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’\(^1\) – the precondition for culpability that the commission of a prohibited act be proven as accompanied by the intention to achieve the unlawful consequence.\(^2\) 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\(^3\) 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,\(^4\) 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.\(^5\)

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’.

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\(^{1}\) 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.
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.’¹ 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 choice² – 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

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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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 careered 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 simultaneously\(^5\) – with its role of ensuring that, by imposing a sequence of

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\(^3\) *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.

INTRODUCTION

‘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' 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. The message sent was for the citizen to do everything possible to avoid such a result. In *Cundy v Le Cocq*, the 'keeper of licensed premises' was convicted under s 13 of The Licensing Act 1872 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).
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


\textsuperscript{16} See Paul Robinson’s ‘evidentiary theory’ at p 142.


\textsuperscript{18} Note 17 at 25. This dichotomy will be explored with respect to the exploitation, by criminal law, of tortious strict liability - in \textit{Chapter III}.

\textsuperscript{19} Note 5 at 174.

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

\[\text{Note 20 at 71. But as Richard Epstein argues, ‘it is a major over-simplification to assume that all harms are caused by one of two types of human conduct: accidental or deliberate. Tort and criminal scholars delight in noting the many gradations of mental states falling uneasily between. Thus, next to strict liability are rules imposing liability absent the highest levels of care; beside these are rules for ordinary negligence; for recklessness; for wilful and wanton conduct; and for different shades of intention that involve conscious indifference or substantial certainty that harm will ensue from the performance of certain actions’; Epstein RA, ‘The tort/crime distinction: a generation later’ (1996) 76 Boston University Law Review 1-21, 15.}\]
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;²⁸ 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.²⁹ 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.³⁰ 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.’³¹

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.³² 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

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33 As Duff proposed, ‘[i]f witnessing and enjoying this spectacle would predictably so affect the attitudes and dispositions of the spectators that they would be likely to commit crimes of violence against innocent victims, the Harm Principle would again give us good reason to criminalize it’: Duff RA, ‘Symposium The Moral Limits of the Criminal Law: Harms and Wrongs’, (2001) 5 Buffalo Criminal Law Review 13-45, 33. Even Devlin famously resorted to such a justification, proposing that ‘[i]f men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on a common agreement, the agreement goes, the society will disintegrate’; Note 30 at 10. Feinberg concludes that ‘[a] pure free-floating evil, after all, is nothing that anyone needs protection from in any sense. It neither violates any one’s rights nor causes any setback to interests the risk of which had not already been voluntarily accepted by the interest-holder. If the “evil” in question, nevertheless, truly is an evil, then its occurrence is regrettable and the universe as a whole would be a better place without it, but it is nothing that anyone has a right to make a personal complaint (or feel personally aggrieved) about: Feinberg Note 32 at 328.'
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 whatsoever34 – 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’ test35 –
on other occasions the common factor seems to be that recourse to full
process was impractical.36 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.38 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

34 Per the discussion on ‘free-floating evil’ at Notes 32-3 above.
35 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,
36 Note 5 at 629.
37 Epstein, Note 24 at 10.
38 Sally Kift proposes that the difficulties of causation flow from the result-based offences: Kift S,
‘Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law, Part II’
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’: \textit{Satnam; Kewel} (1983) 78 Cr App Rep 149, per Bristow J. See also the discussion on \textit{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.\textsuperscript{42} 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.\textsuperscript{43} The alternative rationale is when a benefit outweights the available recompense.\textsuperscript{44} The question underlying this thesis is: when is simple restoration the best control over hazardous behaviour; and when (if at all)

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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: AlDA, 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 sexual 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;\(^{48}\) (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.\(^{49}\) 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?\(^{50}\) 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.\textsuperscript{52} They are restricted to using one person’s conviction to warn others that they should avoid similar dangers.\textsuperscript{53} 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;\textsuperscript{54}
- Strict liability simply ignores the ‘ulterior’ mental element;\textsuperscript{55}
- Recklessness provides an alternative mental element to direct intention;\textsuperscript{56}
- 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;\textsuperscript{57}
- Transferred malice redirects the mental requirement ‘horizontally’ to overcome any disjunction that would frustrate culpability.\textsuperscript{58}

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

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{54} Note 38.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.
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

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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.\(^\text{65}\)

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

\(^{65}\) 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 Kaw 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.
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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 condemning 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} 2\textsuperscript{nd} 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*)
II

ANTICIPATORY OFFENCES

Introduction

Criminal law is arguably the paradigm regime of legal fate-management, with its power to intercept a threatening enterprise before any harm has been done. It can send a warning, and also authorises the incapacitation of those who offend against ‘interceptive’ prohibitions.¹ Yet according to Jeremy Horder, ‘[o]ne of the striking features of almost all systems of criminal law is the primacy of the actual occurrence of harm rather than attempt or the simple risk of the harm occurring.’²

This raises the questions of what degree of advertence, to any harm embedded in the real purpose of the enterprise, is required in order to authorise pre-emptive intervention, as well as the appropriate degree of culpability to be censured.³ According to Simester and Sullivan, the difference between ‘assisting’ and ‘joint’ involvement is that the first requires proof of knowledge plus intention; while joint liability is based purely on some level of foresight.⁴ The inchoate offences therefore provide two comparisons with my endangerment model:

1. They demonstrate how a focus on direct intention limits the capacity of anticipatory offences to intercept all dangers. That is, all the hazards created by indirect intention – reckless, negligent, act-based (strict and absolute) offences – are not caught during their approach.

2. They also reveal the problems encountered when the moment of offending is in advance of any harm being done. There is the evidential problem of potential oppression (if an extremely remote danger must be avoided); also the associated punitive problem of setting a penalty that is appropriate to the harm actually foreseen.

¹ Speeding motorists are stripped of their licences, for instance, before they impose grief.
³ In the Conclusion I will present the challenge of dealing with an offender who is completely inadvertent to the danger they have created. For now, the thesis assumes some level of awareness has been ignored.
The issue is why these possibilities have generally not been embraced.\(^5\) The question becomes whether the current doctrines observe a justice rationale – that it would be unjust to convict where there was some possibility that the planned harm would not be inflicted – or whether they serve a fate-management goal to authorise intervention where there is a positive balance between the risk of offender-harm and that of system-harm. The initial question is whether it is logical to use the actus reus (including strictly anticipated consequences) or the mens rea to authorise a criminal sanction for an inchoate offence? Which is the most practical, or the most just reason for intervention before any harm is done?\(^6\)

**Chapter Goal**

Many jurisdictions regard an attempt as a lesser offence than when the intended harm is achieved.\(^7\) This chapter seeks to demonstrate that any distinction of culpability (and therefore available punishment)\(^8\) between an inchoate and a completed offence leads to a wrong analysis of the role of criminal law. In effect, any such difference reinforces the conception that harm is the sole source of full culpability, so that in some cases (such as when harm was impossible) no criminal liability is appropriate at all.\(^9\)

The chapter explores the law of attempt as a doctrine that respects the

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5. Section 178BB Crimes Act 1900 (NSW) creates the offence of recklessly attempting (‘makes or publishes … any statement’) to gain financial advantage by deception. As this inculpates those who are reckless as to the truth of a representation, as opposed to those who knowingly lie for gain, it is recklessness as to circumstances instead of the traditional focus on possible unlawful outcome. Where other Australian legislation imposes both a reckless and pre-emptive prohibition, they are imposed as alternatives: Infertility Treatment Act 1995 (Vic) s 49; Classification of Publications Act 1991 (Qld) s 20; Family Court Act 1997, ss 107, 108. Section 178BB therefore provides a rare example of full anticipatory fate-management in existing law.

6. Common purpose has been assigned to the constructive doctrines, on the reasoning that it goes further than to nominate a discrete secondary culpability which is punishable per se, but assigns full primary culpability by displacing the actual mens rea with a ‘deemed’ mental element. Its methodology is therefore more that of the ‘presumed intent’ rationale for strict liability than that of the ‘foreclosing intent’ authority for the inchoate offences.

7. Victoria’s legislation, for instance, sets the penalty for an attempt at 60% that of the completed offence: Crimes Act 1958 – 321P. Penalties for attempt.

8. I will explore below, mainly with reference to attempt, the range of legislative approaches to the degree of culpability between an offence that failed to deliver an intended harm, and one that succeeded.

9. As Andrew Ashworth observes, ‘[a] scale of punishments proportioned solely to the amount of harm actually caused would be intolerable in the modern day; yet that is the direction in which most of the arguments for punishing attempts less severely than completed crimes seem to lead’: Ashworth A, ‘Transferred Malice and Punishment for Unforeseen Consequences’, in Glazebrook PR (ed), Reshaping the Criminal Law (London, Stevens, 1978) 77-94, 89.
primacy of intention in deciding culpability. My suggested approach accepts
the reality that sentencing practice will treat a distant or impossible threat with
restraint (perhaps as not a ‘committed’ endangerment), while preserving the
principle that any active malice should be most fully punished.\textsuperscript{10} I will leave
aside regulatory offences, and deal only briefly with the rest of the inchoate
menu.\textsuperscript{11} For now I am concerned with how the current law assigns culpability
to behaviour that set out to deliver illegality but was either intercepted by the
criminal justice system or, due to fate, never arrived – that is, malice that
failed.

\textit{Conspiracy and Complicity}

\textit{Conspiracy}, as the engagement in planning of a criminal enterprise, is
complete once there is sufficient evidence of unlawful purpose.\textsuperscript{12} It is
temporally disconnected from the actus reus of the planned offence, so
culpability exists once the involvement goes beyond ‘merely talking about’ a
plot with associates, and to have ‘agreed to undertake’ the enterprise.\textsuperscript{13} It is a
common law offence, and carries an at-large penalty, so permits criminal law
to robustly interrupt a harmful enterprise.

A significant limit on the power of the doctrine to influence risk-taking is that
conspiracy requires evidence of direct intention. So there must be a question
over whether conspirators are culpable if they mistake the intent of the
discussion. Logically, if that person’s belief is that s/he is ‘merely discussing’
an idle proposal, this does not meet the \textit{O’Brien} test (above at note 13).

\textsuperscript{10} If, as appears to be the case, the community is often dissatisfied with judicial calculations of
appropriate sentence severity, this approach will require some modification to both offence-
definition and court procedure. This possibility is canvassed in Chapter X - \textit{A Radical Reform of
Criminal Law}.

\textsuperscript{11} While inchoate and regulatory offences may share a preventive role, they differs in two ways:
regulatory culpability is not dependent on any harm being intended, so is mainly strict liability; and
such prohibitions punish a dangerous act in itself, without reference to any unrealised result. This
presents no quarrel with my advocacy of anticipatory action as a legitimate form of criminal law.
Given that the proposal of the thesis is to elevate chosen risk to the core position in defining guilt,
my suggestions of how the criminal law should be armed to intervene, before the dangerous choice
is activated, are elaborated more fully later, in Chapter X - \textit{A Radical Reform of Criminal Law}, when
I will also attempt to establish some guidelines as to proportionality.

\textsuperscript{12} Simester and Sullivan see complicity as a ‘special case’, a form of construction: someone who aids
preparation for an offence ‘places her liability’ in the principal’s hands, and cannot then complain if
the principal does as planned: Note 4 at 234.

In complicity the disconnection is spatial rather than temporal. That is, the accessory did not have the requisite physical contact with the actus reus, but was perhaps keeping a lookout or driving the getaway car. To Paul Robinson the doctrine of complicity will impute the conduct element to an actor who ‘causes’ another to perform an illegal act.\textsuperscript{14} The culpability is equal to (and derived from) that of the first-degree offender.\textsuperscript{15} So there is an absolute relationship with the actual offence. Being an accessory, and liable for punishment equal to that of a primary offender, must raise a similar question regarding its effect: if the enterprise stands a greater chance of escaping detection through the full involvement of the accessory, then this offender is encouraged to do so. Since there can be incidental intent for accessorial liability, any claim to inadvertence as to the purpose of the preparation is met by an objective test.\textsuperscript{16}

In summary, conspiracy confirms that the current criminal law will find the authority to act on the basis of a danger, and that it will even find a level of culpability in excess of the actual harm individually inflicted. It is therefore \textit{direct} fate-management, in that it not only delivers a warning, but also reserves the power to incapacitate a danger. However it is limited to direct intention. Complicity is net widening, in that those who only assisted will be made equally culpable. It also overwhelms the defence of inadvertence. therefore it delivers a warning against citizens being careless about what they assist. It is indirect, in both senses: it cannot intercept a danger; but it can

\textsuperscript{15} First degree offenders are those present, by ‘pre-concert’, at the site of the offence - including those who take no active role at the time. The prior agreement will supply all elements of culpability, and differs from causation and common purpose in that the accord must include the offence actually performed; causation and common purpose extend either the voluntary act or agreement so as to embrace the excessive activity of the primary offender. See \textit{Crimes Act} 1958 (Vic) ss 323-5; \textit{Crimes Act} 1900 (NSW) ss 345-7, 349, 351; McHugh J, \textit{Osland v The Queen} [1998] <http://www.austlii.edu.au/au/cases/cth/HCA/1998/75.html> paras 70, 84, 89, 93. (Accessed 22/04/04)
\textsuperscript{16} In \textit{Bainbridge} [1960] 1 QB 129, 134 (UK CA), the accused accessory bought oxy-acetylene equipment for someone who then used it to break into a bank. The accused claimed he suspected it would be used for \textit{some} illegal purpose, but thought that would be breaking up stolen property. He was convicted of being an accessory before the fact. Chief Justice Lord Parker held that the relevant offence need only be ‘of the [same] type’, expanding culpable knowledge to whatever the court regarded as objectively comparable. In \textit{Stokes & Difford} (1990) 51 A Crim R 25, 41 – the beating in gaol of youthful fine-defaulter Jamie Partlic – Hunt J held that secondary offenders derive culpability for harm done if they assist knowing that ‘\textit{some}’ injury was possible. Hunt J also drew from \textit{Georgianni} that the secondary offender’s culpability can be based on the primary offence being incidental: at 38.
supervise oblique intention. Together, these offences create a complementary scheme to supervise criminal endangerment. The question is whether they adequately cover the field, or are there dangers that this scheme cannot control? Can a reckless conspirator be held culpable – as a party to a foolish agreement to do something that will only incidentally create a danger?\(^{17}\)

**A hypothetical:** some pranksters decide to stage a pretend robbery of a service station while one of their mates is the sole ‘graveyard shift’ attendant. The guns they borrow are only water pistols, but look quite real. Although such a prank is dangerous – the mate, any customers present, or even the police/security if called, could react as if it was a real armed hold-up – there is a question of whether this activity would present problems for intervention by either a charge of conspiracy; or complicity for the friend who supplies the ‘guns’?

Unless the current law resorts to traditional assault (the offence of creating fear) as the basis of an illegal act, conspiracy and complicity might be thwarted. Even if assault forms the ‘base’ harm, the available penalty for complicity might be limited to that available for assault, regardless of the danger actually created. This raises the issue of the degree of culpability that is appropriate for an anticipatory offence, a question best elaborated by the doctrine of attempt.

**Attempt**

George Fletcher proposes that ‘[t]he crime of attempt is an innovation of the early 19th century. It comes into the law in the same period that the preventive theory of crime takes hold in the mind of reformers and the use of the modern prison replaces forms of punishment like flogging and modes of execution that re-enacted the crime on the body of the criminal.’\(^{18}\) There are three basic models of culpability for attempt: culpability as if completed; lesser

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\(^{17}\) Simester and Sullivan note that the impossibility defence is still available for the inchoate common law offences of incitement and conspiracy. However a ‘foolish’ attempt (a transparent scam, for instance) is not an impossible attempt: Note 4 at 311.

culpability than if the prohibited harm was achieved; and equal culpability with specific exceptions.\textsuperscript{19}

Even within Australia, the full range operates. Commonwealth and South Australian legislation agree that an attempt (or conspiracy) equals a completed offence in culpability.\textsuperscript{20} The Northern Territory Criminal Code Act is perhaps the most explicit in not allowing any ‘discount’ in the applicable maximum sentence, even when the attempt was impossible.\textsuperscript{21} The NSW Crimes Act, on the other hand, makes the presumption of equal penalty subject to specific discounts for certain otherwise-nominated unsuccessful acts.\textsuperscript{22}

Alec Samuels summarises UK law as generally regarding attempt as equally punishable with the intended offence. The logic proposed by Samuels is that the ‘criminal intent is equal; the social threat is equal’.\textsuperscript{23} He also acknowledges that actual practice is different, as the attempt may not be the ‘worst possible offence’, so ‘the public might feel that it would be unjust or too severe entirely to disregard the lack consequences.’\textsuperscript{24} The Canadian Criminal Code, Chapter C-46, s 24(1) Attempts quite simply ignores incompletion, ‘whether or not it was possible’.\textsuperscript{25} Finally, s 511 of the Indian Penal Code provides that, where there is no ‘express provision’ elsewhere in the Code, the

\begin{itemize}
\item \textsuperscript{19} Although it is usual to distinguish the offence definition from its punitive consequences, the following analysis has its focus on the relationship between attempt and its ‘foundational’ offence – as expressed in the penalty range allocated to either.
\item \textsuperscript{20} Commonwealth Crimes Act 1914 – s7 Attempt. Section 86 Conspiracy similarly imposes an ‘as if completed’ penalty. In South Australia, s 270a of the Criminal Law Consolidation Act provides: ‘(1)Subject to sub-s.(2), a person who attempts to commit an offence (whether the offence is constituted by statute or common law) shall be guilty of the offence of attempting to commit that offence.’
\item \textsuperscript{21} 4. Attempts to Commit Offences.
\item \textsuperscript{22} Crimes Act 1900 – s 344A Attempts. The Victoria Crimes Act 1958 sets out a quite complex table of specific penalties, based on the seriousness of the offence then, in substantial contrast to the above jurisdictions, sets the standard penalty for an attempt at 60% of the penalty for the completed offence: Crimes Act 1958 – 321P. Penalties for attempt. As Halsbury’s outlines: In all jurisdictions except the Commonwealth, the Australian Capital Territory, New South Wales and Tasmania, the maximum penalty available for an attempt is generally less than if the offence attempted was completed. In the Commonwealth, the Australian Capital Territory, New South Wales and Tasmania the maximum penalty available is the same as if the attempt had been completed: Halsbury’s Laws of Australia v9 (North Ryde: Butterworths, 1995) 249,383.
\item \textsuperscript{23} Section 1 Criminal Attempts Act 1981 stipulates ‘[i]f with intent to commit an offence a person does an act which is more than merely preparing to commit the offence, he is guilty of attempting to commit the offence.’
\item \textsuperscript{24} Samuels A, ‘The Sentence for attempt’ (1984) 148 Justice of the Peace 643-4. However he notes that rape, buggery, incest and murder are exceptions.
\item \textsuperscript{25} See also my discussion on Impossibility in Chapter XI - Conclusion.
\end{itemize}
designated form of punishment for an offence (imprisonment or fine) shall also apply to an attempt, but that imprisonment shall be limited to half the maximum for the main offence. No such discount applies where the punishment is a fine.

This range of approaches seems to invite the question: is an attempt an act per se, to be punished as such; or is it no more than an exhibition of a guilty mind? The consequent issue is whether the degree of culpability should rise with the mounting danger, and therefore whether an attempt should always be more lightly punished than its completed version. The debate is whether there is any significant difference in culpability between a risk chosen and chanced, and one which – because harm was actually done – went on to achieve its goal (if direct malice) or to fail (if incidental).

Arguments for a discount

When reviewing Antony Duff’s *Criminal Attempts*, Keith Smith claims that ‘Duff is persuasive in maintaining that the criminal law would be neglecting its fundamental censuring function if it failed to register the relevance of harm caused by changing a distinction between attempts and completed offences.’26 Perhaps the first issue to be resolved is whether punishment for attempt subscribes to a restitutionary or preventive model, and whether this distinction influences the assessment of guilt.

The restitution argument

Duff argues that, even if the attempt fails completely, it still does some harm, in that ‘many attempts arouse fear or apprehension, in the intended victim or in others, even if they are thereafter abandoned’27 Logically, producing fear is a completed offence per se, and culpable as a complete offence. The attempt


itself is only the means of producing the fear, and is unpunishable for its frustrated goal. But if such an approach is adopted, a successful act risks double jeopardy. This possibility has forced some legislators to merge the attempt with any completed result. In fact assault is classically an offence done during the approach to battery, so serves much the same function as the law of attempt: to provide pre-emptive penalties that will deliver good reason for the offender to break off at an early stage of the attack. While the method may appear retributive, the goal is preventive.

Finally Duff resorts to pure retribution as the warrant for punishment. The infliction of penalty is simply a means for the community to make its displeasure known. But why is it necessary that harm be actually done? One of the residual complaints about the protective capacity of criminal law is that, aside from the small group of anticipatory offences, punishment must wait until some defined harm has been done. Surely what is to be condemned is the choice, the decision to either infringe another citizen’s rights; or to put them at risk if they stand in the way of effecting the plan. Only if restitution is seen as a warning mechanism is there substance to this concept, and then it has become prevention.

The prevention argument

This reasons that the more dangerous acts should be more highly deterred, equating proximity with danger. It aims to reserve the higher levels of punishment for the more potentially harmful behaviour, accepting that there is a limit to the amount of pain that can be inflicted, particularly since we no longer officially allow torture, and are reluctant to employ the ultimate sanction, capital punishment.

In summary then, the ‘discount’ approach would punish attempt as preventive,

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28 For instance, to avoid the risk of double jeopardy, s7(4) of the Commonwealth Crimes Act 1914 stipulates that ‘A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.’
29 ‘A criminal conviction communicates a public condemnation of what the defendant has done, to the defendant, to the victim, and to the wider community; and it demands that he accept that condemnation …. The character of his wrongdoing depends … upon its actual outcome: it matters to us, and should matter to him, whether he did the harm he intended to do’: Note 27 at 352.
30 Sub-standard prison conditions may amount to de facto torture.
and as part of an escalating punitive response as the prospect of harm increases. But the ultimate reference point is harm, rather than any independent danger created in advance. The discount analysis therefore confuses tort law methodology with that of criminal law.

*Arguments for no discount*

Again, it seems necessary to analyse the issue under the alternative views of punishment: as retributive or preventive.

**Punishment as retribution**

Given that an attempt is, by definition, a failed attack, what harm was done to earn retribution? The scale of harm actually done cannot be decisive as to the scale of penalty. The failings of the retributive argument are magnified when an attempt is to be punished as if it succeeded. In effect, retaliatory law creates a *fictional harm* to give itself something to punish. Such an approach not only destroys any conception of ‘just deserts’, it *encourages* potential offenders to complete the offence: they are *already* fully culpable once the attempt threshold has been crossed; at least the completed offence will deliver its goal, where the attempt cannot. Both moral and pragmatic goals of any retaliation are damaged.

Retribution as a punishment goal is therefore incompatible with seeing an attempt as equally culpable with a completed ‘contingent’ offence.

**Punishment as prevention**

Again we return to the subjective/objective question – this time regarding whether the most effective warning is delivered by threatening to punish an attempt because, if unchecked, it will do prohibited harm (the objective rationale); or because of the unacceptable (subjective) attitude it demonstrates.

*The objective argument: punish the violation*

This approach is to focus on the potential end result of the action, as the locus of danger, rather than what was intended. The logical problem of this
perception is perhaps best demonstrated by the arguments presented by Duff.\textsuperscript{31} Obviously a fully result-oriented approach would preclude \textit{any} punishment for an attempt. This forces Duff to retreat to punishing ‘transitional’ acts.\textsuperscript{32} Duff’s rationale is that each ‘approaching’ act increases the danger, that proximity is more important than ‘disposition’, so that ‘criminal liability requires more than “mere blameworthiness”: that a defective disposition must be \textit{dangerous}, likely to lead to actually harmful conduct; so we must attend to the probable impact on the world of an agent with such a disposition.\textsuperscript{33}

In contradiction to the essence of the objective argument, Duff seems to be saying that there is a significant difference between ‘blameworthiness’ and ‘dangerousness’ – that ‘blame’ is not assigned in response to either the probable risk or actual delivery of harm, but on some moral authority. He resists the obvious: that what each successive (preparatory) act does is to \textit{reveal} the scope of the unacceptable intent – or blameworthiness. Very much earlier, Oliver Wendell Holmes saw the role of intention in attempt as to indicate what probably would have happened, had fate not intruded: ‘The true answer is, that the intent is an index to the external event which probably would have happened, and that, if the law is to punish at all, it must, in this case, go on probabilities, not on accomplished facts.’\textsuperscript{34} Based on that forecast, anticipatory law cannot afford to wait until harm is proven: \textit{chosen} dangerousness \textit{is} blameworthiness. The key concept again becomes ‘choice’.

If prevention is the goal, the only appropriate authority for finding culpability

\textsuperscript{31} ‘A murder involves the death, the wrongful killing, or a victim; attempted murder does not. Criminal damage involves damage to another’s property; attempted criminal damage does not. Even if criminal law is not concerned only with such harms, it must surely at least be concerned with them: thus a completed crime typically involves harm of a kind that concerns the criminal law, which even an attempt does not’: Note 27 at 125.
\textsuperscript{32} ‘But the position is different with \textit{incomplete} attempts, when the agent desists or is stopped before he has done all that there is for him to do to commit the crime: for he has done less, in subjective as well as objective terms, than one who completes his attempt. But if criminal liability depends on choice as actualized in \textit{action}, the incomplete attempter has less that he is liable for: he has not actualized his choice to take the final steps towards committing the crime’: Duff RA, ‘Subjectivism, Objectivism and Criminal Attempts’, in Simester AP and Smith ATH (eds), \textit{Harm and Culpability} (Oxford: OUP, 1996) 23.
\textsuperscript{33} Note 27 at 183.
must be *what will effectively deter* unacceptable choices. Rather than measure what actually happened, the proper focus must be what harm was intended, and how seriously was that result pursued? It is not how close the offender came to doing harm and the obstacles overcome; but what commitment was acting (however briefly) at the time and place in question, to overwhelm fate. The act becomes evidence of the mental state, so is indistinguishable from the subjective approach.

*The subjective argument: punish the person*

As Eugene Meehan explains it,

> The thesis of the subjectivist is quite simple. The degree of an individual’s guilt …. [m]ust depend on the mental state of the accused …. Thus a person is deemed guilty of an attempt if he actually intended to commit a crime and did acts sufficient from his point of view to carry out his intention, even though in fact his conduct could not achieve the objective.\(^{35}\)

Duff engages a more philosophic rationale, when he sees the subjective approach as – by its locus of culpability – respecting the individual’s right to choose, and asks ‘[w]hy is choice important?’\(^{36}\) This concept is not necessarily the sole property of criminal law. In civil law, the choice to be less careful than the law requires, also attracts legal consequences – when that choice proves harmful. What is unique to criminal law is that the choice to ignore the proscription creates guilt without harm.\(^{37}\) But, as Holmes pointed out above, if harm has not happened, the calculus is forecasting. While this appears to tread perilously close to (objectively) defining an offence by its foreseeable outcome, the essential difference is that the *projected* – the actually foreseen – result which inculpates the intent. It is what the accused *intended to do* which illuminates the scale of the offence. All Holmes is really doing is to insist that the intended harm be ‘probable’, as some protection against penalising acts where the chance of harm was too remote to have

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\(^{36}\) Note 27 at 147.

\(^{37}\) In fact, according to Meehan, the focus on choice – regardless of outcome – has a pedigree in Roman law: ‘A variant of the subjective approach and one which would normally be included in it, is the view that the mens rea is the same whether successful or not – that the accused is just as wicked, and should be punished as severely as if he had succeeded. This was the Roman law approach’: Note 35 at 19.
actually been intended. However Holmes’s attempt to establish a threshold for intent-based punishment reveals one of the major problems with the subjective approach: does it – as its opponents charge – become a global critique of the actor, a bare attack on attitude?38

The anti-subjective argument39
Duff challenges40 whether intention can serve as the sole factor of inculpation. He admits that it satisfies the justice concept of treating ‘like cases alike’, and that there is ‘no relevant moral difference’ created by whether the chosen act succeeded or failed. But he then questions ‘whether the “belief” and “intent” principles really embody, as the argument suggests, not just a proper moral basis for ascriptions of criminal liability, but a deeper truth about the nature of the action.’41 Duff is concerned that subjectivity cannot distinguish between determined and idle attempts; between competent (and therefore dangerous) attempts and those which were bound to fail.42

Duff’s reasoning leads him to question whether the subjectivist approach addresses the specific act or whether it sprawls into a more general reproach of the character of the offender. He proposes that subjectivity is mainly concerned with assessment of the subject’s ‘character traits’, and questions whether these should be the basis for criminal liability.43 He presents the

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38 Kimberly Kessler Ferzan asks, ‘[t]o what extent is there an attitude of indifference encapsulated in an action? … Consider my purchase of an ice cream cone. I desire food. I believe that an ice cream cone will satisfy my desire. I also believe that I like ice cream. Fighting my desire for food is my desire to lose weight. Nevertheless, the hunger wins and I resolve my competing desires with the intention that I go buy an ice cream cone. … What attitude is revealed by my purchase? My desire for food? My love of ice cream? My desire to gain weight or my indifference thereto? Certainly, there are a myriad of beliefs and desires that one might attribute to my purchase, but my purchase, in and of itself, does not imply one attitude over another. In fact, some attitudes that might be attributed to my purchase, e.g., I must desire to gain weight if I am opting for the hot fudge sundaes, might be false (a competing desire won the mental battle or akrasia stepped in). Indeed, one cannot even infer that I am indifferent to gaining weight—perhaps I have made a deal with myself to skip dinner in exchange for this treat.’ Ferzan KK, ‘Criminal Law: opaque recklessness’, (2001) 91 Journal of Criminal Law and Criminology 597-652, 618.
39 This sub-heading has been used to permit a form of ‘re-examination’.
40 Note 27 at 149.
41 Note 27 at 152.
42 It is often argued that the mere fact of failure should not alter criminal liability. A failed attempt should be punished as severely as it would have been had it succeeded; a successful attempt should be punished no more severely that it would have been had it failed.

This claim applies to complete attempts, whose agent has done all that she can to commit the crime …. Intentions can, of course be more or less wholehearted; beliefs can be more or less confident or reasonable; attempts can be more or less competent: Note 32 at 22.
43 Note 27 at 177.
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case of a witness who is threatened into perjury. The act is clearly chosen (from an unpalatable menu, perhaps), so the question is whether the law can demand greater strength of character.  

According to Duff, the ‘character’ theorists would argue that an ‘undesirable character trait’ has been revealed, which ‘merits condemnation and punishment’ if it is judged a ‘defective’ trait. In other words, if someone breaks a window to avoid a beating, is it unreasonable that they put personal safety ahead of property? Is it wrong to move the harm onto another? What Duff appears to miss is that the boundaries around the character aspects a court can consider – when it is reviewing an accused’s performance as a citizen – is provided by the substantive offence itself. All that the subjective analysis adds is to inquire as to whether the accused knew they were offending.  

In summary, I propose that the subjective review of behaviour remains morally and practically sound when no harm was done. In fact, I suggest that it is the only adequate approach in such situations – as the following analysis of its alternative demonstrates. 

The problems created by the objective approach 

There are a number of doctrines and concepts that demonstrate the logical confusion which flows from the law attempting to focus on the consequences – real or anticipated – of an attempt. 

The guilt threshold 

The concept of attempt logically demands some act done, but not completed. It does not cover the ‘inert’ wish. So it precludes a legal response until something is committed to further an offence. A problem created by the focus on the preliminary behaviour is the necessity for a threshold: a point at which the risk of harm is too causally or perceptively remote to warrant prohibition. The current formulation is: wishing someone dead is allowed; but doing anything to fulfil that wish is not. But is such a distinction pragmatically or

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44 Note 27 at 174.
45 Note 27 at 176-7.
moral validity?

The American defence of voluntary abandonment amplifies this threshold issue. It will negative liability if the accused can prove that they chose to vacate an attempt.\(^{46}\) The confusion created by the doctrine, as a defence to the offence of attempt is that, as a complete defence, it suggests that there is a point – during the deliberate preparation for an offence – before which the actor can be completely exculpated. Indeed, as the Criminal Law Officers Committee of the Standing Committee of Attorneys-General point out, ‘[t]o recognise some “defence” of desistance or abandonment implies that a crime already committed is not a crime at all.’\(^{47}\)

So we are forced to consider whether an outer limit to preparatory culpability is created simply to avoid oppression, and to accept that a certain level of antagonism between citizens as unavoidable, or even essential.

Unlawful killing

The illogical product that flows from centring the penalty on the result becomes obvious when Kenneth Simons asks ‘is it possible to convict a person of attempted felony-murder?’\(^{48}\) Simons goes on to see any sentence difference between full felony-murder and attempted felony-murder as the “no harm” penalty discount. Yet for the felony-murder rule to operate, someone has to be dead as a result of an intended non-lethal felony. Even though the felony was stopped at the attempt stage, it remains necessary for someone to die as a result of the attempt itself. As long as there is proximate cause, the link between the act (incomplete or not) and the death is the same, and the harm itself is identical.

\(^{46}\) Australia uses the term ‘voluntary desistance’. As explained in Halsbury’s Laws of Australia: ‘[130-7065] Desisting from an attempt’ In all jurisdictions even though a person voluntarily desists from an attempt he or she may still be liable for that attempt. In the Northern Territory and Queensland, however, if a person is found guilty on a charge of attempt and he or she voluntarily desisted from completing the offence, this will be taken into consideration in determining the penalty to be applied [The penalty applicable is one-half of what the penalty would otherwise have been: (NT) Criminal Code s 279(1); (QLD) Criminal Code s 538].


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Involuntary manslaughter

Duff raises the question of whether it is possible to have attempted involuntary manslaughter, since this requires intending to do the unintended. Conviction for murder insists on full intention to do something at least potentially lethal: that the choice of target, the act, and the consequences to that target were all necessary to the offender's design. Involuntary manslaughter sees the killing as either the product of a choice to do something unlawful and dangerous (with the culpability constructed by fate); or of unacceptable foolishness, that the accused was negligent in not apprehending the risk (which was obviously realised).

Since involuntary manslaughter is a killing resulting from either negligence or construction, there is still an indirect fault element present. So logically it is possible to attempt to be unlawful or negligent. The fact that anyone needs to ask if it is possible to attempt to be negligent demonstrates the futility of the direct/indirect distinction: negligent activity is a choice. However this question also displays the intellectual and logical problems created by using the act or the consequences as the primary offence – rather than simply using them as evidence of the intent.

The problems with the subjective approach

Impossibility

Simester and Sullivan present the rationales for the impossibility defence as: to make people responsible for non-existant harms, on the basis of their mistake, may be oppressive (and that it may create offences simply by what people believe to be the law); or that the law should not be bothered with things that could never have happened. Should it be an offence to attempt to kill someone already dead? Is there something to be gained by punishing a pickpocket who dips empty trousers?  

49 Note 27 at 7.
50 Note 4 at 309. In Haughton v Smith [1975] AC 476, police intercepted a truck when the driver was deliberately carrying stolen meat. Officers hid on board, and allowed the delivery to proceed before arresting all involved, including the driver, for attempting to sell or receive stolen property. The
Duff\textsuperscript{51} presents the issue of whether the law should punish an intention which could never be fulfilled by the act done: a person who administers what he believes is noxious, but which is actually benign, to procure a miscarriage (or for that matter, to murder); a woman who buys what she thought to be a stolen video-recorder, but was just cheap; a man who smuggled currency into England, wrongly believing the act to be prohibited. The logic for prosecuting these people is that it is an accident that they did no wrong, and that they have displayed a willingness to offend. It should therefore be to the benefit of society that they made these harm-deflecting mistakes, rather than to benefit the accused, and that the society should not lose the opportunity provided by such an insight into their attitudes. However the third example raises the issue of whether there is a difference between a mistake of fact (the substance administered, or why the recorder was cheap), and a mistake of law (that currency importation into England was not prohibited).

Australian legislation, where it raises the issue at all, appears to be consistent in creating liability despite impossibility.\textsuperscript{52} However the legislation is silent on any distinction between factual and legal impossibility, thus creating fertile ground for statutory interpretation: is the omission deliberate, an oversight, or is there no perceived difference?

\textit{Mistake of fact}

Holmes would apply a 'no possible harm' test.\textsuperscript{53} The Law Reform Commission of Canada would excuse an accused who attempted harm by

\begin{itemize}
  \item \textit{Commonwealth Crimes Act 1914} – s 7 Attempt
    \begin{enumerate}
    \item A person may be found guilty even if:
      \begin{enumerate}
      \item committing the attempted offence is impossible;
      \end{enumerate}
    \item For a person to be guilty of attempting to commit an offence, the person must-
      \begin{enumerate}
      \item intend that the offence the subject of the attempt be committed; and
      \item intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place.
      \end{enumerate}
    \end{enumerate}
  \item \textit{Victoria Crimes Act 1958} – s321N. Conduct constituting attempt
    \begin{enumerate}
    \item A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offences attempted impossible.
    \end{enumerate}
\end{itemize}

\textsuperscript{51} Note 27 at 77-9.
\textsuperscript{52} Commonwealth Crimes Act 1914 – s 7 Attempt
\textsuperscript{53} 'It has been thought that to shoot at a block of wood thinking it to be a man is not an attempt to murder, and that to put a hand into an empty pocket, intending to pick it, is not an attempt to commit larceny .... If a man fires at a block, no harm can possibly ensue, and no theft can be committed in an empty pocket': Note 34 at 57.
vooodoo, reasoning that ‘although no less reprehensible than an attempt using more appropriate methods, [vooodoo] is itself relatively harmless’. The Commission’s rationale appears to be the general potential for harm if there is no mistake of fact: the believer in vooodoo will not resort to more effective methods when the target remains untouched, so is distinct from the person who will make sure the gun is loaded next time. In England, alternatively, the Law Commission recommended that any defence of impossibility be ignored: ‘Our conclusion is that the fact that it is impossible to commit the crime aimed at should not preclude a conviction for attempt.’ So contemporary legal reasoning continues to divorce itself from the rule of result, at least when this will permit some response to bad behaviour which only failed to do harm because it was frustrated by foolishness.

*Mistake of law*

The other, and more difficult version is ignorantia juris non excusat: ignorance of the law does not excuse. The real complexity emerges when no offence was possible because the act in question was *legal*. In this, the accused is attempting an act which, although they believe it prohibited, is not an offence. Is it proper to convict on a misapprehension of the law? Again, an analysis of intention would convict, despite that no offence was committed. After all, the law does claim to convict when any ignorance (if accepted) would be in the accused’s favour. So should it also convict where the actual mis-

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55 Note 54.

56 ‘By contrast, trying to kill with a gun, wrongly believed to be loaded, is manifestly dangerous and apt in general to produce the harm intended. In cases of inherent impossibility in fact, then, we should hesitate to impose liability for furthering’: The Law Commission, *Criminal Law: Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement*. (London: HMSO, 1980) 53.

57 In England and Wales, both the *Criminal Attempts Act 1981 s 1(2)* and the *Criminal Law Act 1977 s 1(1)(b)* will find culpable an attempt or conspiracy ‘even though the facts are such that the commission of the offence is impossible’ or by ignoring ‘the existence of facts which render the commission of the offence or any of the offences impossible’: and in the Second Reading Speech for the Victorian *Crimes (Amendment) Act 1985*, the Attorney-General saw it as ‘undesirable that an intending criminal should escape liability simply because unknown to him or her … the crime intended cannot be completed.’ This was contrasted with ‘present law that a person who attempts to commit a crime that does not exist cannot be guilty’. Such exculpation for mistake of law, according to the Attorney-General, ‘must be preserved’: *Hansard*, Legislative Assembly, 22 October 1985, 1039, cited in ‘Attempt’ (1986) 10 *Criminal Law Journal* 166-7.

58 Meehan provides some ‘[e]xamples of so-called ‘legal impossibility’ have included; attempting to receive goods believing them to be stolen, but which were not in fact; trying to commit bigamy when the first wife is in fact dead; and attempting to commit perjury with false testimony which is not material’: Note 35 at 152.
apprehension works against the accused? George Fletcher proposed a series of hypotheticals that demonstrated how an act’s intent and legality can conflict.\(^{59}\) In such cases of futility, there is some feeling that although no illegality was actually achieved, there is still reason to punish. The problem is that to punish subjectively for mistake of law would render pointless the entire menu of acts that are off-limits, replacing it with whatever the accused thought was prohibited. To allow intention this freedom would be to move well outside specifically proscriptive law, to conviction for pure attitude.\(^{60}\)

The Law Reform Commission of Canada, however, sees it as quite correct to ignore any misperception of the law, whatever its effect.\(^{61}\) The Australian Criminal Law Officers Committee of the Standing Committee of Attorneys-General preferred to apply a subjective test to a mistake of fact, and an objective test to a mistake of law.\(^{62}\) Duff questions whether there is any essential difference between mistake of fact, and mistake of law.\(^{63}\)

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\(^{59}\) Let us consider a variety of situations in which the suspect engages in perfectly legal conduct but with wicked intent: 1. Y marries a second time in the belief that he is still married. In fact, his wife has procured a valid ex parte divorce in another jurisdiction. 2. C writes a letter to suspect B, inviting B to use C’s car whenever B wishes. Before receiving the letter, B takes C’s car with the intent to steal it. 3. A physician P is about to inject air into the suspect X’s veins with the intent to kill him. Ignorant of P’s intentions, X decides to use the opportunity to assault him. As the needle is poised, X grabs the physician and begins to choke him: Fletcher G, *Rethinking Criminal Law* (Boston: Little Brown, 1978) 555.

\(^{60}\) When Taaffe [1984] AC 539 (HL) was convicted of smuggling drugs, and claimed he thought he was smuggling currency, the House of Lords ruled that he could only be guilty of intending to offend against facts ‘as he believed them to be’. And in Smith [1974] QB 354 (CA) a tenant removed the speakers he had fixed to the landlord’s wall, unaware that they had thus been made fixtures and became the landlord’s property. The trial judge relegated the mistake to mitigation. The Court of Appeal reversed the conviction, ruling that an offender needed some awareness of the legal situation before there could be culpability.

\(^{61}\) ‘Our law only penalizes conduct in fact prohibited by statute, it does not penalize conduct erroneously believed to be prohibited any more than it excuses conduct erroneously thought not to be prohibited …. ignorance of the law is neither a defence nor an offence; it neither exculpates unlawfulness nor inculpates lawfulness …. there is no blanket offence of “attempting to break the law in general”:’ Note 54.

\(^{62}\) ‘An example is a case in which the accused actually imports heroin believing that he or she is illegally importing dutiable watches. The Committee believes that the accused must be acquitted of the offence “actually committed” (in the example, knowingly importing heroin) because he or she lacked the relevant knowledge. Nor can the accused be convicted for illegally importing the watches because he of she has not done so. … However, the accused should be liable to be convicted for attempting to commit the offence he or she believed was being committed’: Note 47 at 49.

\(^{63}\) He poses the situation where two hunters legally kill deer on the first day of the hunting season, but both believe they are poaching: one mistook the nominated opening date to be tomorrow (mistake of law); the other simply thought today is yesterday (mistake of fact): Note 27 at 160. He points out that the issue of a mistake of law may be more an intellectual amusement than a substantive problem, concluding that ‘[c]ases of purely imaginary crime are unlikely to come to court; a repentant adulterer who walked into a British police station to give herself up for this supposed crime would be told to go home’: Note 27 at 93.
The ‘defence’ of impossibility seems to fuse the causal defence\(^\text{64}\) of factual mistake (exculpating) with that of law (irrelevant, or deemed to not exist), so both will acquit. That is, a mistake of fact that creates impossibility (believing that the talcum powder is cocaine) can absolve the deluded conspirator\(^\text{65}\), while mistake of law\(^\text{66}\) must exculpate, or criminal prohibitions become whatever the individual thinks they are. If there is no prohibition against importing currency, how could a court assign a penalty? The ‘default’ is pure bad citizenship; the intent to evade some prohibition.

Nevertheless, we need to reach some conclusion as to whether it is just and practical to inculpate someone who tried to violate a law but failed, because no such law existed. My subjectivist approach would suggest that citizens who regard their peers as prey are still dangerous, even when their behaviour is only subject to moral censure. Even if it is unlikely that anyone would take much notice of those ‘stealing’ something which is in fact free, and even if it would be difficult to establish the value of what was taken, such citizens should really be informed that they had not got away with a predatory attempt. That they had erroneously added to the range of things they are not allowed to do, and for which they will be punished (even if only by ridicule), is a burden they – rather than the community – should bear; and it may encourage them to a bit more diligence as to their actual rights.

**Recklessness**

Should the law punish a reckless attempt? To Duff, those who only regard the offender’s actual intent as culpable (the ‘subjectivists’) must punish attempts as for a completed act, if the offender acted with ‘oblique intention’ or recklessness\(^\text{67}\). Duff posits that the subjective approach cannot logically

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\(^{64}\) That the commission of the offence was caused by a mistake; as opposed to the failure of the attempt being caused by mistake.

\(^{65}\) See *DPP V Nock* [1978] AC 979, where only a conspiracy that ‘would have resulted’ in a crime is culpable.

\(^{66}\) In *Barbouttis, Dale & Single* (1995) 82 A Crim R 432 (NSWCCA), Smart J (at paras 69-70) distinguished legal impossibility (cigarettes presented by police as stolen, but were not) as valid exculpation.

\(^{67}\) ‘For subjectivists must surely hold that oblique intention, or recklessness as to circumstantial aspects of the complete offence, should suffice for an attempt, if they suffice for the complete offence itself’: Note 32 at 27. Duff provides two hypotheticals which reveal the issue: ‘John throws a stone at Jane, intending to hit and injure her: if he succeeds, he is guilty of wounding; if he
avoid violating the principle that the law should not interfere with a risk decision which turned out to be valid. The question for subjective theorists is presented as whether, in pursuit of harm prevention, they are willing to blur any distinction between overt malice and the willingness to put a stranger at risk, when neither have resulted in harm.

By definition, recklessness (as will be more fully explored in *Chapter IV - The Reasonable Person*) is a harmful act done with the willingness to inflict danger *on the way to the goal*. I will later argue\(^68\) that where incidental harm was done, civil law is the appropriate forum: harm was deliberately risked and inflicted on one individual in pursuit of another individual’s interests. Restoration is in order.\(^69\)

Absent such harm however, civil law has no power. This appears to demand that intercepting careless behaviour falls to criminal law. But if deterrence (as opposed to restoration) is the direct goal or criminalisation, dangerous behaviour must still be open to choice. What if the accused citizens are persuasive that they did not know the acts were dangerous, so did not choose to run any reckless risk? There has been no recklessness, and Duff’s critique collapses.\(^70\) His error has been to trudge down that old dead-end – that the

\(^68\) See pp 55, 63, 268, 270, 281 and 283.
\(^69\) Naturally there is a problem when the harm cannot be restored: the victim is dead, or the harm exceeds anything the offender can ever repay. But punitive retaliation cannot change that, beyond satisfying some desire for revenge. Also, in many jurisdictions, the fact that restoration is frustrated by an unintended death is answered by constructively elevating the offence to murder. This solution has its own problems (which will be explored in *Chapter VI*), but it does attempt to retain accountability where civil law is frustrated.

\(^70\) Keith Culver, in critiquing Duff’s *Criminal Attempts*, argues that ‘Duff leaves at least two important questions unanswered. Does he aim to supply a rationalised and clarified law of attempts which includes an understanding of action which is defensible from the standpoint of the philosophy of action, yet possibly arrives at views which do not match the standards of morality? Or does he aim to supply a law of attempts which provides morally defensible results even if those results require side-stepping enduring problems in the philosophy of action? It is ultimately unclear whether Duff’s objective view is a revision of and apology for the current law of attempts (whatever its moral failings), or a sketch of a programme of reform with a better moral grounding than the common law
criminal justice system is designed to directly address harm. It is not. Criminal courts administer prohibitions drawn from a history of behaviour found to be unacceptable to the society. If harm done between citizens is the reason for the prohibition, then the prohibition has taken over as the means of control. With harm relegated to the background, what other practical goal can there be but to prevent it?

My argument is that recklessness is a tort concept which needs the evidential support of actual harm. The correct criminal justice approach is to censure the wilful endangerment of a specified right, uncoloured by vague adjectives such as ‘reckless’ or ‘negligent’. Even when these are embodied in a criminal offence – so that criminal prosecution can embellish the perceived lack of deterrent impact from tort restoration – this still raises the question of why the criminal law had failed to identify the specific offensive behaviour and prohibited it.

I suggest that culpability is properly decided by what the accused chose to do, in the context of what they believed was permitted, and within their capacity to conform. Recklessness is a cavalier attitude towards a harmful result and – if the behaviour it engenders delivers unlawful harm – is a tort. The lawmakers’ power to create offences in the absence of actual damage introduces my final issue: the opportunity for the collective welfare to overbear the individual.

**Oppression**

Duff proposes that the tension created by the law of attempt is between the community’s interest in preventing harm at the earliest possible opportunity, and ‘the need to protects citizens from intrusive and oppressive policing’. This tension forces a definition of when the prospective harm was ‘embarked on’.

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71 The harm to be addressed is rarely expressed beyond the second reading speech; the long title to legislation; or an initial section that swiftly expresses (usually in a single sentence) the statute’s objectives: See the Second Reading Speeches for the Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill [NSW Legislative Assembly 3/12/2003, p 5758], Firearms and Crimes Legislation Amendment (Public Safety) Bill [NSW Legislative Assembly 29/10/2003, p 4352] and Rail Safety Bill [NSW Legislative Assembly 31/10/2002, p 6380] for examples of legislation concerned with harm prevention.

72 Note 27 at 63.
If culpability is located *in advance* of harm, the questions are: How early and on what grounds is the law authorised to intervene? What quality of the act or the actor should control the punitive response?

Can doctrine draw a satisfactory line that permits ‘reasonable’ risk-taking? And is reasonable risk-taking to be decided on the basis of what furthers the public interest? The Law Reform Commission of Canada sees the problem as one of balance.73 I propose that this is an issue of substantive lawmaking, not part of the court process. That legislators should be uneasy about defining criminal offences where there is no actual harm (and resort to soft-edged principles which they expect the courts to interpret) demonstrates an awareness that criminal law deals directly in social attitudes – and that, even within democracy, it therefore carries an awesome capacity for oppression. I suggest that inchoate offending is not another opportunity to dust off the reasonable person to distinguish between an attempt that is too remote from the real prospect of causing harm, from one which is sufficiently frightening to warrant prohibition; a criminal justice system can only evade oppression if it accepts the restraint of finding culpability solely where it can prove a deliberate endangerment of a specified and known right.

**Conclusion**

In *Taaffe*74 the accused managed to convince the court of the reasonable possibility that he believed he was smuggling currency – which was not prohibited – rather than the drugs actually found. The intended offence was both factually and legally impossible. The court was thus faced with either reverting to some form of strict or constructive liability to punish the objective act of importing drugs, or acquit him as lacking the specific mens rea. The House of Lords rejected any such modification to the requirement of knowing conduct.

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73 ‘We criminalize certain conduct to protect fundamental values, but at the cost of encroachment on other values .... In making criminal laws, therefore, society must seek a balance and beware of undue infringement on the individual liberty through forbidding things which people should be free to do’: Note 54 at 6.

74 Note 60.
This certainly harmonises with a ‘conscious endangerment’ paradigm. It is an act deliberately imposing a danger, rather than one reaping an unwanted result, which should authorise censure. Outcome is a distraction. The correct approach, I have argued, is for the court to assess the believability of the claim to have not realised that the drugs were there. So the accused can be found culpable if the counter story fails to raise a reasonable doubt that he did know about the drugs; or if the offence will capture recklessness or negligence as to the possibility of the presence of drugs. But he cannot be punished for the attempted currency offence, since there is none.

If Taaffe had been subject to the ‘conscious endangerment’ paradigm, this would require that the prosecution prove an actual knowledge of the possible existence of drugs.\footnote{In Bahri Kural \(1987\) 162 CLR 502, the accused claimed that a stranger in a Turkish airport had given him a samovar to deliver to a contact in Australia. The traveller admitted he suspected it might be drugs (or a bomb) so inspected it first, but noticed nothing. Inspectors at Tullamarine uncovered 200 grammes of heroin in the base. The High Court found that his suspicion was sufficient for culpability.} Clearly, if the court is convinced that he actually intended to import drugs, he more than satisfies the requirement of believing that the drugs are possibly in his bag. The accused may deny it, and present an alternative belief, but the court is free to disbelieve this account for his behaviour. What is actually in the bag is irrelevant.

Of course, this is punishment for attitude, and radically converts the criminal justice system from enforcing prohibitions to penalising mental bad citizenship. In order to escape punishment, the accused must survive the ‘believability test’: that any misperception was honest. Such culpability also removes from the judiciary the role of assessing the relevance of a prohibition in the instant circumstances. As long as the accused can establish the requisite possibility that they genuinely believed that the harm was not prohibited, so that the risk was permitted, the actual existence or extent of a prohibition becomes immaterial. This avoids reducing the role of a prohibition to merely a test of the citizen’s willingness to obey: the prohibition will be effective as long as actual knowledge of it exists.\footnote{While a subjective test for mistake of law appears to exculpate (and therefore encourage) legal ignorance, in Chapter IX - Defences I will propose how this fear can be met without resort to either a presumption of, or an objective test for, knowledge of criminal law.} The ‘conduct’ element is
the behaviour in the presence of such an unlawful apprehension, without regard for possible or actual success or failure.

The common law companions to the modern species of inchoate offences are the strict regulatory offences. While the inchoate offences focus on the mental element and use the objective behaviour as evidence of intent, the common theme is that both inchoate proscription and strict regulation evade the need for harm to be done as a foundation for culpability. The difference is that strictly prohibited activity widens the net to include those who cannot explain their inadvertence.
III

STRICT LIABILITY

Introduction

Perhaps the doctrine that has the longest pedigree (apparently pre-dating the separation of tort law and criminal law) as a method of critiquing behaviour simply on the basis of an unlawful result, is the concept of strict liability. Francis Jacobs recounts that ‘[e]arly law knew no distinction between civil and criminal wrongs. … The law’s main function was to preserve the peace by providing an alternative to self-help and private vengeance.’¹ According to Kerrie Milte and Thomas Weber, ‘[i]n Anglo-Saxon law there was no distinction between tort and crime as is now understood. The main object was the preservation of order and the law only covered wrongdoing in the sense of a scale of compensation’.² The question now is whether strict liability is appropriate as providing grounds for punishment, rather than for restoration. As Epstein explains, ‘[t]he sharp, separate profiles of tortious and criminal responsibility are … brought into relief by … the efforts to do away with the mens rea requirement through the creation of the so-called strict liability offenses of the criminal law.’³

The first strict criminal conviction is thought, according to Simester and Sullivan, to be Woodrow in 1846.⁴ A tobacco dealer was convicted of selling adulterated tobacco, despite that he was unaware of – and it would have been ‘ridiculous’ to expect the chemical analysis necessary to detect – the problem.⁵ However as Simester and Sullivan propose, strict prosecution serves to make such analysis worthwhile (within the chances, to the dealer, of evading detection).⁶ The question is therefore whether strict criminal liability is better explained as providing supervision of risk-choice rather than harm-infliction.

⁴ 153 ER 907.
⁵ Simester AP and Sullivan GR, Criminal Law, Theory and Doctrine (Oxford: Hart, 2000) 157. The issue of ‘fine chemical analysis’ was raised in defence argument at 153 ER 907, 911.
⁶ Note 5.
Perhaps the best example is the use of strict liability to control adults having sexual relations with (usually) females who may be under the age of consent. Strict English statutes have been interpreted to preclude the defence of mistake, reasonable or otherwise, so the prospective seducer is told: ‘If you cannot be certain that the girl is of full consensual age, stay clear’. In *Prince*,\(^7\) the Court of Crown Appeals Reserved upheld a conviction for abducting a girl of 14,\(^8\) despite that the offender both honestly and reasonably believed she was over 16 – the belief created because she said so, and appeared to be of that age. Baron Bramwell (on behalf of five other members of the Court) held that s 55 of the Offences against the Person Act 1861 did not specify ‘knowingly’ because ‘the legislature had meant it should be at the risk of the taker, whether or not the girl was under sixteen.’\(^9\) The consequence of running the risk is laid on the actor – if that decision turns out to be wrong.

The influence strict liability exercises on those making risk-choices is that – completely random events excluded – the prediction of a lawful outcome must always be correct. This message must be: ‘Don’t incorrectly choose to risk the nominated harm’. The only ‘excuse’ provided for a harmful outcome is when the accused can convince the court of the possibility that s/he was genuinely mistaken, and the ordinary person would have made the same error. The doctrine therefore places a much higher value on the rights of those incidentally endangered by the actor than does even negligence, and inhibits much more activity.\(^{10}\)

Where strict liability is seen as distinct from absolute liability – because strict liability admits the defence of honest and reasonable mistake of fact – the first element of such a defence clearly injects the concept of mental fault; the second of reasonableness. So there is room for challenge as to whether the doctrine is distinct from these neighbouring concepts, or whether it is simply

\(^7\) (1875 LR 2 CCR 154.

\(^8\) ‘Abduction’ then meaning solely without the consent of the female’s father, mother or other carer; the girl having no legal power to agree to her own leaving.

\(^9\) At 884.

\(^{10}\) In *Chapter IX - Defences*, I will argue that the ‘honest and reasonable’ test of defences currently allows the prosecution two chances at establishing culpability.
STRICT LIABILITY

part of a continuum.11

The thesis presents the doctrine as part of a web of culpability-triggers that share a focus on risk-inflicting behaviour. We will encounter many of the same issues in negligence (as a head of manslaughter) and anywhere there is a duty to avoid harm; also where the current process tinkers with fact (the fictions) in order to extend the net of responsibility. Ultimately, since the defences all apply an objective test, negligence links strict liability through to the final guilt-finding procedure. Whatever fate-management capacity the doctrines enjoy, they tend to gain from the similar processes; conversely, whatever inadequacies they exhibit in such a role, they all draw from a common focus on harm.

Chapter Goal

This thesis suggests that, while strict liability may run the risk of convicting those who were quite innocently unaware of the criminalising circumstances of the act (and may operate as another form of the presumption of legal knowledge), it does warn the prospective actor to remain clear of any zone of perceived12 doubt. In later chapters I will deal with the fictional forms of disturbing the requirement for mens rea (constructive, transferred and implied intention) used to enhance such warnings. What makes strict liability a more radical attack on the pursuit of mental-guilt certainty is that while the others artificially displace the barriers to assigning subjective culpability, strict liability removes the independent need for mens rea. Once proof of mens rea has been discarded (or subsumed in the actus reus as voluntariness), strict liability destroys criminal law’s capacity to distinguish between a deliberate harm and an unreasonably foolish one.

The underlying question is whether this distinction has any pragmatic value. There is also the paradox created by the distinction between strict liability which – at least under Australian law – permits a defence of honest and  

11 See Epstein at Chapter I – Introduction, Note 24. See also Robinson’s ‘grading purpose’ at Chapter X, Note 26.  
12 At least under the Australian formulation, which distinguishes absolute from strict liability by permitting a mistake of fact as a defence to the latter.
reasonable mistake (and therefore introduces a hybrid objective/subjective element) and absolute liability which does not.13

This chapter will review the doctrine – its history, logic and effect. Ultimately, the chapter will argue that it is perhaps the original example of criminal law’s focus on endangerment.

**Origins**

Strict liability would appear to have emerged as the favoured doctrine of absolute rulers. Michel Foucault argues that under the *Ancien Regime*, punishment was intended to be excessive, a show of strength rather than as a fitting remedy.14 There was no need for the king to bother as to whether the subject had earned a penalty, the subject had done so just by existing. This was deliberately capricious to show the dissymmetry of power, since the offender had ‘touched the very person of the prince’.15 The actual offence was to disturb the royal peace in any way, even just by being present.16 So the message was: ‘Don’t bring your existence to my notice; that existence alone may be enough to make me punitive.’17 In short, liability was a pure status offence.18

Francis Jacobs recounts that ecclesiastic opposition to such unrestrained

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13 The distinction was introduced to Australian law in Proudman v Dayman (1941) 67 CLR 536, when the High Court found that an offence of unreasonably ‘permitting’ a prohibited act must be based on knowledge: ‘As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent affords an excuse for doing what would otherwise be an offence’ per Dixon J. In *White* (1987) 9 NSWLR 427, at 431 Shadbolt DCJ characterised the defence as ‘honest and reasonable belief’ in exculpating circumstances.

14 This is, of course, as much a *scale of punishment* issue as a *warrant for punishment* one. However, as the modern response to *motor homicide* demonstrates (that such offences as *culpable driving* were needed to overcome jury reluctance to convict in the face of the serious sanctions carried by manslaughter), the two cannot be entirely separated.


16 See Fuller’s argument, that an all-powerful autocrat has no need to manufacture constructions to achieve conviction, at *Chapter VII – Unintended Death 2*, Note 56.

17 In Foucault’s terms, the subject was a *delinquent* rather than an offender, so ‘it is not so much his act as his life that is relevant’: Note 15 at 251. Alan Norrie sees Foucault’s argument as that any irrationality stems from the ‘maintenance of absolute monarchy’ in France, and the Whig oligarchy in England. The huge number of capital offences was balanced by the prerogative of mercy, making the subjects grateful to their betters”: Norrie A, *Crime, Reason and History* 2 edn (London: Butterworths, 2001) 16.
royal power drove the development of mens rea.\textsuperscript{19} According to Jacobs, once the lawmaking power shifted to parliament, a majoritarian logic revived the idea that violating a statute per se could overwhelm any need to prove that the violation was intentional.\textsuperscript{20}

Running parallel with this struggle – to protect the individual from the overwhelming power of the lawmakers – was a division of methods: one branch of the law seeking only to restore the victim of a wrong directly from the wrongdoer; the other retaining the sovereign’s behaviour control.\textsuperscript{21}

Yet if the ‘global’ purpose of law is seen as controlling socially dangerous behaviour, an accident (properly understood as unpredictable) cannot be deterred. What can be inhibited is the choice to invoke such a danger. So it is the moment of choice that has to be supervised by both methods. What properly authorises the civil court to redistribute the offender’s property to the victim is that the defendant’s behaviour fell short of some defined level of social adequacy.\textsuperscript{22} Since criminal law is also attracted by behaviour which has been ruled unacceptable, it is the unity of moral purpose which makes criminal and tort law appear distinct only in their remedies.\textsuperscript{23}

In \textit{Gollins v Gollins} Lord Reid acknowledged that even in a civil case, ‘[o]ften
the conduct must take its colour from the state of mind which lay behind it."24 However at the end of his judgment, he made the distinction between tort and criminal law, that ‘[i]f the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent’s mind.’25 In other words, strict liability is appropriate where civil restoration is called for.

The common goal of social control that Jacobs has identified appears to have become neglected, and the varying methods elevated to the status of the defining objectives of the two branches. Jacobs’s question becomes whether strict liability developed to penalise the harm-doer (either offender or tortfeasor) who did not pay heightened attention to potential unlawful consequences; or whether it was intended to serve only the tortious focus on correcting a bad result – without the modern need to establish fault.26

A possible means of distinguishing the branches from each other is a functional analysis. In the late 18th century, Sir William Blackstone confronted the fact that many unlawful acts are ‘dual wrongs’, in that they are both crimes and torts, and proposed that the basic distinction was the anticipatory capacity of criminal prohibition – pointing to criminal law’s ability to punish someone who dug a ditch across a highway, before anyone was injured. He also made the point that criminal law is fundamentally concerned with behaviour in public, where it can regulate the utility of common space. While it can respond to activity in private, it is usually restricted to acts that are dual wrongs: someone has been harmed.27

Once it is accepted that both tort and criminal law clearly have fate-management functions, criminal law has the capacity to explicitly anticipate risks, tort law only to enforce repayment should a risk result in actual

25 Note 24 at 667.
26 ‘If fault was disregarded, there was no reason for the law to make any distinction between compensation and punishment. To make the wrongdoer ‘pay for’ his wrongs was simultaneously, as the ambiguity of the expression still suggests, to compensate the injured and to punish the wrongdoer. The measure of guilt was identical with the amount of harm done’: Note 1.
An actual consequence is merely proof that the required care was not provided. This means that the actor is responsible in tort for what happened, if that person chose to take the risk and was proven wrong by result. It has no application to criminal law, if the offence is the defying of a prohibition.29

Is the history of strict liability therefore based on punitive or moral naivety? The modern difference is that tort law needs to establish two elements of fault to authorise a finding against the actor: a choice to ignore a risk of doing harm; and that the choice was flawed. Criminal law can get by with neither. It needs only the choice to ignore a prohibition. That harm was done is really quite irrelevant, but has been allowed to condition criminal law through ‘consequence-authorised’ offences. This divergence of criteria for assigning liability to an act, between criminal and tort law, raises the question: should the power of strict liability – to send a clear general message to be very careful with the welfare of others – be applied across both branches?

The Nature of Strict Liability

Strict liability forms one of five major liability thresholds in law:

- Deliberateness;
- Recklessness, in which case the harm-doers are liable for damage done if they knew it was risky but decided to proceed anyway;
- Negligence, which makes harm-doers liable if they did not bother to discover a danger;
- Strict liability, where a voluntary act alone (which is either directly prohibited or inflicts prohibited harm) is a wrong;30 and

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28 Murphy expresses it that '[a] strict liability statute roughly tells you the following: Exercise your capabilities to prevent injury; and the only way you can prove that you have exercised them sufficiently is to succeed in preventing injury': Murphy J, Retribution, Justice, and Therapy (Dordrecht: Reidal, 1979) 125.

29 As Jacobs proposes, '[a] main function of the law of tort, the redistribution of losses which one party has caused the other, itself provided a justification of strict liability to which there is no analogue in criminal theory': Note 1 at 99.

30 Under the title MISTAKE AND STRICT LIABILITY, Halsbury’s Laws of Australia explains: [130-7940] ‘At common law … [t]here is a presumption that mens rea, a guilty intention, or a knowledge
• Absolute liability, imposed on the pure basis that a legal citizen has violated a prohibition or inflicted unlawful harm on another, as an incident to otherwise lawful activity.\textsuperscript{31}

These thresholds are all variations on conscious, willed behaviour. They are united as a \textit{wrongful choice} to trespass on, or take a risk with, someone else’s rights. What progressively changes between them is the (prohibited) focus of that behaviour. Recklessness and negligence are seen as incidental faults, in that the aim lies elsewhere (pursuing something which is legal) – but where there was a willingness to deal other citizens illegal harm in passing. Under strict liability, the wrong is that the accused voluntarily did anything \textit{at all} that was criminally prohibited or did tortious harm. Except for the possibility of the offence being the product of a mistake, no real inquiry is made into what the accused was up to at the time.

Lord Scarman, in \textit{Gammon (Hong Kong) Ltd v A-G of Hong Kong},\textsuperscript{32} presented a ‘summary of principles’ in deciding whether a statute was to be interpreted strictly:

1. Mens rea is presumed;
2. This is strongest for ‘truly criminal’ offences;
3. Any ‘displacement’ must be clear and necessary;
4. ‘Social concern’ and public safety are required.

The final test is that ‘strict liability will be effective to promote the objectives of...”

\begin{itemize}
\item the prosecution must prove mens rea
\item mens rea is presumed present failing an ‘honest and reasonable belief’ that the conduct is lawful
\item proof required only of the objective elements.
\end{itemize}

The authors conclude that ‘[s]tatutory offences which fall into the second category are generally described as offences of strict liability’: Halsbury’s \textit{Laws of Australia} 9 (North Ryde: Butterworths, 1995) 249,730.

\textsuperscript{31} As was demonstrated by the House of Lords decision in \textit{Sweet v Parsley} [1970] AC 132 (a landlady was exculpated as having no \textit{actual} knowledge that she had violated a strict (‘not absolute’) statute when her tenants were caught possessing cannabis) the modern English test for ‘permitting’ unlawful behaviour remains subjective as to the voluntary act – so can be characterised as recklessness with a reverse onus, or even vicarious: see Chapter VIII - Risky Business. The English form of strict liability is therefore not negligence with a reverse onus as it is in Australia, where there is place for an additional, completely act-based, form of liability.

\textsuperscript{32} [1985] AC 1.
the statute by encouraging greater vigilance to prevent the commission of the prohibited act.’ Sir John Smith asks what statute is not concerned with ‘social concern’. He points to *Seaboard Offshore v Secretary of State for Transport*\(^{33}\) as a case where the court confused strict liability with (objective) negligence.\(^{34}\)

Yet strict liability is not absolute. It does not insist on restoration if there was absolutely nothing that the defendant could have done to avoid the damage. For example, a motorist whose car malfunctions through no fault of awareness or maintenance will not be held liable for any consequent unlawful harm, and any loss will be allowed to ‘lie where it fell’. For law to effectively inhibit the future infliction of such harm, the defendant must be the factual author of the act in question (as opposed to fate; or perhaps the manufacturer of the article which did the damage), but beyond that there is no need of inquiry into what the accused was doing at the time.

Alternatively, it is possible to view strict liability as merely a rebuttable presumption of bad intention.\(^{35}\) The distinction between negligence and strict liability in tort is perhaps only that negligence will make more determinative whatever the tortfeasor was doing, at the risk of any incidental unlawfulness,\(^{36}\) than will strict liability.\(^{37}\) What makes such threshold-setting difficult is that (as Horder was cited pointing out in my *Introduction*) almost any activity carries some level of risk. So, if the role of tort law is not simply to ‘return to sender’ – as damages – the cost of every harm done (which may actually be the true means of accounting for the cost of human enterprise) the concept of negligence must decide which risks human advancement must tolerate, and

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33 [1993] 3 All ER 25.
35 Per Lord Reid, above at Note 24. In *He Kaw Teh v R* (1985) 157 CLR 523, 558, when dealing with Section 233B(1)(c), of the Customs Act 1901 (Cth), which provides that ‘Any person who – without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act; ... shall be guilty of an offence’, Wilson J saw the issue as: ‘Proof of the importation of the drug by the accused person will be prima facie sufficient to establish the charge. But an accused person who lacks any guilty intent will have the opportunity of explaining the incriminating conduct and at the end of the day if the jury is left with a reasonable doubt then an acquittal will follow.’
36 Neglect of duty being the sole issue of fault.
37 Which also needs to find dishonesty.
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leave the territory between pure fate and preventable harm to insurance.\textsuperscript{38}

In the presence of insurance, strict tort liability may have a restricted role – as either covering the narrow field of \textit{unreasonably} inflicted damage, or to quarantine the cost as between the parties (with that cost allowed into the general community only where commercial reality will allow). If the concept of objective culpability continues to be incorporated in \textit{criminal law} legislation, it poses a serious challenge to the whole subjective fault logic, and a more radical review of legal development is required. The question becomes, can strict liability still be seen as just? And if so, is it an appropriate doctrine in criminal law?

\textbf{The Justifications for Strict Liability}

Strict tort liability alters the balance between the victim and offender, when it comes to who will suffer if harm is done. Without legal intervention, the victim carries the burden of any harm suffered. In other words, although the actor did not want the harm to happen, the victim was the \textit{less} responsible for the harm, so deserves to be restored.\textsuperscript{39} A broad reason for inculpating specified harm (actual or anticipated) is to ensure that harm does not happen.\textsuperscript{40}

This reasoning leads us to ask: where is the source of any obligation to avoid

\textsuperscript{38} Daniel Shuman points out that insurance does not neutralise the \textit{return-to-sender} role of tortious negligence - it simply slows the process so that an isolated incident of sheer bad luck is ignored, but a pattern of damage induces the insurer to either raise the cost of security or to eject the repeatedly costly person to control by tort law: Shuman D, ‘The Psychology of Deterrence in Tort Law’, (1993) \textit{42 University of Kansas Law Review} 115-68, 129f.

\textsuperscript{39} One explanation for the continued existence of this ‘fault-presumed zone’ is simple developmental inertia. As Epstein proposes, when comparing strict liability with the subjective torts, ‘it has been understood that tort law recognizes isolated pockets of strict liability, say for ultrahazardous activities but these have, at least until recently, been regarded as primitive forms of liability that have resisted, perhaps because of institutional conservatism or inarticulate public policy, incorporation into the general system of tort law based on individual fault’: Note 3 at 242-3. Daniel Cohen presents the generic advantage of strict liability as being that it makes the actors responsible for their mistakes, so that ‘[i]n the matter of deterrence it is usually felt that the stricter the liability the better …. If A has a good-faith feeling it might be her radio, she is privileged to walk off with it. If she knows there is a danger that a good-faith mistake will not protect her, she may be more careful in identifying the object, thereby lessening the chance of harm to others’: DIA Cohen, ‘The jurisprudence of unconscious intent’ (1996) 24 \textit{Journal of Psychiatry and Law} 511-80, 547.

\textsuperscript{40} The most extreme, but effective, method is simply to adopt the disease-control model and permanently remove the potential offender. And no doubt in a regime where those threatened with this response have no power against the person dealing it out (a subjugated population under military rule, for instance) there is nothing to restrain this form of response, other than perhaps the ‘offender’ having some skill too valuable to be destroyed.
criminal mistakes – if it is not to be found in wilful disobedience?\textsuperscript{41} The argument is that criminal law (and its penalty structure) has always been aimed at making any recurrence of inflicted harm impossible or unattractive, and that modern punishment is more carefully focused on the characteristics of the offender that cannot be accepted, in order to rescue those aspects that are of value. Since the citizen cannot be totally supervised and intercepted, the hook for this salvage operation is what that person chooses to do. The question this raises is: how much effort can the law demand of a citizen, to stay out of any possible trouble, without intimidating all endeavour?\textsuperscript{42}

The social duty rationale

Seen in the context of a devolution of power – from a rampant autocracy to lawmakers who are also the law’s subjects – strict liability is quite liberal. It merely demands that risk-takers be just as careful with the welfare of those they may harm in passing as with their own.\textsuperscript{43} Once a decision is made to act, all consequences are the actor’s responsibility, good or bad.\textsuperscript{44} Certainly this seems fair. And while the state is seen as the instrument of the individual’s protection, it seems inevitable.

In general, then, the modern purpose of strict criminal liability is to extend the actor’s attention to harmful behaviour beyond what is deliberate, to that which is incidentally harmful; to prevent risks rather than malicious behaviour. The justification for such strict regulatory offences as excessive parking can be seen as the disruption that has been caused to the smooth workings of society, rather than any fundamental moral issue.\textsuperscript{45} The delict is not harmful

\textsuperscript{41} Jacobs sees it as deliberate reluctance to abandon the nexus with any prohibited damage inflicted, as a proper reason for criminal intervention. He reasons that ‘[t]he imposition of severe penalties regardless of fault is not even by later standards of morality entirely inexplicable. It derives partly, no doubt, from a lex talionis equating guilt with harm done rather than with the intention of the person causing harm’: Note 1 at 15.
\textsuperscript{42} See Pillsbury’s approach at p 245, Note 29.
\textsuperscript{43} In Epstein’s words, ‘[o]ne of the great (indeed consuming) attractions of the old strict liability theory was its protection of innocent bystanders against the harmful conduct of their neighbours’: Note 3 at 235.
\textsuperscript{45} In the opinion of the Law Reform Commission of Canada, to ‘[p]ut it another way, the objective of the law of regulatory offences isn’t to prohibit isolated acts of wickedness like murder, rape or robbery; it is to promote higher standards of care in business, trade and industry, higher standards
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per se, nor necessarily dangerous, merely a nuisance.46

However such an approach is more in line with a civil remedy, since it is an attempt to restore to the society harm already done.47 A view of strict criminal liability presented by Kenneth Simons is as a ‘disguised form of negligence’, reasoning ‘that strict liability can be defended as a form of genuine fault in the sense of a requirement of “extraordinary care”’.48

The question left posed by the duty rationales is whether strict liability has really avoided significant concern for the choice made; or whether the doctrine is another form of construction: does the harm or nuisance done create the appropriate intent to abandon an obligation?49

The necessary process rationale

A further rationale for strict criminal liability is purely procedural: how hard must the legal process be required to work, to gain the right to punish? According to Jacobs, ‘[t]he argument from the difficulty of proof can be found in the law reports as a justification of strict liability as far back as 1824.’50 The Law Reform Commission of Canada outlines the argument that, when the law

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46 The Law Reform Commission of Canada explains the difference as ‘[f]irst, crimes contravene fundamental rules, while offences contravene useful, but not fundamental ones. Murder, for example, contravenes a basic rule essential to the very existence and continuance of any human society – the rule restricting violence and killing. Illegal parking violates a different kind of rule, one which is by no means essential to society, useful though it may be to have it observed. Second, crimes are wrongs of greater generality: they are wrongs that any person as a person could commit. Offences are more specialised: they are wrongs that we commit when playing certain special roles or when engaged in certain specialized activities. Law Reform Commission of Canada, Note 45 at 3. See p 174, Note 16 for an operational distinction between prohibition and regulation. Jonathan Clough and Carmel Mulhern prefer the term ‘quasi-criminal’, deriding such a category as ‘simply a term of convenience that is used to describe those criminal offences that relate to matters such as public safety, consumer protection, fair trading, commercial activity, road traffic, and the like. It is not capable of precise definition, and some offences dealing with these areas a true crimes: for example, reckless driving’: Jonathan Clough J and Mulhern C, The Prosecution of Corporations (5th Melbourne: OUP, 2002) 83.

47 Jonathan Clough and Carmel Mulhern include within the ‘civil remedy’ system all actions launched by government departments in specialist tribunals, regardless of whether they have fines, restoration or mandatory changes to work practices as their purpose: Note 46 at 10.


49 For my analysis of construction see Chapter V - Unintended Death. The alternative of rebuttable presumption is addressed below.

50 Note 1 at 169: Marsh [1824] 2 B&C 717. See Robinson’s ‘evidentiary theory’ at p 142.
has to deal with a ‘crisis’, the traditional notions of guilt are necessarily put to one side.\(^{51}\) In Teh’s case, when dealing specifically with drug importation, Wilson J endorsed this reaction as the threat grew in gravity:

> [T]wo things must be borne in mind. First, the social evil to which the section is directed is a very serious one. Secondly, the difficulties of enforcement would be enormous if the Crown were obliged to disprove beyond reasonable doubt any innocent explanation of the proved de facto possession that might possibly be relevant.\(^{52}\)

Thus the justification for strict liability is the conception that demanding proof of malice undermines the community’s security; that it makes conviction of people who are actual risks too difficult. According to Jacobs, ‘[i]t is possible that so long as mens rea is retained, a person who by the damage he does represents a considerable social danger may never be convicted by a court, if the harm he causes, however frequent and however serious, is always the result of inadvertence.\(^{53}\)’ Somehow the nature of accident is reduced to the slim periphery around a broad territory where virtually everything is foreseeable.

### The Case Against Strict Liability

The main source of disquiet over strict liability flows from the modern criminal law focus on ulterior intention. The requirement that punishment is only warranted in the presence of an intention to deliver an unlawful result, or to ignore a known circumstance that makes the act illegal. Any doctrine that finds culpability without proof of some level of design is seen as incompatible with the modern principles of criminal justice. This discord is manifested in a number of ways.

**The obsolescence argument**

In reality, mens rea is now so much a part of criminal law that the courts will

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\(^{51}\) By contrast, the aim of simple harm prevention isn’t concerned with guilt at all but only with suppression of potential danger. So, for example, the law authorizes inspectors to seize hazardous products, impound adulterated food, ground unsafe aircraft, destroy diseased livestock and so on. Here guilt is irrelevant because the law is acting, not against a person so much as against a harmful thing – proceedings are not in personam but in rem’: Note 45 at 7.

\(^{52}\) He Kaw Teh, Note 35 at 562.

\(^{53}\) Note 1 at 171.
find it in statutes which omit the key words for expressing that intent.\textsuperscript{54} While this approach may appear to be simply the general protection against penalising something beyond the control of the accused – common to both modern tort and criminal law – it does allow the accused to argue that the act itself was never intended.\textsuperscript{55} Once (as the thesis argues is essential) the result is removed from the criminal culpability issue, all that remains is whether the act was chosen. Intention remains a live issue; all that has changed is who raises it.\textsuperscript{56}

**The law’s integrity**

Perhaps the most direct critique of strict criminal liability is that it damages the moral integrity of criminal law.\textsuperscript{57} The High Court of Australia certainly appears quite consistent in rejecting prosecutions under strict statutes. According to Colin Howard in 1963, ‘[o]n this point the attitude of the High Court itself seems to be fairly clear, for, except on three occasions when the abnormal stresses of wartime conditions caused a departure from the usual rule, there is no case in which strict responsibility has been imposed in that court.’\textsuperscript{58} As Jacobs summarises the position taken by the High Court:

> By this rule, even in cases where the prosecution does not have to prove *mens rea* for the defendant to be convicted, it is still open to the defendant to secure his acquittal by proving that he did the act or omission charged owing to a reasonable mistake of fact of such a

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\textsuperscript{54} As Dawson J proposed, ‘[r]ules of construction must give way to actual expressions of legislative intent, but almost invariably in this context such indications as there are require guilty intent as an ingredient of an offence rather than the contrary. Where some such word as “knowingly” or “wilfully” is used in the description of an offence, there is no difficulty in concluding that guilty intent is required. However, the absence of words such as these, even if the words appear in the description of offences created elsewhere in the enactment, does not mean that an offence is intended to be absolute’: *He Kaw Teh*, Note 35 at 594.

\textsuperscript{55} Compare how statutory vicarious liability has been interpreted at p 180, Note 34.

\textsuperscript{56} In *James & Son Ltd v Smee* [1955] 1 QB 78, 79, an English statute which prohibited ‘permitting’ an unsafe vehicle onto a public road had been interpreted as generating strict liability. On appeal, the Divisional Court disagreed, finding that this statutory word ‘imports a state of mind’.

\textsuperscript{57} Herbert Packer argues that ‘the rationale of criminal punishment requires that no one should be treated as a criminal unless his conduct can be regarded as culpable. The flouting of this requirement that takes place when offenses are interpreted as being of “strict liability” contributed to the dilution of the criminal law’s moral impact’: Packer H, *The Limits of the Criminal Sanction* (Stanford: Stanford UP, 1968) 261.

\textsuperscript{58} Howard C, *Strict Responsibility*, (London: Sweet & Maxwell, 1963) 85. In *Yorke v Lucus* (1985) 158 CLR 661, Mason ACJ found that conviction requires ‘an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention’ (at 670); and Brennan J found that being ‘honestly ignorant’ is a defence (at 677). In *Giorgianni v R* (1985) 156 CLR 473, Wilson, Deane and Dawson JJ ruled that ‘intent based upon knowledge of the essential facts which constitute the offence’ is required (at 503).
STRICT LIABILITY

nature that, had the facts been as he believed, he would be innocent. 
This rule has greatly reduced the incidence of strict liability \dots \textsuperscript{59}

The confusion of roles

While both tort and criminal law share an objective of intimidating dangerous 
behaviour, they do so by quite distinct means – with tort necessarily restricted 
to intervening after harm is done, and then only to the degree of damage 
done. Jacobs proposes that ‘[f]or the present, from the point of view of strict 
liability, it is sufficient to distinguish between civil and criminal liability. \dots In 
the law of tort \dots the idea of strict liability has come to be widely accepted as 
serving a useful though limited purpose’.\textsuperscript{60} Strict liability is employed in tort to 
broaden the ‘moral neighbourhood’ around the protected interest, warning that 
this is a ‘no go’ zone. In effect, that any uncertainty as to the actor’s intentions 
– left unexplored by strict liability – is made necessary by the need for a 
robust warning at some range from the harm.

Epstein’s criticism centres on the (at least theoretical) limits strict liability 
places on a criminal court considering the full range of reasons why 
punishment may be inappropriate:

As a matter of principle, these strict liability offenses are totally contrary 
to the general theory of criminal responsibility – barring, as they do all 
defenses based upon mistake, [lack of] knowledge, good faith, 
[absence of specific] intention, or reasonable care – and only the 
strongest possible case can maintain their legitimacy \dots examination 
of the typical situation governed by these statutes should make it 
apparent that they are all better understood not as criminal remedies, 
but as disguised tort (or contract) provisions, applicable where private 
remedies are inadequate.\textsuperscript{61}

The inappropriate doctrine argument

The issue is whether, when strict liability is applied to criminal law, it loses 
whatever clarity it may have had in tort. Certainly the public can asks that 
dangerous behaviour be inhibited as completely as possible. The question is

\textsuperscript{59} Note 1 at 118.
\textsuperscript{60} Note 1 at 99.
\textsuperscript{61} Note 3.
whether criminal law is the most appropriate method.\textsuperscript{62}

The goal of strict criminal liability is perhaps to accept that while an offence was not deliberate, it was the result of attention being wrongly directed to the defendant’s goal rather than the rules (someone who is so busy looking for a street number they fail to notice a traffic direction, for instance) and to supply a stronger reason for paying attention to the rules. Clearly there is a role for such behaviour control. So the problem is whether strict culpability can deal adequately with hazards.\textsuperscript{63}

Regulations that authorise the removal of dangers are normally structured to independently impose a fine for selling (but not simply possessing) such products, without any requirement that the offence is wilful.\textsuperscript{64} Such instruments at least separate the authority to take swift hazard-removal action from the more dubious attempt at hazard-prevention.\textsuperscript{65} If interpreted so that voluntariness need not embrace the dangerous quality of the goods sold, they exhibit the same character as all the other strict statutes: they cannot distinguish bad behaviour from inadvertence.

*The pragmatic argument*

Brennan J, in *Teh’s* case, disputed that the more grave the evil, the more readily strict liability could be used to evade the need for the prosecution to prove mens rea. His objection was not on the basis that it risked injustice, but

\textsuperscript{62} As Calnan proposes. ‘[t]he state, through law, identifies the freedoms we are entitled to enjoy and distributes this liberty to us in a variety of ways. Tort law is one of those mechanisms. By providing rules and standards of behavior, the doctrines of tort law tell us when we have exercised more than our distributive share of freedom, and thus, when our conduct is wrongful’: Calnan A, *Justice and Tort Law* (Durham: Carolina Academic Press, 1997) 297.

\textsuperscript{63} For instance the Northern Territory *Food and Drugs Act* 1983, authorises seizure of goods which are ‘injurious or unwholesome or unfit for use’ – clearly direct hazard-control. However it limits seizure to being on ‘reasonable grounds’ and allows a claim ‘against the Crown, Chief Medical Officer or an Inspector’ if the state official has not acted in good faith: *Food and Drugs Act* 1983 (NT) ss 21; 21A. As such, the judicial review is more concerned with exploring the merits of the examiner’s intent – that property was actually removed without cause, and whether the official did so maliciously – than that of the property’s owner. While the seizure itself is authorised by the community’s welfare overriding the rights of the owner, the taking of property is subsequently subjected to normal concepts of bona fide intention. (I will explore the requirement of reasonableness, as it affects the law’s response to mistakes, in Chapter IV - *The Reasonable Person*).

\textsuperscript{64} *Food and Drugs Act* 1983 (NT) ss 11; 110.

\textsuperscript{65} Compare the operation of strict liability as a deterrent against commercial dangers, with the use of vicarious corporate liability explored in Chapter VIII - *Risky Business*. 
the pragmatic argument that it failed to target voluntary (and therefore inhabitable) behaviour:

However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur.  

The reverse-onus argument

The existence of defences that consider what the accused was thinking at the time seems to confirm that, at most, strict liability reverses the onus of subjective proof. What ultimately happens is that any tangible circumstances, including the performed act, are used to reveal the underlying state of mind, and to excuse the act when malice is missing.

Summary

Obviously absolute liability would punish the pure accident as if it was intended, so the fault is simply that of embarking on the harmful activity. While accepting that strict liability does distinguish the totally unforeseen from what could have been avoided with greater care, conceptually it can still punish what was not wanted by the accused. Any distinction between criminal and civil law is that the criminal offender wanted the prohibited effect, or was

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66 He Kaw Teh, Note 35 at 567.
67 For example, in Teh’s case, three of the High Court justices endorsed mistake of fact as defeating strict liability. According to Gibbs CJ, ‘[a] middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent’ (at 533). Justice Dawson dealt more specifically with the statute in question, which had been held in the court below as imposing absolute liability and therefore denying any defence of mistake: ‘In relation to the offence of importing narcotic goods into Australia, the question which arises is whether the prosecution has to prove any mental state accompanying the importation. In other words, the question is whether mens rea is an ingredient of the offence to be proved by the prosecution. If it is not, the further question arises whether the offence is one of strict liability which, whilst not requiring the prosecution to prove mens rea in order to make out a case, allows the accused to raise honest and reasonable mistake by way of exculpation. To that extent a mental element is imported into an offence of strict liability short of requiring proof of mens rea by the prosecution’ (at 590). Justice Brennan went even further, seeing the onus on the prosecution to prove virtually every element of active choice, despite that the statute in question omitted any such requirement: ‘There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the actus reus does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind’ (at 582). In Canada, strict liability is seen as negligence with a reversed onus, as distinct from absolute with no excuses whatever. In England the two are equated: Note 5 at 174.
at least **willing to impose it** if necessary; while the civil tortfeasor was simply liable for **not caring** sufficiently. As Gibbs CJ reasoned in Teh’s case: ‘It seems improbable that the Parliament would have intended that [a strict liability offence] might be committed as a result of mere carelessness’\(^68\)

In criminal law, the traditional justifications for strict liability centre around reducing the difficulty of prosecution, either when the offence is trivial (but the state still wants to be able to regulate the behaviour cost-effectively), or when the danger to the community is seen to outweigh the need to be certain about whether the accused acted in a way that can be deterred. For the prosecution to be allowed to imply malice from a superficial and presumptive view of the act in question may have the economy of *res ipsa loquitur*. However, if our conception of culpability is so coloured by concern for the accused’s intentions that criminal courts habitually consider that choice anyway, strict liability may relinquish the field of intention to the accused by default. It is difficult to imagine a jury considering solely the physical evidence, without even a passing curiosity as to what the accused had in mind at the time.

Let us reverse the situation. Would we be willing to elevate someone to the status of a hero, if that person performed a grand act unwittingly? We may be grateful for the damage averted, but what if the hero was actually trying to do something nasty at the time? Suppose he intended to rape someone, and in pursuit of this aim, disturbed another rapist? Clearly a good result is to be modified by the aim. While avoiding an unwanted outcome is the purpose of prohibition, criminal law cannot ignore its environment of intentionality – not necessarily out of any grand ideal, but out of simple pragmatism: chance got in the way this time; it may not subsequently. The danger can only be removed by altering what the accused set out to do. Strict liability simply leaves an essential aspect of culpability unexplored. An expedient has been created, which diminishes the court’s accuracy in assessing the social merit of the citizens’ choices. The doctrine either presumes a lack of merit, or allows the actual outcome to destroy any merit. For the state to argue it has the right to prohibit whatever activity it chooses, without the consequent obligation to

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\(^{68}\) *He Kaw Teh*, Note 35 at 535.
fully prove that the accused citizen knowingly and deliberately offended, is only saved from recreating outright autocratic law by political reality: if enough citizens find themselves punished when they honestly believe themselves innocent, the regime is at risk.

The overall impact of strict liability is to reduce a society’s ability to assign censure to offending proven to be chosen. For those offences where it is applied – even where rebuttable – the doctrine requires the accused citizens to prove they have not acted out of inadequate social attitude; and the tribunal of fact may decline to impose such a presumption when those appointed to judge see the accused as one of their own – at least when there is no plaintiff with a valid claim.

Jacobs documents that ‘[o]ne proposal commonly made is to meet the difficulty by transferring the onus of proof in these cases from the prosecution to the defence; this proposal would meet the objection by removing the difficulties of proof without discarding the principle of mens rea. Given the judicial reasoning cited above, particularly from Teh’s case, this already happens. However it remains a dilution of the principle of mens rea and, if that principle serves the community through demanding certainty of a delict which punishment can amend, it dilutes the service criminal law delivers. As Brennan J stated: ‘A pragmatic concern about unmeritorious acquittals does not warrant the imposition of strict liability. These are all powerful arguments within a moral conception of justice; and even a pragmatic one with its focus on the direct diminution of harm. The question becomes whether strict liability opens a useful dialogue with the potential actor – at the point where that person is considering embarking on activity which will always harbour some level of danger to others; and to society. The second question is whether only some dangers demand the level of foresight and caution that strict liability imposes.

Laurie Levenson disputes the traditional distinction (articulated above by the

69 Note 1 at 150.
70 He Kow Teh, Note 35 at 580.
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Law Reform Commission of Canada at Note 46) between ‘real crimes’ – for which the accused is to be protected by proof of intention, and mere regulation – which the traditionalists would subject to strict liability. She approves of the law policing ‘morality offenses’ as well as ‘public welfare offenses’, defining them all as ‘transgressions of society’s sexual and social norms’, and thus rejects strict liability as a proper method – even when controlling mere nuisance. She notes that since strict liability ignores intent, the doctrine ‘traditionally rejects even a reasonable mistake of fact.’

Levenson proposes that, in practice, the effect of strict liability is mitigated through the requirement that the actus reus must be a voluntary act, reflecting the view of the Law Reform Commission of Victoria, that even if mens rea is completely excluded, voluntariness will survive as a requirement of actus reus. Levenson claims that this choice element does not remove the problem of a voluntary mistake, and prefers to concede a role for strict liability as a reverse presumption, open to a good faith defence. Jacobs argues that offences of strict liability can logically permit acts where the defendant can show complete absence of control.

Aside from the morality of inflicting punishment when the intention of the offender is uncertain, there is also the issue of whether it is pragmatic – whether the evil of punishment (the material or moral cost) is outweighed by some social improvement. As Devlin J propounded: ‘I think it a safe general

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71 Levenson L, ‘Good Faith Defenses: Reshaping Strict Liability Crimes’ (1993) 78 Cornell Law Review, 401-69, 417. In fact, if strict liability retains the capriciousness that concerned Foucault, at Note 14ff above, Levenson may have identified the excessiveness flaw in the doctrine: ‘Strict liability laws are inefficient because they tend to over-deter individuals’ behavior’: id at 426.
72 ‘There are, of course, offences in which criminal liability is imposed objectively. These are a limited exception to the general rule that criminal liability should not be imposed constructively and the exception in any event is more apparent than real. Strict liability offences may not require proof that the accused acted intentionally or even recklessly or negligently, but they do require proof that the accused acted voluntarily, which is an element of the actus reus’: Law Reform Commission of Victoria, Criminal Responsibility: Intention and Gross Intoxication, Report (1986) 15.
73 Note 71 at 430-1.
74 Id at 467.
75 ‘[E]ven if the [mistake of fact] doctrine were interpreted in such a way as to exclude altogether the requirement of mens rea … the question could still arise whether it excluded also those defences which do not deny mens rea but deny that the defendant did the actus reus …. For whether or not this division of the elements of an offence is a defensible or even an intelligible one, there is undoubted authority for the view that even when charged with an offence of supposedly strict liability the defendant may still plead a defence of complete loss of control … and there seems no reason why the same principle should not be applied to cases of coercion and duress, and perhaps also cases of automatism’: Note 1 at 119.
principle to follow … that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence then, in the absence of clear and express words, such punishment is not intended.'76 The Judicial Committee of the Privy Council adopted this principle in 1963.77

The key concept here is the requirement that ‘there must be something he can do’ before there is any role for censure. In other words, the breach of the regulations (in this case) must be something less than a total act of fate. To progressively reduce the need to prove that the accused acted with volition as the community danger rises, depends on the conception that the precaution mens rea provides – against conviction for what was unintended – is harmful to the community interests. Such a view displaces the approach that demanding proof of deliberate violation ensures that punishment is only inflicted when and where it will serve some social purpose, avoiding ‘inflicting evil in the form of penalties without achieving any countervailing prevention of future evil on the form of offences.’78 In reality the ‘short cut’ reduces the justice system’s precision, hardly an appropriate response when the stakes are high, which the emergency rationale advocates.79 Justice Brennan agreed that the seriousness of the issue in fact increases the need for the safeguard of mens rea.80

Since criminal penalties can be as large as the society wishes (outside such

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76 Reynolds v GH Austin & Sons Ltd [1951] 2KB 135, 150.
77 ‘It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim’: Lim Chin Aik v R [1963] AC 160, 174.
79 As Jacobs argues, ‘[t]he principal significance for strict liability of the drugs cases is to show the fallacy of the argument that mens rea is not required where a ‘grave social evil’ is involved. If they are indeed serious offences, the case for mens rea is correspondingly greater. The maximum penalties are alone sufficient to demonstrate this’: Note 1 at 117.
80 ‘The presumption that some form of mens rea is an element in these offences is strengthened by the severity of the penalty and the enormity of convicting a person of one of these offences if he were innocently ignorant of the contents of a container he had imported or of the nature of a substance that he had imported if the contents or the substance turned out to be narcotic goods’: He Kaw Teh, Note 35 at 583.
self-imposed limitations as ‘just deserts’), there is little logic behind simply making conviction easier, and arguably more uncertain as to conscious behaviour. If the community feels the danger from a given class of behaviour is high, then the appropriate response is to increase the punitive consequences (mainly certainty of detection), not diminish the requirement that choice be properly proven.

**Conclusion**

A provable, direct, intentional violation of the law presents little adjudicative problem beyond the evidentiary challenge. Where the uncertainty develops is once criminal law aspires to controlling behaviour that only incidentally trespasses on a legal right. Strict liability is a method of overriding the barrier of mens rea, so that any evidential difference between the intention and the incidental trespass is ignored. Strict criminal liability currently comes in two species:

1. **Strict responsibility for the act.** This is generally the modern regulation of dangerous behaviour – such as the use of motor vehicles, or professional enterprise. This species can anticipate and incapacitate harm.

2. **Strict responsibility for the result.** This is the traditional warning, and is logically restricted to a reaction only after harm has been done.\(^{81}\)

Both evade mens rea as the final test of culpability.\(^{82}\) Both aspire to intercepting harm, either by authorising the law to remove the citizen from the capacity to do harm, or by delivering a tangible warning to potential offenders. The former offends Mill’s harm principle, in that it presumes to inflict some punishment without harm being done; and the latter offends the Kantian principle that one citizen should not be used to benefit another.\(^{83}\)

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81 Simester and Sullivan propose that if liability is strict regarding the result, this is better described as *constructive* liability. Strict offences are usually statutory: Note 5 at 158.

82 A common element is that strict regulatory regimes have a licensing component, so some level of knowledge has been established by the application for, and granting of authority to engage an enhanced danger, to support a presumption of mens rea.

83 Kant I, *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).
The doctrine answers the fear that the requirement of coincidence is too restrictive, so risk-infliction is unregulated by criminal law where dangerous acts cannot be prohibited per se. The main objection to strict liability is that even when the doctrine does deliver what it proposes in terms of a less difficult process of conviction for risk-infliction, it does so by failing to distinguish between the deliberate and the incidental offender, thus diminishing the protection from offending that is its overall objective. For example, a motorist drives through a red light without incident, and is identified by police. The direct/indirect division argues that it should make a difference to the censure whether such offenders have violated the law because they allowed themselves to be distracted (by tuning the radio, for instance); or whether they had deliberately decided to barge through – wilfully depriving other citizens of their rights to proceed with safety. If the law cannot make such a distinction it risks finding guilt which is inappropriate either way: it may equally inculpate the distracted driver along with the bully.

The point that this analysis misses is that it distinguishes offending on the basis of motive (generally seen as irrelevant to culpability) and ignores any pragmatic reality that both drivers are equally dangerous. Further, the co-existence of both doctrines – strict culpability and the direct/indirect distinction – can deliver implied malice. He goes on to argue that it is the circumstances that convert the act (as, for instance, discharging a gun within the prohibited 40 yard of a highway) and that knowledge of this fact cannot be ignored or imputed.

As the judicial reactions cited above have shown, attempts to remove mens rea from some offences only inspire judges to find a mental element within the concept of actus reus: the concept of guilt infects the act with some element of

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84 It can even be argued that the deliberate offender – being alert to both the legal and factual dangers of running the light – is less dangerous than the fool who is totally distracted by tuning the radio.

85 Lord Devlin proposes a ‘circumstantial’ hypothetical that reduces a strict offence of selling adulterated milk to absurdity: ‘The reasoning goes something like this: (1) I intend to sell this can of milk; (2) This can of milk is adulterated; (3) I therefore intend to sell adulterated milk. So it is said I intend to sell adulterated milk’: ‘Statutory Offences’, in 4 Journal of the Society of Public Teachers of Law (NS) 206, 212 Samples of Law Making (OUP, 1962)

86 Quoted by Sir John Smith, Note 34 at 176. The problem stems from the presumption of legal knowledge. If the ‘offender’ is required to know the prohibition, this raises a duty to check – that the milk is safe, or that there is no highway within 40 yards. This is an issue I will explore under the head ‘mistake of law’.
disallowed choice. For this reason, strict liability is generally seen as a procedural expedient: the ‘mystery’ of the accused’s actual reasoning regarding risk-evaluation need not be explored, and found wanting, in order to obtain a conviction. That the accused chose to do what s/he is required to know is prohibited (‘mistake of law is no excuse’) is sufficient.87

The doctrines are therefore bad law in a harm-based paradigm; their best justification is found in fate-management. Since criminal law is not concerned with directly restoring any individual harmed by the act, the logic of the strict liability process must be to inhibit repetition. This can only have effect at the point of the citizen deciding to pursue a course of action either prohibited in itself, or that may deliver the prohibited harm. It is, however, very difficult to set the exact standard of care required, particularly to distinguish strict from absolute liability, when they exist on a continuum of warning against gambling with the rights of others. While constant attempts are made to distinguish the various demands into absolute caution, extreme care, reasonable care, and unselfish care, these divisions remain shades.

I suggest that the current use of strict control is unnecessary. In a ‘conscious endangerment’ paradigm, strict liability assumes a role beyond making the court process cheaper and quicker. It warns those considering activity that may stray into violating a prohibition that they best keep out of that ‘zone of doubt’ around the prohibition. They are required to navigate past the prohibition with extreme care – not reasonable care, nor honest care, but potentially productive care. The distinctions between absolute and strict liability, negligence, recklessness and malice can be seen as matters of degree rather than concept – and therefore a sentencing consideration alone. This respects the reality that, in all cases, some knowledge of the potential outcome must be available, but ignored, for a conviction. What differs is the caution required. So strict liability joins the other criminal faults – the risk-elections – as the major role of criminal justice.

The question remains as to how to assign the appropriate level of care

87 This mantra will be explored – and found to be part of the problem – in Chapter IX - Defences.
demanded for specific dangers. Should the risk of irreparable personal harm be subject to absolute caution? Should wide social danger have primacy over any personal benefit? In the penultimate chapter, *A Radical Reform of Criminal Law*, I will suggest a pragmatic answer.

Another process used to apparently bypass the *actual intentions* of the accused is by comparing such behaviour with what the hypothetical reasonable person would have done in the circumstances – either when the choice was to take a risk, or when the offender is claiming some form of external pressure had been responsible. Again, a creature of tort law has been imported to displace mens rea, to assess a choice of risk – an *indirect* intention – by an *objective test*. 
IV
THE REASONABLE PERSON:
‘The Foresight Saga’?\(^1\)

Introduction

The use of the objective test in criminal justice represents one of that law’s most divisive doctrines. To the critics of the test – most notably (among senior Australian judges) Lionel Murphy\(^2\) and Michael Kirby\(^3\) – it completely undermines the role of mens rea. To its supporters – often parliaments – it delivers a necessary community standard; a means of assigning fault when the effort an offender took – to avoid the harm done – was not reasonable. My question is why it is necessary to (at least partially) displace the offender’s actual intentions in order to achieve control over harm occasioned by human activity.

The main consideration raised, regarding any objective analysis of an accused’s behaviour, is whether criminal law can control offensive behaviour, with the test not of what is known to be prohibited, but what is foreseeably and unacceptably dangerous. While the directive that a citizen perform to a normative standard of care may be appropriate for tortious negligence, is it appropriate to use the same directive against the choice to risk violating criminal law? The criminal justice process provides defences – such as self-defence, duress, necessity and mistake of fact – where the question the court must consider is not simply if the accused did actually believe the situation either justified or excused the choice made, but whether this belief is acceptable.

This is the issue raised in Dincer,\(^4\) where a Turkish Muslim father was so provoked by discovering his daughter’s ‘western’ sexual activity that he killed her. There was no doubt that the homicidal father was actually outraged at his daughter’s conduct; the question was whether his lethal response was

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\(^2\) See Chapter IX – Defences, Notes 53 and 58.

\(^3\) See Chapter IX – Defences, Note 134.

\(^4\) [1983] 1 VR 460.
tolerable. In other words, would the local model father also have lost control and killed a daughter because of the behaviour in question? Clearly not. So a court that rejects this response as unreasonable – and therefore unprovoked murder rather than manslaughter – finds Dincer’s intent was to kill his daughter. What is seen as unreasonable is converted to malice.\textsuperscript{5}

Importantly, beyond any retribution delivered to the instant offender, a finding of unreasonable harm-causation sends a warning intended to deter similar prospective behaviour: ‘Learn to match the capacity for restraint of the normative citizen or else.’ My question is whether this directive to gain such skill – particularly in advance of all possible circumstances – can be productive; whether it positively delivers good fate-management. Indeed, when the test is administered to direct intention, its role is reversed: where modern criminal doctrine accepts that mens rea is a critical determinant of guilt, but applies the reasonable person or objective standard,\textsuperscript{6} it exculpates bad intention.

**An example:** A Queensland police officer, exercising s 31(1) of that state’s Police Powers and Responsibilities Act 1997 – which authorises searches if a police officer reasonably suspects the intent to destroy evidence – searches a citizen on a belief which proves to be wrong. As a normal citizen, the officer is now guilty of (at least) wrongful detention. But unlike a citizen performing such an illegal act, the constable is protected by the statutory excuse of ‘reasonable’ suspicion. The constable’s actual intention – to detain and search without evidence of an offence – is not censured, but is permitted if the normative policeman would have been equally wrong in the circumstances.

\textsuperscript{5} This general equation – linking malice and recklessness – is found in the Crimes Act 1900 (NSW), s 5: ‘Every act done … without malice but with indifference to human life or suffering, … or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act …’

\textsuperscript{6} For the purposes of this discussion, I have adopted a broad reading of the objective test - as going beyond asking the tribunal of fact to adopt the persona of the normative person, to all analytic processes where a community standard is applied in place of a legal threshold. Although the courts have often attempted to see a difference between what is reasonable ‘in the circumstances’ (usually when part of the offence definition) and what the reasonable person would have perceived and subsequently done (more a test of an ‘incapacity’ defence), I suggest that any distinction in the analytic process is illusory. As will be argued later, the only significant difference is when the test is applied to evidence – to confirm an offence; or to allow a defence – thus delivering opposed outcomes.
The effect is that a level of prohibited activity is excused, so that only acting on an *unreasonable* suspicion is open to censure. The other effect is that the test turns onto the victim: if the detained citizen’s behaviour meets the test of appearing reasonably suspicious, and risky to ignore, then the police offender is excused, and all citizens now have a responsibility to not create the reasonable impression of guilt. The result is that – like any other error tested objectively – the population loses the protection of the law when offenders make intentional but ‘reasonable’ mistakes. Rather than permit a sentencing judge to apportion the penalty to the grossness of the error, it is excused entirely when the mistake was marginal, and potentially independent of how serious was the prohibited effect.7

The common element in these situations (loss of control and erroneous suspicion) is that the law falls back on the hypothetical behaviour of a normative person to decide if a specific act of harm-doing, even if caused by a lapse of capacity, can be tolerated. A finding of guilt logically means that, if the offender’s behaviour is rejected as paying insufficient heed to the prohibited result – and if mens rea is required for conviction – *unreasonableness* is another word for a guilty mind. In effect, rather than simply rejecting the exculpating claim is *unbelievable* (and therefore dishonest), the behaviour is dismissed as unacceptable – and equal to direct intention.8

This approach gives the objective test – at least in criminal law – the character of a construction, and raises the issue of why such manipulation of intent is necessary. My argument stems from the expression of the test’s purpose presented above: to assess effort taken to avoid harm. That is, the test is not applicable to direct intention, but to harm done inadvertently. However the question remains: if this offender did not foresee the danger (and was therefore not reckless in continuing to pursue the goal) how can subsequent

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7 A jury may well regard a commercial pilot’s *reasonable* margin for error as more strict than that of a skateboarder, but this again introduces the culpability nexus with harm rather than prohibition.

8 In *Hancock v Shankland* (1986) AC 455, Lord Scarman explained the *Moloney* guidelines as that ‘the greater the probability of a consequence the more likely that the consequence was foreseen and … that that consequence was intended’: at 473.
punishment address the behaviour in question, and deter anyone else that is genuinely ignorant of the risk?

In short, is the test fate-management? Is it good fate-management?

Chapter Goal

The function of the objective standard is to designate the degree of irresponsibility permitted to a citizen – usually after that citizen has incidentally done unlawful harm. In effect, it purports to define the risks that a citizen is required to recognise and avoid. In criminal justice, the test for reasonableness appears at two points:

1. As the test for negligence, where there is such an element of an offence (such as manslaughter); and where there is an issue of degree of visibility to support recklessness; and

2. As part of the ‘dual test’ of the confess-and-avoid defences. That is, where the perception (of danger – such as necessity, self-defence, perhaps duress) or mistake of fact; or a loss of rational control (provocation, duress, automatism) must be both actual and reasonable.

In the role of deciding whether the behaviour falls within culpable neglect – where the actus reus is otherwise satisfied (a prohibited act or result has been voluntarily achieved without any relevant lapse of duty) and must now be judged unreasonable – the objective test is a tool of exculpation. In its defence-assessment role, it is a tool of inculpation – with the court required to proceed through the following analysis:

1. The offender has claimed a lack of requisite intent, and the subjective test has been met. In other words, the court reasonably doubts that the offender foresaw the potential offence. However that is not the end of the matter;

2. The offender’s lack of perception or rational control is now exposed to the ‘parallel’ behaviour of the norm-setting citizen.
The logic is to catch offenders who choose to impose an unacceptable level of risk on others, rather than deny themselves some personal benefit. A simple expression of the present understanding of the objective test of harm-infliction is the critique of a citizen’s harmful behaviour as ‘Blind Freddy could’ve seen that coming!’ The harm-doer is guilty of failing to take a good look before acting; with a ‘good look’ defined by how carefully the normative citizen would have peered into the future. The accent is on faulty foresight, with an otherwise innocent actor made culpable by an implied choice to be more careless than Blind Freddy. The question remains: is a finding of culpability appropriate for someone genuinely ignorant of the danger?

Alan Norrie sees the basis for such a test as that, in the circumstances, the accused are presumed to have the ‘latent forms of knowledge and skill’ that actually alert them to the risk. He proposes that when the objective standard is applied to dishonesty, and is known that it will be applied, this forces the potential offender to make a prediction – not as to whether what is proposed is honest – but as to whether the reasonable person will see it that way. Norrie’s reasoning therefore challenges the entrenched division between advertent and inadvertent risk-taking. This raises the question of whether the proscription of incidental intent is driven by pragmatic or moral imperatives. I argue that it is both unjust and impractical to deny a claim of honest inadequacy. To inculpate an offender because the reasonable person would not have been so frail, cowardly or naïve effectively regards such incapacities as within that person’s ability to correct. Where this is not true, and the offender was actually in the grip of overwhelming fear or ignorance, it

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9 See Horder below, Note 24.
11 Note 10 at 43. See the English dishonesty cases Feely and Ghosh, and the Australian High Court reaction in Peters, discussed at Notes 59-61.
12 Celia Wells proposes that ‘At the time of the P&O case, negligence [sic] manslaughter was going through a phase when it was known as ‘reckless’ manslaughter. There were some differences between the test for recklessness and that for negligence but they had in common that they were based on an objective assessment of the defendant’s conduct. Reckless manslaughter had two elements:
A person is reckless if
a). she does an act which in fact creates an obvious (and serious) risk of causing physical injury and
b). has either failed to give any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has nonetheless gone on to do it: Seymour (1983); Kong Cheuk Kwan (1986).
is useless to view that person as morally deficient simply because the model citizen would have resisted.¹³ Capacity and choice must be distinguished.

This chapter contends that the very existence of any debate over whether a mental state can be assessed objectively is yet another example of the criminal/civil confusion: if risks can be anticipated and proscribed, criminal law can intercept them; if unlawful harm done must be the (retrospective) test, then tortious negligence has the answer – mitigated by reasonableness.¹⁴ This issue has been addressed in passing in other chapters¹⁵ – which have reached the conclusion that a standard of intention cannot be imposed before the actual intention is established, and that there is little point in criticising a citizen before it is established that what that citizen consciously attempted to do was the most lawful his or her believed capacity would allow.

Because the reasonable person is so pervasive of criminal law, this chapter will be restricted to the general ‘offensive’ rationale for the objective test, leaving (as far as possible) the issues raised by its application in specific defences to the later chapter on Defences, where I will interrogate the function of the objective element of the hybrid ‘honest and reasonable’ test. The main issue here is the relationship between offences with a negligence aspect and endangerment.

Certainly, by warning people that they must be ‘reasonable’ in the risks they choose to run, placing them at risk of criminal sanctions if they choose to act unlawfully (so an offensive act or result is delivered), reasonableness serves to create a legal demand for caution where the natural circumstances may not rebound onto the actor. However, a choice must have been made. What is missing from the current analysis is any exploration of whether the accused was at all aware of the danger. Instead, it is presumed in order to provide for a comparison with the subsequent behaviour of the reasonable person. So, in the case of someone who discharged a firearm that incidentally killed another person, all that is established of the killer’s behaviour is that the weapon was

¹³ See Lord Hailsham’s view on those who plead duress, in Chapter IX – Defences, Note 43.
¹⁴ I engaged the tort ‘shallow pockets’ problem above in Chapter I – Introduction at Note 44.
¹⁵ Principally Chapter IX - Defences, dealing with the honest-and-reasonable tests.
fired voluntarily, with no concern for whether it was aimed.

Under strict liability, once causation is established, this will be enough for culpability. Negligence does impose another test, but not to establish the accused’s choices. The act of pulling the trigger is presumed to have been chosen with knowledge of the circumstances that led to the death, so the reasonable person can be used to decide if that choice was unacceptable. If no choice is available for the comparison, no comparison can be made. In effect then, a negligence analysis imputes to the harm-doer precisely what recklessness must establish: awareness of a danger; the decision to ignore the risk; and that the consequent activity delivered an unlawful harm. Negligence (normally) only needs the last element: the delivery of prohibited harm.\footnote{Some statutes will allow for prosecution for behaviour that is objectively dangerous without the delivery of harm. For instance, the UK offence of Dangerous Driving: s 1 Road Traffic Act 1991.}

The error is that such assessment of the behaviour’s dangerousness (where none of the characteristics of the accused are to be considered) is general and external, in that it is unreasonable for anybody to deliberately act that way. Since there is no inquiry into the capacity of the offender, such a limited source of culpability cannot encompass different actual degrees of ability to foresee danger. The incapacities of those who have no maturity, or no experience with firearms, or even have no awareness that there is anybody in the line of fire – are all ignored. To that extent, negligence is even more presumptive than strict liability, which at least permits the defence of a choice based on mistake. The only exculpation available, once the voluntariness of the actus reus is presumed, is if that presumed choice was reasonable. In effect, unreasonableness has replaced mens rea within the required conjunction. To avoid this presumption, the objective test must be combined with the subjective test – either by placing the proof of actual intent within the voluntary act, and the comparison within the mens rea; or by linking them as in the familiar ‘two headed’ test of confess-and-avoid defences.

The reasonable person can, as mentioned above, be characterised as a legal
fiction, along with any intention imputed by the objective comparison. I have chosen to keep the objective test apart from these substitutions because it has the character of directly applying a community standard, so is a means of evading—rather than embellishing—the doctrine of conjunction in order that criminal law can manage risky choices.\textsuperscript{17}

The most critical use of negligence in criminal law is as one of the formulations of manslaughter. If I am to challenge the objective test per se, I must therefore challenge whether neglectful homicide is effectively controlled by the presumptive leap over establishing the choice made, to analyse the presumed lethally-dangerous intention. However since the thesis proposes that the distinction between reckless-head murder and negligent manslaughter is both unnecessary and illusory—that there must be the choice to ignore a recognised danger in both—I will reserve discussing manslaughter until the chapter devoted to the infliction of lethal risks.

In the chapter \textit{A Radical Reform of Criminal Law} I will propose a process that rationalises how a court should ascertain and assess the mental behaviour of an accused. For now, my goal is to demonstrate that the objective test is a tool for controlling endangerment—but that it currently does so without regard for actual choice. I will distinguish the role of the objective test from the ‘believability’ test, to explain how the two tests achieve distinct fate-management goals. Ultimately, I question whether reasonableness defines permissible behaviour in circumstances of doubt; and whether the reasonable person is a different test for believing the exculpatory evidence once the behaviour has been found to be socially unacceptable.\textsuperscript{18}

\textbf{The Objective Argument}

One major concern created by a fully subjectivist approach is the possibility

\textsuperscript{17} Paul Robinson regards the doctrine of imputation as a broad power to create culpability artificially under the doctrines of complicity, transferred malice, where intoxication is a defence issue: Robinson P, \textit{Structure and Function in Criminal Law} (Oxford: Clarendon, 1997) 58. And generally ‘from “bad aim” killings to abandoning someone in a lethal situation’: 59. He prefers the term ‘substituted culpability’ when dealing with objective tests: 61.

\textsuperscript{18} In \textit{Ahluwalia} [1992] 4 All ER 889 per Lord Taylor, the longer the delay the stronger the evidence of deliberation. The test is both subjective (actual loss of control) and objective (when the reasonable person would have killed): at 495-6.
that the law is precluded from applying any standard to actual behaviour. The
objectivists fear that, taken to its logical limit, the capacity limitation merges
with determinism, and all choice becomes a mirage.\footnote{ Cf Morris N and Howard C, Studies in Criminal Law (London: OUP, 1964) 4.}
According to Shelley Wright, the American willingness to consider any factor which could have
undermined the accused’s actual capacity for responsible behaviour has
opened the floodgates to a bizarre and limitless menu of excuses.\footnote{ ‘[P]ost-traumatic stress disorder … would easily fall within the American law, as would personal
handicaps, shock from a traumatic injury, extreme grief, the “battered wife syndrome”, “TV
intoxication”, pre-menstrual syndrome, improper diet (the “Twinkie” defence), the “Vietnam veteran”
defence and so on. Once the objective standard is done away with and something like a broader
subjective test in the Model Penal Code is introduced, a wide variety of circumstances and
disorders peculiar to the accused may become an excuse for a lethal reaction’: Wright S,
Provocation: Some Recent Developments (Sydney: Uni of Sydney, 1988) 20.}

Another concern is that any demand for specific prohibition of bad behaviour
in every possible circumstance – as opposed to the more conceptual
proscription of what is unreasonable – would overwhelm the rule of law. The
community attempts to retain control over risky behaviour where it finds
detailed definition difficult – where it is unable to foresee precisely all
hazardous circumstances – by resort to the objective test.\footnote{ Norrie proposes that the role of juries (when instructed to be ‘reasonable’) is to ‘find justice’ where
the law is vague as to the quality of the behaviour – in such issues as provocation or gross
negligence: Note 10 at 45. The actual test is whether the moral model would have chosen to act
more safely than did the accused. Culpability rests on their differing choices. In Jacobs’s words,
‘the doctrine of objective liability … is that where the law purports to make a particular state of mind,
such as knowledge of certain facts, or foresight of certain consequences a condition of liability, that
condition can be satisfied by showing, not that the accused himself had this knowledge or foresight,
but that the so-called ‘reasonable man’ would have known, or would have foreseen the
The objective argument is that if a risky act (lawfully carrying a loaded firearm in a car, say)
is performed and that danger is realised (the gun goes off accidentally), and if
the reasonable person would have recognised that what did happen could
happen so would have avoided it, then the risk was unreasonable, and the act
is consequently illegal. More to the point, since the ‘reasonable person’ has
condemned it (after it caused harm), it is deemed to have always been illegal
– and since mistake of law is no excuse, the offender is deemed to have
known it was not permitted at the relevant moment. Therefore – absent a
regime of absolute liability – mens rea is required and satisfied. It becomes a
criminal law version of res ipsa loquitur: the ‘obvious consequences’ of the act
deny that there could have been any other intention but to offend.
The other main justification for imposing the reasonable person’s behaviour is that it sets a general standard, applied to all. Susan Estrich argues that the ‘genius’ of the objective test is that it is basically political – apparently meaning that it reflects the democratic assessment of acceptable behaviour. The requirement of proven choice disappears once the majority (perhaps as articulated by the jury) would have chosen otherwise.\(^2^2\) And shouldn’t the law generalise? Shouldn’t there be common standards of what we are allowed to do to others? In discussing whether the objective test is valid (when applied to the defence of provocation, as opposed to automatism) Stanley Yeo proposes that ‘[t]he rationale underlying the test is to maintain an objective standard of conduct which society demands of its members.’\(^2^3\) Jeremy Horder proposes a ‘third dimension’ to the objective- versus subjective-test debate, as the balance between the ‘desires’ of the individual and public policy, ‘hence the justification for their criminal liabilities’.\(^2^4\) In short, the objective standard is utilitarian.

By such reasoning, an objective measure (or really, an imposition) is quite **reasonable**. The test demands that individuals inform themselves as diligently as does the person habitually riding around on the Clapham omnibus, and **become** the local norm. The alternative is seen as social and moral chaos. In other words, the objectivists argue that any compassion for the accused’s failed struggle to conform is bought at the expense of community protection. If the reasonable person can do it, the accused will just have to try harder. The obvious rationale is that the law is not there to protect people who don’t make a reasonable effort to discover and avoid unlawfully harmful consequences of their actions. In effect, they chose to allow their ‘best endeavours’ to lapse.

**The Subjective Argument**

The subjective reply is that any objective standard creates a legal fiction: a moral model citizen who correctly evaluates **after disaster** those risks the good


citizen would not take in pursuit of personal benefit; and decides what is his or her moral (or perhaps contractual\textsuperscript{25}) responsibility to modify that pursuit in the larger interests. Not only does this process offend criminal law’s repugnance at retrospection, but in practice the reasonable person is more symbolic than useful as an absolute measure. In reality this icon is narrowed to the reasonable peer when the issue is either the higher standards of a skill or profession,\textsuperscript{26} or the capacity limits of age,\textsuperscript{27} abusive history,\textsuperscript{28} age and sex,\textsuperscript{29} or ‘circumstances’.\textsuperscript{30}

Already the notion of capacity is attacking the objective presumption of choice. Having previously presented the objective approach,\textsuperscript{31} Yeo finally concludes that, when murder following provocation is in issue, ‘[a] far more just approach would be to recognize the accused’s characteristics whenever it has bearing, whether specific or otherwise, on the gravity of the provocation towards the accused.’\textsuperscript{32} When dealing with the role of the objective standard in deciding an appropriate penalty, Dane Ciolino proposes that – even if ‘culpability is a retributivist notion’, so there is no demand that punishment reform the offender – the objective test still fails any moral goal: ‘Retributivists generally believe that criminal punishment is justified only when it is morally deserved. Moral desert can arise only from acts emanating from the actor’s exercise of free will.’\textsuperscript{33} The issue is whether any judgment of the citizens’ behaviour is valid if it does not explore whether the accused did the best they could.

\textsuperscript{25} Per Thomas Hobbes. Richard Aynes also proposes that ‘[t]he conception that the government owes a duty of protection to its citizens is ancient. In a feudal society, the lord would offer military protection to his vassals. The theory of social contract was premised, in part, upon the view that in exchange for surrendering certain natural rights to society, the individual gained certain protections from society’: Aynes R, ‘Constitutional Considerations: Government Responsibility and the Right Not to be a Victim’ (1984) 11 Pepperdine Law Review 63-116, 75.

\textsuperscript{26} As Wells points out, this produces a double standard – so when dealing with a lay defendant ‘[n]o account is taken of the defendant’s knowledge deficit, but where the person has a surplus of knowledge compared with a reasonable person that is regarded as relevant’: Note 12 at 117.

\textsuperscript{27} Stingel [1990] 171 CLR 312, paras 24, 26.


\textsuperscript{29} See also Chhay (1994) 72 A Crim R 1 (NSW CCA), where extended domestic abuse was permitted as reasonable provocation.

\textsuperscript{30} Morhill [1996] 1 AC 90 (HL).

\textsuperscript{31} Above Note 23.

\textsuperscript{32} Note 23 at 290.

Jacobs proposes that any test which ignores actual capacity is not simply immoral, but of little practical effect, claiming that ‘a person is not responsible if his mental capacity was such that it was not reasonably in his power to act otherwise.’ Jacobs also rejects the justification for the objective approach as a necessary ‘convenience in the administration of the law’ and is restricted to issues where the penalty is small.

Another argument against the objective standard is that, when the issue is serious, it duplicates the function of the jury. Yeo proposes that the role of the jury is to apply the subjective experiences of its members, as the community’s representatives, to the behaviour of the accused. So a properly-selected jury will impose any community standard anyway. As an advocate of the objective standard, Alan Michaels contends that an objective assessment of the circumstance (the wounds on a dead child, for instance) better guides a jury as to guilt than trying to assess the state of mind of the accused (where there were no wounds, say). He concludes that ‘the former incident calls for harsher treatment without reference to the defendant’s goal or attitudes towards risk.’ What is quite startling about this argument is that it completely ignores that the physical evidence displays the subjective attitude: severe injuries indicate (at least prima facie) the actor’s capacity for brutality.

In essence then, the subjective argument is that there is no substitute for

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34 Jacobs, Note 21 at 157. It is unfortunate that this description incorporated the word ‘reasonably’, since this injects an external measure. It therefore negates the use of medical evidence on mental capacity, and again asks the tribunal of fact to view the behaviour from a ‘normal’ standpoint. However Jacobs’s point is sound: the most that can be achieved by punishing someone for any incapacity is to authorise quarantining them.

35 Jacobs, Note 21 at 125.

36 ‘Objective liability, far from being confined to minor offences, is on the contrary more commonly associated with serious crimes, and …; the objective test in the law of provocation, and the requirement on a plea of self-defence, for example, that ignorance or mistake of fact must be reasonable, have their most important application in cases of homicide’: Jacobs, Note 21 at 125-6.


38 The counter argument is that the reasonable person test blocks a jury from simply finding guilt when that will make its members feel safe, so protects an accused. Either way, the question remains whether the imposition of a community standard at this stage is presumptive.


40 Even worse, Michaels badly conflates the role of evidence in finding culpability per se, and its contribution to the moral reaction (and penalty) that follows this finding; so elides the processes of authorising some punishment (guilt), and deciding how much punishment is appropriate (sentencing).
knowing precisely what choice was actually made.\textsuperscript{41} Any revulsion that the law may then feel – at the demonstrated willingness to make a prohibited decision – is really the law’s subsequent (and conclusive) reaction to the way a free agent has actually dealt with social responsibilities, that is, in the sentence. The overall proposition is that behaviour is no more than evidence of what the accused was attempting at the time; that intention is not to be found by comparing conduct against what the reasonable person would have done in the circumstances – any such comparison achieving nothing more than indirectly casting doubt on the \textit{believability} of subjective innocence.

A direct objective test belongs to civil law, where the definition of a wrong is different – being the authority to order restitution when the defendant’s gamble distributed damage to the plaintiff and the court regards the gamble to have been unreasonably chosen.\textsuperscript{42} The presence of the objective test in criminal law can only be explained when it is faced with the same issue: where, on a continuum of dangerous-but-legal activity, do the circumstances provide good reason to convert chosen behaviour into an offence? Is there adequate justification for making this decision after the event? Must criminal law sometimes let any incidental offending go unpunished?

\textit{Is There a Better Logic?}

George Fletcher takes issue with the pervasive use, by the common law, of the term ‘reasonable’, seeing it as an all-purpose threshold test: faults of delay, care, force, mistake etc are all permitted if they are, well, reasonable.\textsuperscript{43} He argues that this resort to the reasonable person is unnecessary, and he presents the major Continental jurisdictions (German, Russian and French) to demonstrate that such a creature is unknown in those systems.\textsuperscript{44} Fletcher’s

\textsuperscript{41} The determinist argument can now be answered simply by asking why the threat of legal sanctions cannot be part of the determining forces controlling the behaviour of the rational person; and why criminal sanctions cannot be made the overwhelming factor. Indeed, determinism would be undermined if punishment were administered without proof that the offender acted despite actual knowledge of the legal consequences – an issue I will further explore in \textit{Chapter IX - Defences}, regarding the doctrine of presumed legal knowledge.

\textsuperscript{42} However note that there is still a requirement that a choice be present, and assessed.


\textsuperscript{44} ‘In German law, the assessment of guilt is a two step process: (1) The act is assessed for whether it was justified (and not ‘abused’) – parallel to our complete defences. In other words, whether the act was a proper response to a prior illegality (which includes the lethal defence of property); then if that
point is that Continental process first reviews the competing rights of the accused and victim; then assesses the accused’s capacity for proper conduct. The tests are directly legal, and are not bundled together under an assessment against the normative person: ‘The standard “what would the reasonable person do under the circumstances?” sweeps within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or on blameworthiness.’ If what is prohibited is the taking of a risk with someone else’s rights, and the best definition of the prohibited risk can only be supplied by what the reasonable person would have chosen in the circumstances, all that such a test can provide is a prohibition itself.

Jacobs sees the objective test as contributing to the subjective analysis, when he argues that reasonableness is mere evidence to support a belief that the mistake was honestly made, claiming ‘it was clear that there was considerable authority [in 1949] for the view that a mistaken belief must be reasonable if it is to be a good defence.’ As articulated by Lord Bridge of Harwich in Moloney, ‘foresight of consequences ... belongs, not to the substantive law, but to the law of evidence’.

The error is that the objective test ignores the critical element of choice. When a jury decides ‘I wouldn’t have done that’, volition has been discussed. If they frame it as ‘I wouldn’t have allowed that to happen’, there is still an implication of control: it was within the model person’s capacity to decide the issue, and a less harmful choice could have been made, so the accused has failed as an acceptable citizen. Although the objective test only requires the offender to use reasonable foresight, this approach allows any inadequate prediction to displace unlawful intention as the basis of culpability. This is tort
OBJECTIVE TEST

law’s duty of care uprooted, and elevates foresight well above its proper role.

In Moffa, Murphy J even managed to turn the objective test upon itself, suggesting that if the reasonable person can permit a murderous loss of control, then that person has abdicated the role of model: ‘It degrades our standards of civilization to construct a model of a reasonable or ordinary man and then to impute to him the characteristic that, under provocation (which does not call for defence of himself or others), he would kill the person responsible for the provocation.’ To this extent, Murphy J saw such a test as a justification – which raises the question of whether the only acceptable role for objectivity is as an assessment of the mental element actually present at the moment in question.

This Thesis

Strict liability allows as an excuse – and the confess-and-avoid defences exculpate – an honest and reasonable mistake of fact. If there has been no actual misapprehension of any unlawful danger imposed by the activity in question, the only remaining issue is whether the choice to proceed anyway was acceptable in the circumstances apparent to the harm-doer. The point at issue is: if the court is convinced that the accused did actually lose control of the situation – that it was not a choice, but a genuine collapse of individual capacity to remain civilised – then the objective test is useless. If the accused was in a state of mind (or in perceived circumstances) where no rational warning was effective, then s/he was beyond control by the law, and the justice system is foolish to believe it can warn anyone in the future who is in this perceived situation.

For the court to find (to the requisite level of possibility) that honest incapacity existed without fault, then go on to an objective test – to seek culpability by measuring the loss of control against whether the reasonable person would have been more adequate – doubles the error. That the offender was beyond

49 Note 48 at 627.
50 The difficult, and arguably unhelpful, distinction between mistakes of fact and law will be examined in Chapter IX - Defences.
control is not to be corrected by comparison with the reasonable person. But this appears to be the role of the ‘defensive’ objective test: to have another go at conviction. It is therefore a form of double jeopardy.\textsuperscript{51}

The alternative is to instead characterise the objective test as the second chance at exculpation. That is, although the accused has failed the subjective test – so was not believed when claiming loss of control, and was seen to have chosen to lash out – the objective test seeks some reasonable justification for the behaviour anyway. In other words, would the reasonable person have also chosen to retaliate?

My argument is that the objective test is a doctrine transplanted from tort law, and in the process its function has been reversed. The objective test in tort sets the threshold of liability at an attitude of ‘couldn’t be bothered’ in respect of the relevant danger. It does so by comparing the actor’s behaviour with that of the hypothetical reasonable citizen. If that person would have avoided the harm, absent any evidence of diminished capacity, the harm-doer is presumed to have chosen to put his/her own interests ahead of any potential victim. The difference between attitude and capacity is telescoped. The test is usually presented as an expansion of liability for damage beyond the limits of privity of contract, \textit{per Donoghue v Stevenson}.\textsuperscript{52} However, this ignores that tortious negligence is an alternative to strict liability: it restricts result-based liability to lapses of duty. The objective test is in reality a limit on the previous strict or absolute regimes: it only authorised restoration if there was both a result and neglect, where the previous regimes authorised such compensation in the wider zone of causing a harm.

\textsuperscript{51} The logical confusion created by the ‘hybrid’ test was demonstrated by the NSW Court of Criminal Appeal in \textit{Dziduch} (1990) 4 A Crim R 378, 379 when Hunt J proposed that the correct means of instructing a jury on self-defence was that ‘[t]he Crown may establish \textit{either} that the accused had no [actual] belief \textit{or} that there were no reasonable grounds for such a belief.’ However he went on to say that ‘[i]f the Crown fails to establish either one of these two alternatives, the accused is entitled to be acquitted’. The judge now appears to require that the Crown prevail in \textit{both} tests for a conviction. If this was Hunt J’s intended explanation, this thesis concurs that it is the only rational ‘community-standard’ analysis. However it is simply not the current law. In \textit{Zecevic v DPP} (Vic) (1987) 162 CLR 645, Mason CJ, Wilson, Dawson and Toohey JJ all agreed that if \textit{either limb} of the defence is destroyed, it fails completely. See Mason CJ at para 14: 71 ALR 641, 646. See Wilson, Dawson and Toohey JJ at 71 ALR 641, 650

\textsuperscript{52} [1932] AC 562.
In tort law, therefore, the reasonable person test serves as a cushion against strict liability. However, in criminal law the objective test serves to extend rather than limit culpability. That is, when the reasonable person would have acted more lawfully (rather than as harmfully), then the inadvertent citizen is punished for failing ‘to live up to the criminal law's standard of virtue’. The rationale is usually based on criminal law’s role of directly controlling its subjects according to community standards. It is a test used in the absence of any strict articulation of the unacceptable behaviour, and is applied where some ‘conceptual’ standard is set for the infliction of incidental harm. The exact illegal activity is not defined, but if damage is done to another citizen, and an unreasonable (rather than malicious) attitude is seen as the cause, then the accused is guilty.

The dual tests therefore, as assessment of defences, improperly operate not as alternative escapes from culpability, but as alternative sources of culpability: if the defence fails either one, it is dead. This contrasts with the role of the reasonable person in the analysis of the offence itself. If indirect intention – recklessness or negligence – are sufficient mens rea, then the reasonable person sets the threshold (either as to intention or foresight) below which there will be no offence. In other words, if there is inadequate proof of direct intention – so the court must be convinced that, as an alternative, the accused was less careful than the law requires (as in the case of murder/manslaughter) – the reasonable person sets that standard, and is applied where (1) There is no doubt that the accused caused an unlawful harm; (2) The act causing the harm was competently chosen; (3) But it was performed where there was doubt about its illegal outcome.

The reality is that the society depends on enterprise, and enterprise carries risks. The various regimes simply set different levels of required caution. Historically, negligence reigns in the degree of ‘timidity’ required of the citizen venturing out into risky activity. In a restoration environment this is some protection from responsibility for fate, and does permit the less negligent party

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to be compensated. However, it is inappropriate in a punitive environment, where there it is more necessary to prove the ‘couldn’t be bothered’ attitude. This subjective recklessness properly does, when it insists that the offender be shown to have acted despite actual knowledge of the danger. In effect, any analysis of (in)visibility per se serves to persuade the court that the offender chose to not (rather than could not) see the impending harm. This is the ‘believability’ test. The court is certainly free to disbelieve the accused, when these people claim they could not do any better. Whether the chosen behaviour is acceptable citizenship is another (and subsequent) inquiry. As a test of the quality of that intention – the willingness to proceed at the risk to the rights of others – the objective test provides a basis for such evaluation.

Where I see the objective test as deficient, even when limited to this role, is that it employs a vague personal measure: it asks the tribunal of fact to place themselves in the shoes of the offender and decide whether – if they acted as foolishly or harmfully – they would regard themselves as culpable.54 Such a calculation does not directly engage the social merits of the decision in question. Supposing a policeperson has shot and wounded a fleeing suspect. The goal was not to inflict injury per se, but to arrest the flight of this ‘person of interest’ – perhaps on the basis of their disobedience alone, with no real evaluation of whether the suspected offence was as serious as the method used. Would a jury necessarily go beyond viewing the situation from the position of the policeman (so looking at reasonableness as an excuse for harmful activity under conditions of urgency) to actually evaluate the social merits of armed police injuring suspects? Indeed, even if the jury did attempt such a calculation, does the law of incidental intent provide any guidance?

Criminal law ought not be a wait-and-see situation. For criminal law to introduce, as a culpability factor, a post facto decision based on a test as variable as the reasonable person’s performance (as perceived by the members of a jury) undermines the role of criminal justice. Further, setting a

54 Pillsbury contends that ‘[t]he reasonable person standard represents a modern version of character judgment, requiring the decision maker to compare the conduct of the accused with that of a person possessed of ordinary prudence and self-control’: Pillsbury S, ‘Crimes of Indifference’ (1996) 49 Rutgers Law Journal 105-218, 122.
culpability threshold at an unreasonable lack of foresight is really another version of the de minimus rule – so that marginal mistakes do not clutter the courts, and consequently marginal risks do not thwart all enterprise. At best it is an expedient, but one where the individual accused is expected to carry the cost of promoting general community security with elided process.\^55 At worst the objective test creates a zone of causation where the law relinquishes control after the event despite any announced prohibition. The objective test will logically exculpate speeding motorists who don’t go beyond ‘what everyone does’. Conversely, it condemns as a deliberate offender the motorist who went unreasonably fast (that is, within the relevant speed limit, but beyond what ‘everybody does’) by honest mistake. It fails both sides of the artificial, hypothetical threshold.

To see the objective test as a test of the existence of foresight is the fundamental error. Such a test imposes a fictional capacity on the harm-doer: if the normative citizen was more skilled at seeing approaching danger, then the offender is deemed at fault – regardless of whether it was within his/her capacity. The test attributes an attitude of neglect where the problem may have been one of incapacity. However, to see the test as of behaviour once the danger was foreseen, by both the offender and the reasonable person, permits their attitudes to the approaching danger to be compared. If the reasonable person would also have proceeded on the basis that the risk of harm was inferior to the potential social/economic benefit, then even though that decision may have been a mistake, it is valid within fate-management: the general benefit on offer was greater than the damage threatened.

Thus reasonableness is not a matter of personal capacity for foresight, but of comparative Weberian cost-benefit prediction.\^56 The benefit of this analysis is that it avoids displacing real perceptions with artificial ones. Rather it reviews the choice made, against a ‘reasonable’ guess of whether a course of action is potentially socially worthwhile. The only role for reasonable foresight is

\^55 One way or another, the subjective analysis is bypassed or over-ridden.
\^56 An anticipatory extension of Weber’s ‘value-rationality’, under which people may subordinate their individual qualitative interests to a more general quality value.
either as some indication of whether to believe a claim to having been taken
by surprise at the harm; or alternatively as a means of exculpating
recklessness where the ordinary person would also have seen the potential
cost-benefit equation as authorising the activity. It is left to the tribunal of fact
to decide if, in hindsight, they agree that the risk was worth running.

Summary

What is remarkable is just how completely the notion of objective negligence
has been adopted by legal doctrine. It has become the reigning tort, and
introduced a shift from specified wrongs (such as the old writs of trespass and
action on the case)\(^57\) to censuring a broad (and unclosed) lapse of citizenship.
With this change has come the problem of distinguishing the technical role of
the judiciary from the moral, demographic and populist judgment of the jury.
In modern English law, the old menu of property offences such as larceny,
embezzlement and fraud have been displaced by a general concept of theft,
to be found by a jury’s decision that the accused ‘acted dishonestly’.\(^58\) The
conundrum that faced the UK Court of Appeal in \textit{Feely}\(^59\) and \textit{Ghosh}\(^60\) – and
ultimately the High Court in \textit{Peters}\(^61\) – was how to draw the line between a
legalist definition of theft, and the community-based notion of dishonesty.

Ultimately, the \textit{Ghosh} court resorted to an objective assessment of the actus
reus (is the behaviour regarded by the community as dishonest?) with a
difficult hybrid test of the mens rea (did the accused know or believe that the
behaviour would be so regarded?),\(^62\) an unusual (and academically
unpopular) result.\(^63\) My critique is centred on the illusion of subjectivity
created by the \textit{Ghosh} tests. While the second test may appear to be
subjective, the question is whether the accused’s perception of the

\(^{57}\) Although trespass is commonly described as an ‘intentional’ tort, it is better understood as a \textit{direct}
wrong (since there is not the criminal law requirement of proving intention, only a defence of
unavoidability) in contrast with case – where the damage done was indirect: Luntz H and Hambly D,
\textit{Torts: cases and commentary} 5 edn (Chatswood: Butterworths, 2002) 675-9; 663.

\(^{58}\) Theft Act 1968, ss 1-6: Definition of ‘Theft’

\(^{59}\) [1973] 1 QB 530.

\(^{60}\) [1982] 1 QB 1053.


\(^{62}\) Per Lord Lane CJ, 1064.

\(^{63}\) For example, see Steel A, ‘The Appropriate Test for Dishonesty’ (2000) 24 \textit{Criminal Law Journal} 46
– a critique of the objective test in a multicultural society.
community’s value can differ from that found by the first test. If the accused’s perception is the definition, then the first test becomes pointless. If the definition of dishonesty is that decided by the jury regarding the behaviour itself, then the second test has more the character of recklessness: culpability based on proceeding in the face of proven knowledge that the activity is unlawful.64

This outcome was perhaps due to the drift witnessed (through the development of negligence) towards ‘community-based’ testing of the value of the individual’s behaviour. It is no longer the clean analysis of whether the behaviour fits within the proscribed territory (for recklessness, that the accused knew of the danger to a legal right, acted to risk violating it, and failed to avoid inflicting the harm) but whether the behaviour lacks adequate social responsibility.

The fate-management question is: how effective is the objective test as a warning? Traditionally it only comes into operation after a specific incident of harm-infliction. Can other citizens be effectively warned to assess risks ‘reasonably’? Is the term too conceptual to perform a tangible warning function? Does the fact that each case becomes ‘retrospective legislation’ mean that the citizens must somehow keep themselves informed on what has now been seen by the court as negligent?

I argue that culpability based on unreasonably-inflicted harm does suffer from these gaps in capacity to warn. The objective test does not (on its own) assess whether a harm is to be tolerated – that is the job of substantive law. Rather it evaluates the cost-benefit justification for a risk inflicted. It cannot establish a choice made – that is the role of the subjective test. It can only exculpate such a choice if it satisfies a community standard of due caution. The fact that such exculpation will prevail over harm done again demonstrates that the dominant issue for modern criminal law is fate-management.

64 In Chapter X – A Radical Reform I will attempt to rationalise this process into lawmaking and subsequent guilt-finding – as a revision of the doctrine of conjunction.
Conclusion

The chapter conclusion is that the objective test is conventionally applied to incidentally harmful behaviour without establishing a critical element of culpability. It is allowed to make a judgement on the acceptability of the accused’s harmful choice – a decision to pursue a personal goal that delivered unlawful harm on the way – without establishing that any such risk-running choice was actually made. Instead, the voluntary act is imputed with awareness of the dangerous circumstances, and consequently the choice to inflict the risk. While there may be many circumstances in which such an inference can be drawn (a driver with comprehensive experience of the specific danger, for instance) this hardly justifies excluding any such question from the guilt-finding process. Indeed, if such knowledge is easily proven – or if the evidential difficulty precisely reflects any uncertainty that the accused did make a choice – any argument based on litigative expediency is obviously specious.

The objective test therefore discloses the rise of endangerment as the principal concern for criminal law, leaving any achieved unlawful harm to tort. However it has brought to criminal jurisprudence serious problems. While its focus is clearly on incidental intention, in its present form it is neither capable of authorising criminal law action prior to harm being done, nor of discovering the actual risk-awareness of the accused. It is generally triggered by a harmful outcome; and the guilt-finding process then proceeds directly to a moral judgment of activity that has been presumed – rather than proven – to be based on actual knowledge. The thesis argues that the objective test – particularly when administered as part of the offence definition – is an incomplete means of finding endangerment. Thus I propose another analysis that makes sense of the use of the objective test.

If the prosecution fails to prove actual perception of inculpating circumstances – by a subjective test of the behaviour in question – the accused should be acquitted, the criteria for guilt having not been satisfied. There is no call for any second analysis. Logically, any objective test should follow a successful test of capacity, and should only be applied once the requisite possibility of
choice has been established – not as an alternative to the subjective test, but as a measure of the social utility of the danger actually risked: the potential harm actually perceived, balanced against the social benefit apparently available if the prohibition can be avoided. In other words, it depends on knowing the choice actually made, rather than displacing it. The subsequent test is a mechanism for permitting the community – through its representative jury – to render judgment on permissible risk taken in each case.

However there is ‘quasi-legislative’ merit in reversing the tests so that, on an interlocutory presumption of capacity, the court can render judgment on the social value of the risk imposed. The testing process I propose is: (1) An (objective) finding of an actual disproportionate endangerment - that the potential harm to a right was in excess of the possible legal benefit; (2) A (subjective) finding that this disproportionate danger was consciously chosen by this actor.

The first test is purely of the event in its circumstances. At this stage is does not matter who did it or why; merely that a human being voluntarily created the excessive danger. It is the second test that assigns culpability to a specific citizen. The justification for dividing the issue in this way is that the first test permits a court to ‘legislate’ in general terms, presuming an actual choice to be assessed for its social responsibility. The second test is of this individual. Any plea of ignorance, or inability to conform to the knowledge of danger, must raise the requisite degree of possible truth to exculpate.

In the chapter on Defences I will propose how it can be structured into a two-step test to remove the current presumption; and in Chapter X - A Radical Reform of Criminal Law I will suggest how it can gain an anticipatory capacity. I will present an offence formulation that can create a combined duty to observe a prohibition and to anticipate unlawful risk-infliction.

A partial modification to what the accused actually intended, designed to

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65 This is not simply a restatement of the doctrine of conjunction, since – as I argue throughout the thesis, using the logic of conspiracy – any activity by the accused is properly only evidence of intent. See also Jacobs, Note 21 at 112; Ashworth A, ‘Transferred Malice and Punishment for Unforeseen Consequences’, in PR Glazebrook (ed), Reshaping the Criminal Law (London: Stevens, 1978) 77-94, 86; Wilson v Inyang [1951] 2 KB 799 per Lord Goddard, 803.
extend culpability to offenders who have deliberately reduced their foresight and obedience, is the current approach to intoxication. At low levels of potential harm, intoxication is deemed irrelevant to subsequent direct intention. For more serious issues, the diminution of capacity is considered as a defence. This approach thus operates as another species of construction when the intoxication is partial (imputing intention to a subsequent offence), then completely reverses to a defence once the impairment approaches mental obliteration. It moves from imposing a norm to accepting the limits of capacity; from an objective to a subjective assessment. In effect, there is a violent clash between censuring the immorality of voluntary endangerment, and accepting the reality of diminished ability to act as a proper citizen. It therefore occupies both sides of any fate-management conflict. The next chapter, Intoxication, explores the chaos created by a doctrine that differentially imputes malice to risk-creation.
INTOXICATION

Introduction

Intoxication is defined as ‘a condition in which certain centres of the brain are affected as a result of poisoning …. It is characterized by impaired intellectual ability and confusion.’ To the extent that criminal law has a remit to intercept avoidable harm, and does so primarily by dissuading dangerous behaviour, control over the use of intoxicants provides an overt example of fate-management. Medical knowledge of the impact of alcohol is that it affects the very instruments of thought which deal with the individual’s social concepts. According to John Mason, ‘[a]lcohol is a cortical depressant. Since it is the higher and most recently evolved brain functions that are first affected by depressants, the immediate effect of a dose of alcohol is to inhibit those cerebral functions which are associated with orderly community behaviour’

This implies that the intoxicated person would otherwise have obeyed the law, and that the intoxicant has opened a window to harm otherwise closed. If culpability is viewed as the failure to exercise diligent ability, and if intoxication progressively degrades that ability, it should mitigate the sober expectation.

Is alcohol to be seen as analogous to a weapon (so misuse is required to transfer onto the user responsibility for any incidental harm); or analogous to the other (defensive) influences that become the legal cause once reasonably overwhelming?

The current approach attempts to use both rationales. It declines to accommodate any excuse at low levels of lost capacity or subsequent offending, instead it condemns the subsequent activity as being perhaps sufficiently intentional; or on the basis that a ‘moral hangover’ of elective

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3 In Henry [1999] NSWCCA 111; 46 NSWLR 346, the Court rejected the defence argument that addiction should mitigate the sentence. Instead, voluntary addiction was seen as the ‘act’ which created the liability for the subsequent offence.
4 The basic/specific division explored below as the Beard doctrine.
5 Charlie v R HCA (unreported 13 May 1999): unless the degree of intoxication is ‘fatal’ to the mens rea required to conviction, the intoxication is irrelevant. However see Coghlan [1997] QCA
drinking is still present. Then suddenly – once a threshold of lost capacity or (perhaps) potential penalty has been crossed – criminal law accepts that inebriation does affect culpability, by allowing the plea of lack of voluntariness at high levels of intoxication; or to defeat ulterior intention when the harm done attracts a substantial penalty; or if the inebriated person is not responsible for being intoxicated.

One means of rationalising the normative methodology is that, when ignoring the fact of incapacity, intention is doctrinally created. Paul Robinson proposes that someone intoxicated is imputed with the mental element, overriding that it was actually absent. This he characterises as an example of the ‘doctrine of imputation’. Another approach is to view intoxicated behaviour simply as a consequence of a poor choice. A further rationale is to see the intent as incidental. Finally there is the legal necessity validation.

(31) (unreported 5 September 1997): an accused can plead the defence if the intoxication has ‘diminished’ rather than ‘deprived’ the accused of capacity. The latter case raises the question of what a trial court is to do with a finding of partial culpability, without entering the minefield currently occupied by excessive self-defence, provocation, infanticide and diminished responsibility (statutory ‘substantial impairment’ in NSW). Can there even be partial culpability for a non-lethal offence? 6 Voula Konstantopoulos opens her discussion on the topic with the February 1997 acquittal of footballer Noa Nadruku (SC Small v Noa Kurimalawai [aka Nadruku], Australian Capital Territory Magistrates’ Court, Matter No. CC97/0194, October 22, 1997, Transcript of Proceedings, p 11. Cited in the Report of the Victoria Law Reform Committee, Criminal Liability for Self-Induced Intoxication (1999), para. 1.11) of assaulting (traditionally seen as an offence of ‘basic’ intent) two women outside a nightclub in Canberra when he was so intoxicated as to be ‘barely conscious’: Konstantopoulos V, ‘Review of criminal liability for self-induced intoxication’ (1999) 73 Law Institute Journal, 60-3, 60. As Cory J noted in Daviault, [1994] 3 SCR 63, pp 515f-516a: ‘In reality it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence.’ 7 Robinson P, Structure and Function in Criminal Law (Oxford: Clarendon, 1997) 58.

6 As Ian Campbell records: ‘there is a line of authority on impossibility of performance which denies the excuse when the accused placed himself in the position where he could not exercise a choice’: Campbell I, Mental Disorder and Criminal Law in Australia and New Zealand (North Ryde: Butterworths, 1988) 120. This strict liability approach, however, does not categorise any particular offence as strict, but makes strict any offence performed by the intoxicated person. As such, it reverts to being status law, and creates a class of citizen with diminished rights, where a citizen chose to join that class.

7 Raoul Wilson notes that ‘[t]he justification advanced is that the accused’s recklessness in getting into a state of incapacity deprives him of the right to claim that he had no actual intention’: Wilson R Intoxication as a Defence to Crime: Majewski or the Subjective Doctrine? (Canberra: ANU, 1979) 91.

10 The New Zealand Criminal Law Reform Committee argued that if the law were to allow offenders to drink their way into immunity from prosecution, the entire relationship between the law and its subjects would be undermined: “[F]irst, that to allow an acquittal in all cases where voluntary intoxication resulted in an absence of criminal intent would permit the community with insufficient protection from violence; second, that the criminal law would seriously depart from the common consent which it should command, and would so outrage victims and shock the public as to bring the law into contempt” Criminal Law Reform Committee, Report on Intoxication as a Defence to a Criminal Charge, Wellington, 1984. 28.
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As either an inchoate or status offence, or a construction, intoxication is perhaps the most explicit instance of criminal doctrine anticipating harm – either by prohibiting the status, or by warning that being intoxicated will not serve as an excuse for subsequent offending. Consequently it exhibits the major problems with such anticipation: the conversion of legal activity into being unlawful on the presumption of a predictable and permanent link between that activity and harm. If the presumption is not true, and it is only some drinkers and situations that create harm, then any censure of either the act of becoming intoxicated, or of the status itself, must be based on an unacceptable chance of such a link. That is, the drinker is to be punished for invoking a danger per se. This brings the fate-management role of criminal law into direct conflict with the concept of mens rea as a proven choice (or willingness) to offend.

The fate-management issue raised by voluntary intoxication is whether an ambit warning against embarking on legal drinking can achieve adequate control over the damage drunks later do. In other words, whether it is effective to notify potential drinkers that they will be made constructively culpable for any harm they do as a result of choosing to drink. I must therefore address two questions:

1. Is the current regime capable of establishing and announcing a clear point at which the use of intoxicants is seen as potentially more destructive than productive, so becomes illegal?¹¹

2. If not, is there a better approach to controlling the generation of such danger?

Chapter Goal

A hypothetical: In identical circumstances, two young men each

¹¹ NSW currently uses 0.05% alcohol in the bloodstream as the point where a fully licensed driver is impermissibly dangerous. This limit is reduced for less experienced drivers. There is no countervailing benefit acknowledged, however since the fully sober driver is known to be more alert, such exculpating of partial intoxication is an apparent concession to recreational reality (if preserving the moral view that one person should not put others at risk simply in pursuit of fun). While there is a residual question as to whether there is a direct link between such a concentration of alcohol and actual capacity (some drivers are simply better; some less confused by alcohol) the medical measure provides a clear line in the sand, and many hotels have ‘breathalysers’ for hire.
independently attack and kill a stranger. Each attack is equally ferocious. The only relevant difference is that one of them is drunk and the other sober. Should they both be convicted of the same offence? Should the intoxicated attacker be seen as more culpable, or the other way around? Is it possible to see the intoxicated killer as not culpable at all? There is certainly a strong sense of moral outrage at those who deliberately – and for fun – choose to run risks with the welfare of others. However the core question is how the current approach to intoxication contributes to the view that modern criminal law has fate-management as its (hidden) agenda; and whether, once this role is accepted, there is a superior means of managing the danger that drunks invoke. What then is the true character of intoxication as a legal issue?

Is the intoxication issue one of wilfully-reducing foresight?

Should the potential drinker have peered into the future and seen the consequences of consumption? According to Lord Elwyn-Jones LC in *DPP v Majewski*:

> In the case of these offences it is no excuse in law that, because of drink or drugs which the accused has himself taken knowingly and willingly, he has deprived himself of the ability to exercise self-control, to realise the possible consequences of what he was doing or even to be conscious that he was doing it.

Is intoxication another form of ‘indirect’ intention?

Is intoxication recklessness? This implies that there is not only a causal link between intoxication and harm, but that the potential drinker knew and ignored that risk.

Should intoxicated intention be measured objectively?

The main issue is whether the law should accept, as a basis for assessment, what the accused actually intended; or whether it has a role to grow impatient.

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13 Note 10 at 9.
14 According to Samuel Pillsbury, ‘[s]ome have tried to reconcile the awareness approach with full blameworthiness for intoxicated persons by emphasizing the defendant’s pre-intoxication awareness of risk. The argument is that virtually all adults know the risks of intoxication and this general awareness of risk may substitute for specific awareness of the hazards of actions taken while intoxicated’: Pillsbury S, ‘Crimes of Indifference’ (1996) *Rutgers Law Journal* 105-218, 186.
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(or morally outraged) at elective stupidity and set a ‘should have’ standard which the accused must meet. Should the behaviour of an intoxicated person be measured against that of someone sober?

This chapter is concerned with the legal response to voluntary acts of becoming intoxicated, and the fate-management problems created by allowing citizens to reduce their ability to avoid harming others. While intoxication can be caused by recreational drugs other than alcohol, or drugs which may be taken for reasons other than recreation; may be administered without the knowledge of the person affected; and may be taken with no knowledge of the effect on mental performance – alcohol use presents a special legal problem: the permitted, deliberate reduction in the capacity for taking optimum care. The analysis here has therefore been restricted to the voluntary use of alcohol, because this isolates the following factors: legal use; a conscious decision to alter social responsibility; and a progressive corruption of the capacity for caution.

History

Nineteenth century common law seems to have been something of a watershed for the role of intoxication in criminal law. According to the New Zealand Criminal Law Reform Committee, ‘[t]he early authorities on the common law indicate that before the nineteenth century intoxication was no defence to a criminal charge. Indeed, there were statements that drunkenness, far from being a defence, actually amounted to an aggravation of a crime’¹⁵ Raoul Wilson adds that ‘[i]n the nineteenth century the common law rule that drunkenness was an aggravating rather than excusing factor was relaxed in relation to serious offences.’¹⁶ David McCord records that ‘drunkenness’, as an aggravating factor, has disappeared from both English and American law:¹⁷

¹⁵ Note 10 at 1.
¹⁶ Note 9 at 44.
¹⁷ ‘In England, after being approvingly mentioned in several treatises around 1820, the doctrine that drunkenness can increase culpability for an offense dropped out of English law, never to reappear.’ He continues ‘[t]he last mention of the view that drunkenness increases culpability is found in a 1925 case where the Louisiana Supreme Court disapproved a suggestion that such aggravation
Most modern jurisdictions regard intoxication as a factor of possible exculpation, or at least ignore it. In O'Connor, Barwick CJ reviewed this general evolution. He regarded the resultant incapacity as quite beyond any moral judgment based on whether it was self-induced or not, and saw intoxication as simply part of the evidence as to whether an offensive intention actually existed: ‘The use of the words “defence” and “excuse” suggests … the idea that drunkenness might furnish a defence to or excuse for an offence otherwise established.’

The question is whether the law should focus on what the accused should have done (remained sober), or on what depreciated control the actor retained at the time of the offending. Jeremy Horder sees the current approach as to sidestep the difficulties of assessing actual self-control, so that performing the actual prohibited event becomes decisive. However Katherine White reasons that ‘[i]n most circumstances, a drunk driver is not consciously aware of risk at the time he drives …. Ascribing what the defendant “should have known” creates a tort-like foreseeability standard for murder.’ White is quite blunt, claiming that ‘[r]estricting evidence regarding a defendant’s mental state cripples the fact finding process and perverts the very foundations of criminal law.’

Derrick Carter makes the point that intoxication does not create innately unacceptable behaviour, it merely disinhibits it: ‘Intoxication releases inhibitions, impairs judgement, incites hostile behavior, and unleashes one’s
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criminal impulses.25 The question is whether criticism of a mitigating role for intoxication is just another variation on the utilitarian arguments against mens rea that have sponsored concepts such as strict liability, or whether elective incapacity raises unique issues.26

The Conflict

One analysis of the tension surrounding intoxication would appear to be between the community’s right to law which protects it from known dangers, and the individual’s right to only be held accountable for activity that individual chooses. Professor JWC Turner27 put the counter argument neatly fifty years ago when he wrote: ‘[A] rule of law which requires the mental processes of an accused person to be investigated is a rule which emphasises the rights of

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26 The Law Reform Commission of Victoria reports post-O’Connor judicial research ‘undertaken by a judge in New South Wales, who examined District Court criminal trials for a period of a year after O’Connor, by means of a survey distributed among his judicial colleagues, which supplied “reasonably accurate” figures in relation to “approximately 510 trials”’. The judge concluded: ‘Those figures disclose that a “defence” of intoxication which could not have been raised pre-O’Connor was raised in eleven cases or 2.16% of the total. Acquittals followed in three cases or 0.59% of the total, but only in one case or 0.2% of the total could it be said with any certainty that the issue of intoxication was the factor which brought about the acquittal’: Law Commission, Intoxication and Criminal Liability (London: HMSO, 1993) 60.

Further, the Commission reported from its own research that the general reaction to the presence of intoxication is that it ‘very rarely’ completely destroys intention: ‘The Law Reform Commissioner’s research indicates that the great majority of offenders who have taken alcohol or other drugs before committing a proscribed act are convicted in spite of their intoxication. Disinhibited by alcohol they may have acted in a way that they would not have done while sober and that may be taken into account in sentencing. Nevertheless, they are almost invariably found to have acted voluntarily and with the intent to do the proscribed act, even if they cannot be proved to have acted with the additional purposing element of specific intent’: Law Reform Commission of Victoria, Criminal Responsibility: Intention and Gross Intoxication, Report (1986) 3.

In an attempt to quantify this conclusion, the Commission sought the experience of litigation lawyers, and found that ‘[l]egal practitioners estimated that the number of cases in which the accused alleged that the act was done involuntarily or without a criminal intent because of gross intoxication was between 2% and 20% of cases. Such defences were rarely successful’: 19.

On the community-protection side of the argument, while the dismal ‘run rate’ of the defence is obviously a factor, research in Australia and New Zealand has failed to discern any greater danger having developed since the defence became available. As the New Zealand Criminal Law Reform Committee reported: ‘A defence of lack of intent as a result of intoxication has been generally available for some years in New Zealand and some States of Australia, but we are not aware of any reason for supposing that it might have contributed to any increase in crime, nor has it led to widespread concern’: Note 10 at 29.

Even when the Committee narrowed its search to those cases where the defence was deployed, it found no case where a New Zealand jury had accepted the plea, and few cases where a judge had done so: ‘We have not discovered any instance in New Zealand where a jury appears to have acquitted of all charges because of lack of intent as a result of voluntary intoxication, and we have details of only some six or seven cases where such a result has followed trial by judge alone’: Note 10 at 24.

the individual against the claim of the State, a conflict between interests.28 In Christina Almanzor’s words, a ‘balance needs to be struck between the defendant’s interests and the state’s interests’.29 While this is not an unusual demand, the character of intoxication poses unique problems. As the English Law Commission recorded: ‘One of the most common arguments advanced … is that public safety and respect for the law would be threatened if offenders could gain acquittals by reason of their voluntary intoxication.’30

The complexity of intoxication becomes obvious when a choice must be made as to the relevant moment of actual culpability, since the decision to become intoxicated, and the ‘decision’ to subsequently offend, are made at different levels of the offender’s competence. Most approaches place the moment of culpability at before the first drink. Wilson reads the common law approach as that becoming intoxicated is a deliberate (and punishable) abdication of social responsibility.31 McCord notes that American law’s response to the effect of alcohol was to use the familiar constructive technique of imposing malice.32

The problem remains: how to characterise and distinguish chosen behaviour (which is to be ignored as an explanation) from the reality of lost ‘authorship’ (no matter how dangerous) when assigning responsibility for intoxicated offending. Is it too artificial to construct culpability for all subsequent offending, regardless of gravity?

28 Quoted by Wilson, Note 9 at 72.
30 Note 26 at 59. When rejecting argument advanced in Majewski – that actual incompetence should prevail over an imposed community standard of chosen consequences – Lord Simon of Glaisdale stated that: ‘One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives …. To accede to the argument on behalf of [Majewski] would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he is doing or what were its consequences’: DPP v Majewski [1977] AC 443, 476.
31 ‘The concept of responsibility invoked by the English courts is closely akin to the tortious counterpart: an accused will be criminally responsible if he acts in a socially irresponsible manner and this element of social responsibility is defined by the policy towards self-induced incapacities’: Note 9 at 85.
32 ‘[T]o make sure that intoxication could not mitigate homicide too far, American common law developed the artifice of constructive malice aforesaid: the intention to drink was deemed to substitute for the intention to kill’: Note 17 at 380.
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The Basic/Specific Doctrine

As Ronald Mackay points out, the struggle to condemn bad behaviour at low levels of intoxication, while accepting the injustice and penal futility of censuring grossly intoxicated activity, has driven the English courts to invent the rather odd distinction between basic intention (to perform a prohibited act) which is punishable despite intoxication, and specific intention (to achieve a prohibited result) which is punishable only if done while sober. While it is difficult to discover exactly what is the logical contour of the division, it appears to loosely follow a number of concepts. Herbert Fingarette and Anne Fingarette Hasse argue that the ‘specific intent exception’ was a nineteenth century judicial attempt ‘to handle the very serious problem of the criminal responsibility of the intoxicated defendant.’ The first recorded judicial use of the term ‘specific intent’ was in Beard in 1920, when Lord Birkenhead LC said

where a specific intent is an essential element of the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime.

The English Law Commission, in its 1993 report, saw the distinction as a quasi-defence: once intoxication has been raised against a charge of specific intention, the prosecution must prove that sufficient intention existed at the time of the offending despite the intoxication; when the charge is of basic intention, voluntarily getting intoxicated colours the offence as intentional.

The flaws in the latter moral judgment (the act of becoming intoxicated is, on

33 Mackay R, Mental Condition Defences in the Criminal Law (Oxford; Clarendon, 1995) 150. However in the opinion of Matthew Biben, 'Mackay's criticism of choice theory is valid only if one accepts his claim that choice theory presupposes that choice is caused. While this may be the position of some choice theorists, it is not the position of all, including some of those he cites (for whom there must be an act of choosing); Biben M, 'Book Review: RD Mackay, Mental Condition Defences in the Criminal Law' (1996), 7 Criminal Law Forum 679-89, 683.
35 DPP v Beard [1920] AC 479, 499
36 'Where the charge is a crime of specific intent, evidence of intoxication is taken into account in deciding whether the defendant has the necessary mens rea, and this intoxication can be regarded as a ‘defence’: in the sense that the prosecution has to establish the actual intent of the defendant, taking into account the fact that he was intoxicated. Where, however, the offence with which the defendant is charged is categorised as one of basic intent the Majewski approach appears on the present view to apply to every mental element that the prosecution has to prove in order to obtain a conviction: to put the matter simplistically, the fact that intoxication was self-induced provides the necessary mens rea': Note 26 at 12.
its own, perfectly legal) become apparent once attempts are made to stretch the principle to cover gross intoxication. As the Law Commission vividly argues, this two tier approach to intoxication is not simply unsatisfactory, but even reverses the law’s censure, since ‘it would be very odd, granted the general Majewski approach, if a person could escape liability for an offence of basic intent if he drank so much as to render himself an automaton, but not if he indulged only to a lesser degree.” Mackay points out that this odd distinction between basic and specific intent serves (within the adversarial system) to hide from the court the true nature of the event in question. In effect, since intoxication (if it is seen as having any relevance at all) can become an aggravating factor in sentencing an offence of basic intent, it is not in the accused’s interests to introduce it into evidence; and the prosecution can only use it if the charge itself requires proof of intoxication.38

Jeremy Horder explores the uncertainty of the doctrine when he reports that ‘[m]uch understandable confusion has been caused by this distinction, and in particular the unappealing notion that evidence of voluntary intoxication itself constitutes or supplies evidence of mens rea in crimes of basic intent, even if not in crimes of specific intent.” Clearly dissatisfied with the notion of using voluntary intoxication to construct mens rea for ‘basic intent’ offences, Horder prefers to reason the distinction along the lines of direct and indirect intention.40 His argument has the appeal of distinguishing – as specific – an offence which has as its aim direct harm; from the basic offence which only intends a dangerous (if prohibited) act. Since the reckless firing of a shot into the air lacks any goal other than as an expression of exuberance, it is basic – and therefore needs no proof of mens rea. On the other hand, a shot fired at somebody is specific, and requires a more substantial inquiry into (and proof

37 Law Commission, Note 26 at 23.
38 ‘Indeed, if the accused is charged with a “basic” intent or “recklessness” offence, any attempt by him to use this type of evidence will usually be fatal to his case as the effect of it will be to relieve the prosecution from their normal burden of having to prove mens rea’: Note 34 at 151.
40 ‘The proposition that comes closest to being a rule is the notion that an allegation that a crime was committed with basic intent is an allegation that is was committed by gross negligence or recklessness, whereas the allegation that a crime was committed with a specific intent is an allegation that nothing less than proof of the particular intention (or specific knowledge or belief) at issue will suffice as proof of mens rea’: Note 39 at 537.
of) the prohibited intent.

Horder’s struggle to make sense of the doctrine embodies the flaws of the ‘victim-is-essential’ rationale. For this doctrine to have any moral or pragmatic validity, so that it can render judgment on what inebriated persons do and warn their peers, requires the absurd reasoning that the nature of a basic offence can penetrate the fog of intoxication – whereas the characteristics of a specific offence are accepted as lost in the haze.

The first attempt to evade the reality that harm-doing capacity rules therefore crumbles.41

The Recklessness Approach

An alternative approach is to extend culpability by imputing recklessness to the choice to risk intoxicated offending. The Law Reform Commission of Victoria sees English law as moving to this approach in an attempt to extract itself from the problems created by the basic/specific intention doctrine.42 By this approach, legal intoxication becomes punishable not because direct intention has been manipulated to focus on the offence (as with the constructive approach) but because the decision to become intoxicated has opened a ‘window of liability’ which makes the person responsible for what should have been foreseen.43 The Law Reform Commission of Victoria points out that a recklessness approach virtually erases the requirement that full mens rea be present at the moment of the actual (subsequent) offence.44

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41 Although the High Court rejected the Beard/Majewski distinction of basic and specific/ulterior intent in O’Connor in 1980, in 1996 s 428 was inserted in Part IIA Crimes Act 1900 (NSW) to restore the exclusion of intoxication evidence when the accused is charged with a basic offence.

42 ‘Majewski has been criticised in England and there has since been a change of emphasis in the House of Lords. Instead of saying that evidence of gross intoxication is not relevant if the offence is one of general intent, it has been held that such evidence is not relevant if the offence is one which may be committed recklessly’: Law Reform Commission of Victoria, Note 26 at 10.

43 Lord Simon of Glaisdale advanced a similar concept of mens rea, when he said ‘there is nothing unreasonable or illogical in the law holding that a mind rendered self-inducedly insensible (short of M’Naghten insanity) through drink or drugs, to the nature of a prohibited act or its probable consequences is as wrongful as one which contemplates the prohibited act and foresees its probable consequences (or is reckless as to whether they ensue)’: Majewski, Note 30 at 479.

44 ‘In practice, offences which may be committed recklessly will include almost all offences since it is only in attempts, conspiracy and a few other offences that the mental element is the ‘intention that particular thing should happen in consequence of the actus reus’, rather than ‘recklessness as to whether that particular thing should happen or not’. Since self-induced intoxication may itself
However the English Law Commission itself was unimpressed with equating intoxication with recklessness, criticising that recklessness is the *deliberate* ignoring of a foreseen risk – saying ‘it would be arbitrary for such a rule to apply to an offence because it may be committed “recklessly”. That term normally signifies that the defendant must foresee a particular risk, but the intoxicated defendant envisaged by this rule would have been “reckless” in a moral, rather than a technically legal sense.’\(^{45}\)

So recklessness is not an adequate substitute for intoxication, since – when dealing solely with offences committed while inebriated – intoxication renders the person at least partially incapable of appreciating (and then ignoring) risk that is fundamental to recklessness: the *capacity* to make a prohibited choice was reduced, perhaps entirely absent.

The second attempt to evade the importance of capacity has fallen.

**Summary**

The argument presented so far in this chapter in support of the current control over the use of alcohol – that to deem offenders were sober, because it would have been socially preferable that they had been – risks being an absurd fiction. The best justification may be that conscious intention is so central to criminal conviction that, when faced with the problem of ‘impaired intention’ thwarting the law’s action, the constructivist approach is to move the point of choice back to when the mental capacity was unimpaired. In principle, this approach to voluntary intoxication is modelled on felony murder: the act of becoming intoxicated negatives the protection of mens rea, so any subsequent offensive act is presumed intentional.\(^{46}\)

\(^{45}\) Law Commission, Note 26 at 47.

\(^{46}\) As Mitchell Keiter proposes, ‘[t]he felony-murder rule deters on several levels, it deters against ‘accidental’ killings during felonies and it deters the underlying felonies themselves, by attaching severe penalties to their potential consequences. Similarly, a full responsibility rule will deter instances of severe intoxication as well as promote responsible behavior by inebriants, such as locking away firearms and car keys before consuming’: Keiter M, ‘Just Say No Excuse: The Rise and Fall of the Intoxication Defense’ (1997) 87 Journal of Criminal Law and Criminology, 482-520, 509.
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Not only does this approach confuse the ‘elevated responsibility’ action of felony-murder for the strict liability effect of ‘full responsibility’ (the subjective circumstances of the offence are simply ignored), the felony-murder analogy is inappropriate as failing to address the actual progressive effect of intoxication on foresight and harm-evasion. Clearly Keiter visualises drinkers planning to become thoroughly intoxicated, as if such preparation was akin to soberly organising a robbery. The reality is (as amply demonstrated by the campaign against intoxicated driving) the capacity to fulfil an intention is corrupted by intoxication (intoxicated drivers cannot drive as well as they believe). Even if a ‘drunken intention’ can be formed, the ability to carry out a consequent act is progressively destroyed.

Can Australia, in legislation, do any better?

*Australian Legislation*

The various Australian parliaments have legislated four distinct models of response to offending behaviour where the accused is intoxicated:

- punish as if sober: the *intoxication-ignored* model – Commonwealth (Cth) and New South Wales (NSW)
- accept incapacity, but preclude it: the *defence-disqualified* model – Queensland (Qld) and Western Australia (WA) Codes
- impute awareness: the *presumptive foresight* model – Northern Territory (NT) and South Australia (SA)
- distinguish the offence: the *two tier* model (Cth, NSW, Qld and WA Codes).

In almost all jurisdictions, the drafting produces formulations that satisfy more than one model. I suggest that such imprecision stems from attempts to legislate a moral reaction to social irresponsibility, rather than accept the truth of the offender’s diminished capacity for sensible behaviour.
The intoxication-ignored model

The Commonwealth\(^{47}\) and NSW\(^{48}\) simply ignore voluntary intoxication, and view the accused’s actions as if sober. The test is what the reasonable person would have done.\(^{49}\) NSW further negatives any inquiry into the accused’s actual state of mind by allowing the actus reus alone to provide for conviction where the accused was intoxicated.\(^{50}\) So in fact the NSW formulation withdraws the protection of mens rea once an impaired state of mind is evidenced. Even by simply requiring the tribunal of fact to ignore the fact of intoxication, any subjective requirement has been supplied by construction.

In effect, there is no point in the defence raising the issue of intoxication. Tactically, the defence is compelled to present the accused’s actions as within a reasonable (and sober) perception or mistake. Such an approach clearly distorts the actual nature of the event in question, and imposes a second moral standard in respect of the drinking as well as the subsequent behaviour.

The defence-disqualified model

The Codes of Queensland and Western Australia accept (in a common formulation) that alcohol produces a state analogous to ‘mental disease or natural mental infirmity’, but then refuse to allow such a defence if the intoxication was ‘to any extent intentionally’ chosen.\(^{51}\)

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\(^{47}\) Section 4.2 of the Criminal Code Act 1995 (Cth). This Act is a complement to the Crimes Act (Cth).

\(^{48}\) Section 428E of the Crimes Act 1900 (NSW).

\(^{49}\) Cth s 8.3; NSW s 428F.

\(^{50}\) NSW s 428G.

\(^{51}\) Schedule 1 and The Criminal Code, Criminal Code Act 1899 (Qld); Schedule 1, ss 27, 28 of the Criminal Code Act Compilation Act 1913 (WA).
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The result is logically that the act of becoming intoxicated is sufficiently morally deficient that the reality of impairment is withdrawn as a factor. While the result is probably very similar to the NSW intoxication-ignored model, that the censure of drinking overwhelms the medical reality of intoxication is far more obvious.

The presumptive foresight model

The Northern Territory Criminal Code Act presumes ‘evidentially that the accused person foresaw the natural and probable consequences of his conduct.’\(^{52}\) By accepting the effect of intoxication when ‘the intoxication was voluntary’,\(^ {53}\) this formulation allows evidence of intoxication to rebut the presumption, where the issue was lack of foresight rather than actual malice. So the offence is not of acting in disobedience of the law, but of doing or risking a prohibited harm while intoxicated – more a tortious approach than criminal law.

Perhaps the most rational use of presumption is the South Australian formulation, which analyses the timing of the intent-formation and the intoxication, so that only an intent formed ‘before becoming intoxicated’, and when the intoxication was undertaken ‘in order to strengthen his or her resolve’, is to be presumed as full intention.\(^ {54}\)

However, it appears difficult for a tribunal of fact to deal with degrees of intoxication, when its only choice is either to convict or exculpate on the basis of the diminished capacity for intent-formation.

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\(^{52}\) Criminal Code Act, 1983 (NT) s 7(1)(b)

\(^{53}\) Section 7(1)(b)

\(^{54}\) Criminal Law Consolidation Act 1935 (SA) s 268.

(1) If the objective elements of an alleged offence are established against a defendant but the defendant’s consciousness was (or may have been) impaired by intoxication to the point of criminal irresponsibility at the time of the alleged offence, the defendant is nevertheless to be convicted of the offence if it is established that the defendant—

"(a)" formed an intention to commit the offence before becoming intoxicated; and

"(b)" consumed intoxicants in order to strengthen his or her resolve to commit the offence.
The ‘two tier’ models

The Commonwealth,\textsuperscript{55} NSW\textsuperscript{56} and the Code states of Queensland and Western Australia\textsuperscript{57} have all incorporated the English ‘specific intention’ distinction, so that an intention to \textit{act} offensively (\textit{general} intention) cannot be defeated by intoxication, but an intention to achieve a prohibited \textit{result} (\textit{specific} intention) is subject to the effect of intoxication.

As was argued earlier in this chapter, this distinction produces some odd effects – such as providing the inebriated offender with the protection of mens rea (perhaps presuming that a consequence-based offence carries the more serious penalty) when there is an actual victim, and denying this shield when there is not.

The Commonwealth Code\textsuperscript{58} makes a further distinction between direct intention and acts done by accident or mistake of fact. In the latter case, intoxication can be considered as an exculpating factor. This distinction reflects the presumption employed in the Northern Territory.

The Northern Territory has devised another split in censuring intoxication, so a prosecution for an offence against property can be defeated by intoxication.\textsuperscript{59} This process is not available for offences against the person. Such legislation – heavily weighted towards protecting the individual from drunken attack – reverses the ‘specific intention’ doctrine, taking attacks on the person beyond the reach of an intoxication defence.

Clearly these formulations fail to address the central issue: the offender was befuddled at the time of the offence and, if the law is to excuse those who \textit{could not} do any better, it should excuse those intoxicated.\textsuperscript{60} Of course I accept that the law may properly censure people who deliberately enter this

\begin{itemize}
\item \textsuperscript{55} Section 8.2 \textit{Criminal Code} (Cth).
\item \textsuperscript{56} Section 428C \textit{Crimes Act} (NSW)
\item \textsuperscript{57} Section 28 Qld & WA Codes.
\item \textsuperscript{58} Section 8.2 \textit{Criminal Code}
\item \textsuperscript{59} Section 383 of the \textit{Criminal Code Act}, 1983 (NT).
\item \textsuperscript{60} While it is possible to argue that any \textit{degree} of intoxication can be addressed in sentencing, the question is whether it is best seen as a mitigating equivalent to previous convictions – also denied the guilt-finding court. This issue highlights the artificiality of separating these processes, a problem I will attempt to resolve in \textit{Chapter X}. 
\end{itemize}
state, but surely only for the choice to abandon responsible behaviour – not for what subsequently happens when the drug takes over. The Law Reform Commission of Victoria reasoned, in 1986, that the state of intoxication cannot be permitted to stand in place of actual intention, without such a doctrine damaging the fundamental concept of mens rea.

Another attempt to evade the difficult reality – that choosing to become intoxicated is distinct from then becoming a social liability – has failed.

**Australian Judicial Reasoning**

As far back as the mid-1970s, Australian judicial reasoning has been seen as preserving the subjective approach via the requirement for a voluntary act. Raoul Wilson distinguished that '[i]n contrast to the English practice of withdrawing the defence of involuntarism in cases of self-induced intoxication, the Australian courts have consistently applied the principle that the accused can never be responsible for his involuntary act.' He explains that the difference has been achieved by the Australian courts locating voluntariness as an element of both the actus reus and mens rea.

In *O’Connor*, by a majority of four to three, the High Court agreed with the Supreme Court of Victoria that intoxication is a relevant factor in assessing the intention to commit an assault. While Murphy J (in the majority) abstained on constitutional grounds from making any direct finding on the relevance of intoxication, three of the majority rejected the *Beard* doctrine of confining the intoxication defence to offences of specific intent. So Australian common law since 1980 has been to allow evidence of intoxication without concern for any

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*Nor can evidence of intoxication, however gross, be accepted as equivalent to proof of a blameworthy state of mind, to justify the imposition of criminal liability. If criminal liability is imposed without proof that the defendant acted voluntarily and intentionally, but merely on proof of intoxication, that would be constructive criminal liability*: Law Reform Commission of Victoria, Note 26 at 6.

*In England the courts have fused questions of volition with mens rea considerations and this dispensed with the 'voluntary act' requirement when intoxication is in issue in crimes of 'basic' intent. In Australia, the courts by locating the 'voluntary act' with the actus reus may require that an intoxicated offender be acquitted because the actus reus has not been proved (beyond reasonable doubt). Equally, the lack of mens rea will be sufficient to exculpate*: Note 9 at 25.
distinctions between specific and general intention. In Wilson,65 the Queensland Court of Appeal endorsed the trial judge’s allocating intoxication to evidence against mens rea,66 so the jury was to consider whether the level of intoxication was sufficient to destroy any significant intention.67

This is a move in the right direction. Intoxication as a defence is now similar to necessity, the central issue being: does the evidence show that there was a sufficient external reason driving the commission of the offence to warrant complete inculpation?68 The remaining question is whether, if the defence rarely succeeds, this reveals that moral censure prevails over fact when a court finds guilt? David McCord sees the issue of intoxication as being more a moral reaction than one informed by medical fact:

What is clear from the legal history of the effect of voluntary intoxication on mens rea is that the vast majority of jurisdictions on the United States have a rule of law that is based on a curious mixture of, on the one hand, moral sentiment, and on the other, unexamined

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66 The Trial judge’s instructions were:

‘Now, I tell you and I already have told you as a matter of law the intention to cause a specific result – that is, to kill – is an element of the offence of attempted murder. That is the law. You have to intend to cause the specific result; that is, to kill. So intoxication becomes relevant and intoxication whether complete or partial and whether intentional or unintentional is relevant. That means that it does not matter, it is not essential as a matter of law, that the intoxication be complete and it does not matter whether he intentionally went out and got drunk, but it also means that a specific intention can, as a matter of fact, co-exist with partial intoxication. In other words, while partial intoxication may be a foundation for a finding that in the circumstances of the case a particular person was unable to form the specific intention to kill, it is not necessarily so. It is a matter of fact for you. If you find he was partially intoxicated, then you have to decide whether the degree of intoxication was such as to preclude the formation of the specific intention to kill.’ Wilson, Note 65 at 630.

67 The American Model Penal Code has proposed that, where recklessness is a sufficient mental state for conviction, reduced foresight due to voluntary intoxication is to be ignored:

s 2.08(2) When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

As the English Law Commission reports [Note 26 at 42], the Model Penal Code approach to intoxication has been adopted in 14 jurisdictions in the USA. The largest, and most notable, of these jurisdictions is New York. The intoxication provisions of the Model Penal Code are adopted in the following form in that state:

s 15-25: Intoxication is not, as such, a defence to a criminal charge; but in any prosecution for an offence, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

s 15-05(3): A person acts recklessly with respect to a result or circumstance described by a statute defining an offence when he is aware of and consciously disregards a substantial and unjustifiable risk that such a result will occur or that such circumstance exists. … A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

By contrast, the Commission reports that Hawaii and Indiana allow intoxication as a defence to all offences. Hawaii makes no distinction between direct and indirect intention, and the Indiana Supreme Court has rejected the English concept that there is any difference between basic and specific intention: Law Commission, Note 26 at 63.

68 Any partial culpability for drunken offending being expressed in sentencing discretion.
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factual assumptions regarding the effects of alcohol on human mental functioning.\textsuperscript{69}

The issue of intoxication, as it influences culpability, is therefore a battleground for a number of conflicting analyses:

- Can the \textit{decision} to become intoxicated discredit any claim of subsequent unintended harm? That people may become less cautious when intoxicated, than when sober, might qualify as \textit{enhanced recklessness}, but is it intent?

- Is there any proper difference between subsequent harm directly or indirectly inflicted? Has a drunken assault a different legal character to impaired driving?

- Is there a point at which sufficient intention has been so obliterated that, while still able to an act, the offender is no longer legally competent?

\textbf{Conclusion}

Any doctrine with the capacity to deter incidental harm obviously conforms with the fate-management paradigm. The constructive or strict approach to intoxication as a defence – when the impairment or harm done is minor – is, in common with the other such doctrines I have explored, clearly a means of controlling indirect intention. Proving an intention to offend (by evidence of foresight and conscious choice) are now the key to much modern criminal culpability. Capacity (rather than willingness) to form that intention is undermined by intoxication. However if this loss of capacity is self-selected, and if the law is to exercise control over circumstances known to be potentially anti-social, citizens should not be allowed to voluntarily depress their capacity to act responsibly. As George Fletcher notes

\textup{[t]he issue of intoxication is buffeted between two conflicting principles. One principle is that if someone voluntarily gets drunk and then commits a crime, his prior fault in getting drunk should deprive him of the claim that he was not responsible for his drunken acts\textsuperscript{70} ... and the principle that liability and punishment should be graded in proportion to}

\textsuperscript{69} Note 17 at 389.
actual culpability.\footnote{Note 70 at 847.}

The prevailing approach to this dilemma is to switch between these two principles, imposing a norm initially, then abruptly reversing to accept the ‘incapacity’ concept in a defence. In \textit{Majewski}, Lord Elwyn-Jones saw the initial election as constructing culpability, by the accused having ‘cast off the restraints of reason and conscience’, so becomes ‘answerable criminally for any injury he may do in that condition.’\footnote{[1977] AC 443, 474-5.} Yet whatever the moral repugnance the law may feel towards ‘drunken conduct … perhaps because it is so often a matter of thoughtless self-indulgence [so] one of the more offensive categories of inadvertent wrongdoing’,\footnote{Gough S, ‘Intoxication and Criminal Liability: The Law Commission’s Proposed Reforms’ (1996) 112 Law Quarterly Review, 335-51, 337.} at high levels of intoxication the courts are forced to accept the reality that the ability to form active criminal intention \textit{is depreciated}, perhaps even sufficiently absent to render punishment futile.

The current doctrine is caught between imposing a standard of citizenship, and accepting an actual limit of capacity. It borrows the prevailing ‘hybrid test’ technique common to all the defences outside permanent impairment, not as two tests of the same event, but rather as discrete tests applied to different events: different levels of impairment; and different characteristics of offences.\footnote{I will revisit this ‘sequentialist’ concept when reconstructing the hybrid ‘honest and reasonable’ test of the non-insane defences in \textit{Chapter IX}.} What needs to be found is some means (other than sentencing discretion) of avoiding the sudden, violent switch from intoxication as a substitute for the \textit{requirement} of proven intention, to intoxication as the substitute for the \textit{existence} of intention – the reversal of role from a norm to a fact.

The most critical measure of culpability is ignored when the process injects a moral judgement too early in the process. Recreational drinking is legal. So while it may appear to make sense for the court to say to someone who was intoxicated at the time of the offence, when that court is rejecting a defence of intoxication, ‘You \textit{should} have stayed sober’, in reality two acts of bad
citizenship (one legal, the other prohibited) are being compacted together: the irresponsible act of becoming intoxicated prior to a foreseeably risky or nuisance activity; and the subsequent offence. They are logically distinct, and if the court is to isolate any prohibited choices made by the offender, the two acts should be considered separately.

At the first level, the faulty prior risk-evaluation (the decision to gamble against the impairment contributing to harm) is imported into the subsequent incident, creating a form of strict liability. Since excessive drinking is hardly likely to be seen as having any valid social utility, it is not assessed against ‘reasonable’ behaviour. Basic offending is therefore strict fate-management. At the more ‘senior’ level it is allowed to remain irrelevant to the impaired offending (the court assessing only whether there was totally corrupted awareness of risk at the time the harm was done), so switching to a ‘dualist’ analysis. Specific offending has now become subjectivist risk-control.

In essence, the court assesses whether such deliberate risk-infliction was chosen at the time of commencing to become intoxicated – so that choice becomes a criminal offence. The question is whether the law can also recognise the progressive incapacity created by intoxication – and discount its response to any illegal consequences in line with the diminished competence. In effect, the question is whether behaviour relevant to intoxication can be split into two discrete offences.

The thesis will suggest, in Chapter X – A Radical Reform of Criminal Law, that the ‘conscious endangerment’ approach may provide such a development. Pillsbury records that ‘[s]trict adherents of the awareness approach argue that individuals deserve punishment only for taking risks they realized when sober. They advocate the creation of a new offense of dangerous drinking: drinking where the individual knows that intoxication may lead to dangerous conduct.’\(^75\) I agree with this approach, provided it remains rooted in actual awareness and choice, and is not allowed to descend into another form of construction.

\(^{75}\) Note 14 at 187.
I now need to answer the initial questions:

1. Is the current regime capable of establishing and announcing a clear point at which the use of intoxicants is seen as more destructive than productive, and therefore illegal?

This was never the objective of the current process. Instead, the threshold between allowing voluntary loss of capacity as an excuse, and deeming it irrelevant, has been based on some compound of the degree of lost capacity and the scale of available penalty for the harm subsequently done. So instead of the law reacting more vigorously as the inflicted harm overwhelms any personal benefit, the response is reversed: the offender gains the additional protection of intoxication as a defence as the created situation deteriorates. Again we see the inadequacy of culpability reserved until harm is actually done; along with that of yet another ‘deeming’ process.

My remaining question is whether high levels of intoxication or subsequent offending are so completely different to the basic model – as endangering events – to warrant exculpation?

2. If not, is there a better approach to controlling the generation of such danger?

While conscious endangerment can retain, as the relevant fault, the decision to abandon social responsibility, it is not condemned to impute culpability from the mere act. Someone with little knowledge of the effect of alcohol cannot be seen as completely ‘conscious’ of the danger. Actual capacity to form intention should not be shunted to one side just because the community is impatient to erase bare unpleasantness. The result is both unjust and impractical.\textsuperscript{76}

By this reasoning, the initial hypothetic can be answered: A sober offence is more culpable than an intoxicated one, since the decision to offend was reasoned at that offender’s full capacity. If the society wishes to control the

\textsuperscript{76} As I will finally argue in Chapter XI - Conclusion, dealing with degrees of culpability is the role of a sentencing court. The problem is to authorise this process, without the community regarding a finding of guilt as one of total culpability.
INTOXICATION

choice to become intoxicated per se – as deliberately unleashing the risk of violence – it has to be prepared to step in at the choice stage, with all the attendant risks of oppressing harmless fun. Retroactive construction (imputing any violent choice to the offender when sober) assumes that the individuals know their own propensity for such behaviour when drunk, so amounts to a presumption of guilt.

While the issues invoked by intoxication have their focus on the positive mental element (choices to act), the doctrines I now explore are those that inculpate for a death caused by neglect; and which sidestep any barrier created by the doctrine of conjunction by falsifying the actus reus. That is, they invent the necessary fact when that is required to manage lethal danger.

The next chapter forms part of two devoted to homicide. The distinction is between an analysis of direct and indirect intention in the first chapter; and in the second the issue is artificial compliance with the doctrine of conjunction. The first therefore picks up the theme of false distinctions developed in this past chapter; the second leads on to yet another modern fiction, vicarious corporate culpability.

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77 Even regimes that place the responsibility on the suppliers – to refuse service to those obviously intoxicated – tend to ‘close the stable door’ somewhat late.
VI
UNINTENDED DEATH 1: BAD GAMBLER

Introduction

The traditional understanding of the division within homicide is between an act causing death, performed with the goal of killing (or the willingness to risk it); and a lethal act carried out without considering its deadly potential. This thesis suggests that – even if there is any useful difference between direct and incidental intention when they both deliver death – the present division is wrongly located. Distinguishing reckless murder from manslaughter certainly fails to reflect any populist view that there is a significantly greater ‘insult’ done by someone who wilfully attacks another citizen’s rights,¹ as opposed to the offender who only does so in passing. More critically, it has obscured the reality that all lethal acts exist on a scale of disregard² – and that this scale is better expressed (and administered) by evaluations of ‘conscious endangerment’.

Indeed, the distinction between direct and indirect intention may be more the product of procedure. Controlling deliberate killing is a relatively straightforward matter of identity, and satisfying the co-existence of actus reus and malice. Where legal protection from mortal harm becomes more difficult is when criminal law attempts to lay down standards of lethal risk-taking. That is, when it attempts to draw the line between a pursuit that carries a risk which must be accepted as just part of legitimate enterprise, and when the society has decided – via its criminal law – that any social benefit is overwhelmed by the risk of catastrophic result.³ It can be seen as a pragmatic analysis of


² Robin Charlow summarises ‘Garvey argues that wrongs, which are criminal, differ from harms, which are not, because they add a moral injury to an otherwise only material injury. That moral injury is the symbolic message of contempt, insult, dishonor, disrespect, or the like that one conveys when one considers himself free to pursue his own ends at the expense of someone else’s, effectively saying “I’m better than you,” or “I count but you do not”: Charlow, Note 1 at 324.

³ When entering military training in preparation for actual warfare during the 20th Century, recruits accepted (and promulgated) the myth or fact that 10% casualties - due to accidents with munitions and vehicles - was tolerated in training. Regardless of whether war was seen as high drama or emergency, it authorised profound incidental hazard.
when the common good must be allowed to put individuals at risk. This raises two issues: (1) Whether there is any real purpose served by the distinction between direct and indirect intention; and (2) where, in a continuum of potential catastrophes, criminal law should set its prohibition.

Just how erratic the direct/indirect distinction can become in practice is demonstrated by the sequence of decisions in the 1985 case of Moloney. After a long night of heavy drinking together, the offender's stepfather (of whom Moloney was accepted as being very fond) dared him to pull the trigger of the shotgun he had just loaded. Moloney did so and the shot killed his stepfather at point-blank range. Moloney was charged with murder and in his defence denied any intention to kill.

Such a state of mind (if the subjective/objective debate is temporarily suspended, and such actual lack of intention is reasonably possible) should not even attract conviction for manslaughter. Instead it had been seen as murder. This thesis maintains that at most it was lethal stupidity, and questions whether supervising such faulty citizenship is the job of criminal law. So not only had the apparent wish of the accused been displaced (the continued relationship with his step-father), but he was made responsible for the consequences alone of the 'voluntary act'.

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4 This is an extension of the Benthamite principle of law adjudicating 'the greatest happiness for the greatest number', in that it balances risks against potential benefits. It also accepts more openly the clash of interests between the offender and the society. As Alan Calnan puts it, '... conduct which exceeds a community's tolerance of risk, and causes harm in the process, is wrongful in the sense that it subordinates the community's interests to the grasping will of the actor': Calnan A, Justice and Tort Law (Durham: Carolina Academic Press, 1997) 113.

5 Moloney v R [1985] AC 905.

6 The evidence indicated that Moloney was heavily intoxicated at the time, raising the issue of objective or subjective testing dealt with in Chapter VII - Intoxication. Moloney was convicted of murder, after the trial judge had directed the jury that 'particular intent' (Lord Bridge of Harwich at 906) includes (a) when he desires it to happen, whether or not he foresees that it will probably happen; and (b) when he foresees that it will probably happen, whether he desires it or not.'(Bridge, 917). This decision was upheld by the Court of Criminal Appeal but reversed by the House of Lords, who rejected the trial judge’s point (b) as misdirection, ruling that ignoring foresight cannot displace full intention for murder, and can only evidence intention (Bridge, 908; 928). The Lords accepted that the accused acted with inadvertence: he did not actually recognise, or reasonably foresee, what was the potential outcome of pulling the trigger (Bridge, 917).

7 As Francis Jacobs puts the issue: 'It is one thing to measure prudence by the test of the average man; it is another so to measure intelligence. Stupidity is a misfortune, not an offence': Jacobs F, Criminal Responsibility (London: Weidenfeld & Nicolson, 1971) 135.

8 Given the trial judge's instructions, a sole focus on capable intention makes it quite correct that the Lords reacted as they did. For foresight to have been introduced to the calculation, as a measure of wisdom (so its absence characterises stupidity as recklessness) elides a range of issues: Does
The final result was to characterise foolishness as distinct from recklessness, and more akin to negligence. The case serves as an example of the ‘intellectual Wonderland’ the criminal law enters, once it tinkers with a border between what someone wanted to happen and what they would prefer didn’t. It shows how perilous is the position (under the current law) of someone who was being stupid, but at the limit of their capacity, when that stupidity becomes lethal. Even if manslaughter is seen as an appropriate means of warning people off choosing to be stupid, the question is whether it needs to be distinct from choosing to kill as part of an enterprise.

The next two chapters explore the current division from an alternative position: that a more appropriate distinction is between those who are seen to have offended by ‘gambling’ badly and fatally; and those whose culpability is to have created situations for another agent to deliver the deadly harm.

Chapter Goal

Paul Robinson and John Darley suggest, as part of their research into community attitudes to culpability for various levels of risk-taking, that there are three objective elements to all offences – conduct, result and circumstances – which are then to be evidenced at one of four levels of subjective culpability: knowledge, recklessness, negligence or faultlessness. This chapter investigates the extension of culpability for homicide into recklessness and negligence. I examine extended murder, as the foreseen risk and actual delivery of a lethal catastrophe to another; then manslaughter, as an offence of neglect or construction, and the problems caused by ignoring the actual intention and punishing the result. My inquiry questions whether the current regime of imputed responsibility effectively polices the border between avoidable harm and sheer chance, and whether (since all homicide currently depends on harm being done) incidental killing is conceptually more at home as a tort. The chapter will explore whether the blurring of any distinction for culpability – between a killing that was intended, and one which

the lack of foresight need to be proven deliberate? Or is it objectively offensive (the reasonable person would not have been so silly)? Is foolishness a breed of recklessness, or is it negligence?

was incidentally risked – is to ignore the fundamental differences in what criminal law punishes and what civil law restores.

Even if we accept that killing is so serious a matter that reckless murder and manslaughter are appropriate as criminal wrongs, the chapter questions if culpability should be based purely on whether the killer did know there was a risk, or should have known – the classical subjective/objective division. Although conviction for recklessness requires proof of actual apprehension of an imposed danger, once the ‘visibility’ of that danger sets the culpability threshold, an objective test seems unavoidable. The ultimate question is whether, by setting the threshold for culpability at some unacceptable degree of ‘knowability’ embedded in the circumstances, the actual proscription becomes merely a prerequisite for a moral judgment.

**Recklessness**

In a broad preamble to criminal liability, The Law Reform Commission of Canada outlined its definitions of the three levels of mens rea:

- *intent* as ‘acts done with intent … [as] attacks on basic values’ (including ‘oblique’ intention, where the offender does not want to do the harm, but accepts it as certain and ‘necessary to his actual purpose’);

- *negligence* as ‘carelessness: he ought to have realized that his conduct would increase the likelihood of the offence occurring’; and

- *recklessness* as intermediate between the two, ‘he does an act that furthers an offence, and does so knowing that it may well do so’.

Edward Griew argues that English criminal law is erratic in how it expresses the mental element of crime, ranging through ‘malice’ to ‘wilful’ and even to ‘reckless’, and that this ‘indifference’ to precision and consistency forces

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LETHAL GAMBLES

courts to fall back on non-legal definitions. As if to make Griew’s point, Colin Howard poses two different types of recklessness: the first becomes an offence dependent on what happens after the decision is made; the second because of facts which already exist, but which the accused does not know for certain.

By definitions provided above, the latter example is more an issue of negligence: not bothering to find out whether an offence is (in this case) certain. But Howard’s point is sound: the umbrella-taker knew there was a risk and ignored it, and it is this choice that converts what would otherwise have been an unpunishable mistake into an offence. As Stanley Yeo reports:

Although the [English Law] Commission recognised wilful blindness as a fault element in the criminal law, it appears not to have regarded such a mental state as sufficient for murder. This is inferred from the absence of the term ‘knowingly’ in the Commission’s definition of murder.

On an alternative reading of this draft provision, it could be argued that since the prosecution need not prove knowledge of some level of risk, a more strict responsibility applies. Yeo even admits as much, at least as the level of certainty rises. However, Yeo is then forced to struggle with the fantasy that the harm done which brought the issue into court has – at the point when the reckless act was launched – not yet (and may not have ever) happened.

In other words, once the concept of risk (or incidental intention) is allowed to co-exist in criminal law with direct intention, the waters are hopelessly muddied. Dealing with the judicial criticism of the distinction between actus

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12 ‘The term “recklessness” has been enthusiastically adopted by modern jurists to express a state of mind, characterised by conscious unjustified risk-taking, that can, along with “intention”, properly found liability for serious crime’: Note 11 at 60.
13 In the first a hunter decides to take the risk of missing the chosen target and hitting a person the hunter knows is present beyond the quarry; in the second someone takes an umbrella from a stand, realising that it may not be theirs: Howard C, Criminal Law (Sydney: LBC, 1977), 306.
14 The reference to the absence of ‘knowingly’ is to cl 54(1) of the Draft Criminal Code.
15 Yeo S, Fault in Homicide (Annandale: Federation, 1997) 42.
16 ‘As for the English law reform proposals, there has been strong support for extending the meaning of intention to cover foresight of virtual certainty’: Note 15 at 31.
17 ‘Another problem is that, on one view, so long as the relevant consequence is not absolutely certain to arise from the accused’s conduct, there is a possibility that the consequence may not materialise. As such, what is involved is foresight of a risk of the consequence occurring even though the probability is very high as indicated by such expressions as ‘virtual certainty’, ‘natural consequence’ or ‘in the ordinary course of events’. And once we speak of foresight of risk, we are dealing with recklessness’: Note 15 at 34.
FATE MANAGEMENT

reus and mens rea, James Gobert concedes that ‘[w]hen an offense is defined in terms of recklessness or gross negligence … the line between actus reus and mens rea becomes more blurred.’

Perhaps the most intuitively troubling aspect of recklessness, as behaviour which appears to require much more potent control than is available under any civil obligation to restore, is presented by Colin Howard:

The case has been put of an aircraft designer who places a bomb in the prototype of an aircraft designed by a competitor when it goes up for a test flight. D’s purpose is only to gain an advantage by destroying the competing aeroplane but he knows that incidentally the test pilot will be killed. It is hard to accept that if the bomb fails to explode D is not guilty of attempted murder.

Yet the distinction with a (frustrated) homicidal intention is clear: the designer intended to enhance the endeavour’s commercial chances, but chose an illegal method: property destruction. Killing the pilot was not an essential goal of that wrongful method. It was incidental, unavoidable, perhaps even regrettable to the designer. Why, then, do we so readily class it as murderous?

The key element to a conviction for recklessness is a bad gamble. What authorises punishment is not simply the election to take a prohibited chance but that a gamble turned out to be wrong. Samuel Pillsbury summarises that ‘Anglo-American criminal law divides unintentional criminal homicides into two basic categories: 1) depraved-heart murder; and 2) involuntary manslaughter. With the exception of some forms of felony murder, depraved-heart murder represents the most serious form of unintentional homicide in Anglo-American law. Its hallmark is extremely dangerous conduct for which there is no justification’. If Pillsbury is correct, Anglo-American law does not distinguish between direct and indirect intention. In Australia, according to Yeo, this division remains. Yeo concludes that ‘Australian law recognises intention

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19 Note 13.
21 ‘The Australian courts have largely avoided the difficulties which their English counterparts have had over the meaning of intention as a fault element for murder. They have accomplished this by
and recklessness as alternative forms of fault elements for murder.\textsuperscript{22}

Certainly the NSW \textit{Crimes Act} presents recklessness, grievous battery, felony and intention as alternative heads of murder.\textsuperscript{23} But it remains unclear how recklessness, as a discrete authority for conviction, can avoid the problems embedded in retrospectively punishing a wrong gamble, purely by allowing it to exist alongside intention. All that is avoided is the elision of terms which I argued in \textit{Chapter IV} corrupts the objective test: recklessness means intention. The foresight criteria therefore remain as an inappropriate judgment of the defendant’s criminal culpability if the state has already decided that certain behaviour is dangerous, and announced a penalty as a reaction to anyone inflicting the risk. Whether the lawmakers’ foresight was right or wrong in a particular instance is interesting but irrelevant now. All that matters is that the behaviour sufficiently worried the lawmakers as dangerous, without waiting to see who was right.

The proper goal of any subjectivist inquiry into the behaviour in question is to establish precisely what chosen activity contributed to the offence, then to apply the standard to what was convincingly voluntary. For the accused to escape criticism, the court must come to believe there was a sufficient ‘window of possibility’\textsuperscript{24} that the act was \textit{not} voluntary. As I suggested in \textit{Chapter IV}, the objectivist (when allowed to decide that the \textit{obviousness} of a risk is the key to recklessness) wants to leap over this step, go straight to the outcome itself, \textit{imply} that it was chosen (if that is necessary), then apply the prohibition, without allowing this finding to remain purely the actus reus.

While effectiveness-of-punishment cannot be ignored in any debate over the law’s response to offending, the question is whether this approach is significantly at odds with the general common law notion of a guilty mind as the final element of culpability, and defining that guilty mind so as to capture \textit{endangerment} along with malice.

\textsuperscript{22} recognising recklessness as a distinct type of fault element from intention … left to cover foresight of consequences’: Note 15 at 52.
\textsuperscript{23} Note 15 at 54.
\textsuperscript{24} Section 18.
\textsuperscript{24} The criminal burden of proof.
In concept, establishing manslaughter should be a fairly simple process: if there is no reasonable doubt that a death was caused by a chosen act that had another goal, but the risk of death was sufficiently (objectively) obvious that the act — even if legal — should not have been pursued, the criteria have been met. However the test for whether it was blameworthy or simple bad luck requires the court to place itself in the shoes of the accused, disregard what actually happened, and decide whether the tribunal-of-fact would have foreseen the risk and gone another way to the goal. The offender’s fault is in not choosing to have done likewise. Clearly there is some artificiality to this process. The question is whether this reasoning is essential. If manslaughter were a tort of strict liability, the debate would more or less end once causation and absence of any pleaded mistake are established. Unfortunately it is a criminal offence, so the criminal issue revolves around the concept of deliberateness, rather than simply creating harm.

Let us explore this doctrinal labyrinth to see if there is any logic to setting a range of ever more demanding thresholds — matched by potentially more serious punitive consequences — when the result was perhaps not even what the accused thought possible. To facilitate the discussion, I adopt the categorisation proposed by Yeo:

Reckless manslaughter covers cases where a person causes the death of another when aware of the risk that her or his conduct may cause harm to another.

Negligent manslaughter involves cases where a person causes the death of another by gross carelessness. Under this category will be discussed so-called inadvertent or objective recklessness, that is, where the person fails to appreciate an obvious risk of injury.

Unlawful manslaughter (or constructive manslaughter) covers cases where the death of another is caused by an unlawful and dangerous act.

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25. There is no issue of whether this other route would have been better, just that it would have avoided the certainty the court is trying to ignore.
26. This head of manslaughter does not appear in s 18 Crimes Act 1900 (NSW), but is included in the definition of murder (manslaughter being negatively expressed as every killing not defined as murder). That Yeo has included it demonstrates that the porous nature of the border between the two forms of homicide.
27. Note 15 at 150.
LETHAL GAMBLES

This distinction, between a killing caused by an otherwise legal act, and one flowing from an act already prohibited, mimics Colin Howard, when he reports that ‘[a]s a general rule the law has long since accepted not only that the proper conviction for negligent killing is manslaughter, not murder, but also that even for manslaughter the degree of negligence required is very high.’

What is common to these formulations is some quality of choice which, when exercised, indirectly caused a death. If we allow homicide to depend on a lethal result, is it possible to avoid being drawn into distinguishing between an act which killed en route to a legal goal, and one which was designed to kill but which was driven by some imperative beyond the choice of the killer?

The voluntary/involuntary distinction

So far we have three levels of responsibility for unintentionally causing death: (1) not knowing – but could have done – that there was an unlawful lethal risk; (2) knowing that a risk existed, but going ahead anyway; (3) engaging in lethal activity that was prohibited in its own right.

To this we can add the notion that, even if someone fully intended to kill, some element of that person or the person’s circumstances can impute inadequate lethal intention. In other words, voluntary manslaughter. Alan White explains the general American approach as ‘homicide with mitigating circumstances, e.g. provocation, diminished responsibility, in pursuance of a suicide pact.’

In other words, that the killing was intended, but with the accused lacking, by reason of some individual inadequacy, any real capacity for choice.

To Antony Duff the distinction is that voluntary manslaughter is an intended killing which is excused from murder because of some imperfection in self-control (unreasonable lethality when facing assault; or responding mortally to

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28 Note 13 at 62.
30 This tends to bridge the other formulation that some offences can be excused (because there was no conscious control that can be affected by sanctioning), while some may even be justified as necessary. Veronica Bowen sees the Nebraska formulation of voluntary manslaughter as more narrow – restricted to a provoked killing, and that the Nebraska Supreme Court in State v Pettit 233 Neb 436, 445 NW 2D 890 (1989) distinguished malice from intent. She argues that the Nebraska Code definition reflects the common law concept that ‘malice and adequate provocation were held to be mutually exclusive concepts’: Bowen V, ‘Intent as an Element of Voluntary Manslaughter: State v Pettit’ (1991) 24 Creighton Law Review, 583-619, 589.
antagonising circumstances); involuntary manslaughter is a killing which results from an inadequate appreciation of the risk (recklessness or negligence) rather than that the harm was intended. Howard expanded this division:

The categories of voluntary manslaughter are killing upon provocation, killing by the use of more force than the occasion warrants in the defence either of oneself or another or in the exercise of a lawful power of arrest or the prevention of a felony, diminished responsibility and infanticide. The categories of involuntary manslaughter are killing by a blow not intended to cause grievous bodily harm or death, killing by criminal negligence, and, possibly, killing by means of certain other unlawfully dangerous acts.

So voluntary manslaughter is one level deeper into culpability than a fully-justified intentional killing, such as in proportionate self-defence. To kill was still the aim of the act, but the killer was only partially competent at the time. Involuntary manslaughter, by contrast, is a conscious act with no criminal intent nor lethal purpose, which lead to a culpable death. How many reasons for punishing an unwanted killing do we have now? You negligently didn’t discover the risk; you knew and recklessly decided to run it; you were busy being feloniously evil anyway; you meant to kill, but lacked the full status of a competent citizen.

In each case, culpability was ‘earned’ prior to the act that killed. Apart from the last category, some goal was chosen which, by following the pursued course, made the death happen – whether this was the intention or not. The question is: should the intention to do something that is in fact permitted, be converted into an illegal intention because it reaped an illegal result?

Since involuntary manslaughter is a killing resulting from either negligence or recklessness, there is still a fault element present. So logically it is possible to decide to be reckless or negligent. The decision to press ahead despite a known risk to others, or to go ahead without fully investigating the possible damage, is a decision, and therefore must submit itself to legal review. It only becomes an illegal decision once fate has decided that the decision to take a

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32 Note 13 at 73.
risk was wrong.

This question again displays the intellectual and logical problems created by making the consequences the primary source of culpability. To take a risk is to take a risk. If that risk-taking is seen as criminal, then the law is already authorised to intervene. If someone runs a risk which is not permitted, that choice alone is the offence. So the act can evidence the intention – if it requires some voluntariness in order to have been performed as it was – but what subsequently happens is hardly the province of criminal law, other than to inform the lawmakers about a risk which may now need to be addressed. Whether the lawmakers were overly cautious is a lawmaking (and political) issue. The citizen is not empowered to decide what risks are socially or economically valid, at least within criminal law. At best that citizen can choose that the advertised cost of performing a ‘nuisance’ offence (illegally parking, for instance) is recouped by some other benefit.33

But when a little elective foolishness risks twenty-five years of incarceration, everything changes quite dramatically. That death resulted incidentally should not on its own be enough. Even that the reasonable person would have foreseen the lethal potential should really do no more than to create some presumption that the offender did foresee such a possibility and, importantly, ignored any legal directive to vacate that risk. For criminal punishment (as opposed to civil restoration) to follow, the killer should be shown to have earned that punishment by an actual decision, however ill-informed,34 which is both illegal and made before the culpable event was played out.

Perhaps this route arrives at much the same result: not bothering to discover a prohibition is still a choice. What is removed from the issue is the reasoning that has authorised the prohibition. Once a prohibition is created, it is beyond individual challenge. Equally, if certain behaviour has yet to be identified as risky, that it actually causes harm has not yet become a criminal law issue.

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33 This can be seen as the equal-but-opposite reaction to Herbert Packer’s ‘crime tariff’ model. ‘The crime tariff is what the seller must charge the buyer in order to monetize the risk he takes in breaking the law’: Packer HL, The Limits of Criminal Sanction (Stanford: Stanford UP, 1968) 277-82. Packer H, ‘The Crime Tariff’, (1964) 33 American Scholar 551.

34 The issue of mistake is addressed in Chapter IX - Defences.
Logically then, since manslaughter is an unintended harm, it can only operate within a regime that is unconcerned by what was intended, so concerns itself with what was avoidably caused. In short, civil law. So can we dispatch manslaughter, and indeed all unintended death, to restorative law? The debate divides quickly into two opposed arguments: retention rests on the ‘augmented response’ contention; and the ‘proportional consequence’ approach favours its despatch.

**The augmented response argument**

Initially (and intuitively) to strip criminal law of control over incidental killing feels wrong: the *bite* of criminal law will be missing, if only the collateral victims have to be restored; the rest of us will be exposed to greater incidental danger if the potential ferocity of criminal law is removed. The question is whether an act that only incidentally caused death should be punishable as if it had both been intended and succeeded. And whether it is more culpable than an act that deliberately attempted death but failed.\(^35\)

Bare prevention theory would suggest that there should be no difference, if the full power of the law is to be allowed to warn as early as possible against any life-threatening behaviour. What was intended is irrelevant; only what was risked matters. Donna Sternicki rationalises that ‘the crime of manslaughter was created out of necessity; it enabled the arm of the law to reach those wrongful killings that fell outside the definition of murder.’\(^36\) While there is generally some difference in penalty – both moral censure and maximum possible sentence – between manslaughter and murder, Sternicki’s rationale sounds suspiciously like that which is used to justify constructive murder.\(^37\) As such, it serves to buttress the view that criminal law has a role well beyond simply responding to malicious behaviour, reaching into censuring judgment below the individual’s capacity.

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\(^{35}\) As I pointed out in *Chapter II*, in some jurisdictions – notably Victoria – attempt attracts a lesser penalty than if fate has favoured completion.


\(^{37}\) One of the doctrines I will examine in the next chapter.
The proportional response argument

The counter argument is that mounting inhibition requires that the force of the law increases as the harm becomes more imminent: the deliberate attempt is more dangerous, so should be more heavily punished. Stanley Yeo sums up the broadly canvassed view that liability beyond any conscious decision to offend is a relic from an autocratic past.38

In other words, modern criminal law has quite deliberately distinguished the deliberate act which achieves its goal, from the act which either fails to deliver or achieves something not wanted. Killing, however, joins the so-called regulatory offences as remaining punishable without direct intent.

Conclusion so far

This chapter (as the first of two chapters dealing with homicide) has sought to study the offence definitions of unlawful killing that include both malice and the willingness to expose others to lethal danger. The current approach is to distinguish between direct intention (firing a shot at someone) and ‘bypass’ intent (firing a shot past someone).39

I have argued that all killing is (to some degree) the outcome of creating a chosen hazard – the only distinction being whether the actor wanted fate to inflict or evade death. The current law is however, that while a shot aimed at another person (but which misses) will be made culpable by the law of attempt, as long as the ultimate target of a bypass risk is lawful, firing such a

38 ‘As relics of an archaic system which did not base criminal liability in the subjective fault of the actor, escape-murder and felony murder have no place in a contemporary society whose views on crime and punishment have been significantly tempered by a greater humanity and an insistence on individual accountability.’ Note 15 at 50.

39 Colin Howard notes that ‘[t]he law of homicide is in a constant state of evolution. In modern times the tendency, especially since Stephen’s day, has been to narrow its scope and very slowly ... to rationalise it in the direction of murder being equivalent to intentional killing and manslaughter to negligent killing’: Howard C, ‘Developments in the Law of Homicide’ [1962] Criminal Law Review, 435-44, 442. However three years later, Morris and Howard complained that, while direct intention is the fundamental conception of blame, murder has its incidental aspects, observing that ‘[w]e habitually regard the intentional wrongdoer as more blameworthy than one who brings about a forbidden consequence without actively desiring to do so. In the law of homicide this attitude is reflected in the distinction drawn between murder and manslaughter. Unfortunately, at the present time the excellence of this distinction is universally impaired by a failure to confine murder to intentional killing. In most parts of the common-law world the special rules relating to killing whilst committing another felony of violence, and to killing whilst resisting lawful arrest, are still good law’: Morris N and Howard C, Studies in Criminal Law (London: OUP, 1964) 5.
shot remains legal so long as it does actually bypass the intermediate person (and is not subject to some form of statutory proscription against dangerousness). So a near-miss is gathered up by anticipatory offences – mainly statutes that evade the doctrine of conjunction by siting the mental element in a voluntary act. The need for common law creativity flows from this requirement that the objective act and endangerment coincide.\(^\text{40}\)

Such examples seem to support the conclusion that both common law and statute view risk-taking as at least equal to malice. The thesis questions whether it is possible to subsume both deliberate harm-pursuits ('direct' intention) and harm-gambles ('indirect' or incidental intention) under the one 'master wrong' of endangerment. Is it significant that all activity carries a risk of failure, but that directly intended activity risks benign failure, while recklessly intended activity risks catastrophic failure? Murder seems to demonstrate that the current regime sees no difference: when either malice or recklessness results in a death, the initial culpability is equal.

For my purposes, the investigation of murder and manslaughter has demonstrated the following characteristics of the current law: (1) That murder encompasses both direct and incidental intention as culpably equal; and (2) The distinction between murder and manslaughter – as between recklessness and negligence – is within indirect intention.

I will address the constructive elements of both murder and manslaughter in the next chapter. I have already addressed the theoretical contribution of determinism to legal standard-setting in the previous chapter. For now my concern is whether the moral rationale can accommodate this structure of guilt; or whether it is better understood as supervising endangerment.\(^\text{41}\)

\(^{40}\) In *Ryan v R* (1967) 121 CLR 205, D claimed that, while robbing a service station with a rifle, he was startled by a sudden movement by the attendant, and shot him purely as a reflex. Police restaged the incident a number of times, and all reacted as did D. Since s 18 *Crimes Act 1900* (NSW) constructive murder was open, D’s only escape was to plead that the relevant act (pulling the trigger) was involuntary (and therefore not a reckless choice). Barwick CJ found the necessary endangerment at the previous decision to bring a firearm to the robbery, so long as the lethal outcome was – or ‘ought to have been’ – in his contemplation when he first arrived.

\(^{41}\) Norval Morris and Colin Howard argue that ‘it is morally repugnant to classify intentional and unintentional wrongdoers together for any purpose. It might be said that on a determinist view all are equally to blame, for the appearance of free will is an illusion’: Note 39 at 4. Stephen Morse
If statute is viewed as formalising a society’s moral superstructure, and with both direct and incidental murder equated within crimes legislation to deliver the same maximum penalty, it would seem that the lawmaking community is willing to accept some form of equivalence between malice and deliberate risk-infliction. The main procedural distinction is that the reckless act is more easily proven, and the negligent act is even less demanding: it is sufficient for conviction to establish an active (and relative) want of care, rather than deliberation. The difference in culpability between the two faults is elided, retaining only the differences in ease-of-proof. Such a regime would appear to have made risk-taking more accessible to punishment than malice. Similarly, for manslaughter, being negligent or intending an unlawful and dangerous act are alternatives. In this case, while both defaults are incidental (the definition of manslaughter) the technique is to equate neglect with construction.

The final question is whether the current approach provides society with adequate protection from (and control over) poor judgment. The question is whether there are dimensions of harm inflicted on the society that tort cannot address. Clearly tort fails to adjust for the loss of a citizen, and any benefit that citizen may have brought. Is this the reasoning behind manslaughter, an incidental offence created because of the catastrophic social result? However questionable it may be to punish a gamble purely because it turned out badly – converting an innocent act into an offence because of the unwanted result – there is the variation where one offence is constructively made into another,


For example, should criminal law be concerned with a negligent death, or should it leave tort law to penalise the person responsible through enforced restoration of the victim’s survivors? If criminal law has any such a role, is it purely to adjust for the failings of tort? There is a popular call for corporate homicide to make business leaders more sensitive to the harm they do when they allow a certain level of death as part of their operation – even when that is fully compensable by tort. This is driven by such situations as the Ford Motor Company’s response to the designed dangers of the Pinto. Francis Cullen, William Maakestad and Gray Cavender report – in their chapter ‘The Ford Pinto Case and Beyond’, in Hochstedler E (ed), Corporations as Criminals (Beverly Hills: Sage, 1984) – that, to the company, it appeared less costly to pay out the few victims than to remove the problem. If tort damages awards are accurate assessments of the harm done (at least to the living) then all harm would be relocated within the company, and the society is neutrally affected. Yet, despite this being the most cost effective fate-management, there is some sense of outrage – not at the incidental harm-creation in the original faulty design; but at the deliberate infliction of continuing danger caused by rejecting rectification. This species of wrong, and the Pinto case, are more fully explored in Chapter VIII - Risky Business.
as through the deliberate infliction of injury or through felony-murder.\footnote{When attacking the direct/incidental division within murder, Morris and Howard identify the law’s propensity for importing incidental culpability under disguises, saying ‘[i]t is our view that the theory of criminal responsibility has reached a point where the undiscriminating acceptance of an intention to inflict grievous bodily harm as sufficient mens rea for murder ought to be discarded as concealing a form of constructive murder’: Note 39 at 12.}

Since reckless-head murder inculpates what would – absent harm – be unpunishable, it is really another response to a species of unreasonableness. Felony-murder, on the other hand, attempts to close any ‘culpability-gap’ between the offence and the result. They are both objective impositions in the sense that the offender’s subjective truth (the relatively minor anti-social intent) is replaced with the major harmful result. In the next chapter the thesis will explore the range of fictions deployed when either the actus reus or mens rea fall short of directly connecting the accused with an outcome both risked and inflicted.
VII

UNINTENDED DEATH 2: CREATING DANGEROUS CIRCUMSTANCES

Introduction

This chapter investigates the doctrines that go further than to alter the legal significance of behaviour, but which invent facts that fit the result. These doctrines enhance the inadequate act or intent so that it encompasses the outcome, and makes the accused responsible for the consequence. Such doctrines are:

- **Causation**, where – at least in principle – an actus reus that fell short of the lethal outcome is artificially extended;
- **Transferred malice**, which is the subjective companion to causation;
- **Construction**, where mens rea only going to a non-lethal outcome is similarly appended with a fictional lethal design, once death has occurred; and
- **Common purpose**, which goes beyond simply altering the scale of culpability of the individual by extending either the actus reus or mens rea to capture the result, but attaches entirely the culpability of an associate to those who neither performed the act nor intended the unlawful harm.

The common objective of these fictions is to match the culpability with the result, with a deterrence rationale that they deliver a warning against creating a circumstance where harm may be produced at some other time or place, or by some other agent. The doctrines therefore fashion ‘circumstance creation’ offences. Pierre Olivier classifies fictions as (a) the identity of the act or actor is made that of another; (b) a false quality is ascribed; (c) the law itself is ‘deemed’ to be different – for instance, an amendment is made retroactive; sometimes a repealed provision is extended; or its interpretation is amended.¹

¹ Olivier P, Legal fictions in practice and legal science (Rotterdam UP, 1975) 97-100.
Chapter Goal

Robinson proposes four theories to support the fictional connections: causal, equivalence, evidentiary control 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. 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).² Robinson’s evidentiary theory is that the doctrines stop an accused from escaping culpability on the basis that one element cannot be proven beyond reasonable doubt, or even that it would require great expense to do so. As Robinson points out, while this might avoid ‘dangerous acquittals’, it also increases the risk of erroneous convictions. So certainty and proportionality (punishment for what was both intended and done) are sacrificed to the societal interest of crime control.³

I will suggest that these doctrines are the inevitable outcome of the struggle to cope with other doctrines intended to ensure accurate warning against, assessment of, and response to, deliberate offending, but doctrines that are unnecessary once controlling incidental unlawfulness is accepted as the main role for criminal law. It is difficult to imagine any human activity that carries an absolute guarantee that it will never lead to harm, since there are always ‘risks and dangers inherent in one’s conduct.’⁴ Even if we accept that any killing deserves to be reviewed by a court, this still raises the questions of

- when subsequent circumstances logically become the actual cause of the death, so the most effective focus of legal harm prevention;
- on what basis should other contributing human involvement be exculpated; so
- how effective can the doctrines be as lethal fate-management?

³ Note 2 at 66. However Robinson can see no analytical theory behind the doctrines. It would therefore appear that the doctrines are a response to the ‘correspondence’ requirement, where that protection denies culpability for the unlawful harm that the accused inflicts’: 65.
Causation

Sir John Smith has documented the history of the criminal law struggle to decide what degree (and quality) of contribution to an unlawful harm should be regarded as either completely culpable, or ignored as the accused doing nothing wrong at all. Under this doctrine, when the actus reus does not stretch all the way to the prohibited consequence, the link is artificially completed. Normally, the conjunction requirement would defeat a prosecution for homicide if the intended result was non-lethal. That is, the accused only intended behaviour that would have been satisfied before the eventual harm (a death) was inflicted. ‘Constructive causation’ is employed to attach the accused to the excessive result, by extending the responsibility to the eventual harm done by another agent – on the basis that the initial act created the opportunity for the consequent harm. In other words, the accused was only partly responsible for the eventual harm, having only created a dangerous situation where somebody or something else then completed the offence, but criminal law is unwilling to allow this partial responsibility to go unpunished.

The most vivid example is *Meli.* In this case, the offenders beat their victim unconscious then, believing they had succeeded in killing him, disposed of the body by rolling it over a cliff. In fact it was the later act that achieved the killing. At trial, they pleaded that when they had the intention to kill, the act had not done so, and when the killing act was done, they lacked the intention to kill. The Privy Council evaded this through the ‘continuing act’ doctrine which extended the killing act back in time so that it co-existed with the intention. The judicial reasoning is somewhat confused, in that it appears to have extended the sub-lethal act (rather than the lethal intent) forward until it became lethal. The case therefore demonstrates the difficulty with the doctrine.

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6 [1954] 1 All ER 373.
A more mundane example was *Fagan v CMP*, where a similar logic was used. A motorist incidentally drove onto a policeman’s foot, but then – having been antagonised by the policeman ordering him to park – took his time about driving off it again. On appeal he contended that the act of driving onto the foot had lacked mens rea, and it had ended before any guilty omission began. The respondent argued ‘continuing act’, or a duty supporting an omission. Justice James held that, since the accused had remained in the car, failing to remove it from the police foot was a ‘continuing act’, still alive when he formed the intention that ‘the victim should suffer’.

In these examples, the ‘continuing act’ doctrine bridges any temporal disjunction between act and intent. A more difficult issue is when someone is already engaged in an unlawful (and dangerous) activity, and another agent consequently delivers an illegal result. The problem is that criminal law does not recognise partial cause as diminishing culpability. On one level, legal causation can be argued as a response to this ‘all or nothing’ approach, that harm is not divided between agents (such as by contributory negligence), but the full responsibility is replicated between contributing agents, so to capture those who – because they were only partial or antecedent contributors – would otherwise escape culpability. Since sentencing discretion can adjust for different levels of blameworthiness, what causation achieves is to present such a contributor before a sentencing tribunal for an appropriate sentence. Other doctrines that perform this function are common purpose and construction, and the menu of inchoate offences.

Since criminal law is founded on the concept of chosen behaviour rather than sheer outcome, causation is not a tort creation, where the result is the main warrant for a legal response. Rather it remains based on some element of intended activity. It works by deeming the whole sequence of acts as chosen

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8 As we will find when we investigate transferred malice, that doctrine performs the same function where there is a disjunction between the actual and intended consequence – commonly a spatial difference such as hitting a bystander by accident during an unlawful attack.
9 See the discussion in Chapter III - *Strict Liability* and Chapter IV - *The Reasonable Person*, where I argued that the concept of mental fault was only introduced to the definition of a tort with the arrival of negligence. Action under the so-called ‘intentional torts’ is still triggered by the delivery of a harm.
DANGEROUS CIRCUMSTANCES

by the accused – when an unlawful outcome is delivered incidentally. Causation can thus be defined as: ‘a legal fiction to extend certain voluntary acts – that did not factually cause an offensive result – to creating that outcome’.\(^{10}\) Culpability can be supplied by an (unreasonable) omission, or an unlawful act.

I argue it is a technique for attaching equal blame to risk-creation as to deliberately achieving unlawful harm. My issue is whether it is necessary for criminal law to create this equation, rather than to assign blame for risk-creation in itself, and without any connection to actual harm. The questions raised by the doctrine are whether causation serves any pragmatic or equitable purpose; and what rationale the judges see as supporting it.

In *Royall v The Queen*,\(^ {11}\) the accused was convicted of murder when he broke into the bathroom he shared with his drug-using girlfriend, after she had locked herself in following a violent argument. Her body was found six floors below the open window. The Crown proposed that there was evidence of a bloody struggle, and that either she was pushed, fell while retreating or jumped while escaping a reasonably obvious threat. Royall claimed to have been concerned over what she was doing while locked in the bathroom, and that he had no opportunity to do anything more than watch her jump from the window to her death. The question for the High Court was: if the most ‘innocent’ facts are believed, did he still legally cause the death? Was his voluntary behaviour relevant to all possible causes of her death?

Chief Justice Mason held that the accused must be shown to have reasonably foreseen that the ‘suicide’ was the ‘natural consequence’ of his noisy entry, but an unexpected death remains the victim’s act: per *Roberts*.\(^ {12}\) Justices Deane and Dawson cited *Halliday*\(^ {13}\) as authority that creating an actual fear, if escape then causes harm, will make the person creating the fear liable for the

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\(^{10}\) Although there would appear to be no reason to restrict the term ‘causation’ to homicide, where such an extension is applied to non-lethal results – as demonstrated by *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 – it goes by the name ‘continuing act’.

\(^{11}\) [1990] 172 CLR 387.

\(^{12}\) (1971) 56 Cr App R 95, 102 per Stephenson LJ.

\(^{13}\) (1889) 81 LT 701, 702 per Lord Coleridge CJ.
consequence. In *Grimes & Lee*\(^{14}\) the jury was instructed that if two muggers on a train had created an actual (but wrong) perception by the victim that jumping from the train was safer, they were ‘just as responsible’ as if they had thrown him. If the accused’s actions were both intentional and ‘a substantial and significant cause of death’ it is murder. However if the victim (unreasonably) ‘over-reacts’ this may break the chain of causation. The two *Royall* judges held that foreseeability is not an issue in ‘fright’ cases – only whether the fright was reasonable. Brennan J’s approach was that, absent the direct intent to scare someone to death, both reasonable fear and foreseeability are relevant to indirect causation. Finally McHugh J would allow unforeseeability to defeat causation where the death was due to the ‘irrational or unreasonable conduct of the victim’.

The decision of the High Court majority can be seen as delivering the ratio that: if your behaviour would cause such fear in the reasonable person that they would act as the victim did, the victim’s choice becomes your intent. Thus the court employed a ‘vicarious’ (or secondary) reasonable person test to make culpable those who create the risk of suicide: Generating (reasonable) mortal fear is now the cause of such a death, so the bully is told to contemplate how the normative person would react, and warned off risking that they might harm themselves.

Such a warning has also been delivered regarding the lethal intervention of non-human agents. In *Hallett*,\(^{15}\) the accused claimed that, after a long-running fight along a beach, which was started (and elevated to warranting self-defence) by the victim, he left his opponent unconscious at the water’s edge. Hallett passed out, recovered and returned, but the tide had drowned the victim. The judge ruled that the threshold of culpability was crossed if Hallett’s behaviour was the ‘substantial cause’ of the death – and Hallett was convicted of murder. The issues raised were: Can a simple ‘but for’ natural consequence test be used, or must there be foreseeability of likelihood – in order to provide causation? Was passing out an involuntary act intervening?

\(^{14}\) (1894) 15 NSWLR(L) 209, 213.

\(^{15}\) [1969] SASR 141.
The appeal court cited the *Smith & Hogan* text\textsuperscript{16} to the effect that there is no unlawful killing if a man is left unconscious and an earthquake drops a building on him. The judges reasoned that malice and causation are different, the latter being concerned with risk. If the trial judge had wrongly added a requirement of foreseeability, this would actually help the accused. The true cause of the death was the violence, not the omission or involuntary act. Even if the *Meli* ‘continuing act’ doctrine is wrong, here the later omissions are not causal. This case therefore appears to add a ‘situational’ culpability to the *Royall* ‘vicarious’ reasonableness. That is, if violence creates a dangerous potential, it will override the effect of a succeeding cause.

This principle was developed further, so even an independent rational choice by the victim was removed as an intervening cause. In *Blaue*,\textsuperscript{17} the victim of a knife attack was a Jehovah’s Witness and bound to refuse a blood transfusion, and died as a consequence. The attacker was convicted of voluntary manslaughter because of diminished responsibility. On appeal, the issues were: Did the attacker cause the death? Was the victim’s refusal unreasonable and therefore the cause of her death? Lord Justice Lawton approached these questions by stating ‘It has long been the policy of the law that those who use violence on other people must take their victims as they find them.’ This includes religious beliefs. So the blood refusal – even if outside the norm – did not break the chain of causation, and the stab wound remained the cause of death. The result appears to be that causation allows criminal law to adopt one tort concept – the ‘eggshell skull’ rule – without its partner, apportionment for contribution; and that any normative person can be as devout as the victim. The warning is quite awesome: consider any honest way your victim could elevate an assault to homicide.

Finally, in *Pagett*,\textsuperscript{18} another person’s lethal act was attributed to the person who initiated the dangerous situation. The offender was using his girlfriend as a human shield to avoid arrest when he fired on police, who returned fire and killed the woman. The judge instructed the jury on causation that if, when

\begin{footnotesize}
\textsuperscript{16} Smith & Hogan’s *Criminal Law*, 172.
\textsuperscript{17} [1975] 3 All ER 446.
\textsuperscript{18} (1983) 76 Cr App R 279.
\end{footnotesize}
Pagett had fired, he had caused police to reasonably defend themselves or perform a duty, that he alone had chosen to endanger the shield. In effect, that the police bullet had come from Pagett’s gun. Pagett was charged with her murder, and convicted under the alternative verdict of manslaughter. The issues raised on appeal were: (1) Was firing on the police a ‘substantial, or operative, or imputable cause’ for the jury to decide? (2) Was the death too remote from the initial shot?

Lord Justice Robert Goff dealt with these question as: (1) An act that ‘contributed significantly’ is enough. Novus actus interveniens is a jury matter. The killing of an innocent bystander by an act of self-defence could be either murder or manslaughter. Using a shield and firing a shot are (at best) unlawful and dangerous enough for manslaughter. If the shot was intended to kill, or knowingly risk killing, or to inflict GBH, or during the performance of a felony, then the death makes it murder. (2) Remoteness is not a causation issue.

This decision appears to extend causation beyond even strict circumstantial culpability. The mental elements of constructive murder19 were applied to the actus reus so that, provided the actual killer has a good defence, any death coming within a ‘but for’ test will become the responsibility of the person who unlawfully set the dangerous situation in motion; and since ‘remoteness’ is not to be considered, that responsibility will be attributed regardless of how unpredictable was the lethal response. The only protection available, from the lethal act of another, is if the jury finds that act was not a response but completely original behaviour.

In summary, causation is a third method – along with objective tests and construction – of widening the culpability net to cover risk-taking. The overall rationale for the doctrine is perhaps that it allows the criminal justice process to hold people to account for the dangers they willingly create, and when either criminal law’s ‘all or nothing’ culpability or the conjunction requirement

19 ‘Constructive’ being read, consistent with its use elsewhere in the thesis, as embracing all the alternative heads of murder beyond direct intention.
would otherwise block such accountability. The effect, however, is that where the fully malicious offender is protected by the conjunction requirement, the incidental offender is vulnerable to an extended form of strict culpability.

This would appear to give fate-management a more extensive role for criminal law than malice-control. Certainly it seems that an initial act of malice is extended to cover the incidental harm subsequently done, so it is an extension of direct criminal intent. However this is a deceptive analysis, since while it presents as having its focus on the initial malice, in fact it was the risky circumstance created that delivered the harm. Conceptually, it is a cousin to recklessness – itself an attempt to control the willingness to inflict risks. Also, since there can be an element of omission to the ‘extension’ – Hallett could be argued to have omitted to deal with the ‘natural consequence’ of leaving someone unconscious at the mercy of tides – the doctrine also trespasses into quasi-negligence. The doctrine therefore raises two familiar questions: (1) Is the conjunction requirement inappropriate? (2) Is the error the focus on consequences?

As to the first issue, certainly the need to prove that both actus reus and mens rea were present at the critical moment appears to be sound protection against turning the criminal justice system into a form of the Thought Police. 20 The question is whether the doctrine was relevant at some previous point in the history of criminal law, is perhaps just in intermediate stage on the way to a completely subjective regime, so has now outlived its usefulness. As strict liability demonstrates, even when the need for a mental element is removed, the courts tend to replace it with voluntariness as to the act itself. Is the mental default the primary source of culpability, with the act as merely a demonstration of the internal lapse of citizenship? As to the second issue, obviously the law needs to nominate the harms it wishes to remove. The question is why criminal law must wait until the individual harm is done before intruding? 21

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20 Per George Orwell, 1984.
21 Sally Kift proposes that the difficulties of causation flow from the result-based offences: Kift S, ‘Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law, Part II’
The question from *Hallett* is: why is criminal law seen as not dealing adequately with the behaviour of battering someone unconscious per se? Why is criminal doctrine reluctant to create a duty to take care of your victim – regardless of any consequences – so that any death becomes evidence of default alone, not grounds for another charge? *Blaue* raises a similar question: can’t criminal law administer adequate punishment (to satisfy the prevailing sentencing goals) on the basis of wounding alone? Pagett fired at another citizen (who happened to be an armed policeman) with some unlawful intention: at its lightest, to frighten. Is this not enough warrant for an adequate penalty? Is not the answer to establish (to the requisite standard) what the intention was, then set an appropriate response?

In all these cases, my thesis is that creating a harm was deemed voluntary: an artificial link was constructed between some activity (in Royall’s case, perhaps classical assault in raising the fear in his girlfriend) and a result that was never demonstrated as recognised or sought. In place of such investigation, a complex ‘moral short cut’ was imposed, which elided the distinction between malice and ‘gambling’, so that the entire event was seen as malicious. By this process, risk-infliction is converted to, rather than addressed as a distinct form of, unacceptable behaviour. While the lazy individual is generally dealt with by the tort of negligence, the gambler is deemed malicious by criminal law.

That such a process is sheer risk-management is amply demonstrated by the fact that, in the cases studied, a range of harm-agents is compressed into one – imputed voluntary endangerment. Precisely what Royall consciously did wrong we do not know – beyond that he may have unwittingly frightened his girlfriend into a deadly form of escape. Whether Hallett was aware of the danger he had created was never investigated. What was Pagett up to when he fired a shot in the direction of a policeman? As for Blaue, venting a fury ignited by sexual frustration seems to have been his chosen activity. In all cases, a quasi-tort ‘but for’ test created the (fictional) voluntariness that turned

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them all into culpable killers.\textsuperscript{22}

\textit{Transferred Malice}

As Ashworth explains:

Manslaughter apart, it is rare for English law to impose criminal liability for harm or damage caused accidentally. Cases of transferred malice are singled out for different treatment because, although the actual harm was inflicted upon someone other than the intended victim, the accused did intend to cause harm of that kind.\textsuperscript{23}

Paul Robinson points out 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 actus reus 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).\textsuperscript{24} Such doctrines would appear to allow the court to consistently use the more severe prohibition. If robbing a store attracts the greater penalty than a dwelling, one doctrine can be employed; alternatively, if invading a dwelling is seen as the greater offence, the other is available.

In \textit{Attorney General’s Reference (No 3 of 1994)}\textsuperscript{25} the defendant injured a foetus when he stabbed his girlfriend, knowing her to be pregnant. The baby died due to being born grossly premature as a result of the stabbing. The trial

\footnotesize{\textsuperscript{22} Sir John Smith raises the issue of assigning culpability when a victim of violence dies following negligent medical treatment: Note 5. The courts seem to commence with the ‘but for’ test, and predictions of what would have been the outcome had there been no second harm done. In other words, did the inadequate medicine simply fail to cancel a ‘natural consequence’? There are, however, some possible moral and pragmatic questions underlying such an approach: Is the test to be a moral comparison between the hostile attack and the well-meaning-but-inadequate medicine? What if the victim may have recovered without medical treatment – will this clinical possibility prevail over the traditional notion that malice is a greater wrong than neglect? How close to the ‘ultimate question’ can medical evidence tread – regarding the pure clinical assessment of the actual cause of death – without trespassing on the jury’s moral decision? Again we see how unsatisfactory is the divide between inadequacy and malice; the dependence on an unlawful outcome; and the temptation to place all responsibility on a contributor who inflicted an unacceptable danger, when any actual harm-doer was criminally ‘innocent’.


\textsuperscript{24} Note 2 at 60.

\textsuperscript{25} [1998] 3 AC 245.}
judge found no ground for either murder or manslaughter on the ground that a foetus is not a legal person. The Court of Appeal, however, ruled that the defendant's intent to cause GBH to his girlfriend was sufficient for murder to be transferred to the child.\textsuperscript{26} By this analysis, the intent to inflict harm prevails over any disjunction between the actus reus and mens rea. On the positive side, the doctrine appears to waive any distinction between victims, so satisfies the criminal law public-protection rationale. The warning sent out by this judgment is: ‘Do not knowingly attack a pregnant woman – and therefore endanger two lives – or you will be held accountable for all harm inflicted within the risk you take.’ However the question is whether the outer edges of transferred culpability capture the choice to take a risk, without entering the territory of inadvertence – and the trouble caused by any resort to objectivity that bedevils negligence and recklessness.

Conversely, a shot that misses \textit{everybody} will not trigger transferred malice, despite that the malice has not changed, leaving any culpability to such doctrines as attempt. Where the punitive consequence of attempt is less than for a completed offence, such luck will deliver a lesser penalty. So since the doctrine is only invoked when there is some (unwanted) result, it again demonstrates the power of a consequence as the trigger for a legal response, even if delivered by luck: \textit{somebody} got hit, so the intention was realised.

It is unclear from the cases whether the doctrine extends to reckless offending. However there would appear to be no logical reason why not: if recklessness is the equal of malice for murder, then if malice can be transferred so should the equivalents.\textsuperscript{27} ‘Transferred fault’ now appears in the UK Draft Criminal Law Bill, cl 32, and transfers both intention and ‘awareness of a risk’ to the actual result. The following discussion proceeds on the possibility that the common law doctrine could be deployed against risk-

\textsuperscript{25} However, since the foetus was not directly injured by the stabbing, and died due to the mother’s injuries \textit{after being born}, the House of Lords saw this as an impermissible ‘double transfer’: from mother to foetus, then from foetus to child (at 435).

\textsuperscript{27} Any need to resort to transferred malice, in the case of incidental offending, would only be created if a court decided that the reckless offender was only to be held liable for harm to a victim within the offender’s contemplation. That is, where there are two elements of risk: the chance of unlawful harm being done to a human right; and that the actual holder of that right was recognised at the point of choosing to offend.
inflicting behaviour – where a gamble is (knowingly or unreasonably) taken with the interests of one citizen, but delivers that harm to another. The main question is whether the doctrine will expand reckless intention beyond its limits of actual foresight, in the same way that it will relocate direct intention.

The problem is that transferred malice is another legal fiction – another means for criminal law to create fact. It is therefore open to the same critiques: that it breaches the principle that the rule of law is properly limited to placing values on actual behaviour; that the doctrine invents fact in order to evade a restriction such as the conjunction requirement, when that restriction stands in the way of apparent justice. To see both the primacy of fact, and the doctrine of conjunction, as adverse to justice is hardly an acceptable rationale for such evasion. Rather it demonstrates a cascading descent into greater error.28

If, as Ashworth ultimately argues, jurisprudence can learn to ignore the consequences of the offence in question, and focus purely on the offender’s subjective approach to the act, then the harm actually done can be used solely to evidence the nature of the intention. That a bystander was shot, even by accident, displays an intention to shoot somebody. A conviction for attempt is possible in virtually all cases which fall within the doctrine of transferred liability, since the offender will invariably have taken sufficient steps towards committing the offence against his intended victim for there to be actus reus of an attempt, and mens rea will be undisputed.29

Where attempt is punished as severely as a completed offence, the doctrine of transferred malice is redundant. If the upper punishment limit for attempt is below that for transferred completion, then luck is permitted to set the relative

28 The doctrine also contains a number of incidental traps, which Ashworth identifies. The most significant is whether, by ‘generating’ malice elsewhere than where it actually was, this constructive malice is additional to the real malice: ‘A further question is whether the doctrine of transferred malice allows two convictions, one for an offence against the intended victim and one for the transferred crime against the actual victim’: Note 23 at 83.

29 Note 23 at 86. Moreover, as Ashworth suggests, if there were no transfer of mens rea from the original attacker to the incidental victim, it would be unnecessary to transfer any defences. Thus if person A, lawfully defending him/herself against an attack by B, struck out and hit C, the injury to C would be treated as an accident: at 87. Indeed, the doctrine of causation as applied in Pagett (1983) 76 Cr App R 279 would simply redirect B’s attack onto C – taking with it any required mens rea. A whole ‘toolbox’ of alternative fictions are required to attach culpability to somebody who clearly acted out a choice to inflict unlawful harm, but missed.
punitive ceiling. Thus the doctrine of transferred malice only succeeds in demonstrating once again the fictions the law must create when it insists that the intent and result coincide, and insists on this conjunction in the face of an unwanted result.

As a tool of fate-management, transferred malice is therefore capable of infecting the legal response to danger-election with the uncertainties of the outcome. The thesis suggests that this only enhances the attractions of such gambling since, if fate is permitted to decide the existence of culpability, the full criminal justice retaliation is reserved for poor judgment rather than poor citizenship. Someone who gambles successfully is immune to transferred malice;\textsuperscript{30} the person who takes a chance which does harm becomes fully culpable for the as if fiction. All that the doctrine has contributed is to raise the stakes, not deter gambling per se.

But, as the thesis has argued, all enterprise is gambling to some degree. While there may be some logic to artificially restricting gambling, to exculpate any choice to take a chance that reflects a socially positive equation between potential benefit and cost, the thesis proposes that this is not achieved by continuing to attach culpability to the individual outcome. The more rational approach would be to prohibit such risky behaviour per se, to construct a penalty structure that makes societally-negative risks unattractive, and accept that the offender who genuinely does not recognise the secondary risk cannot be warned by any prohibition.

The current doctrine has been attacked by the modern judiciary – even when bound to apply it. In A-G’s Reference (No 3 of 1994),\textsuperscript{31} the House of Lords critiqued it as ‘rough justice’, a doctrine with a ‘lack of any sound intellectual basis’. I suggest that it is but another technique used by the common law to take control of incidentally dangerous behaviour – but by a ‘back door’ to malice. While this technique of artificially moving culpability from one target to

\textsuperscript{30} And will also evade attempt, which requires direct intention.

\textsuperscript{31} [1998] AC 245 per Lord Mustill, 261.
another may be in decline, another that synthetically replaces one objective with another is alive and well. This is the legal fiction of construction.

**Constructive Murder**

Under this doctrine, a death incidentally caused during a felony becomes murder. An actual intention to do one thing (rob someone who might resist) constructively becomes an intention to do another (to kill). The logic is similar to intoxication, and even strict liability: once you execute an act which might result in death, if death results, your actual intention constructively becomes to kill. Jeffrey James confirms that ‘[t]he effect of applying the rule … is to heap additional punishment on the defendant because of the result of the act, not the act itself.’

*A scenario:* A robber enters an all-night shop and threatens the shopkeeper with a gun. The shopkeeper responds by brandishing his own firearm. The robber shoots and kills the shopkeeper, thereby carrying out the initial (and illegal) threat. Is the robber a murderer?

The accused pleads knowing (or believing) the money was locked in a safe, and that only the shopkeeper could open it. So it was the intention only to have the shopkeeper comply, and the shopkeeper was not shot out of frustration. The worst deliberate behaviour that could further the robbery would be to wound and disarm the shopkeeper. The accused claims to have only fired in self-defence, being afraid the shopkeeper intended to break the law by shooting to protect his property. So the killer pleads guilty to attempted armed robbery, perhaps wounding, but not to murder.

The actual result is, of course, that the concept of constructive murder would defeat any such defence. According to the *Crimes Act* 1900 (NSW) s 18 (1) (a): Murder shall be taken to have been committed where the act of the

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accused …, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm … [or] during or immediately after the commission … of a crime punishable by penal servitude for life or for 25 years.\(^34\)

The extended categories of culpable lethal act are therefore: (1) a legal act which was predictably dangerous, and caused a death; (2) a non-lethal offence (usually a serious assault) which caused an unintended death; (3) a felony which incidentally caused death.

Normally the term ‘constructive murder’ is reserved for the last variation. As the NSW Law Reform Commission explains it: “"Constructive murder”, also known as “felony murder”, is the exception to the general principle of unlawful homicide that the seriousness of the particular killing be measured according to the accused’s mental state.”\(^35\) The three-way distinction seems both unnecessary and confusing. Since all the above situations allow some other intention to qualify as the intent to kill, it seems logical to include them all under the rubric of constructive murder, retaining only the distinction between whether it is the (recklessly ignored) danger or the existing criminality (serious assault or felony) which exposes the offender to conviction for murder.

The following analysis aims to reason for this broad concept of constructive murder. It will review the social function presented to justify the creation or waiving of intention when death has occurred, to see whether this has led legal reasoning into a mire of desperate definitions and thresholds to shore up what is simply a wrong concept. It will question whether there is any moral or useful way to decide whether an unintended homicide is carelessly manslaughter or constructively murder; and whether it is necessary to contain

\(^34\) Crimes Act 1900 (NSW) s 18. Discussing US law, Guyora Binder notes that ‘while discussions of the felony murder rule often say it punishes accidental rather than intentional killings in the course of a felony, in most states it punishes killings which are neither intentional nor accidental, but negligent, or possibly reckless. In many of these states, a reckless killing for an antisocial purpose is classified as “extreme indifference” murder, usually murder in the second degree. In such states, felony murder may simply be a category of extreme indifference murder, or it may serve to upgrade some extreme indifference murders to murder in the first degree’: Binder G, ‘Felony Murder and Mens Rea Default Rules: a study in statutory interpretation’, (2000) 4 Buffalo Criminal Law Review 399-485, 407.

constructive culpability within some zone of serious default of foresight.

In principle, the process of finding the requisite knowledge for manslaughter – by comparison with the normative person – should yield a different result to that used by construction – the ‘transfer’ of guilty knowledge by deeming. Thus in *Dawson*\(^{36}\) when an armed robber pointed the gun at a middle-aged man with a weak heart, who then died of a coronary, this was not seen as manslaughter, as the medical issue was not reasonably foreseeable. However in *Watson*\(^{37}\) the death of an elderly victim in similar circumstances was seen to be foreseeable, as the offender had a reasonable period to notice his victim’s frailty. So far so good. Then in *Ball*\(^{38}\) the offender was quarrelling with the victim and, meaning only to frighten, mistakenly took a live round out of a pocket he knew was partly filled with blanks, and so shot and killed the victim. The trial court’s test was whether it was unreasonable to act in the awareness of such a danger, so manslaughter was substituted for murder. The Court of Appeal saw the risk as ‘inherent’, and within the knowledge of the accused. So foresight was deemed, rather than supplied by comparison with the reasonable person.

George Fletcher acknowledges the view that the intentionality in felony-murder is a fiction,\(^{39}\) however he prefers to see it as an overlap into the field of recklessness.\(^{40}\) This fiction can deliver some odd results. David Thomas\(^{41}\) contrasts the differential culpability between someone who causes GBH in a pub brawl, but where the victim consequently dies, elevating the offence to murder; and another who deliberately-but-ineffectively tried to kill, and so – whether the failure is due to ineptitude or luck – is convicted only of attempted murder. The outcome, while purely the result of chance, therefore decides the severity of guilt; and the nexus between design and punishment is reversed.

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36 (1985) 81 Cr App R 150 (CA).
37 (1989) 89 Cr App R 211 (CA).
39 He reports that ‘[a]ccording to one popular rationalization, the felon’s intent in committing the felony attaches, fictitiously, to the killing and somehow becomes transformed into the malice aforethought required for murder’: Fletcher G, ‘Reflections on Felony-Murder’ (1980-81) 12 Southwestern University Law Review, 413-29, 413.
40 ‘The precise problem with the felony-murder rule is that it represents a formal approximation of extremely reckless homicide’: Note 39 at 415.
He continues:

The extension of the definition of murder by the felony-murder rule and the recognition of an intention to inflict grievous bodily harm as a sufficient mental state for conviction may have made some sense in the days when the offence was capital, as directing the supposedly unique deterrent effect of the death sentence at the potential offender who was prepared to risk the use of grave violence to achieve his objects. Now that justification has gone, the effect of the extension of the definition of murder beyond intentional killing weakens whatever morally educative force the mandatory life sentence possesses.42

The fact that the constructed sanction is decided by the effect allows an offence of less intent to leapfrog over one of more serious intent, where the actual goal was death.43 The potential over-reach of felony-murder (and the blurred distinctions between different forms of construction) is demonstrated by a curious American development where it is not even required for a felon to incidentally cause the killing. In one case, an arsonist blew himself up, and his co-conspirator was convicted of his murder.44

Common Purpose

This is another doctrinal reaction to the criminal law’s ‘all or nothing’ limitation, apparently intended to ensure that those who join in a unlawful and dangerous enterprise, but who do not directly deliver the harm risked, do not escape culpability when that harm is realised. According to Halsbury’s Laws of Australia, ‘common purpose proper’ will act if the accused has agreed to one offence – but another ‘unintended’ crime is committed – to make the non-actor guilty of the incidental crime.45 The fact that the bystander did not participate

42 Note 41 at 27.
43 The doctrine also manages to collide with other common law concepts, such as the doctrine of merger. In order to prevent any preparatory felony disappearing into the principal offence under this doctrine, thus defeating the felony-murder elevation of an incidental killing to murder, James proposes that ‘the underlying felony … must be a separate felony from the act that proximately causes death’: Note 33 at 314. Otherwise, he reasons, the merger doctrine would remove all the felonious preparations for an armed robbery, and leave a killing outside the scope of felony-murder. The result may be that only a felony quite disconnected with the killing can survive to lift the homicide to murder. This doctrine is dismissed by Colin Howard as ‘an obscure rule’ (Howard Criminal Law 47 edn, 311); Dean and Gaudron JJ saw it as the overall criminal law concept which, when not removed by statute, creates autrefois acquit and res judicata – Rogers v R (1994) CLR 251; It ‘has no place under the Northern Territory Criminal Code’ – Mildren J, Prior (1992) NTSC 108.
in the unplanned act becomes irrelevant: if the mutual enterprise contained such a danger ‘within the actual shared contemplation’ of the accused, this earns the same penalty for all involved. The doctrine was explained by the High Court majority in *McAuliffe* 46

If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. 47

The Court went on to conclude that the doctrine will satisfy the requirement that actus reus and mens rea coincide, when the physical and mental elements actually remain apart. This view appears to give the doctrine the character of construction, and clearly invites the same challenges as the other forms of fictional offence-creation. What saves common purpose proper from being characterised as a full constructive doctrine is that actual knowledge of the risk (the presence of weapons, for instance) is required; construction (as we have seen above) can supply the requisite knowledge objectively. So if the accused is not present at the execution of the offence, the ‘common’ knowledge and agreement is whatever prevailed at the time of parting. 48

The operation of the doctrine therefore has the effect of destroying any ‘punishment advantage’ (a slighter maximum penalty) for only accompanying an offence. Such an approach clashes with the concept – where it exists – of attempt as being a lesser offence than its completed version, simply because it did not deliver the intended harm. 49

However the doctrine does endorse the role of the subjective test. As the High Court majority in *McAuliffe* 50 confirmed, ‘in accordance with the

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47 183 CLR 108, 114.
48 Halsbury’s *Laws of Australia* v9 (North Ryde: Butterworths, 1995) [249]-[472]
49 The Law Reform Commission of Canada has summed up the approach taken by Continental law to secondary involvement, as part of a genre of preparatory offences: ‘On this question of punishment for participation, however, Continental systems have been divided. France, for example, followed the lead of Roman law and made all parties liable to the same sanction. Germany, on the other hand, assigned a lesser penalty for secondary participation than for commission’: Law Reform Commission of Canada, *Secondary Liability: Participation in Crime and Inchoate Offences* Working Paper 45 (Ottawa: The Commission, 1985) 10.
50 Note 46.
emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.\textsuperscript{51} In Davies v DPP,\textsuperscript{52} the accused had joined in a group brawl, and had not realised that one of his group brought (and used) a knife. The absence of knowledge defeated conviction under common purpose. The question is whether the doctrine has a moral or pragmatic rationale. There appears to be a range of possible goals, such as to express a moral repugnance at citizens vicariously offending ‘by association’; to put supporters on notice at the earliest possible stage, while harm is remote; and to more effectively deter collusion by scaring off any support.

Thus the doctrine shares a role with the inchoate offences. However the doctrine has its problems. Since it elides any moral or deterrent distinction between the primary offenders and their associates, it runs the risk that the common penalty may induce accomplices to full involvement in the offence: the ‘sheep as a lamb’ calculation that I noted in regard to conspiracy and complicity.\textsuperscript{53} As the doctrine has removed the requirement that the secondary offender perform a prohibited act, it would appear to demolish half the traditional protection (actus reus) against capricious punishment. No matter how strongly we may feel that a common purpose offender should not have donated the gun, that is \textit{all} this offender did. The lawmakers still cannot resist the power of the consequence, and have succumbed to the temptation to attach culpability to what happens, when that is different to what was sought. Again the doctrine is reactive, since it ties the helpers’ fate to the commission of the subsequent offence. If warning fails, criminal justice is unable to employ this doctrine until after the deed has been done.

Finally, it also offends the principle that penalties should observe some proportionality to the prohibitions violated. This aspect effectively destroys the claims of a moral basis for the doctrine: the secondary offenders are being punished for something they neither did nor intended to do. It becomes a

\textsuperscript{51} 183 CLR 108, 114.
\textsuperscript{52} [1954] AC 378.
\textsuperscript{53} See Chapter II - Anticipatory Offences.
variation on transferred malice.

Why, then, do all these fictions survive?

The Rationales

Fictions have a long history. According to Ihering, a Roman law stipulating that only a Roman citizen could leave a will – so that any Roman soldier captured (thereby losing citizenship) was deemed to subsequently die intestate – was abrogated by the lex Cornelia, a fiction that moved the moment of death to immediately before capture. The rationales are usually expressed as a means of enhancing the reach of criminal law to deliver an adequate result in a specific circumstance, but without disturbing the existing law. To Fuller, legal fictions can be explained as the law attempting to reconcile a specific (and morally satisfactory) result with an inconsistent legal premise. An autocrat, who has no need to explain conflicting decisions, has no need of fictions. Olivier views fictions as used to avoid full revisions of the law. Instead, something overlooked is simply tacked on. For instance, the term ‘employment’ in the South African Act 22 of 1941 was amended in 1967 to include all legal absences: leave, military training, sickness and under the direction of the employer. However one section was amended by deeming (a fiction), the other by redefinition. So fictions can be the result of: a fear of tinkering with the existing law, with any consistency problems then created; the bother of revising it; preserving the notion (arguably a fiction itself) that judges do not make law; retaining the fiction that the law is always correct; the danger of undermining the subjects’ faith in the rule of law.

Some writers claim such doctrine as vicarious liability to be legal fictions, and it is often expressed in legislation that way. Yeo presents the case in

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54 Ihering continues, '[t]he purpose of the fiction consists in making lighter the difficulties connected with the assimilation and elaboration of new, more or less revolutionary, legal principles; in making it possible to leave the traditional learning in its old form, yet without hindering thereby the practical efficiency of the new in any way … Better order and easy mobility with the fiction, than disorder and stagnation without it!': Ihering, Geis des romischen Rechts (6th ed, 1923) III, 301-6.
55 See also SH Amin, Islamic Law and its Implications for The Modern World (Glasgow: Royston, 1989) 184ff.
56 Lon Fuller, Legal Fictions (Stanford UP, 1967) 51
57 Note 1 at 104-5
58 Robinson includes strict liability as another form of imputation: Note 2 at 63.
support of constructive offences in general, that there is ‘no significant moral
difference’ between the intent to seriously injure and to deliberately kill, as ‘a
person who intends to cause really serious injury should be presumed in law
to realise the risk of death’. He continues:

In place of an intention to cause grievous bodily harm, English law
reform bodies have proposed a hybrid type of fault element which is
partly intentional and partly reckless. It would render a person liable
for murder if he or she did an act causing death with an intention to
cause serious personal harm and being aware that he or she may
cause death. Interestingly, this is not such a novel proposal since the
Indian Penal Code contains a similar type of fault element.60

The character of these rationales is that the doctrines ‘kick in’ while the killing
was unintended. By definition, there is no choice element at work, other than
to embark on another offence (perhaps a felony) in the first place. What is
being actively deterred is the felony, not the killing; the elective use of violence
is punishable on its own. There is therefore considerable overlap between
such constructive murder concepts as recklessness and infliction of non-
felonious bodily harm, when they result in an unintended death. Yeo’s moral
equivalence argument must work to compress the law’s ability to announce a
range of responses to increasingly dangerous attacks; while the presumed
awareness of risk argument overlaps with both recklessness and
negligence.61

The question to be asked is whether such a process serves any proper legal
goal. Most observers would probably approve of the fact that it extends the
severity of guilt when a death results from an initially non-lethal offence. But

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99 For instance the Liquor Act 1982 (NSW) s 141(1) deals with the responsibility of the licensee of
licensed premises – for offences by staff who serve those legally intoxicated – by deeming the
licensee to have served the patron; rather than simply to state that the licensee is liable for these
acts of offending by the staff: ‘In any proceedings under this Act: (b) evidence of a sale of liquor on
a vessel or an aircraft is evidence of a sale by the master of the vessel or the captain of the aircraft.’
The latter approach does not alter the facts, it simply makes the relationship significant. See also
the discussion on vicarious liability in Chapter VIII - Risky Business

60 Yeo S, Fault in Homicide (Annandale: Federation, 1997) 142.

61 Sir John Smith challenges the Caldwell lack of distinction between recklessness and negligence as
having ‘no moral basis’, preferring to retain the Cunningham approach – that wilfully ignoring a
danger is more reprehensible than being too lazy to discover one: Smith J, Smith & Hogan, Criminal
Law 9th ed (London: Butterworths, 1999) 67. I argue that this variation on the direct/indirect
division is of no pragmatic value. Once it is accepted that there can be no point in finding fault in
behaviour based on genuine unawareness that a proposed act is dangerous, and that recklessness
is ultimately tested objectively, any division between the two is closed. Any grading of culpability
becomes totally a sentencing issue.
since the death was not what the offender wanted to make happen, is this the wrong process to use? George Fletcher cites a situation where, while killing was intended, the motivation was quite the opposite of that normally associated with murder:

[A] group of physicians were indicted for intentionally killing hospital patients [as euthanasia of the incurably mentally ill during the Third Reich]. Their defense was that ... they only did so because they believed they could save many patients by falsely warranting that the patents were curable. They believed, presumably on reasonable grounds, that if they did not participate in the killings, loyal members of the party would do so, with a much higher toll of innocent lives. The appellate court in fact remained unpersuaded that this argument undercut the physicians’ culpability for intentional homicide.62

The issue this raises is, which intention should prevail: an immediate intent to kill; or a more distant benign objective? In this case, if the doctors are to be believed, that was to save lives in an extreme situation. Although this contingency is arguably covered by the necessity defence (see Chapter 9 - Defences), in this case it appears to have failed. It would seem that once the court has before it a simple intentional killing, it is supremely difficult to redirect that court’s attention to any lesser objective. Yeo takes the argument a step further:

Under the present law, there are only a limited number of defences which can be relied upon in a murder case and even these defences have requirements which restrict their application within narrow limits. The upshot of this is that there may be cases where the court feels that there is some compelling social reason to acquit the accused but no defence enables it to do so.63

If a ‘compelling social reason’ is to prevail over the intricate mechanics of doctrine, a more rational approach to inculpating our robber who killed when the victim resisted is simply to recognise as guilt any dangerous choice made at the scene. The decision process is ongoing and alive throughout to the event in question. The robber could have (and perhaps should have) abandoned the robbery once s/he recognised that someone might die if it went on. Any choice to continue (if one actually existed) was another decision, to take a more dangerous chance than was necessary. At this point

63 Note 60 at 39.
the robber is confronted with precisely the choice that constructive murder attempts to inculpate: go on from this moment without regard for the *now foreseen consequences* and you have offended, whether harm happens or not.

The distinction may appear irrelevant: what is wrong with the current warning that if a non-lethal felony *develops* into a killing, you will be responsible as a murderer? The answer is that construction imputes a prior rational choice into the subsequent desperate situation.\(^{64}\) If the warning has failed to deter the initial enterprise, it will not be heard when the circumstances become highly charged.

**Conclusion**

The technique of expressing a legal rule in the form of a synthesised fact is routinely used in criminal law to disguise the predominance of fate-management as the central function of criminal justice. By deeming the creation of a dangerous situation as either the act or intent to achieve the harm done, the technique obscures the reality: the offender is to be punished for creating a risk – even one that crystallised *vicariously* into actual prohibited harm.\(^{65}\)

There is some linkage with the logic underlying strict liability. That is, strict liability warns that a prohibited act will be punished without any further inquiry as to the circumstances. A construction, however, warns against the intended ‘founding’ offence itself – imposing a loading to the penalty conditional on a specified incidental result – if it happens. So the doctrines do appear to duplicate the role of recklessness, in that they warn against ignoring an apprehended possibility. The reasoning appears to be: If the offender was actually capable of apprehending the risk and decided to proceed anyway, then assigning responsibility for the outcome can serve as a warning. If, on the other hand, the accused was not capable of foreseeing the outcome, then it is pointless to assign guilt. Worse, if this lack of insight is overridden by an

\(^{64}\) In the case of the doctors attempting to diminish the lethal ‘street sweeping’ required by the Third Reich, their prior objective was ignored – so construction is only inculpating.

\(^{65}\) The use of vicarious liability will be more fully explored in *Chapter IX - Risky Business.*
objective test, then guilt will be assigned where there was no actual capacity for less damaging behaviour. So the doctrines struggle to evade the simplistic approach taken wherever the reasonable person is employed.

Clearly construction appeals to some desire to inflate the legal consequences of a non-lethal but dangerous crime (an armed robbery, say) that goes wrong.\textsuperscript{66} It is therefore a close cousin to reckless-head murder, but provides an evidential shortcut: the felony itself is enough to transport the death into intentional killing without the need to demonstrate that the behaviour was knowingly risky. However it suffers from the same conceptual problem: the requisite intention has been invented. Rather than amend the available sentence for the actual offence (the felony) so it sits at an appropriate level within the hierarchy-of-consequences that satisfies the lawmaking community, there is some attempt to directly align a risky endeavour with its deliberate cousin: what you were willing to risk becomes what you intended, when the gamble fails. The common feature among these constructions of intent is that the normal requirement – for intention to support an accusation of offending – is either removed or that intention is artificially supplied when a death results. However the culpability dynamics vary significantly between these heads of murder.

Despite any similarity in goals between criminal law and tort (to redress the past, and to secure the future), to make unlawful killing \textit{result-authorised} dilutes criminal law’s capacity to react to an act which trespasses on a prohibition. Such result-based concepts as recklessness and negligence, when incorporated in criminal law, lead into a labyrinth of unnecessary calculations such as proximity and foresight. These are qualities which make an otherwise legal act unlawful after the event, and are therefore quite inappropriate when an act is \textit{already} prohibited.\textsuperscript{67}

\textsuperscript{66} Petronovic [1999] NSWSC 1131 unreported (26 November 1999). Greg James J said: ‘The suggestion that cases of felony murder such as this involve a lower level of culpability than cases of murder involving intention to kill and therefore should receive a lower level of sentence, has been rejected by the Court of Criminal Appeal in Mills (CCA, unreported 3 April 1995)’, para 41.

\textsuperscript{67} One conceptual problem with these ‘gateways’ to a legal response, even within tort law, is that they tend to be different terms for the same thing. That an action \textit{actually} caused a harm (the more fundamental and logical meaning of proximity) can only be an evidential concept: it establishes that
If intention, rather than effect, is the core issue for criminal culpability, how does that affect the doctrines in question? James Gobert identifies the tort-like characteristic of involuntary manslaughter:

The fault element in that branch of involuntary manslaughter known at various times in England as reckless manslaughter, gross negligence manslaughter, manslaughter by breach of duty continues to prove elusive. There is a general agreement that more should be required to convict a defendant of a criminal offense than would suffice for tort liability, but disagreement as to the additional elements that should have to be proved.68

In short, the lethal result of the choice is purely a matter for civil law. Yes, we have the macabre possibility that unintentionally – if negligently – killing a person without dependants will be risk-free, or that killing someone will be cheaper than maiming them. But this opportunity does not allow anyone to choose death over injury. It therefore does not authorise murdering the derelict or widow, nor deciding to back up over a pedestrian you have so far only maimed. Such killing remains chosen.

If voluntariness is ignored, vulnerability to criminal punishment is dissociated from choice. Once we put aside incidental killings by those deemed not competent to make a choice which conforms with the law, we are left with the stark reality that a killing indirectly caused was not what the accused wanted to happen, and may even be what the accused wanted not to happen. The doctrines we have studied reach behind this, to prohibit the creation of a circumstance of lethal danger. The prohibition is not against the death per se, but is against performing a dangerous act which – in conjunction with other agents – delivers death. The focus is not directly on the consequential harm, but on providing the opportunity for that result to happen. These doctrines therefore already serve to control endangerment. The problem is that they do so indirectly, by converting behaviour that satisfies a risk-based conjunction to fit the harm-based doctrine of duality. The outcome is arbitrary, as controlled by fate.

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68 Note 18 at 435.
DANGEROUS CIRCUMSTANCES

But if arbitrary censure is to be effective, it must only inflict pain when that hurts an individual who was causally associated with an unwanted result. Even then, that association must be avoidable. Such random brutality as the Roman Empire’s response to cowardice by Roman soldiers (decimation – killing one in ten of those in the same unit as the deserters\(^69\)) could only work if it sent a clear message: don’t even passively become an accessory to bad soldiering.\(^70\) Although crude and unacceptable by modern standards, decimation demonstrates a movement towards taking control over what the subjects can choose, rather than what they may inadvertently achieve.\(^71\)

Olivier explores the use of factual substitutions, particularly the statutory use of ‘deeming’, and argues that it is unnecessary, illusory, and used to disguise alterations to the law, where it is too specific, too narrow. Rather than openly broaden the ‘net’ to include the overlooked circumstance, identity, or activity, a fiction is used to equate it to the already controlled one. Olivier characterises the existing objections to legal fictions as that they are scientifically untruthful; uncertain as to what rules and facts can be revised; concealing of judicial creativity; unsystematic; undermining of respect for the law; indiscriminate.\(^72\)

The debate over constructive murder would appear to demonstrate that extending the ambit of murder to cover acts which were *never intended* to kill serves to destroy any distinction between those acts where death was risked, and those where it was the object. In Yeo’s words, ‘[b]y allowing the fault element to be satisfied by an intent to cause grievous bodily harm, the law

\(^69\) During the Roman Empire, one martial response to troops abandoning their weapons and retreating was ‘decimation’ of five hundred of that formation – the killing of one in ten as a reprisal: Polybii *Historiae*: Libra IV-VIII, Book VI, ch 38. In other words, the entire formation was seen as guilty, and a penalty was extracted which made repetition by the survivors very unattractive, if only by the laws of chance.

\(^70\) This causal linkage apparently escaped American soldiers in Vietnam, when they assumed they could *out-intimidate* the Vietcong by ‘Zippo Raids’ on villages (torching the cottages with cigarette lighters) regardless of any proven collaboration.

\(^71\) As Yeo suggests, ‘take the case of a heart surgeon who operates on a patient knowing that it was virtually certain that the patient would die on the operating table. If the surgeon’s aim was to preserve the patient’s life and restore her or him to health, it would be ludicrous to say that the surgeon intended to kill the patient and the jury would certainly so decide’: Note 60 at 30.

\(^72\) Note 1 at 88-90. To demonstrate Olivier’s point, the goal served by the mantra that everyone is presumed to know the law (a fictional state of affairs) can be just as easily served by ruling ignorance as justiciably irrelevant (a rule of the fact’s significance), an issue I will examine in *Chapter IV - Defences*. 

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permits a murder conviction to be constructed out of this lesser intent.\textsuperscript{73} Again, the notion of endangerment prevails over both species of homicide.

But since this extension only operates once a death has been caused, constructive murder is controlled by \textit{fate}. The flaw is again that, when culpability is created by a bad choice being made, \textit{the effect or consequence of the intention} has been allowed to prevail. If the intention is to be reckless, then logically this is the factor to be deterred and punished. That someone has died, in circumstances where the danger was overt, simply performs the function of proving the reckless intention. But it is not the \textit{cause} for punishment other than for recklessness itself. Any result simply builds the conclusion that the accused \textit{saw tragedy coming} but chose to proceed, perhaps because the tragedy was not going to affect them. Of course, the person who saw it coming, and who did break off from the enterprise, will not become subject to criminal prosecution. But is this person categorically, or only relatively, less dangerous?

To punish such a person beyond any disproportionately dangerous act itself, and to do so simply because any choice to take a risk proved to be an error, must defeat any genuine preventive aspiration of criminal law. So the residual questions are: (1) Can all forms of prohibited behaviour be articulated? (2) Must there be some ‘qualitative’ or ‘attitudinal’ prohibition – such as recklessness? (3) Can an ‘attitudinal’ proscription exist independent of actual damage?

The suggested approach is to dispense with the need for harm, so the intention to run the risk of inflicting a prohibited harm is sufficient for the sentencing ‘gate’ to be opened, triggering the imposition of consequences that will best serve the goals of fate-management. It remains a live issue whether the community is willing to relinquish control over what it sees as an appropriate penalty – arguably the reason for the menu of defaults we studied.

\textsuperscript{73} Note 60 at 45. This confirms the earlier view of Norval Morris and Colin Howard that ‘the theory of criminal responsibility has reached a point where the undiscriminating acceptance of an intention to inflict grievous bodily harm as sufficient mens rea for murder ought to be discarded as concealing a form of constructive murder’: Morris N and Howard C, \textit{Studies in Criminal Law} (London: OUP, 1964) 12.
in *Strict Liability* – and an issue I will take up in the *Conclusion*.

This conception of ‘shared’ responsibility for harm – between human activity and legal artifice – is most pronounced when criminal law assigns culpability for modern industrial catastrophe to those who set the harmful scene, by making them vicariously liable.
VIII
RISKY BUSINESS: CORPORATE HAZARDS

Introduction: the Pinto case

In 1978, three teenage Indiana girls were travelling in their Ford Pinto when the car was struck in the rear by a van. Although the van suffered negligible damage, the Pinto burst into flames, killing all three girls. Police at the scene noticed both the disparity of damage, and the quantity of petrol that had escaped. It was subsequently found that car’s design placed the bolts retaining the rear bumper hard against the petrol tank, so virtually any impact would drive them through the rear wall of the tank. Worse, it was established that the manufacturer, Ford Motor Company, had conducted crash tests and was aware of the danger, but was reluctant to rectify 1.5 million vehicles, preferring to pay whatever damages resulted from contested civil litigation.¹

Cullen et al² chart the Ford campaign to escape criminal prosecution and conviction.³ The result was that, ‘[a]fter four days of exhausting deliberations, the jurors returned their verdict: not guilty. The initial vote was 8-4 to acquit. Twenty-five ballots later, the final holdout changed his mind and joined the majority.’⁴ Thus the Pinto jury exculpated Ford, while the legislation defined as reckless ‘… plain, conscious and unjustifiable disregard of harm that might result … [and] substantial deviation from acceptable standards of conduct’.⁵

¹ As Swigert and Farrell depict, ‘[t]he indictment against Ford may be viewed as an attempt on the part of the state to assert moral integrity in the face of enemy deviation. In its decision to contest civil suits, the corporation refused to recognize that moral boundaries had been transgressed. This opened the way to a definition of the manufacturer as a force against whom the power of the [criminal] law must be directed’: Swigert V and Farrell R, ‘Corporate homicide: definitional processes in the creation of deviance’, (1980-1) 15 Law & Society Review 161-82.
² Francis Cullen, William Maakestad and Gray Cavender, in their chapter ‘The Ford Pinto Case and Beyond’, in Hochstedler E (ed), Corporations as Criminals (Beverly Hills: Sage, 1984)
³ First was an attempt to have the indictment dismissed, on the grounds that the offence of producing the Pinto in question pre-dated the Indiana statute making corporations liable for both commissions and omissions. The court ruled the omission – to recall or to warn – was alive for 41 days between the legislation coming into effect and the crash. Then the argument was advanced that federal product safety legislation overrode the state criminal law. This was rejected on both principle and lack of precedent.
⁴ The next ploy was to have the trial moved 55 miles from the town of the tragedy, on the basis that Ford could not get a fair trial there, to be heard by a rural judge only familiar with ordinary criminal law. The photographs of the charred bodies were excluded; along with Ford’s own crash test data demonstrating the car’s vulnerability to rear-end explosions, because they were all done with previous models. Overall, Ford spent an estimated $2 million to the prosecution’s $20,000.
⁵ Note 2 at 125.
There was never any suggestion that Ford directly intended its customers any harm, just that the company was in a position to have avoided a gruesome outcome. In response to the legal attack, clearly those guiding corporate policy had decided that the company’s commercial welfare was better served by denying civil and criminal liability, and that a legal admission was more damaging than the ‘moral’6 consequences of fighting it out.7

While this raises some intriguing questions about the adversarial system in general, this chapter is more directed at analysing whether criminal law currently has adequate doctrinal resources to control the production of hazard when the stakes are extreme. Can it find, and hold to account, that part of a corporation that does have control over policy where endangerment is generated?

The Scale of the Problem

As Jonathan Clough and Carmel Mulhern record, ‘the sheer scale of some corporate activity means that corporations have the capacity to cause much greater harm than individuals. To take two infamous examples: the 1984 chemical leak from the Union Carbide plant in Bhopal, India killed at least 3800 people and seriously injured many thousands more, while the grounding of the Exxon Valdez in Prince Edward Sound, Alaska discharged 11,000,000 gallons of crude oil into pristine wilderness.’8 Celia Wells collates the grim picture in the UK.9 Harm of great magnitude clearly challenges the capacity of

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6 Insofar as an artificial entity can experience guilt, beyond the community response of commercial ostracism.
7 Note 2 at 116-7.
9 Between 1996 and 1998, 510 people died and 47,803 suffered major injuries from work-related accidents. A total of 3,555 people have lost their lives at work in the last ten years. The Health and Safety Executive… concluded that 75 per cent of maintenance accidents in the chemical industry were either partly or wholly the result of site management's failure to take reasonably practicable precautions. ‘[[In at least two out of three fatal accidents, managements were in violation of the Health and Safety at Work Act 1974’. Between 1981 and 1985 there were 739 deaths in the construction industry 70 per cent of which (over 500) could have been avoided by ‘positive action by management’. There have been only a handful of prosecutions of company directors for manslaughter following a workplace death and these resulted in only two convictions. Brothers, David and Norman Holt, directors of David Holt Plastics, were charged with manslaughter. Norman Holt pleaded guilty and received a 1-year suspended prison sentence; the CPS accepted David Holt's not guilty plea: Wells C, Corporations and Criminal Responsibility 2 ed (Oxford: OUP, 2001) 121. [references omitted]
tort to restore; it also challenges criminal punishment to deliver any form of proportionality, particularly when linked to intent rather than effect.\(^{10}\)

There is evidence that corporate malpractice is punished less severely than inter-personal offending.\(^{11}\) Norrie suspects that there might by another agenda driving the relatively light penalties for corporate harm, since ‘corporate violence has just as (if not more) serious an effect on individuals as does interpersonal violence, so that the different treatment is a matter of socio-political construction and of how labels of criminality come to be conferred on some but not on others.’\(^{12}\)

**Chapter Goal**

An accepted goal of a commercial enterprise is solely to earn a dividend for its owners, so it is not abnormal to find businesses deliberately exploiting their power or knowledge for profit.\(^{13}\) In general however, beyond the traditional concept of unconscionability, there must be some element of deception before such behaviour is seen as impermissible. Such offending is relatively easy to control by normal concepts of dishonesty. The greater problem is when trading does harm beyond the normal cut-and-thrust of competition, with such harm incidental (perhaps even hostile) to the profit motive.\(^{14}\)

\(^{10}\) Wells concludes that ‘every year over 300 people die at work in the United Kingdom, and not just in traditionally dangerous industries. As the Health and Safety Commission has been keen to point out, many of these deaths occur during “seemingly innocuous” activities… the HSE’s own research into safety in specific industries … concludes that between 70 and 85 per cent of workplace deaths were preventable’: Note 9 at 9.

\(^{11}\) Adam Graycar points out that when Alan Bond diverted $A1 billion to his own use, this was more than all the Australian household burglaries over 18 months: *Sydney Morning Herald*, 13/8/97. If Bond had been imprisoned proportionately with the Northern Territory Aborigine who was given a mandatory sentence of 12 months for stealing $23 in biscuits, his sentence would have been 50 million years.

\(^{12}\) Alan Norrie, *Crime, Reason and History* 2 ed (London: Butterworths, 2001) 93. He concludes that ‘[t]he issue of sanctioning corporations takes us far from the calm, apparently apolitical, waters of the national criminal justice system. That system was designed functionally to control “natural” individuals, wrenched from the social context by their crime. To try to transfer those forms from the political context of control of the lower social classes (“street crime”) to that of control of an organisational elite (“suite crime”) is to ignore the basic differences in content, purpose and function of the criminal law’: at 103.

\(^{13}\) As Katsuhito Iwai puts it, ‘The traditional assumption in America is that the whole aim of a business corporation is to maximize the returns to its shareholders; whereas in Japan, the main concern of corporate managers is to maintain and enlarge the corporation itself as a going concern’: Iwai K, ‘Persons, Things and Corporations: the corporate personality controversy and comparative corporate governance’ (1999) 47 *American Journal of Comparative Law* [AMJCL] 583-632. 586.

\(^{14}\) Aside from perhaps arms manufacturers, who may profit by more efficient destruction and death—but only of an enemy. Jennifer Quaid notes, of the Law Reform Commission of Canada’s Working
A difficult legal role has been created by the emergence of industrialisation and the corporation, which have developed a species of enhanced dangers that the community has passed to law for management. \(^{15}\) These are generally safety issues. Some are covered by direct ‘civil’ regulation of the working environment, such as occupational health and safety legislation; others by product safety statutes. Such law can be anticipatory, restorative or punitive. \(^{16}\)

My concern is the pure criminalisation of dangerous commercial practices that were not directly intended to take fraudulent or unconscionable advantage of others, but which were willing to run some risk of inflicting harm in pursuit of profit. Jonathan Clough and Carmel Mulhern pose the question:

> even if we assume that corporations should be held responsible by the state for their wrongdoing, it does not automatically follow that we should utilise the criminal law. The same ends can arguably be achieved more efficiently by the use of civil regimes. Such regimes are supported by extensive investigative powers and allow for the imposition of monetary penalties, enforced undertakings, clean-up orders and the like without the many procedural obstacles of the criminal law. Why then, it might be asked, do we need to impose criminal liability upon corporations at all? \(^{17}\)

Such a development introduces a number of new issues, and recasts a number of old ones. The new problems tend to centre on identifying that element of a corporation that is capable of making (or that has already made) decisions that cause unlawful harm. The most obvious example is some form

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\(^{15}\) As Clough and Mulhern state, ‘[w]ith increases in scale comes a commensurate rise in the risk and degree of harm that may be caused. While this is the product of increased industrialisation it was the corporate vehicle that allowed this to occur’: Note 8 at 1.

\(^{16}\) See the previous discussion of the Northern Territory food safety legislation in Chapter III - Strict Liability. The important distinction between regulation and prohibition is that they deliver an opposed ‘residue’ of freedom: prohibition permits anything not specifically controlled; regulation permits only what is controlled – normally by licensing. Regulation therefore needs enabling legislation that withdraws an area of activity from the residual liberty of silence.

\(^{17}\) Note 8 at 10.
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of ‘moral apathy’\textsuperscript{18} that has caused a death, with the criminal justice system seeking out the entity that made a sufficiently autonomous choice to create the lethal situation, to then characterise that (legal) person as a subject for censure. This immediately raises the question of whether the human constituents of a company are in charge of its policy; or whether the corporate entity is overwhelming.\textsuperscript{19}

There is the issue of whether customers voluntarily assume responsibility for the products they buy, at least regarding any harm they then suffer, if they actually (or perhaps reasonably) know them to be dangerous.\textsuperscript{20} Who then, is really responsible when mechanical failure inflicts harm? As Cullen et al report of the jury that acquitted the Ford Motor Company over the three fiery deaths attributed to poor design of the company’s Pinto, ‘[s]ome of the jurors felt that the hazards of the Pinto were basically inherent in small cars and that owners took certain risks when they chose a vehicle that was less costly and consequently less sturdy.’\textsuperscript{21} Indeed, as Clough and Mulhern suggest, the condemnatory nature of criminal conviction often appears inappropriate for corporate malfeasance:

There is a common perception that corporate crimes are not truly criminal and are therefore more appropriately dealt with in the civil courts, and this perception is reflected in a number of ways. First, it permeates our language when we refer to industrial 'accidents' and environmental 'spills', and state that corporations are 'sanctioned' rather than punished.\textsuperscript{22}

\textsuperscript{18} Since the tribunal of fact will ultimately decide what \textit{degrees} of additional culpability should be attached to those creating the dangerous environment, it seems appropriate to regard the default as ‘moral’.
\textsuperscript{19} As Clough and Mulhern note, ‘behavioural theorists recognise that a corporation is made up of human actors with their own agendas and interests. Such theories recognise that corporations develop an internal sociology of their own that impacts upon the behaviour of individual personnel’: Note 8 at 191. And according to Lord Acton, when writing on the perils of absolute power, ‘[t]here is no worse heresy than that the office sanctifies the holder of it’: JEE Dalberg, ‘Lord Acton, letter to Mandell Creighton, April 5, 1887’, in G Himmelfarb (ed), \textit{Acton, Essays on Freedom and Power}, (1972) 336.
\textsuperscript{20} Despite Ralph Nader’s long campaign against vehicles \textit{Unsafe at Any Speed} (Mass: Knightsbridge, 1991), the public continues to buy the cheaper, faster cars over the slow, safer and more expensive ones. See Roy Morgan Research Centre, \textit{Willingness to pay for vehicle safety features} (Canberra: Federal Office of Road Safety, 1992) 19; 26; 31; 36.
\textsuperscript{21} Note 2 at 125. If the victims taking ‘certain risks’ was truly seen as attracting criminal responsibility away from the manufacturer, a logical (if dreadful) corollary would be to make any surviving victims culpable for whatever collateral damage their gamble inflicted on surrounding innocents.
\textsuperscript{22} Note 8 at 10. They continue ‘This notion is exacerbated by the establishment of specialist agencies to regulate and ensure compliance, the impression being that such offences are not true crimes as
Norrie points out that, ‘[t]he initial problem is that of seeing an actor or actors at the “moral centre” of the community as a criminal. To prosecute a company for manslaughter is to perceive the “captains of industry” upon whom, it is said, we rely for our economic wellbeing, as reckless or grossly negligent killers.’

Thus this topic again questions whether tort is the better forum for dealing with corporate activity that has incidentally done harm. The argument is that the most appropriate (and economically sound) response to those who have authorised inflicting risks for profit (ultimately the shareholders) is the ‘internalising’ process of damages. Opposing this reasoning is that the sheer scale of modern industrial harm, particularly death, may be beyond the resources of the offender to repay (so tort would be futile), and that no fine can be devised to reform without bankrupting the offending corporation; also that incarceration can focus on the wayward human decision-maker without destroying the rest of the enterprise. Ultimately, according to Clough and Mulhern, ‘[t]o abandon criminal proceedings in favour of civil penalties is to deprive the community of its right to express its contempt for conduct that seriously breaches the standards set by society.’

The topic also seems to revisit some of the unresolved issues about the purpose and effectiveness of the criminal sanction – particularly whether punishment is to provide retribution, deterrence of incapacitation – if from a novel angle: who, of all the contributing agents, to warn and/or convict? If it is seen as retribution or deterrence, then the search for a culprit will go in one direction (to find and blame those who can experience the required

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23 Note 12 at 92.
24 See the following discussion on John Coffey Jr’s ‘equity fine’ proposal at Note 80.
25 Note 8 at 13.
discomfort); if it is seen as incapacitation, the search may go elsewhere (perhaps adopting the function of a coronial inquiry, to reveal the gap in the management practice that, when sealed, will prevent recurrence).

The prospect of imprisoning industrial managers also raises the perennial question of whether incarceration can achieve anything much more than temporary incapacitation, and whether there should be more specific means of removing the person from any future access to the power misused. Is it sufficient to bar a corporate criminal from future directorship, as we do with those who have been convicted of some corrupt (or inept) financial practice?

The central question is: can the criminal courts find, with acceptable certainty, who has the decisive role; and is this more critical when punishment is possible, rather than restoration? Is the criminal burden of proof a proper protection against any uncertainty of interpreting evidence of professional procedure? Will it protect the harm-doer from a jury’s sympathy towards the victim; or from their own fears of the insidious hazards within industry?

Species of Corporate Culpability

Corporate culpability can be strict, based on recklessness or negligence, or even vicarious. The development of such liability is charted by Jonathan Clough and Carmel Mulhern:

Although corporations had existed at common law for centuries, their regulation did not become a pressing issue until the industrial revolution when the rapid industrialisation of nineteenth century society resulted in a flurry of regulatory legislation concerned with commerce and public welfare, together with the rise of the limited liability company as a vehicle for financing the growth in industry. While there was clearly a need for corporations to be regulated, the artificial nature of corporations presented a significant obstacle to regulation if personal liability or fault elements were to be insisted upon.

Hence the criminal law adopted and adapted the civil law principles of strict and vicarious liability which were developing at the same time. No special form of corporate liability was developed.26

Strict liability is seen as appropriate for ‘ultra-hazardous’ activity – presumably on the reasoning that entry into an area of commerce is entirely voluntary, so

26 Note 8 at 72 [footnotes omitted].
it is quite legitimate to warn prospective entrants when they are at the door that they will be held responsible for the (legal) risks they have knowingly engaged.\textsuperscript{27} However, beyond all the presumptions of free choice that characterise the laissez-faire philosophy,\textsuperscript{28} this logic depends on the enterprise remaining ‘risk static’. That is, neither the technology nor the market develops new dangers after there is no realistic choice of withdrawing from that field of activity.

Criminal negligence demands more than its traditional moral analysis where business is concerned; it requires a commercial judgment. A reasonable commercial choice – to inflict a criminal risk – cannot be divorced from the commercial realities that tort automatically addresses. That is, when tort threatens to add restitution (and no more) to the cost of the enterprise, the risk of harm is factored into the commercial decisions (and the price of the output). Criminal law, on the other hand, is only restrained by principles of ‘just deserts’. It can (and indeed, is advocated because it can) levy penalties at whatever level will effectively deter. Within the (cost and intrusion) restraints normally applied to policing, it can obliterate a lawful enterprise at will. In such an environment, reasonableness must serve to stay criminal law’s power when it would otherwise be oppressive. Since the only pragmatic role for (proof of) a mental element is to establish whether the harm-doing corporation has the capacity to lift its game (that is, the harm was not completely unavoidable), negligence serves to insist that the harm is not conclusive – there must be something the corporation could have done that was commercially viable.

However the core issue is that corporate criminality uses \textit{vicarious} liability to capture those who fashioned the dangerous environment, but were not the people who actually delivered the illegal harm. This construction is regarded with distaste elsewhere in criminal law, as it clashes with the principle that performed intent, rather than effect, is the central tenet of the criminal justice

\textsuperscript{27} This reasoning was developed in \textit{Chapter III - Strict Liability.}

\textsuperscript{28} ‘… a model of laissez faire economic competition and co-ordination would draw the lines quite differently from an interventionist approach stressing social responsibility and protection’: Note 12 at 99.
process. The justification for vicarious liability in tort – which is more directly concerned with redressing a result than reforming the tortfeasor – is generally that the employer has created the harmful environment, so was the primary source of the damage done. It is qualified by the tortious employee not being off on ‘a frolic of his own’ when inflicting the harm.\textsuperscript{29} Also, that only those with actual control over the workplace are held liable.\textsuperscript{30} Criminal vicarious liability similarly aims to only capture those who had some capacity to create an adequately\textsuperscript{31} safe environment, but who failed.\textsuperscript{32} So like all the other ‘reactive’ doctrines, it also fails criminal law’s anticipatory role.

I am not concerned, at this late stage of the thesis, to elaborate the pro/con discussion over this aspect of the doctrine. To a large extent, the same arguments will apply to vicarious liability as have been used to attack or defend the other constructions: that it is inappropriate for addressing direct intention (since there was none – either in the person who incidentally did the harm; and particularly the person who only set up a risky environment) but is highly relevant to those who would cut corners so that others are exposed to danger. I propose to investigate the doctrine’s capacity as a method of fate-management, and to compare it with a more direct endangerment model.

\textbf{Vicarious Liability}

In principle, criminal law has little place for liability based on the choices of others. As Jonathan Clough and Carmel Mulhern note, ‘[w]ith some minor exceptions, there is a common law presumption against vicarious liability.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{29} Per Parke B, \textit{Joel v Morison} (1834) 6 Car & P 502, 503.
\item \textsuperscript{30} \textit{Stevens v Brodribb Sawmilling Co Pty Ltd} (1986) 160 CLR 16.
\item \textsuperscript{31} I have avoided using the term ‘reasonably’ because it carries a direct implication of employing the normative person test. ‘Adequately’ allows some room for a potential cost/benefit analysis instead. It remains to be discovered during the chapter – whether this possibility is within the capacity of vicarious liability.
\item \textsuperscript{32} Eli Lederman summarises the US position as: ‘According to this development, which relies on the law of agency, a corporation is liable for the deeds of any of its agents or employees (regardless of the rank of this agent or employee in the corporation’s hierarchy or of the type of infringement) as long as two cumulative conditions are fulfilled: [T]he agent was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business which was conducted criminally; (2) the agent acting, at least in part in furtherance of the corporation’s business interests . . . At times, American courts added a third condition: “and (3) the criminal acts were authorized, tolerated, or ratified by corporate management,” thereby making the doctrine of vicarious liability more similar to the doctrine of direct liability’. Lederman E, ‘Models for Imposing Corporate Criminal Liability: from adaptation and imitation toward aggregation and the search for self-identity’ (2000) 4 \textit{Buffalo Criminal Law Review} 641-708, 654-5 [footnotes omitted].
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That is, it is presumed that a person should not be made liable for the criminal acts of another. This presumption may, of course, be displaced by parliament'. However there are situations where both justice and utility require such an extension. To use the situation of one diner left in a restaurant when his partner has departed before paying his share, and the owner – as completely innocent – should not be denied payment, the restaurant has two choices: to either transfer the responsibility for the food consumed to the remaining diner (vicarious liability); or to regard the food as having been eaten by that diner (deeming). As discussed in Chapter Six - Unintended Death 2, while both can be seen as constructions, deeming violates fundamental legal ideology, as it alters the fact rather than a principle.

There is a range of dangers that can only be answered by liability ‘reproduced’ in an associate. In the above hypothetical, the risk to restaurateurs of going unpaid; and the resultant need to demand payment in advance, or some form of bond. This may extend into restaurants refusing to serve those who look as if they lack the resources to pay (a right given by legislation to Sydney taxi drivers because of the frequent ‘runners’ they experience), to the use of ‘bouncers’, and even to some restaurants electing to take the risk (and inflate

Note 8 at 80. The issue of statutory interpretation is explored below.

Clough and Mulhern see this distinction between vicarious and deemed liability in ‘… the [first] approach adopted by the United States Federal Courts, which essentially applied principles of vicarious liability to all criminal offences involving corporations, including those requiring proof of mens rea. The second [approach], and which was ultimately adopted, was to formulate an alternative basis for corporate criminal liability whereby the mental state of certain officers would be imputed to the corporation. Liability would therefore be direct rather than vicarious’: Note 8 at 74 [footnotes omitted]. However Eli Lederman sees no difference, when he says ‘[t]he law implements the doctrine of vicarious liability through the auxiliary structure of a legal fiction that states, for the purpose of imposing liability, that whatever a person does through an agent, he is deemed to have done himself. In other words, the law views the act of the agent or the employee as an act perpetrated by the principal or the employer, and the knowledge of the agent or the employee is the knowledge of the principal or the employer. The law does not claim that the principal or the employer actually acted or actually knew. The law knows that reality is different and that these are two separate and independent entities, only one of which the agent or employer is actually involved in the actions or thoughts at stake’: Note 33 at 652.

In this sense, the criminal application of vicarious fault varies from its use in tort. In civil law, vicarious liability simply hands over the entire liability to a person sufficiently in control. Criminal law, by contrast, retains the primary culpability where there is an actual offender, but seeks to create additional culpability in the mind(s) fashioning the harmful corporate practice. See Tesco Supermarkets Ltd v Nattrass, 1972 App. Cas. 153 (1971). However Smith notes that statutes controlling the retailing of liquor often make the licensee solely liable for illegal sales performed by their staff. The legislation demands that the licensee not ‘suffer’ such sales to be performed; it does not inculpate the staff who do it: Smith J, Smith & Hogan Criminal Law 9 ed (London: Butterworths, 1999) 171-6.

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36 Passenger Transport (Taxi-cab Services) Regulation 2001 - s 55(2)(h).
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their prices) rather than make the dining experience unpleasant. In effect, vicarious liability is a technique for distinguishing who took the most avoidable risk of social harm: in this case, a restaurant that serves customers on trust (which will otherwise go unpaid because of any policy – or because of staff inattention – to freely allow people to leave); or customers who dine with people of questionable morality.

However the main use of vicarious liability is to make those who create and operate businesses – or the corporations themselves – legally responsible for the activities of those under managerial control. As the US Supreme Court noted in 1909, the logic of vicarious liability is indisputable, ‘since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done.’37 This invokes the familiar problem of statutory intent:

in circumstances where vicarious liability is not expressly imposed, the language of the statute is crucial in discerning the implied intention of parliament, if any. For example, the use of certain words such as “ill-treat” may suggest that the action must be performed by an individual and therefore vicarious liability is not to be imposed. However the courts have been extremely generous in interpreting words as being capable of encompassing vicarious liability and so such words as “to sell”, “to cause”, to “supply”, to “use”, “make” a declaration, “to pollute”, and to “dispose” have all been held to encompass vicarious liability.38

Yet according to Todd Grant, ‘courts often confuse strict liability and vicarious liability, and cases where both are involved, and describe [both] as strict liability. True strict liability indicates the absence of any mens rea requirement. In contrast, true vicarious liability indicates the absence of any requirement of actus reus. The simultaneous application of strict liability and vicarious liability (sometimes termed ‘absolute liability’) indicates the absence of any requirement for either mens rea or actus reus.’39 How then, should

37 New York Cent. & Hudson River RR v United States, 212 US 481, 492-93 (1909)
38 Note 8 at 81-2. [Footnotes omitted]

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criminal justice decide when an individual is to be held solely responsible for a harmful decision; or when that person’s ‘corporate umbrella’ is the entity warranting censure?40

**The Impact of Corporate Culture**

The very nature of corporations introduces situations of joint culpability that escape the direct intention required by the ordinary doctrines of conspiracy and complicity.41 The use of such emblems as corporate logos demonstrates that the company is an entity apart from the combination of all its human constituents.42 The struggle over individual or collective culpability is well summarised by Jonathan Clough and Carmel Mulhern:

> When discussing corporate criminal liability, one is invariably confronted with the ... strict individualistic position ... that corporate criminal liability should be abolished and authorities freed up to focus on the individuals who are the true culprits. There are a number of arguments used to support this position.43

40 Eli Lederman sums up the existing approaches: "Nominalist" theories of corporate personality view corporations as nothing more than collectives of individuals. Speaking of corporate conduct or corporate fault is seen as a shorthand way of referring to the conduct and culpability of the individual members of the collectivity. The "corporation" is simply a name for the collectivity and the idea that the corporation itself can act and be blameworthy is a fiction. "Realist" theories, on the other hand, assert that corporations have an existence that is, to some extent, independent of their members. Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault ... the responsibility of the corporation is primary. It is not dependent on the responsibility of any individual. Responsibility is analyzed within a realist framework by examining directly questions about what the corporation did or did not do, as an organization; what it knew or ought to have known about its conduct; and what it did or ought to have done to prevent harm from being caused.

41 See the discussion on complicity in Chapter II - Anticipatory Offences.

42 The Sydney taxi industry recently used the very expensive initiative of issuing uniforms to all its drivers (many of whom only worked occasionally or briefly) in order to raise their sense of professionalism. As Shaun Martin notes, [a]lthough fictional legal entities such as corporations are made up of multiple natural persons, a corporation and its managers have for centuries been considered as one person in law. It has long been the case that artificial persons, like natural persons, cannot "conspire" with themselves or be convicted of any such "conspiracy." Indeed, this longstanding rule continues to be applied in the resolution of common law civil conspiracy claims: Martin S, 'Intracorporate Conspiracies' (1998) 50 Stanford Law Review 399-467. 447 [footnotes omitted].

43 Note 8 at 4 [footnotes omitted].
These authors then discuss the alternative positions presented over whether a corporation is more than the ‘sum of its parts’; the absence of a ‘mind of its own’; and whether the corporate entity presents a better target.

Given the broad (even international) spread of the modern corporation, it is obvious that there must be some special criteria defining corporate culpability. According to William Laufer, ‘[l]arge, decentralized entities often distance themselves from the decisionmaking of management through delegation of responsibilities and employee empowerment.’ Wells proposes that there are three different theories for attributing blame to corporations. Shaun Martin

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44 ‘Firstly, it is argued that a corporation is merely an aggregation of individuals and cannot commit crimes in its own right. Responsibility should therefore be brought home to the individual. To proponents of ‘enterprise liability’ such an assertion is simply wrong. A corporation is more than an aggregation of individuals. It is a system comprised of individuals but which has properties that are distinct from the individuals themselves. That is, it is greater than the sum of its parts. Corporations are complex entities with their own standards of behaviour that may deviate from a defined norm so as to warrant being described as criminal: 4-5.

45 ‘Secondly, it is said that as a fictional entity, a corporation cannot have a will or intent of its own and is therefore not capable of being subject to the highly individualistic principles of criminal law. However, the criminal law’s individualistic focus on subjective mental states should not be exaggerated. There are many instances where the criminal law abandons subjective mental states, including vicarious liability, where the accused is made liable for the offences of others, strict liability offences for which there is no fault element, and objective liability where the fault element is negligence. Corporate offenders can, and do, fit easily within these categories of crime’: 5.

46 ‘Thirdly, even if it is accepted that a corporation may be criminally liable in its own right, there is the pragmatic argument that there is nothing to be gained from pursuing it rather than the individuals concerned. There are, in fact, a number of circumstances in which it may be desirable to pursue the corporation in addition to, or instead of, the individuals concerned. The most obvious example is where it is difficult or impossible to ascertain the individual or individuals responsible. Such difficulties may arise because of the complexity of the corporate structure or of the alleged offences. In addition, as corporate harm often takes a long time to reveal itself, the relevant officers may have left or died. Alternatively, the obfuscation of the individuals responsible may be more direct with the corporation adopting measures to protect individuals, particularly senior executives, from responsibility. This may take the form of organisational secrecy or other individuals who are more dispensable becoming scapegoats. In addition, corporate criminal liability may also serve a useful purpose where multinational corporations are involved. Although the criminal law cannot extend to a parent company that is outside the jurisdiction, criminal sanctions on the local company may have an impact on the parent’: 6. Susanna Kim presents the issue as that ‘[e]ven if the corporation exists as a real person, it is important to determine whether the corporation enjoys such existence on its own or merely as a byproduct of aggregating its individual members. In other words, is the corporation a distinct and independent person, separate and apart from the human beings that make up the corporate structure, or is the corporation merely an aggregation of such individuals, the sum total of the human beings involved in its operations?’: Kim S, ‘Characteristics of Soulless Persons: the applicability of the character evidence rule to corporations’ (2000) 76 University of Illinois Law Review 787.


48 The agency principle, respondeat superior, whereby the company is liable for the wrongful acts of all its employees, is deployed in the United States federal law. The second theory of blame attribution, utilized in English law for all other offences, renders the company liable only for their culpable transgressions, not for those of other workers. Identification theory forms the basis of corporate liability, although often interpreted more generously, in many American states, Canada, New Zealand, and the state jurisdictions in Australia. The third theory locates corporate blame in the procedures, operating systems, or culture of the company. Company culture theory is deployed in the Australian Criminal Code Act, and in the proposed corporate homicide offence in the United Kingdom: Note 9 at 130.
points out that, at least when dealing with civil liability, the US courts have applied a ‘single entity’ analysis which has defeated conspiracy actions. 49

This raises the question of whether any individual human decision-maker is truly the author of a dangerous industrial choice. In discussing alternative conceptions of the relationship, Katsuhito Iwai makes the point that:

Corporate realism asserts that the corporate personality is a full-fledged legal entity simply because this theory views the corporation as an organizational being capable of having its own will and pursuing its own goals in society. Corporate nominalism dismisses corporate personality as a mere legal symbol simply because it views the corporation as no more than an association of individual human beings forming a contractual agreement among themselves in the society. 50

The harmful effect of the corporate personality can also be triggered by omission, usually a wrong that is dependant on a duty. 51 Brent Fisse argues that ‘[t]o the extent that corporations can and do have criminal policies, the blameworthiness inherent in those policies can be reflected by imposing corporate criminal liability.’ 52 He concludes, ‘no matter how individual criminal liability might be reformed, it would still be incapable of expressing the “corporateness” of corporate fault.’ 53

Even when it is necessary to find a human person as the conduit to corporate culpability, under the “identification doctrine” [when] the conduct of certain officers of the company is treated as being that of the company itself, 54 there are a number of approaches designed to restrict the focus onto appropriate individuals. 55 Alan Norrie has identified two broad approaches to isolating the

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49 ‘According to this approach, because the acts of a corporate agent are the acts of the corporation, no plurality of autonomous agents exists when wholly intracorporate conduct is at issue. This theory posits that internal corporate discussions cannot give rise to corporate liability for conspiracy because only the actions of one entity – the corporation, acting through its agents – is alleged’: Note 42 at 411 [footnotes omitted].

50 Note 13 at 600.

51 Norrie notes that ‘arguments can be made about whether a company “accepts” dangers arising from its operations. British Rail had forbidden electricians from wiring in unsafe ways; but in the organizational climate in which they were operating, their general way of organising their activities generated precisely the unsafe practices they had formally prohibited. Had they then “accepted” these practices?’: Note 12 at 97.


53 Note 52 at 80.

54 Note 8 at 75.

55 Clough and Mulhern identify three major methods of transmitting culpability through to the corporation: The US approach of requiring that the person is acting ‘at least partly in the interests of
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human agents who serve as a culpability conduit. One is ‘individualisation’, meaning to narrow the search to the least number of persons that can effectively be held responsible (depending on the purpose of such identification). Another approach is the reverse: ‘aggregation’, gathering together all who contributed to the harm. The difference is based on whether the law views human agents as controlling the artificial entities they have created; or whether it accepts that a corporate entity can gain its own personality.

**Individualisation**

This is the modern development of the identification doctrine. Jennifer Quaid notes that:

> [t]he current system of corporate liability in Canada and the United Kingdom, based upon vicarious liability and the identification doctrine, is a reflection of this individualist model. Although no one suggests that the individualist model for liability should be abandoned, it has nonetheless been the object of much criticism. Critics find that individualism is an incomplete basis upon which to ground the criminal liability of corporations because it does not accurately capture the nature of corporate behaviour.

Lord Justice Denning in *Bolton v TJ Graham* chose to anthropomorphize the corporation, to decide which workers constituted the head (responsible for the decisions) or the hands (doing as told). In *Tesco Supermarkets Ltd v*

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56 Paula Dalley explains that ‘Nineteenth-century law conceptualized that imputation through the identification doctrine, pursuant to which the principal and agent were identified as one person. The agent was treated essentially as an appendage of the principal; acting through an agent was the equivalent of using one’s own hand. The identification doctrine, frequently expressed in the maxim *qui facit per alium facit per se*, solved a number of problems in agency law because it allowed the agent’s state of mind, as well as his actions, to be imputed to the principal. The identification doctrine is now largely ignored, except as an historical artifact, and there is no generally accepted grand theory of agency law’: Dalley P, ‘All in a Day’s Work: employers’ vicarious liability for sexual harassment’ (2002) 104 *West Virginia Law Review* [WVLR] 517-569. 522 [footnotes omitted].

57 Note14 at 69.

58 [1957] 1 QB 159.
supermarket staff had refilled a shelf of ‘specials’ with the same product price-tagged at the normal price. The Trade Descriptions Act 1968 (UK) s 11(2) makes it an offence to indicate ‘by whatever means’ a price below that ultimately charged. Section 24(2) of the Act absolves the company if it exercised all ‘due diligence’, and the mis-pricing was done by ‘another person’. With corporate due diligence satisfied at trial, the question was whether the store manager (as vicariously liable for the acts of his staff) was related to Tesco as ‘another person’. The trial magistrates found that he was not, so Tesco was convicted. On appeal to the Divisional Court, the manager was held to be ‘another person’, but that he held (and failed) a delegated duty of ‘due diligence’ from the corporation (so Tesco had vicariously failed s 24). On appeal to the House of Lords, the judges’ reasoning was diverse. Lord Reid found that since a corporation is a fiction, people directing it are acting as the company; servants work for it. The question is where does ‘as’ stop and ‘for’ begin? In this case, the delegate manager was not ‘independent’, so was acting for the company, and is culpable on his own. The key statement by Lord Reid was:

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them.

Brent Fisse criticised Tesco on the basis that criminal fault is individual; workers (and perhaps union representatives) can make more policy decisions

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60 In Lennard’s Carrying v Asiatic Petroleum [1915] AC 705 (HL) the ‘managing owner’ made decisions as the owners. Subordinates ‘carry out orders’ within the discretion given them. Only if the delegation is to act independently is the delegate acting as the company. The argument for (upward) transferred culpability, despite the superior’s due diligence, is a spur to greater control – based on a suspicion that magistrates rate ‘perfunctory efforts’ as proper. The counter argument is that to absolve the large employer will discriminate against the owner-shopkeeper.
61 Note 35 at 171.
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than remote boards; the top managers of small companies are more at risk; and corporations can evade the ‘duplicated’ fault by ‘hands on’ supervision.⁶²

One of the problems generated by individual culpability is, as Norrie suggests:

By virtue of complex systems of company ownership within a conglomerate financial structure, of relationships of contracting and sub-contracting with dependent ancillary companies, and of positions of string influence enjoyed by partial, non-controlling owners or third parties such as banks, the locus of actual responsibility for a criminal act may reside far away from the formal head of a particular company, even if he is himself an immediately responsible agent.⁶³

The courts have nevertheless found it difficult to ignore human agents, when attributing culpability.⁶⁴ According to Norrie, ‘[i]t is said in America that companies appoint senior personnel as pre-emptive scapegoats in order to avoid opprobrium falling on the company as a whole (the ‘Company Vice-President responsible for going to jail’). One individual carrying the responsibility for fault permits business to proceed as usual.’⁶⁵

Aggregation

Wells characterises aggregation as that the concept ‘straddles agency and holistic forms of liability. It is used in the United States but has been

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⁶² ‘Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties’ (1990) 13 University of NSW Law Journal 1, 3-4.
⁶³ Note 12 at 100.
⁶⁴ According to Celia Wells, ‘[i]n their case against GWT [Great Western Trains – operators of the railway involved in the Southall crash in 1997. It was alleged that the driver was away from the controls, packing his bag ready for arrival at Paddington, with the Automatic Warning System known to be malfunctioning, and the new Automatic Train Protection system was not in use, because the driver had not been trained to use it, when the train ran a red light and collided with a goods train – killing seven passengers], the prosecution sought to [argue that] … the company's liability should be established by proving that the company's management policies had resulted in the failure to have a proper warning system which led directly to the crash. This attempt to forge a route to liability independent of an individual director's negligence was rejected by the trial judge who ruled that a non-human defendant could only be convicted via the guilt of a human being with whom it could be identified; it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty (human) mind to be proved. The case therefore collapsed’: Note 9 at 112. Wells suggests ‘[t]he conclusion was that “unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company [it] is not, in the present state of the common law, liable for manslaughter”: Attorney-General’s Reference (No 2 of 1999) (2000) per Rose LJ, 191. Given that few directors are involved in operational roles (they do not actually drive trains), the suggestion that this includes the actus reus would add an additional burden in a corporate prosecution’: at 113.
⁶⁵ Note 12 at 100.
⁶⁶ Under this approach, the entire culture of the corporation is examined for a general inadequacy in anticipating and averting corruption or endangerment.
rejected in English corporate manslaughter cases. Given the length of time that can exist between the harmful corporate behaviour and any prosecution, to seek out only the corporate entity runs the risk that the policy may well have been reformed (thus rendering futile any punishment beyond retribution or general deterrence), and even that the entire entity may no longer legally exist.

Again we see the distinction between tort and criminal law. Perhaps the search for the culpable entity must acknowledge the responses available to criminal law, particularly when such law is attempting to dissuade dangerous behaviour. In effect, the entity capable of avoiding unlawful activity must be aware of the potential legal reaction, and must want to elude it. DiMento et al conclude that ‘[o]nly criminal liability, according to proponents, sends a sufficiently strong message to the corporation, through both its managers and shareholders, to serve as a deterrent. Punishing individuals alone fails to control the large, complex firm.’

**Penalty**

One line of argument is that the prospect of gaol (and the subsequent damage done to careers) is a tangible and effective warning to anyone capable of

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67 Note 9 at 156. Norrie attacks the concept of aggregation as that '[w]hile [aggregation] correctly recognises that the harm produced by a corporation can involve the combined activities of a number of persons, it fails to specify what it is that unifies those activities so as to justify attributing responsibility to the corporation. It fragments the concept of the "directing mind", in order to reflect the way in which corporate harm occurs, but fails to explain why corporate responsibility should be based thereon. The idea of the "directing mind" “works” precisely because it analogises corporate and individual human activity": Note 12 at 95.

68 As Norrie notes, 'One reason given by the families of those killed in Piper Alpha disaster for abandoning their attempt to mount a private prosecution against the oil rig company was its sale by the parent company, Occidental": Note 12 at 101.

69 DiMento J, Geis G and Gelfand J, ‘Corporate Criminal Liability: a bibliography’ (2000-1) 28 Western State University Law Review 1-64, 2. They continue: ‘This point of view stresses that, at times, corporations do, in fact, effect criminal acts through elaborate corporate processes and not through individual decision-making. It is not always just an aggregate of individuals that constitutes the culpable entity.

Furthermore, proponents argue that the mens rea element for corporate crime is not an insurmountable barrier, as specific intent need not always be an element of a crime. Moreover, criminal procedure rules make successful prosecutions of entities, rather than individuals, more likely. Corporate criminal liability creates a strong incentive to promote compliance among managers without necessarily punishing stockholders. In fact, corporations can be “rehabilitated” (redesigned) more readily by court-imposed sanctions than can individuals. Finally, from a restitution perspective, since the corporation almost always has many more assets than the individuals who work for it, the opportunity to redress the harm inflicted by criminal actions will be greater if corporate resources can be attacked.’
functioning within the broadest concept of rationality. There is no way that the corporation can replace the loss (as it can with a fine). Incarceration, then, is seen as effectively taking away from the human agent some equivalence with the individual harm done. This is a power beyond tort, which is limited to guesswork about the monetary value of the detriment done.

If the goal of the organisation is to make a profit, a fine is the most appropriate response. It should produce the effect of either putting that corporation at a disadvantage to competitors who have done no harm (perhaps even forcing the guilty corporation out of business entirely), or of enraging the shareholders against those elements of management that they see as having reduced their earnings, so they will be removed from power.

Economic sanctions are not without their problems. Kip Schlegel notes the familiar ‘crime tariff’ issue identified by Packer: if fines are to deter, they must multiply the potential benefit by the chances of escaping detection. So a $500,000 potential gain with a (known) 9-in-10 chance of the activity going undetected, would only be deterred by a $5 million fine. Schlegel argues even the goal of invoking shareholder power may misfire, because modern short-term investment strategies (and electronic selling capabilities) undermine the logic that shareholders can provide residual, effective policing of management error. Even if shareholders remain a legitimate target for a corporate fine, there is no way of protecting the employees from a ‘cannon effect’ as the company attempts to recoup the penalty; and from punishing the customers where there is not fierce price competition. Norrie points out that, ‘[t]o punish a corporation is … to affect both the company as a corporate actor

70 There is argument that even a ‘deranged’ individual, when faced with someone armed with a shotgun and displaying the determination to use it, will pause to reconsider any further antagonistic behaviour. As I noted in Chapter IX - Defences when discussing provocation, this logic has led judges to see anger as a choice within rational behaviour.

71 Foucault argued that prison was initially seen as the perfect punishment: it took away a portion of the criminal's liberty, the one thing that cannot be bought, and is the equal birthright of all. It was therefore an egalitarian punishment: Michel Foucault, Discipline and Punish (London: Penguin, 1977) 231f.

72 A novel possibility could be a ‘reversionary fine’. That is, a fine extracted then returned to the company for the sole purpose of installing better safety. The logic is that a one-way fine may well cripple exactly the enterprise needed to avoid more trauma.

73 See p 193. Also Packer at p 135, Note 33.


75 Note 74 at 28-9.
and at the same time all those persons who as investors, employees, and consumers are the living human beings within the company’s orbit.’76 He elaborates the vicarious effect generated by the company’s integration with the surrounding society: ‘Economic deterrence required to match wrongdoing may exceed the company’s ability to pay, eventually driving it to the wall. Such a result affects society as a whole, not just the company and its shareholders.’77 In Norrie’s view, such issues demand greater punitive imagination.78

Clough and Mulhern suggest that there are four possible sanctions specific to the artificial corporate offender: adverse publicity (including mandatory apologies); corporate probation; fines (directed at redressing the victim) and incapacitation (by deregistration).79 John Coffey Jr’s proposal of an ‘equity fine’ is that the value of the fine would be taken in newly issued shares, to be held by (for instance) a state victims-of-crime fund. This would dilute the dividends to the existing shareholders, and give the state some representation in deciding company policy.80 Kip Schlegel investigates ‘structural intervention’, a form of ‘corporate probation’, but suggests that this penalty creates an internal conflict between the corporation’s commercial goals and extensive legal supervision, so that obeying the law gains inappropriate weight in forming policy.81 ‘Adverse publicity’ – as a deliberate penalty created by mandatory apologies – he sees as too dependent on such unknown quantities as community reaction. It can also inspire the company to launch a counter-publicity campaign to neutralise the bad impression.82

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76 Note 12 at 101.
77 Note 12 at 101.
78 ‘One response to this problem is to consider forms of non-financial sanction. If fines hurt too much, then other punishments less potentially damaging to the corporation can be considered. Proposals include the use of ‘equity fines’ or stock dilution … enforced adverse publicity, community service, and corporate probation orders or punitive injunctions focused on restructuring the firm’s internal organisation (Coffee, 1981; Fisse, 1990)’: Note 12 at 101.
79 Note 8 at 194-216.
81 Note 74 at 34f. This reasoning clearly casts legal control as merely one player in deciding what risks are tolerable.
82 The US practice of forcing companies to publish retractions of false advertising claims has been known to backfire. Even with the required form of the retraction being a bare statement, subsequent buying has revealed that the correction was more effective promotion than the glossy assertions that were deemed deceptive.
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If the goal is traditional punishment, aimed at encouraging better behaviour, as Norrie suggests, ‘[s]uch sanctions do not side-step the basic problem of the financial sanction. Since corporations are at bottom concerned with profitability, punishment will only have serious effect to the extent that corporations’ transaction costs, and therefore their balance sheets, are affected by alternative sanctions.’

Another issue is the problem of competing with jurisdictions which do not place an equal emphasis on industrial safety – so if the industrial harm is not ‘internalised’ into the production costs, the product can be exported with advantage into more safety-conscious jurisdictions. As Norrie points out, the concept of corporate culpability re-opens the question of whether criminal law has ever escaped its political origins.

It is difficult to deny a corporation the ‘collective character’ that we assign to society itself, particularly under theories such as post-modernism. Even federalism concedes that neighbouring jurisdictions gain differing characters from the laws they each create. Once the corporate mind becomes the locus of guilt, this genus of offending extends the concept of culpability familiar to conspiracy – to an active decision, rather than an agreement – and gains the anticipatory character of inchoate offences. Further, the ‘corporate personality’ analysis reveals one artificial entity (the society) using law to

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83 Note 12 at 102.
84 Fisse notes the temptation for corporations to site their directorate in ‘refuge’ jurisdictions that do not reciprocate domestic criminal process, so that (to extend Denning LJ’s vision) only a non-culpable ‘hands-not-mind’ organisation is resident where there is vigorous pursuit of corporate duty of care: Brent Fisse, ‘The Duality of Corporate and Individual Criminal Liability’ in Hochstedler É (ed), Corporations as Criminals (Beverly Hills: Sage, 1984) 69-82, 74-5. This dynamic requires the deliberate use of import levies to protect the local businesses. However it does not guarantee safe work practices beyond what is required by law. So while it may provide a zone of safety for those corporations that – for their own corporate reasons – voluntarily work towards a safe environment (they may see some advantage in attracting better workers, for instance) – it also provides ‘fat’ for the lazy corporations. They now have protection against vigorous external competition.
85 With the human individual, the law has managed the clever trick of representing essentially political acts as depoliticised crimes, recognised under criteria that appear universal and apolitical. The technical doctrine of mens rea is crucial to conferring liability on individuals without apparent recourse to moral or political grounds for action. But this achievement … is called into question by the nature of corporate deviance’: Note 12 at 104.
86 Shaun Martin believes ‘[t]here is no reason to believe that possible punishment for conspiracy adds substantially to the deterrent effect of the criminal law. Indeed, an individual or corporation that feels that a certain type of substantive criminal activity is “worth the risk” seems unlikely to have a change of heart simply because the government might add a conspiracy charge to the substantive and attempt offenses that the conspirators, if caught, are likely to confront. As a result, it is doubtful that corporate liability for criminal conspiracy adds any substantial deterrent to corporate contemplation of illegal conduct’: Note 42 at 461.
FATE MANAGEMENT

protect itself from another (the corporation). Perhaps the better model is international law, with its dependence on negotiation (a powerful corporation can bargain where the individual cannot) and its permitting pre-emptive measures against virtually any ‘immediate and pressing threat’.87

Summary

DiMento et al suggest that there are a range of issues that conspire to make the present approach to corporate criminal culpability less than ideal.88 Jeffrey Rosin remains unconvinced as to its effect.89 Julie Rose O’Sullivan prefers to critique the doctrine for its violation of settled criminal law principles.90 Perhaps the more fundamental issue of legal principle, and the final attack on the current capacity of criminal law to supervise corporate behaviour, is presented by Jonathan Clough and Carmel Mulhern:

Although we have argued that the moral authority of criminal law is one

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87 ‘... the customary right of self-defence permits the use of force in any of the following circumstances:
(b) Force is lawful in anticipatory self-defence, so that a state may strike first, with force, to neutralise an immediate but potential threat to its security.
(c) Force is lawful in self-defence in response to an attack (threatened or actual) against state interests, such as territory, nationals, property and rights guaranteed under international law. If any of these attributes of the state are threatened, then the state may use force to protect them
(d) Force is lawful in self-defence even if the ‘attack’ does not itself involve measures of armed force, such as economic aggression and propaganda. All that is required is that there is an instant and overwhelming necessity for forceful action’: Marion Dixon, *Textbook on International Law* 2 edn (London: Blackstone, 1993) 254.

88 ‘Opponents of the doctrine assert that a corporation cannot have the requisite mens rea to commit a crime. Further, the doctrine of corporate criminal liability builds on the worst elements of vicarious liability; it results in unfair punishment of the innocent, including shareholders and employees and those who live in the communities in which the corporation serves. Moreover, opponents argue that the doctrine does not work. Even worse, it has the counterproductive effect of protecting guilty individuals within the firm. If deterrence is the goal, the more effective means of achieving it is through civil liability. Use of the civil law faces many fewer procedural hurdles’: Note 69 at 2-3.

89 ‘Vicarious liability was an attempt to place the loss on the party best able to anticipate harm and ensure against its occurrence, as well as to discourage employee misconduct by encouraging improved supervision. However, vicarious liability only marginally furthered these goals. The doctrine improved employer supervision, but corporations remained capable of absorbing the relatively small compensation costs by buying insurance and passing the cost on to consumers. In short, vicarious liability provided only the most minimal incentive to abide by the law’: Rosin J, ‘New Chapter 9: an analysis of the proposed sentencing guidelines for organizational environmental offenders and the historic evolution of a compliance nightmare’ (1995) 3 New York University Environmental Law Journal 559-91. 572 [footnotes omitted].

90 ‘Whether the imposition of corporate criminal liability is fair or efficient in furthering the goals of criminal punishment is still very much an open question among commentators, if not courts. Why is this diversity of opinion troubling? Primarily because the imposition of vicarious liability, through the doctrine of respondeat superior, “is contrary to the basic Anglo-American premise of criminal justice that crime requires personal fault on the part of the accused.”[LaFave WR, *Criminal Law* (3 ed) 2000) 271] …. In particular, the civil law standard of vicarious liability was transplanted into the criminal realm without consideration of the different aims of criminal and civil liability’: O’Sullivan J, ‘Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal’, (2002) 16 Georgetown Journal of Legal Ethics 1-90. 15.
of the primary justifications for imposing criminal as opposed to civil corporate liability, its importance lies in the greater educative and deterrent effect that criminal sanctions are likely to have. To go further and attempt to use criminal sanctions to morally condemn an amoral entity is reminiscent of the medieval punishment of animals and objects that had offended.91

In any society that retains faith in the criminal sanction as an agent of harm-control, it is unremarkable that such sanctions should be extended to an artificial entity capable of inflicting immense tragedy. Indeed, it would be astonishing if such control was not at least partly the job of criminal justice. That criminal law has entered the field certainly supports the argument that modern criminal justice is increasingly focused on the creation of danger, and on control over catastrophic outcomes.92 It is the resort to vicarious liability – a form of construction similar to those I have investigated earlier in the thesis93 – that most vividly demonstrates that criminal law has joined with tort to control those who have effective power over the creation of danger, in order to enforce their vigilance. The combination of such constructed culpability – with the flexibility of the criminal penalty – creates a potentially powerful method of control against those who would otherwise not bother to execute their business as safely as possible.

It consequently creates the demand, of the criminal justice system, for great precision in targeting those who do have the capacity to make industry safer; along with astute judgment as to when some social benefit demands that risks be tolerated. As Kip Schlegel asks, ‘[h]ow much crime do we as a society tolerate? The utilitarian response is to weigh the costs, where costs are measured by the expenses imposed on both society and the offender, and the

91 Note 8 at 185. Deodand was the medieval practice of punishing inanimate objects and animals. More closely analogous to corporate criminal liability is Frankpledge, which was the practice whereby members of a group were made responsible for a crime committed by one of them [original authors’ footnote]. See also my reference to the Roman practice of ‘decimation’ in Chapter VI - Unintended Death 2.

92 As I have argued elsewhere, the only significant difference between direct and indirect intention is that – since perpetrators of both forms of offence want their enterprise to succeed – only direct success will deliver harm, while failure by either offender can harm any person in the vicinity. Thus a greater armory of doctrines is available to inculpate the stray bullet that does harm, than the one that succeeds in going where it was meant.

93 Most notably in Chapter VI - Unintended Death 2: creating dangerous circumstances.
benefits, which derive from the reduction in crime. 94

At last we see an acknowledgment that criminal law has a role to arbitrate between conflicting claims for freedom and security – the freedom to inflict risks, against the security that only ‘valuable’ risks will be permitted – and that it does so by imposing objective tests on the actual intentions of the accused. 95 What vicarious culpability displays is a focus, not on individual malice, but on risks created by fate-management lethargy. It is therefore a primary example of the thesis contention that criminal law is recognising its core function as fate-management, with the enforcing or morals as simply a method.

I suggest that the best approach is to accept corporate offending as a special genus of criminal law. Rather than the usual distinctions of the focus of the unlawful enterprise – whether it is a trespass to property or to the person – what seems to provide the binding concept here is that the offender was being paid to make lawful decisions at the time that some trespass was at least possible. It does not present the usual forensic difficulty – of finding the individuals who satisfy a legal definition of wilful causation, and (at least) conscious endangerment 96 – but rather one of comprehending a collective person per se. Certainly, blaming the entire corporate body would permit the use of all the usual processes. However that would sweep up the innocent human individual along with the guilty, a problem we have encountered with a number of other constructions. Some new distinction needs to be forged, that recognises a difference between the corporate mind and its body. 97

94 Note 74 at 40. Celia Wells takes this argument a step further, observing that ‘[w]e tolerate different degrees of risk according to the nature of the activity, its social utility, any future benefits it might bring, the type of harm threatened and the cost of its avoidance. The risks taken in open-heart surgery, for example, might be high but the pay-off is too, while the prospects if the operation is not done are limited. Transport systems also have social utility. In the case of both surgery and transport we neither expect that all risks can be eliminated nor that ‘clear’ risks will be ignored by those who have the specialized knowledge and skill with which to assess them’: Note 9 at 115.

95 In 1968, Herbert Packer proposed that there was a ‘binary opposition’ struck between the rights of the citizens in general to security, and the rights of the individual to remain free from interference until some deliberate harm has been done: Packer H, The Limits of the Criminal Sanction (Stanford, Calif: Stanford UP, 1968).

96 That - as I have argued – they (perhaps unreasonably) failed to recognise and avoid a danger that became an unlawful harm.

Conclusion

The difficulty unique to corporate culpability is this: who actually made the dangerous decision? Or what combination of entities did so? The key issue is the modern acceptance that a corporation develops its own policies as an aggregation of all the human agents who contribute; so there is an interaction between a corporation and its human agents, with the presumption that the corporation is an independent moral entity. This accepts that policies can outlive the people who created them. Indeed, many of the incumbents may well oppose a policy, but be unable to change it. An executive has a limited discretion, depending on the structure of the company. Ultimately, it is the owners who make the major decisions, but again collectively. Indeed, the logic underpinning the use of vicarious liability could be argued as that the doctrine is merely returning responsibility to where it originated.

So how pragmatic, even just, is it to blame the executive for dangerous policy? In 1987, the Law Reform Commission of Canada proposed, for offences requiring intention or recklessness as their fault element, a broad version of the identification doctrine. The individuals whose conduct could make the corporation liable were those ‘with authority over the formulation or implementation of corporate policy.’ 98 Certainly these officers might be blamed for dangerous procedures within their discretion, but if those above have not provided the resources for adequate safety – the board and shareholders – then management cannot pragmatically be made responsible. In any event, such documentation as the Articles of Association will control the relationship between management and the board.

When it comes to the issue of punishment, clearly a corporation cannot feel pain; that can only be transmitted through to those who depend on it. The problem is that this does not necessarily isolate who has the power to make the procedures more safe. The workers, for instance, will suffer if a fine puts the company out of business, or even if the increased price of their produce makes it unattractive to the customers. Similarly, shareholders normally get

one chance a year to influence the board; and even then, the management of a modern corporation may be beyond the comprehension of those permitted to hold shares.

The issue now is: can the conscious endangerment model remove the current problem of assigning culpability between the artificial entity and its human agents? With deliberate menace as the template, perhaps it is possible to distinguish those who choose to benefit from hazardous activity from those who genuinely have no apprehension of the danger they are (vicariously) inflicting. It should not draw the line between investors and workers, but between those who proceeded to create danger consciously. It should inculpate a truck driver who takes to the road suspecting that the vehicle was unsafe, but should exculpate the investors who were foolish about the hazards they were financing (although they would not be protected from tort restoration when reasonably foreseeable hazards are realised).

In line with the proposed model, exculpation would be available if the dangerous choice was made to an acceptable standard of general social welfare – not simply the best interests of the company itself. Applied to the Pinto case, it would mean that the company’s knowledge of the fault would provide the requisite knowledge of danger; but the counter cost of rectification (if externalised to the general community) would permit the ‘defence’ of social benefit. The company would only succeed in avoiding criminal prosecution if the court agreed with that calculus. This is the objective element to the offence.

This still does not address whether there are human agents within the company who should be made criminally liable. This would be a matter of finding those who (1) actually knew of the danger, and (2) made the decision to ignore it, or (3) knowingly had the authority to overturn a policy the court sees as culpable, and did not act on this duty.

100 Although this approach accepts that some individual casualties will be allowed in pursuit of the common good, it does not create this equation. Rather it unmasks it, permitting reform where a society finds it unacceptably brutal.
(1) and (2) are fairly straightforward recklessness, with the actus reus satisfied by a decision to either invoke or not remove a danger. As such, it is like conspiracy, where the agreement is all the activity required. It is (3) that introduces a duty that is specific to corporate management. This is subjective, and inculpates those who have the capacity to revise existing policy, but who fail to acquit a duty so created. It therefore acknowledges that the offensive decision may not be attributable to any of the existing executive, and that it may well be ultra vires their roles. At the same time, it does not allow those with sufficient power to hide behind the corporate personality; if they have adequate power, they are required to use it. As to the scope of individual culpability, the workers may well satisfy (1) and (2), and perhaps they should be culpable if they go ahead producing a danger without even bringing their fears to the attention of their superiors.

The final question is one of penalty. Should the model simply abandon the company’s monetary consequences to tort? For all the usual reasons, fining a company may be unhelpful. The ‘crime tariff’ calculation may be encouraged; the more reckless corporate operators may actually be better able to absorb the cost than those who already apply expensive safety measures; innocents, such as workers and customers, are punished.

A number of ‘administrative’ penalties have been suggested above, mainly operating to rehabilitate company operations. There is also the possibility that legislation could deem a criminal conviction sufficient as a finding of tortious negligence, leaving only quantum of damages to the civil court. If we are to evade the problems with fines against individuals, what would be an appropriate penalty? Prohibiting the guilty persons from future positions with such power (as we now do with convicted paedophiles and undischarged bankrupts) according to the normal principles (and aspirations) of incarceration? A ‘consequent’ finding of tortious negligence similar to that proposed against the company?

The goal of any reform is to distribute responsibility in accord with the corporation’s management practice. While it may appear to encourage management to strip itself of power in order to evade legal liability, this would
come at some cost, if it also inhibited efficient management. Andrew Hopkins\textsuperscript{101} suggests that when BHP decentralised its mine-safety, this excluded the corporate expertise necessary to avoid the Maura explosion. In any event, if the responsibility is devolved downwards, the recipients would become liable. The criminal justice system would not be denied a culprit, only that the person would change. The only real problem would be when such devolution fragments the responsibility, so that a multitude of people become responsible for a single danger.\textsuperscript{102}

Criminal liability is traditionally replicated between joint offenders, so that any sufficient involvement permits the infliction of a discretionary sentence which, at least in principle, is proportional to the degree of culpability. Although this would create some difficulty in prosecution, where pecuniary penalties (or damages) are the consequence, such distribution of liability may have the advantage of reaching into more pockets. This raises the question of whether good fate-management must allow the accused to raise a reasonable doubt about knowledge of the danger or prohibition, as a normal challenge to the accusation; and therefore whether ignorance of the law be permitted a stand-alone defence. These questions are more fully explored in the next chapter on Defences. My focus is on whether the problems embedded in exculpating deliberate behaviour can be removed by viewing their role as to permit endangerment when that is unavoidable – rather than the current enigma of whether the ‘escape’ is an excuse or a justification.

\textsuperscript{101} Managing Major Hazards (St Leonards, NSW : Allen & Unwin, 1999).
\textsuperscript{102} As Susanna Kim states the issue, ‘individual participants may contribute a small part to a collective decisionmaking process without necessarily being aware of the totality of that process. Certain individuals may be asked for their input on discrete, isolated issues without being informed of how the input will be incorporated into the bigger picture. As a result, none of them fully understand the larger implications of their singular contributions’: Note 46 at 790.
IX
DEFENCES

Introduction

There is a traditional conflict over the role of defences. The subjective view is as protection for the individual who offended while doing the best s/he could, with objective exculpation where the situation precluded any legal behaviour. Within a utilitarian paradigm,¹ one of two major rationales are put forward: (1) That this individual lacked the personal capacity to have done better (traditionally seen as an excuse) so the costs of any punishment – to the individual concerned and the community – are wasted; or (2) That the crisis was beyond the control of the anybody standing where the offender was, and that the accused’s unlawful actions were the best that the circumstances would permit (characterised as a justification).

There are four formal ‘confess-and-avoid’ defences to an unlawful killing: self-defence, duress, necessity² and the partial defence of provocation.³ They are united in that they all plead that the lethal act was driven by some external threat which undermined volition.⁴ For example, Stanley Yeo argues that duress is a fairly straightforward plea of ‘constraint upon the will of an actor by threats. It is the inability of the actor to exercise free choice in her or his actions which forms the reason for the law’s recognition of the defence’.⁵ Yet according to Yeo, the common law generally allows the objective test to prevail. On the defence of duress, Yeo proposes that under English common law, if a threat did not actually exist, the mistaken belief pleaded to excuse the


² There is some doubt as to whether necessity can serve as a defence to murder, since that allows a value judgment of competing human lives: see Coleridge LCJ’s logic in Dudley & Stephens (1884) 14 QBD 273, when the imminent death of three men did not authorise the killing a single near-dead boy.

³ In NSW, the partial defence of infanticide is available to a mother who kills her child within the first year of its life.


⁵ Note 4 at 40.
offence must be ‘honest and reasonable’. Similarly, a defence of necessity is to be ‘gauged objectively’. The objective test is always there.

The question is therefore the application of the appropriate tests: whether the defences subjectively allow the criminal justice system to ‘pardon’ an actor for an offence that citizen perceives as beyond their capacity to avoid; or objectively condone an unlawful act because it stood to deliver a better result in the circumstances that the prohibition itself could provide. If the proper explanation is the former, the appropriate test is for ‘honesty’. However if the latter, the ‘reasonableness’ test can assess the utility predicted by the actor.

The key problem is that defences are often ‘dual tested’: an honesty test is applied; then a reasonableness test. The entry of the reasonable person would therefore appear to make the prosecution’s task harder: it not only has to discredit the claims by the accused to an actual excused state of mind; it also has to prove that this state of mind (and consequent action) is unacceptable by comparison with that of the reasonable person. In reality the current tests of the defence are alternative rather than cumulative. If the prosecution manages to destroy the claim to an actual exculpating belief, that is the end of it: the defence has failed, as not being ‘honest’ – as part of the requirement ‘honest and reasonable’. If, however, that test is adequately met (and the court is convinced that an honest belief was possibly present) there can be no other purpose to the second test other than that it allow a second assault on the defence: what the reasonable person would have done. So a ‘dual’ test permits two attacks on the actor’s intention, including one that negates its existence if it was ‘unreasonable’.

In effect, the dual test exposes the accused’s behaviour to analysis as both an excuse (the subjective test) and a justification (the objective test). An excuse can be seen as a plea of incompetence: that the accused did not have full

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7 Note 7 at 55.
8 The Model Penal Code talks of ‘privileged’ conduct which – while otherwise unlawful – cannot be lawfully resisted: s 3.11(1). Unprivileged conduct needs a subjective mistake to excuse it. Some jurisdictions use the objective test for a complete defence; and a hybrid (honest but unreasonable) for mitigation: Robinson P, Structure and Function in Criminal Law (Oxford: Clarendon, 1997) 147.
power of choice at the time. Therefore there was no unlawful intent. A justification is either a challenge to the prohibition itself (that compliance would have done more harm than violation); or is seen as of indirect intent, so the act of the accused saving themselves by doing harm is reasonable – in that less harm was done by the violation. The latter is a community-standard rather than a legal assessment.

A ‘dual test’ regime also creates problems with both the direct/indirect distinction and the subjective/objective analysis. The distinction between direct and indirect intention is necessary to allow both the subjective and objective tests, so requires the defence to have both characteristics. Is an accused who is pleading duress, for instance, claiming the direct intention of escape from threat, with the harm imposed incidentally but reasonably? This seems to make the outcome achieved merely a means to another end. Such reasoning would make all violation indirect: a killing in pursuit of property, for instance. Therefore, the intention for an offence performed under duress must be the offence itself, not the background goal – making the lethal intention direct. Under this analysis, the defence is straight confess-and-avoid. There is an admission of direct intention, but a claim that the intent came from elsewhere; that it was vicarious. The accused was merely a conduit for some external mens rea.

The defences provide yet another example of the confusion caused by the spurious division between direct and indirect intention. In answer to the prosecution charge of direct malice, the species of intention being claimed in a defence is that, while the unlawful act may have been chosen, the choice itself was driven by some force other than the offender’s rational mind. While the act was voluntary, the outcome was only desired to evade something worse, so the intention was indirect. The point is that none of the defences actually serve a dual role, but are alternatively explained. To dual-test them is a false analysis. If the defence is an excuse, there is no point in testing it for reasonableness. If it is a justification, all that the subjective test can contribute is to establish whether the claimed belief was actually held. Let us look at the current range of defences, to see how they fit either definition:
• Insane automatism is pure, internal and residual incompetence.\(^9\)

• Non-insane automatism is generally regarded as incompetence: an instinctive response that was outside the control of any warning.\(^10\)

• Provocation is overtly regarded as a plea of incompetence. However it is only a partial defence, which implies only partial incapacity. It also only applies when the provoker was the victim. The alternative is to see it as a partial justification, in that the provoker partially earned the death.\(^11\)

• Duress can have either explanation: excused as a loss of competence;\(^12\) or justified as the infliction of less harm than was threatened.

• Necessity is also alternative, although it is not permitted to exculpate murder. This suggests it is primarily a justification.\(^13\)

• Self-defence is similarly ambiguous. Since it does exculpate murder this may characterise it as a reaction beyond the control of criminal law; or as a permitted penalty against a lethal attacker. A further complexity is introduced by the law’s attitude to an excessive response – wavering from full to partial inculpation\(^14\) – so demanding sufficient rationality that only an unambiguously lethal attacker be killed.

\[\text{Chapter Goal}\]

In \textit{Chapter IV - The Reasonable Person}, I argued that objective testing of a criminal offence is an adaptation of a tortious technique (where it exculpates otherwise strict liability). The question now is whether reasonableness should

\(^9\) The \textit{M’Naghten Rules} set the incapacity at the inability to know: (i) the conduct is prohibited, or (ii) it offends ‘ordinary standards’.


\(^12\) Alan Norrie presents the defence of duress as normally a response to overbearing pressure by another person. Duress of circumstances is a new version of necessity: Norrie, Note 1 at 161.

\(^13\) Per Gleeson CJ, \textit{Rogers} (1996) 86 A Crim R 542 (NSWCCA). The judgment is liberally peppered with requirements of ‘reasonableness and proportionality’. Although Gleeson uses the sub-heading of ‘The Excuse of Necessity’, he cannot avoid such phrases as ‘sufficient to justify the defence’ (BC9602574 at 6) [italics added].

perform the opposite function when applied to the confess-and-avoid defence (to inculpate where direct intention is absent). This raises the issues of whether there is any legitimate objection to exposing an accused to a normative test when a voluntary, legal-but-risky act has inflicted harm. Is there is any proper reason why an honest mistake of law is not permitted as an excuse? Can any just distinction be made between allowing someone to misread the facts of a situation, so that an offence is committed, without also allowing them to misread the relevant legal controls?

The general defences will be analysed because they demonstrate most vividly how modern criminal law is willing to exculpate an offender who is only before the court because a potentially productive (reasonable) activity turned harmful. That is, the defences supervise endangerment rather than malice. Also, the doctrines are discussed because they don’t always achieve this goal, but fall prey to the harm analysis – and the consequent justified/excused riddle.

The Justified/Excused Debate

Eugene Morgan argues that excuses are mere ‘compassion’, and that criminal culpability should only respond to justifications.15 Sanford Kadish summarised excuses as: involuntary actions; deficient but reasonable actions (cognitive deficiency, volitional deficiency); and non-responsibility.16 Jeremy Horder distinguishes duress, an excuse, as concerned with the ‘personal sacrifice D is being asked to make’, from self-defence as a justification pleading ‘legal permission to act’.17 However he concedes that the excuse/justification distinction is unclear: ‘Coercion or duress is an excuse, but (as in provocation cases) excuses may involve strong – even overwhelming – elements of personal moral justification.’18

Yeo too distinguishes justifications from excuses by viewing the former as

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15 Morgan, E. ‘The Defence of Necessity: Justification or Excuse?’ (1984) 42 University of Toronto Faculty of Law Review, 165-83, 182. Presumably, Morgan sees the sentencing process as the correct forum for compassion.


18 Note 17 at 163.
asserting the offensive conduct to be ‘rightful in the eyes of society’; consequently ‘the actor deserves praise rather than blame.’ Also that the focus in a justification is on the ‘conduct rather than the person.’ Alternatively, he sees a utilitarian character to justifications.\textsuperscript{19} By contrast, an excuse admits that the society disapproves, but the defence contends that circumstances overwhelmed an otherwise honourable (if weak) citizen. In an excuse, the focus is on the actor rather than the act.\textsuperscript{20} Already this division is fertile ground for conceptual error: is the law willing to immediately excuse any frailty, any cowardice? Or must an excuse also be reasonable?

Kent Greenawalt agrees with Yeo’s distinction between act and actor: ‘Justifications typically arise out of the nature of the actor’s situation, excuses out of the actor’s personal characteristics.’\textsuperscript{21} Greenawalt goes on to reason that this explains why a justification must be assessed objectively, and an excuse subjectively. He argues that a ‘justified act’ may be supported (approved) and need not be repressed, whereas an ‘excused act’ cannot be supported and should be stamped out as effectively as possible.

The concept of a justification is now in dangerous territory: by both Yeo’s and Greenawalt’s reasoning, a justification exculpates offenders who have taken the law into their own hands. To find that an offence was justified means that the court has looked behind the relevant prohibition for its rationale, and found that the accused chose \textit{better} in the circumstances than the rule of law could provide – even when there is no initiating malice: that the driver of the runaway car was justified in running down a lone pedestrian on a crossing in preference to the only apparent alternative of colliding with a school bus. Why then is there any resort to the reasonable person? All that is really in issue is whether the accused’s claim – to have seen no better course – is honest.

In an attempt to salvage some degree of objective control, Fletcher proposes

\textsuperscript{19} \textquoteright{}[I]f the actor’s conduct causes less harm than the harm which he or she thereby avoids, the conduct is justifiable. This comparative exercise has been variously described as the "balancing of harms approach", "lesser evils doctrine" and the "notion of superior interest": Note 4 at 6.


a hypothetical to explore the role of the objective analysis. He proposes a situation where A (wrongly) believes B is attacking her, so defends herself. B sees only A’s attack, so also defends himself. Clearly B can claim self-defence, but can A’s actions be excused as a mistake of fact? This claim is part of Continental law, as ‘putative self-defence’. Fletcher is concerned that the law cannot allow both, arguing that only one party can be in the right where there are two claimants: ‘The claim is that any situation of physical conflict, where only one party can prevail, prohibits us from recognizing that more than one of the parties could be justified in using force. I shall refer to the proposition as the ‘incompatibility thesis.’ As an analogy, he proposes that the right of a mother to abort a foetus cannot co-exist with a foetus’s right to be born: ‘It is worth considering, however, whether a legal system founded on reasonableness is likely to generate the sharp distinction between objective justification and subjective belief required to distinguish between actual and putative self-defense.’

Since it is the result which initiates legal assessment of its cause, to impute self-defence means the criminal process has already veered into a quasi-tort law ‘contingent’ analysis: that whatever harm was done was – at least in terms of the overall community welfare – preferable to the alternatives available. So acquittal on the basis of a justification is akin to negligence allowing damage to ‘lie where it fell’: with any fault erased, criminal censure will serve no moral or pragmatic purpose.

This leaves excuses as the proper defence of any inadequate choice made. Once choice becomes the criterion, there can be no other test but to verify what choice was actually made. This is the subjective test. The question is, in the management of chosen risk, whether (and how) the two tests can be

22 Although Fletcher is primarily concerned with the role of the objective test as part of the hybrid testing of defences – an issue I have delayed until Chapter IX – his argument does permit some analysis of the differing purposes of the two alternatives: evidence of what the accused actually intended; or of what the moral model would have pursued.


24 Note 23 at 973.

25 While there may be some argument as to whether the alternatives are required to be objectively (reasonably knowable as), or subjectively (actually perceived as) available, I reiterate the argument made in Chapter III: if the court is convinced the offender did not know any better, censure is both immoral and futile.
applied to the same event; and whether they should be applied in the reverse order. We must decide whether there is a better way (or even any necessity) to characterise defences as approving of the choice made, or as waiving unproductive censure; or see them simply as presenting an opportunity for the actor to raise a doubt as to whether the unlawful risk in question was ever chosen?

**Necessity**

Unless the drive to survive is seen as a human weakness, necessity would appear to be the paradigm justification. According to Glanville Williams, '[n]ecessity in legal contexts involves the judgement that the evil of obeying the law is socially greater in the particular circumstances than the evil of breaking it. In other words, the law has to be broken to achieve the greater good.' Yet when reviewing a range of European approaches to the defence, George Fletcher acknowledges that '[t]he first model of the defense is properly a theory of excuse rather than a claim that the use of force is right and proper. It has its origins in the common-sense view that a person sometimes has “no choice”.'

Yeo argues that *Dudley and Stephens* – which convicted as murderers two starving sailors who killed their cabin boy for food – imposed a requirement of heroism, and that such a ruling is ‘contrary to excuse theory’. However he concedes that the defence may have both characteristics:

Necessity as an excuse is sometimes described as duress of circumstances in order to differentiate it from its justificatory counterpart. Society disapproves of the actor’s conduct but is

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26 The alternative logic must be based on the available penalty: that *nothing* the criminal sanction can deliver is as terrifying as the impending threat – the ‘crime tariff’ model I have previously explored. So the distinction is not between rational and incompetent behaviour; but between the natural and artificial detriment apparently on offer. Williams G, *Textbook of Criminal Law* 2nd edn, 597.

27 Fletcher G, *Rethinking Criminal Law* (Boston: Little Brown, 1978) 856. He then notes that '[t]he second model of necessary defense is founded on the principle that it is right and proper to use force, even deadly force, in certain situations. The source of the right is a comparison of the competing interests of the aggressor and the defender, as modified by the important fact that the aggressor is the one party responsible for the fight. This theory of the defense appears to by a straightforward application of the principle of lesser evils’: 857.

29 *Dudley and Stephens* (1884) 14 QBD 273.

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prepared to exculpate her or him because an ordinary person caught in the same circumstances of emergency could have reacted in the same way as the actor did. 31

This ambiguity is confirmed in Halsbury’s Laws of Australia.32 Necessity is seen as having two rationales: ‘justified in so far as it causes less harm’ (the ‘greater good’ principle); and ‘excusable due to the grave predicament’. It can be called ‘impossibility of compliance with the law through no fault of the accused’.33 What is missing from all of these formulations is any curiosity as to what dire situations the offenders thought themselves to be facing. Necessity therefore demonstrates the lawmakers’ reluctance to directly test what the offender actually believed was necessary against the prohibition. Instead, the reasonable person is used as a compromise between the ‘perfect’ citizen (who does not respond by violating the law in any circumstances) and the actual offender (who did). If what the accused did is closer to perfection than how the court believes the reasonable model would have acted, the offence is approved.

So intention is blended with consequence, fact with fiction, in a cocktail where two standards are applied: the defence itself – prescribing the circumstances which the law allows to overwhelm the prohibition in issue; and what the hypothetical moral model sees as those circumstances. What the offender actually chose to do is compared with a choice that best serves the community interest. When the accused Pommell34 hid a sub-machine gun away from someone who had threatened ‘to shoot some geezer with it’, the English Court of Appeal saw this is an admissible defence to possession of the firearm. Even though he was not under any necessitating threat, the act could be justified as responsible citizenship.

Such a rationale easily explains why necessity is not permitted as a defence to murder: the community interest in limiting the resort to lethal force and promoting trust is badly damaged when one person (or, in the case of Dudley

31 Note 4 at 188.
33 Note 32 at 249-669.
and Stevens, two or even three) survives at the expense of an innocent. Coleridge LCJ’s logic in *Dudley & Stephens* was that the victim had done nothing to warrant being killed, as a ‘weak and unoffending boy’. This would appear to be a clear case of viewing necessity as a justification.

**Duress**

According to Yeo, ‘[c]ases of necessity are closely similar to those involving duress, so much so that the English courts have described the former defence as “duress of circumstances”’. Again, Halsbury’s agrees that ‘[t]he defence is a particular form of the defence of necessity. Its rationale is based on the law’s compassion towards an accused who is faced with the choice of two evils’ So the defence is an excuse. As quoted above, Yeo proposes that the defence is founded on the fact that it is not the accused who made the wrongful decision. Logically then, it would appear wrong to apply an objective test to the actions of someone lacking free choice, since they have made no decision which needs to be justified.

In an apparent attempt to find a compromise, Yeo argues that a subjective test is appropriate for the offence itself, but a defence should be objectively tested, claiming that ‘[s]urely society would demand protection from ... a person who is unnaturally apprehensive or cowardly’. No such compromise will satisfy Ian Leader-Elliott, however: ‘Objective tests and other rules limiting duress are meant to ensure that some individuals who were overwhelmed by terror and incapable of behaving differently, will be convicted.’ As the Victorian Law Reform Commissioner vividly explains, an objective test of duress is futile:

> The promotion of a greater social good is generally not to the point in

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35 Note 20 at 170.
36 Halsbury’s *Laws of Australia* v9 (North Ryde: Butterworths, 1995) [249]-[658]
37 Note 4 at 40.
38 Yet, according to Rose LJ in *Hussain*, the defence shares the limitation on necessity in that ‘the defence of duress, whether by threats or from circumstances, is generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason’ which would characterise it as an objectively-assessed justification: *Abdul-Hussain; Aboud; Hasan; Naji; Muhssin; Hosham* [1999] Crim LR 570.
cases where the conduct of the actor is sought to be excused rather than justified. The swimmer ferociously struggling for possession of the plank cannot urge a choice of the lesser social evil in beating off the other contender. He would seek to be excused because in the desperate circumstances in which he finds himself the instinct of self-preservation prevailed and the law could hardly blame him for succumbing to that instinct.41

Where the life of the accused was in danger, any point to distinguishing a ‘greater good’ justification from a ‘human weakness’ excuse simply evaporates. Someone in mortal cognitive fear cannot be constrained even by a lethal normative threat. Simester and Sullivan propose that the reason for English law permitting duress as a defence to murder, attempted murder and (probably) treason, is the pragmatic view that to exercise legal control in the face of a threat of death or GBH would be ineffective. An uncertain future harm cannot compete with an immediate one.42 To impose an objective standard, even if modified to what the reasonable (as opposed to heroic) person would have done, is pointless. The worst the law can threaten to do to an offender is close to what such persons claim they face anyway.43

Duress appears to continue the path pursued by necessity, proceeding from a subjective test for honesty to introduce the reasonable person as judge of the offender’s perception of future benefit against the view of the bystander. If the offender’s survival, by complying with the threat, offered the better social result then the illegal activity is justified.44

Self-Defence

Self-defence – as perhaps the ultimate case of necessity – allows citizens under illegal mortal threat to save themselves at the cost of the life of their

43 In Hussain, Note 38, the Court of Appeal allowed the defence to be considered, ruling that those who had hijacked a plane to escape the prospect of Iraqi torture and death had been subject to an ‘imminent’ threat. The subjectivist problem is therefore whether the court approved of the offenders calculating torture as a greater peril than any legal punishment on offer in Britain. In Howe [1987] 1 All ER 771, 780 Lord Hailsham held that, as the ordinary person ‘was capable of heroism,’ duress is the refuge of ‘the coward and the poltroon’.
44 Cole failed to convince the Court of Appeal that there was less harm done by his robbing building societies than the violence that might follow from him not paying his debts: Cole [1994] Crim LR 582.
attacker. This immediately raises my two questions: Is it a justification or an excuse; Is there any role for an objective test? A justified retaliation would clearly (ultimately) be subject to a test against a community standard. Alternatively, an excuse – being a plea of incapacity – must be subjectively assessed.\(^{45}\) Self-defence may be more directed at inhibiting attack out of range of the law, by authorising ‘self help’. The issue is therefore whether the accused’s perception of threat was required to be reasonable – that is, the reasonable person viewing the situation would also have read the menace as lethal – or whether an actual but inflated fear is enough to excuse the killing. Andrew Ashworth presents a number of limits on the right to violent self-defence, all variations of proportionality, including ‘the so-called “duty to retreat”’;\(^ {46}\) proportionality of response (meaning that minor teasing does not justify a lethal reaction);\(^ {47}\) and a general requirement that the accused has not ‘contributed to the show of violence’ but has reacted immediately in ‘fear, panic and surprise’ rather than carefully decided to retaliate.\(^ {48}\) Brent Fisse\(^ {49}\) summarises the Australian positions on reasonable self-defence as:

- NSW, Victoria, SA and ACT require that ‘the accused believed, on reasonable grounds’ that the action taken was necessary, and that any mistake also be ‘based on reasonable grounds’.
- Section 46 Tasmanian Criminal Code is similarly hybrid, authorising an accused to use ‘such force as, in the circumstances as he believes them to be, it is reasonable to use’;
- Queensland and Western Australia require a ‘reasonable apprehension of death or grievous bodily harm’;
- The Northern Territory characterises the force used as ‘unnecessary’ if ‘the

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\(^ {45}\) On the first question, George Fletcher notes that ‘[t]he [13th to 16th century English law] defense of se defendendo springs more from compassion for the predicament of the trapped defender than from a passion for justice and the dictates of reason … [c]onceiving of self-defense as an excuse, based on the defendants uncontrollable reaction to the spectre of death’: Fletcher G, A Crime of Self-defence (NY: Free Press, 1988) 30.


\(^ {47}\) Note 46 at 296.

\(^ {48}\) Note 46 at 299.

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user knows’ and ‘the ordinary person would regard’ it as excessive.

Wilson, Dawson and Toohey JJ agreed in Zecevic\textsuperscript{50} that a self-defence plea will fail completely if either the actions taken go beyond what the accused actually believed necessary, or if that belief is not reasonable.\textsuperscript{51} If the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence;\textsuperscript{52}

The pattern seems to be that both a subjective and objective test are applied, and both must be satisfied for the defence to survive. Since raising the defence automatically provides evidence of the subjective element, the actual test becomes the objective one. Justices Jacobs and Murphy have criticised the use of an objective test in relation to both provocation and self-defence (the latter in terms of a perception of danger). Murphy J has been the strongest in advocating that the objective test be totally abandoned, arguing that it has nothing to do with the actual state of mind of the offender.\textsuperscript{53} A year later, Jacobs J\textsuperscript{54} added his criticism in Viro:

When we speak of what a reasonable man would believe, we are speaking of that reasonable man most familiar in the law of negligence. He is the type, ... The great difficulty of introducing an objective test of reasonableness into any part of the concept of mens rea is that crimes other than crimes of negligence can as a consequence be committed by a neglect to observe the standards of conduct of a reasonable man.\textsuperscript{55}

Justice Jacobs offered the interpretation of reasonableness as simply some measure of the actual defence evidence, as a test of its believability: ‘An alternative formulation is that the question of reasonableness goes only to the

\textsuperscript{50} Zecevic Note 14.
\textsuperscript{51} I will explore the development of excessive self-defence as a partial defence below.
\textsuperscript{52} At 662.
\textsuperscript{53} ‘The test cannot withstand critical examination. … For example, it might have been an unbearable insult to a person of the accused’s origin to be called a “black bastard”. Once the full circumstances are taken into account, the objective test disappears because it adds nothing to the subjective test. For this reason, those who adhere to the objective test have rigidly excluded individual peculiarities of the accused (e.g. low intelligence, impotence, pugnacity): Moffa v R (1977) 138 CLR 601, 625.
\textsuperscript{54} Viro Note 14.
\textsuperscript{55} At 154-5.
question whether the belief was in fact held by the accused.\textsuperscript{56} He went on to distinguish the reasonable person (as a moral template), from the rational person (as a measure of whether the accused is actually pleading a form of insanity).\textsuperscript{57} Thus Jacobs J almost broke out of the gravitational pull of objectivity, to designate the normative person as solely a superficial test of rationality. Sadly he fell back to familiar territory. However logical his rationality test may sound, criminal law’s capacity for inhibition is frustrated by the same issue: no matter whether any accused over-reacted, once they thought themselves fighting for their lives, no legal threat can effectively interrupt. Anyone who \textit{is} listening to warnings from criminal law, is clearly deciding when they are authorised to kill.

The circumstances (including the personal characteristics of the accused) are therefore no more than evidence on whether offenders pleading self-defence \textit{actually} believed themselves in mortal danger. Any reference to what the normal person would do cannot be any more than a starting-point. The analysis must depart in whatever direction the accused’s characteristics dictate. A small man, who has experienced the wrath of bigger men, will probably have a heightened sensitivity to threat. Even someone of Anglo-Saxon background (which traditionally requires a larger personal space) may feel more threatened by close proximity of a stranger than someone Latin.\textsuperscript{58}

So the subjective test – and the consequent definition of defences as excuses – appears to have strong ‘progressive’ judicial support: no matter how mistaken the belief, only its honesty and absence of deliberateness can be

\begin{footnotesize}
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  \item At 156.
  \item 'In my opinion it is a constituent of the defence of self-defence that an accused use only that amount of force which he believes to be necessary to repel the attack on him. His belief must be based on reasonable grounds in the sense that the belief must be one which a rational man could hold, but not necessarily a belief which an ordinary reasonable man would hold. Applying the analysis which I have attempted above I therefore conclude that there is no place for a verdict of manslaughter where acting on an irrational belief that such force was necessary an accused has used excessive force to defend himself': \textit{Viro} Note 14 at 156.
  \item As Murphy J explained in \textit{Moffa}, 'the objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences .... The same considerations apply to cultural sub-groups such as migrants. The objective test should not be modified by establishing different standards for different groups in society. This would result in unequal treatment': Note 53.
\end{itemize}
\end{footnotesize}
used as the test of good citizenship which the criminal charge now challenges. What then of someone who correctly perceived an incoming attack, but incorrectly saw it as mortal, and killed in response?

As Yeo puts it, '[a] person who defends herself or himself over-zealously should not be treated as equally culpable with one who killed but not in circumstances of self-defence at all.' He separates necessary self-defence from an excessive reaction by assigning them to the opposed rationales. He claims there is a ‘distinction between general self-defence which is justificatory by nature and excessive self-defence which is an excuse.’ He reports that ‘there is growing authority in England permitting the defence to succeed if an accused honestly although unreasonably believed that he was being or about to be attacked.’

In Viro, Mason J led the High Court on an excursion to establish the partial defence of excessive self-defence. Yeo reasons that ‘the doctrine [of partial culpability when the accused and reasonable person disagree] reflects the lesser degree of moral culpability of a person who kills in an honest although unreasonable belief that he was defending himself compared to one who has killed without any circumstances of justification or excuse whatsoever.’ Justice Murphy continued his long-standing opposition to any use of an objective test, reasoning that the objective test displaces any ‘honest belief’. If there is no reasonable doubt that the killer believed the force used was unnecessary, it is murder. If s/he did honestly believe it necessary, even if actually excessive, the killing is no offence at all. In effect, the community must learn to live with the unfortunate fact that people make honest – and

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59 Note 20 at 163.
60 Note 20 at 164.
61 Note 20 at 363.
62 Note 14.
63 He proposed a sequence of tests: Did the killer honestly believe s/he was under mortal attack? If the jury remains in reasonable doubt as to such belief, was the force used proportionate to any reasonable belief? If the force used was excessive, did the killer actually believe it was necessary? If the killer knew it was excessive, it is murder; if s/he thought it necessary it is manslaughter [at para 31].
65 At paras 31-41.
sometimes lethal – mistakes; and if there is no preliminary fault, this is beyond the power of criminal law to control.

Ultimately, in Zecevic, the High Court reverted to the all-or-nothing justification model: the defensive reaction must be objectively proportionate to the apparent danger. If the reasonable person does not agree that the incoming attack was (possibly) life-threatening, a responsive killing is murder. Personal incapacity was subsumed below risk to community security, thereby authorising the criminal justice system to fully incapacitate those inept at reasonable self-protection.

Provocation

Colin Howard defines the defence as that ‘[p]rovocation is any unlawful act or series of acts of a kind which would deprive an ordinary person of self-control, and which in fact deprived D of self-control’. This definition covers a number of discrete requirements: that the provocation be unlawful; and an objective and subjective test of the reaction. It is therefore a good place to conclude my analysis of the dual test approach.

Brent Fisse proposes that ‘[t]he defence has been seen as maintaining a balance between the protection of society and the compassion felt for human weakness’. He also identifies two elements common in all jurisdictions: actual loss of control; and the requirement that ‘the provocation must have been such that it might have caused an ordinary person to act similarly’. When intoxication is involved, Fisse says that this element is ignored, and ‘the yardstick is that of the ordinary sober person’. Yeo proposes two main differences between provocation and the rest of his menu of defences:

66 See the discussion above of Ryan v R at p 138, Note 40.
67 Zecevic Note 14.
68 Howard C, Criminal Law (Sydney, LBC, 1977) 78.
69 The NSW Law Reform Commission, in Partial Defences to Murder: Provocation and Infanticide, Report 83 (Sydney: The Commission, 1997) 18, has summarised the conduct accepted as provocation in Australia: abuse of the accused’s daughter – Masciantonio, Note 11; a Muslim Turk discovering his daughter was sexually active – Dincer [1983] 1 VR 460; a display of affection towards the accused by the victim, after the accused discovered the victim had a history of incestuous child abuse – The Queen v R (1981) 28 SASR 321; a wife taunting the accused about his sexual inadequacy and boasting that she had been openly and widely promiscuous – Moffa Note 53.
70 Note 49 at 163.
71 Note 49 at 180.
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The defence of provocation as presently understood differs from self-defence, duress and necessity in some material aspects. One difference is that provocation operates only as a partial defence to murder while the others are complete defences which arguably apply to all offences. Another is that provocation is premised primarily on loss of self-control and the attendant emotion of anger while the other defences are based on intense pressure brought about by a threatening situation and the consequent emotion of fear.  

This reasoning would appear to define provocation as the paradigm excuse, to be tested for the actual choice made. Yet Pillsbury rejects provocation as a subjectively-tested excuse: ‘Temper seems to be the characteristic we wish to judge in the defendant; we abandon any effort at a universal standard if we use the defendant’s temperament as our legal norm.’ This fear that lethal tantrums will escape under a subjective test surfaced in the course of defence argument in Lesbini’s case, when Avory J interjected: ‘It would seem to follow from your proposition [suggesting that the actual response of the accused should determine guilt] that a bad-tempered man would be entitled to a verdict of manslaughter where a good-tempered one would be liable to be convicted of murder.’

Clearly all these objections are based on the view that people choose to lose their temper. Jacobs proposes that ‘[t]he law of provocation … is not intended to protect those who resort to violence on relatively slight provocation.’ Ashworth asks what would happen if the objective test was abandoned, and argues that it would destroy proportionality, so ‘a trivial affront’ could spark ‘a cataclysm of violence.’ ‘Phrases such as “he asked for it” or “it served her right” might have no application at all.’

So the question is whether the law can disentangle what the offender could do from what that citizen should do. The New South Wales Law Reform Commission admits that ‘[t]he theoretical underpinning for the defence are unclear. Some defences are based on the idea that the act in question was

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Note 4 at 57.
Lesbini [1914] 3 KB 1114, 1118. I will address the issue of a ‘good tempered’ killer below, via the reasoning of the NSW Law Reform Commission at Note 92.
“justified” in the circumstances’. 77 However, ‘[i]f the individual’s capacity for self-control can be taken into account this effectively demolishes the [objective] test – the investigation becomes completely subjective.’ 78

How have the courts coped with the subjective logic, and any conflict it may present to the community? The High Court has opted for a modified objective test of the provocation defence, taking into account only age as a ‘personal characteristic’ of the accused. 79 The courts are so worried about acknowledging individual characteristics that, as Shelley Wright observes, ‘[t]he House of Lords in Mancini laid down the following test: … an unusually pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did.’ 80 The apparently innocuous shift from reasonable to ‘unusual’ shows how frail is the objective anchor. On the surface, following Avory J’s logic, a subjective approach would appear to excuse simple bad temper. However this rationale is rather at odds with the whole concept of the defence. If provocation is an excuse, it admits that no state-of-mind either morally or pragmatically appropriate for punishment was present at the time.

However this analysis hardly survives the demand that only the provocateur is ‘fair game’. In other words, the accused is required to still have sufficient control to restrict the violence to the provoking agent (or at least who the accused believed to be the source). A level of design is still required. 81

Bargen et al identify a further peculiarity in the objective approach, when they

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78 Note 77 at 43.
79 As Barwick CJ explained in Johnson (1976) 136 CLR 619, 635: ‘In relation to the element of loss of self-control … my own preference is for the objective element to be related to the ordinary man. The objective test is, in my view, better related to human nature rather than to reason and thus to the ordinary man. So to relate it will be to increase the area in which, by use of the objective test, acts in fact done by an accused, hypersensitive or of unusual temperament, though in fact done whilst out of self-control, cannot qualify as acts done under provocation. But none the less, the adoption and proper application of the objective test of loss of self-control better fits the administration of justice than the adoption of a subjective test. What seeming injustice may result from the use of the objective test must be left to the wisdom and discretion of the Executive’. Presumably, in the last sentence, Barwick CJ is referring to sentence administration as being capable of mitigating the punishment of someone simply incapable of reasonable self-control.
80 Wright S, Provocation: Some Recent Developments (Sydney: University of Sydney, 1988) 6.
81 As Howard explains, ‘[a]lthough D cannot set up provocation unless he actually lost his self-control, the question whether he is entitled to rely on provocation is not answered by reference only to the actual effect of V’s behaviour on D. The law also requires that D’s reaction to the provocation offered conform with the likely reactions of an ordinary man in his position’: Note 68 at 80.
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reason that ‘the defence may be taken to be a partial justification, reflecting the contributory fault of the victim’.\(^{82}\) Yeo concedes that provocation has evolved from an excuse to a justification, so that the victim’s behaviour is relevant to the response.\(^{83}\)

Chief Justice Barwick went further, to apply the objective test to the proportionality between the victim’s acts, and the lethal retaliation:

Disproportion between the provocative act and the fatal act might result in the conclusion that an ordinary man would not have so far lost self-control in like circumstances. The provocation in that case is relevantly inoperative. The notion that a state of loss of self-control is relative is basic to the concept of the objective test. That test properly applied keeps provocation within bounds.\(^{84}\)

Barwick’s implied primacy of a moral judgment was picked up by the New South Wales Law Reform Commission when it noted, ‘aspects of the judicial and statutory development of the law of provocation – such as the imposition of an objective (“ordinary person”) test, the relevance of “proportionality” of the response to the provocation, and the need for the provocation to emanate from the victim – resonate … with the “balancing” concerns traditionally associated with justifications.’\(^{85}\)

If provocation is an objectively-tested justification, the question posed by the defence becomes obvious: did the victim earn his or her death? Was the

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\(^{82}\) Bargen J, Coss G and Fairall P, ‘Partial Defences to Murder’, The Laws of Australia 10 (North Ryde: LBC, 1993). Finbarr McAuley explains it as that ‘[t]he distinction between excuses and justifications has an important bearing on the issue of the gravity of provocation. The defendant who alleges that he or she was partially justified in killing the victim must establish that the provocation was substantial and not merely trivial …. Excuses proceed on the assumption that the defendant’s conduct was entirely wrongful and are therefore not directly concerned with the victim’s contribution to it’: McAuley F, ‘Provocation: Partial Justification, Not Partial Excuse’, in Yeo S (ed), Partial Excuses to Murder (Sydney: Federation, 1990) 19-36, 24.

\(^{83}\) ‘As the defence gradually developed, however, it may have done so more on the basis of a justification. This would explain the requirement that the provocation has to emanate from the deceased as it accords with the idea that the accused has a partial right to use force against someone who was blameworthy in depriving her or him of self-control. It would also explain the requirement that the provocative conduct must be unlawful so as to make the accused’s response of killing the provoker less socially undesirable’: Note 4 at 59.

\(^{84}\) Note 79.

\(^{85}\) Note 77 at 28. McAuley agrees that ‘[w]e have identified that the victim’s conduct (the provocation) and the defendant’s state of mind (the loss of self-control) in commanding and subordinate positions respectively. This relationship suggests that the defence of provocation functions as a partial justification rather than a partial excuse. Thus the defence entails a denial that the defendant’s actions were entirely wrongful in the first place, which implies that the defendant was partially justified in reacting as he or she did because of the untoward conduct of his or her victim’: Note 82 at 21.
provoking behaviour so irresponsible that the accused’s resort to violence was (partly) justified? The use of the objective test is as a judgment on the behaviour of the victims: did they act so badly that the model (normal, not perfect) citizen would have responded as did the accused. If so, then the accused is convicted only of manslaughter (as a form of strict liability). If not, then the community censure is turned back onto the accused. Either way, the issue is whether the victim’s behaviour was unreasonable.

This offends the principle noted by George Fletcher that, unlike the tort calculation of contributory negligence or voluntary assumption of risk, in criminal law the offender stands alone as being responsible for the offending. Fletcher uses the examples that a jogger who foolishly runs through a dangerous area, or shoppers who are less than careful about where they have their money to illustrate the point that ‘[t]he irrelevance of the victim’s fault cuts across the criminal law.’

In the case of Dincer, there appears to have been some acceptance that although the offender’s behaviour was outside Australian community standards, the reality is that (since he is presumed to know our law) he was truly out of control – and that no legal threat could have intervened. Lush J, instructing the jury on the defence of provocation, told them that the ‘doctrine … is available only when the Crown fails to prove that the accused man was not in a state of loss of self-control.’ Lush J saw provocation as simply a matter of accused being unable to control their actions. However he was not willing to allow the accused such loss of control if the response was excessive, ruling that ‘the law will only concede the existence of provocation if there is some kind of proportion between the provocation and the act.’ As Yeo has argued above, the defence begins to look more like a justification.

Justice Lush instructed the jury that the Crown ‘must satisfy you beyond

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87 Dincer, Note 69; previously cited in Chapter IV - The Reasonable Person.
88 The report of Dincer does not indicate whether the defence succeeded, being solely concerned with Lush J’s instructions to the jury, and the consequent suggestion that this is (at least in Victoria) a proper expression of the defence.
89 At 464.
90 At 465.
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reasonable doubt that Dincer did not lose his self-control and it must satisfy you beyond reasonable doubt that an ordinary man of Dincer’s characteristics would not have lost his self-control [or] would not have gone on to stabbing the girl.\textsuperscript{91} So to turn this formulation into the actual test, Lush J has proposed three requirements for the prosecution. It must rebut (a) actual loss of control; and (b) that the loss of control was reasonable; or (c) the violence was reasonable.

Certainly Lush J has correctly placed the burden on the prosecution; however he appears to be saying that it must overwhelmingly defeat all limbs to the defence. As I argued above, under the current law, this is simply wrong. Once Dincer is believed to have \textit{not} lost control, the game is up: he deliberately murdered his daughter. It is only if the jury harbours reasonable doubt that his behaviour was malicious (so the subjective attack on the defence has failed) that the jury need consider whether his now-accepted loss of control is acceptable. But unless Dincer is to be characterised as an amoral dangerous animal (to be incapacitated rather than punished), the jury is being asked to pass judgement on what can only be seen as a choice – an \textit{abandoning} of self-control. So the subsequent objective test simply assumes Dincer voluntarily killed his daughter, overriding the fact that the subjective test has failed to find intent, then decides whether she deserved it.

The final blow to the objective test, as having the deciding role where provocation is pleaded (and to the logic proposed by Avory J above) is delivered by the New South Wales Law Reform Commission:

The ‘classic’ argument for the objective test … contends that the test is necessary because otherwise the good-tempered killer would be convicted while the bad-tempered killer would have the benefit of the defence. This argument only needs to be stated to be rejected. If the good-tempered person does not lose self-control then he or she will not kill and there will be no occasion for a murder trial at all. If she or he does kill but still does not lose self-control then provocation is not applicable because the killing was done in cold blood. Finally if she or he kills and does lose self-control then there is no reason why

\textsuperscript{91} At 468.
provocation cannot be raised\textsuperscript{92}

Is it possible that both views are correct? The key is the requirement of actual \textit{loss of control}. Provocation is not, in its pure form, a warrant for people to \textit{decide} to lash out. If they make that decision, then they fail the subjective test. Absent such a choice, the behaviour should be excused.\textsuperscript{93}

Perhaps what the subjective analysis provides is to inform the court of precisely what decision it is reviewing. A loving, if devout, father who kills his daughter because she has tarnished all that he believes is holy is quite different to one who kills a daughter to prevent her from revealing his sexual abuse of her. The mental state in issue in provocation now appears to have more the character of rage (a reaction to the behaviour of a specific individual) than, for instance, belligerence produced or released by intoxication (where \textit{anyone} can become its victim). As such, the defence has now become an objective assessment of the \textit{victim}, and clearly a moral judgment rather than a legal one. So provocation becomes a justification rather than an excuse.

The argument that provocation is a justification rather than an excuse must acknowledge that it only partially justifies the killing. In fact, whatever the difference in moral \textit{sting} between murder and manslaughter, it only bars the sentencing judge from setting a penalty in the zone between manslaughter and murder.\textsuperscript{94} The question being asked is: was the victim’s behaviour so \textit{bad} that it can be allowed to destroy any \textit{direct intention} by the killer, reducing the killing to one unwanted but (somehow) still avoidable?

If the defence of provocation is to avoid blaming the victim, it has to abandon

\textsuperscript{92} Note 77 at 44. I leave to another occasion any inquiry into why judges make statements in open court – knowing them to be recorded – that would be greeted with some astonishment if issued by a child.

\textsuperscript{93} As Stephen Morse puts it, ‘[i]f it is true that an agent could not help or control herself and was not responsible for the loss of control, blame and punishment are not justified on any theory of morality and criminal punishment’: Morse S, ‘Culpability and Control’ (1994) 142 University of Pennsylvania Law Review, 1587-1660, 1587-8. Yeo proposes that, since most ‘normal’ people don’t kill, an objective test of provocation will be ‘purely conjectural’. He endorses the practice of the Indian courts, to restrict their judgment to the accused’s behaviour \textit{after} the loss of control: Yeo S, ‘Lessons on Provocation from the Indian Penal Code’ (1992) 41 International and Comparative Law Quarterly, 615-86

\textsuperscript{94} Interestingly, the maximum determinate sentence for murder in NSW is also 25 years. Life means exactly that, but can – on successful application – be commuted to a determinate period.
all such ‘standards’ as the reasonable person and proportionality so that, like all the other excuses, the whole focus is on whether this individual was not capable of lawful behaviour when the offence was committed. Examination of the victim’s behaviour is only relevant to convincing the court that the killer was actually beyond self-control, and oblivious to all possible consequences, at the critical moment. If the court believes (to the appropriate standard) that any such capacity remained, the killing must have been chosen, and the defence should fail outright.

To then apply a community standard\(^95\) must mean that there are conditions under which angered killing is partially tolerated. Could this mean that unreasonably provocative conduct is potentially socially harmful, so criminal law will discourage such aggression by rendering the provoker partially unprotected? Such a shift in logic would clearly remove the excused/justified conundrum, replacing it with risk-control. The message becomes: don’t push anyone beyond their limit. The onus rests on the aggressor to accurately predict when their target will be forced beyond the reasonable control of law.

But again we are confronted with what is meant by the concept of reasonableness: Does it excuse on the grounds that anything better is beyond the capacity of normal people? Or does it justify because greater freedom (here, to speak freely) would impose impractical stresses on the society?\(^96\) Does it even arbitrate between the right to liberal behaviour and that to protection from offence? In Chapter 10 I will attempt to redefine the role of community standards in law so that it assumes a function of adjudicating between conflicting claims to freedom and security.

This leads finally to an issue that has troubled the role of subjective test: how should the law react when an offender is honestly wrong in believing that an illegal choice is necessary?

\(^95\) I argue that the most practical sequence for the ‘dual’ test is for the community-standard objective test to follow the failure of the subjective test; however lawmaking may require the reverse.

\(^96\) Prohibitive and invasive policing, for example. For professional police to personally monitor every interaction, 24 hours a day, would require a force at least 3 times that of the supervised population.
Mistake

Characterising defences as excuses, to be tested for the actual intentions of the offender, raises the issue of mistake. Logically, once the evidence demonstrates a believable mistake, the defence prevails. The question, then, is whether criminal law should refrain from punishing an honest mistake; and if so, how the honesty of the mistake is to be established. This engages the dispute of whether there is any adequate distinction between a mistake of fact (acceptable as a defence within the above debate) and one of law.

The fact/law distinction

Ingrid Patient presents the issue in Tolson,\(^97\) when there was argument as to whether Mrs Tolson’s bigamous second marriage was a permissible mistake of fact (she thought her first husband was dead), or an impermissible mistake of law (she thought herself legally widowed).\(^98\) Eric Colvin records that ‘in *R v Tolson* it was held to be a defence to a bigamy charge that a woman mistakenly believed that her husband was dead, and therefore that she was unmarried.’\(^99\) By this account, the fact/law issue was resolved by seeing the *primary* mistake as fact, and the legal mistake as simply a consequence.

Patient proposes that the fact/law distinction is better resolved by assigning the physical act to actus reus and the legal proscription to mens rea.\(^100\) As Dixon J said in *Thomas v The King*, ‘in any case, in the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.’\(^101\)

Mistake of fact

Unless the accused has been authoritatively misled (‘I’m a professional

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\(^97\) (1889) 23 QBD 168.
\(^100\) Note 98 at 330.
\(^101\) (1937) 59 CLR 279, 306.
mechanic,102 and the brakes are fine, mate’) there seems little scope for a factual mistake being justified, leaving only the role as an excuse. Using the logic developed around excessive self-defence, this should limit any testing of the mistake to the subjective model. Again, however, lawmakers are reluctant to abandon some form of procedural supervision, relinquishing the power to criticise what the accused actually believed. As Okechukwu Oko frames the argument, ‘[t]he objective test works fairly well in screening out bogus mistake of fact claims …. [and] the object of law as regulation of human conduct is thereby promoted.103 By this logic, any belief that appears more gullible than the norm is deemed bogus.

Even when legislation adopts the subjective test,104 the courts cling grimly to an objective assessment. Half a century ago, in Wilson v Inyang,105 Lord Goddard saw the reasonableness test as evidence of the accused’s claims of bona fide belief when he said ‘a man may honestly believe that which no other man of common sense would believe. If he has acted without any reasonable ground, and has refrained from making any proper inquiry, that is generally very good evidence that he is not acting honestly.’ The objective test was assigned the role of subjective proof: an accused can claim to have had no illegal intention (didn’t mean to do any harm), but that claim needs to be supported by otherwise reasonable behaviour. Rather than have two tests, then, the objective test becomes the ‘credibility lens’ through which the subjective test is viewed. As I responded to Jacobs J’s reasoning above, the reasonable person is at most a place to start in weighing the defence’s believability.

But while the movement recorded by such authors as Yeo, towards a greater dependence on the subjective test, appears to be a welcome move towards exculpating a mistake of fact on the basis of its honesty, mistake of law

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102 Implying some form of legal certification.
104 See Criminal Code Act 1899 (Qld) s 24 (1) under which [a] person … is not criminally responsible … to any greater extent than if the real state of things had been such as the person believed to exist.’ On the issue of excessive self-defence, Yeo notes that recent English law has developed towards a purely subjective test: Note 39 at 139.
105 [1951] 2 KB 799, 803.
continues to resist such development.

Mistake of law

Richard Singer distinguishes three forms of mistake of law: (1) pure ignorance of any relevant prohibition; (2) not realising the range of a known prohibition; and (3) believing an exception applies to a recognised ban.106

One of the earliest rationalisations for the ‘no excuse’ rule was in 1802, when Lord Ellenborough said, ‘[e]very man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.’107 This explains the fear that drives the rule, creating an irrebuttable presumption.108 Alternatively, Margaret Briggs presents the argument that there is a ‘duty of citizenship … to take reasonable steps to acquaint ourselves with the criminal law.’109 However, as an inflexible rule it has worried many judges. According to Windeyer J in iannella v French,110 the rule’s ‘main justification is

• in South Africa mistake of law was the same as mistake of fact
• in Korea a reasonable mistake of law is a valid defence
• in Germany both a failure to perceive the prohibition and that the act was not avoidable will bring an acquittal; if the act was avoidable, a mitigated penalty applies

107 Per Lord Ellenborough, Bilbie v Lumley (1802) 2 East 469, 472.

108 The struggle with the prohibition is widespread. Brookbanks notes that New Zealand law follows the common law in rejecting the defence, and applies that rejection to aliens: WJ Brookbanks, ‘Recent Developments in the Doctrine of Mistake of Law’ (1987) 11 Criminal Law Journal 195-205, 197. Kastner presents the Canadian exceptions to the doctrine: Impossibility and Non-publication; Colour of Right; and Officially induced error (Note 106 at 316). These exceptions do not include ‘erroneous legal advice’, as such an exception would promote ‘lawyer shopping’ for the most convenient advice, or alternatively induce corrupt advising to provide the excuse. (Note 106 at 325). Kastner also presents (at 327) the problems embedded in relying on a judicial decision. She present the case of a ‘bottomless dancer’ in Alberta, who relied on a decision permitting total nudity, which was reversed before the de novo retrial. The retrial court apparently felt obliged to follow the new precedent, presumably on the basis that the new precedent applied to an event pre-dating this dancer’s act. See also Brett P, ‘Mistake of Law as a Criminal Defence’ (1965) 5 Melbourne University Law Review, 179-204; Ward R, ‘Officially Induced Error of Law’ (1988) 52 Saskatchewan Law Review, 89-114; Morgan N, ‘Mistake’ (1991) 15(2) Criminal Law Journal, 128-38.

109 Briggs M, ‘Officially Induced Error of Law’ (1995) 16 New Zealand Universities Law Review 403-30, 405. However she proposes that, if statutory ambiguity is the source of the mistake, ‘the orthodox common law approach [is] the principle of strict construction. In the event of ambiguity, the meaning most favourable to the individual is adopted’: at 423. See also Colvin E, ‘Interpretation of Criminal Legislation and Codes’, The Laws of Australia 9 Ch 7 (North Ryde: LBC, 1993) 131.

110 (1968) 119 CLR 84, 113.
expediency.'\textsuperscript{111} While being satisfied to leave the question open ‘in some cases’, in the same case Barwick CJ proposed that the rule is not absolute:

Mens rea may in some cases, depending as I have said on the context and the subject matter, require that the defendant should know that the act is unlawful. That element of the offence itself cannot be eliminated in such a case by saying that ignorance of the law is no excuse. The defendant who is not shown in such a case to know that the act is unlawful needs no excuse. The offence has not been proved against him.\textsuperscript{112}

So ignorance of the law serves as an excuse in some cases but not others. How are the citizens to know when they are required to fully research their rights before acting? Chief Justice Bray attempted to find a way out of the problem through statutory interpretation:

No one doubts the proposition that ignorance of the law affords no defence. Equally, however, it is perfectly competent for Parliament to define an offence in terms which make consciousness of wrongdoing an essential element. The question here is whether Parliament has done so by the use of the word ‘wilfully’.\textsuperscript{113}

The problem with this reasoning is that an offence can be performed ‘wilfully’ while ignorant of the prohibition. On the other hand, if mens rea is read as meaning that there was intention to do what was known to be prohibited (thus providing the ‘guilt’ of mind), then clearly ignorance of the law becomes a defence. I propose that the purposes of such a canon of law are:

- To encourage legal learning. The citizens are given a motive to discover what their rights and obligations are;
- To reduce the effort required by the prosecution. If the defence was allowed, the prosecution would have to rebut it. Such rebuttal would be difficult, and would almost inevitably resort to the reasonable person as the test of a claim of legal ignorance. So the presumption has the goal of protecting criminal law from intrusion by the objective test;

\textsuperscript{111} He acknowledges that ‘[f]rom Hale, or earlier, until Austin, Salmond and today the rule has been stated by writers on criminal law and jurisprudence, and with it various explanations or justifications of it. These have been offered because the rule itself can have harsh effects by cutting across the basic doctrine of the common law that a man is not to be condemned as a criminal unless he had a guilty mind, mens rea’: at 112.
\textsuperscript{112} At 97.
\textsuperscript{113} French v Iannella (1967) SASR 226, 232.
To warn people to stay out of areas of doubtful legality. Like strict liability, the presumption creates a wider no-go zone around a legal right.

In short, the rule has the overall purpose of supervising risks. A representative case is rape. If the law is only concerned with the deliberate rapist – the person who wants to take sex despite rejection – then only full direct intention is the issue: the prosecution is required to prove that the rapist knew he was being rejected. If, however, criminal law has the objective of protecting women from the rapist who is willing to proceed when rejection is not explicit – where consent may be either ambivalent or undecided – then it will either apply a strict test or include recklessness in the offence description.

The problem with this approach is that it may not encourage women to make their rejection clear. It can permit a rape accusation to be used as retaliation for some other disagreement. In any tension between an existing unit of law (whether legislation, common law or contract) being ‘court-proof’ and that unit of law being able to instruct its subjects on how to conduct their affairs with legality, the objective of being impregnable to clever courtroom argument logically prevails. The opposed functions of litigation – law making and administration – then shifts towards the creation of law for doubtful situations.

In answer to the argument that to permit mistake of law as a defence would encourage citizens to remain ignorant of the law, Kastner proposes that ‘[t]he doctrine of wilful blindness may well negate any possible defence if circumstances were such as to alert the offender to the need to make himself cognizant and he did not do so.’ She argues that ‘[i]gnorance is also seen as blameworthy in itself.’

But unless ignorance is seen as ‘wilful blindness’, as Richard Singer points out, once the intention of the offender is dismissed as irrelevant, the criminal

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114 As writers for the performing arts aspire to making their scripts ‘actor-proof’.
115 Perhaps founding the old aphorism that ‘hard cases make bad law’.
116 Kastner, Note 106 at 311.
117 Id at 313.
DEFENCES

law has no option but to look to the actual result to understand the nature of the offence. This can produce some odd, and unjust, results. Singer proposes that under the 'greater crime' theory, 'if one steals a nickel, believing this to be petty larceny, and it turns out that the nickel is a rare coin worth $500,000, one is guilty of grand larceny, having taken the risk that the item would be more valuable than he understood.'\textsuperscript{118} An alternative approach is to construct a presumption of such knowledge. Francis Jacobs proposes that a presumption of legal knowledge is justified where the laws in question are in harmony with (as either the source or product of) the current sense of right and wrong: ‘Insofar as serious offences are concerned, it may be argued that it is not altogether unreasonable to assume a knowledge of legal rules which necessarily reflect to some extent the current conceptions of the prevailing social morality.’\textsuperscript{119}

By this reasoning, Jacobs is able to retain the principle of mens rea as to fact, but suggests that the presumption of legal knowledge be rebuttable. There is a question of whether this would allow a foreigner to argue that the prohibition in question is not part of the jurisdiction in which they are domiciled; or an illiterate to contest that the knowledge has been made adequately available. Jacobs concludes that the 'no excuse' rule is a companion to the objective test which I have criticised:

Thus the rule excluding ignorance of the law as a defence does comply with the principle against which the doctrine of objective liability offends, that the citizen should not be penalised for any infraction which he had no opportunity to avoid; though it would be desirable to modify the rule to provide a defence to a person who can show that he had no reasonable opportunity to discover the law's provisions.\textsuperscript{120}

In fact the 1955 Tentative Draft No 4 of the US Model Penal Code\textsuperscript{121} sought to permit both mistake of fact and law as defences:

\begin{quote}
\textit{s 2.04 (1) Ignorance or mistake as a matter of fact or law is a defense if (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or}
\end{quote}

\textsuperscript{118} Note 106 at 55.  
\textsuperscript{119} Note 75 at 136.  
\textsuperscript{120} Id at 137.  
\textsuperscript{121} Model Penal Code, Tentative Draft 4, 25/4/55
(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

The section also aimed to negative culpability for ‘(3)(a) Enactments … not known to the actor’ and ‘(b) … reasonable reliance upon an official statement of the law.’ However s (4) required that the defendant must prove the mistake on balance. In short, belief is a matter of evidence rather than doctrine.

**Summary: defences as fate-management**

We have seen how the harm-control model leads to some irreconcilable issues over the ‘dual test’ of defences, principally centred on ‘engineering’ the appropriate procedure. The core of this thesis regarding defences is that a plea of incapacity can only be tested for its believability; any comparison with the more careful behaviour of a normative citizen can do no more than ignite a suspicion that the accused’s behaviour was chosen. Any defence that employs the objective test apart from the subjective test is actually assessing the merits of the offender’s choice, not that person’s capacity. Such a defence can only be a justification. As the string of High Court statements regarding provocation demonstrates, there is an inevitable drift towards giving the reasonable person more of the relevant characteristics of the accused, so that eventually the two tests become one. Indeed, English criminal law has abandoned the dual test for a purely subjective regime.122

The question is whether it is the censuring of choice-of-harm – as opposed to the evaluation-of-risk – that creates the problems. Stanley Yeo argues that, in respect of self-defence, the solo subjective test would allow the ‘unnaturally apprehensive and cowardly’ person to kill repeatedly ‘if that is her inclination’.123 The error in Yeo’s argument is that an ‘inclination’ is a choice. The current understanding of self-defence is that the defence only succeeds where the accused can successfully argue (to the required standard of proof) both that there was *no perceived choice* – the power of choice being destroyed by some form of panic – and a justified choice. The former is

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122 *Williams* [1987] 3 All ER 411; The Draft Code cl 41(1) provides: ‘Belief in circumstances affording a defence. Unless otherwise provided, a person who acts in the belief that a circumstance exists has any defence that he would have if the circumstance existed.’

123 Note 4 at 200-19.
assessed by the believability (subjective) test; the latter by resort to the moral model. But how can a non-choice be a justified choice?

The problem with the ‘dual’ structure is that the tests should be inculpating cumulatives rather than a procedural form of double jeopardy: the relevant defence should fail both tests in order to be ignored. If the offender was in the acceptable level of panic, there has been no choice made that can then be compared with the moral model. It is only if the offender fails that test that there can be resort to the choices the moral model would have made.

All defences therefore, when understood to be excuses, simply admit that culpability must be attenuated by incapacity. Someone who could not do any better, and can prove it, is beyond the reach of censure. The test of capacity is not what is reasonable, but what is believable. A defence of incapacity is a matter of evidence, not doctrine, including all genuine mistakes. For a court to decide that – solely because it believes the moral model would have acted better – the accused is lying in claiming a lack of capacity, is sheer construction, and confuses reasonableness for believability. At best the comparison is some evidence that the offender may be lying, so impacting on the believability test; but it is not conclusive. It is not an independent test, but evidential support for the subjective test.124

The issue is, of course, whether a court must step back when an offender convincingly says ‘I thought that was the best I could do’? Is there no further legal means available to censure the basis for a genuine belief, where that basis reveals some form of neglect? George Fletcher, in critiquing Greenawalt’s approach, 125 introduces the reality of perceived cost/benefit.126

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124 Heidi Hurd would resolve the justification/excuse conundrum by assigning only one test to each, arguing that ‘the law ought never to incorporate subjective epistemic elements into justification doctrines. Whether it can justifiably build objective conditions into excuses (such as the requirement in the duress excuse that the threat to which the defendant succumbs be one that might tempt a person of reasonable firmness) turns on whether our doubts about the mental states with which persons do wrong actions should be resolved by exonerating persons from wrongdoing only when they meet certain objective standards’: Hurd H, ‘Propter Honoris Respectum: Justification and Excuse, Wrongdoing and Culpability’, (1999) 74 Notre Dame Law Review 1551-73, 1571.

125 Above, Note 21.

126 He proposes that ‘[t]wo factors intersect in Greenawalt’s defense of treating reasonable mistakes about justifying conditions as themselves claims of justification. The first is the shift from reality to
Randal Marlin opposes exonerating genuine mistake that is based on an unreasonable belief with the hypothetical of ‘[t]he would-be assassin who sets off a quantity of explosives not making any inquiry into what would be the right quantity for the job, might just as well kill more people than he contemplated as kill none at all.’\(^{127}\) However the logic here is clearly to challenge the result as what initiates and controls culpability. Marlin is arguing that the actual outcome is irrelevant, but that it is the failure to properly research the potential harm of the endeavour – whether criminal or not – which is the warrant for punishment.

Let us apply the logic to a hypothetical. Two climbers are ascending a rocky cliff face, roped together. The lower climber loses his footing and falls to the end of the mutual rope, and hangs there. The upper climber sees the pitons bending, apparently coming loose from the rock. He fears that both he and his mate will plummet to their death, so severs the rope below himself. His mate falls to his death.

The survivor is charged with murder, having deliberately cut his mate loose knowing this will almost certainly kill him. He pleads necessity. The prosecution provides evidence from the manufacturer of the equipment that the pitons are designed to react as they did, and to carry the weight of the two climbers in such an emergency. The survivor was therefore wrong, and his mate died unnecessarily. Should he be punished? Was his fault that he failed to learn emergency procedures before embarking? Or could it have been that he chose to protect himself, at the cost of a near-certain catastrophe to his mate?

The point of this scenario is that the offender was faced with evaluating a

danger, and got it wrong. What is the most productive means for criminal law to encourage better risk-assessment? Should the survivor be tested just for whether he held the honest-but-wrong view of the danger? Or should there be some penalty for error? Should criminal law go looking for some reckless or negligent choice previously made (to not make himself adept at emergency procedures, for instance) and punish that by construction?

**A Risk Worth Inflicting: the role of the objective test**

Currently a defence, being dual-tested, must survive two risks. If the jury does not believe in the reasonable possibility that the accused held an actual apprehension of imminent danger, then the defence fails the honesty test, and is rejected. If, however, the jury does believe that the defendant may have held such a belief, it must then compare that belief with what the normative person *may have* believed in the circumstances. If there is no reasonable possibility that the normative person would have seen the danger as sufficient to warrant a lethal response, then again the defence is inadequate. Yet if the accused survives the first test, the second test seems pointless: there is no moral or pragmatic purpose in a criminal law response to harm inflicted because the citizen’s (situational or personal) capacity for benign behaviour had been overwhelmed.

Such a process can be explained within the fate-management theory, which suggests instead that the defences are direct or internal mechanisms to minimise the social harm done by criminal law when supervising endangerment. The test can be seen as the community imposing its own interests on a dangerous situation, a two-step review of the actor’s fate-management.

The fate-management argument would be that the court says to our survivor: ‘OK, you made an honest mistake on the mountain, but this was caused by your previous neglect. We believe the acceptable person would have previously responded to the scale of danger you were electing to impose, and taken adequate precautions.’ The function of the ‘dual test’ is not choice or no choice, as the current understanding requires. Such a threshold operates
solely within the subjective test. The second (normative) test seeks out some other neglect. It does not challenge the honesty of the choice made at the time of the incident; just whether a prior chosen attitude to danger was unacceptable.

**Conclusion**

I have argued previously\(^{128}\) that, historically, negligence places a lower burden of risk-anticipation on the harm-inflicting party than existed under strict regimes. It is therefore a (relatively) exculpating doctrine: harm absent some poor citizenship is not a wrong. This reverses the normal appreciation of negligence as a source of fault; rather, because it needs to be proven, it is an ‘escape’ from strict culpability. In the case of defences, to defeat a claim for exculpation, the ‘dual test’ must find (1) a voluntary offensive act; (2) an unlawful decision; and (3) prior neglect of danger.

If any of these do not meet the criminal burden of believability, the defence prevails. The key issue is the accused’s response to competing risks. This was displayed in *Said Morgan*\(^{129}\) — when an off-duty policeman saw killing as necessary to defend a pair of child witnesses from the alleged paedophile who had threatened them. Despite that all the elements of murder were made out — a fully intended death — the jury accepted a defence of vicarious self-defence.

The doctrinal rationale for the result begins with the fact that the presiding judge did not preclude the defence, presumably on the basis that there was a sufficient lethal threat in existence to support extended self-defence. That is, it was open to the jury to believe a reasonable possibility existed that Morgan *actually* believed the girls would die if he did not intervene; and that it was reasonably possible that the normative person would have also believed their death was imminent.

Alternatively, it is possible to speculate that — between an armed defender

\(^{128}\) Chapter IV - *The Reasonable Person*, pp 100, 101.

\(^{129}\) Unreported Supreme Court of NSW 28/7/96.
and an alleged paedophile – the jury saw the offender as the lesser danger. His lethal behaviour was therefore endorsed as a reasonable response to the apparent hazard. This would appear to display the outcome encountered when a jury has the role to make a social utility decision – rather than to simply assess whether the believed facts satisfy the offence definition. Such ‘adjectival’ process may have allowed this jury to decide that society will benefit more from allowing armed citizens to kill those who threaten children, than by insisting that the murder is prohibited. Reasonableness in criminal law is not simply what the normative person would have done in the circumstances. It is a more complex judgment of social values, cultural aspirations, even what the citizens see as a life worth living. In short, it is the competing values placed on risk and security.\textsuperscript{130}

Since all risks cannot be removed, at what point in the continuum from extreme hazard to oppressive boredom do the citizens get the best balance: enough adventure to make life interesting; not enough to induce panic?\textsuperscript{131} The dangers of the objective approach are not only that productive enterprise may be inhibited, but also the court has the ability to apply hindsight against an accused who was facing uncertainty. The objective test deliberately withholds this decision to case-by-case analysis, and so places the responsibility on the active citizen to err on the side of caution. Robinson argues that vague defences may benefit from a ‘chilling effect’, so those unsure of whether they are protected may be careful. However the enforcers need to be sure.\textsuperscript{132} In effect, risks are converted to facts, forcing the court to convert an unwanted outcome into malice, as the only means of addressing harm rather than danger.

\textsuperscript{130} As Fletcher pointed out in \textit{Chapter IV - The Reasonable Person}, German law acknowledges that offences and justifications represent competing rights, so the initial test is to decide which should prevail – before any concern for the individual capacity of the accused. Fletcher proposes that '[t]he necessity defense expresses the same commitment to the welfare of the public that supports the very crime of possessing weapons without a license. In the case of the prohibition, the public interest or welfare is expressed in a benefit to public safety that exceeds the cost to individual liberty resulting from the suppression of guns. Cost-benefit judgements of this sort pervade modern regulatory schemes': Note 45 at 161.

\textsuperscript{131} This approach makes the individual supreme, and would have the society accept a duty to provide whatever the citizen wants. If it fails, the citizen has the right to leave, and any future relationship becomes purely political.

\textsuperscript{132} Note 8 at 74.
Since the present chapter has invited a more detailed exposition of the proposed conscious endangerment paradigm than previously, it is now appropriate to engage that model directly and fully, as a topic in its own right. In the next chapter, *A Radical Reform of Criminal Law*, I will propose a formulation that applies a community standard within the subjective test – modelled on the approach taken by the United Kingdom Court of Appeal to dishonesty in *Feely*,\textsuperscript{133} and *Ghosh*.\textsuperscript{134}

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\textsuperscript{133} [1973] 1 QB 530, per Lawton LJ.
\textsuperscript{134} [1982] 1 QB 1053, per Lord Lane LJ: ‘It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest’ [emphasis added]. These cases were explored in *Chapter IV - Reasonable Person*, at p 96. For Australian critiques of these cases, see *Salvo* [1980] VR 401, per Fullagar J at 430; and *Peters v The Queen* [1998] <http://www.austlii.edu.au/au/cases/cth/HCA/1998/7.html>, obiter by Toohey and Gaudron JJ, 15-19; and Kirby J’s preference for a totally subjective test at 136-8. [Accessed 22/04/04]
The previous chapters have each identified a species of doctrine that are best explained as giving criminal law a fate-management capacity. These debates also highlighted aspects of the doctrines that undermine such a role. Clearly a most ambiguous role for the criminal sanction is when a society wishes to inhibit harmful behaviour, while permitting useful enterprise based on the same pursuits. To date, the solution has been to either prohibit precise activity; or to place the onus on the actor to correctly anticipate an unlawful harm. The former is inflexible and complex; the latter sends out a warning by making the accused responsible, regardless of any goal, if a proscribed harm is done.

This problem has been the foundation of the thesis, with the objective of identifying the source of all the difficulties flowing from criminalizing incidental intention, including the troubled distinction between recklessness and negligence, along with the need to resort to constructions. The specific issues I have explored are:

1. The incomplete coverage between inchoate and completed offending – which effectively authorises behaviour that inflicts risks without doing unlawful harm: Chapter II.

2. The present formulations of offences according to either the act or the consequence – allowing the court process to ignore the accused’s process of choosing when to impose a risk, or permitting fate to dictate whether an offence has been committed: see Chapters III, IV and VII.

3. The current culpability distinction between malice and risk-infliction – leading to a process that is distracted (arguably by a focus on moral outrage) from addressing the potential for harm engendered by either intention: see Chapters IV, V and IX.

4. The imposition of quasi-legislative objective standards – creating retrospective fictions of the choice to endanger: Chapters IV and IX.
5. The fictional construction of indirect intention as malice – which, while artificially addressing the problems created in 3, preserves the concept of malice as being the core criminal mischief: Chapters VI and VIII.

The outcome of these developments is to create definitions of offending which are embedded in either a voluntary act or a consequence.¹ Neither of these are ideal. Voluntary act offences are difficult to express with precision; or alternatively prone to overwhelming detail; and potentially oppressive. Contingent offences limit the justice system to responding after a risk has become a harm. Criminal law therefore loses much of its preventive potential; and when supervising indirect intention, only deliver specific warnings through the caselaw refinements of recklessness and negligence.

Certainly, the wait-and-see approach achieves absolute certainty about any mischief, and (since normally accompanied by defences incorporating reasonableness) weeds out the minor risks from the more serious threats, and thus allows reasonable freedom of enterprise.² The question is whether inculpating only the reasonably foreseeable consequence adequately – and proportionately – inhibits the choice to inflict a hazard per se. Simester and Sullivan suggest that ‘[t]he prevention of harm is a legitimate purpose of criminal law, and the seriousness of the harms involved in these cases justifies their criminalisation.’³ In other words, sentencing can make any necessary distinction between different levels of risk. The real issue is that the rule of law needs the power − limited by evidence of active choice − to control those behaving with unjustified disregard for another citizen’s welfare, both for the actual and potential social harm it does.

Equally, for the law of inchoate offending to insist on proof of malice before

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¹ In Chapter III - Strict Liability, I distinguished between definitions of offending that is satisfied by a prohibited act and those requiring an unlawful result. The status offence has been excluded on the grounds that, if it is a situation the actor can control, it duplicates behaviour or consequence offending; if not, it can only be effective if authorising incapacitation, and is beyond our concern for managing fate by warnings.

² Paul Robinson proposes that a trivial risk is usually made immune by the de minimus rule. An ‘improper’ risk can be decided by both the probability and the scale of harm. We have all consented to some degree to some level of danger: Robinson P, Structure and Function in Criminal Law (Oxford: Clarendon, 1997) 149-50.

intervening leaves the ‘agent gamblers’\textsuperscript{4} free to take risks with other people’s interests, so long as fate is on the gambler’s side. The current approach therefore leaves significant gaps in the control of endangerment. Anticipatory action is limited to finding either a violation of detailed prohibition or ‘direct’ intention (malice). Also a danger inflicted, which turns out to be harmless, escapes any legal response on the basis of luck.

\textbf{What is the Proposal?}\textsuperscript{5}

The reform advocated in the thesis is that the ‘foundation’ substantive criminal offence be formulated as:

1. \textit{Conduct that consciously endangers a legal right which is not protected by civil law, where such danger is disproportionate to any potential social benefit.}

2. \textit{It is a defence that the accused honestly believed:}
   \begin{enumerate}
   \item \textit{no such right applied, where the mistake was not due to a default of diligence proportional to the potential harm;}
   \item \textit{the act could advance a social benefit greater than the danger imposed;}
   \item \textit{that the danger was unavoidable;}
   \end{enumerate}
   \textit{a reasonable possibility of (a) to (c) to be raised in evidence by the accused.}

3. \textit{All degrees of actual capacity for foresight to be addressed by absolute judicial sentencing discretion, exercised through an appealable statement of reasons.}

The elements of this offence would be:

- The activity establishes a rebuttable presumption of rational mental default;
- The mental element is the decision, despite actual apprehension of the relevant right, to inflict unlawful danger;
- The defences of perceived right, social utility or incapacity fail to

\textsuperscript{4} Citizens who decide to gamble, for their own benefit and absent permission, with the rights of their peers – such as those who, when operating machinery hazardous to others, take ‘short cuts’.

\textsuperscript{5} The problems created by the suggested reform – including those embedded in the processes of democratic lawmaking – will be addressed in the final chapter Conclusion. For now the thesis is concerned solely with the aims and methods of the proposal.
neutralise the mental element.

The tests of culpability will all be those of perception: the potential outcome as it appeared to the accused at the moment of decision. Under the new ‘umbrella’ offence proposed here, the existing prohibitions in criminal legislation can then be divided and reformulated as follows:

- The ‘consequence’ offences, such as homicide, serve to define what is protected from endangerment – basic entitlements reformulated as ‘rights’;
- The ‘act’ offences, for instance dangerous driving, serve as prohibited methods of endangerment – sanctionable misconduct as ‘wrongs’.

Such a modification is a fusion of two existing models:

- The structure of the Penal Code of France, with its division between the General Part articulating the citizen’s procedural rights, and the Special Part which enunciates the substantive wrongs; and
- The focus of such international law as the International Covenant on Civil and Political Rights (ICCPR) – on articulating of the conceptual rights that municipal law is expected to protect.

While these models have no standing in Australian law, they demonstrate that a division between rights and wrongs is possible. The model I am proposing, while respecting the French right/wrong division, does not follow the procedure/substance split. That is, we all have both procedural and substantive rights: the right to due process, and the right to security of the person and property. Equally, there are prohibitions (wrongs) we must respect. Clearly the substantive wrongs are the most obvious. However there

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6 See also Williams G, Criminal Law: The General Part (London: Stevens, 1964) 3; and Fletcher’s analysis of the German process in Chapter IV – The Reasonable Person at Note 44.
7 Although ICCPR is mainly directed at limiting state legal power, it varies from most domestic criminal law in claiming a foundation of rights, rather than expressing them in negative form by articulating legal wrongs.
8 This division does have distant precedent in English law, with the original writs distinguished as the praecipe writ nominating a right to be respected, and the trespass writ demanding a wrong be corrected: Baker JH, An Introduction to English Legal History (London: Butterworths, 1979) 54-8.
are also procedures we are not permitted to use: perjury, for example; or contact with witnesses and jurors; and certain degrees of hearsay.

The useful aspect of ICCPR is that it does not make the process/substance distinction. Rather it enunciates rights of both. While the main focus of the Convention is on the State’s duties to its citizens, ICCPR requires the provision of both the right to personal security protected by law, and to due process when their behaviour is questioned legally. As is obvious by the interleaving of substantive and procedural provisions, the drafters of ICCPR saw no need to follow the French model.

While I might challenge the merits of the process/substance division, all that is important to the thesis is that it is not the distinction I am proposing. Rights and wrongs can be either. So the similarity with the French Code is merely that rights and wrongs have been separated. The other difference is that (given my opposition to any requirement of legal knowledge) the wrongs are seen purely as ‘for example’. They are acts that have demonstrated their capacity for harm and are advisory rather than directory. If a motorist knowingly chooses to ignore a recommended maximum speed, or drives too fast to be able to observe known warning signage, this on its own serves as evidence of a willingness to endanger.

The Process

The new distinction – between the old ‘consequence’ offences (now serving

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9 Articles 5, 6, 8, 12, 17, 23, 26.
10 Articles 2, 7, 9, 10, 11, 14, 15, 17.
11 In his book chapter ‘Legalizing Blame I: the Quest for the General Part’, Norrie proposes that the fundamental distinction within criminal law is between a ‘technical offence core’ and a ‘moral defence periphery’. He argues that the ‘dualist’ and ‘tripartite’ structures – which propose various arrangements of actus reus, mens rea and defences to form the general and special parts of criminal law – do not recognise that any such dichotomy is intellectually attractive but unnecessary. He even blames this quest for either/or structures for many of criminal law’s operational difficulties: Norrie A, *Punishment, Responsibility and Justice* (Oxford: OUP, 2000). I agree that act, intent and defence are better seen as ‘procedural hurdles’ deliberately placed in the path of the prosecutor, so are all better seen as means rather than ends. McConville, Sanders and Leng see the criminal law procedure as ‘an obstacle course’ against ‘capricious and arbitrary actions of criminal justice agents’: McConville M, Sanders A and Leng R, *The Case for the Prosecution* (London; New York: Routledge, 1991).
12 Of course, a licensed situation has the advantage that the driver may have been required to know such signs exist, as part of the test for permission to drive. However this does not alter the fact that such a requirement is purely a matter of evidence as to knowledge, and can be seen as a form of experience that attacks the believability of any plea of ignorance.
as the interests under criminal law protection)\textsuperscript{13} and the old ‘act’ offences (now the methodological wrongs) – makes the function of the old consequence offences indirect. They merely nominate what is not to be endangered. If there is a trespass on that right, this initiates an inquiry into whether it is the result of a choice to endanger. Any harm (a death, say) actually inflicted is irrelevant to the assessment of guilt. The ‘mechanics’ of the harm (the act-in-circumstances – such as discharging a firearm in public) become the main body of evidence for whether that activity was driven by a decision to endanger a right.

Thus there should be an offence requirement of ‘relative inutility’: if the risk was socially worth taking, or its prevention would have posed greater social danger, then the citizen’s judgment (if the court believes – to the requisite standard – it to have been based on such a calculation) is not censured.

**The external/general element**

‘Conduct that consciously endangers a legal right … where such danger is disproportionate to any potential social benefit’ is the objective element, in that the conduct becomes unlawful if it imposes a risk to a legal right that the court regards as greater than any potential social gain. Both the danger and potential benefit are a compound of the degree of possibility (the ‘visibility’ or remoteness) and the latent social impact\textsuperscript{14} – a quite unremarkable actuarial analysis.\textsuperscript{15} The frequency-of-incidence (how often the damage is done) compounded by the mean amount of damage; divided by the costs of

\textsuperscript{13} Joel Feinberg has developed a scale of interests that need protection:
- ‘Welfare’ interests are the basic needs for productive life.
- ‘Security’ interests are a ‘cushion’ protecting the welfare interests.
- ‘Accumulative’ interests are the furthest from a critical interest, being the hoarding of security: Feinberg, *J Harm to Others* (NY: Oxford UP 1984) 42; 206; 207.

\textsuperscript{14} Feinberg tackles the question of ‘compound’ risk – the possibility that harm will occur, aggravated by the potential level of catastrophe if it does – by introducing an ‘independent value’ of the behaviour, to the actor and to society in general. He points to the example of defamation privilege, where the potential harm to reputation is opposed to the need for a free flow of opinion: id at 190-2.

\textsuperscript{15} According to Keshava Chandra Mehrotra, ‘Section 81, [of the Indian] Penal Code, excuses the doing of an evil if the act is done so that good may come. In other words, an act which would otherwise be a crime may be excused if it was done only in order to avoid consequences which could not otherwise be avoided, and which, if followed would have inflicted upon him or upon others, whom he is bound to protect, inevitable and irreparable evil, and that the evil inflicted by it was not disproportionate to the evil avoided’: Mehrotra KC, *Culpable Homicide and Legal Defence* (Eastern, Lucknow) 193.
prohibition (economic ‘slowdown’ and enforcement) should be able to indicate, on a social utility basis, whether the activity should be interrupted. The proposal accepts that all activity is dangerous, so employs the objective test to establish the point at which the criminal justice system will open an inquiry into the actor’s behaviour.16

This element is intended as a clarification of the traditional objective test, but differs in that it does not excuse behaviour on the basis that the reasonable person would have been equally neglectful of a duty. Rather it tests for whether the society believes the activity must be tolerated (and any harm absorbed across the relevant citizenry)17 if other benefits are to be available. So this analysis is general: it simply assesses the activity for its apparent social productivity, without any inquiry into the intentions and capacities of the actual offender.18

The internal/personal element

Item 2 of the proposal addresses the capacity of the instant offender to conform with criminal law’s demands that dangers are only to be imposed within a social utility equation, and blocks inculpation if such capacity is not proven. This is the subjective element.

Item 2(a) covers mistake. Where the accused claims to have believed that there was no relevant right to be endangered – that the person, property, or freedom that was the subject of the activity was not protected by criminal law – any mistake must not be the result of the actor’s lack of diligence, with the

16 Schlegel accepts that any assessment of corporate offending must include ‘the context of the provision of socially useful services and products’: Schlegel K, Just Deserts for Corporate Criminals (Boston: Nth Eastern UP, 1990) 110f. He then goes on to propose that the gravity of the harm and its probability can be combined to become the risk of harm. However, while he sees Feinberg’s ‘effort to list and rank the interests’ [Feinberg above], and his own evaluation of risk, as only a ‘possible starting point’, he somehow fails to then incorporate the social context he previously mentioned. So any sense of cost/benefit balance is missing.

17 For instance, the cost of road traffic trauma transmitted proportionately to those who most benefit from the use of motor vehicles – as is currently achieved by compulsory insurance.

18 As the sole point of objective culpability, it removes the need (and the power) for the substantive law to construct a menu of ‘crime tariffs’, with their consequent effect of authorising unlawful behaviour when the offender is prepared to pay the price set; and eliminates any necessity for resort to the basic/specific distinction when dealing with intoxicated behaviour (a distinction no longer available with the suggested new roles for act and consequence offences).
demand for such diligence rising in proportion to the perceived threat.\textsuperscript{19} The logic is to curb the danger created by those who fail to use appropriate endeavour to discover and obey a legal obligation, while permitting the defence where there has been effort equal to the danger.\textsuperscript{20} This is a rationalisation of the mistake-of-law issue. It distinguishes (and inculpates) those who act dangerously on the basis of sloppy attitudes with regard to their legal responsibilities, while protecting those who were unable to discover, using proportionate effort, a specific modification to fundamental principles.\textsuperscript{21}

Item 2(b) of the proposal creates a defence that the accused believed (and the court accepts the reasonable possibility that such belief was honest) there was potential social benefit that outweighed the danger. This is a normal justification defence in that, if the accused can satisfy the evidential burden as to having acted on a belief in aggregate social advantage, then the prosecution must remove all reasonable doubt that such a belief did exist.\textsuperscript{22} It is required that the accused nominate the perceived benefit, not simply assert that – if the act had evaded any damage – there would have been a general social advantage. The freedom of the individual to impose dangers is thus weighed against the specified benefit on offer from the activity under review.

Thus the court must agree that the perceived balance of risks favoured proceeding. In effect, the dangerous driver answering an emergency is

\textsuperscript{19} Simester and Sullivan propose that ‘a due diligence … defence would … be relevant to a plea of excusable ignorance or mistake of law’: Note 3 at 648.

\textsuperscript{20} A search of all current legislation available through <http://www.austlii.edu.au/forms/search1.html> at 9/08/03 found 800 sections permitting a defence of due diligence in Australian instruments. These are, however, routinely limited to diligence as to fact. By contrast, a search for ‘mistake of law’ on the same URL found 24 hits, mainly denying any such defence. Kumaralingam Amirthalingam saw ‘the doctrine of due diligence or reasonable care’ regarding mistake of law as still new to Australia in 1994, and a doctrine that ‘only applies to regulatory offences’: Amirthalingam K, ‘Mistake of Law: A Criminal Offence or a Reasonable Defence?’ (1994) 18 Criminal Law Journal, 271-83, 279.

\textsuperscript{21} Ashworth proposed that a doctrine of criminal estoppel be created to cover mistake of law - so that those who have properly ascertained the limit of their positive legal rights can stop a court from looking behind the law: Ashworth A, “Excusable Mistake of Law” (1974) Criminal Law Review, 652-62, 657f. However compare this with the result in Tesco Supermarkets Ltd v Nattrass (1972) AC 153, when the House of Lords constructed ‘common’ criminal liability in management that was completely unaware of an offence by an employee, in order to provide (according to Lord Reid) ‘additional protection to the public’. I suggest that this is simply the criminal law creating the ‘workplace control’ principle articulated by the High Court in Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR, and is based on the perceived fate-management capacity of the directors to ‘do more’.

\textsuperscript{22} In contrast with Rehnquist J’s ‘only reasonable alternative’ test for necessity: US v Bailey (1979) 444 US 395, 411.
different to one simply trying to avoid losing pay from arriving late for work. This can distinguish those persons who can meet the evidential burden that they honestly believed themselves critical to some worthy enterprise – and were inadvertently running late – from the person who inflicts a risk simply to stay in bed longer. Such a defence reflects both recklessness (proceeding against a known danger) and negligence (the court sees the risk as being reasonable). This is the old reasonableness test but, since the objective of the proposal is to authorise pre-emptive action by the criminal justice system, articulated so as to deploy a social benefit analysis of an offence without harm. It therefore distinguishes the justification defence from the excuse.

Under Item 2(c) the conduct will be exculpated if the accused genuinely thought themselves incapable of avoiding creating the danger. This is the excuse defence. It is not objectively tested; rather the court must be convinced of a reasonable possibility that the offenders did actually see themselves as overwhelmed in some way that precluded even inactivity. It is absolute, in the sense that there is no equation between the potential harm and how much effort the offender is required to expend in avoidance; that equation is covered in the justification.23

Item 3 replaces the need for partial defences, while retaining appellate review of sentencing proportionality. In effect, the actus reus is satisfied by acting on any degree of unlawful apprehension, so the gate to assigning a penalty is opened. A finding of culpability thus allows infliction of a penalty up to the maximum prescribed by law, without informing the sentencing official of what is appropriate within that range, when considering the capacity of the offender to avoid creating the danger in issue.24

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23 This division progresses that deployed in the French, German and Russian codes – as Fletcher outlined in my Chapter IV - The Reasonable Person.
Kaplan suggests that one measure of the law’s purpose is ‘social productivity’, so criminal law is authorised to intrude on the citizen’s freedom if the citizen’s activity is ‘harmful’ by this measure.\(^{25}\) This leads to a fairly contentious proposition: the correct and sole focus of modern criminal law is to respond when a citizen has chosen to invoke a prohibited risk, or to disproportionately endanger a legal right, regardless of success or failure.\(^{26}\) It is the intention based on *choice* that attracts a criminal sanction, on either a moral level (citizens have a responsibility to avoid harming their peers) or a pragmatic/psychological one (only chosen behaviour can be deterred by the intervention of punishment)\(^{27}\) and the only necessary distinction between offences is their position on a socially-constructed continuum of unlawful harm.

The method proposed here aims to centralise the *formation* of a prohibited choice as the locus of guilt. Proper process makes it necessary for a court to find, beyond reasonable doubt, that the accused had the capacity to avoid the recognised disproportionate risk of inflicting unlawful harm; and that such a capacity was not exploited – rather than to compare that citizen with any individual norm. When proposing that all homicide be brought under a single test for indifference, Pillsbury saw this test as subjective.\(^{28}\)

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26 Robinson agrees with the line of argument taken by this thesis, that result elements should be excluded from criminal law, as such offences ‘without results, are only risk-creation offences, many of which already exist in the code. Manslaughter without death is reckless endangerment. In other words, some entire offences, such as manslaughter, exist not to serve a rule articulation purpose but only to serve a grading purpose’: Robinson P, *Structure and Function in Criminal Law* (Oxford: Clarendon, 1997) 143. I propose that any issues of how culpable an offender may be (for endangering) is solely a sentencing consideration.

27 Since punishment does not present itself as a natural consequence of an act (as does the pain of grabbing a hot object) the subject has to logically relate the two. Hence it is only deliberated behaviour which can be addressed by a punitive response.

28 ‘Under an indifference approach, the defendant’s reasoning powers would be a potentially important factor in both murder and manslaughter cases. In all instances the prosecution must prove that the defendant’s disregard of risk was the result of culpable, selfish motivations, indicating indifference; the defendant may win acquittal by evidence indicating the disregard of risk was due to low intelligence, a nonculpable reason’: Pillsbury S, ‘Crimes of Indifference’ (1996) 49 *Rutgers Law Journal* 105-218, 201. In his formulation of instructions to juries in homicide cases, Pillsbury would require that the judge explain, ‘[i]f you determine that the defendant was not actually aware of the life-threatening nature of his or her conduct, you must determine why the defendant was unaware. You must determine whether lack of awareness was due to a culpable lack of concern for others or whether it may be attributed to other, nonculpable factors. In this regard you should consider any
While I agree with Pillsbury – that indifference to a hazard imposed is poor citizenship – I contend that it does not necessarily connect with any quantum of hazard (which may be why Pillsbury felt constrained to limit his reform to homicide) and thus seems to have more a moral than pragmatic character. It also retains some role for a lethal outcome and, despite attempting to place unintended murder and manslaughter on a scale of ‘notice of risk, degree of risk and degree of moral indifference’, is unable to evade the traditional subjective/objective distinction. As such, it would appear that Pillsbury’s reform has foundered on the usual prescriptive difficulties. This leaves the territory ready for occupation by conscious endangerment.

Full intention, then, cannot be limited to the actual goal of the act – with specific extensions to recklessness and negligence – but must consistently include the collateral harm that was foreseen but nevertheless risked. The concept of ‘direct’ endangerment, as a species of intention that elides the distinction between malice and recklessness, has already been developed by the High Court – at least where an accessory is concerned. In Giorgianni the accused was the owner of a truck involved in a fatal collision due to brake failure. The driver was convicted of the strict offence of culpable driving causing death. The question for the High Court was whether the owner could be held culpable of ‘procuring’ the dangerous situation that caused the death, if he was negligent about the maintenance of the vehicle; or whether full recklessness was required; or only if the court could find full intention to create the danger. Justices Wilson, Deane and Dawson held that ‘his defect in the defendant’s reasoning powers caused by mental disease, low intelligence, youth, lack of training or education. In making this assessment you should remember that all persons are obliged to try to avoid causing lethal harms to others. To the best of their abilities, all persons must look out for serious dangers which their conduct may create for fellow human beings’: at 210.

As Pillsbury himself later acknowledges, ‘[t]he indifference approach does commit the law to an explicitly moral standard. Each of the proposed offense definitions asks the jury to make a normative judgment about whether the defendant displayed a culpable lack of concern for others’ physical well-being. As we have seen, overtly moral standards permit a significant degree of decision maker discretion, an uncomfortable prospect in our heterogenous society’: Note 28 at 215-6.

Ultimately, Pillsbury is unable to discard an objective test for manslaughter, formulating it as ‘[a] person is guilty of involuntary manslaughter who causes the death of another by the disregard of a substantial, unjustified and reasonably apparent risk to human life, under circumstances that demonstrate a basic lack of concern for the welfare of others’: Note 28 at 211. [Italics added]

(1985) 156 CLR 473.

Crimes Act 1900 (NSW) s 52A.
participation must be intentionally aimed at the commission of the acts which constitute the offence’, so the accessory must be shown to have deliberately courted endangerment.34

Andrew Simester proposes a hypothetical where the direct intention is far less ‘monstrous’ than a side-effect which the offender chose to risk: ‘If I burn my house down to collect the insurance, knowing that a disabled man is asleep inside with no chance of escape, my behaviour is monstrous. The moral character of my behaviour is not determined by my end, but – glaringly so – by the foreseen side-effect.’35 So even the decision to risk harm on the way to the main goal can become the principal measure of culpability, if the harm risked is greater than the harm intended. Simester concludes:

As it happens, the analysis in this essay offers support for an additional feature of Anglo-American law: that recklessness, as much as intention, is characteristically a sufficient mens rea element for stigmatized criminal offences. If there is no moral priority of means over side-effects, then in general (subject to a defence of reasonableness) advertence ought, as it currently does, to suffice for criminal culpability.36

So Simester is untroubled by positioning the moment of culpability at when the danger is first identified, despite any evidential problems. Clearly, provided that some activity is necessary to open the inquiry, the result is ultimately the same: a guilty act (designated by law) must be performed voluntarily (choosing to risk unlawful harm, or to plunder another citizen’s lawful interests) in order to attract a legal response. In fact, the entire role of the criminal mental element defences can be seen as argument that choice was missing from behind the act.

The proposed reform is intended as pragmatic, in the extended sense that a society’s survival depends on the morality of its laws.37 The remedy is one that involves the development of criminal and tort law as alternative methods

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34 Gibbs CJ characterised this fusion of direct and indirect intention as wilful blindness, so promoting it from its usual position between recklessness and negligence.
36 Id at 100.
37 Cf Packer H, The Limits of the Criminal Sanction (Stanford, Calif: Stanford UP, 1968), especially at p 256, where he addresses the legal problems created by ‘polycentric’ morality.
of supervising unacceptable behaviour.\footnote{In fact, the subtext of the thesis is to explore whether the fault-finding process can be expressed as the society saying: ‘We use our substantive laws to define adequate citizenship, and no matter whether you breached a tortious duty or performed a criminal act, you have failed the test by choosing to perform less well than you could.’} To some extent, the citizen is still presumed to know the general contours of unlawful endangerment, with any claim of ignorance tested for specific believability.\footnote{See eg Sedley S, Freedom, Law and Justice (London: Sweet & Maxwell, 1999); Denning A, Freedom Under the Law (London: Stevens, 1949) 5; Gordon S, Welfare, Justice and Freedom (NY: Columbia UP, 1980) 131-5.}

This raises the issue of how diligently the citizens are required to inform themselves regarding any hazardous choice, before criminal law can censure consequent activity. Someone about to set up in business (or wanting to acquire a privilege controlled by licensing) can be expected to be exhaustive, so is usually required to anticipate quite remote possibilities,\footnote{In Brown [1994] 1 AC 212, the House of Lords denied a group of sado-masochists the right of consent to malicious wounding and assault occasioning actual bodily harm because, in the words of Lord Templeman, ‘[s]ociety is entitled to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.’} and is usually guided by certification requirements. So the question becomes whether it would be overly disruptive to social utility to expect such foresight where general activity is concerned. The answer turns on viewing utility as a means of achieving a ‘general good’ that includes freedom.\footnote{\cite{41}}

The suggested threshold is where the citizen has been disproportionately lazy, compared with the potential harm. Certainly all citizens must be allowed to do nothing if that is their wish (so long as they have not already created an unlawful danger). However if they intend to embark on some activity that imposes an overt disproportionate risk to a legal right, this imposes a duty to evaluate that danger, and abandon the pursuit once they recognise the potentially excessive social cost.\footnote{\cite{42} It is omitting to make any actual calculation – as opposed to the objectively tested merits of such prescience – that brings the citizen within range of criminal justice. That the legislature or the court believes the activity to be excessively dangerous to others (so the actus reus is satisfied) is no more than the authority for a court to open an inquiry into the capacity of this citizen to show equal social wisdom.}
The question then is: how to interpret ‘conscious endangerment’ to include the choice to not apprehend a danger to legal rights – perhaps wilful blindness – without resort to the objective test. The thesis proposes that such a person should only be excused if the court believes that s/he was not alert at all to the possibility of unlawful harm, so had no reason to pause and find out – rather than the person who negligently (unreasonably) chose to remain ignorant (who I have argued is indistinguishable from the citizen who knew of the specific risk but still went ahead). If this is not believable – that is, the court does not accept that the person was so naïve as to not recognise the prospect of any possible unlawful harm – then they have been conscious of the possibility of a prohibited endangerment, to an extent that authorises some level of censure. In effect, the gate to punishment is opened when a citizen ignores any awareness of creating potential unlawful danger, so does not (even inadequately) evaluate the risk/benefit.

The Proposal in Context

So how does ‘conscious endangerment’ differ from the current doctrines controlling indirect offending?

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43 See Chapter V - Unintended Death 1: Culpable Omission. See also Kirby P in Kitchener (1993) NSWLR 696, 697, where (in the context of sexual assault) he sees any distinction between ‘conscious advertence’ and ‘reckless failure … to give a moment’s thought’ to the possibility of non-consent as ‘unacceptable’. He has therefore equated the entire spectrum of knowledge as the basis for intention.

44 Pillsbury tenders that ‘[i]n liberal political theory, many argue that the government should punish only acts of individual aggression toward others, such as situations where persons choose to inflict new physical harms on others. This argument supports the otherwise strange common law doctrine that a passerby has no legal obligation to rescue another in peril unless the passerby was responsible for the peril or has a special relationship with the victim (See generally Heyman SJ, ‘Foundations of the Duty to Rescue’, 47 Vanderbilt Law Review 673, 746-54 (1994); Kleinig J, ‘Good Samaritanism’, 5 Philosophy and Public Affairs 382, 383-84 (1976); Sistare CT, ‘In the Land of Omissions: An Opinionated Guide’, 14 Criminal Justice Ethics 26, 26 (1995)). Similarly, a wealthy person need not give material aid to one in need, even if she may die as a result. To require such affirmative acts would violate the social contract, in which government's power is limited to maintaining minimal order in society’. Note 28 at 127. My proposed formulation is centred on ‘conduct’, in order to evade the many problems associated with the criminalisation of omissions. As other writers have recognised, culpability based on a ‘bad Samaritan’ formulation demolishes the perimeter that keeps duty-based neglect from demanding intermeddling: see Stewart MJ, ‘How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability’, (1998) 25 American Journal of Criminal Law 385-436; Huigens K, ‘Virtue and Inculpation’, (1995) 108 Harvard Law Review 1423-79. 1472; Dressler J, ‘Some Brief Thoughts (mostly negative) About “Bad Samaritan” Laws’, (2000) 40 Santa Clara Law Review 971-89, 86. In any event, ‘conscious endangerment’ would itself excuse the bystander who foresaw (given the House of Lords refusal, in Dudley & Stevens (1884) 14 QBD 273, to allow any value comparison of human lives) greater aggregate risk than benefit in voluntary intervention. So even if culpability was extended to passive endangerment, it would only capture those who ignored a proven awareness that they held the potential to deliver more good than harm.
• Compared with recklessness, it requires no harm as the trigger. It also avoids the remoteness calculus to excuse very distant risks. That the danger was greater than the potential benefit is the test.

• The distinctions from negligence are similar. Additionally, conscious endangerment is not a fault of omission.

• The judicially unpopular culpability based on wilful blindness is also distinguished as the negative form of knowing endangerment. However the main distinction is again that no prohibited harm is necessary.

• As for the fictions, the new proposal does not depend on enhancing the actual default to match the harm done. There is no longer a need to deem a chosen risk to that which proved an error.

And what of the other anticipatory doctrines?

• In general, those that can intercept harm all depend on a direct assault on a protected interest. Attempt, conspiracy and complicity all require deliberate activity aimed at offending a prohibition.

• The statutory prohibitions of ‘dangerousness’, which are intended to change behaviour (such as driving) before harm is done, serve as a basic model for the new proposal. However these are usually either strict or objectively tested. They therefore do not have a requirement of knowledge, beyond what can be imputed from the circumstances (or issue of a licence).

The underlying rationale for this revision is to remove objective evaluations, and imputed awareness, of potential social harm. All the constructions, for example, may be seen as distinguishing legal enterprise from illegal incidental endangerment. But if we are forced to assign the defences of self-defence and provocation to either incapacity or utility, we are forced to address their real purpose. Do we permit self-defence on the basis that the law cannot override the urge to self-preservation; or because the law will authorise ‘self help’ when it is unable to stop one citizen violating the peace by attacking another? Similarly, does the defence of provocation send out a message that
utility is best pursued by not antagonising other citizens?

Let us apply the reform to an everyday hypothetical: A football game has just ended and the crowd is streaming across the road in front of the stadium, disrupting the traffic. One driver barges through, horn blaring, enforcing his right of passage. Another driver does the same, but in response to a life-threatening emergency at home. A third is intoxicated. All three are dangerous. Should all be punished, absent any injury? Without them doing harm, who decides the degree of danger inflicted: parliament; police; or court? Should it make any difference if one driver or another knocks anyone down? How well does my endangerment formulation assess the culpability of the three drivers?

1. Driver one is being dangerous in enforcing his perceived right of passage. He is endangering the pedestrians, without any arguable perception of counter benefit beyond preserving the majesty of the law itself. However any culpability is dependent on the pedestrians having legal rights – such as to bodily integrity – that have not been excluded by statute or circumstance; and that the driver should recognise such rights. In NSW s 5 of the Roads Act 1933 specifically preserves the pedestrians’ rights to be on the road.\footnote{Section 5 Right of passage along public road by members of the public. (1) A member of the public is entitled, as of right, to pass along a public road (whether on foot, in a vehicle or otherwise) and to drive stock or other animals along the public road.} If such rights are not required knowledge – that the driver learn of such a sharing, as part of acquiring a licence, or through subsequent community education – then the obligation is on the prosecution to prove that such ignorance is not believable (an issue of particular relevance to those driving on international or interstate licences).

2. Driver two is responding to an emergency, so the perceptive balance test is applied. In order to find culpability, a court must conclude that the danger s/he is attempting to counter is of less weight than the recognised risk to the pedestrians.\footnote{In the event of there being a choice of inflicting equal harm on one citizen over another, clearly the courts would not countenance any calculus of relative worth between innocents. Compare...}
3. Driver three is voluntarily incapable of acting safely. The issue is whether the 'act that consciously endangers a right' is the chosen act of drinking itself, and whether the risk of hitting a pedestrian must be actually contemplated before the drug had its effect.\(^{47}\) Drivers who can provide evidence that raises reasonable doubt of such awareness (s/he has never drunk alcohol before; or acquired an acceptable licence where there was no prohibition against alcohol etc) could defeat the prosecution.

Nowhere is there a reasonableness test, only an honesty analysis. It would be hard to imagine a 'social benefit' test in the circumstances of recreational intoxication. The court must decide whether the accused’s evidence of no unlawful intent is reasonably possibly true. Perhaps if alcoholism destroys the drinker’s perception of control there may be an excuse (since an excuse defence admits that punishment is ineffective), but the court would need to be convinced that the perception was honest. That is, the actor can provide evidence to support the belief that s/he can never assume control over the addiction.\(^{48}\) A drunk driver who fails to provide evidence of a reasonable possibility that s/he had no capacity to avoid becoming a danger would fail the defence outlined in Item 2(c) of the proposal. This leaves any consideration of partial loss of capacity to sentencing.

How can the suggested approach improve some of the key doctrines I have examined?

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\(^{48}\) Section 23A 1(a) Crimes Act 1900 (NSW) provides for a partial defence where a killing can be attributed to 'an abnormality of mind arising from an underlying condition', which is defined under s 23A(8) as 'a pre-existing mental or physiological condition’. However s 23A (3) requires that self-induced intoxication be disregarded. It is perhaps arguable that alcoholism could satisfy subsection 1(a), and remove the self-induced requirement of subsection (3). In Tandy [1989] 1 All ER 267, 272-3 diminished responsibility was permitted where alcohol has produced brain damage.
**Incomplete offending**

The *subjective intention* argument that is the core of this thesis – that the sole authority for the action of criminal law is that the accused *actually intended to do what they were aware was potentially an unlawful risk-inflicting act* – logically leads to the following regime of inchoate offences:

1. The *criteria for conviction* for ancillary offences should be unaffected by whether anyone else committed the substantive offence or not. That the accused chose to risk violating an anticipatory prohibition should be sufficient authority for punishment.

2. The commission of any physical act should be merely evidentiary, as providing precise and convincing insight into the offence intended.

3. Conspiracy and incitement should be variations of attempt, and should benefit by non-completion only by a discounted penalty for the same reasons as in point 5 below. They are, after all, intentional preparation, even if the goal is to succeed through an agent (as under the doctrine of common purpose).

4. A *mistake of fact* that thwarts only the actus reus (so leaving the mens rea intact) should provide no excuse, while *mistake of law* that makes the behaviour appear legal should be considered. It should be the prohibition the accused *intended to violate* that is decisive. In other words, the intention to smuggle *anything thought to be prohibited*, regardless of whether the mistaken object is prohibited, attracts punishment: it consciously endangered a perceived right. Any quality of secrecy is evidence of the defiant or evasive intention, so someone acting mistakenly-but-openly becomes evidence of honest (and unpunishable) choice.

5. That the intended goal is factually impossible should be irrelevant. That the act was intended to create an unlawful danger should be sufficient. It is the *attemptive act*, not the result, which is the cause for punishment. Attempting to commit a non-crime is adequately punished by the derision of all who know about it.
**Intoxication**

If becoming intoxicated is to be considered for its actual contribution to bad behaviour, it needs to be accepted as both an offence and a source of sentence mitigation: the former the endangering *choice* to abandon responsibility that opens the gate to penalty; the latter accommodating the depreciated *capacity* to act responsibly, and therefore indicating the appropriate remedy. Pillsbury notes the argument that culpability for behaviour while intoxicated should be limited to an ‘awareness principle’:

> The strictest proponents of the awareness approach argue that intoxicated harm-doers deserve punishment only for taking risks they realized when sober. They advocate the creation of a new offence of dangerous drinking; drinking where the individual knows that intoxication may lead to dangerous conduct.49

He accepts the awareness-reducing effects of intoxication, so proposes that the real default is intentional indifference: ‘Instead of treating intoxication as an exception to the awareness-culpability principle, we should view it as proof of the indifference-culpability principle.’50 I agree with Pillsbury, and suggest that the main weight of culpability for *becoming intoxicated* be carried at the point where the accused *decided* to drink – and to *consciously* create a danger. The thesis consequently suggests that there really should be a two-step analysis of the intoxication:

1. The *normative* response to voluntarily getting drunk. This is the key point of contact, the only point at which the criminal law can have any preventive impact, by making itself heard at the point of decision; by penalising, as irresponsible, those who voluntarily diminish their capacity for caution.

2. The actual *capacity* for lawful behaviour while drunk, when further endangerment is inflicted. Regardless of any moral reaction to someone who has made themselves drunk, the point is that they cannot be expected to think well once intoxicated.

So where an act is committed that is an endangering offence independent of

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50 Note 49 at 179.
intoxication (for example: assault; criminal damage; trespass; disturbing the peace), there should be two independent endangerment offences: choosing to become intoxicated; and any offending behaviour performed in that state. However the severity of guilt will be reversed between them, so that as the level of intoxication rises, that choice to endanger is more rigorously condemned. Conversely, with rising impairment the responsibility for subsequent bad behaviour diminishes, accepting that the offender’s capacity for control is impaired.

So while responsibility for subsequent offending may eventually be negativised by sufficient intoxication, culpability for becoming dangerously drunk becomes total.\(^{51}\) It would then become a matter of evidence as to the danger consciously inflicted: proof of prior violent behaviour when intoxicated perhaps; demonstrated prior intention to drive. The trial court’s exculpating decision becomes whether it believes that complete inadvertence to the particular danger was reasonably possible, leaving any proportional inadvertence to the sentencing court.

**Constructive homicide**

A number of writers have struggled with a just response to a killing that was not meant to happen. Alan White argued that ‘[a]n examination of the relations between intention and foresight clearly shows that neither without nor within the law does the one imply the other.’\(^{52}\) In reviewing the development of intention from pure ‘malice aforethought’, Antony Duff outlined various alternative definitions of murder, including restricting murder to fully intended death, or to the willingness to kill if necessary; acting ‘purposely or knowingly’; creating a presumption of intent for an accomplice; or where the act ‘displays’ a ‘depraved’ disposition.\(^{53}\) Griffin is perhaps the most blunt, arguing that ‘[t]o clarify the law and have a rational division of the two crimes of murder and manslaughter, the crime of murder must be cleansed of any

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\(^{51}\) Although obviously there would be argument presented that as drunkenness developed, further drinking became less voluntary.


reference to recklessness.\textsuperscript{54}

If the basis for criminal culpability is accepted as solely the choice to impose a known disproportionate danger, then all forms of constructive murder can be removed. The incidental acts which are presently attached to murder – intention to act with recklessness indifference, to inflict GBH, or to embark on a felony – become evidence of conscious endangerment.

\textbf{Defences}

I propose that the current use of dual objective/subjective tests leads to misleading analysis, in that it does not establish the offender’s actual capacity for caution before finding whether such capacity was reasonably exercised. However, as argued in the previous chapter on Defences, such a sequence of tests can serve an anticipatory fate-management purpose. The main distinction with the current regime is that, under the thesis proposal, it is not necessary that harm has been done, so the objective test cannot serve as exculpation from a more strict consequence-based process. Instead it assesses whether the risk was worth running, and if not, whether it nevertheless did appear so to the offender at the moment of choice. The court’s analysis is sequenced between finding an objective offence, then a subjective defence:

1. The objective test, of the charged actus reus, establishes whether it is to be exculpated as having offered greater social benefit than potential damage. Any actual outcome – harm inflicted or benefit delivered – is not decisive (or even admissible); rather it is the balance of utilitarian possibilities that would have confronted anyone in the relevant situation.

2. The subjective test is purely a matter of whether the court is to believe that this accused was capable of forming a responsible calculation; and if so, actually held such a belief. Those found to be totally incompetent, but still dangerous (the insane, children) are diverted to the most appropriate non-punitive regime.

\textsuperscript{54} Griffin SG, ‘Inferring the requisite intention to kill’ (1989) 139 \textit{New Law Journal}, 1637-8, 1638.
In effect, the present partial defences of diminished responsibility\textsuperscript{55} and provocation disappear. Only if the lack of personal capacity is total – and the offender is diverted as a forensic patient or juvenile – does the criminal justice system stay any rational punishment.

**Mistake of law**

Mistake as a defence has the function to challenge the prosecution assertion that the behaviour was (reasonably without doubt) deliberate. The presumption of legal knowledge raises its head as denying the defence of mistake of law: there is no opportunity to demonstrate actual ignorance; the existence of such knowledge is imputed. The doctrine differs from the other fictions in that it does not create an artificial fact (such as, in the case of *Pagett*, that it was his bullet that killed his girlfriend),\textsuperscript{56} nor an artificial intention. The rule creates artificial knowledge, thus making any subsequent activity intentionally illegal. However it does provide an incentive for anyone considering imposing a danger to inform themselves on the prevailing limits on such activity. The question then is: how can the endangerment model preserve this fate-management function without resorting to such artifice?

Since the thesis has previously attacked the role of the reasonable person\textsuperscript{57} as ignoring what the accused *did think*, a culpable lack of legal knowledge must be actual, if it is to support an actual choice. Consequently, as deterrents, law and fact merge as material a sensible person would consider before acting. Any distinction between the forms of mistake ignores the reality that a mistake of fact can inflict harm on an innocent, and it can be argued this is the characteristic which sponsored the legal rule as a corrective. The law is warning against making a designated mistake of fact – such as to drive too fast – because the consequences are believed to be societally unacceptable.

The only consistent test, then, must be whether the accused was *honestly* inadvertent of the fact that the (intended) action has already been adjudged

\textsuperscript{55} Or its statutory version in NSW of ‘substantial impairment’: *Crimes Act* 1900, s 23A.
\textsuperscript{56} See Chapter VI - Intended Death 2: Dangerous Circumstances.
\textsuperscript{57} See Chapter IV - The Reasonable Person: ‘The Foresight Saga’?
dangerous to some innocent under the law’s protection, and is therefore prohibited. The relevant limits on behaviour must be available, and any ignorance must be wilful, before it can be seen as culpable.\footnote{In \textit{Lim Chin Aik} [1963] AC 160, the accused was prosecuted as an unregistered alien, under an unpublished ordinance imposing the new requirement of registration on those already in Singapore. The Privy Council overturned the conviction, on the basis that the existence and nature of an obligation must be available if culpability is to be limited by there being ‘something that the person on whom the obligation is imposed can do’; per Lord Diplock, \textit{Sweet v Parsley} [1970] AC 132, 163. Kumaralingam Amirthalingam proposed that ‘the corollary of a duty of citizenship should be a duty on the part of the state to take reasonable steps to educate and inform the citizens as to the law and their legal responsibilities. The courts have not recognised this duty’; Amirthalingam K, ‘Ignorance of Law, Criminal Culpability and Moral Innocence: Striking a Balance between Blame and Excuse’ [2002] Singapore Journal of Legal Studies 302.} To satisfy this constraint, the presumed knowledge of the law (or the irrelevance of ignorance) would have to become at least a rebuttable presumption; but preferably a matter of evidence. That is, there would need to be proof that any such ignorance was a choice in itself, an act of wilful blindness, not just some form of inadvertence (with the consequent objective test). In effect, a utilitarian test that will allow the court to find that it was unproductive to expect the citizen in question to inform him/herself, so the defence of legal inadvertence prevails as negating either the actus reus, or raising the possibility that it actually appeared socially onerous to delay the activity in question to acquire full particulars of its legal status. Lacking the knowledge of the legal requirement, there can be no conscious endangerment, as the requisite intention has no foundation.

\textbf{What Improved Procedures Does the New Analysis Offer?}

1. \textit{It establishes a single responsibility and cause for criminal censure}

The patchwork of direct/indirect, anticipatory/consequential prohibitions is simplified into one central lapse of adequate citizenship, so the law’s subjects are handed a single duty: don’t inflict dangers you recognise as disproportionate to potential social benefit. Simester and Sullivan suggest that:

\begin{quote}
A conscientious Parliament ought normally to decide whether or not to prohibit particular behaviour by considering the probability and
\end{quote}
magnitude of the harmful consequences of that behaviour, and by balancing these factors against the social value of the behaviour itself.\textsuperscript{59}

Paul Robinson proposes a ‘societal benefit’ calculus of proper risk, balanced against the scale/probability measure, citing that the Model Penal Code sets the degree-of-risk threshold at disregard for known circumstances that was grossly unreasonable.\textsuperscript{60} The consequence of violating this responsibility is directly at the discretion of the state – as opposed to indirectly through tortious restoration of a victim – so the duty is more clearly one directed to a general security.\textsuperscript{61}

2. It clarifies what is a ‘permissible danger’

This is currently decided by resort to the reasonable person, and exculpates on the basis of visibility. If the harm actually done appeared so unlikely that the normative person would have proceeded as did the offender, then the actions were not irresponsible. This is in fact to telescope two criteria: the level of potential catastrophe; and the probability of that being delivered.

The thesis suggests that this approach omits a critical third criteria: the potential social benefit weighed against the risked catastrophe.

For a harm-control regime to ignore this aspect distorts any calculation of gambles that are socially beneficial. When reviewing a conviction for some form of risk-infliction, the judiciary routinely avoids any such calculation – despatching it to parliament as a substantive law issue; only an issue of perceived personal necessity is allowed to exculpate.

This ignores that judicial decisions become substantive warnings. When a

\textsuperscript{59} Note 3.

\textsuperscript{60} Note 26 at 150. When finding recklessness, the Australian Model Criminal Code imposes a test of justifiable risk: s 5.4(2) \textless http://www.ag.gov.au/www/nwpattach.nsf/viewasattachmentPersonal/743ACB88E0EE2266CA256BB30000A0E5/$file/modelcode_ch1_general_principles.pdf\textgreater  [accessed 25/02/04].

\textsuperscript{61} Additionally, Michael Harper argues that ‘the expressive function of the criminal law suggests why we would have a criminal system even if the tort remedial system - along with public civil enforcement perhaps - could offer perfect compensation and perfectly balanced external incentives’: Harper M, ‘Symposium: Comment on the Tort/Crime Distinction: a generation later’ (1996) 76 Boston University Law Review 23-7, 23.
criminal court-of-record considers a gamble that inflicts harm as culpable, the elements of this gamble become the test for subsequent similar harmful choices presented to the court. If a social-benefit aspect is brushed aside by the court, the implication is that it is legally irrelevant – leaving it to a jury’s discretion to exculpate (for instance) a traffic death attributed to an ambulance driver, but perhaps not excuse motor homicide caused by over-hasty salesmen – and to risk being seen as ‘perverse’ for either decision.

3. **It removes the ‘gaps’ in the supervision of endangerment**

The problem with the legal control of risk is when it is conditioned by foreseeability. Consequence-based law (including tort) accepts, simply by reacting only once damage is done, that the specific risk was unforeseeable to the lawmakers. In tort, a court must deploy the reasonable person after the event to decide whether the harm that happened was predictable. In criminal law, the sheer fact that consequence-based charges cannot be brought until harm has been done exhibits the doctrinal flaw: had the danger been foreseeable, the causal activity should have been prohibited.

The key point is that harm is removed as the trigger for prosecution. Instead the trigger is the accusation that the potential for harm was wilfully engaged – if within certain ‘capacity for harm-evasion’ requirements – with no superior social benefit available. The criminal justice system can interrupt dangerous behaviour per se, by either making completion impossible, or unattractive at some point in advance of harm – in the manner (if with the same problems) of existing regulatory regimes. Since activity preliminary to harm can be addressed on the basis that risk-infliction is the offence per se, anticipatory offences no longer need to be based on malice; and harm need not be done before criminal law can intervene.

4. **It removes ‘moral luck’ as an influence on culpability**

With any outcome ideally inadmissible as evidence (and provided that the tribunal of fact can be secluded from media reporting connecting the accused

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62 See the ‘Problems’ subheading in the final chapter Conclusion.
with any harm done) the court can only consider the offender’s choice to inflict danger. Whether this particular gamble succeeded or failed should not be permitted to influence whether it was a lawful choice.

5. It relegates contingent offending to tort

The thesis suggests that two elements of criminal law – its deterrent and its retaliatory capacities – combine to make criminal justice more at home outside the contingent regime. If criminal justice is forced to wait for harm, it loses its direct preventive edge. Similarly, because criminal law can structure the legal consequences to achieve any chosen warning power, intervention at the inchoate stage better serves its fate-management function.

If tort law already commands the field of general duties between citizens – acting once those duties are breached by the infliction of damage – criminal law can afford to vacate that area and concentrate on prohibiting specific risks. As Daniel Shuman notes, ‘[d]eterrence delineates tort law.’ Once history shows that citizens carrying loaded firearms in public is unnecessarily risky, criminal law must deter such behaviour, and not wait for history to repeat itself in order to convict for manslaughter.

The outcome of this new conception appears to be a regime of strict liability. However it is essential to re-characterise it as strict culpability, in order to distinguish it from tortious strictness as to result. The regime this thesis proposes is one imposing strict criminal culpability as to chosen prohibited behaviour, not the current quasi-tort regime based on waiting for an unlawful consequence. The goal is to arm criminal law with the authority to assign culpability as soon as it can be proven (to the criminal standard) that an unlawful danger was consciously created – being the earliest point the criminal justice system can be adequately certain that such behaviour was chosen, and therefore capable of rational deterrence.

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6. *It separates culpability based on community standards from exculpation founded individual incapacity*

The trial process becomes more distinct: any community standard made necessary by the novel circumstances of the behaviour is applied directly to the actus reus, including any issues of objective justification; issues of individual incapacity are not exposed to any such analysis, but are assessed purely on the believed reasoning of the offender.

7. *It simplifies defences*

The substantive prohibition I suggest – ‘conscious endangerment’ – includes the defence that the danger was necessary to permit those activities that are ‘acceptable’ – in the sense of having potential social utility. They are the justification of what appeared to be a worthwhile risk. It is the circumstantial defence.

In a fate-management paradigm which embodies an objective test of inutility in the offence definition, the current menu can be resolved into a single subjective defence of *apparent unavoidability*. Whether this is due to the circumstances or the capacity limits of the individual becomes irrelevant. The key concept is ‘unable’, excluding (as ‘unwilling’) an actor too lazy or self-interested to avoid disproportionate danger. Such a regime better distinguishes exculpation based on social utility from that founded on personal incapacity. The test of what the reasonable person would have done is eliminated. All the tests are from the perspective of the accused; all are concerned with the risk intentionally engaged. If the new analysis can achieve this, much of the moral, intellectual and populist concern with the results achieved by the criminal justice system may be resolved.
XI

CONCLUSION

Introduction

The central goal of this thesis has been to demonstrate that the primary function of criminal law is fate-management, so that even a conception of justice as retribution cannot be shorn of all purpose to warn or incapacitate. My main concern has been the harmful consequences the citizen is permitted to ignore, so I have questioned just how effectively criminal law can deter oblique intention. The criminal justice system denies itself the right to pursue punishment if procedural doubt is ‘reasonable’. How should it formulate the dangers that are, or should be, beyond criminal law’s supervision? Is it too demanding of criminal law that it anticipate all risks in all circumstances, and then design the appropriate warning against taking the risk itself, before there is any outcome? As Pillsbury asks, ‘how much effort is required by persons to avoid harming others in particular situations? No legislature can predict the range of factual settings which would meet this moral standard; accordingly the decision must be left to courts and juries’.1 Is it better to simply announce that – exploiting the methodology of tort – neglectful behaviour will be legal if it succeeds in avoiding unlawful harm, punishable if it fails?

The thesis examined the existing methods of dealing with risky behaviour – including those doctrines that elevate a risk wrongly imposed into a sought result. I looked into causation (which extends the actus reus to the consequence); and such doctrines as common purpose and constructive murder (which stretch the intention to embrace the outcome). I also questioned whether the current distinction between direct and indirect intention in criminal law (usually expressed by such terms as malice, intention, or recklessness and negligence) serves or confuses any fate-management purpose. Another issue was whether the law should resort to a ‘reasonable’ judgment call as the test for incidental criminal culpability after the event. Such a process defeats a fundamental principle of the rule of law – that the

contours of the prohibition be knowable before a choice is made, rather than imposing a quasi-legislative responsibility on the citizen, and the court in retrospect. My conclusion was that the barriers protecting the individual from wrongful conviction are modified when necessary for criminal law to effectively control incidental culpability. However the approach is reactive and ad hoc, creating major inconsistencies of principle. While such common law process will satisfy the warning goal for subsequent activity, it delivers injustice to the instant accused.

Then I asked whether the criminal justice process is entirely the wrong forum for deciding levels of permissible risk, or whether that is a civil law responsibility. The thesis questioned whether risk-inflicting can be better managed so as to provide a more complete anticipatory capacity – authorising both incapacitation and warning that is not oppressive.

Finally, I proposed a radical new approach to both offence definition and court process, in an attempt to remove the problems I saw in the existing regime.

The Current Inadequacies

The main distinction underlying fate-management techniques is whether the criminal law requires obedience to a specific prohibition, or to some duty of harm-anticipation. The latter can require proof of an actual apprehension of the danger (and a reckless disregard therefore); or by ‘substantive process’ it will create such foresight by some form of objective ‘should have’. If necessary it will refer to a prior moment of voluntary choice, or fictionally ‘deem’ such foresight into a preceding act. The need for such creativity has a range of sources.

Specific prohibition problems

Even in a harm-control paradigm, clearly prevention is the preferred result.

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2 A procedure by which certain proven circumstances will convert the significance of other facts: see the discussions on fictions and deeming in Chapter VII.

3 For instance, in Jiminez v The Queen (1992) 173 CLR 572, the fact that the driver was asleep at the point when the accident became unavoidable, so was acting involuntarily, was displaced by the High Court with an inquiry into whether he had previously ignored signs that he was at risk of falling asleep.
But law authorising intervention ahead of a proven individual connection between the act and prohibited damage carries known dangers. When the lawmakers dare to specifically prohibit general behaviour in advance of any actual damage, they risk imposing a disproportionate restriction on the community. Much harm must be tolerated (and if necessary repaired) if the society is to progress; if its citizens are to be allowed to engage in any enterprise; even to enjoy some forms of recreation. If criminal law intrudes too early, it may inhibit productive-but-risky enterprise – particularly where there may be other regimes that are more capable (such as tort and general insurance) of distributing the costs and benefits.

As demonstrated by the regulatory regimes administering issues like food safety, detailed prohibition comes at a price. It is voluminous, technically difficult to comprehend, and requires specialist policing. As such, it is really only appropriate within professional environments – where those subject to the controls can study them in some depth. The question for fate-management becomes: what scale of threatened harm is to be permitted; and can that be defined in advance? A restriction that is too limited will soon display a lack of effect; a restriction that is excessive may obscure the point at which the most appropriate level of suppression was achieved: that averting a potential risk will – of necessity – destroy evidence of whether the risk would ever have materialised as actual harm.

It is perhaps these problems that have inspired the current criminal law approach to damage, and to risk. They make the wait-and-see procedure attractive, as it removes the need to make individual predictions. The alternative is for the law to fall back on regulating the ‘citizenship’ of an act. That is, to critique it as a lack of concern for a duty. However this is vague, and risks punishing attitude rather than activity. As Strong suggested, ‘freedom of conscience and belief has been established as a fundamental human right in most Western nations for many years.’

While this notion may have once been limited to freedom of religious beliefs and practices, the concept has expanded and now encompasses a wide realm of opinions and ideologies. See Universal Declaration of Human Rights, GA Res. 217A, UN GAOR 3d Sess., pt. 1, 71; 74, art. 18,
Contingent offence problems

The continued presence of consequence-based prohibitions, when used to control risk-infliction, forces the development of ‘conceptual’ rather than specific fate-management. Where substantive lawmaking cannot designate specific behaviour that is unacceptably risky – because such a regime would be impossible to operate (the legislation would be too elaborate, so beyond what could be expected of the ordinary citizen to accommodate) – the lawmakers resort to proscribing the concept of (for instance) recklessness. Such an approach requires two limits: that unlawful harm actually be done; and that disregarding remote risks does not attract censure.

The contingent prohibitions place the burden of foresight on the citizen, where the criminal lawmakers have been unable to establish the defining level of danger. They also delay any punitive response until after harm has been done, which inevitably injects an objective test of the visibility of impending harm. The outcome of this process is perhaps that, ultimately, the measure of whether the risk was unacceptable becomes objective.

Therefore, while the accused is protected by the criminal standard of proof, when a court is dealing with oblique or indirect intention – as the choice to impose a risk gone wrong – the current regime permits two tests of the accused’s conscious behaviour, two hazards the accused must survive for exculpation. This reverses the tortious use of the objective test, where the questions are:

1. *Was the defendant an active cause of the harm?* If the court is not
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convinced of this on balance, then there is no liability, and the action fails. But if the court believes the defendant did cause the harm, then where the tort is subject to negligence, in order to find liability it must subsequently (and additionally) ask,

2. *Was the harm caused by neglect?* Only if so will there be liability.

Within the current consequentialist criminal regime, and where incidental intention is sufficient for culpability, I have proposed that the correct sequence of questions the court must answer is:

1. *Does the court believe beyond reasonable doubt that the accused actually foresaw the risk of the harm done?* If the answer is yes (perhaps because the court is convinced that the harm was the actual goal of the activity) then the accused is guilty. At this stage, any resort to what the reasonable person would have foreseen is purely an indication of whether to believe any claim to inadvertence. If the actual accused has greater incapacities than the man on the Clapham omnibus, these incapacities (where relevant) must be included in order to properly test for believability.

If the answer to the first question is no – that the court is not convinced that accused actually foresaw the impending harm – then the court can now ask

2. *Should the accused have foreseen the harm?* That is, was the actual inadvertence the product of *prior* neglect? In effect, while accepting that the accused did genuinely blunder into doing the proscribed harm, that blundering itself could have been prevented: the incapacity was caused. Now the objective test makes sense: it looks into the previous choices of the accused, to see if they contain an election to not bother applying proportionate effort.

The problem is most acute when the accused claims to have not seen the danger (so has not been reckless), and a frustrated justice system seeks to censure neglect.\(^5\) It accepts that the apprehension is absent, but now wants

\(^5\) See the discussion on *Caldwell* [1982] AC 341, in *Chapter I - Introduction: Hypothesis* at Note 42.
to re-test for visibility. The courts resort to an objective test (the excuse will fail if the reasonable person would have seen the harm coming, and presumably avoided it) rather than the ‘believability’ test. It may be a less blunt way of saying the claim of unawareness is false, but it hides in the concept of negligence: the actor is guilty of neglecting a duty.

Such a duty is for the citizens to acquaint themselves with the law. The question within my utilitarian analysis is: what would make any requirement of legal self-education disproportionately onerous? That is, if the restriction is designed to avert a broad catastrophe, it would be harder for an offender to argue in favour of proceeding without the knowledge, than if the potential harm was minor. The current law makes no such evaluation, perhaps relying in the *de minimus* discretion.

**The direct and incidental intention issue**

Both a malicious or reckless assault on rights consciously create danger. The most benign enterprise can become a disaster; the most malicious attack can fail. This questions whether the distinction between malice and recklessness is a false dichotomy. The distinction tends to mask that there is a degree of choice in both malice and recklessness: a harm has been deemed of value (in the eyes of the offender) in gaining whatever that citizen is after, and is preferable to a more difficult means of success.

By this analysis, all is fate-management. Safety must be seen as bought at a cost, so some balance is required. The current approach is to define a harm, but then exculpate if that harm was not reasonably avoidable. To divide offending according to its target only partially distinguishes the level of danger inflicted, and on the presumption that aiming *at* someone is more dangerous than aiming *past* them. I suggest that it would make a significant difference in prospective harm whether an air rifle or a shotgun was about to be used – the former aimed *at*; the latter aimed *past*.

The enterprise of legal fate-management cannot be divided between what is intended and what is risked. The only legitimate restraint on the law’s attempt to limit harm is when that enterprise creates greater damage than it avoids.
The better analysis goes beyond the goal of the activity, to centre on the risks consciously addressed and invoked. Criminal law needs to retain the focus on intention, but abandon the distinction between malice (wanting fate to be harmful) and gambling (wanting fate to be benign).

If any such division is critical, perhaps the most rational split – at least after the event – is between the person who, while they may not want the ‘bother’ of colliding with another person’s rights, still sees the course of action as preferable *even if the worst happens*; and the person who foolishly believes the worst will not happen. If the goal is to deter these attitudes to inflicting harm, the job of criminal law is to increase the ‘bother’ to the first person, to the point where it exceeds the potential benefit; the second we must either excuse or incapacitate (the latter perhaps until we can educate them about risk).

The problem with the ‘prepared-to-pay’ individual is that the legal consequence (along with the non-legal ‘bother’) must exceed the projected benefit, if it is to be effective. So the desperate person (the subscriber to ‘death before dishonour’, perhaps) is beyond control until that degree of desperation can be reduced. Dincer, for instance, may have believed it better to go to gaol for life than to acquiesce to his daughter’s behaviour. Where the second person is concerned – the ‘payment-won’t-be-required’ individual – the criminal law response to harm can have no effect. A driver who (foolishly) believes s/he can handle any emergency is untouchable by making harmful consequences unlawful: s/he is convinced there will never be any harm done, so there is no danger to avoid. The only behaviour modification possible is greater wisdom.

The current law – in distinguishing between recklessness and negligence – attempts to deal with this conundrum through what can be termed the *doctrine*

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6 p 85, Note 4.
7 Nor, for that matter, can *any* contingent response.
8 In order to get NSW drivers to wear their seatbelts, the Parliament was forced to introduce fines – demonstrating that the motorists in question believed the protection was not going to be needed. The only threat that entered their radar was a few dollars, rather than the prospect of permanent injury.
of prediction: the requirement that the person is proven to have actually foretold the possibility; or, when it is possible that s/he didn't, the process decides whether s/he should have foretold it. These responses all depend on either decision being wrong. If harm does not happen, the willing-to-pay individual got better than s/he was prepared to suffer; and the chancer was correct. So the current approaches are all fine as a critique of the harm done, with the secondary goal of warning others off such harmful choice. How can we promote the criminal sanction to a primary warning and, where warning will fail, allow it to intercept the harm?

Capacity or normative defences
The capacity analysis insists that an offence will not exist if an unlawful act (usually a result) was beyond the capabilities of the accused to avoid, and that the failure was not individually controllable. In Pillsbury’s words, ‘[a]wareness advocates often link awareness of risk to the idea of capacity to choose otherwise. Many philosophers and criminal theorists contend that punishment cannot be deserved unless the harmdoer had the capacity to choose a different mode of behavior.’9 The usual critique of this approach is that the demands for convincing evidence – to rebut a plea of mental incapacity (in its broadest sense)10 – cripple otherwise sound convictions. That is, it is difficult to assess whether a mental default was the result of genuine limitations or just a lack of diligence. According to Pillsbury, ‘[t]he common assumption is that while individuals may know why they acted as they did, the rest of us can only guess based on indirect clues.’11 The normative approach, on the other hand, insists that the accused perform according to a reasonable standard, presuming the default as capable of correction with greater effort. This dichotomy is best demonstrated by the courts’ ambivalent attitude to anger. Some judges – such as Avory J – see a loss of control as a deliberate act (so the offender ‘abandoned’ control) while the defence of provocation classically

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9 Note 1 at 169.
10 ‘Incapacity’ here means all inability to perform as adequately as the law would require, not simply legal incompetence.
11 Note 1 at 131.
admits that there can be a genuine absence of rationality.\textsuperscript{12}

Where intoxication is concerned, the developed doctrine has even attempted to divide the single defence into two: one where incapacity is ignored (the offences of basic intent); the other where it is to be considered (the specific intent offences). This distinction so defies any logical understanding that Simester and Sullivan advise the ‘only safe course’ is to pluck from the caselaw those offences that have been specifically deemed specific, and assume that all the rest are basic.\textsuperscript{13}

\textbf{Interaction problems}

Many of the current problems stem from the interaction of doctrines that, while they may be appropriate for the supervision of deliberate activity, clash when applied to behaviour that is only unlawful because a danger has become a reality. The thesis has questioned whether the doctrines of conjunction (the required concurrence of act and intent) and consequential authority (that it is the faulty delivery of harm that permits the state to inflict reduced rights on a citizen) have led criminal law into error, mainly by forcing the development of constructive culpability.

Certainly the requirement of finding some inadequate choice as well as harm serves to protect the accused from absolute culpability. However when the doctrines are combined, they require all of an unlawful act, a prohibited harm, and wrongful intention to authorise a penalty. This form of fate-management not only duplicates tort law in that it is unable to act until harm has been done, but strips criminal law of its ability to intercept the first instance of an unlawful harm, so relies totally on any warning it sends to those contemplating activity that is identical. It also reveals that the roles of criminal and tort laws may not have been sufficiently distinguished.

\textit{The Thesis Proposal}

In a broad review of the struggle to tame indirect intention, and the attempts

\textsuperscript{12} See Avory J’s reasoning in \textit{Lesbini} [1914] 3 KB 1114, 1118 – on p 215.

by Pillsbury and Simon to redraw it as indifference, Ferzan proposes that:

we must create a new mental state in the Model Penal Code, one that captures the actor's conscious decision to engage in dangerous behavior as well as the actor's preconscious appreciation of the exact risk imposed. This new mental state is morally equivalent to the Model Penal Code's conception of recklessness, because when the actor decides to engage in dangerous conduct she not only understands on a preconscious level the potential harms involved, but her decision to engage in the risk necessarily includes this preconscious appreciation.14

My suggested re-conception of current criminal law is as a means of defining, then policing, the choice to create a danger. By contrast, tort works in the opposite direction, from harm done back to whether it – and situations like it – is avoidable. This thesis suggests that, by openly recognizing that risk is the proper focus of criminal law, it is possible to reconstruct the substantive prohibitions so that luck is removed as a barrier to enforcement. Ideally, the choice to defy the prohibition of activity becomes the authority for enforcement. However, this may be too complex, if every variation of danger must be anticipated and proscribed. The ‘fallback’ must therefore expose risky behaviour to review for its ‘disproportion’, being the choice to inflict risk greater than the perceived social benefit. The proposed prohibition on willingness to endanger is both a guide to unacceptable behaviour and to relevant legal response. As in tort, the notion that the species of negligence are ‘never closed’, the species of ‘endangerment’ remain open.

The doctrinal result would be that, while law based on endangerment would continue to remove any distinctions between intentional and neglectful behaviour (between acts and omissions) along with that between inchoate and consequence-triggered culpability, it would do so by reducing the prohibitions to whatever active choices the lawmakers see as too dangerous to be allowed. The better approach to fictions and deeming (which simply invent fact convenient to a principle) is to classify certain aspects of behaviour as irrelevant. It can be argued that this is how strict liability works: an intended lawful objective (other than what happened) is deemed irrelevant, so

the chosen unlawful act prevails as causing the prohibited result. The conjunction itself is ignored, so the actus reus is the sole locus of culpability.\textsuperscript{15}

It is the understanding of unreasonableness that most distinguishes the proposed paradigm. Rather than centre it in foreseeability, or in Pillsbury’s \textit{indifferent attitude}, I propose that it is better sited in a cost-benefit comparison. Harm done pursuing an enormous social benefit (speeding to deliver urgently-needed medicine, for instance) at little visible risk (late at night) may well be exculpated. It is important to keep any harm done to no more than a ‘regrettably too late’ trigger for potential future prohibition; any restoration is the job of tort law. All that concerns criminal law is an attempt to formulate (and advise future ‘gamblers’) when the law will permit their enterprise. How proximate to the potential harm the law chooses to draw the line of unlawfulness would become purely a community standards decision, and one that must consider the costs of over-protection.

The first step must be some acceptance that fate-management is the central role for criminal justice, and already prevails (in disguised form) over other conceptions of justice. From there, the current notion that malice is deserving of a more vigorous response from the justice system needs to be removed; along with the countervailing softening of the evidential demands on incidental dangerousness. Then that any outcome be demoted (if critical) to evidence of a risk inflicted. Whether it was the goal of the enterprise – or a mere incidence risked – becomes irrelevant.

As to methods of exculpation, I propose that any objective element of proportional hazard be embedded in the offence itself, with subjective defences limited to excusing only the totally incapable offender. That is, if the act in question was the best fate-management that believably appeared available, it not be criticised. That the court reached a different conclusion after the event is no more than a lawmaking exercise. Caselaw is thus made; and the individual offender protected by a form of the de minimus rule, and a sentencing focus on deterrence.

\textsuperscript{15} As opposed to replicating the voluntariness in the mens rea as direct intention – a fiction.
The Limits of Conscious Endangerment

The core question the thesis has addressed is whether general dangers can be intercepted through methods presently restricted (in the main) to those licensed to perform specific tasks, and who can then have that privilege removed. In the absence of specific, accessible and tangible prohibitions for every situation, there would certainly be the criticism that the law has ‘passed the buck’ to the citizen, by demanding socially acceptable cost-benefit calculations regarding their behaviour.

One issue is when it is proper for the law to insist that one citizen cease pursuing lawful interests on the basis of some chance that it may interfere with rights of others. This problem takes Mill’s harm principle to a new level, requiring not simply a weighing of individual cost against aggregate benefit, but also the relative opportunity for either to occur. Whatever tension already exists between legislators and the courts – over when the general welfare can properly overwhelm the interests of the individual – criminal justice must now embrace an actuarial calculus that the courts (and the legislative moralists) have preferred to keep at arm’s length.16

Richard Ericson and Kevin Haggerty note the beginnings of such ‘actuarial justice’.17 This raises the spectre that, by liberating criminal justice to pursuing social utility solo, such a process could unleash it from all restraints beyond what will be effective. Thus, if the only conception of culpability is lack of social benefit, the useless citizen who does (or even poses a risk of) any

16 While the courts are willing to allow fingerprints and DNA to indicate the ‘probable’ culprit (fingerprints depend on 16 points of similarity, which would logically turn up a vast number of false positives if testing was not limited to the suspect; equally, DNA identification depends on establishing the size of the ‘pool’ in which there is one duplication, so makes it highly improbable that anyone other than the accused satisfies all the identification evidence) in People v Collins (1968) 438 P (2d) 33 the appeal court overturned a conviction that was based (in part) on the reasoning that there was only one chance in 12 million that the police had arrested an innocent mixed-race couple (a black man with a full beard and a blonde with a pony-tail) in a yellow car, when such a pair of muggers had escaped into traffic.

17 Ericson R and Haggerty K, Policing the Risk Society (Toronto: UP, 1997) 52. Craig Jones, on the other hand, is concerned that ‘[k]nowledge of risk, that is, the kind of social mapping risk analysis that Ericson and Haggerty discuss, does not allay fear. Rather, it generates more anxiety about that which is not easily quantifiable. It perpetuates a demand for more fine-grained, detailed risk-relevant information about an ever-widening net of people in a self-perpetuating and auto-accelerating logic. No amount of information about risk is enough, since it only makes risk-managers more reflexive about risk and hence more anxious and security conscious’: Jones C, ‘Book Review: Policing the Risk Society, RV Ericson and KD Haggerty’ (1998) 23 Queen’s Law Journal 527-31, 528.
CONCLUSION

harm could be punished for posing the most trivial risk. Conversely, the
citizen crucial to the society’s survival (the only surgeon who can perform
certain cures, for instance) would gain the right to do almost any harm (at
least where that benefit is embedded in the questionable behaviour). So there
are some residual issues:

1. The first time a particular form of endangerment is performed, it is only
   conceptually defined – as is recklessness or negligence. It also lacks
   the causal confirmation of harm. The citizen concerned was not
   guided with any precision. This mimics the problems with the existing
   conceptual prohibitions that are usually assigned to the jury.

2. There is the problem of articulating in substantive law every distinct
   threatening situation. While it would perhaps be ideal for substantive
   criminal law to simply identify all risky acts that are not to be tolerated,
   this task appears monumental. This would risk creating a monster of
detail; could threaten judicial lawmaking; challenge the division
   between mistake of fact and law; and force substantive law to adopt
two roles – prohibitions and test-of-citizenship.

3. Defining and evidencing the social deficit; and the ‘defence’ of
   perceived potential social benefit. I have replaced the old evaluation
   of whether the behaviour was ‘reasonable’ in the circumstances with a
   more utilitarian analysis of whether the chances of harm outweighed
   those of social benefit. This clearly invites a court to invoke value
   judgements based on culture, economic and social theory, existential
   fear, even pure morality. If such judgment is discretionary, it will
   largely be beyond appellate review.

4. Keeping the behaviour distinct from the actor, so that the nightmare of
   culpability based on individual social utility is avoided.

5. For sentencing purposes, how is the quantum of culpable
   endangerment to be established? Can the democratic lawmakers
   provide adequate guidance to sentencing officials (including those with
   ongoing administrative discretion) that indicates the society’s goals for
   its criminal sanction, without prescribing specific responses to
dangerous activity?

How then does the conscious endangerment model handle these issues? Is it enough that the prosecution must prove:

- the offender knew of the illegal danger;
- any actual ignorance was not the product of neglect;
- actual perceived equation between potential harm and benefit favours proceeding; and
- there was no actual perception of unavoidability?

**A final hypothetical:** A lad places a coin on a railway track, thereby risking causing a derailment, and is charged with the new offence of endangerment. How is the potential harm to be assessed, and an appropriate legal response designed? What if the offender only intended to have a passing train flatten the coin, but the railway management know that this could cause a catastrophe? Should any punishment be limited to reflecting the maximum disaster that the offender recognised could have happened?

Under the endangerment regime, if the court reasonably doubts that the accused had *any suspicion at all* that his actions were a dangerous wrong – that it was either prohibited or would put the legal interests of others at disproportionate risk – it must refuse to convict. The awkward truth is that a totally naïve individual cannot be warned; and can only be made less dangerous by education. However if there is convincing evidence of *any contemplation* of it being wrong, or that the lad chose to not consider the potential for unlawful harm, the appropriate legal response becomes a sentencing mitigation issue.

This raises the question of whether a rule of law can be created by the case in question – while that actor was exculpated as failing the ‘consciously’ test – so that others cannot subsequently hide in such ignorance. Is it possible for a court to warn from this point on, by clearly separating a rationally chosen act

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18 This latter objective provokes the issue of whether the criminal sanction can have any goal distinct from painfully encouraging self-reform.
from any defence of personal inadequacy? This appears to re-introduce the
requirement that everyone know the law, where a due diligence requirement
would be proportional to the accused’s naivety. Indeed, if harm was
prevented by the intervention, it may never be proven whether there was a
danger.

The border of culpability must be set at adequate proof of any choice to risk
disproportionate harm. The *proportionate diligence* defence is completely a
matter of fact – and while it may exculpate our believably ‘slow’ lad, it would
deny protection to an accused who demonstrated an unused capacity for
avoiding recognised danger, the scale of requisite diligence rising with the
perceptive aptitude. To go beyond such policing of danger would be to enter
the forensic patient regime, seeking authority to incapacitate dangerous
individuals without critiquing their choices, which is better handled by a special
verdict. 19

Some degrees of proportional endangerment will, of course, be difficult
quantification. For instance, a secure life may also be a boring and
unsatisfactory one. People take to dangerous sports to reclaim excitement.
This could certainly have a negative economic and social effect. The law’s
administrators need to be alert to the balance of excitement and security that
society collectively wishes its law to deliver – or at least what the majority may
want – when choosing what to deter.

This is no mean task. Just as civil courts attempting to ascertain general
damages must peer into an uncertain future, so must criminal justice
lawmakers attempting to foretell those risks that will endanger the acceptable
(productive, interesting, but also predictable) world the criminal law is
attempting to create. As noted by Roscoe Pound, ‘[l]egislation ... involves the
difficulties and the perils of prophecy’. 20 However it is not an novel mission.
US judge Learned Hand once proposed a tort-law liability test where, if the

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19 I accept here that modern sentencing is not restricted to inflicting various forms of pain, but that
sentencing judges have a range of other tools available to address personal incapacities –
particularly where youth is concerned. However there is still some sense that a criminal conviction
is the society showing (at least) disappointment in the choices the offender made.

costs of avoidance would have been higher than the damage done, then the harm-doer should be excused – and the cost left where it lay.21 My suggested process leaves the substantive law freedom to decide what is a legally protected interest, while having the procedure stand guard against activity that enters into endangering that right. If that zone is too inclusive, the society will pay.22

The proposal is intended to rationalise the existing law rather than completely upend it. The existing notions of culpability remain, and the slow evolution towards a fully subjective process is assisted. I suggest that the anticipatory prohibition model, while not being without line-in-the-sand problems, is preferable to wait-and-see – particularly when working in tandem with tort law – and all the fictions made necessary by the co-existence of contingent offences, bifocal intention and the doctrine of conjunction.

**But Why Bother?**

Any serious remodelling of a system of doctrine as entrenched as criminal law must satisfy these questions: Is the current system so inadequate as to need change? Are the benefits going to justify the disruption?23

While my thesis may not erase all the imperfections of criminal law’s current fate-management, by directing the focus onto endangerment I hope to limit reform to the striking of a correct balance between conflicting dangers, including:

- the substantive danger of any proposed activity; as against

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21 Calabresi G and Klevorick AK, ‘Four Tests for Liability in Torts’ (1985) 14 Journal of Legal Studies, 585-627, 594. It is interesting to speculate whether, by using the balance of harms to authorise courts refraining from imposing any redistribution, Learned Hand was incorporating the social costs of litigation in that equation (if by discouraging tort action). Absent some sense of detriment to the community, his formulation relieves the harm-doer of the entire cost of harmful enterprise, transmitting it to those damaged where avoidance would have been more costly, effectively delivering a double benefit for not performing safely.

22 While this may be cold comfort to those caught up in an excessively oppressive regime, the possibility certainly rationalises why the modern criminal sanction is ideally limited to a restriction on freedom, rather than any form of torture or permanent harm.

23 As Pillsbury accepted, when proposing his ‘indifference’ model, ‘[t]he reformer of law always bears a dual burden of proof. The reformer must not only show that the new rule handles the (presently) difficult cases better than the old rule, but also must show that the new rule handles the (presently) easy cases as well, or nearly as well as the old rule. In other words, the reformer must show that the new method performs better over the whole range of criminal cases’: Note 1 at 174.
CONCLUSION

- the procedural danger in legal obedience.

The latter embraces both the risks of inappropriate prosecution itself (the systemic costs, including those that flow from punishment – presently the subject of the de minimus rule) and the thwarting of enterprises that may have delivered a social benefit. My concern is to develop a criminal justice process capable of giving correct weight to the competing dangers and potential rewards invoked by the decisions citizens make every moment of their day; and one that can effectively advise at the moment these decisions are made.

What Are the Chances of Acceptance?

There may be a public acceptance problem: would the community be able to accept that recognised danger is the core of substantive criminal law – discarding the traditional intended result approach for serious dangers; whether those already living in the present moral/legal universe – where malice is seen as a greater wrong than careless gambling – can accept that the distinction has been overtly removed?24

Legislative law reform takes place in an arena of direct populism; and while common law development may aspire to doctrinal ‘purity’, the primacy of statute and the process of judicial appointment deliver indirect populist control.25 Tom Tyler asks ‘how lawmakers might decide when to follow public opinion and when to keep formal laws that are discrepant with public views, out of deference to the special knowledge and expertise of legal authorities.’26 Indeed, the thesis suggests a significant shift of centrality from the legislative power to prohibit to the justice system’s right to assess behaviour.27

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24 Pillsbury complained, ‘[w]e seem more impressed – to the point of obsession – with the purposeful wrongdoer….Our moral discourse reveals the same preoccupation with intentional wrongdoing; we often seem unwilling to condemn harmful conduct absent dramatic evidence of aggressive and deliberate injury to others. Yet the most common cruelties are acts of indifference’: Note I at 217.

25 For a somewhat whimsical account of the continuing attempts to reform and simplify English law, see Baker JH, Note 8 at 183-91.


27 Robert Schopp presents it as that ‘[l]egal punishment under conditions that do not elicit condemnation in the conventional social morality weakens the popular association between the criminal law and the accepted social morality. To the extent that the criminal law and conventional social morality diverge, members of the society are less likely to attach personal sanctions on the
So the question becomes whether the community can accept a pragmatic role for criminal law, with greater reliance on court expertise, and if necessary relinquish the satisfaction of sheer retaliation. The irony may be that the greater the sense of endangerment, the less a community can accept that harm delivered should be restored by either civil litigation or through state insurance. Don Stuart states the problem as, ‘when key general principles are forgotten about in the interests of ad hoc responses to pressing social concerns or to anguished pleas of victims, there is a danger of an overreach of the criminal law that may produce injustice.’

So as well as the risk that the lawmaking majority may hi-jack culpability based on endangerment – to reforge it as an oppressive shield – there is the threat of a worried community retreating to demands for sheer ‘just deserts’ sentencing, so returning to ‘taxing’ any harm done.

Only time will tell.

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