as necessary to achieve their designs, or those who honestly believe their behaviour will not create any additional danger, the doctrine had to develop fictional and objective assessments of guilt. So the question turned to why modern jurists continue to defend such clumsy artificial procedures.

Finally, the thesis arrived at the conception that all the existing ‘fictionalising’ doctrines (along with modern preventive legislation) were designed to exercise control over the choice to impose a danger. This led to the conclusion that it is indirect intention that presents the central struggle for the criminal justice system delivering both individual equity and social utility. Indeed that – since criminal law distinguishes intention from motivation – all activity has legally ulterior impetus. Nominating a prohibited harm is then purely an indication of the outcome to be avoided; and any flirtation with that result is the behaviour to be inhibited or physically incapacitated.

Now the question became whether the existing regime of contingent, strict and pre-emptive prohibitions provide the best possible coverage of fate-management, and if not, whether it could be rationalised; then whether most of the inconsistencies could be removed by creating an umbrella offence of ‘conscious endangerment’. This is where the thesis now begins.

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3 These people do not reject anyone else’s rights per se, they just want such impediments out of their way.
4 Those that either turn a blind eye to the goal of behaviour, or that substitute an unlawful one on the legal result actually sought.
5 In attempting to express the logic of my endangerment offence proposal, I have refrained from plunging into the world of the parliamentary draftsperson. Indeed, when dealing with different aspects of the proposal – usually within different chapters – I have allowed the formulation to vary, in order to accommodate what appears necessary for that issue. So attempting actual drafting of the overarching prohibition has been left to the penultimate chapter A Radical Reform of Criminal Law. For now, the thesis is content to suggest the goals of the enterprise.
ACKNOWLEDGEMENTS

First, I thank my supervisor, Professor Terry Carney. His diligence, patience and generosity – over some years – were invaluable. That the thesis now exists is due to a huge act of faith on his part. I acknowledge also his expertise as an editor. He reviewed my imprecise expression, along with more basic aspects of correct form, and in the process taught me to be more careful at presenting my argument.

Second, I thank my associate supervisor, Professor Mark Findlay, who directed my thinking to one central issue and dared me to venture into aspects of criminal law where there was a dearth of signposts left by authors ahead of me. This had to be some indication of virgin territory (although I suspect that Mark had already surveyed the landscape).

Finally, thanks to David Fraser, who provided an alternative logic for how the argument would be best deployed; and to Angela Damis, who brought a rather flabby thesis down to its fighting weight.

Beyond those who contributed professionally to this enterprise, I would like to express my great appreciation for the forbearance of my partner, Margery, over the period when completing this thesis was all consuming. Any mention of criminal law now sends her comatose, or worse – shopping.
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**Criminal Procedure (Scotland) Act 1995, ss.64(6), 138(4) and Sched. 3, para. 3:**
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**Health and Safety at Work Act 1974:**
172n

**Draft Criminal Code**
- cl 54(1) 129n
- cl 41(1) 228n

**Draft English Code s 24(1)**
22n

**International instruments**

**Universal Declaration of Human Rights, GA Res. 217A, UN GAOR 3d Sess., pt. 1, 71, 74, art. 18, UN Doc. A/810 (1948) art. 19**
265n

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I
INTRODUCTION

The Issue

The mens rea for a criminal offence is not restricted to a prohibited harm attempted or done deliberately. As the following examples demonstrate, both statute and common law will make fully culpable those who offend while pursuing another goal – even when the unlawful outcome was opposed to what the actor sought.

A pair of friends had a long-running intoxicated brawl along a beach. The fight ended with one abandoned unconscious at the ocean’s edge. The rising tide then drowned him. The trial judge instructed the jury that the survivor was culpable if his actions were the ‘substantial cause’ of the death. He was convicted of murder. The appellate court, answering the appeal that the death was not maliciously caused, ruled that the concepts of malice and causation are different – the latter being ultimately concerned with risk. The violence was seen as the true cause of such a death, not any subsequent omission to make the victim safe.¹

Two brothers and a mate set out to ‘roll’ any unfortunate homosexual they might find at night on a path between two suburban beaches. The third member came armed with a baton. He attacked his victim so ferociously that the victim fell down a cliff, and was later found dead at the bottom. The lone attacker was convicted of murder under the s 18 of the Crimes Act 1900 (NSW) construction of intentional infliction of grievous bodily harm (GBH) as deliberate homicide. The brothers were also convicted of murder, and the conviction confirmed on appeal, following the trial judge directing the jury to find whether the brothers individually contemplated (and ignored) ‘possible’ GBH being inflicted.²

A mugger only wanted the money, but his victim resisted the robbery. The

¹ Hallett [1969] SASR 141 (SC of SA in Banco)
situation got out of hand and the victim died of an unknown medical infirmity. Under the definition of homicide in s 18 of the Crimes Act 1900 (NSW), a death incidental to the commission of an offence such as robbery, carrying a maximum penalty of 25 years, becomes murder. That is, the unintended nature of the outcome is ignored, and the result is deemed to be directly sought. As far as the law is concerned, when someone dies during a felony, the choice to commit that offence becomes the intent to kill.3

Finally, a driver decided to overtake another, miscalculating the closing speed of an approaching vehicle, with disastrous results. Although the oncoming vehicle was only lightly clipped in the collision, it careened across the road and down an embankment, killing the occupants. The offending driver was charged with manslaughter and causing death by dangerous driving. The appeal court insisted that responsibility for the consequences lay with the over-taker unless the other driver’s contribution was ‘some entirely new factor’.4

In all these cases, an unlawful harm was done – but incidentally. That is, the offence was in excess of (even opposed to) what the offender wanted. The common element is that the charge (and potential conviction) did not reflect either the act performed by the accused, or the goal of that act. Criminal law therefore appears to have delivered unjust results, in that people were convicted of offences they did not intend.

Intuitively, there does appear to be some merit in convicting these people: they have all initiated a dangerous situation, one that someone reasonable would have avoided, and one that has turned out badly. It is both just to punish them for the harm they have inflicted, and pragmatic to warn others off such poor citizenship. However, the result clashes with the ‘correspondence principle’ – the requirement that actus reus and mens rea are present simultaneously5 – with its role of ensuring that, by imposing a sequence of

3 *Ryan v R* [1967] 121 CLR 205 per Barwick CJ, 218. *Cf Dawson* (1985) 81 Cr App R 150 (UK CA); and *Watson* (1989) 89 Cr App R 211 (UK CA). The issue of whether death must be either foreseen or foreseeable is addressed in Chapter VII - Constructive Murder.
4 *Storey* [1931] NZLR 417, case stated 421.
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‘hurdles’ to conviction, only deliberate acts of achieved mala in se are culpable. It also makes conviction contingent on harm being delivered, there being no offence where no harm is done, so ‘moral luck’ has an influence within the justice system. Additionally, culpability will almost inevitably be decided by resort to what the reasonable person would have done in the circumstances, so only incidental harm that was reasonably avoidable will support conviction. Ultimately, the incidental offence becomes indistinguishable from one fully intended – a neglectful omission is equated to malice.

This engages the distinction between substantive and procedural law. While the substantive law nominates the behaviour or outcomes that are prohibited, it is the procedure that sets the standards for how careful one citizen is required to be when exposing other citizens’ rights to danger. The thesis accepts that it is the legitimate role of a parliament to decide what rights are to be protected, and does not pretend to tell the legislature how to do that job. If there is any proper relationship between the lawmakers and the courts (beyond any common law power to declare law) it is that the trial process is to decide when a right has been offended. So the thesis pursues a more transparent and uniform expression of what is an offensive hazard to a legal right.

That is, it pursues a means of allowing the individual competent citizens to make such judgments, so long as they are able to justify them to their peers. The immediate concern is to design a process for the court to use in deciding when a danger is unacceptable – given that all enterprise can menace legal rights – without resorting to specific harm done. The next concern is to find a means of filtering out those who (because of both circumstantial and

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6 Simester and Sullivan distinguish a criminal offence as being mala in se, where a civil offence is mala prohibita: Note 5 at 3.
9 At first glance, this appears to presume that the thesis is mainly concerned with procedures controlling jury trials. However, since the reform suggested is to legislate for a new guilt-finding process, the community of peers is engaged both in general anticipation of, and specific response to, an issue of hazard-creation.
10 This ‘retroactive’ process being the function of recklessness and negligence.
personal incapacity) are not able to make a benign choice, without such exculpation corrupting the message of intolerable endangerment. Finally, how are the citizens to be adequately advised of when to ignore a hazard to others, and when to retreat? The question is how to present fate-control rather than harm-response as the fundamental role of criminal law.

The Doctrinal Background

The history of criminal law displays a development from an absolute response to results, through to a focus on the mental state of the actor. The initial phase of what could be called the ‘precondition of event evidence'\(^{11}\) allowed punishment on the basis of absolute consequence. That is, once there was evidence of a causal connection between the accused and the activity delivering a prohibited outcome, there was no further inquiry.\(^{12}\) The message sent was for the citizen to do everything possible to avoid such a result. In Cundy v Le Cocq,\(^{13}\) the ‘keeper of licensed premises’ was convicted under s 13 of The Licensing Act 1872\(^{14}\) of selling liquor to a drunk, despite that the customer showed no sign of being intoxicated. Justice Stephen reasoned that the prohibition was made absolute to combat ‘the great temptation to a publican to sell liquor without regard to the sobriety of the customer’, so

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\(^{11}\) This is to distinguish the previous evidential methods, such as ordeal or the duel of appointees, which tested the accused (for standing, wealth or courage) rather than the activity.

\(^{12}\) Although, as Stephen Gough notes, this is still the approach in Scotland, ‘which attaches rather less importance to subjective mens rea than England or other common law jurisdictions. Most Scottish criminal charges allege no mental element at all but refer only to the proscribed harm, and while mens rea terms like wilfully, maliciously, recklessly, negligently and so on are implied by statute their interpretation often carries a markedly objectivist slant’: Gough S, ‘Surviving without Majewski’, [2000] Criminal Law Review 719-733, 730-1. An example is the Criminal Procedure (Scotland) Act 1995, ss.64(6), 138(4) and Sched. 3, para. 3:

> It shall not be necessary to allege that any act or commission or omission charged was done or omitted to be done “wilfully” or “maliciously”, or “wickedly and feloniously”, or “falsely and fraudulently” or “knowingly”, or “culpably and recklessly”, or “negligently”, or in “breach of duty”, or to use such words as “knowing the same to be forged”, or “having good reason to know”, or “well knowing the same to have been stolen”, or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case.

However James Chalmers contends that ‘[a]lthough “wicked recklessness” is sufficient mens rea for murder in Scots law, it is generally accepted that a person cannot be said to be “wickedly reckless” unless they have an intention to inflict bodily harm (see Gordon, The Criminal Law of Scotland (2nd ed., 1978), para. 23-15, but note the contradictory statement at para. 7-18): Chalmers J, Letter: “Surviving without Majewski” [2001] Criminal Law Review 258-259, 258.

\(^{13}\) (1884) 13 QBD 207.

\(^{14}\) (35 & 36 Vict c 94).
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insisting that the licensee take all precautions.\textsuperscript{15}

Clearly, since this fails to distinguish between pure coincidence and activity that could have been made harmless with greater diligence, any harm done by ineffective conviction becomes a negative.\textsuperscript{16} It may be that such culpability has been gradually discredited as unjust since the law’s subjects gained lawmaking power, hence the evolution of the second phase: permitting a defence of involuntariness, through an honest and reasonable mistake of fact. Paul Robinson argues that the crime control objective supports strict liability, with the actor’s own future conduct warned away from any potential danger; and strict conviction also serving as an example to others.\textsuperscript{17} This raises the issue of whether strict criminal culpability is concerned with behaviour or results. Robinson notes that offence elements such as ‘kills’, ‘destroys’, ‘falsifies’, ‘mutilates’ or ‘desecrates’ imply both an act and a consequence.\textsuperscript{18}

Even though strict liability has softened absolute culpability – exculpating harm done by honest and reasonable mistake – it has done so by introducing a requirement of choice to the behaviour. In Canada, strict liability is seen as negligence with a reversed onus, as distinct from absolute liability, which allows no excuses whatever.\textsuperscript{19} The development indicates that criminal law is moving slowly (along with tort) through basing guilt on the relative inadequacy of the citizen’s choices, rather than simply the consequence, and on to a fully subjective analysis. Where strict liability is applied above ‘mere regulatory’ offending, Alan Norrie argues that there is a strong moral base of ‘should know’. The reality of ‘didn’t realise’ is simply swept aside under a procedural judgment.\textsuperscript{20}

Ultimately, the development of the requirement that harmful (and prohibited) activity be accompanied by some level of guilty choice introduced a final

\begin{itemize}
\item \textsuperscript{16} See Paul Robinson’s ‘evidentiary theory’ at p 142.
\item \textsuperscript{18} Note 17 at 25. This dichotomy will be explored with respect to the exploitation, by criminal law, of tortious strict liability - in Chapter III.
\item \textsuperscript{19} Note 5 at 174.
\item \textsuperscript{20} Norrie A, Crime, Reason and History 2 ed (London: Butterworths, 2001) 91.
\end{itemize}
subjective test. This is the regime of intent, and emerged through the conception of mens rea as an independent test for culpability. Where the process of finding culpability requires both a coexisting guilty act and a guilty intent, the chosen behaviour is no longer enough; a further hurdle is created – proof that some prohibition was adverted to, and either sought or (in some cases) risked.

The other development during this phase is the distinction between direct intention (malice) and indirect intention (recklessness, with its quasi-negligence objective test for the visibility of danger; negligence; and constructive culpability). Although there is no significantly different outcome between a harm done (or even a risk inflicted) maliciously and one the result of carelessness – and legal doctrine has often equated them in terms of culpability – there remains the emotional attachment to malice as the more egregious wrong. Norrie proposes that someone ‘forgetful’ of an arrangement with another is generally seen as merely displaying indifference. This tends to be converted into legal recklessness, as it manifests an attitude of choosing to not bother to ensure remembering.

The core procedural issue is that proving carelessness is much easier than establishing direct intent, so in fact the relationship between the two is reversed. In the NSW approach to homicide for instance, manslaughter is posed as an alternative to murder when proof of lethal intention proves

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21 David Lanham has collected together a range of cases where the courts attempt to deal with the degree of risk required under various state statutory prohibitions of recklessness. The threshold of culpable foresight is usually set at apprehending ‘probable’ harm or ‘appreciable danger’: Lanham, Note 8.

22 It can even be argued that all intention beyond the voluntary act is indirect, in that any offence is no more than the means of achieving an independent lawful goal; even murder seeks to remove – where necessary – an obstacle to some separate (possibly legal) objective. However since this thesis is restricted to a pragmatic reform, I will limit the analysis to the traditional understanding of intention as being different to motive (the what-not-why review of decisions) and question whether the direct/indirect distinction serves any practical role.


24 Note 20 at 71. But as Richard Epstein argues, ‘it is a major oversimplification to assume that all harms are caused by one of two types of human conduct: accidental or deliberate. Tort and criminal scholars delight in noting the many gradations of mental states falling uneasily between. Thus, next to strict liability are rules imposing liability absent the highest levels of care; beside these are rules for ordinary negligence; for recklessness; for wilful and wanton conduct; and for different shades of intention that involve conscious indifference or substantial certainty that harm will ensue from the performance of certain actions’: Epstein RA, ‘The tort/crime distinction: a generation later’ (1996) 76 Boston University Law Review 1-21, 15.
elusive. So if culpability is equivalent between direct and indirect intention, the latter is more readily deterred.

A further problem stems from the fact that most prohibitions are still 'contingent': no legal reaction is permitted until harm has been done. The only power given to criminal law to act before harm is via anticipatory regulations and the inchoate offences. The thesis will explore whether, while the interceptive offences serve a valuable role in harm-prevention, they are limited in their scope. The most serious potential curb is that they all demand proof of some level of direct intention, so are inappropriate as control over indirectly harmful behaviour. In effect, the choice to inflict a risk per se remains uncontrolled.

Finally, a range of doctrines has emerged which evade the requirement of a connection between the prohibited outcome and both the behaviour and the intention. Some simply ignore one aspect; others artificially satisfy it – in order to assign guilt to an unlawful consequence when that was not the actual goal. Robinson sees the problem as to define when the artifice is proper.

**The Chosen Paradigm**

Legal theory has long recognised that the concept ‘justice’ embodies some difficult, and often antagonistic, goals. The utility or morality dispute has been an ongoing sore for criminal justice theory. Feinberg summarised the debate with ten ‘Liberty-Limiting Principles’ that range from ‘Legal Moralism’ (which allows a prohibition on the basis that it is ‘inherently immoral’, even when it ‘causes neither harm nor offence to the actor or to others’), through ‘Benefit-Conferring Legal Paternalism’ (including a variation that ‘moralistically’ confers a benefit on the person restrained) to the ‘Offense Principle’ (which permits intrusion on the basis that ‘it is probably necessary to prevent serious offense’). The question this debate raises is whether the prevailing function of criminal law is to respond to the ‘character defects’ of disobedience or bad

25 *Crimes Act 1900* (NSW): s 18(1)(a) having defined murder in terms of construction, recklessness or direct intent, s 18(1)(b) then proclaims ‘Every other punishable homicide shall be taken to be manslaughter.’
26 Note 17 at 59.
citizenship per se; or whether it has the more pragmatic role of incapacitating or inhibiting behaviour capable of delivering harm.

JS Mill opened the modern debate with his ‘harm principle’ – that the community is authorised to limit the freedom of the individual if that behaviour risks doing harm to the community. In response to the 1957 Report of the Committee on Homosexual Offences and Prostitution (The Wolfenden Report) Lord Devlin proposed, as a displacing alternative to harm, that any authority to impose rules was limited to morality. That is, it had to be ‘right’ to interfere with the natural order – not pragmatic or democratic. HLA Hart retorted that the role of law was to minimise suffering. In rebutting Devlin’s argument in The Enforcement of Morals, that ignoring small lapses in sexual morality will lead to greater offending, Hart proclaimed that ‘[n]o reputable historian has maintained this thesis, and indeed there is much evidence against it. As a proposition of fact it is entitled to no more respect than the Emperor Justinian’s statement that homosexuality was the cause of earthquakes.

The most vivid counter to the harm paradigm is Irving Kristol’s prohibition of ‘free-floating evil’ – behaviour that either does no injury, or does so with the consent of the victim, yet is still somehow wrong. It is suspect whether the

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28 As Jeffrie Murphy argued, ‘I agree with Feinberg that punishing for character defects unrelated to possible harm is inconsistent with liberalism; but, unlike Feinberg, I am not yet persuaded that liberalism may consistently target character even if it limits itself in the way Feinberg suggests. If such character defects as a callous disregard for human life are a legitimate target at the sentencing level, then it would seem that there would be nothing wrong in principle with targeting them before they are realized in action’: Murphy J, ‘Symposium Issues in the Philosophy of Law: Participant: Legal Moralism and Liberalism’, (1995) 37 Arizona Law Review 73-95, 83.

29 ‘That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering in the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant’: Mill JS, ‘On Liberty’, in Warnock (ed), Utilitarianism (Fontana, 1970) 126, 135.


32 Kristol I, ‘Pornography, Obscenity, and the Case for Censorship’, The New York Times Magazine, March 28, 1971. All the contestants freely apply for a chance to compete; the losers’ dependents get $10 million; and the debate remains open as to whether the audience is less violent because of the catharsis. So there is no conclusive harm done, perhaps even a social benefit. Yet there
pure ‘free-floating evil’ model does exist. Most intrusions on the freedom of individuals are rationalised on ‘social harm’ lines.³³

The Hypothesis

The measure of doctrinal utility adopted for this thesis is: the effective answering of whatever brief the community gives to its criminal justice system. It is not the job of the criminal process to tell the community what they can ask; only what criminal law can deliver, and how. Any opposition that I present to such a mandate is simply that the brief may be impossible to fulfil; or that certain methods will work to defeat the objective, even exacerbate the problem.

Thus the concept of utility employed is legal procedural utility, not political pragmatism. Where such utility clashes with moralism, the thesis will argue...
that moralism has overreached from substance into process (itself a troubled distinction); or that they are conflicting methods of achieving some higher goal – with moralism unable to inform law absent any objective whatsoever⁴⁴ – so allowing them to be compared for the service they provide.

The thesis suggests that much current procedural doctrine already places fate-management as the dominant paradigm for criminal law, and that while due process may have the role of protecting the individual from the overwhelming state – sometimes falling back to a ‘balance of harms’ test⁵⁵ – on other occasions the common factor seems to be that recourse to full process was impractical.⁶⁶ According to Epstein:

> In principle, the utilitarian overlay looks to maximize the social welfare function. The upshot is to use criminal and tort law to optimise the net gain from productive activities, less the sum of the costs of harmful ones and the costs of their prevention. The dialogue then switches to the familiar litany of optimal deterrence, which envisions harm from both under- and over-enforcement of the law (criminal and tort) and hopes to steer a path between the two. Questions of individual rights, so congenial to the traditional deontological approach, are swept away by a set of instrumental and technical concerns.³⁷

This ‘sweeping away’ can be seen in the range of doctrines and legislative formulations that override the conjunction requirement – despite that the harm was neither intended nor sought – and transform incidental harm into malice. These doctrines expand the culpability from a harm deliberately inflicted to the harm incidentally imposed, and do so by revising or ignoring the facts.⁵⁸ They import some of the logic of tort into criminal law, but without the restrictions as to the legal consequences. That is, they allow the result to prevail as the

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⁴⁴ Per the discussion on ‘free-floating evil’ at Notes 32-3 above.
⁴⁵ Any calculation where aspects of legal process – such as the privilege of confidentiality – are pitted against the ‘public interest’ – interestingly seen as distinct from justice. In defamation law, for instance, it is expressed as a qualification to any absolute right of free speech. In the 1990 case In Re F (Mental Patient: sterilisation) [1990] 2AC 1, a ‘mentally handicapped’ female was sterilised on the reasoning that there was no other way to avoid her becoming pregnant. See A-G’s Reference (No 6 of 1980), per Lord Lane [above at Note 32]. The NSW Prisoners Action Group submitted to the NSW Royal Commission into Prisons that the tension between proscribed harms and individual responsibility be resolved by an assessment of ‘aggregate social harm’: Prisoners Action Group, ‘Crime and Aggregate Social Harm’ (1980) 3 Alternative Criminology Journal 46-7; 63-5.
⁵⁶ Note 5 at 629.
⁵⁷ Epstein, Note 24 at 10.
cause for a legal remedy, but beyond the normal restraint of simply shifting the cost of any harm from the active to the passive party. They also introduce the notion of reasonableness as the triggering quality, overriding the criminal concept of conscious violation.39

This line of reasoning addresses many traditional questions. Why, for instance, is it argued as unacceptable to measure the actor's chosen behaviour against what the reasonable person would have done? Susan Estrich argues that the 'genius' of the objective test is that it is basically political – apparently meaning that it imports the community assessment of acceptability. The requirement of proven choice disappears once the majority (perhaps as articulated by the jury) would have chosen otherwise.40

Why, also, does criminal law persist with consequence-based offences that can only respond when harm is actually delivered? Jean Floud and Warren Young suggest that there is a balance of risks – between that of unnecessary deprivation of the offender’s rights; and harm to the potential victim. Without the authority of fault, culpability offends the principle that one citizen should not be deprived for the benefit of another.41 So any pre-emptive role falls to either strict regulation or to the inchoate offences.

The response is a complex of doctrines aimed at inhibiting imposed gambling: one citizen taking unauthorised risks with the legal interests of others – and a solution that necessarily employs legal fictions. The thesis suggests that this is unnecessary. Once the primary role of fate-management is accepted, there is little reason for the criminal justice system to depend on a range of discrete prohibitions – such as anticipatory regulation, conspiracy, complicity and attempt – to supplement the wait-and-see offences.

The key issues for the assessment of unintended offending are: how to decide what behaviour is to be regarded as risky but lawful, and on what criteria this

39  As I will argue when exploring recklessness – particularly in homicide – juries are frequently (and wrongly) instructed to decide whether a risk was 'obvious', and even more directly told to apply the capacity for foresight of 'every ordinary observer': Satnam; Kewel (1983) 78 Cr App Rep 149, per Bristow J. See also the discussion on Caldwell at Note 42.
41 Note 23 at 55.
behaviour should be converted into an offence; whether poor judgment is the most critical issue to be controlled by the rule of law; and whether it should be the responsibility of criminal law in the first place. Perhaps the primary question is whether criminal law should concern itself with patrolling risk-choice at all; or whether it should withdraw to controlling intentional violation of prohibitions – leaving fate-management to tort and insurance.

This approach would rid the criminal justice process of the objective test, which asserts an authority to punish whenever an unreasonable mistake is made. However for criminal law to abandon the field of risk-infliction would leave a significant gap in the coverage of the rule of law – particularly where catastrophic loss has been incidentally delivered, which tort cannot effectively reclaim. The alternative rationale is when a benefit outweighs the available recompense. The question underlying this thesis is: when is simple restoration the best control over hazardous behaviour; and when (if at all)

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42 Even when the doctrine of recklessness insists on actual advertence, it still resorts to the reasonable person as the test of the acceptable degree of foresight. Caldwell recklessness includes an objective element, in that it makes an act culpable if the accused 'has not given any thought to the possibility of there being ... an obvious [and serious': interpolated in Lawrence [1982] AC 510, 527] risk': [1982] AC 341, 354. So Caldwell now makes the accused culpable for failing to avert to an overt danger, at least for criminal damage. The pure malice approach would also make the division between direct and indirect intention redundant.

43 Where wrongful death is concerned, and there are no secondary victims (the apparent outcome of the highway accident in Storey [above at Note 4]), tort presents no restoration problem to the person responsible for the death. Indeed, a corpse may present less of a compensation problem than someone profoundly maimed – by isolating the compensable damage to survivors, if there are any. As Epstein puts it, '[t]he first step in the argument is to show why traditional tort law will no longer do the job. Quite simply, the answer is that there are no victims to whom a tort remedy can be sensibly assigned': Note 24 at 8. Michael Harper adds that '[i]n response I offer the special moral and educative function of the criminal law. Only the criminal law condemns certain behavior and associated mental states as evil. Our society is only ready to visit punishment on those who have demonstrated such evil. And our society will criminalize, or at least will continue to criminalize, only those actions which it deems – ultimately, I hope, for utilitarian reasons – sufficiently evil to require condemnation to maintain and insure the internalization of public morals. Such condemnation, and its associated possible sanctions, require special procedural safeguards such as those provided under our system': Harper M, 'Comment on The Tort/Crime Distinction: a generation later', (1996) 76 Boston University Law Review 23-7, 26.

44 If vast riches are possible, and the consequences of any hazard being realised are limited by damages 'caps' or shallow pockets, then tort and insurance will fail to deter the gamble. Even if a damages award is seen as the proper quantification of incidental harm, beyond the need for prophecy is the response that placing a monetary figure on some tragedy appears ghoulish. Criminal law’s focus is elsewhere. There is also the fact that tort’s power is limited to restoration (The ethically-doubtful concept of ‘punitive’ damages can be argued a desperate attempt to gain for tort the greater inhibition available to criminal law: Owen MJ, The Extended Class Action in the Australian Context (Melbourne: AIDA, 1979) 11) while criminal law can exclude offenders from any future situations where their incapacity to conform with the law will expose others to danger. In NSW there is the Child Protection (Prohibited Employment) Act 1998, explained in its long title as ‘An Act to prohibit the employment in child-related employment of persons found guilty of committing certain serious sex offences; and for related purposes.’ Such post-sentence control is based on the high rate of recorded recidivism for paedophiles.
must it be buttressed by criminal law?

In the end, the thesis will propose that fate-management through criminal justice is critical to the legal supervision of modern ‘functionally differentiated’ society, and that the current model can be improved. This will require a review of the present range of mens rea:

- Direct intention – the offender’s wish to inflict a prohibited harm;
- Indirect intention – the reckless and negligent willingness to ignore a known or knowable danger to others;
- Constructed intention – a risky enterprise fictionally elaborated to become malicious once harm is done;
- Transferred intention – malice relocated to where fate delivered the harm.

The thesis suggests that this range can be usefully collapsed into one conception of acting with a demonstrated willingness to endanger a legal right beyond potential social merit. The direct/indirect distinction is otiose in an endangerment paradigm. Also, once the need to establish both a mental and physical connection between the offender and a prohibition is reduced to endangerment (rather than harm) there is no longer any need for the fictions. If the danger is well known, this will weigh against believing the offender was unaware it was potentially more socially damaging than beneficial.

The Argument

In 1996, Samuel Pillsbury advanced his proposal that ‘indifference’ be the core criminal fault. In many respects, the logic underpinning his proposal

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46 The full restructure of the various obligations and tests will be presented in Chapter X.

47 ‘Crimes of Indifference’, (1996) 49 Rutgers Law Review 105-218. Gough [Note 12 at 731] identified a similar formulation in the Scottish approach to recklessness, of which the *Stair Memorial Encyclopaedia* notes:

"It has ... been held (and this is consistent with the philosophy of Scots criminal law) that there is no need for the accused actually to have foreseen the risk of the occurrence of such results by virtue of the way in which he was conducting himself; but the accused must be shown, from his conduct in the circumstances, to have been culpably indifferent to the consequences, or to have had a blameful disregard of the results, or a total indifference to and disregard for the safety of
supports the endangerment proposition, and this thesis will refer frequently to Pillsbury’s work. However I will suggest that – as the central source of criminal sanctioning – conscious endangerment goes beyond that proposed by Pillsbury, and at three levels: (1) Conscious endangerment suggests active choice that is missing from Pillsbury’s default by omission; (2) It covers activity that directly intends harm as well as that which is only willing to risk it; and (3) It is not limited to homicide.

Pillsbury’s proposal quite directly targets attitude. It also appears to be objective, in that indifference is to be found by some form of comparison. One problem this creates is that we are all permitted to be indifferent to interests that have not been given legal protection. In fact, in a competitive society, we are encouraged to attack the interests of our rivals. This leads to the inevitable consequence that illegal indifference is based on knowing that the interest in question has the protection of criminal law. However Pillsbury does not appear to require actual knowledge – beyond the existing rule that we all know the law.

Pillsbury (perhaps quite reasonably) restricts his proposed regime to homicide, where there is little contention as to whether (beyond warfare or capital punishment, for instance) any killing is permissible. The question this raises is whether a regime centred on indifference to the welfare of other citizens can administer such issues as apparently abandoned property. If the property is genuinely abandoned, but the taker didn’t really care whether it was or not, is there any point to punishing that person? Certainly the subjectivist argument would say yes. The problem is that Pillsbury imposes an objective test, so the taking is only culpable if the circumstances of potential abandonment were unreasonably ignored.

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49 In his offence definitions, and proposed instructions to juries – for both incidental murder and manslaughter – Pillsbury frequently uses adjectives such as ‘obvious’ and ‘reasonable’ in regard to the perception of risk, rather than the subjective ‘actual’ or ‘honest’ perception of an insignificant risk: Pillsbury S, ‘Crimes of Indifference’, (1996) 49 Rutgers Law Review 105-218, 208f.

50 The issue of impossibility is more fully explored in Chapter IX - Defences.
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Pillsbury’s proposal is therefore caught between two poles: centring attitude as the source of censure; but without the protection of actual proof thereof. While I applaud Pillsbury’s suggestion that all the current distinctions between different classes of indirect intention – recklessness, negligence, wilful blindness – are unnecessary and artificial, I differ in that I propose he lost momentum at the most critical distinction (at least from a pragmatic analysis): that the distinction between direct and indirect intention is itself needless and troublesome. My thesis in this area is threefold:

1. While we may hold to some greater moral outrage at those who deliberately attack our rights, this can be dwarfed in any pragmatic sense by the scale of harm put in issue. Someone who, merely to save a bit of time, is willing to put at risk millions of people through the careless disposal of toxic waste is a far greater problem than someone who deliberately sets out to steal a ballpoint pen.

2. Deliberately pursuing a prohibited consequence is vulnerable to the same rules of chance as incidental endangerment: both can fail.

3. If there is any substantive pragmatic reason for retaining some scale of culpability based in part on the directness of any such attack, this is most appropriately dealt with by sentencing discretion – not by establishing a bank of different gateways to punishment, each with different keys.

My proposal therefore builds on that of Pillsbury. Rather than focus – as he does – directly on a critique of the offender’s attitude (which I submit leads inevitably to the conclusion that direct and indirect intention are simply points on the same scale), my thesis has its centre at intervening before any damaging activity is performed.

At present there are a number of doctrines that stand in the way of ‘best practice’ in fate-management. The issue can perhaps be expressed under two heads:

1. Contingent offence definitions that withhold legal reaction until harm is done;

2. Manufactured compliance with the doctrine of conjunction, namely: the
various expressions of fault that evade the necessity for a chosen act in defiance of a known prohibition.

While the first may well satisfy a strict harm-response model, it serves to strip criminal law of one important aspect of harm-management: the capacity to intervene during the risk-choice phase. The second responds to criminal law’s reluctance to openly pursue fate-management, preferring to ‘engineer’ the choice to inflict a danger into the form of malice. The main issue is that some of the doctrines do not fit the malice model; others clash with the harm-control model. The doctrines that fail the malice model are:

- Strict act liability, in which a voluntary offensive act is sufficient for culpability – since it does not seek any mental default beyond a voluntary act. The purpose of the act is never investigated;
- Recklessness – the doctrine is a companion to malice, an indirect alternative;
- Negligence converts unreasonable self-interest into hostility towards the rights of others.

Those doctrines that deliver inadequate harm-control are:

- Strict outcome liability, in which voluntarily creating the prohibited circumstance is sufficient;\(^5\)
- Recklessness;
- Complicity;

Along with the constructions of:

- Felony-murder;
- Common purpose;
- Transferred malice.

These doctrines all partially fail harm-management simply because all

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\(^{5}\) Simester and Sullivan propose that if liability is strict regarding the result, this is better described as *constructive* liability. They note that under s 1 Road Traffic Act 1988, ‘dangerous driving’ is one strict offence, with an additional actus reus of ‘causing death’ where that is the consequence: Note 5 at 158, 177.
authority for criminal law to intrude is stayed until a prohibited result is delivered. Then the mental guilt is often established by a failure of ‘reasonable’ foresight. They are restricted to using one person’s conviction to warn others that they should avoid similar dangers. I propose that these doctrines undermine the conjunction requirement in the following ways:

- Causation artificially provides the causal link between the behaviour and the consequence, so provides the actus reus as a fiction;
- Strict liability simply ignores the ‘ulterior’ mental element;
- Recklessness provides an alternative mental element to direct intention;
- Negligence replaces mens rea with a value judgment of the actus reus.
- Construction and common purpose elevate the mental fault artificially to match the more catastrophic actus reus outcome;
- Transferred malice redirects the mental requirement ‘horizontally’ to overcome any disjunction that would frustrate culpability.

The question is whether the concept of guilt can be defined to accommodate one citizen consciously placing other citizens in danger. Since the role of the

52 Barry Mitchell argues that recklessness is ‘attitude as well as awareness’. As such, he opposes any resort to objective testing of the foresight. The keys are the courts’ language, when recklessness is expressed as ‘couldn’t care less’ and ‘indifference’: Mitchell B, ‘Recklessness could still be a state of mind’ (1988) 52 Journal of Criminal Law 300-8.
53 At this stage I am only concerned with the impracticality of contingent culpability, leaving until later the moral critique by Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre [The Philosophy of Law: an exposition on the fundamental principles of jurisprudence as the science of right. Translated by W Hastie] (Clifton NJ: Kelley, 1974).
54 Note 38.
55 Simester and Sullivan ‘regret’ that the English courts’ approach to strict liability is not as a reversed onus of proof, thus a pragmatic process for minor offences: Note 5 at 14.
56 Estrich divides criminal intent into purpose (the hit man), knowledge (proceeding despite ‘virtual certainty’), recklessness (the drunk driver, or light-runner) and negligence (not seeing the lights): Note 40 at 10-11.
57 Robinson suggests that ‘substituted culpability’ can even provide the mental element needed at the time of the objective element, by what the accused set out to do. This will override mistake, once a prior intention is proven. The Pinkerton doctrine (Pinkerton v US (1946) 328 US 640, 66 S Ct 1180, 90 L Ed 1489) is a form of common purpose. Accomplices are imputed with culpability by the ‘natural and probable consequence’ rule: Note 17 at 61.
58 Robinson proposes that transferred malice and transferred actus reus work in reverse to each other. The first relocates the intent to the result; the latter imputes the objective harm to where it was intended to go. Robinson’s example is where a burglar mistakenly robs a dwelling when intending to raid a store; the doctrine will allow him to be charged with robbing the store (despite that the objective element is missing). Transferred mens rea, on the other hand, is used when a shot misses its target and hits a bystander; the intent becomes to kill the bystander (despite that there was never any such design): Note 17 at 60.
doctrines in question is to extend culpability, reaching out to incorporate the (unreasonable) creation of danger as a fault equal to malice (but often demanding less evidence), guilt already embraces incidental intention. The thesis therefore suggests that, while these doctrines are a partial answer to the limit on the consequence-based offences, they still fail to permit a response to risk per se. Is it possible, say, to attempt to be reckless? Simester and Sullivan argue that it would be ‘a misuse of language’ to claim that a risk-taker attempted to inflict harm. So in general there is no direct power for criminal law to intervene when a risk is deliberately inflicted on another, and without that risk turning to harm. Either the species of activity must be prohibited, or harm must be done, before incidental danger can be addressed.

Fate-management by specific prohibition requires that the lawmakers display godlike foresight, and assume the responsibility for anticipating all the ‘vicissitudes of life’ that they wish to legally control. There is the attendant problem of effectively announcing such direction over every threatening situation, so that those controlled by such law can know and obey the limits on their freedom. This issue confronts such regimes as food safety, demanding that those who choose to engage in trade study the law as it applies to their business, with the administration by specialist inspectors to quickly correct (through confiscation) any lapse in the standards.

The increasing use of statute to impose specific restriction in circumstances of heightened danger imposes on the citizen a burden of knowledge that may be inappropriate under the rubric that ‘ignorance of the law is no excuse’. That is, in the more general aspects of life, a retreat from the more quasi-moral approach of describing unacceptable behaviour as negligent or reckless, in favour of hard-edged ad hoc prohibitions. Yet if conceptual foresight is beyond the lawmakers, this shifts the onus onto the citizen to master such miscellaneous law.

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59 Note 5 at 134-5.
60 See the discussion of the Northern Territory Food and Drugs Act 1983, at p 66, Note 63.
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As well as this impact on the individual, unrestrained re-emption carries broad dangers to fate-management. If it intrudes too early, it may inhibit productive-but-risky enterprise – particularly where there may be other regimes that are more appropriate (such as general insurance). If it intrudes too broadly, even when backed by a majoritarian mandate, it is potentially highly oppressive: one person’s freedom from sleep-deprivation is bought at the expense of another’s right to party. Robert Nozick argues that it is the right and power of an individual to make their own choices that ‘is his way of giving meaning to his life.’ So an over-protective state may achieve security, but take away all value on the way.61 Robinson concedes that when attempting to deal with risk, criminal law cannot proscribe every possible act, but must resort to the ‘concept’ of danger-creation. However not all risks are to be inhibited.62 David Carson makes the distinction that while the concept ‘danger’ is seen as a total negative, ‘risk’ acknowledges that it may also have benefits. However the courts have generally not followed this reasoning.63

Clearly harm is best avoided by accurate anticipation. The questions become: Who – of the lawmakers or subjects – is the best agent of such foresight? How should any balancing benefit be assessed? If a prohibition is to pass some such test, then this creates some ground for legitimate disobedience.64 The questions raised are: Given all the dangers of excessive risk-regulation, is there an alternative? Is it possible to cover the field of endangerment, without depending on nominated dangerous activity, preparatory malicious intent, and contingent risk-infliction?

This thesis is based on the view that all the opposed conceptions – act or result; malice or recklessness – are simply part of the transition from objective

62 Note 17 at 148.
64 In the case of White (1987) 9 NSWLR 427 (NSWDC), a father rushing a choking child to hospital was charged with speeding. However the conviction – for disobeying a strict traffic prohibition – was overturned on the basis that the violation was more pragmatic that compliance would have been. Per Shadbolt DCJ: ‘It was a choice to be made and he made it in order to avert, as he saw it, a real danger and a real possibility of death but I am not of the view that the public good and society’s cohesion would be placed in such jeopardy by that choice, that the defence of necessity should not be available.’
to subjective fate-management. The essential error in the previous debate is that it presented harm rather than risk as the key issue. Although the ‘indirect’ prohibitions deny criminal law the authority to respond until a harm is done, they then respond by imposing a penalty where any natural detriment to the actor was either absent or insufficient to deter the activity. While this approach does appear to posit the doing of harm as the core issue for criminal law, the thesis will argue that it is hobbled by a level of caution towards risk-control. That is, that risk-infliction cannot be absolutely erased, so the most appropriate prima facie control is to limit potential culpability to those risks that were badly chosen – in that they delivered harm – with the qualifications that the risk was known.65

The thesis will propose that those doctrines that appear to oppose the goal of evidential certainty – as to the existence of intention at the time of the offence – either elide any distinction between malice and the defaults of recklessness or negligence, or displace the search for malice with the search for some form of elective gambling. The basic question is whether criminal law should adopt a strict objective approach to all risky behaviour – incapacitating what cannot be deterred? Can the purpose of criminal justice be reduced to fate-management?

In Chapter 10 - A Radical Reform of Criminal Law, I will suggest a regime that can gather together the anticipatory and contingent doctrines, so that risky behaviour can be addressed – directly and consistently – before harm is done. I will propose the creation of an umbrella offence of anticipatory neglect, making the citizen culpable at the point where a demonstrable decision has been made to act in the face of a known (and unacceptable) danger. The external element of the proposed offence is a danger in excess of any

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65 Robinson argues that result elements should be excluded from criminal law, as such offences ‘without results, are only risk-creation offences’: Note 17 at 143. My argument also suggests that the distinction between malice and neglect creates unnecessary confusion. In He Kow Teh (1985) 157 CLR 523, Brennan J (at para 6) claimed that ‘specific intent to cause a prescribed result can be … established by knowledge that such a result will probably (or is likely to) occur’ – a principle he took from Crabbe. This reveals how completely the notion of risk-infliction has invaded that of malice (and the chaos caused by the distinction between a prohibited act and unlawful result). The only malicious occasion on which any assessment of the likelihood of harm is at all relevant, is when it is necessary to establish an indirect intention to form the base offence for constructive culpability.
potential social benefit. The subjective element of the offence is a fusion of recklessness, wilful blindness and negligence – the unwillingness to abandon activity that lacks potential social benefit at least equal to the danger it imposes. It is not whether the actor adverted to a danger – since all activity is potentially dangerous – but whether the requisite believability exists, that the activity in question was actually assessed as justified by some community advantage.

Why is This Reform Useful?

The thesis proposes three main reasons:

1. To give criminal law more complete reach over incidental harm. The current collection of pre-emptive and reactive offences either requires some level of direct offending, or withholds supervision until a species of harm is done once.

2. The difficulty in proscribing every harmful eventuality. Not only is the anticipation difficult, but it risks creating a monster of detail that is beyond the compliance capacity of the average citizen.

3. The potential for detailed legislation to become socially oppressive. It can prohibit the most remote dangers; and can inhibit enterprise that has potential benefits.

When presenting the rationale for the proposal, the thesis will refer to other models – such as European Codes and international law – to demonstrate that the proposed reform is based on a combination of existing principles.

Methodology

The thesis accepts that legal theory cannot subscribe to the scientific role of hypothesis. Rather law must adhere to the social science methodology, where only comparative aspects of a theory can be verified empirically (usually by tabulating the performance of the existing regime). The thesis therefore uses the technique of argument logic, rather than presenting evidence, to promote its theory.
The initial goal of the thesis is to provide an explanation of criminal law that rationalises those doctrines which appear to clash with culpability founded on conjunction: behaviour accompanied by the intention to deliver a prohibited effect. The focus of the thesis is spread across the methods currently used to match the law’s condemnation with either the bare act (strict liability) or with the actual result (causative and constructive liability) where these may differ from the actor’s direct intention. Similarly, the thesis is concerned with procedures that deem an illegal intention to exist if that would explain the model citizen behaving better than did the accused (objective liability). The question is whether the current array of means and (apparent) ends can be subsumed under one ultimate goal: to manage avoidable damage, by supervising of the decision to gamble?

I have adopted, as the most appropriate means of understanding the continued support for objective and fictional elements in the establishment of culpability, a review of the primary and secondary literature that defends such approaches. I have asked the questions: why do modern legal academics and jurists decline to acknowledge that harm-management requires the courts to seek out precisely what the accused intended; and why do they prefer to convert an intention to gamble with another citizen’s rights into malice, in order to exercise control over the behaviour?66

From there, I move on to the critiques of the present regime in order to demonstrate that, even when it is explained as fate-management, there are significant gaps left in the coverage by the ad hoc development of doctrines to administer danger. For criminal law to administer endangerment, it needed to develop some ‘creative’ doctrines to meet the requirements of these limits on the state’s power to intervene. The logic proceeds along the lines that if deterrence requires proof of a prohibited result – and such an outcome was not directly intended; and the result must be accompanied by both causation

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66 Robinson proposes four theories to support the fictional connections: causal, equivalence and evidentiary and crime control. The ‘causal theory’ used to support such connections is based on a ‘community consensus’ that the attendant behaviour is as blameworthy as the primary offending. However Robinson can see no analytical theory behind the doctrines. The second theory of ‘apparent equivalence’ is to be found in the Model Penal Code s 2.04(2) and Draft English Code s 24(1): Note 17 at 65.
and malice – and one of these is missing; then additional doctrine is necessary to supply the ‘missing link’. The doctrines that have been developed to cater for the supervision of endangerment, at the expense of the above barriers, are:

- Absolute or strict culpability based solely on prohibited (but voluntary) activity – so the need for ‘ulterior’ or ‘specific’ intent is either removed or supplied by extension of voluntariness;
- Objective provision of mental fault – if the reasonable person would have been more careful, the offender’s intentions are effectively deemed malicious;
- Causation, under which any inadequacy in the actus reus is supplied through artificial fact;
- Construction, transferred malice and common purpose, which supply the difference – in focus or degree – between what the offender intended and the necessary result.

All these doctrines artificially connect the person creating a danger to the prohibited outcome. They therefore withhold a criminal justice response until harm has been done. As such, their preventive capacity is thwarted (beyond谴责 every species of potential endangerment). The ultimate questions are:

- Whether fate-management by criminal law can be released from the restraint of requiring that harm be done? Is this a proper curb on the oppressive power of criminal justice?
- Whether there is an alternative method for criminal law’s supervision of incidental danger? Can criminal law realistically foreshadow (and prohibit) all dangerous activity with sufficient specificity as to effectively warn?
- Whether a concept of anticipatory recklessness can become the basis for all criminal prohibition?
Structure

This is an unusual thesis, even for law. Rather than the traditional reformist (re)cataloguing of the current law,\textsuperscript{67} approaching each doctrine discretely, this thesis argues sequentially from the current law to a new paradigm. The thesis has been built mainly on a temporal sequence: that substantive lawmaking precedes court process; that argument for conviction precedes defence; and that conviction precedes sentence. Also, those doctrines that can intercept harm are explored before those that are condemned to react to it.

Where the procedural sequence provides no guidance for the order of topics, I have then dealt with them in order of their appearance on the scene. That is, the doctrines with the greatest longevity first. After all, the survival of a doctrine must have something to say about the system that endorses, tolerates, evades or simply cannot shift it. And where that arrangement proves unsatisfactory, I have resorted to saving the most catastrophic dangers until last. This can perhaps only be explained by some sense of theatre.

I will examine the following doctrines, as they modify the role of mens rea to control incidental offending, over the course of the ensuing chapters:

- \textit{Inchoate offending} as doctrines of harm-interception (\textit{Chapter II})
- \textit{Strict consequence liability} as the most primitive species of fate-management (\textit{Chapter III})
- \textit{The reasonable person} and whether this citizen’s behaviour is an appropriate test of intention-based culpability (\textit{Chapter IV})
- \textit{Intoxication} as an example of the clash between capacity and result-management (\textit{Chapter V})
- \textit{Unintended homicide} such as neglectful, reckless, constructive murder and manslaughter (\textit{Chapters VI and VII})

\textsuperscript{67} See the opinion of JH Baker, regarding the extra-legislative history of law reform: Baker JH, \textit{An Introduction to English Legal History 2nd edn} (London: Butterworths, 1979) 183-91. According to Baker, the more radical jurisprudential rationalisations of common law have generally stalled at merely digesting it.
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• *Transferred* culpability, to inculpate the person who created the dangerous situation (*Chapters VII and VIII*)

• *Defences* where they are seen as (objective) justifications (*Chapter IX*)