

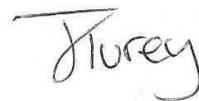
A Consistent Approach to Assessing *Mens Rea* in the Criminal Law of England and Wales

**By Furey, JR
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Submitted by Jason Richard Furey, to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law, August 2010.

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Abstract

The current criminal law of England and Wales does not assess *mens rea* in a consistent manner. The law applies two distinct methods of assessing *mens rea* – subjectivism and objectivism – which are based on conflicting principles of criminal liability. A subjective test depends upon what the defendant himself foresaw, believed or intended whereas an objective test will label the defendant culpable for what a hypothetical ‘reasonable person’ would have foreseen or how he would have reacted. This thesis will show that, if the law is ever to take a consistent approach to assessing *mens rea*, both subjectivism and objectivism must be cast aside. As they place undue importance on foresight of the consequences, neither of these doctrines are capable of providing an accurate reflection of an individual’s moral culpability. Subjectivism is too narrow because it ignores any other states of mind that, although inconsistent with subjective foresight, may be considered to display a high degree of moral culpability. Objectivism is too broad because, by labelling all who fall below the reasonable standard as culpable, it takes no account of those individuals who lack the capacity to foresee what the reasonable person would have foreseen.

It will be shown that an approach based on the defendant’s attitudes and reasons for acting will allow for a much more accurate inference of an individual’s moral culpability than is achieved by either subjectivism or objectivism. Accordingly, this new approach is one that could be applied across the scope of the criminal law without the need for any special exceptions or illogical deviations from the norm. As a result, the way in which the English and Welsh criminal law assesses *mens rea* would achieve a consistency that it currently lacks.

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Introduction

0.1: The aim of the thesis

This thesis will seek an approach to expressing an individual's moral culpability in order to answer the question: how the law can define *mens rea* logically and consistently, if at all? Consistency is important to the criminal law as it allows for reliable and predictable verdicts, and ensures that the law assesses every defendant's culpability according to the same criteria. Accordingly, the criminal law ought to set out clearly and consistently what can be considered sufficiently wrongful or blameworthy for a criminal conviction. It is therefore regrettable that the law of England and Wales lacks consistency in its approach to a core ingredient of serious criminal offences – the assessment of *mens rea*.

The law currently identifies two distinct approaches to assessing *mens rea*. A 'subjective' test purports to look at the defendant's actual awareness of the outcome: what did he foresee and how likely did he think that outcome was? It blames him for choosing to cause or risk causing that outcome. Conversely, an 'objective' test imposes an external standard of care or foresight that the defendant is expected to measure up to and thus blames him for failing to attain that standard. The current law adopts both of these methods in different contexts, deciding on an apparently *ad hoc* basis which approach is most appropriate. It is the use of both of these approaches that has led to the observed inconsistency. One long-standing inconsistency in the law of England and Wales can be illustrated by reference to a recent incident in France.¹ Two soldiers, A and B, have mistakenly loaded live rather than blank rounds into their firearms during a public military display and have opened fire on the audience. A's bullets cause serious injury to several people, but no-one is killed. B causes death. Under the law of England and Wales, A is not liable for those injuries unless he at least foresees the risk that his actions would cause some harm.² However, B's foresight is irrelevant.³ Both defendants

¹ The Times, 'Soldier to be prosecuted after shooting live rounds into crowd' July 1st 2008

² s20 Offences Against the Person Act 1861 as interpreted by *Mowatt* [1968] 1 Q.B. 421

³ *Adomako* [1995] 1 A.C. 171

display the same degree of fault, so why does the current law fail to treat them in the same manner?

Such inconsistencies should have been resolved over time yet the law remains ambivalent about *mens rea*. Every recent attempt at a resolution in relation to one offence is countered by a contradictory decision in another. For example, The House of Lords in *G&R*⁴ put an end to the divergent definitions of recklessness⁵ by settling upon a subjective definition. At the same time, Parliament defined *mens rea* objectively throughout the Sexual Offences Act 2003. The need for consistency is plain. Accordingly, it is hoped that this thesis will offer one possible resolution to this dichotomy, and identify how the law can provide consistent guidance as to what renders a state of mind sufficiently culpable for a criminal charge.

0.2: Approaching the problem

A great deal of literature championing one method of assessing *mens rea* over the other can be found. Prominent academics like Smith and Williams favour subjectivism on the basis that individuals are convicted only for outcomes of which they were consciously aware, whilst others favour objectivism for its pragmatic realism and simpler enquiry.⁶ However, the question of how consistency can be achieved is not answered simply by saying that the law ought to apply either a subjective or objective assessment of *mens rea* without regard to the offence charged, and accordingly this thesis will not attempt to add to the arguments of either camp. Instead it will be demonstrated that neither subjectivism nor objectivism can accurately convey the defendant's moral culpability with consistency because both methods focus on the non-issue of whether or not the risk was foreseen or foreseeable.

This thesis will expose the reasons why neither subjectivist nor objectivist principles can provide us with an approach to assessing *mens rea* that can be consistently applied. This argument will be conducted by an examination of the moral values of each of these two doctrines in turn, drawing on material from both academic and judicial

⁴ [2004] 1 A.C. 1034

⁵ *Caldwell* [1982] A.C. 341 and *Cunningham* [1957] 2 Q.B. 396

⁶ i.e. that we can never truly apply an 'artificial' subjective standard anyway. McEwan & Robilliard, 'Recklessness; The House of Lords and the Criminal Law' [1981] 1 L.S. 267; *Caldwell* *ibid* per Lord Diplock at 352

supporters of each approach in order to make it clear how an individual is labelled morally culpable. I will then challenge those arguments by examining past and present examples of each respective test in substantive law, focussing on where and why the test has been avoided or criticised, and how this undermines the moral arguments made by supporters of that approach.

It will be seen that both subjectivist and objectivist principles fail to set an accurate threshold of moral responsibility. The subjectivist approach to this threshold is too narrow, whilst objective tests are too broad. This choice of terminology requires some explanation, for when talking about setting the minimum requirements for *mens rea* it may be thought that labels such as ‘too high’ or ‘too low’ are more appropriate. However, to say that, for example, subjectivism sets the threshold ‘too high’ because it cannot punish any individuals who were inadvertent to the risks would presuppose that advertence may be considered more morally culpable than inadvertence. I am not convinced that foresight is an accurate indicator of an individual’s moral blameworthiness. Someone who does not foresee the risk because he does not care what the consequences might be is just as culpable as one who consciously took that risk, as will be seen in part 1. Accordingly, it is better to say that subjectivism sets the threshold of moral culpability too narrowly; if the law were to take a consistently subjectivist approach to assessing *mens rea*, it would fail to ensure the conviction of many individuals that we might otherwise judge to be culpable. Objectivist principles mirror this in that their approach to culpability is too broad. Thus, a consistently objectivist law would risk convicting those whom we may consider to be blameless.

Having shown that the law cannot remedy its current inconsistencies by favouring subjectivism or objectivism, this thesis will advance an alternative approach to moral culpability. Outside the continued discourse between subjectivists and objectivists, there are a select few who recognise that foresight is unimportant, and instead claim that we morally condemn the attitude displayed by the defendant or his reasons for acting. This thesis will end by analysing these moral arguments, showing how such an approach can be expressed in a workable practical test that can be consistently applied to any assessment of the defendant’s mental responsibility, thus achieving a consistent assessment of *mens rea*.

Throughout the course of this discussion, the use of a masculine pronoun is generic except in specific examples.

The discussion will be divided into three parts:

0.3: Part one: Why Subjectivism cannot be consistently applied

This part will establish that subjectivist principles take too narrow an approach to moral culpability, and so we cannot sensibly claim that the law would be logical and consistent if it were to adopt an exclusively subjectivist assessment of *mens rea*.

0.3.1: Chapter 1: Subjectivism and the current law

Here the thesis will analyse how a subjective test determines whether or not an individual is morally blameworthy for the harm he causes and how blameworthy he is according to the degree of harm foreseen and the probability of the risk. It will also be demonstrated how this approach logically would label the inadvertent individual as displaying a very limited degree of culpability, thus explaining the traditional subjectivist's attitude towards objective tests. This is followed by some general observations about the subjectivist's position. Subjectivist principles can be criticised for ignoring the impact that both laudable and unfavourable attitudes might have on an individual's moral culpability, as well as necessitating a somewhat artificial enquiry. The chapter concludes with the observation that, despite the favour for subjectivist principles that is so often expressed in the common law, 'deviations' from these principles can be found ranging from slight modifications to the core principles to 'greater deviations' in which a conflicting objective assessment of *mens rea* is nonetheless sufficient for a serious criminal offence. There are two categories of greater deviations identified here. The first is 'punishable negligence,' which covers those offences in which negligence forms the necessary *mens rea*, such as driving offences. The second is 'culpable inadvertence,' which covers those states of mind that can be considered morally culpable even where the defendant may not have been aware of the risk of harm, such as voluntary intoxication.

0.3.2: Chapter 2: Why do we punish negligence?

It was observed in chapter 1 that subjectivists are prepared to impose liability for negligence for minor offences courtesy of the welfare principle. However, this chapter identifies some serious criminal offences – namely: manslaughter, driving and sexual offences - in which *mens rea* is formulated in terms of negligence. This chapter analyses why negligence is currently accepted as sufficient *mens rea* for these offences despite the otherwise subjectivist stance traditionally taken in the law of England and Wales. This begins with an analysis of a number of utilitarian arguments favoured by subjectivists. However, these arguments are shown to be insufficient, and it is instead demonstrated that the punishment of negligence in these offences is justified only by the realisation that it can be considered a morally culpable state of mind. ‘Punishable negligence’ can thus be regarded as an additional example of ‘culpable inadvertence’.

0.3.3: Chapter 3: How ‘culpable inadvertence’ fundamentally challenges subjectivism

This chapter concedes that negligence is currently punishable in only specific contexts, and accordingly that a subjectivist might argue the above examples of punishable negligence are exceptions to the general rule. However, the realisation that negligence can be culpable inadvertence challenges fundamental subjectivist assumptions because it suggests that something other than foresight is important to moral culpability. If this is accepted, we must take account of any other states of mind that can be shown to be culpable inadvertence. This chapter identifies three states of mind that match this description: indifference, anger and voluntary intoxication. In each case it will be shown that the state of mind cannot be found using a subjective test, although a moral basis for blaming the defendant remains if he causes harm. This clearly exposes subjectivism’s focus on foresight alone as too narrow an approach to moral culpability in general.

0.3.4: Chapter 4: The subjectivist response to culpable inadvertence

To conclude Part 1, I will analyse and reject subjectivist arguments that attempt to reconcile the established examples of culpable inadvertence with subjectivist theory by showing that there is no way the punishment of these states of mind can be considered consistent with subjectivist logic. They cannot be regarded as special exceptions, nor can

it be said a subjective test can punish them because of the way in which it will be applied in practice. Furthermore, even if subjectivist principles are modified in order to deal with these states of mind, we can still observe that the defendant is ultimately being blamed for something other than his awareness of the outcome. These modifications merely paper over the cracks in subjectivist logic. Thus it can be concluded that subjectivist principles will be consistently applied only if a subjective test were to be imposed regardless of the offence on charge or the defendant's drunkenness or rage, which is not a desirable conclusion.

0.4: Part 2: Why Objectivism cannot be consistently applied

This part shows that objectivist principles take too broad an approach to moral culpability to be suitable for a universal application within the law. This part acknowledges that objective tests in criminal law have often faced heavy criticism, and so this part will set those criticisms that carry little weight apart from those that pose a significant challenge to any claim that objectivist principles ought to be applied across the board.

0.4.1: Chapter 5: What is wrong with objectivism?

As with Part 1 the first chapter of this part identifies why an individual is considered morally blameworthy according to objectivist logic, establishing that the autonomy principle is still satisfied by an objective standard and that objectivists determine an individual's moral culpability according to the degree of harm that is objectively foreseeable and how obvious it was. This chapter also considers the relationship between the subjective and objective hierarchies and discusses the objectivist's solution to the problem of laudable motive. The chapter then identifies those contexts in which an objective test has been criticised in the criminal law of England and Wales for producing undesirable results. Like subjectivism, an objective test cannot take account of the defendant's laudable motive. Furthermore, intention cannot be expressed as an objective test. However, these problems do not mean that objectivism cannot be applied consistently. The more significant challenge to objectivist principles is posed by those individuals who lack the capacity to attain the ordinary standard of care imposed by

an objective standard. We may not necessarily consider such individuals to be morally culpable, but a strict objective assessment would inevitably compel their conviction. It is therefore this criticism of *Caldwell*⁷ that exposes the overly broad approach to moral culpability taken by objectivist principles.

0.4.2: Chapter 6: Unworkable tests of 'mitigated objectivity'

Solutions to the observed broadness of objective tests have been attempted in substantive law, described in this chapter as tests of 'mitigated objectivity.' These are objective tests that are theoretically capable of taking account of any of the defendant's characteristics that may limit his capacity to do otherwise, thus rendering that test as a fairer enquiry. However, it will be demonstrated that none of the numerous attempts at mitigated objectivity can be regarded as workable solutions to the broadness of the objective hierarchy. They all fail to provide any clear guidance to the jury as to those characteristics of the defendant which ought to be relevant to the test and those which should be excluded. Furthermore, most of these attempts result in circular reasoning. As with subjectivism, it is concluded that the way in which objectivists ascertain the moral culpability of an individual is too deeply flawed to be remedied by mere quick-fixes. Hence the law cannot resolve its inconsistent approach to *mens rea* by adopting a consistently objective assessment of the state of mind of the accused.

0.5: Part 3: A New Approach to Moral Culpability

The thesis here acknowledges the need to reject the persistent notion that foresight, whether subjective or objective, is somehow of central importance to an assessment of an individual's moral culpability. Instead, it is suggested that we should base a new approach to moral culpability upon the defendant's conative state of mind, taken here to mean his reasons for acting or his attitudes. Therefore, regardless of whether the defendant foresaw an obvious risk or not, we would look primarily at the reasons why he acted as he did. Accordingly, this final part will show how such a moral approach can be applied in practice and how it allows an individual's *mens rea* to be assessed in a clear and consistent manner.

⁷ Above, fn.5

0.5.1: Chapter 7: Expressing a new threshold of criminal culpability in a workable test

This chapter will show that, although conative states of mind do not share a common factor, such as foresight, that allows them to be placed in a hierarchy in the same way as subjective or objective standards, a test can be constructed to act as an accurate indicator of the threshold of moral culpability according to this new approach. This new test is aimed at punishing those examples of culpable inadvertence neglected by subjectivism whilst protecting those who cannot attain an ordinary standard of care. However, it is recognised that the law often struggles to accurately define and apply tests based on conative states of mind, especially indifference. Accordingly, this chapter will also demonstrate how these moral ideals can be brought into practice using existing test structures from substantive law that allow for an accurate inference of indifference.

0.5.2: Chapter 8: How a conative approach would affect English and Welsh law

Once the threshold test has been established, this next chapter will show how the new approach to moral culpability allows *mens rea* to be assessed in a consistent and logical manner across a range of criminal offences. Firstly, it will be shown that the new test does not cover all states of mind as separate tests are required for intention, sexual motive and dishonesty. However, it will be shown that each of these concepts can be considered as a conative state of mind, and how so doing will make better sense of some existing legal issues. It will also be shown how the new test would act as a replacement to recklessness and negligence in relation to other existing offences, identifying those offences that would need to be modified and also where degrees of negligence may already accurately identify an individual as morally culpable according to this new approach.

0.5.3: Chapter 9: Conative states of mind and mistaken belief

This final chapter will discuss how the defendant's mistaken beliefs affect his *mens rea*. This is not a discussion that can normally be made. Because both objective and subjective tests are concerned only with the defendant's cognitive state of mind, many

beliefs, such as the belief in the need for defensive force, appear to be completely unrelated to *mens rea*. However, this has led to uncertainty about what belief is actually relevant to, and further inconsistency in the way the defendant's mistaken beliefs are assessed. This chapter resolves these problems. If *mens rea* is formulated in terms of the defendant's blameworthy attitude towards the victim, then we can see much more easily whether or not his mistaken belief is capable of exculpating him. Firstly, it will be shown that a genuine belief does not automatically negate the suggestion that the defendant was indifferent; instead the unreasonable belief may be considered to have been formed on the basis of a rushed or insufficient analysis of the circumstances. However, it is also recognised that we may not always want to limit our consideration of the defendant's beliefs to those that were reasonable, and so it will be shown how a differing assessment of beliefs can be rationalised on the basis that all beliefs will have some potential impact upon the defendant's conative state of mind and thus on our perception of his moral culpability. Thus it would not be inconsistent to allow for the defendant's genuine beliefs in other matters, such as the need for defensive force, because the underlying legal significance of that belief remains based on whether the defendant's conative state of mind was one that can be morally condemned. It will also be considered how intoxication might affect this assessment.

0.6: Conclusion

To conclude, my aim is to demonstrate why the law should reject both subjectivist and objectivist principles if it is to achieve consistency, and then provide an alternative approach that may allow for a more accurate reflection of an individual's moral culpability. Because the moral standpoint referenced is my own, alternate views of what can or cannot be considered morally culpable may arise. However, it is hoped that this thesis will at least demonstrate that consistency can be achieved, as long as we are prepared to look beyond simple questions of foresight which currently dominate the assessment of *mens rea* in the criminal law of England and Wales.

Part 1: Why Subjectivism cannot be consistently applied

Leading academics commonly believe *mens rea* is best formulated as a subjective test,¹ but adopting a subjectivist enquiry as to an individual's state of mind will fail to provide an accurate reflection of his moral culpability on some occasions. If the law were to formulate *mens rea* in consistently subjectivist terms, logically it would be forced to acquit certain individuals who ought to be punished according to a broader view of morality. Part 1 will demonstrate the limitations of a narrow view of morality derived from subjectivism thereby showing that the law could not achieve consistency by adhering to subjectivist principles.

Chapter 1: Subjectivism and the Current Law

1.1: Key Subjectivist Principles identified

1.1.1: Autonomy

Subjectivism relies on the notion that individuals can be considered culpable for harm only where they were at the material time aware of the risk of causing that harm, and thus were able to avoid it. This means that, to a subjectivist, it is important that the defendant voluntarily causes the outcome, either by consciously running the risk of that outcome or by actually intending it. One of the most important principles to subjectivism therefore is that of individual autonomy. This principle requires that every person be treated as an autonomous agent capable of choosing his own acts and omissions. Thus he can be held responsible for that behaviour. Ashworth claims that this requires the law to penalise an individual only for conduct he has chosen to do.² Freedom of choice is of utmost importance to a subjectivist when labelling an individual morally culpable for his conduct; someone who has no opportunity to desist from his actions is not considered blameworthy for the outcome at all.

¹ See for example the attitudes of Glanville Williams, *Textbook of Criminal Law* (2nd ed. 1983) and JC Smith & B Hogan, *Criminal Law* (11th ed. 2005)

² Ashworth, *Principles of Criminal Law* (5th ed. 2006) chapter 2.2.; Law Com. No. 218, *Legislating the Criminal Code: Offences against the Person and General Principles* (1993), Cm. 2370 para 14.14

1.1.2: Correspondence

The autonomy principle tells us whether or not an individual *can* be considered morally culpable for the harm he causes, but it does not tell us *how* culpable he is.³ To resolve the latter problem, subjectivism also adopts a Principle of Correspondence between an unlawful act or consequence⁴ and the *mens rea* required for the full offence. The Correspondence Principle has been explained thus:

“[I]f the offence is defined in terms of certain consequences and certain circumstances, the mental element ought to correspond with that by referring to those consequences or circumstances.”⁵

For example: according to this principle the defendant charged with causing grievous bodily harm⁶ should be considered sufficiently morally culpable for a charge based on that harm only if he has foreseen at least that level of injury. Unlike the principle of autonomy, it can be observed that the correspondence principle actually provides a measure of the level of blameworthiness.⁷ The greater the harm contemplated or intended by the defendant, the more morally culpable he can be considered to be because of the risk to others he was willing to pose. Hence the most criminal charges are justified. For example, individual A foresees a risk of grievous bodily harm and so has much more cause not to take that risk than B, who foresees only the application of unlawful force. A, when he takes the risk, can be considered more blameworthy than B even if both individuals eventually cause the same degree of harm.

1.1.3: Demonstrating a ‘Subjective Hierarchy’

In addition to the academically recognised correspondence principle, there is an extra ‘restrictive’ principle of liability that is rarely mentioned. The *mens rea* requirements of most offences against the person, and some property offences, can

³ This is because the Principle of Autonomy is merely a ‘permissive’ principle of liability. Horder, ‘A Critique of the Correspondence Principle in Criminal Law’ [1995] Crim. L.R. 759 at 760

⁴ Depending on which the offence is designed to punish

⁵ Campbell & Ashworth, ‘Recklessness in assault - and in general?’ [1991] 107 L.Q.R. 187 at 192

⁶ Herein GBH

⁷ Thus it is a ‘restrictive’ principle of liability. Horder above, fn.3 at 760

generally be satisfied where the defendant has foreseen the consequences of his actions merely as a possibility and so can be described, in legal terms, as reckless.⁸ However, for the most serious crimes within any one category of harm, this level of awareness is insufficient, and no less than an intention to bring about the result will do.⁹ The correspondence principle explains why, for example, subjectivists consider a defendant who has foreseen some harm to be less morally culpable than one who has foreseen death. However, it does not give any indication as to why a defendant who intended a result is thought to display a greater degree of culpability than one who merely foresaw that outcome as a possibility. The distinction appears to be based on the degree of probability of the risk foreseen by the defendant. Thus, one who acted having foreseen a possible risk does not attract as much moral blame from a subjectivist as one who acted in the knowledge that the outcome was almost certain. Hereinafter, this will be referred to as the ‘subjective hierarchy’: the more likely the defendant thought the outcome was, the more blameworthy a subjectivist considers him. This subjective hierarchy is evidenced by an examination of the way courts have struggled to define the concept of intention and how it compares to subjective recklessness.

It is useful to note that there are two contexts in which the term ‘intention’ is used. The first is where an individual acts intentionally in that his actions are voluntary. If person C voluntarily throws a brick, we can say he intends to do so, irrespective of any argument as to what he thinks would happen as a result of him throwing it. An example of this use of intention may be found in the Sexual Offences Act 2003. Section 1(a) refers to intentional penetration, as in the action itself must be intended. This form of intention, which I will label as ‘action-intention’, causes no definitional problems because it can be very easily inferred from the defendant’s actions. However, although always implicitly required,¹⁰ it is not relevant to the subjective hierarchy, and therefore is not pertinent here. In the example above, although the brick may have been thrown intentionally, C

⁸ *Cunningham* [1957] 2 Q.B. 396; *G & R* [2004] 1 A.C. 1034

⁹ s18 Offences Against the Person Act 1861 is thus distinguished from s20, and murder from manslaughter by the requirement that intention must be proved for the more serious charge.

¹⁰ If the individual’s actions were involuntary, then he cannot be considered morally culpable at all according to the principle of individual autonomy. Instead, he can plead automatism; *Hill v Baxter* [1958] 1 Q.B. 277

does not pass the threshold for criminal culpability imposed by a subjective test unless he at least foresaw that he would cause some harm by throwing the brick.

The second meaning of intention demonstrates the reason a subjectivist considers intention more wicked than recklessness. Intention is used legally and linguistically in a similar way to recklessness: as a way of tying our actions to the consequences. It describes the purpose of our actions. For example: if person D throws a brick in order to hit another person, then we would say that he intends to hit that person with the brick. I shall refer to this as ‘consequence-intention’. If defined strictly, consequence-intention would bear a meaning very similar to ‘purpose’, as can be observed in the dated case of *Steane*.¹¹ The defendant, who assisted the enemy during wartime, successfully claimed that his intentions were not to assist the enemy, but rather to protect his family from persecution. The state of mind identified by this definition of intention is clearly blameworthy, but it is not easily related to the reasons we blame a reckless defendant. However, the law has long since recognised that this definition is far too narrow because it excludes defendants who can be considered to have displayed an equally high degree of moral blameworthiness. The point is aptly illustrated by Williams’s example of a man who blows up an aeroplane mid-flight in order to claim insurance.¹² It is not his direct purpose to kill the passengers and crew, but rather his ‘intention’ is to gain the insurance money. However, he knows that, by destroying the plane, he will almost certainly cause the deaths of the passengers and crew. He has accepted the inevitability of this outcome, and so is just as morally blameworthy as one who blew up the plane with the intent to cause death. This sort of reasoning was adopted by the House of Lords in *Hyam*,¹³ a case which led to a series of decisions on the meaning of intention culminating in *Woollin*,¹⁴ which adopted the following guidance:

¹¹ [1947] 1 All E.R. 813

¹² Williams, ‘*Oblique Intention*’ [1987] 46 C.L.J. 417 at 423 from *Hyam* [1975] A.C. 55 at p74

¹³ *ibid*

¹⁴ [1999] 1 A.C. 82

“if [they] are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act.”¹⁵

This is, of course, old news, but what is interesting for the purposes of this discussion is the apparent moral equation¹⁶ between a desired outcome and one that was accepted as a virtually certain consequence. If intention can be considered the most blameworthy state of mind according to subjectivism, then the moral equation of intention with an outcome foreseen as certain shows that the degree of probability of the foreseen risk is also important; it distinguishes the culpability displayed by someone who appreciated an outcome as virtually certain from that of one who foresaw that it was a possible outcome. Indeed, criticism of the pioneering judgment of *Hyam* can be attributed to this extra principle of subjective liability. Lord Hailsham held that both foresight and the degree of probability of the proscribed consequences occurring could be evidence from which the jury would be able to draw an inference that there had been intention. There was much talk of ‘highly probable’ and ‘likely’ consequences in *Hyam*,¹⁷ but the actual threshold as to how probable the consequences would have to be before intent could be inferred did not appear to have been set very high at that point: Lord Cross stated that his only criticism of the trial judge’s direction was the use of the word ‘highly’ before ‘probable’.¹⁸ If intention can be evidenced from a ‘foresight of a probability of serious harm or death’ then, according to a subjectivist, there is little distinction between the culpability of a reckless individual and one who intends an outcome.¹⁹ *Hyam* thus blurred the boundaries of murder and manslaughter and so, from a subjectivist point of view, was flawed because it failed to recognise the importance of the subjectivist hierarchy. By contrast, an individual who acts knowing that the result is virtually certain displays the

¹⁵ *Nedrick* [1986] 1 W.L.R 1025 per Lord Lane CJ at 1028; affirmed in the House of Lords in *Woollin* *ibid*

¹⁶ It is, however, recognised that there is a lack of clarity as to whether the *Woollin* test provides an alternative definition of intention, or simply an evidential rule that allows intention to be inferred. Below, Ch. 1.4.1

¹⁷ Above, fn.12. See for example the trial judge’s direction to the jury, cited by Lord Hailsham at 65; Lord Hailsham at 69, 75 and 76-7, ; Viscount Dilhorne at 82, 85 and 86; Lord Diplock at 86-7, 92 and 93; Lord Cross at 96; Lord Kilbrandon at 98

¹⁸ Above, fn.12 at 97

¹⁹ As recklessness is defined in terms of foresight of a *possibility*. *Cunningham* above, fn.8

very highest degree of moral guilt and so the distinction between recklessness and consequence-intention is now much clearer.

1.2: The subjectivist's attitude towards objective tests

The above analysis of subjectivist principles demonstrates that subjectivism considers an individual's moral culpability to be very closely related to his foresight of the consequences of his actions. The degree of culpability an individual displayed is determined according to what he foresaw and how likely he foresaw it as being. In contrast, objective standards are defined by reference to how likely or obvious that risk would have been to an ordinary person, or what that ordinary person would have done in the defendant's situation. There are different degrees of objective liability: 'mere' negligence can be described as a failure to foresee what an ordinary person would have foreseen, or any deviation from the normal standard; gross negligence can be considered to be a greater degree of objective liability in that the risk must have been obvious to a reasonable person, or that the defendant fell *far* below the reasonable standard. However, in both standards, the threshold for criminal culpability according to subjectivism has not necessarily been passed; thus the general subjectivist standpoint can be observed to be that neither of these objective standards can show the defendant to be sufficiently morally culpable for a serious criminal offence.²⁰ For example, unlike the reckless defendant, the negligent defendant cannot be said to have placed his own interests above those of his victims,²¹ rather he is considered to have displayed a degree of stupidity that constitutes a lesser degree of moral culpability.

1.2.1: The purist subjectivist's opinion

Because cognitive awareness of the risks is the central factor in subjectivist principles, some purist subjectivists will go so far as to say that an individual who did not foresee the possible consequences of his actions cannot be considered morally culpable at all. This purist stance comes from the perception that inadvertence is not a state of mind

²⁰ Although it will be observed shortly that they appear to accept the need for objective standards for utilitarian purposes.

²¹ Law Commission no. 218 above, fn.2 para 14.15 citing Ashworth, *Principles of Criminal Law* (1991), p.155.

but rather the absence of one.²² For example, Professor Williams is fervent in his criticism of the objective test in *Caldwell*²³ on the basis that an objective fault element makes no attempt to assess what went on in the defendant's mind:

“failing to think can be called a state of mind only in the sense that unconsciousness is a state of mind; that is to say, it is an absence of a relevant state of mind.”²⁴

This is why he holds the view that Lord Diplock's abandonment of a distinction between objective and subjective standards would lead to injustice:

“if we gave up all language for distinguishing between those people who have criminal states of mind and those who have not, we should, of course, give up the [requirement of *mens rea*] itself. The Newspeak of 1984 would be on the way.”²⁵

Professor Smith similarly believes that an objective test does not require *any* enquiry into the defendant's state of mind, and so could not be properly described as *mens rea*.²⁶ Such is the strength of Smith's subjectivist convictions he even questions whether the House of Lords should continue to sit on criminal appeals following the notorious decision in *Caldwell*.²⁷ The purist subjectivist's view is that, because the individual is not aware of it, this is an outcome to which he cannot react or avoid. Therefore, punishing him for that outcome is a violation of the Principle of Individual Autonomy.

Such arguments inevitably suggest that there is no distinction between an objective standard and strict liability. A strict liability offence involves, by definition, a crime committed by conduct alone. Proof of the defendant's state of mind is not required, although it could be represented by a mitigated sentence. Some, such as Honoré, have expressly stated that forms of objective liability do not require any fault at all, but instead

²² A claim that will be contested below.

²³ [1982] A.C. 341

²⁴ Williams, '*Recklessness Redefined*' [1981] C.L.J. 252 at 256

²⁵ *ibid* at 254. See also Williams above fn.1 at p100

²⁶ Smith, '*Caldwell Case and Comment*' [1981] Crim. L.R. 392 at 394; Fine and Cohen, '*Is Criminal Negligence a Defensible Basis for Penal Liability?*' [1967] 16 Buffalo L. Rev. 749 at 750

²⁷ Smith, '*Caldwell Case and Comment*' *ibid* at 393

impose strict liability.²⁸ This view is not universally held, however, as some have recognised that strict liability and objective liability are distinct. Indeed, the common law, despite a generally subjectivist stance,²⁹ does not recognise an equation of strict and objective liability. For example, in *Sweet v Parsley*,³⁰ the House of Lords considered that negligence was an alternative form of *mens rea* and therefore preferable to absolute liability. The status of gross negligence as either *mens rea* or strict liability was also considered in *Misra*,³¹ as it was feared that the objective standard imposed would be at odds with the decision in *G*.³² Judge LJ held that gross negligence still required some form of fault on the part of the offender, and thus reiterated the statement in *Sweet v Parsley* that gross negligence was not an absolute standard. Interestingly, Williams also acknowledges a distinction between negligence and strict liability.³³ However, he does not explain what the distinction is; while he maintains that an objective standard is completely unconcerned with the defendant's state of mind it is difficult to tell exactly what he thinks this distinction is based on.

1.2.2: The Welfare Principle

Whichever of these two views a subjectivist holds, it seems entirely correct to say that he would perceive a vast moral gulf between the moral culpability of a defendant who acts having foreseen an outcome and another who is inadvertent to the risk. However, this is not to say that subjectivists will never accept the use of objective tests of *mens rea*, but rather that they will accept them only where there is an utilitarian purpose in using one.³⁴ The penalisation of a defendant who does not display the minimum degree of moral blameworthiness required by subjectivism is sometimes validated by the recognition that, although individual autonomy is important, the law ought to be able to enforce society's collective goals. Thus, the 'Welfare Principle'³⁵ can justify punishment

²⁸ Honoré, 'Responsibility and luck: the moral basis of strict liability' [1988] 104 L.Q.R. 530 at 537.

²⁹ This stance will be observed below, cf. Ch. 1.3

³⁰ [1970] A.C. 132 per Lord Reid at p150

³¹ [2005] 1 Cr. App. R. 21

³² Above, fn.8

³³ Williams above, fn.24 at 262-3

³⁴ Williams above fn.1 at p91. cf Fine and Cohen above, fn. 26 who do not accept criminal liability for negligence at all.

³⁵ Ashworth above, fn. 2 at chapter 3.6

for some offences where individuals have been negligent, or even where they have no state of mind at all regarding the outcome.³⁶ Among his criteria for allowing an offence of strict liability to be read into a statute, Lord Scarman held in *Gammon (Hong Kong) Ltd.*³⁷ that:

“(4) the only situation in which the presumption [of *mens rea*] can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.”

Ashworth’s example of such an offence is the failure to accurately state income for the purposes of tax.³⁸ The Welfare Principle may be invoked here, and an offence of strict liability imposed, because the law must be able to regulate certain activities in order to ensure that they are performed correctly. Tax offences are an issue of social concern according to the theory that certain wrongs give the criminal an unfair advantage over all law-abiding citizens.³⁹ The existence of an offence of strict liability thus ensures that those stating income for the purposes of tax take care to ensure they do so correctly. Similarly, driving offences are a matter of public concern because of the danger that would be created if driving were not regulated. The fact that negligence is punishable ensures that all drivers take care. Consequently, punishment for failures to meet regulatory requirements can be justified by the need to achieve society’s collective goals even where the defendant does not meet the minimum requirements of moral blame required by subjective recklessness.⁴⁰

³⁶ I.e. the offence is one of strict liability.

³⁷ *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] A.C. 1 at 14

³⁸ Ashworth above, fn.2 at chapter 3.6

³⁹ Duff, RA: *Answering for Crime; Responsibility and Liability in the Criminal Law* (2007) at 52 and 140

⁴⁰ Ashworth above, fn.2 at chapter 3.6

1.2.3: Limits of the Welfare Principle

That said, subjectivists appear to accept changes wrought by the Welfare Principle only where the crime is a relatively minor ‘regulatory’ offence. This limitation of the Welfare Principle is inevitably linked to the subjectivist notion that one who did not foresee the consequences of his actions displayed little to no moral culpability for the harm he has caused. The need to regulate conduct in the interest of public welfare is thus set against the social stigma of being convicted of a ‘real,’ (as opposed to a ‘regulatory,’) criminal offence.⁴¹ Indeed, this is a factor that has been expressly considered by the courts when determining whether or not an offence is one of strict liability or if subjective awareness is required:

“Other considerations have to be borne in mind including the nature of the prohibited act: if it were ‘truly criminal,’ it would be necessary, for example, to consider whether the public interest really required that an innocent person should suffer in order that fewer guilty men might escape.”⁴²

Smith and Hogan suggest that a further factor will be the severity of the punishment.⁴³ However, although this suggests that the greater the penalties, the greater the presumption of *mens rea*, the courts have not taken the opportunity to base this boundary upon the possibility of imprisonment.⁴⁴ Thus it is not clear how serious the penalties have to be before the Welfare Principle will have been overstretched.

It is because of this limitation of the Welfare Principle that subjectivists do not think negligence to be a sufficient fault element in ‘truly criminal’ offences carrying high penalties. The difference in the available penalties between criminal damage and regulatory offences was in fact part of Williams’s criticism of *Caldwell*:

⁴¹ Although Horder notes that such categories are obviously artificial, they remain convenient labels. Horder, ‘*Strict liability, statutory construction and the spirit of liberty*’ [2002] 118 L.Q.R. 458 fn4

⁴² *Gammon (Hong Kong) Ltd v A-G of Hong Kong* above, fn.44 per Lord Scarman at 13

⁴³ Smith and Hogan (Ormerod) above fn.1 at p250

⁴⁴ *Howells* [1977] Q.B. 614 although Horder suggests that the existence of potentially severe penalties (3 years imprisonment) may even have made the Court more willing to find the offence to be one of strict liability to aid its deterrent effect. Above, fn.41 at Horder’s footnote52

“We have made a conscious decision of policy in this Country not to visit damage to property when caused by inadvertent negligence with penal sanctions except in special situations, where the penalties are comparatively light.”⁴⁵

Williams instead takes the view that:

“Fines, and if necessary repeated fines, [for negligence] prod people into taking care. On the other hand, a substantial sentence of imprisonment would make little sense, since it would be disproportionate to the occasion.”⁴⁶

Even subjectivists who accept that negligence displays some degree of culpability may not think the penalties should be as severe as for offences requiring subjective foresight of risk.⁴⁷ According to subjectivist principles, an inadvertently negligent individual remains much less blameworthy than one who foresees the risks, and so from a subjectivist perspective it remains unfair to place the full social stigma of a ‘truly criminal’ offence upon him. Therefore, it can generally be stated that it remains inconsistent with subjectivist principles to impose an objective standard for a more serious offence, even if the Welfare Principle is taken into account. It will be seen that this statement remains true, even though some subjectivists have suggested other ways to reconcile, with subjectivist theory, the imposition of an objective assessment of *mens rea* in serious offences.

1.3: Current favour for Subjectivism

It can be shown that a great deal of favour for subjectivist principles has been expressed in the criminal law of England and Wales, and especially in common law. In the House of Lords, Lord Nicholls expressed the opinion that:

⁴⁵ Williams above, fn.24 at 262

⁴⁶ Williams above fn.1 at p93; Ashworth above fn.2 at p193

⁴⁷ *Sweet v Parsley* above, fn.30 where, although negligence and strict liability were not equated, negligence was nonetheless thought insufficiently blameworthy for ‘truly criminal’ offences. Lord Reid at p150 where he distinguishes gross negligence and ‘*mens rea* in the full sense.’

“by definition the mental element in crime is concerned with a subjective state of mind such as intent or belief.”⁴⁸

This stance is evident in the way some recent cases have been decided. For example, the greatly maligned objective standard imposed by *Caldwell*⁴⁹ was finally overruled by the House of Lords in *G*,⁵⁰ alongside Lord Bingham’s claim that

“[i]t is neither moral nor just to convict a defendant...on the strength of what someone else would have apprehended if the defendant himself had no such apprehension.”⁵¹

Even before *G* was decided the Court of Appeal had already avoided *Caldwell* in cases where the judgment was not binding.⁵² Even those judges that were bound by *Caldwell* strongly expressed their reluctance at the conclusions they felt they were forced to make.⁵³

The development of intention also demonstrates the generally subjectivist stance of the courts. Although the House of Lords in *Hyam* pioneered the notion that intention could be evidenced from the defendant’s foresight, the decision was not favoured in subsequent cases. Even before *Hyam* was overruled, the Court of Appeal declined to follow the judgment in respect of section 18.⁵⁴ This lack of favour can be attributed to the fact that *Hyam* took the definition of intention too far down the subjective hierarchy to be representative of the extra degree of culpability implied by intention. Had it been retained, the only way a clear distinction could be made between intention and

⁴⁸ *B v DPP* [2000] 2 A.C. 428 per Lord Nicholls at 462

⁴⁹ Above, fn.23

⁵⁰ Above, fn.8

⁵¹ *G and R* *ibid* per Lord Bingham at 1055

⁵² *W (A Minor) v Dolbey* (1989) 88 Cr. App. R. 1 is an example of this.

⁵³ Consider Goff LJ’s comments in *Elliott v C* (1983) 77 Cr.App.R. 103 at 116

⁵⁴ *Belfon* [1976] 2 Q.B. 396

recklessness would be to impose a broader definition of recklessness as well.⁵⁵ The Law Commission have also openly admitted their preference for a subjectivist approach.⁵⁶

For the purposes of this discussion, it is therefore useful to think of the current criminal law of England and Wales as an example of how an attempted subjectivist approach might look in practice. If such a desire to follow subjectivist principles exists, then why not do so consistently? Where the law does not follow subjectivist principles closely, those rules will be identified as deviations from subjectivism that require an explanation. These explanations will prove that subjectivism cannot work. The existence of such deviations undermines the subjectivist's reliance on foresight as a central factor in determining moral culpability.

1.4: Criticism of subjectivist principles: an overview

If the law were to take a consistently subjectivist approach, it would have to adhere to the rules and principles that were set out above. However, there are a number of criticisms that can be directed at subjectivist principles. These criticisms necessitate deviations from those principles in the current law, despite the favour for subjectivism that has been expressed.

1.4.1: Inability to deal with motive

Duff claims that we can regard the traditional subjective definition of recklessness as too broad because not every conscious risk taker can be regarded as reckless.⁵⁷ Therefore, the writer who throws his typewriter out of a window knowing it is possible (as opposed to probable) that his neighbour might be sunbathing below is not necessarily reckless. Duff contends that the harm to his neighbour, if it occurs, will nonetheless have occurred against his expectations.⁵⁸ Therefore, that actor ought to be regarded as consciously negligent - he has not acted in the expectation that he will harm the victim,

⁵⁵ There are numerous other examples of the subjectivist stance of the judiciary, found in *Williams* [1987] 3 All E.R. 411, *Smith* [2001] 1 A.C. 146 and *B v DPP* above, fn.48

⁵⁶ Law Commission, '*Legislating the Criminal Code: Involuntary Manslaughter*' (1996) Law Com no 237 para 4.3

⁵⁷ Duff '*Recklessness*' [1980] Crim. L.R. 282

⁵⁸ i.e. he thought it more likely that his neighbour was not there.

and so the law should not treat him as morally equivalent to one who foresees the outcome as probable. The same might be said of an actor who foresees the risk but takes some inadequate precaution to avoid that risk. However, although Duff is correct to assert that subjective recklessness is incapable of morally distinguishing the individual who foresaw an outcome as possible from one who foresaw it as probable, the same cannot be said of subjectivist principles themselves. It was observed that, according to the subjectivist hierarchy, the defendant's moral culpability is proportionate to how probable he thought the outcome was. Someone who foresaw only a remote possibility that an outcome will occur is less morally culpable according to the hierarchy than one who foresaw that outcome as probable. It is likely that the reason the recklessness test makes no distinction between these individuals is that it may be too difficult in practice for the jury to determine exactly how probable the defendant thought the consequences were.

However, subjectivist principles themselves can be criticised for broadness where the defendant foresaw an outcome, or maybe even intended that outcome, but acted with a laudable motive. According to subjectivist principles, an individual's motive ordinarily does not affect his moral culpability. This prevents the law from being overly-complex; if D intended to kill V, we need not prove why he did so. It matters not whether he killed in order to obtain an insurance payout or out of revenge if the law regards his moral culpability as unchanged. However, a praiseworthy motive may have an effect on an individual's moral culpability; someone may risk some lesser harm in order to avoid greater harm, for example: a surgeon who intends to cause serious harm in order to perform an operation. Subjectivist principles, by focussing on foresight alone, cannot take these laudable motives into account. In some cases, this eventuality has been accepted. For example, in *Smith*,⁵⁹ it was held that evidence of a laudable motive, in this case to expose Mayoral corruption by offering a bribe, was inadmissible because:

⁵⁹ [1960] 2 Q.B. 423

“The mischief aimed at by the [Public Bodies Corrupt Practices Act 1889,] as the judge told the jury, was to prevent public officers or public servants being put in a position where they are subject to temptation.”⁶⁰

However, what of the surgeon who causes grievous bodily harm by operating on the victim? Or a father who throws his child out of a burning building, knowing that death or serious injury is almost certain to occur to the child, but chooses that course of action over a completely certain death from the fire?⁶¹ We surely do not think that these individuals are morally culpable at all, and yet a strict application of subjectivist principles would label them so simply because they have foreseen or intended the outcome. This is a particular problem for the *Woollin*⁶² test insofar as it imposes an alternative definition of intention. As evidence of a ‘definitional approach’ to intention⁶³, Clarkson and Keating cite remarks in *Woollin* by Lord Steyn, who approved a comment in *Moloney* that, if a person foresaw the probability as little short of overwhelming, it would establish intent.⁶⁴ Lord Steyn himself placed emphasis on the word ‘established’, suggesting a rigid definition of intention. If this were the law, Clarkson and Keating point out, it would place juries in a ‘moral straightjacket’⁶⁵; they would be compelled to convict wherever the defendant was aware that an outcome was virtually certain, regardless of his laudable motive. Thus, according to a subjective test, both the surgeon and the father are liable for murder if they appreciate that death or grievous bodily harm are virtually certain to occur.

Of course lawmakers have done all they can to avoid convicting individuals such as the surgeon performing a risky but life-saving operation. However, they do not do so by actually taking account of the defendant’s motive *per se*. Instead, Lord Hailsham emphasised in *Moloney* that the jury *may* - but not must - infer intention to kill or cause

⁶⁰ *ibid* per Lord Parker CJ at 429-30

⁶¹ Nathan Committee Report, Report of the House of Lords Select Committee on Murder and Life Imprisonment (HL paper 78-1, 1989); Law Commission, ‘A New Homicide Act for England and Wales?’ (2005) LCCP 177 para 4.21

⁶² Above, fn.14

⁶³ Clarkson and Keating ‘*Criminal Law Text and Materials*’ (6th ed. 2007) p126

⁶⁴ *Moloney* [1985] A.C. 905 at 925

⁶⁵ Clarkson and Keating, ‘*Criminal Law Text and Materials*’ (5th ed. 2003) p130

grievous bodily harm where the defendant foresees a high probability of death or serious harm. He cited Byrne J. in *Smith*:

“... while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.”⁶⁶

Indeed, the House of Lords has ruled that tests of oblique intention are evidential only, meaning that the *Woollin* test merely provides guidelines as to how intention can be inferred. As Lord Hailsham in *Moloney* said:

“I conclude with the pious hope that your Lordships will not again have to decide that foresight and foreseeability are not the same thing as intention... and that matters which are essentially to be treated as matters of inference for a jury as to a subjective state of mind will not once again be erected into a legal presumption. They should remain, what they always should have been, *part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not part of the substantive law.*”⁶⁷

Following *Woollin*, where this distinction between an evidential and definitional approach was not discussed, the Court of Appeal claimed that:

“In our judgment... the law has not yet reached a *definition* of intent in murder in terms of appreciation of a virtual certainty... On the contrary, it is clear from the discussion in *Woollin* as a whole that *Nedrick* was derived from the existing law, at that time ending in *Moloney* and *Hancock*, and that the critical direction in *Nedrick* was approved, subject to the change of one word.”⁶⁸

⁶⁶ *DPP v Smith* [1961] A.C. 290 at 300

⁶⁷ *Moloney* above, fn.64 at 913 emphasis added. See also Lord Bridge at 927-8 and Lord Scarman's approval of this speech in *Hancock* [1986] A.C. 455 at 471-2

⁶⁸ *Mathews & Alleyne* [2003] 2 Cr.App.R 30 per Rix LJ at para 43

This ‘evidential approach’,⁶⁹ because it allows the jury to choose not to infer intention, provides protection for the surgeon and the father from a murder charge.⁷⁰ However, the approach leaves us with a lack of clarity as to what intention, if it is inferred, actually means. Lord Bridge’s ‘golden rule’ was that the trial judge need not elaborate on the meaning of intention unless such further explanation is necessary.⁷¹ This suggests that intention as evidenced by *Woollin* cannot share the same meaning attributed to it by ‘direct intention.’⁷² Therefore, we either have to accept that one serious and narrowly defined state of mind can be inferred from another ‘lesser’ state of mind, or we have to identify some other definition of intention that does fit the *Woollin* test.

Furthermore, both the father and the surgeon from above foresee the risk that death or serious harm will be caused. Although they may not be liable for murder, they nonetheless remain morally culpable according to subjectivist principles. The question then becomes: on what basis do subjectivists consider the father and surgeon’s conscious risk-taking to be morally innocent? The subjectivist answer to this question does not rely upon the defendant’s actual motive, but an objective assessment of the context of his actions. Lord Edmund-Davies, dissenting in *Caldwell*, stated that:

“[subjective] recklessness involves foresight of consequences, *combined with an objective judgement of the reasonableness of the risk taken.*”⁷³

This added objective requirement protects the conscious risk-taker who has a justifiable reason for taking that risk whilst preserving the subjectivity of the test. Imagine driver 1 brakes suddenly to avoid hitting a child who unexpectedly runs into the road. He may foresee damage to other road users, but this damage is likely to be less than that caused to

⁶⁹ To use the terminology of Clarkson and Keating above fn. 63 at p126

⁷⁰ This is a benefit that Wilson read into the *Nedrick/Hancock* judgments, although he believed that the preference for the word ‘find’ rather than ‘infer’ in *Woollin* (Above, fn.14 per Lord Steyn at 96) may have ruled out this possibility. Wilson ‘*Doctrinal rationality after Woollin*’ [1999] 62(3) M.L.R. 448 at 458.

⁷¹ *Moloney* above, fn.64 at 926

⁷² I.e. intention according to *Steane*. Above, fn.11 and also Duff, ‘*The Obscure Intentions of The House of Lords*’ [1986] Crim. L.R. 771 at 772; Norrie, ‘*Oblique Intention and Legal Politics*’ [1989] Crim. L.R. 793 at 803

⁷³ *Caldwell* above, fn.23 per Lord Edmund-Davies at 358 emphasis added

the pedestrian if he were to continue driving. Similarly, both the surgeon and father are not reckless so long as their actions are reasonable. However, this assessment of the reasonableness of the defendant's actions allows a concession for his laudable motive without actually making that motive relevant to his moral culpability. Subjectivist principles still suggest that the defendant is at fault for the harm caused, but his actions are justified. It seems odd to say of individuals such as the surgeon that they are *prima facie* culpable for the harm, given their commendable reasons for acting. The subjectivist solution to laudable motives is therefore a practical solution and nothing more.

1.4.2: Relevance of the defendant's mistaken beliefs

Subjectivism's inability to deal with motive causes further problems where the defendant acts with a laudable motive having made some mistaken judgement about the factual circumstances. This is because subjectivism cannot say that the individual who intentionally attacked another in self-defence, for example, lacked *mens rea*. His desire to protect himself or others does not change the fact that he intended to cause his attacker harm. Instead, subjectivists are forced to perceive his plea as a 'confession and avoidance' defence:

“Defendants admit that that the *actus reus* took place accompanied by the requisite *mens rea* (the ‘confession’); but they seek, as the case may be, to justify or excuse their conduct to negate or reduce liability (‘the avoidance’).”⁷⁴

Such an account does not make clear how an individual's liability is affected by any mistaken beliefs relevant to his defence. Keeping in the context of self-defence: subjectivists, although keen to ensure that the defendant is able to rely on his genuine, even if mistaken, beliefs,⁷⁵ are unable to explain why. We cannot say that the defendant's actions were justified if no threat existed and no reasonable person would have thought it existed. We cannot say that the defendant lacked *mens rea* if he intended the attack. Subjectivists get around these problems by reclassifying certain elements of his plea as

⁷⁴ Horder 'Autonomy, provocation and duress' [1992] Crim. L.R. 706 at 706

⁷⁵ Glanville Williams, 'Offences and Defences' [1982] 2(3) L.S. 233 at 240 onwards; Williams (Gladstone) above, fn. 55 per The Lord Chief Justice at 281

excusatory or justificatory depending upon whether they think his belief should be assessed subjectively or objectively. However, it will be seen below that justification and excuse categories, whilst useful, are unhelpful when determining whether or not an individual should be able to rely on his mistaken beliefs.⁷⁶

1.4.3: An artificial test

Any subjective test effectively asks the impossible of the jury; they have to decide what the defendant's actual state of mind was. However, as was stated by the trial judge in *Moloney*, the jury cannot simply:

“...take the top of a man's head off and look into his mind and actually see what his intent was at any given moment.”⁷⁷

Consequently there are few cases (those where the defendant expressly admits to having foreseen a particular outcome) in which the subjective test can be said to have been accurately applied. In all other cases, it cannot be said reliably that the jury actually knew what the defendant himself foresaw. This leaves the practical application of any subjective test open to criticism for being artificial.⁷⁸ In *Stephenson*, Lane LJ claimed that

“the fact that the risk of some damage would have been obvious to anyone in his right mind is not conclusive proof of the defendant's knowledge, but it may well be... a matter which will drive the jury to the conclusion that the defendant himself appreciated the risk.”⁷⁹

⁷⁶ Below, Ch.9.2. Further discussion on this is unhelpful at this point because, to a subjectivist, this is not a *mens rea* issue. Chapter 9 will be dedicated to this problem; showing that, if we were to take a conative approach, the defendant's mistaken beliefs could be considered part of his *mens rea* and therefore a consistent approach can be achieved.

⁷⁷ *Moloney* above, fn.64; the trial judge is cited by Lord Bridge at 918. See also *Caldwell* above, fn.23 per Lord Diplock at 352

⁷⁸ McEwan & Robilliard, 'Recklessness; *The House of Lords and the Criminal Law*' [1981] 1 L.S. 267 at 280-1

⁷⁹ *Stephenson* [1979] 3 W.L.R. 193 per Lane LJ at 200

Thus, the more obvious the result, the less believable is the defendant's contention that he did not foresee it or that he was completely unaware of it on any conscious level. However this means that, when the jury are asked to consider what the defendant foresaw, it is quite possible that they think primarily of what they would have done or foreseen in that situation. This is little different from requiring the jury to pose the entirely objective question of what the reasonable man would have foreseen. In other words, the practical application of subjective and objective tests is not as different as it may first appear.⁸⁰

This in itself is hardly a damning criticism of subjectivism. Indeed, such an argument can be easily countered by pointing out that section 8 Criminal Justice Act 1967 ruled that foresight must be decided upon all the evidence and not an automatic inference from what the probable outcome was. This means that inferring subjective foresight is no different from any of the other of the jury's tasks; they cannot know with certainty what actually happened, just as they cannot know with certainty what the defendant was actually thinking. Therefore, they must decide all the points in dispute according to the evidence available to them.

1.4.4: The narrowness of subjectivist principles

This is the biggest criticism of subjectivist principles, as it is their narrowness that undermines the operation of traditional subjective tests. Subjectivist principles will not label individuals as culpable for harm they have caused unless they at least foresaw the possibility that such harm would occur. In doing so, subjectivist principles must disregard any states of mind that may be considered culpable despite the defendant's inadvertence to the risk. The angry defendant or the defendant who does not care what effect his actions will have are examples. As with laudable motive, some subjectivists assert that there is no problem in practice. For example, Ashworth suggests that the challenge posed to subjectivist principles by indifference need not be addressed; juries may well choose to convict such thoughtless defendants as subjectively reckless because they would simply

⁸⁰ The Law Commission, '*Murder, Manslaughter and Infanticide*' (2006) Law Com no 304 at para 355, HL Deb Volume No. 646 Part no. 73 31st March 2003 cols 1089-90 and even Williams, '*The Unresolved Problem of Recklessness*' [1988] 8 L.S. 74 at 75 for recognition that the standards will often achieve the same results.

not believe their defence.⁸¹ Williams notes a very similar view from both the Law Commission and Criminal Law Revision Committee in relation to those defendants who acted out of rage: since foresight is a matter of inference only, defendants who claim to have lacked foresight because of their rage are likely to be convicted due to a lack of sympathy. Hence, Williams thought it unnecessary to deviate from the normal application of a subjective test.⁸² However, it will be seen in the course of the following discussion that this argument is unconvincing.⁸³

1.5: The current law's deviations from Subjectivism

Although apparently favouring subjectivism, the current criminal law cannot be described as exclusively or consistently subjectivist. This might in part be attributed to the fact that Parliament is influenced by different considerations than is the judiciary. For example, the Sexual Offences Act 2003 places more importance upon protecting victims and raising conviction rates than it does upon preserving traditional principles of liability.⁸⁴ However, we cannot simply assume that Parliament is wrong to ignore subjectivism in favour of other considerations, nor can we assume that instances where the common law employs an objective test are simply incorrect. Instead, what is required is a closer scrutiny as to why subjectivist principles have not been followed in certain contexts. The deviations from subjectivism that can be found in the current law will be separated into three categories: 'minor deviations' where subjectivist principles have undergone slight alterations in order to be workable; 'moderate deviations' where those principles have been stretched to breaking point; and 'greater deviations' where subjectivism has been completely abandoned. Of these, the objective 'greater deviations' are necessary because of the narrowness of subjectivist principles, and thus the existence of the former undermines the latter.

⁸¹ Ashworth above fn. 2 at p184

⁸² Williams above fn.1

⁸³ Below, Ch. 4.2

⁸⁴ Baroness Noakes HL Deb Volume No. 644 Part no. 45 13th February 2003 col 777

1.5.1: Minor deviations

Some deviations from subjectivist principles can be attributed to the fact that those principles are idealistic. Minor deviations from the norm are thus required in order that the law remain workable. Subjectivist logic is still recognisable within these minor deviations; all that has been changed is that the parameters are slightly broader in order to improve the practical application of those principles. For example, the *mens rea* requirements in offences against the person are frequently broader than the subjectivist approach to moral blame would suggest. The *mens rea* of murder does not adhere to the correspondence principle as, so long as it can be proved that the defendant intended to inflict grievous bodily harm, it is unnecessary to prove that he intended to kill.⁸⁵ Similarly, section 20 Offences Against the Person Act 1861 requires foresight of only some harm, not GBH.⁸⁶ This discrepancy arises because it is not desirable in all cases that the law should require an exact match between the harm caused and the harm foreseen. Horder points out that harm such as GBH is an ‘open textured harm’; there is a range of different degrees of injury that might be considered bodily harm. He adds:

“the overwhelming likelihood must be that in many cases D will have given no thought to the exact nature of the injury he may inflict.”⁸⁷

Accordingly, the required *mens rea* in murder and section 20 GBH do not represent a complete abandonment of the correspondence principle; clearly some link between the harm foreseen and harm caused is still necessary or else an individual could face a murder charge where he intended, for example, only very minor injury. Horder is therefore correct to assert that the correspondence principle is more accurately described as the ‘proximity principle’; the defendant is culpable where he foresaw harm that was at least proximate to the harm caused.⁸⁸ This therefore provides a proper rationalisation for the minor deviations seen in both murder and section 20; although the correspondence principle is not followed in these offences, the basis by which it measures the defendant’s

⁸⁵ *R v Vickers* [1952] 2 Q.B. 664 Herein referred to as GBH

⁸⁶ *Mowatt* [1968] 1 Q.B. 42; *Savage v Parmenter* [1992] 1 A.C. 699

⁸⁷ Horder above, fn.3 at 767. See also the empirical evidence of this claim in Clarkson, ‘Assaults: The Relationship between Seriousness, Criminalisation and Punishment’ [1994] Crim. L.R. 4.

⁸⁸ Horder *ibid* at 770

moral culpability remains, by and large, untouched. A defendant who foresees that he will cause a greater degree of harm to the victim will be considered more morally culpable than one who foresees a lesser degree of harm.

1.5.2: Moderate deviations

A greater threat to the dominance of subjectivism is posed by ‘moderate’ deviations from subjectivist principles. In these deviations, foresight of a possibility still forms the threshold for criminal culpability but either the correspondence principle or the subjective hierarchy have been abandoned. For example, in constructive manslaughter the defendant need only form the *mens rea* for his dangerous unlawful act⁸⁹ and so the harm foreseen by the defendant may be too remote from the severity of the charge, in terms of social stigma and harm caused, even for Horder’s revised proximity principle. Section 47 Offences Against the Person Act 1861 displays a similar deviation. The defendant need only form the *mens rea* of an assault, but is liable for a more serious offence where actual bodily harm⁹⁰ is caused.

Similarly, the *mens rea* for some offences does not follow the subjective hierarchy; an individual may be convicted for a crime of intent where he was merely reckless. An example of a reduced degree of foresight can be found in the law on complicity: as a secondary party to an offence, the defendant must have intended (in the action-intention sense) his own contribution to another party’s crime. It is also required that he knew or foresaw as a *mere possibility* the ‘essential matters’ of the primary party’s actions that made those actions an offence.⁹¹ If the defendant is found guilty as an accessory he is sentenced as though he were the principal offender. This requirement resembles recklessness, and so there is little conflict with subjectivist principles where the principal offence is one of basic intent. However, if the principal party has committed a specific intent offence, then the secondary party can be convicted for that offence even though he may have foreseen only the possibility that the offence would be committed. This deviation from the subjective hierarchy is therefore at its most obvious where the offence committed is murder. The secondary party does not need to intend that someone will be

⁸⁹ *Church* [1966] 1 Q.B. 59

⁹⁰ Herein ABH

⁹¹ *Powell & Daniels; English* [1999] 1 A.C. 1

killed, nor does he need to appreciate that it is virtually certain that murder will be committed. He needs to have foreseen merely the possibility that the principal will kill with the intention to kill or cause grievous bodily harm. The secondary party's *mens rea* sits too far down the subjective hierarchy to be reflective of the greater degree of culpability normally associated with murder and yet, if that *mens rea* can be proved, it will nonetheless be sufficient for a murder conviction and the mandatory life sentence that it carries.

These moderate deviations greatly distort subjectivist principles, and so their existence within an otherwise subjectivist approach to *mens rea* would need to be explained. That said, they do not represent a complete abandonment of subjectivism. They are in fact compromises; although the need to avoid certain subjectivist principles has been recognised, they still at least determine the defendant to be morally culpable according to what he foresaw. Therefore, although they still require some explanation,⁹² these are not the deviations that prove fatal to claims that the subjectivist approach to moral culpability can be applied consistently.

1.5.3: Greater Deviations

It is the final category of deviations from subjectivism that poses the greatest challenge to subjectivist principles. Unlike minor and moderate deviations, greater deviations display a complete abandonment of subjectivist principles and *mens rea* is instead formulated objectively. Because such deviations go so far beyond subjectivist principles, subjectivists must either disapprove of their existence, thus claiming that the current law is wrong, or they must find some way of rationalising these deviations as exceptions to subjectivist principles. In fact, it will be shown that neither option is viable.

There are two categories of greater deviations that must be kept in mind. The first will be called 'punishable negligence': this refers to offences where negligence is currently sufficient for a criminal conviction such as negligence whilst driving or gross negligence that causes death. The second category will be called 'culpable inadvertence': for example, currently the law will punish an individual who commits an offence whilst

⁹² The explanation for these moderate deviations will be considered alongside the problems caused by the latter category of greater deviations. Below, Ch. 2

voluntarily intoxicated despite the fact that he may not have foreseen that his actions would cause any harm.⁹³ The drunken offender is not punished for his negligence, but rather because his state of mind may be considered morally culpable even though he may not have been aware of the risks, or even aware of what he was doing. The relationship between these categories is somewhat complex, which is why I will discuss them separately. Some subjectivists appear to accept the existence of offences of punishable negligence and have cited an assortment of utilitarian arguments that attempt to justify those offences as exceptions to the subjectivist rule. These arguments suggest that the defendant's negligence is not morally blameworthy according to subjectivism, but it is punishable in order to achieve some greater good. By contrast, an acceptance that a state of mind is one of culpable inadvertence cannot allow a legitimate exception to subjectivist principles, because it necessitates the realisation that other factors are equally important in determining moral culpability. The following chapter will show how these different greater deviations can be combined to pose the same challenge to subjectivism. The utilitarian arguments that have been used to justify punishable negligence as an exception to subjectivist principles are insufficient. Instead, punishable negligence can be considered a form of culpable inadvertence.

⁹³ *DPP v Majewski* [1977] A.C. 433

Chapter 2: Why do we punish negligence?

2.1: Punishable negligence in the current law

This chapter is dedicated to justifying the punishment of negligence and the impact that has on any claim that subjectivist principles can be consistently applied. Accordingly, it is useful to highlight where punishable negligence can currently be found in the current criminal law of England and Wales and what degree of negligence is being punished. The offences identified in this section are those that can be considered ‘real’ (as opposed to regulatory) offences and so go beyond the traditional limits of the Welfare Principle.¹

2.1.1: Manslaughter

The law on manslaughter carries two deviations from subjectivist principles. As noted before,² there is a moderate deviation in that the defendant can be charged for constructive manslaughter where his subjective *mens rea* corresponds only to the dangerous and unlawful act that he was committing - and so he need not have foreseen death. However, the *mens rea* for manslaughter can also be satisfied by evidence of gross negligence, which is a greater deviation from subjectivist principles: the *mens rea* is satisfied by an objective standard. The defendant may be liable for manslaughter where he breaches his duty of care towards the victim and:

“the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.”³

This definition carries no requirement that the defendant actually foresaw that his actions were likely to cause any degree of harm at all. He is liable if the risk was an obvious one. As noted above,⁴ gross negligence represents the highest degree of objective liability and

¹ Above, Ch. 1.2.3

² Ch. 1.5.2

³ *Bateman* (1925) 19 Cr App R 8 per Lord Hewart CJ at 13

⁴ Ch. 1.2

so the test applied in manslaughter is useful as a point of comparison for the other objective standards that the law currently applies. However, despite this objectivity, gross negligence manslaughter appears to be well-established in the current criminal law. Even subjectivists such as Williams acknowledge that gross negligence manslaughter can exist as an exception to the normal requirements of *mens rea*.⁵

2.1.2: Dangerous driving

Driving offences are an area of law in which the use of an objective standard has long been accepted.⁶ However, recent changes to legislation have seen the penalties for these offences become much harsher,⁷ going beyond traditional bounds of the Welfare Principle and leaving open the question of whether individuals should face such serious penalties where they formed no subjective foresight or awareness of the harm they risked causing. Whilst the offence of dangerous driving is clearly an example of punishable negligence, there is a lack of clarity as to what degree of negligence the offence is designed to punish. It is likely that the offence operates a standard of gross negligence, although it is expressed rather differently from the test in manslaughter. There is no requirement that the defendant's negligence must have shown such disregard for the life and safety of others as to amount to a crime, but rather the defendant will be considered to have been driving dangerously where his driving fell far below the standard of the ordinary and competent driver and it was obvious that driving in that way would create a risk of injury to a person or serious damage to property.⁸ The claim that this is in fact a standard of gross negligence is initially supportable by the requirement that there must be an *obvious* risk that the defendant's driving would cause a danger of injury or damage.⁹

However, sentencing guidelines leave open the challenge that the degree of negligence required in dangerous driving is somehow lesser than that required in manslaughter; the latter carries a maximum sentence of life imprisonment, whereas causing death by dangerous driving carries a maximum penalty of 14 years.¹⁰ This

⁵ Williams, *Criminal Law, The General Part* (1953) p88

⁶ The reasons for this will be considered below. Ch. 2.2.4 and 2.4.1.

⁷ Road Safety Act 2006 s20(4) and Criminal Justice Act 2003 s285

⁸ s2A Road Traffic Act 1988 (as amended by s1 Road Traffic Act 1991.)

⁹ Consider the discussion on an 'objective hierarchy' below, at Ch. 5.1.3

¹⁰ s285(3) Criminal Justice Act 2003

problem had been considered in relation to the predecessor of dangerous driving, causing death by reckless driving, in the case of *Seymour*.¹¹ Lord Fraser rejected any suggestion that the two offences differed in name alone and consequently it was held that the difference between the two offences was that in manslaughter the risk of *death* occurring from the defendant's driving must be much higher. In other words, manslaughter would be charged where there was an obvious risk of death, and dangerous driving would be more appropriate where there was an obvious risk of lesser harm. Thus it seems that even an objectivist approach would adopt the correspondence principle.¹² On the other hand, it is difficult to see how a distinction based on correspondence can work in this context. It will often be very hard for the jury to look at a fatal accident and say with any certainty that the defendant's actions did not create an obvious risk of death. Almost any clumsiness behind the wheel creates a risk of a high degree of physical injury due to the dangerousness of motor vehicles, and with high levels of physical injury comes an inherent risk of death.¹³ The problem is that a distinction between the two offences not founded on the correspondence principle would suggest one based on the level of negligence required. Reckless driving, and by analogy dangerous driving, would therefore punish a degree of negligence less than that required for gross negligence manslaughter.

*Adomako*¹⁴ resolved this uncertainty somewhat by ruling that the statutory basis for the *Seymour* decision no longer applied. Regarding the new statutory driving offences, Lord Mackay expressed the opinion that the same principles of gross negligence should apply to all homicide cases regardless of how the death was caused. Otherwise he feared that, in a fatal boat collision, different standards would apply to those navigating the boat and those on lookout.¹⁵ It therefore appears that the standards of dangerous driving and gross negligence are virtually identical. Indeed, the lesser sentence and different terminology of the driving offence could be attributed to the jury's reluctance to convict drivers of manslaughter, rather than any difference in the degree of culpability displayed

¹¹ [1983] 2 A.C. 493

¹² For more discussion on the existence of an objective correspondence principle, see Ch. 5.1.2

¹³ Cunningham, 'The Reality of Vehicular Homicides: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving' [2001] Crim. L.R. 679 at 682; Spencer, 'Road Traffic Law: A Review of the North Report' [1988] Crim. L.R. 707 at 711

¹⁴ [1995] 1 A.C. 171

¹⁵ Lord Mackay in *Adomako* *ibid* at 187

by the respective defendants.¹⁶ It has been suggested that juries may be hesitant to convict for a driving error that most drivers, including the juror himself, might make.¹⁷ The juror may identify with the defendant, and think ‘there but for the grace of God go I.’¹⁸

2.1.3: Careless driving

If dangerous driving punishes gross negligence behind the wheel, then it follows that careless driving punishes negligence. Carelessness with respect to driving is defined in section 3ZA(2) Road Traffic Act 1988 which states that the defendant merely needs to have fallen below the ordinary standard. Sir Igor Judge backed this up in *Richardson*,¹⁹ stating that careless driving involves culpability at the lowest possible level. A driver is guilty when he makes any mistake; he does not therefore have to have fallen very far below the standard of the ordinary and competent driver. The provision is supplemented by further guidance in section 3ZA(4) that the defendant is careless only where other road users are inconvenienced by his driving. This definition differs from dangerous driving only with regard to how far below the ordinary standard the defendant must have fallen, apparently imposing a standard of mere negligence.

Since only minor fines may be imposed upon the careless driver, the punishment of mere negligence behind the wheel is justified by the Welfare Principle. However, since the Road Safety Act 2006 the careless driver who kills is now liable for a more serious offence that, despite using the same standard of carelessness, is punishable by up to five years imprisonment.²⁰ This latter offence clearly goes beyond the bounds of the Welfare Principle.

2.1.4: Sexual offences

Certain offences within the Sexual Offences Act 2003 can also be shown to be based on mere negligence. Prior to the Act, the *mens rea* of rape was intention or

¹⁶ Unless, of course, one subscribes to the purist subjectivist’s theory that all degrees of negligence display the same degree of moral culpability –that is; none – on the basis that the defendant did not foresee the risk.

¹⁷ Ferguson, ‘*Dangerous Driving*’ [2005] 155 N.L.J. 660 at 661

¹⁸ Samuels, ‘*Road Kill*’ [2007] 157 N.L.J. 924 at 925; Mackenna ‘*Causing Death by Dangerous Driving: A Suggestion*’ [1970] Crim. L.R. 67 at 67.

¹⁹ [2007] R.T.R. 29 at para 29

²⁰ Amended by Road Safety Act 2006 s20(4)

subjective recklessness²¹ as to the victim's lack of consent. Any claim by the defendant that he genuinely believed the victim consented could be a defence on the basis that the genuine belief was inconsistent with his subjectively assessed *mens rea*.²² By contrast, there can be little doubt that the *mens rea* for rape has become objective; according to section 1(1) which states:

- “(1) A person (A) commits an offence if–
- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.”

The sole reference to either of the subjectively recognised criteria of intention and recklessness in the 2003 Act is the requirement that the defendant intended the penetration. This is action-intention, but it is:

“by the very nature of the acts involved, unlikely that difficulties will occur in establishing that penetration was intentional.”²³

Accordingly, the use of action-intention alone does not render the *mens rea* in sexual offences as ‘subjective’. The effect is that all that is required is that A did not reasonably believe that B consented. There is no longer any requirement that B knew that A did not consent nor that A was aware of the risk of B's non-consent. The *mens rea* for these serious offences therefore appears to be one of mere negligence. Therefore, although expressed rather differently from the offences discussed above, negligence is a sufficient ground of criminal liability, where consent is an issue; the defendant is liable where he does not reasonably believe that the victim consented.²⁴

²¹ *Satnam and Kewell* [1984] 78 Cr App R 149

²² *DPP v Morgan* [1976] A.C. 182

²³ Clarkson and Keating, *Criminal Law Text and Materials* (6th ed 2007) p646

²⁴ Sexual Offences Act 2003 s1(2)

Unlike the driving offences, however, there is no immediately identifiable ordinary standard of conduct against which to measure the defendant's. Therefore, it is difficult to identify whether the Sexual Offences Act imposes a standard of gross or mere negligence. It is significant that there is no mention within the Act that the victim's non-consent needs to have been particularly obvious. If it did, it would suggest that liability is imposed where the defendant was grossly negligent. Since all that is required is that there were no reasonable grounds for the defendant's belief, it seems that, so long as a reasonable person would think the victim might not be consenting, the defendant can be liable. The standard being imposed can thus be seen to closely resemble mere negligence. The defendant is liable for *any* unreasonable beliefs, not just those that are exceptionally unreasonable. Simply lacking reasonable grounds for belief could result from any degree of inattention on the defendant's part. Certainly, during the House of Lords debates, there was little doubt that the new Sexual Offences Act imposed liability for mere negligence. This was one of the criticisms of the new Bill as it passed through Parliament.²⁵ Despite these criticisms, the relevant provisions were not changed and so it seems that the Act can still be said to impose a rape charge where the defendant was merely negligent as to the victim's non-consent.

2.2: Subjectivist justifications for punishable negligence

It is insufficient for anyone to claim merely that the law should replace these objective tests with subjective ones in order to achieve a consistently subjectivist approach. Given the favour for subjectivism observed in the current law and among leading academics,²⁶ it is prudent to consider why, for these offences, negligence is considered sufficient as a basis for criminal liability. As noted earlier,²⁷ subjectivists consider negligence to be punishable for utilitarian reasons. For example, despite the subjectivist perception that the actor's state of mind is not criminally culpable, negligence behind the wheel is punished because of the social importance of ensuring that drivers attain a predetermined standard of care. These arguments suggest that:

²⁵ Lord Lloyd HL Deb Volume No. 646 Part no. 73 31st March 2003 cols 1065-6

²⁶ Ch. 1.3

²⁷ Ch. 1.2.2: The 'Welfare Principle'.

“Liability for negligence is a way of sanctioning (punishing) common sense rules that in themselves have no legal force.”²⁸

Accordingly, there is no suggestion that the defendant is morally culpable. He is punished because the importance of attaining society’s collective goals may sometimes outweigh the Autonomy Principle. These utilitarian arguments thus pose no challenge to the moral importance placed upon foresight of the consequences by subjectivist principles in other, more serious, offences. However, it was seen that the Welfare Principle does not justify the imposition of serious criminal penalties. It allows the law to regulate certain conduct, but does not show that individuals who fall short of regulatory requirements can be considered morally culpable. Therefore, although utilitarian arguments have been made, they will be seen to offer insufficient explanation as to why we should punish merely negligent individuals for such serious crimes all the while negligence is not considered morally blameworthy. After all, manslaughter and rape both carry maximum life sentences, despite the lack of any requirement that the defendant foresaw the risk of death or non-consent. Therefore subjectivists, since they cannot hide behind these utilitarian arguments, must surely perceive the punishment of negligence in these offences to be wrong.

2.2.1: Protecting the public – a utilitarian argument?

A frequently cited objective of the law is that of ensuring the protection of the public from particular conduct: from criminals acting in gangs and, more recently, from individuals having sex without regard to the wishes of their partner. However, it will be established below that these particular arguments carry weight in this context because the normal subjective standard for mens rea is too difficult to prove. Therefore, the true issue is not whether the need for public protection has a greater moral claim than the autonomy principle, but whether subjectivism should give way to the pragmatic need for easier convictions. This public protection argument has been used to justify two deviations from subjectivism in the current law: the ‘moderate deviation’ in complicity and the ‘greater deviation’ of punishable negligence in many sexual offences.

²⁸ Williams, *Textbook of Criminal Law* (2nd ed. 1983) at p93

The law concerning sexual offences such as rape and sexual assault is always a contentious area of discussion and, so far as the aims of the law are concerned, the traditional subjectivist standpoint often comes into conflict with groups who wish to protect women's rights. Before the new Sexual Offences Act, Parliament had faced pressure from numerous groups, including Liberty, the Criminal Bar Association, the Metropolitan Police and the Rape Crisis Federation,²⁹ who wished to see a requirement of reasonableness imposed on the beliefs of defendants in rape trials.³⁰ Such was the force of these pressure groups, even the Law Commission backed away from making any firm decision on whether the test should be subjective or objective, stating that it was instead a matter of:

“jurisprudential principle applied to a highly contentious area of social relations and political debate.”³¹

Because of this, much emphasis was placed on the outcomes the law ought to seek during the passage of the Sexual Offences Bill through Parliament. The low conviction rates for sexual offences were identified as a problem that the law must deal with. These rates were, in turn, explicitly attributed to the old laws regarding belief in consent,³² in part because of fears that a test based on honest belief would deter the victim from reporting the crime and bringing the matter into court.³³ Although this view was not unanimously accepted by Parliament,³⁴ it was the majority's opinion that an objective standard must be used in order to ensure higher conviction rates. Thus, the argument appears to be that we ought to punish the merely negligent rapist, not because he is considered morally

²⁹ The *Sexual Offences Bill* [HL] Bill 128 2002-03 Research Paper 03/62 10 July 2003 p18

³⁰ The reasons for this will be considered below.

³¹ Law Commission: *Consent in Sex Offences – A Report to the Home Office Sex Offences Review* (2000) Para 7.29, reiterated at para 7.40

³² Baroness Noakes HL Deb Volume No. 644 Part no. 45 13th February 2003 col 777

³³ Baroness Gould in HL Deb Volume No. 644 Part no. 45 13th February 2003 col 784 and Home Office, *Protecting the Public* (2002) cm.5668 at para 32; Ashworth and Temkin in *Rape, Sexual Assault and the Problems of Consent* [2004] Crim. L.R. 328

³⁴ Lord Campbell in HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1061; Baroness Mallalieu at col 1077

culpable, but rather to ensure the protection of victims against those who do not take care to ascertain whether their partner consents.

These arguments are noticeably similar to those in favour of the moderate deviation relating to complicity in crime. Lord Steyn in the joint appeals *R v Powell; R v English*³⁵ stated that:

“A prime function of [The Criminal Justice] system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.”³⁶

Similarly, Lord Hutton noted that the rules of the common law were not based on logic alone, but that ‘practical concerns’ must also play a part. Subjective principle, as a result, yielded to:

“the need to give effective protection to the public against criminals operating in gangs.”³⁷

It is therefore the importance of securing convictions and so protecting society against the ‘menace’ of criminal gangs that justifies the secondary party’s conviction for murder even though he had a lower state of awareness than would normally be required of a principal offender. Even subjectivist commentators have favoured this retreat from subjectivist principles by virtue of the need to protect the public from the threat of criminal gangs.³⁸

³⁵ [1997] 4 All E.R. 545

³⁶ *ibid* per Lord Steyn at 551

³⁷ *ibid* per Lord Hutton at 561

³⁸ Simester and Sullivan, *Criminal Law Theory and Doctrine* (2nd ed. 2004) at pp225-6; Smith, ‘*Commentary on R v Powell, R v English.*’ [1998] Crim. L.R. 48

2.2.2: *The real issue: a subjective test is too difficult to prove*

However, these utilitarian arguments are deceptive. As the need to protect the public from criminal harm is an issue that pervades the whole of the criminal law, subjectivists surely cannot regard these arguments alone as a justification for any departure from subjectivist principles. That would inevitably suggest that those principles themselves were inconsistent with the targets and objectives of the law and so would be a crushing blow to subjectivism. The issue here is in fact not a utilitarian problem at all, but rather an issue of pragmatism. The fact that these arguments question the general suitability of subjectivist principles has gone unnoticed by the appellate courts and Parliament, and they do not show any intention that the law should distance itself from those principles in a wider context. It seems that instead the normal subjective standard has been put aside where, by being too difficult to prove, it risks hindering successful convictions. Indeed, it was expressly claimed on behalf of the Government, when creating the new Sexual Offences Act, that the *Morgan*³⁹ guidelines are problematic because an honest belief in consent is a very easy argument to raise, but it is hard to disprove.⁴⁰

It should be noted that it is not universally accepted that a *Morgan* defence will be very difficult to disprove. Lord Lloyd pointed out that we must not discount the ability of the jury to tell when the defendant is lying and presenting a bogus defence.⁴¹ It could also be argued that the decision in *Morgan* left unaltered the defendant's evidential burden of proof, and thus it will be up to him to show on what facts his genuine belief was based.⁴² However, it will not always be the case that the defendant is lying about what his beliefs were. The defendant may have had a reprehensible attitude towards women that led to his forming a genuine but unreasonable belief. Temkin gives some hypothetical situations in which such a claim might be accepted despite the unreasonableness of the defendant's belief: where the defendant has been told that the victim's resistance is play-acting as was

³⁹ Above, fn.22

⁴⁰ Lord Falconer in HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1089

⁴¹ HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1066. Cowley, 'The Retreat From *Morgan*.' [1982] Crim. L.R. 198 at 207

⁴² Above, fn.22 per Lord Simon at 217-8

the case in *Morgan*;⁴³ or where the victim is easily overpowered, so the defendant assumes it is only a 'token resistance' and that all women act in this way; or where the defendant's conduct terrifies the victim so that she does not register her non-consent, such as where the defendant has broken into the victim's house and she is apparently submissive.⁴⁴ Another common belief might be that women often say 'no' when they mean 'yes.'⁴⁵ There had been focus in Parliament as to how a defendant's prejudiced perception of women might avail him under *Morgan* as it might evidence his genuine belief that the victim had consented. Mr Hersford cited an allegedly real case study of a girl followed home by a man after a night out.⁴⁶ the defendant claimed that he believed that the victim had agreed to have sex with him because he looked Italian and that amongst his friends it was 'well-known' that 'all girls said "yes" to a man who looked Italian'. His excuse was clearly unreasonable; it was even laughed at by the MPs listening to Hersford's account.⁴⁷ Nonetheless it was feared that the jury would be unable to dismiss all doubt that this was not an honestly held belief,⁴⁸ presumably because the defendant could satisfy his evidential burden by claiming his belief was based on his own, prejudiced, beliefs. It was therefore feared that a conviction would be difficult to secure in the face of such a claim as it would be difficult, if not impossible, to prove subjective *mens rea*. On the other hand, a test involving reasonableness would allow for a challenge against prejudiced assumptions, making convictions easier to obtain.

Whatever examples are used, the ultimate problem is that, if genuine belief is involved, then rape trials will often involve a conflict of evidence between the defendant and the complainant. In many of these cases, the only evidence available is that of the defendant's word against the complainant's, and so the defendant's claim that he held a

⁴³ Although this may not always be an unreasonable belief, the resistance given by the victim in *Morgan* suggested an unreasonable belief in this case.

⁴⁴ Temkin, '*Rape and The Legal Process*.' (2nd ed 2002) p122 See also her criticism of *Morgan* in Temkin, '*Towards a Modern Law of Rape*' [1982] 45(4) M.L.R. 399

⁴⁵ HL Deb Volume No. 644 Part no. 45 13th February 2003 col 784

⁴⁶ Mr Hersford HC Deb Volume No. 409 Part no. 429 15th July 2003 col 232 The case study was included in a briefing given to MPs by the Rape Crisis Federation.

⁴⁷ Mr Hersford *ibid*. The Home Office had also expressed awareness of the need to undermine such arguments put forward by defendants Home Office, '*Setting the Boundaries: Reforming the Law on Sexual Offences*' (2000) paras 2.13.11

⁴⁸ Home Office *ibid* paras 2.13.11

genuine belief may be naturally hard to disprove.⁴⁹ A requirement for a reasonable belief would therefore provide better protection for victims because the absence of reasonable grounds for belief would not be so difficult to prove beyond reasonable doubt. It would also clearly prevent the defendant's prejudices from having an exculpatory effect.

Similar difficulties of proof can also be found lurking behind the policy arguments in the case of *Powell*. Lord Steyn had expressed concern that it might often be too difficult to ever prove that a secondary party had the required malice aforethought in murder cases, as he might not even have been present at the time of the murder. Lord Steyn thus feared that requiring intention would undermine the utility of accessory cases;⁵⁰ if an accessory can never be proved to have intended, or have appreciated the virtual certainty, that the principal party would kill or cause grievous bodily harm, there would be no possible way of convicting anyone as an accessory to murder. The law would be failing in its 'prime function'⁵¹ of dealing effectively with the threat posed by joint criminal enterprises.

2.2.3: *Should pragmatism defeat subjectivism?*

These arguments attempt to justify an objective assessment of an individual on the basis that it is unacceptably difficult to prove mens rea defined according to subjectivist principles. This is not a rational explanation for the greater deviations from subjectivism. Indeed, it would be alarming to any subjectivist legal commentator to suggest that such widely accepted principles should be relaxed or abandoned and replaced with an objective standard merely because they are sometimes difficult to prove. We would effectively be saying that we should convict the defendant regardless of whether or not he was morally culpable in order to spare the prosecution the problem of proving that he was.

The obviousness of the flaws in these arguments is evidenced by the reluctance of the House of Lords to deviate too far from subjectivist principles when creating our current law on complicity; their reluctance is betrayed by somewhat confusing comments

⁴⁹ Presuming he finds some way of discharging his evidential burden of proof.

⁵⁰ *R v Powell; R v English* above, fn.35 per Lord Steyn at 551

⁵¹ *Ibid* per Lord Steyn at 551

in *Powell; English*. Lord Hutton held that the act that actually constituted the principal offence must, in order for the defendant to be liable as an accessory, be of the type that he foresaw. So, if he foresaw death or really serious harm being caused in some other manner, then he would not be liable for that death.⁵² An example is contained in the facts of *English* itself: the defendants had been beating the victim with wooden posts when one of the attackers took out a knife and stabbed him. The act of stabbing was, in Lord Hutton's view, fundamentally different from a savage beating and so the other defendants were not a party to the crime on the basis that they had foreseen the possibility of death caused by the beating only. Thus, a defendant who foresaw the possibility of death caused in a manner entirely different from that actually employed is thought to be too far removed from the principal's activities for him to be considered a party to them. By contrast, if the other attackers in *English's* case had known about the knife, they could have been found to have foreseen the risk that the victim would be stabbed and so would have been guilty as accessories. The dividing line is very thin between the two – in both instances the defendant has foreseen a possibility of death caused with a weapon, and yet we convict in one case and acquit in the other. So why, after all of the rhetoric about protecting the public from criminal gangs, did the House of Lords come to this conclusion?

The answer must be a reluctance to deviate too far from subjectivity simply because the subjective standard makes convictions hard to obtain. The *English* judgment was an attempt to ensure that an individual displays a very high degree of moral culpability according to subjectivist principles before he can be convicted as a secondary party to murder. We saw above that subjectivity determines the defendant's degree of moral culpability according to what result he foresaw,⁵³ and how likely he foresaw it as being.⁵⁴ We can assess the moral culpability of the defendant involved in a joint enterprise according to these principles: he has intended his own part in the criminal enterprise and has foreseen the possibility that someone might be killed. The problem remains that foresight of a possibility results in a conviction for a crime of intent, but the *English*

⁵² *R v Powell; R v English* *ibid* were two individual cases heard jointly by the House of Lords. This aspect of the judgment, which was not relevant to *Powell's* appeal, will herein be referred to as the *English* judgment.

⁵³ The correspondence principle or, perhaps more accurately, Horder's 'proximity principle'

⁵⁴ The subjectivist hierarchy

judgment offers a concession to subjectivist principles by requiring some recognition of the correspondence principle, thus ensuring that the secondary party displayed a high degree of moral culpability according to those principles. He must have foreseen the death in the precise manner in which it was caused. He cannot be convicted of murder if he foresaw only grievous bodily harm, nor where he foresaw death caused by some other means than that carried out.⁵⁵ In short, the deviation from subjectivist principles in the law on complicity is not absolute. It is for this reason that the current law on complicity was noted above to be only a moderate deviation from subjectivist principles.⁵⁶

This is in sharp contrast to the punishment of negligence in rape, which was seen to be a greater deviation.⁵⁷ In both rape and complicity, we may attempt to justify a deviation according to the aims and objectives of the law, but the objective test in rape has placed much more importance upon such arguments than their Lordships were willing to in *Powell*. Indeed, the Law Commission, having regard to the arguments about protecting women from men who give no consideration to the question of whether their partner consents, warned that:

“If there is to be a departure from the general rule that liability for a serious crime should be based on intention or recklessness but not (gross) negligence, then the burden should be on those seeking to depart from that rule to show that the application of the standard rule is failing to deliver the convictions of those who ought to be convicted. There is no such evidence.”⁵⁸

2.2.4: *Can we protect the public only from dangerous activities?*

Subjectivists therefore cannot accommodate objective tests on the ground of public protection. However, there is a legitimate, more specific, utilitarian argument that public protection requires that those who engage in dangerous activities, such as driving, observe a proper degree of care. Attempting to justify the use of an objective test of *mens*

⁵⁵ There is some evidence in the common law that such an individual may nonetheless be convicted of manslaughter. *Gilmour* (2000) 2 Cr.App.R. 407 and *Day* [2001] Crim. L.R. 984. However, there is no deviation from subjectivist principles in this event as he foresees harm proximate to that caused, and he sits high enough on the subjective hierarchy for a manslaughter charge.

⁵⁶ Above, Ch. 1.5.2

⁵⁷ Above, Ch. 2.1.4

⁵⁸ Law Commission above, fn.31 at para 7.31

rea in this way would be by no means unprecedented. It can be observed that many jurisdictions - even those, such as English and Welsh law, that normally apply a subjective test as a minimum standard of *mens rea* - will impose an objective standard where the defendant causes or risks harm whilst carrying out a dangerous activity. An example is third degree assault⁵⁹ in New York. Normally the required *mens rea* is at least recklessness⁶⁰, but criminal negligence⁶¹ will suffice where the injury was caused by ‘a deadly weapon or dangerous instrument.’⁶² This is an example of the punishment of gross or criminal negligence where the defendant was engaged in a dangerous or potentially dangerous activity. However, there are also examples of mere negligence being applied as sufficient *mens rea* for the same reason. For example, in the South Carolina case of *State v Gilliam*,⁶³ there was insufficient evidence to show that the defendant’s careless handling of firearms was grossly negligent, but the court ruled that it would interpret the term ‘negligent’ as a failure to use ordinary care. The United States Supreme Court has also, on occasion, allowed for a lesser standard of negligence than gross negligence to be used:

“where one deals with others and his mere negligence may be dangerous to them.”⁶⁴

This explanation imports aspects of the Welfare Principle noted above:⁶⁵ it is in the interest of society that the law ensures that people do not, for example, drive dangerously or carelessly and so the punishment of negligence ensures vigilance during those particular activities. Ashworth recognises that where an individual is engaged in an activity that is particularly dangerous, such as in driving offences, an objective standard is legitimately imposed on citizens because of the potentially disastrous effect their

⁵⁹ This requires that an injury was caused. New York Penal Code § 120.00

⁶⁰ Which carries a subjective definition; New York Penal Code § 15.05(3)

⁶¹ ‘Criminal negligence carries a similar definition to our gross negligence; it is where the defendant “fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists.” New York Penal Code § 15.05(4)

⁶² New York Penal Code § 120.00(3)

⁶³ 45 SE 6 (SC 1903)

⁶⁴ *United States v Balint* 258 US 250 at 252 (1922)

⁶⁵ Ch. 1.2.2

conduct may have on others.⁶⁶ The Home Office, when creating the offence of causing death by careless driving, explained their decision on the basis that bad driving at any level involves taking risks, and it is these risks that are punished.⁶⁷ As noted before, almost any clumsiness behind the wheel creates a risk of physical injury due to the innate dangerousness of motor vehicles.⁶⁸ By punishing negligent drivers, others are thus made aware of the need to take care and so the law protects the public from the consequences of bad driving.⁶⁹ This utilitarian need for deterrence is met by visiting penal sanctions on those who fall short of that standard of care, even if they do not display the state of mind that the law normally requires to establish that they are criminally culpable for the harm they cause. It is for this reason that a departure from the usual principles of liability is acceptable.⁷⁰ However, although this argument might initially appear to suggest that objective standards in driving offences can exist as a legitimate exception to subjectivist principles by virtue of the Welfare Principle, there are two problems:

Firstly, if this argument is to work it would have to be shown that a law punishing negligent drivers, for example, is actually capable of protecting society from negligent drivers and thus that there would be a point to a significant deviation from the normal *mens rea* requirements. Such a law would need to deter people from being negligent at the wheel and so encourage them to take care. The problem with such a statement is that, to a subjectivist, the theory of deterrence cannot be applied to negligent conduct. How can it be said that the imposition of liability based on negligence would have a deterrent effect if the defendant was unaware of the possible consequences of his actions and did not choose to perform those actions negligently? This problem alone may not be insurmountable. If we punish negligence only in relation to specific activities, it can be argued that the threat of punishment itself will alert people to the need to take extra care

⁶⁶ Ashworth, *Principles of Criminal Law* (5th ed. 2006) chapter 3.6

⁶⁷ Home Office Consultation Paper, 'Review of Road Traffic Offences Involving Bad Driving' (2005) para 3.24

⁶⁸ Cunningham above fn.13 at 682; Spencer above fn.13 at 711

⁶⁹ Garfield, 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) Vol. 65 Tennessee Law Review 875 at 887 and 914; Leigh, 'Liability for Inadvertence: A Lordly Legacy?' [1995] 58 M.L.R. 457 at 467 and Williams above, fn.28 at p306

⁷⁰ Ashworth above fn.66 at chapter 3.6(p) With which the Law Commission agrees: 'Legislating the Criminal Code: Involuntary Manslaughter' (1996) Law Com No. 237 paras 4.16-7

when embarking on those activities and thus a deterrent effect is achieved.⁷¹ By contrast, if negligence were to be punishable regardless of the activity performed, there may be nothing at the time to alert the actor that extra precautions were required. Using driving as an example: a driver knows that he may be subject to social and criminal blame if he exhibits carelessness because of the high risk of harm that might arise. This knowledge encourages him to take extra care whilst driving. The same is true wherever such a law is applied. For example, it has been said that a result of the judgment in the South Carolina case of *State v Gilliam*⁷² was that the residents of the State were alerted to the need to exercise more care when handling firearms on pain of criminal conviction.⁷³ However, this means that no justification remains for gross negligence manslaughter. The defendant is not alerted to the need to take care during the specific activity he is performing, as manslaughter is simply not restricted in this way.

A second and more significant problem is that the conviction and punishment of the dangerous driver conflicts with the subjectivist notion that an individual who does not foresee any risk displays little to no moral culpability. We may want the driver to take more care, but his failure to take care does not render him morally culpable according to subjectivist principles, unless it can be proved that he actually foresaw the risk of harm occurring. Although the Welfare Principle may justify the criminalisation of negligent driving in the interests of public safety, it was observed earlier that the principle is more commonly used in relation to minor ‘regulatory’ offences rather than offences of a ‘truly criminal’ nature.⁷⁴ The current penalties for driving offences, with the exception of non-fatal careless driving, surely go beyond the former category. Additionally, driving offences, especially the fatal ones, carry a social stigma that surely designates them as offences of a ‘truly criminal’ nature. Are subjectivists really happy that negligent individuals can face such serious convictions and heavy penalties by virtue of utilitarian

⁷¹ Such an argument has long been recognised: Holmes JR; *The Common Law* (1923); Garfield above, fn.69 at 887 and 914

⁷² Above, fn.63; the case involved the negligent use of a firearm.

⁷³ Garfield above, fn.69 at 896-7

⁷⁴ Above, Ch. 1.2.3

arguments? Do we need heavy penalties merely to deter the defendant from driving badly?⁷⁵

2.3: Inadvertence as a state of mind

The above utilitarian arguments cannot justify punishable negligence as a logical exception to subjectivist principles. A conflict exists between the public interest and the subjectivist's perception that inadvertent negligence is not sufficiently morally blameworthy for serious criminal offences. A law that adopted a consistently subjectivist approach would therefore have to favour subjectivist principles in this conflict, meaning that all instances of punishable negligence would be illegitimate. However, this does not necessarily mean that criminal punishment for mere negligence is completely unjustified. From a non-subjectivist perspective, it can be established that we punish negligence, not solely in the pursuance of a 'greater good', but also because negligence can itself be much more morally blameworthy than subjectivists are prepared to admit. However, such an argument undermines the very basis by which subjectivist principles assess moral culpability.

As noted before, the purist subjectivist's view is that an objective standard cannot show *mens rea* because it is concerned solely with the state of mind of the hypothetical person and not with the state of mind of the defendant himself.⁷⁶ This is why subjectivists can use only utilitarian arguments if they are to explain existing offences that punish negligence. However, to say that objective standards are unconcerned with the defendant's state of mind is tantamount to saying that negligence is a form of strict liability, as was noted above.⁷⁷ From a broader perspective, this can be seen to be untrue. In fact, a clear distinction between these terms can be found in the reference to the standard of the reasonable person in an objective test: either asking what he would have foreseen or what he would have done in that situation. It would be of no help to the defendant in an offence of absolute liability to claim that the outcome was not reasonably foreseeable. The defendant can be guilty simply by virtue of the prohibited state of affairs

⁷⁵ However, Williams (above, fn.28 at p307) claims virtually no knowledge of whether the social cost of punishing negligence so harshly is worthwhile in terms of accident prevention.

⁷⁶ Above, Ch. 1.2.1

⁷⁷ Ch. 1.2.1

having occurred. By contrast, a typical objective standard does not punish the defendant solely because of what has occurred, but rather it punishes him for his *inadvertence* to the risk of that outcome.

This means that objective standards, unlike strict liability, are based on the defendant's inadvertence to the risk rather than the mere fact that the harm has occurred. To some subjectivists, this is of no consequence because inadvertence is not thought to be a state of mind. For example, Williams condemns the inclusion of a failure to perceive a risk as a state of mind in *Caldwell*⁷⁸ as 'regrettable wordplay', on the basis that a failure to think, in an analogy with unconsciousness, could be described as an absence of a state of mind only, and to call it otherwise would be an 'abuse of language'.⁷⁹ Such views as Professor Williams's appear to be rooted in the idea that an objective standard such as negligence is based on the *absence* of a state of mind, i.e. the defendant's mind was 'blank'.⁸⁰ A state of mind, from this subjectivist point of view, is conceived in terms of positive thoughts that go through some level of the defendant's mind, and therefore cannot extend to inadvertence or unconsciousness. However, if we are to become concerned with these semantic arguments, then we would surely say that not even unconsciousness can be truly excluded as a 'state of mind', since unconsciousness can legitimately be described as a state that the mind is in. The same applies to inadvertence. Therefore, negligence is a legitimate form of *mens rea* because it directs us towards the sort of inadvertence that we consider to be culpable. The term 'negligent' connotes a failure to do what is required and is not just a descriptive psychological expression such as 'his mind was blank'.⁸¹ This is something that has been recognised by the courts themselves. Lord Diplock stated that:

“Recklessness as a word by itself covers a whole range of states of mind from failing to give any thought at all... to recognising the existence of the risk but nevertheless deciding to ignore it.”⁸²

⁷⁸ [1982] A.C. 341

⁷⁹ Williams, 'Recklessness Redefined' [1981] C.L.J. 252 at 256

⁸⁰ Turner, 'The Mental Element in Crimes at Common Law' in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (MacMillan 1945) 195-261 at 211.

⁸¹ Hart, 'Punishment and Responsibility: Essays in the Philosophy of Law' (Clarendon Press 1970) at 148

⁸² *Caldwell* above, fn.78 per Lord Diplock p351.

From this it is clear that Lord Diplock views failure to give thought to a matter as a state of mind. In the case of *Reid*,⁸³ Lord Keith expressed a comparable view:

“Absence of something from a person’s mind is as much a part of his state of mind as its presence. Inadvertence to a risk is no less a state of mind than is disregard of a recognised risk.”

We can see, far from being equal to strict liability, an objective standard is indeed based on the defendant’s state of mind; it punishes his failure to avert a risk that the reasonable person would have recognised. This is not to say that we should always punish the defendant who involuntarily causes harm. We absolve the involuntary actor because their state of mind cannot be considered morally culpable. The true issue is thus not a semantic point as to what is or is not a state of mind; it is whether a given state of mind can be considered culpable.

2.4: Why punishable negligence is ‘culpable inadvertence’

Traditionally, mere negligence is considered to display only a very small degree of moral culpability, if any at all, on the basis that it identifies nothing more than ‘a mere error in skill or judgement, and so covers the sort of minor deficiencies or moral lapses that the criminal law should not be concerned with’.⁸⁴ A fair assessment of this and similar arguments could be that the reluctance to allow negligence to be sufficient *mens rea* in most circumstances is born of the common perception that a negligent actor, having made a mistake that many other people might have also made, is not considered sufficiently blameworthy for a criminal conviction. However, the punishment of negligence can be justified if there is some reason for finding that the defendant’s negligence can be considered morally culpable. It should be noted that the following explanations presuppose, as so many subjectivists do, that gross negligence cannot display as great a degree of moral culpability as conscious risk-taking in relation to any

⁸³ *Reid* [1992] 95 Cr.App.R 391

⁸⁴ Simons, ‘*Culpability and Retributive Theory: The Problem of Criminal Negligence*,’ (1994) 5 J. Contemp. L. Issues 365 at 386

other offences. Therefore I will be considering only those offences in which a deviation from subjectivist principles can currently be found. It is not necessary at this stage to consider how an objective standard defines culpability. The point here is, rather, that negligence in certain situations can clearly be condemned even though the defendant acted without actual foresight of the risks.

2.4.1: Dangerous Activities

A key element in this is the dangerousness of the activity. It seems relatively uncontroversial to say that blame can legitimately be attributed to an individual who drives dangerously.⁸⁵ Lloyd-Bostock has shown that blame is more readily attributed where serious harm is caused or an activity is dangerous in the circumstances. In psychological terms, blame depends on the subject's ability to control events; the attribution of blame can sometimes be greatly influenced by the need to avoid certain circumstances or severe consequences.⁸⁶ However, readiness to place blame upon an individual who falls far below the standard expected of someone performing a particular dangerous activity does not pinpoint the exact basis for such blame.

According to an American commentator, Garfield, mere negligence can display a sufficient degree of blameworthiness provided it involves something more than a mere case of bad judgement. She gives examples such as carelessness whilst driving and a person who disabled a smoke alarm that another was relying on.⁸⁷ These examples carry the common theme that the defendant was involved in an activity which, whilst lawful if carried out competently, involved an innate danger should the proper precautions not be observed. As a result, there seems to be room for the view that negligence in certain dangerous situations may render the defendant more morally blameworthy than negligence in less perilous contexts because the defendant was involved in an activity *in which he is expected to have taken more care*. Garfield explicitly recognises and endorses this possibility arguing that, because of the increased number of technology-related accidents, there may be some circumstances where the defendant's mere negligence can be considered sufficient to demand criminal punishment. If mere negligence can be

⁸⁵ i.e. well below the standard of the ordinary and prudent driver.

⁸⁶ Lloyd-Bostock 'The Ordinary Man and the Psychology of Attributing Causes and Responsibility' [1979] 42 M.L.R. 143

⁸⁷ Garfield above, fn.69 at 876-7

considered morally culpable in this context, then it obviously follows that gross negligence can also be considered culpable on the same basis.

The essence of this suggestion is therefore that degrees of negligence may be considered sufficiently morally blameworthy for serious criminal offences, and thus punishable in the context of driving, because *any* degree of negligence in this context is very likely to lead to harm. Put another way, the defendant's inattention as to his conduct or the possible consequences of his actions made those actions very dangerous, and so we are willing to condemn him when he failed to take sufficient care. Similarly, if the defendant has an incapacity which renders him unable to act safely in such a dangerous situation, then he should not have got himself into that situation in the first place. The focus is not on what the defendant foresaw or was capable of doing, but rather on the minimum level of care that he ought to have been displaying. This analysis implies that the imposition of objective liability in driving offences goes beyond mere utilitarianism. The use of an objective standard in driving offences can be justified not just in order to protect the public from dangerous drivers, but also because those people who drive negligently can be considered morally culpable for their failure to take proper care. It explains why an individual can be punished so harshly for a risk that he did not necessarily foresee. However, this basis for moral blame goes beyond the criteria for culpability identified by subjectivists, thus creating a conflict with subjectivist principles.

2.4.2: The moral significance of the harm caused

The argument employed above would suggest that inadvertence can be morally and legally condemned. However, the defendant's moral culpability remains the same regardless of what harm is actually caused during the negligently performed dangerous activity. Thus, it does not follow that an aggravated offence ought to be charged where death is caused by dangerous or careless driving. Similarly, it offers no explanation for the punishment of gross negligence in manslaughter, which covers a much wider range of activities. It is submitted that these offences exist because we place moral importance also upon the consequences that the defendant caused to occur. Arguably, carelessness during a dangerous activity displays an even greater degree of moral culpability where a serious consequence ensues. The fact that a serious consequence has been caused allows

moral blame to be placed on negligence even where the defendant was not taking part in a dangerous activity. This certainly appears to be the reason for the greatly aggravated charges available in driving offences where death was caused. Since section 1 Road Traffic Act 1988 and section 20 of the Road Safety Act 2006 (adding section 2B to the 1988 Act), it is now true of both dangerous and careless driving that if death is caused, the severity of the offences charged is greatly aggravated. Careless driving jumps from comparatively minor level 5 fines to a maximum 5⁸⁸ years imprisonment where death occurs and dangerous driving leaps from 2 years to 14⁸⁹ years maximum imprisonment.⁹⁰ However, the respective definitions of dangerousness and carelessness remain the same as for the lesser non-fatal offences.⁹¹ As there is no extra *mens rea* requirement, the only distinction is the fact that a death was caused by the driver's negligent conduct. Similarly, there appears to be no better explanation for the use of gross negligence in manslaughter.

The reason we may feel the need to punish such an individual is that killing another human being may be regarded as the very worst possible outcome of one's actions, and so where a death has occurred because of an individual's grossly negligent conduct, it will greatly influence our moral perception of that conduct. Kay LJ rather emotively stated in *Wacker*:

“The concept that one person could be responsible for the death of another in circumstances such as these without the criminal law being able to hold him to account for that death even if he had shown not the slightest regard for the welfare and life of the other is one that would be unacceptable in civilised society.”⁹²

Indeed, it is relatively certain that, in the eyes of the general public, the fact that death occurred can greatly change our moral perception of the killer provided he was in some way at fault for that death. In the face of increasing media attention on the sentencing of

⁸⁸ Amended by Road Safety Act 2006 s20(4)

⁸⁹ Criminal Justice Act 2003 s285

⁹⁰ All sentencing can be found in Schedule 2 Part 1 Road Traffic Offenders Act 1988

⁹¹ ss2A and 3ZA Road Traffic Act 1988

⁹² [2003] Q.B. 1207 at 1216

drivers who kill,⁹³ the AA found in their survey that the majority of respondents (81%) thought that the law was weak on drivers who kill.⁹⁴ At that time, unless the defendant's driving could be proved to have been dangerous,⁹⁵ the available sentences were unable to reflect the fact that the defendant had caused a death. In such cases, Samuels contends that bereaved families are 'outraged' by the low penalties imposed upon the defendant in the light of the terrible thing that he has done.⁹⁶ Indeed, it was the Home Office's response to public opinion⁹⁷ that ultimately led to provisions in the Road Safety Act 2006 that increased the maximum penalty for causing death by dangerous driving and also created the offence of causing death by careless driving. However, we cannot claim that the harm caused by a negligent actor is morally significant simply because that is what the general public thinks. A subjectivist would easily counter any such argument by pointing out that this sort of public opinion - that the law should reflect the tragic outcome of the defendant's bad driving - has come from a lack of understanding of the general principles of criminal liability.⁹⁸ After all, we cannot label an individual as culpable merely because of the consequences. It is important that the defendant remains morally at fault in some way for that death. Accordingly, it must be established that there is some principled basis for saying that an individual's negligence can be considered to display a great degree of moral culpability because of the harm that *negligence* caused.

It is not unprecedented that the fact that the defendant killed the victim might have an influence upon the law's perception of his culpability, even within the traditional boundaries of subjectivist logic. For example, the *mens rea* required for both murder and section 18 Offences Against the Person Act 1861 is the same: intention to cause grievous bodily harm. Yet the case is regarded as far more serious where death actually occurred despite the defendant's state of mind remaining unchanged. Charged with murder, the defendant is faced with mandatory life imprisonment on conviction.⁹⁹ Nevertheless, this

⁹³ Ferguson above, fn.17 at 661 who comments on the Home Office Consultation Paper above, fn.67 at para 2.20

⁹⁴ Cited by the Home Office, Consultation Paper, *ibid* at para 2.20

⁹⁵ i.e. grossly negligent

⁹⁶ Samuels above, fn.18 at 925

⁹⁷ Home Office Consultation Paper above fn.67

⁹⁸ Firth, 'Crime of Consequences?' [2006] 156 N.L.J. 1876 at 1876

⁹⁹ s1(1) Murder (Abolition of Death Penalty) Act 1965

example does not deviate far from subjectivist principles in that the defendant has still displayed a very high degree of moral culpability. Therefore, it does not necessarily follow that the fact death was caused by the defendant's gross negligence makes him so morally culpable as to deserve punishment for manslaughter or causing death by dangerous driving. To a subjectivist, holding the defendant to be morally culpable for the consequences of his grossly negligent conduct is unfair because an individual who was unaware of the potential outcomes of his actions is considered to have been incapable of actually avoiding those outcomes. To punish that defendant because a death was caused is to punish him solely on the basis of his 'bad luck', and so the law would be making no distinction between the moral culpability of different actors. Therefore, it would be possible that a defendant who causes serious injury, although his state of mind may be more morally culpable than one who kills, would face conviction for the lesser offence.¹⁰⁰ Indeed, the correspondence principle has been interpreted as protecting an individual from the consequences of his conduct that were beyond his control.¹⁰¹

On the other hand, the claim that the grossly negligent individual who kills is merely morally unlucky can be shown to be a dubious one. The concept of luck itself has moral content, as the following analysis shows: murder can be satisfied by intention to cause grievous bodily harm, and manslaughter can also be proved where the defendant, during the commission of any dangerous criminal offence, causes death.¹⁰² In neither of these examples does the defendant need to have intended, or even to have foreseen, that death would occur. However, given the defendant's intention to cause some harm, he is not 'morally unlucky' if his victim then dies as a result of the injuries he caused; we hold no sympathy whatsoever for the individual who intends only grievous bodily harm but in fact kills his victim. Horder's analysis of luck¹⁰³ demonstrates that 'pure' luck, good or bad, can exist only where the individual has done nothing to 'deserve' that luck. A man who intended to cause grievous bodily harm to another can be considered to have 'deserved' his luck should the victim die. The same can be applied to constructive

¹⁰⁰ MacKenna above fn.18 at 67; Mr Strauss in Hansard HC vol 553 col 594; Ashworth, 'Taking the Consequences' in Shute *et al* (eds) 'Action and Value in the Criminal Law' (Clarendon Press, Oxford 1993) at p123; Simester and Sullivan above, fn.38

¹⁰¹ Horder, 'A critique of the correspondence principle in criminal law' [1995] Crim. L.R. 759 at 761

¹⁰² Church [1966] 1 Q.B. 59

¹⁰³ Horder above fn.101 at 764

manslaughter; someone who intended or foresaw that his actions would result in a criminal outcome might be thought to have 'deserved' his luck if those actions also led to a death. His 'luck' was tainted by his criminal conduct. In these examples, there is therefore some moral basis for holding the defendant blameworthy for the death he has caused. By the same token, a defendant's luck can be tainted also by his grossly negligent conduct. A defendant need not have intended any wrongdoing in order to be considered to have deserved his 'bad luck', just as a defendant who intended lesser harm cannot suggest that the more serious outcome of his actions was down to mere chance. Horder acknowledges this but only insofar as stating that 'pure' luck can be corrupted by the defendant's very poor conduct.¹⁰⁴ It follows that if a defendant's driving has fallen far below the standard of the ordinary and competent driver, it is not entirely appropriate to say that he has been 'morally unlucky' that death has occurred. He could perhaps have been considered lucky if harm had been avoided altogether. If a driver overtook another at a high speed on a blind corner, we would think him fortunate that his extremely dangerous conduct did not injure anyone on that occasion. He would not be commiserated for his bad luck if someone happened to have been coming the other way, and this is true regardless of whether or not he actually foresaw that possibility or not. The same would be true if the defendant's utterly shocking conduct caused death whilst doing something other than driving. For example, Clarkson and Keating give an example of a builder who, without thinking about who might be below, throws a brick off scaffolding rather than carry it down.¹⁰⁵ Again we would not think the builder in this example to be 'unlucky' if he happens to kill someone, but rather condemn the fact that he does such an obviously dangerous thing without thought to the consequences or that he simply does not bother to pay attention to what he is doing.

2.4.3: Examining the extent of this basis for moral blame

We can see that there is clearly some moral basis for blaming the defendant for a death that resulted from his grossly negligent conduct. However, it is doubtful that we could make seriousness of the consequences a general determinant for finding mens rea.

¹⁰⁴ *Ibid* at 764-5

¹⁰⁵ Clarkson and Keating 'Codification: Offences Against the Person under the Draft Criminal Code' [1986] 50 J. of Crim. L. 405 at 422

For a start, we cannot condemn the merely negligent killer in the same way as the grossly negligent killer. We are prepared to blame the grossly negligent defendant because he has acted in the face of an obvious risk that death would result. Regardless of whether he could not be bothered to think of the risks, was incompetent, or was simply not paying attention to what he was doing, we can say of him that he deserved his 'luck' and so the outcome can be fairly attributed to him. On the other hand, if the risk was not so obvious and the defendant was merely negligent, which could be a result of momentary inattention or carelessness, there might be more scope for regarding him as 'morally unlucky' should there be severe consequences. After all, these are the sort of mistakes that anyone might make in their everyday lives and do not carry such a high risk that harm would result. Consequently, although there is justification for the punishment of those grossly negligent individuals who cause death, a merely negligent individual does not necessarily attract the same moral blame. However, mere negligence, although not sufficiently blameworthy for a manslaughter charge, will still suffice for the offence of causing death by careless driving. We saw before that mere negligence whilst driving already displays a greater degree of moral culpability than it does in other contexts. Because driving is an activity in which the defendant is expected to take more care, the negligent driver may still be thought to have 'deserved his luck' if his lack of care caused the death of the victim.

Just as we do not take the same moral perception of the merely negligent killer as we do the grossly negligent killer, it is also doubtful that lesser degrees of injury will have the same moral influence on our perception of the defendant's gross negligence as death. Assuming that gross negligence is not already considered to display a high degree of moral culpability, we are prepared to morally blame the grossly negligent for his 'deserved luck' only where the consequences were so appalling – someone has died. Clarkson and Keating¹⁰⁶ argue that the fact death has occurred completely alters our perceptions of the defendant's conduct. In their example of a builder throwing a brick from up high, if the risk has materialised, then it has left an incredibly serious and permanent mark for which he is responsible. Death alters our perception of the

¹⁰⁶ *Ibid* at 423

defendant's actions in this way because there can be no worse an outcome. It is the ultimate violation of the victim's personal autonomy. However, lesser degrees of harm will not necessarily alter our perception of the defendant in the same way. Indeed, Parliament shied away from creating a separate charge of causing bodily injury by dangerous driving.¹⁰⁷ Similarly, the Corporate Manslaughter and Corporate Homicide Act 2007 makes no provision for punishing gross negligence that causes less than death. This reluctance to place the same importance on even the highest degrees of bodily injury as was placed on death, appears indicative of the different ways we might perceive fatal and non-fatal harm. Accordingly, the only consequence that might influence the need to punish an inadvertent defendant's conduct is death or something *just as serious*.

2.4.4: *Can negligent rape be culpable inadvertence?*

Having examined the boundaries of this basis for moral blame, it appears unlikely that it offers any particular justification for punishing mere negligence in rape, although if the Sexual Offences Act had imposed a test of gross negligence then that would have been justifiable. It is doubtful that sexual intercourse can be considered to be a dangerous activity (in terms of the risk of non-consent) in the same way as driving, and thus there is nothing to compel the defendant to take more care. Furthermore, if there were no particularly obvious signs that the victim was not consenting, there is less basis for saying that the defendant morally deserved his luck.

None of the arguments for an objective standard in rape appear to offer any convincing reason to the contrary. It has been suggested that the law ought to focus more on the protection of the victim's sexual autonomy,¹⁰⁸ and that the deliberate or careless violation of a person's sexual autonomy is self-evidently immoral.¹⁰⁹ This point boils down to an argument that, because the violation of one's sexual autonomy is such an exceptionally serious consequence, the defendant's genuine belief in consent does not change the fact that the complainant did not consent. Moreover, it has been suggested that, from the victim's point of view, her sexual autonomy has been violated regardless of

¹⁰⁷ Such an offence was proposed by The Transport Research Laboratory, '*Road Safety Research Report No 26*' Jan 2002 but was not enacted.

¹⁰⁸ Temkin above, fn.44 at 400-1

¹⁰⁹ Power, '*Towards a redefinition of the mens rea of rape*' [2003] 23(3) O.J.L.S. 379 at 383

what the defendant believed and so the law should not then tell her that there was no crime. The argument appears to have swayed Parliament; in its reports leading to the new legislation, The Home Office stated that the *Morgan* guidelines,¹¹⁰ by taking the belief of the accused to be paramount, risks saying to a victim of an attack that they were not really the victim of a crime at all.¹¹¹ Lord Falconer also claimed on behalf of the Government that:

“There is no justice in a situation where a person who has been raped... sees an assailant go free because of a belief that society as a whole would have found unreasonable...”¹¹²

The view is therefore that even where the defendant was merely negligent as to her non-consent, the victim has still been ‘raped’¹¹³ and so the defendant should still be held criminally liable. However, this argument does not work so well when considered in a wider context. If we accept the argument that a complainant would be faced with the perception that they were not a victim of a crime at all, then logically we would be forced to change our attitude to many other criminal offences in which we would surely face the same problem. For example, where the defendant performed an action in the genuine but unreasonable belief that it would cause no physical harm to anyone, a subjectivist would be forced to justify punishing him on the basis that, if we failed to do so, the injured party would have to be told that he was not the victim of a crime. Many of the general defences would similarly risk telling the victim that ‘there was no offence’. The major problem with this argument is therefore that it places far too much importance on the harm caused and the desire that justice must be seen to be done, rather than explain how the defendant’s negligence is in this context criminally culpable. If we cannot consider the defendant to have been acting so badly that he can be said to have morally deserved his luck, then it may be that he is not sufficiently morally culpable for a serious offence

¹¹⁰ Above, fn.22

¹¹¹ Home Office Report above, fn.47 at para 2.13.2 The view matched that of Lord Simon in his dissent during *Morgan* *ibid* per Lord Simon at 221

¹¹² HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1089; Horder ‘*Cognition, Emotion and Criminal Culpability*’ [1990] 106 L.Q.R. 469 at 470

¹¹³ Insofar as her sexual autonomy has been violated without her consent.

despite what he has done. Therefore, the punishment of mere negligence in rape cannot be justified on this basis. Perhaps the only way the use of mere negligence could be justified as sufficient *mens rea* in sexual offences is if sexual violation were to be considered a consequence that is significantly worse than death, a point that has not been convincingly argued by any commentators, legislators or judges. On present analysis, the use of mere negligence thus appears to be completely unjustified.

It is worth noting that non-consensual sexual violation can be argued to be *as serious* as causing death, thus there is some basis for the claim that the grossly negligent rapist displays a sufficiently high degree of moral culpability. As the most serious sexual offence, rape is perceived differently than other offences, even murder. In fact, the claim that rape carries serious consequences for victims seems to have been one of the main arguments in favour of imposing an objective *mens rea* whilst the bill was discussed in Parliament.¹¹⁴ However, when deciding whether rape is sufficiently serious to suggest that we ought to punish gross negligence as to the victim's consent, we are presented with the difficulty of identifying the precise nature and degree of the harm caused to a rape victim. This difficulty arises because the offence does not require that any physical harm was actually caused to the victim, nor can we definitively say that every victim of a rape will have suffered physical harm directly as a result of the defendant's actions. It might be thought that they will inevitably suffer from psychological trauma as a result of their ordeal,¹¹⁵ but this would then leave little distinction between the harm punished by rape, and the harm punished by non-sexual offences against the person, in which the victim may have also suffered a similar level of psychological harm.¹¹⁶ What distinguishes the harm penalised by sexual and nonsexual offences against the person? If no distinction can be found, then it implies that the harm caused by rape is not serious enough to justify punishing the inadvertent defendant, or that all serious harm caused negligently should be criminal.

¹¹⁴ HC Deb Volume No. 409 Part no. 429 15th July 2003 col 220, 234; HL Deb Volume no. 648 Part No. 99 col 1055

¹¹⁵ Simester and Sullivan above, fn.38 at p409; HC Deb Volume No. 409 Part no. 429 15th July 2003 col 220; 'A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape.' (2000)

¹¹⁶ According to *Ireland; Burstow* [1998] A.C. 147 psychological harm can be considered equivalent to bodily harm.

However, such a crude analysis of the ‘harm’ caused by rape overlooks the fact that the victim’s sexual autonomy has been violated by the attacker; a much more serious matter than the physical or psychological harm that may or may not be caused. McGregor describes it as a clear assumption of the offender’s superiority over the victim:

“[The defendant’s] actions express her inferiority to him... He is superior to her, his desires matter and hers do not, making her an object rather than an equal person.”

Rape has also been described as:

“humiliating even when unaccompanied by further affronts because the sheer use of a person... is a denial of their personhood. It is literally dehumanising... [It is] wrongful, because it amounts to the most straightforward breach of that other’s right to sexual autonomy. It is morally unlicensed objectification.”¹¹⁷

Therefore, rape is a serious offence because of the sexual nature of the act perpetrated by the defendant. If it is accepted that ‘there can be no greater violation of a person, female or male, than the non-consensual penetration of their body for sexual purposes,’¹¹⁸ then we can see how the violation of an individual’s sexual autonomy can be regarded as being much more serious than bodily injury, and perhaps as serious as death. Thus a harm by harm comparison could justify the punishment of grossly negligent rape. The outcome risked was so serious that we can legitimately expect the defendant to have displayed some care to avoid that risk. Given that he did not do so, he can be said to have ‘deserved his luck’ that she did not consent.

2.5: The implications for subjectivists

If the utilitarian arguments given earlier in this chapter had been more convincing, then subjectivists would have been able to use them to justify the current law’s

¹¹⁷ Gardner and Shute, ‘*The Wrongfulness of Rape*’ in Horder, *Oxford Essays in Jurisprudence* (2000) 193 at p205 and p215; Lord Carlisle in HL Deb Volume No. 644 Part no. 45 13th February 2003 col 800

¹¹⁸ HL Deb Volume No. 644 Part no. 45 13th February 2003 col 800

punishment of negligence in driving offences and manslaughter.¹¹⁹ These offences would be regarded as valid exceptions to the norm in order to serve the public interest. I have shown that the reality of the situation is not so simple. From a subjectivist point of view, utilitarian arguments cannot justify the offences of punishable negligence that the criminal law of England and Wales currently imposes. However, this does not mean that the current offences of punishable negligence are wholly unprincipled. We can justify punishing the negligent defendant where his negligence can be regarded as culpable inadvertence, either because the defendant is in a situation in which he is expected to take care or because he deserves his luck if his grossly negligent conduct causes an outcome as serious as death.

This means that the current law poses a particular problem for subjectivists. The punishment of negligence in driving offences and manslaughter can be justified only by findings that are inconsistent with subjectivist principles and the traditional subjectivist attitude towards objectively assessed liability. We have seen that subjectivism identifies the defendant's foresight or awareness of the possible consequences as the minimum requirement for establishing sufficient moral culpability for serious crimes. Conversely, labelling punishable negligence as a form of culpable inadvertence requires an acceptance that there are factors in moral culpability that go beyond subjective foresight. They naturally appear to suggest that the negligent defendant may sometimes display a level of moral culpability sufficient for a very serious offence, and so suggest that the grossly negligent individual may sometimes be *as or almost as morally culpable* as one who foresees a possible risk. Thus, the moral gulf between advertence and inadvertence to a risk perceived by subjectivists is questioned.

Subjectivists may retort that they are not bound to accept that negligence may be regarded as morally culpable. However, by holding to their perception that inadvertence to a risk does not evidence sufficient moral culpability for the harm caused, subjectivists must inevitably regard the current criminal law of England and Wales as wrong and that the *mens rea* for driving offences and manslaughter ought to be formulated in terms of the defendant's awareness of the risk. This is not a defensible position; the need for an

¹¹⁹ And sexual offences such as rape if they were re-formulated to punish gross negligence.

objective standard in driving offences appears to be well-entrenched and long-accepted both in England and other jurisdictions.¹²⁰ The same is true of gross negligence manslaughter.¹²¹ Indeed, although we cannot justify a deviation from subjectivist principles courtesy of utilitarian arguments alone, the policy arguments raised are still significant. There remains a need to ensure that people drive carefully, or that people take more care to ensure sexual consent, and such needs cannot be met by subjectivism.

¹²⁰ Criminal Code of Canada (R.S.C. 1985) C-46 s249.

¹²¹ Criminal Code of Canada (R.S.C. 1985) C-46 ss220, 222(5)(b) and 234; *The People v Dunleavy* [1948] IR 95; New York Penal Code § 125.10

Chapter 3: Culpable Inadvertence

3.1: 'Conative' States of Mind

If viewed in isolation, the previous chapter challenges but does not present a crushing blow to the subjectivists' argument. In the discussion so far, I have used the current criminal law of England and Wales for illustrative purposes – showing where and why *mens rea* is still formulated in objective terms despite evidence of the recent favour for subjectivism. We have seen that the current law's punishment of negligence in manslaughter, driving and sexual offences cannot be considered legitimate exceptions to subjectivist principles for utilitarian reasons. Therefore, if the current law is correct to punish negligence, then it is by virtue of the realisation that negligence can be a form of culpable inadvertence, either because of the expectation that people will take care during dangerous activities or because we take no pity with someone who causes an obvious risk of a consequence as serious as death. This analysis suggests, however, that negligence is morally culpable in only specific circumstances; a subjectivist could claim that a number of specific offences pose no fundamental challenge to subjectivist logic. For example, Dashwood¹ asserts that general subjectivist principles should be viewed as the application of a policy preference rather than an obligation. Such an approach would mean that the 'default' basis for criminal liability would be assessment by a subjective standard, with exceptions made where necessary. Thus, the fact that negligence can be considered to display a high degree of moral culpability in certain contexts could justify the above 'greater deviations' from subjectivist principles as special exceptions to the normal rules. Accordingly, a relaxed subjectivist approach to assessing *mens rea* would accept that negligence can be regarded as a state of mind, and also that there are specific situations in which the defendant's negligence can be considered to display a much greater degree of moral culpability than it does normally. However, assuming these are the only situations in which negligence does display such culpability, then they may be regarded as exceptions to an otherwise consistently subjectivist rule. In all other contexts inadvertence would remain blameless and subjectivist principles would prevail.

¹ Dashwood, '*Logic and the Lords in Majewski.*' [1977] Crim. L.R. 532 at 535 and 538

Were that the end of the matter it might be concluded that the law could still take a consistently subjectivist stance. However, there is more to the difficulties explored above than can be solved by making exceptions. Subjectivists who accept an objective assessment of *mens rea* in relation to particular crimes admit that subjective foresight cannot be the foundation of the whole criminal law. They cannot, however, simply pick and choose their exceptions; if the moral gulf between advertence and inadvertence is smaller than traditionally thought, any other factors that may show inadvertence to be morally culpable surely must also be considered. Subjectivists must then face the argument in this chapter that three other inadvertent states of mind can be considered as morally culpable as conscious risk-taking: indifference, anger and voluntary intoxication.

In the following discussion it is no longer useful to consider how the law's current approach impacts upon subjectivist principles, since the law has different approaches to these three states of mind, veering from a complete absence of analysis to subjectivist fiction as in *Parker*². Throughout this discussion, I shall refer to indifference, anger and voluntary intoxication as 'conative' states of mind. This terminology is drawn from the work of the American Professor Simons, who also believes that the traditional subjective hierarchy³ conveys only a very narrow conception of criminal culpability. His criticism is that the subjective approach places undue focus on the defendant's cognitive state of mind, i.e. his mental processes: what he foresaw, believed or intended. This method of allocating blame neglects the defendant's conative state of mind, considered in this context to refer to his desires or attitudes. An individual's conative state of mind is capable of explaining *why* he acted despite having foreseen the risk, or even why he may have failed to foresee the risk; factors that the subjectivist focus on foresight alone is unable to deal with. Thus, the subjectivist criterion for moral culpability cannot cope with those situations in which the reason for the defendant's inadvertence to the risks his actions caused is blameworthy in itself. Indifference, anger and voluntary intoxication all fit this description. These attitudes may be just as morally culpable as conscious risk-

² [1977] 1 W.L.R. 600. Below, Ch. 4.3.2

³ Simons, '*Culpability and Retributive Theory: The Problem of Criminal Negligence*,' (1994) 5 J. Contemp. L. Issues 365 at 371. Professor Simons' description of the traditional hierarchy is not dissimilar from my own. In descending order, he describes the hierarchy as; Purpose, knowledge, recklessness and negligence.

taking, and yet the defendant may have held such an attitude even where he did not foresee the risks. Furthermore, these conative states of mind can be regarded as the morally culpable equivalent of conscious risk-taking *regardless of the context in which the inadvertence took place*.

3.2: Indifference

An attitude of indifference is a state of mind frequently recognised as reprehensible. It is often defined as ‘not caring’ about the outcome of one’s actions. For example, the Law Commission proposed a test of ‘reckless indifference,’ which required proof of subjective foresight of death accompanied by an attitude of ‘if death occurs, so be it.’⁴ However, the Law Commission’s proposal nonetheless remains consistent with subjectivist principle in that the defendant must still have foreseen the risk, suggesting that an attitude of indifference is not inconsistent with the defendant’s subjective foresight. Indeed, Williams asserts that an individual cannot be indifferent to something of which he was ignorant.⁵

The accuracy of such claims as Williams’s is doubtful, as an individual can surely be described as indifferent to an obvious outcome precisely because he has not bothered to give it thought. Goff writes that:

“we can think of many cases in which it can be said that the accused acted regardless of the consequences, not caring whether the victim lived or died, and yet did not consciously appreciate the risk of death in his mind at the time ...”⁶

Other ways in which a practical definition of indifference has been attempted are consistent with the notion that a defendant can be indifferent to a consequence he did not foresee. For example, Scottish criminal law has long imposed what, on the face of it, appears to be a definition of recklessness based on indifference. The noted Scottish critic,

⁴ The Law Commission, ‘A New Homicide Act for England and Wales?’ (2005) LCCP177 at para 3.150. Note that this standard was ultimately rejected – Law Commission, ‘Murder, Manslaughter and Infanticide’ (2006) LC304 at paras 2.103-107

⁵ Williams, ‘The Unresolved Problem of Recklessness’ [1988] 8 L.S. 74; Smith ‘Commentary on Caldwell’ [1981] Crim. L.R. 392 at 394

⁶ Goff, ‘The Mental Element in the Crime of Murder’ [1989] 104 L.Q.R. 30 at 55

Sheriff Gordon, questions whether foresight is really as important in determining moral guilt as subjectivists believe:

“It may be doubted whether, accepting that someone who shot another, beat him to death, or killed him by driving on in the knowledge that he was clinging to the bonnet, did not intend to kill the deceased, it matters that he did or did not actually foresee what he was doing was likely to kill him.”⁷

Instead, the current definition of Scottish recklessness from *Quinn v Cunningham*,⁸ condemns the defendant for his attitude towards the outcome. Lord Justice-General Clyde stated an essential element of a criminal charge was that there should be either intention to commit a wrong or:

“an utter disregard of what the consequences of the act in question may be so far as the public are concerned.”⁹

Looking to the degree of culpability involved, Lord Clyde considered culpable homicide to be an example of such a crime based on disregard; he noted the Judgment of Lord Justice-Clerk Aitchison in *Paton v H.M. Advocate*¹⁰ that what was required is gross, wicked or criminal negligence amounting to, or analogous to, *criminal indifference* to the consequences. This definition is clearly unconcerned with what consequences the defendant actually foresaw. A clear definition of a practical test for indifference has also been proposed by Professor Duff, who envisages a test based on the attitude that the defendant’s conduct displays.¹¹ Where the defendant does not avert to an obvious risk that he is capable of assessing properly, an attitude of indifference towards the risk can be read into his failure.

⁷ Gordon, *The Criminal Law of Scotland* (2nd ed. 1978) at p244 para 7-51

⁸ [1956] S.C.(J.C.) 22.

⁹ *Ibid* per Lord Justice-General Clyde at 24

¹⁰ [1936] S.C.(J.C.) 19 at 22

¹¹ Duff, ‘*Recklessness*’ [1980] Crim. L.R. 282

It may be thought that indifference will struggle to deal with an individual such as Shimmen.¹² Shimmen pretended to strike at a window with his foot, having reassured his friends that he had everything under control. However, Shimmen misjudged his kick and broke the window. At the trial, counsel for the defendant argued that Shimmen had considered the risk of causing damage but concluded that there was none based on his skill and muscular control; he is described in the report as a ‘skilled and experienced practitioner’ of Korean self-defence, holding both yellow and green belts. Ignoring for the moment the fact that Shimmen had been drinking, can a defendant be considered indifferent if he considered the possibility of a risk and concluded that there was none? The answer to this question depends upon whether the defendant’s belief that no harm would be caused is capable of displacing the inference of a conative state of mind such as indifference. It will be shown in chapter 9.3.2 below that a belief can itself be considered to have been formed indifferently and thus it may be possible to regard an individual such as Shimmen as indifferent.

3.2.1: Is indifference as morally culpable as conscious risk-taking?

Given that an individual can be considered to have been indifferent even though (and indeed because) he did not foresee the risks, the purist subjectivist’s position would have to be that such an individual cannot be considered culpable regardless of how repugnant his reasons were for failing to avert to the risk. However, despite the indifferent defendant’s failure to foresee the consequences of his actions, the broader moral view is that he is culpable for the harm he caused. Indeed, the defendant’s culpability for indifference could be said to lie within the fact that he simply did not care whether or not there was a risk.¹³ Sheriff Gordon claims that:

“[t]o be so callous as to give no thought to what one is doing in such a situation [where there is a high risk of harm] is arguably at least as bad as to foresee and accept the risk.”¹⁴

¹² *Chief Constable of Avon and Somerset v Shimmen* [1987] 84 Cr.App.R. 7

¹³ Clarkson, ‘*Law Commission report on offences against the person and general principles: Part 1: Violence and the Law Commission*’ [1994] Crim. L.R. 324 at 330-1

¹⁴ Gordon above, fn.7 at p244 para 7-51

Even subjectivists such as Williams accept that:

“If inadvertent negligence results from not caring about other people, it is a defect of character and may be regarded as morally wrong.”¹⁵

Professor Duff provides the deepest account as to precisely why an attitude of indifference is morally culpable even if the defendant did not foresee the risks. His view is that, even in the traditional definition of subjective recklessness, it is not the defendant’s foresight of the consequences alone that rendered him morally culpable, but rather the attitude his conscious risk-taking displayed towards the victim; the defendant’s actions showed a willingness to cause injury, not because he desired it, but because he did not care about the outcome.¹⁶ Duff claims that the ideal attitude that the defendant ought to display, in the context of offences against the person, is a proper kind and degree of practical concern for the physical well-being and security of others. He need not attach *supreme* importance to this, as other factors may justify his actions:

“but he will, as far as is possible and reasonable, try both to prevent others suffering injury and to avoid causing them injury by his own hands.”¹⁷

If indifference can be considered to be the true reason why a subjectively reckless individual can be considered blameworthy, then it is easy to see why an individual who does not foresee a risk because he does not care can be labelled as equally morally culpable. Duff recognises that, when the defendant genuinely did not notice an outcome, the risk of which was integral to his actions, he expressed a certain attitude towards that outcome. Additionally, the defendant can still be regarded as having been in full control of the consequences of his actions even though he did not realise the risk of harm occurring. Duff thus argues that, contrary to the subjectivist position, someone who did

¹⁵ Williams, *Textbook of Criminal Law* (2nd ed. 1983) p91 Although he does not consider this equal to indifference: Williams above, fn. 5 at 83

¹⁶ Duff above fn.11 at 283-4

¹⁷ *Ibid* at 285

not care about the risk could nonetheless still be said to have voluntarily brought about the harm:

“Whether I notice some aspect of my action or its context may depend on the attention I pay to what I am doing, and [the risk is] thus within my control.”¹⁸

Why does this analysis differ so much from the subjectivist’s perception of that individual? Simons observes that, when dealing with a conative state of mind such as indifference, the basis for blaming the defendant is opposite to that applied to a cognitive state of mind. He describes the subjectivist position thus: it considers a defendant blameworthy only where he acted having foreseen the risks, and so he is considered to be less blameworthy if he did not foresee the same things as a reasonable person. However, when dealing with his conative state of mind, the defendant cannot be considered less blameworthy just because his desires did not equal those of a reasonable person. It is in fact the opposite; we find him more blameworthy where he did not share the reasonable person’s empathetic qualities.¹⁹ Thus the indifferent defendant can be considered to be morally culpable because he did not display the same kind and degree of practical concern for those affected by his actions as a reasonable person would.

Furthermore, focus on the defendant’s lack of proper kind and degree of practical concern can go so far as to suggest that indifference, whether advertent or inadvertent, may display a greater degree of moral culpability than subjective foresight alone does. Indeed, it was noted above that Duff condemns the traditional subjective definition of recklessness as too wide on the basis that its current definition pays no regard to the defendant’s attitude towards the risk.²⁰ Thus it cannot morally distinguish an individual who acted knowing the outcome was probable and one who foresaw a possibility but took some inadequate precautions to avoid that risk. A focus on attitude would therefore label the latter defendant as ‘consciously negligent’ rather than reckless or indifferent. This would of course mean that the inadvertent but indifferent defendant would be regarded by Duff as manifesting a greater level of moral culpability than the consciously negligent

¹⁸ *Ibid* at 291

¹⁹ Simons above fn.3 at 376

²⁰ Ch. 1.4.1 Thus a subjective pays no regard to the motive of the defendant.

one; the former displayed the lack of practical concern integral to moral blame, whereas the latter did not.

Despite this analysis, indifference is rarely recognised by the law. English and Welsh common law has on occasion applied tests of indifference as a central basis for criminal culpability as an alternative to both subjective and objective forms of recklessness, but as yet none of these tests have been particularly successful. Indeed, Scotland's focus on indifference as a central issue in criminal liability²¹ remains virtually unique and very different from our own, which has been observed to be based on conscious foresight of the consequences.²² In England and Wales, it was held in *Pigg* that the defendant was 'reckless' as to the victim's non-consent in sexual offences where he did not bother to give his mind to the risk,²³ and yet this basis for moral blame was overruled relatively quickly in favour of a more traditional approach.²⁴ It has also been claimed that 'objective' recklessness in *Caldwell*²⁵ and *Lawrence*²⁶ was supposed to focus on the defendant's indifference to some extent.²⁷ Lord Diplock in *Caldwell* held that an individual can be considered reckless if he had not given any thought to the possibility of there being a risk,²⁸ which appears to fall short of indifference insofar as it does not make any reference to the reasons why he gave the matter no thought. Thus, the absent-minded individual is not distinguished from the one who simply did not care. However, indifference may still be read into *Caldwell* if other similar judgments from Lord Diplock are also taken into account. In *Sheppard*,²⁹ Lord Diplock sought a definition of the term 'wilful neglect' in the Children and Young Persons Act 1933, and specified that a parent would be 'wilful' where he refrained from providing medical care because he simply *did not care* about the child's welfare. Lord Diplock stated that such a law would acquit a defendant who was genuinely unaware of the risk because of his

²¹ Above, Ch. 3.2

²² *Quinn v Cunningham* above, fn.8

²³ *Pigg* [1982] 74 Cr App R 352

²⁴ *Satnam and Kewal* (1984) 78 Cr. App. R. 149 although this case is sometimes regarded as ambiguous; Power, 'Towards a redefinition of the mens rea of rape' [2003] 23(3) O.J.L.S. 379 at 388

²⁵ [1982] A.C. 341

²⁶ [1982] A.C. 510

²⁷ Stannard, 'Subjectivism, Objectivism and the Draft Criminal Code.' [1985] 101 L.Q.R. 540 at 548

²⁸ *Caldwell* above, fn.25 per Lord Diplock at 354

²⁹ [1981] A.C. 394

ignorance or lack of intellect, but not one who did not care about the risks.³⁰ Furthermore, Lord Diplock stated:

“As regards the second state of mind [not caring whether the child required medical attention], this imports the concept of recklessness which is a common concept in *mens rea* in criminal law.”³¹

It appears that Lord Diplock considered ‘not caring about an outcome’ to be synonymous with recklessness and this may have shaped his subsequent definition of recklessness in *Caldwell*. However, despite the disquiet with *Caldwell* expressed in some of the cases that followed,³² subsequent courts never took the opportunity to expand on this idea.

However, this comprehensive rejection of indifference as a practical assessment of *mens rea* in the criminal law of England and Wales does not necessarily indicate doubt that the concept accurately conveys the defendant’s moral culpability. Instead, it has likely been overlooked because the question asked of the jury is too complex to be considered a satisfactory test of *mens rea*. This problem arises because a test based on indifference requires the jury to identify the defendant’s attitude to the risk, which is often thought to be too difficult an enquiry for them to make. Thus, the imposition of an extra requirement that the defendant expressly ‘did not care’ or was indifferent would overly complicate the practical application of the law.³³ Similarly, the test of ‘reckless indifference’ that was proposed by the Law Commission was also rejected on the basis that it risked being too ambiguous.³⁴ Although Duff’s test of ‘practical indifference’ appears easier to apply, it also has been accused of imposing vague criteria.³⁵ It remains the case, however, that indifference is a morally culpable state of mind regardless of whether or not the defendant foresaw the risks. The defendant who showed a callous lack of concern as to the possible consequences of his actions is more morally reprehensible

³⁰ *Ibid* per Lord Diplock at 408

³¹ *Ibid* per Lord Diplock at 405

³² *Elliott v C* (1983) 77 Cr.App.R. 103 per Lord Goff at 116; *G&R* [2004] 1 A.C. 1034

³³ A view expressed by both Smith and Hogan, ‘*Criminal Law*’ (7th ed. 1992) at p59 and Stannard, ‘*From Andrews to Seymour and Back Again*’ [1996] 47 N.I.L.Q. 1 at 6-7

³⁴ The Law Commission report 304 above, fn.4 at paras 2.103-107

³⁵ Simons above, fn.3 at 390 Discussed below, Ch. 7.3.2

than one who did not foresee the risk because of some factor such as a mental incapacity falling short of insanity, and equally as reprehensible as one who consciously took the risk that he might cause harm. Thus indifference as a state of mind remains a challenge to the traditional subjectivist assumption that an individual is morally culpable in general only for that which he foresees.

3.3: Anger

3.3.1: Can rage negate subjective foresight?

Even subjectivists have recognised that a weakness in the subjective test is that it might not always encompass an individual who caused harm while too angry to realise the potential consequences of his actions.³⁶ Despite this, the law currently makes no express deviation from subjectivism in order to punish the individual who caused harm whilst enraged. Instead of resorting to an objective standard to deal with the problem, the subjective test has been stretched in order to include the enraged defendant. In *Parker*,³⁷ the Court of Appeal was faced with a defendant who was allegedly unaware of the likely damage his actions would cause because of his rage. He had lost his temper whilst in a telephone booth and was seen repeatedly slamming the receiver down with great force; an action that would clearly damage the telephone given the material of which it was made. Parker was deemed to have been aware of the phone's constituent materials and also of the degree of force he was employing. It was held therefore that, to the extent to which he was unaware of the risk of damage, he could be said to have 'closed his mind' to that risk. This suggests that he was nonetheless aware of the risk on some mental level; because he could be said to have held awareness of the risk in some part of his mind, he was criminally liable because of his 'subjective' awareness of the consequences. Professor Williams concurs with these judgments. In his textbook³⁸ he notes that knowledge does not necessarily amount to conscious awareness. The defendant may have had knowledge of that risk but had excluded it from his mind in following his particular course of conduct.

³⁶ Ashworth, *Principles of Criminal Law* (5th ed. 2006) at p183

³⁷ Above, fn.2

³⁸ Williams above fn.15

However, it is doubtful that the enraged individual will have always been aware, on some mental level, of the possible consequences of his action, and so this solution does not seem particularly convincing - a point that will be further developed below where the subjectivist response to conative states of mind is explored.³⁹ Indeed, rage arguably may completely overwhelm the defendant's thinking. This effect was recognised to some extent in the common law partial defence of provocation, which required:

“[a] sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her not a master of his mind.”⁴⁰

It is said that sometimes, in the heat of the moment, a ‘red mist’ may have descended on a person to the point that he was no longer truly aware of what he was doing. An example can be made of the case of *Bedder*,⁴¹ where the defendant claimed that he was so angry he did not remember anything from the moment he was kicked until the victim fell. Similarly in the case of, *Edwards*,⁴² the defendant claimed that he remembered the fight as being 10-15 seconds long when in fact it lasted 10-15 minutes. According to Wells, experiences such as these are entirely consistent with accounts of the physiological changes people undergo when enraged, and that biological factors can lead to a lessening of sensory perception.⁴³

Furthermore, it is fully conceivable that less enraged individuals still may have acted in the heat of the moment and so could be argued to have ‘acted without thinking’, failing to give any consideration whatsoever as to the consequences of their actions or even without realising the nature of those actions. Consider an example of a man indiscriminately striking some object whilst in a rage, or one such as the defendant in *Parker*⁴⁴ who, in a fit of temper, repeatedly slams down a telephone receiver: the defendant's emotional state and the spur-of-the-moment nature of his actions demonstrate that he may not have actually thought about the consequences of his actions and so may

³⁹ Ch. 4.3.2

⁴⁰ Devlin J in *Duffy* [1949] 1 All E.R. 932 at 932.

⁴¹ [1954] 2 All E.R. 801

⁴² [1973] 57 Cr App R 157

⁴³ Wells, ‘*The Death Penalty for Provocation?*’ [1978] Crim. L.R. 662 at 666; Brett, ‘*The physiology of provocation*’ [1970] Crim. L.R. 634 at 637

⁴⁴ Above, fn.2

not have actually formed the minimum degree of foresight required for recklessness. Thus, anger is precisely the sort of conative state of mind that Simons alludes to;⁴⁵ it is a reason why the defendant acted as he did and may explain why he failed to foresee what any normal person would have foreseen.

3.3.2: *Do we morally blame the enraged defendant?*

A genuinely subjective test for *mens rea* would exclude from criminal liability an angry defendant who genuinely did not foresee the risk of harm, but we have already seen that the courts have shied away from simply acquitting such individuals.⁴⁶ In fact, although the defendant's extreme rage used to act as a partial excuse to murder, the plea nonetheless presumed that the defendant displayed sufficient moral culpability for a manslaughter charge. Furthermore, during discussions regarding the provisions of section 54 Coroners and Justice Act 2009,⁴⁷ there was a desire to grant the enraged killer even less protection. Lord Bach comments that:

“With regard to provocation, the new ‘loss of control’ partial defence will ensure that a defendant who has killed in anger will be able to plead the partial defence only in extremely grave circumstances.”⁴⁸

Part of this reluctance to acquit the angry defendant is undoubtedly that the problem is too common to be simply ignored in this way. Even subjectivists have acknowledged that rage is closely linked to aggression.⁴⁹ However, whereas the link between intoxication and aggression has been extensively cited in order to justify the punishment of drunken offenders,⁵⁰ a similar discussion is rarely made in respect of anger. It may be that it is thought that the *Parker* judgment makes this line of argument unnecessary. Furthermore,

⁴⁵ Simons above, fn.3

⁴⁶ *Parker* above, fn.2

⁴⁷ October 2010; The Coroners and Justice Act 2009 (Commencement No 4, Transitional and Saving Provisions) Order 2010 SI 2010 No 816 (C.56) Note that the defence of provocation is, because of s54 Coroners and Justice Act 2009, obsolete.

⁴⁸ Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach) Hansard HL Deb Volume No. 710 Part no. 77 18th May 2009 col 1206

⁴⁹ Williams above fn. 15 at p106

⁵⁰ Below, Ch. 3.4.3

as will be seen below, such arguments tend to be of a practical nature anyway and so do not show why the defendant can be considered morally culpable.⁵¹

More significantly, there is little room for sympathy with the defendant who claims that he was too enraged to be aware of what he was doing if he caused damage or injury whilst in the grip of such rage. Any person should be expected to exercise sufficient control over their passions to ensure that they do not cause injury or damage. There is a clear distinction between the moral blameworthiness of an angry person who caused harm and someone who did not know what he was doing because, for example, he was acting involuntarily following a blow to the head. Indeed the basis for the moral blame that is placed upon the enraged individual is remarkably similar to that of indifference, even though the states of mind may not appear similar.⁵² An angry defendant can be said to have acted without caring what the outcome would be, as was the case with the indifferent defendant. So although the enraged defendant may have been unaware of the risk of harm arising from his actions, we can still say that he displayed as much moral culpability as one who foresaw but dismissed a risk. Unlike indifference however, the law is currently capable of reflecting this culpability. The *Parker* judgment, although it will be shown to be flawed, at least ensures that individuals cannot escape liability by claiming that they were too angry to know what they were doing.

3.4: Voluntary Intoxication

3.4.1: Intoxication and subjective foresight

How should the law deal with a defendant who was voluntarily intoxicated at the time he committed an offence? There is little need for discussion on whether intoxication can preclude the defendant's ability to form subjective foresight; if the defendant was drunk or on drugs, it is likely that he was unable to foresee the possible consequences of his actions, or might not even have been aware of what he was doing. Of course, this is not to say that *every* drunken offender would lack subjective *mens rea* - clearly 'a drunken intent is nevertheless an intent'⁵³ - but rather that intoxication clearly has the

⁵¹ Below, Ch. 3.4.3

⁵² It was for this reason that Duff does not expressly consider the effect of anger within his account of indifference: above fn.11 at 290-1

⁵³ *Sheehan & Moore* [1975] 1 W.L.R. 739

potential to prevent the defendant from forming foresight as to the consequences of his actions. Indeed, this is why the law currently makes a considerable deviation, (described above as a ‘greater deviation’), from subjectivist principles in order to ensure that the voluntarily intoxicated individual who caused harm is convicted.⁵⁴

However, Glanville Williams argues that individuals who committed offences whilst intoxicated, because they were incapable of foreseeing the consequences of their actions, are less culpable than sober offenders.⁵⁵ In particular, Williams appears to be concerned that, if the person in question did not know while sober that he was capable of doing such an act while drunk, it would be unjust to punish him. He suggests that the required element of moral blame can be found only upon the commission of a second drunken offence, presumably because the defendant could then be said to have been broadly aware of the risk that he might cause harm whilst intoxicated. The Law Commission have also acknowledged that the law’s rejection of the subjective test has caused controversy because of the perceived willingness to override traditional requirements without any principled basis for doing so.⁵⁶

Despite this subjectivist view, it can be demonstrated that the voluntarily intoxicated individual displays a form of moral culpability very similar to that of the angry or indifferent individual, and so intoxication helps to demonstrate that subjectivism takes too narrow an approach to moral culpability to be consistently applied within the criminal law. That said, the basis for moral culpability here is significantly more difficult to identify.⁵⁷

3.4.2: *Majewski – A failure properly to identify the basis for moral culpability*

Although the law is currently capable of punishing the voluntarily intoxicated offender, it fails to adequately determine why we consider him to be morally culpable. In

⁵⁴ Above, Ch. 1.5.3

⁵⁵ Glanville Williams, *Criminal Law, The General Part* (1953) p373; Smith, ‘*Commentary on Majewski (Court of Appeal)*’ [1975] Crim. L.R. 570 at 572. Although Smith admits that the drunken offender might be considered blameworthy, he asserts that he should not be convicted if proof of *mens rea* is absent. Accordingly, he must surely believe that the drunkenly inadvertent offender is less culpable than a sober one who foresaw the risks.

⁵⁶ Law Commission, ‘*Intoxication and Criminal Liability*’ (2009) LC314 at para 1.62

⁵⁷ Some subjectivists in fact believe that it has not yet been convincingly argued that it is morally culpable: Simester, ‘*Intoxication is Never a Defence*’ [2009] Crim. L.R. 3 at 14

Majewski,⁵⁸ The House of Lords did make some attempt to explain why the intoxicated offender is morally culpable, but unfortunately their explanations are unsound.

The majority judgment appeared to link the basis for culpability in voluntary intoxication with that of recklessness. Lord Elwyn-Jones noted that, in *Tolson*,⁵⁹ Stephen J had warned against a uniformly subjective understanding of *mens rea*. With this in mind, Lord Elwyn-Jones saw no ethical objection to holding a person answerable for his drunken actions even where he was unaware of the risks he was creating. Lord Elwyn-Jones' reasoning was that the defendant's course of conduct, in reducing himself to such a condition, was a reckless course of conduct in itself;⁶⁰ a claim supported by a majority of their Lordships. If an intoxicated state of mind can be labelled as a reckless one, then there is a clear and recognisable basis for the claim that the state of mind is a morally culpable one that can be penalised. This expanded definition of recklessness is a commonly understood result of the judgment in *Majewski*⁶¹ and has, on occasion, been recommended for codification by the Law Commission.⁶² Additionally, this aspect of the *Majewski* judgment is by no means unique. There are some other legal jurisdictions that have also considered drunken conduct to be reckless. For example, the Penal Code of the State of New York, which closely follows the American Model Penal Code, defines recklessness subjectively but adds that if a person is unaware of the risk solely because of his intoxication, then he can still be regarded as reckless.⁶³

However, the problem is that the term 'recklessness' in the criminal law of England and Wales has become synonymous with foresight, at some level, of a consequence. Even when it was termed objectively, it still required that the reasonable person would have foreseen those consequences. By contrast, the reference to recklessness in *Majewski* does not appear to contain any requirement that the consequences were foreseen by the defendant, or even that they were reasonably foreseeable. It therefore risks the result that the defendant is responsible for the consequences simply because he was drunk,

⁵⁸ [1977] A.C. 433

⁵⁹ [1889] 23 Q.B.D. 168 at 185

⁶⁰ Lord Edmund-Davies also adopted a solution in similar terms, as did Lord Russell: *Majewski* above, fn.58 at 498

⁶¹ As it formed part of the reasoning of some other the other Lords as well.

⁶² Law Commission, '*Legislating the Criminal Code: Intoxication and Criminal Liability*' (1995) LC229

⁶³ New York Penal Code § 15.05(3)

regardless of any other consideration. Consequently, the judgment is in desperate need of clarification as to what recklessness in this context actually means. It is doubtful that their Lordships intended to require proof of subjective foresight as that would leave us with two unattractive possibilities. We would either have to require that, whilst starting to drink, the defendant had actual foresight that he might commit the offence he did in fact go on to commit, or alternatively, that the defendant had averted to the risk of more general 'unlawful activity.' The former has little to be said in its favour; if we require that the defendant actually foresaw the specific type of offence that he went on to commit, then convictions may be all but impossible to obtain.⁶⁴ The latter enquiry is just as problematic. Duff argues that it is just as implausible to ask whether the defendant was aware of the dangers in becoming drunk as it is to ask whether he was aware of them whilst he was in that state.⁶⁵

Because an intoxicated state of mind bears no resemblance to the recognised forms of recklessness, it raises the question why Lord Elwyn-Jones referred to the concept at all. It seems that he was taking a cautious approach, identifying the intoxicated state of mind as 'reckless' as a concession to the subjectivist's understanding of a culpable state of mind. This causes confusion due to the fact that *Majewski* recklessness does not require any proof of what the defendant foresaw, nor even what the reasonable man would have foreseen in that situation. Thus it bears no resemblance to any existing definition of recklessness. By writing off the defendant's state of mind as 'reckless' in this way, without any requirement for foresight, their Lordships can be said merely to have paid lip-service to the subjectivist understanding of a 'guilty mind';⁶⁶ the defendant is blamed simply because he was drunk at the time. The judgment thus lacked any proper explanation as to why being drunk can be blamed in this way.

The Law Commission have recently recognised the inadequacy of Lord Elwyn-Jones's approach to culpability in intoxication.⁶⁷ They instead favour the alternative

⁶⁴ Except in cases such as those advanced by Williams where the defendant has previously caused such harm whilst in an intoxicated state: above, fn.55

⁶⁵ Duff, '*Professor Williams and Conditional Subjectivism*' [1982] C.L.J. 273 at 277

⁶⁶ Sellers, '*Mens Rea and The Judicial Approach to Bad Excuses in The Criminal Law*' [1978] 41 M.L.R. 245 at 257

⁶⁷ Law Commission 314 above, fn.56 paras 2.44-5

argument that, where the defendant's condition was a voluntary one, the defendant's state of mind can be said to be morally equivalent to recklessness but not actually reckless in itself. This is the same argument as that made by Lord Simon in *Majewski*. Like the majority, Lord Simon also considered that *mens rea* denotes any state of mind marked as 'wrongful,' but instead of simply labelling the intoxicated state of mind as 'reckless', he suggested that the fact that the defendant had got himself into such a state that he was unaware what he was doing should itself be considered blameworthy. Thus, Lord Simon rather more adventurously suggested that intoxication can be considered a morally culpable state of mind that falls outside of the normal boundaries imposed by subjectivity:

“... a mind rendered self-inducedly insensible (short of *M'Naghten*⁶⁸ insanity), through drink or drugs, to the nature of a prohibited act or to its probable consequences is *as wrongful* a mind as one which consciously contemplates the prohibited act and foresees its probable consequences.”⁶⁹

There was no suggestion that this is a form of recklessness. This was an explicit claim that voluntary intoxication itself can be considered morally culpable regardless of what was foreseen. Lord Simon's judgment in *Majewski* therefore poses a particular challenge to the orthodox subjectivist doctrine. Whereas the criminal law of England and Wales has not yet fully recognised anger or indifference as species of morally culpable inadvertence, Lord Simon's opinion that intoxication is a culpable state of mind in itself has received support from later judgments such as *Heard*,⁷⁰ and is also the approach taken in some other jurisdictions.⁷¹

Although this reasoning is less confusing than that of Lord Elwyn-Jones, the question still remains: on what basis do we consider voluntary intoxication to be morally wrongful? Lord Simon's approach appears to suggest that the act of getting drunk is itself wrongful because the individual voluntarily put himself into a state in which he was

⁶⁸ (1843) 10 Cl. & F. 200

⁶⁹ *Majewski* above, fn.58 at 479

⁷⁰ [2007] EWCA Crim 125

⁷¹ s33.1 Canadian Criminal Code

incapable of foreseeing the risks that his actions were creating. Accordingly, one possibility is that voluntary intoxication may be condemned as a ‘thoughtless indulgence’, and so a very culpable species of inadvertence.⁷² Even prior to *Majewski*, Stroud wrote that:

“By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to *mens rea* for the purpose of all ordinary crimes.”⁷³

Canada also followed this line of thought in section 33.1 of their Criminal Code. In that provision, it was stated that a person, in getting himself into a heavily intoxicated state, had departed so far from the standard of care recognised in Canadian society that he is criminally at fault. Again the idea is that the defendant is morally blameworthy for getting himself into such a condition that he was unaware of the consequences of his actions. In short, because his inadvertence was self-induced, the defendant should not be able to rely on his condition to evade criminal sanction for the harm he caused.

However, the fact that the defendant’s condition was voluntarily induced cannot show by itself that the defendant is morally culpable for any harm he caused whilst in that condition. Williams argues that an analogy could be drawn with other ‘voluntary’ conditions that might affect the defendant’s foresight. He argues that syphilis may be contracted via the conscious running of a risk, and yet if it results in insanity the excuse would not be denied to the defendant as we would not consider him to be morally culpable.⁷⁴ Voluntary intoxication therefore cannot be deemed to be morally culpable merely because it was voluntary. Indeed it is legal, albeit unwise, for an adult to drink as much as he likes.

⁷² Gough, ‘*Intoxication and Criminal Liability: The Law Commission’s Proposed Reforms*’ [1996] 112 L.Q.R. 335 at 337

⁷³ Stroud, ‘*Constructive Murder and Drunkenness*’ [1920] 36 L.Q.R. 268 at 273

⁷⁴ Williams above fn.55

3.4.3: The 'public menace' of drunken offenders: does policy dictate conviction?

Due to the high-profile nature of the connection between alcohol and violence it is unfortunate but not surprising that much of the discussion of the law's approach to voluntary intoxication is ultimately dominated by utilitarian arguments for punishing drunken offenders. Lawton LJ warned that occasions of drunken violence are:

“so commonplace that their very nature reveals how serious from a social and public standpoint the consequences would be if men could behave as the defendant did and then claim that they were not guilty of any offence.”⁷⁵

This view was adopted by Lord Edmund-Davies in the House of Lords, who considered that the 'universal object' of the law was to establish and maintain order.⁷⁶ In short, appellate courts considered it a greater evil to allow drunken offenders to go free than it is to convict them, despite their lack of a subjective *mens rea*, because there is such a high correlation between alcohol and criminal offending. This correlation has also been observed by the academic community. Clarkson notes that most violence takes place on the spur of the moment when tempers are flared or aggravated by alcohol.⁷⁷ As evidence, he cites an American study by Hodges that shows a strong connection between alcohol and violence. For example, two thirds of the inmates interviewed had been drinking when they committed an assault.⁷⁸ The Law Commission has also collated a number of empirical studies that support this assertion.⁷⁹ A Home Office bulletin states that in 2006/07 there were over a million violent crimes where the victim believed the attacker to be intoxicated, and that about half of all violent incidents were believed to be fuelled by alcohol.⁸⁰ A Strategy Unit Report also attributes half of the arrests for breach of peace and criminal damage to alcohol, and further suggests that heavy drinking also raises the likelihood of a sexual assault being committed.⁸¹ This high correlation between alcohol

⁷⁵ *Majewski* above, fn.58 at 447

⁷⁶ *Ibid* at 495

⁷⁷ Clarkson above, fn.13 at 331

⁷⁸ J.E.Hodge, 'Alcohol and Violence' in Taylor, *Violence in Society* (1993) pp129-30

⁷⁹ Law Commission above fn.56 at para 1.1

⁸⁰ Home Office, Statistical Bulletin 'Crime in England and Wales' (2006/2007) p65

⁸¹ Prime Minister's 2004 Strategy Unit Report, 'Alcohol Harm Reduction Strategy for England' Cabinet Office March 2004 at p13-14

and violence led even the Law Commission, who traditionally adopt a subjectivist stance,⁸² to recognise a need for concerns about public safety to be taken into consideration.⁸³

The recognised association between alcohol and violence equally leads to fears that a law that fails to properly deal with the public menace of drunken or drug-induced offenders would face a great risk of public contempt and disrepute. Many of their Lordships in *Majewski* expressed such a concern.⁸⁴ The Court of Appeal also noted a similar risk of public disapproval in *Fotheringham*.⁸⁵ Here Watkins LJ observed that, in rape, intoxication could not be taken into account when assessing the defendant's belief in consent, warning that the public would be outraged if the law were to be held as being otherwise. The Law Commission also air such fears:

“It follows that the availability (or non-availability) of defences to criminal liability based on intoxication is not just a matter of legal principle. It may have a far-reaching effect on the perception – particularly the perception of a victim and his or her family – of whether justice has been done.”⁸⁶

However, arguments about the link between alcohol and violence and the risk of bringing the law into disrepute are insufficient by themselves to explain the law's punishment of the drunken offender. We have already seen why similar arguments are flawed: it is unacceptable from anything other than a purely utilitarian point of view to say that morally innocent offenders should be punished so harshly in the interests of public safety.⁸⁷ If we are to justify from a broader moral perspective the punishment of voluntarily intoxicated offenders, we must therefore demonstrate that such offenders are morally culpable. Additionally, whilst the law ought to be able to protect the public from the risk of intoxicated criminal activity, the aim of deterrence may be difficult to achieve

⁸² By their own admission: ‘*Legislating the Criminal Code: Involuntary Manslaughter*’ (1996) LC237 at para 4.3

⁸³ Law Commission 314 above, fn.56 at para 1.54

⁸⁴ *Majewski* above, fn.58 see comments by Lord Elwyn-Jones at 469, Lord Simon at 476, Lord Salmon at 484, Lord Edmund-Davies at 495 and Lord Russell at 498 that suggest this fear.

⁸⁵ (1989) 88 Cr. App. R. 206

⁸⁶ Law Commission 314 above, fn.56 at para 1.2

⁸⁷ Above, Ch. 2.2

in this context. What exactly would the law be attempting to deter? We cannot say that we wish to deter the defendant from causing harm *once he has become drunk* as the very reason we need to consider the strength of policy arguments is that, by definition, he may be completely unaware of what he is doing at the material time. The only alternative would be to say that we wish to deter him whilst he is still sober; we might wish to prevent individuals from getting so drunk that they might commit an offence. However, if this were the case, then the law's objectives would be better served by criminalising excessive alcohol consumption rather than punishing for harm that was caused, a move that neither Parliament nor the appellate courts have taken the opportunity to make. Indeed, history has shown that bans on the consumption of alcohol would have far wider repercussions.

Some subjectivists have in fact argued that fears of a public outcry should drunken offenders be acquitted are overstated.⁸⁸ This is because they hold the view that foresight is not so difficult to prove where the defendant was intoxicated and so there is no real social issue anyway. Drunken offenders would still be convicted, justice would be done and there would be no risk of public outcry. Orchard in particular suggests that the example of other jurisdictions can show that the subjective standard is sufficient, and so a rule such as *Majewski* is unnecessary.⁸⁹ However, the example of these jurisdictions arguably shows us the precise opposite.

For subjectivists, New Zealand led the way in 1975 in the case of *Kamipeli*.⁹⁰ This pre-*Majewski* case held that there should be no distinction between offences of basic or specific intent and so intoxication can be admissible as evidence to show the defendant lacked *mens rea* regardless of whether the offence on charge requires intention or recklessness. Post-*Majewski*, it has been left open as to whether *Kamipeli* or *Majewski* should be followed.⁹¹ The Australian States that utilise a common law system have more expressly shunned *Majewski* in favour of the application of the ordinary subjective

⁸⁸ Glanville Williams above fn.54 at p373. Williams cited these fears from Criminal Law Revision Committee 7th Rep (1843) Parl. Pap. Xix 23. but they are similar to the fears later echoed in *Majewski* above, fn.58

⁸⁹ Orchard, 'Surviving Without *Majewski* – A View from Down Under' [1993] Crim. L.R. 426

⁹⁰ [1975] 2 N.Z.L.R. 610

⁹¹ *Roulston* [1976] 2 N.Z.L.R. 644 at 643-4

standard. In *O'Connor*,⁹² *Majewski* was rejected, and it was held that intoxication could be introduced as evidence to show that the defendant lacked any knowledge or subjective foresight of the consequences. Canada also witnessed a rejection of the *Majewski* principle in the case of *Daviault*⁹³, where it was held that *Majewski* offended the Canadian Charter of Rights and Freedoms as the mental element is an integral part of a crime. The example of these jurisdictions has been claimed to show that arguments about social policy advocated in *Majewski* are not as strong as they otherwise might appear. Intoxication often explains why a person acted violently, but rarely results in the absence of the mental requirements.⁹⁴ Orchard argues that acquittals on the grounds of lack of *mens rea* are still unusual in those jurisdictions that shun *Majewski*. Even without an alternative offence for acquitted defendants, there had been no increase in crime or collapse in the law at the time Orchard was writing. As a result he suggests the criminal law of England and Wales should try going without *Majewski* as fears that such a move would cause public dissatisfaction with the law appear to be largely unfounded.

In concession to Orchard's argument it is certainly well established, even in the criminal law of England and Wales, that subjective *mens rea* can still be found where the defendant was drunk. In *Majewski* itself, Lord Salmon considered it fairly obvious that the defendant in the instant case did in fact know what he was doing even though he claimed to have no memory of the events.⁹⁵ Similarly, in the case of *Stubbs*,⁹⁶ O'Connor LJ recognised that the defendant had no recollection of his actions, but added that it could nonetheless have still been purposeful, and:

“the evidence of the complainant and the account given by an eye witness to the incident shows quite clearly that that is what it was.”⁹⁷

⁹² [1981] 146 C.L.R 64

⁹³ [1995] 118 DLR (4th) 469

⁹⁴ Orchard above, fn.89 at 429

⁹⁵ Above, fn.58 at 480

⁹⁶ (1989) 88 Cr. App. R. 53

⁹⁷ *Ibid* at 54

O'Connor LJ thus stated that there was not the slightest evidence that the defendant was incapable of forming the necessary subjective *mens rea*. In the New Zealand case of *Kamipeli*,⁹⁸ it was also said that the jury should be warned not to reach the decision too lightly that the defendant lacked intention.

It is equally clear, however, that very extreme cases of intoxication are capable of precluding the defendant's ability to assess the possible consequences of his actions.⁹⁹ This problem becomes more obvious where the defendant was intoxicated on illicit substances that may have effects on his actions which were greater, but of a kind with which the jury are likely to be less familiar. As the defendant's condition becomes more extreme, it therefore becomes less likely that the jury will be truly able to infer that he foresaw the outcome. If they are undecided as to precisely what effect the intoxication had on the defendant, they surely cannot decide beyond all reasonable doubt that the defendant had subjective foresight of the relevant consequences. Thus they will surely be compelled to acquit the defendant in many cases where he was heavily drunk or drugged. This is a problem that the Law Commission appears to recognise. They suggest that, if a strictly subjective approach to criminal liability is logically applied, it would inevitably result in the defendant having a complete answer to any serious offence because his self-induced state of mind was such that he was incapable of forming subjective foresight.¹⁰⁰ The subjectivist's argument therefore cannot be that the drunken defendant will always have formed subjective foresight. Rather, they must assume that the problem will present itself only in those rare cases where the defendant was so drunk as to be completely unaware of his actions, and in most other cases the jury will find that the defendant foresaw the harm notwithstanding his condition - an argument that has little force in cases where voluntary consumption of hallucinogenic drugs have entirely removed conscious awareness, as in *Lipman*.¹⁰¹

It indeed seems that drunken offenders have in fact been acquitted in the highly subjectivist jurisdictions of Australia¹⁰² and Canada. In Australia, the treatment of

⁹⁸ Above, fn.90

⁹⁹ Especially re hallucinogenic drugs as in *Lipman* [1970] 1 Q.B. 152

¹⁰⁰ Law Commission 314 above, fn.56 at para 1.53

¹⁰¹ Above, fn.98

¹⁰² However, the most significant developments occurred after Orchard had written '*Surviving Without Majewski – A View from Down Under*' [1993] Crim. L.R. 426

drunken offenders fell under public scrutiny after the high profile case of *S.C. Small v Noa Kurimalawai*.¹⁰³ A well-known rugby star, whilst drunk, had attacked two women outside a nightclub. The attack was described by the Magistrate as ‘cowardly and deplorable’, but following *O’Connor* he felt compelled to acquit the defendant because he had been too drunk to be able to form any sort of subjective *mens rea*. There was public dissatisfaction with the outcome, increased by the fact that this incident was very much in the public eye due to the high profile of the defendant. Even before *Noa Kurimalawai*, Australian case law had been controversial. Those States that follow a criminal code continued to apply limitations on the availability of the defence of intoxication. The Australian ‘Gibbs’ Committee had also recommended a reversion to the *Majewski* rules¹⁰⁴ following earlier reports of acquittals due to the relaxed approach of *O’Connor*. The Gibbs Committee warned that the number of acquittals was significant and may lead to defendants in future exaggerating their intoxicated conditions in order to be able to claim the defence. Although a later report supported *O’Connor*, the case was not incorporated into Australia’s Federal Criminal Code Act 1995. The Canadian approach, expressed in *Daviault*, also faced public disapproval. Although not as high profile as *Noa Kurimalawai*, *Daviault*’s crime was a particularly violent and sexual assault on an elderly invalid. She had been dragged from her wheelchair in the course of the assault. A Canadian writer, Grant, observes that:

“The suggestion that someone could be too drunk to be convicted of sexual assault shocked the public’s sense of justice and common sense. The facts of the case... brought the issue into stark focus for the public.”¹⁰⁵

Such was the strength of dissatisfaction about the outcome of this case that it led to Canadian Parliamentary intervention. Section 33.1 of their Criminal Code reaffirmed the *Majewski* approach in offences involving an assault. It is therefore inescapably clear that an entirely subjective test in intoxication cases will risk failing to adequately protect the

¹⁰³ Australian Capital Territory Magistrates’ Court Matter No CC970194

¹⁰⁴ Review of Commonwealth Criminal Law, ‘*Interim Report: Principles of Criminal Responsibility and Other Matters*’, AGPS (July 1990)

¹⁰⁵ Grant, ‘*Second Chances: Bill C-72 and the Charter*’ [1995] 33 Osgoode Hall LJ 379 at 383

public from drunken offenders. Therefore, the fears of the House of Lords in *Majewski* cannot be dismissed as groundless.

3.4.4: *The true basis for moral blame*

Members of the public clearly do not consider drunken defendants to be completely blameless even when apparently unaware of what they are doing, hence the outcry in response to cases such as *Daviault* and *Noa Kurimalawai*. The high correlation between alcohol and violence helps to show why we attribute the same degree of moral culpability to the drunken offender as we would to the indifferent or conscious risk-taker. It cannot be the case that drunken offenders are morally blameless. Gough suggests that some supporters of the approach in *O'Connor* view drunken harm as a 'tragic accident' for which no-one was really responsible.¹⁰⁶ However, as Lord Salmon observed in *Majewski*, true accidents are distinct from the situation where a man voluntarily gets himself, by way of drink, into an aggressive state.¹⁰⁷ Even in the case of *G and Another*, where subjectivist principles were strongly reaffirmed, Lord Bingham commented that

“One instantly recoils from the notion that a defendant can escape the criminal consequences by drinking himself into a state where he is blind to the risk he is causing to others.”¹⁰⁸

It is therefore unlikely that anyone could truly view incidents such as those in *Daviault* and *Noa Kurimalawai* as 'tragic accidents.'¹⁰⁹

Nevertheless, the actual moral basis for criminal liability for those in an intoxicated state remains elusive. It may reside in the commonly recognised link between alcohol and violence which, according to the Law Commission, means the defendant, when he became intoxicated, *ought to have been aware* of the increased risk that he would cause

¹⁰⁶ Gough, 'Surviving Without *Majewski*?' [2000] Crim. L.R. 719 at 725 Gough cites this as one of the reasons the Law Revision Committee of Victoria ('*Criminal Liability for Self-Induced Intoxication*' (1999)) supported the *O'Connor* judgment. (Above, fn.92). Gough himself does not think this is the correct basis for the law and criticises *O'Connor* for its failure to secure the conviction of Noa Kurimalawai

¹⁰⁷ Lord Salmon in *Majewski* above, fn.58 at 482

¹⁰⁸ [2004] 1 A.C. 1034 at 1056

¹⁰⁹ Gough above, fn.106 at 730

harm to other persons or property.¹¹⁰ Indifference is again the key. The defendant may be blamed because, without caring what the consequences were, he put himself into an intoxicated state. He thus fell below the minimum kind and degree of practical concern that we require of him. Indeed, this is hardly a groundbreaking reason for placing moral blame upon an actor. Paley writing in 1837 states that:

“those vices which are the known effects of drunkenness, either in general or upon particular constitutions, are in all, or in men of such constitutions, nearly as criminal as if committed with all their faculties and senses about them.”¹¹¹

However, the perception that an intoxicated state of mind is morally equivalent to indifference or subjective recklessness because of the high correlation between alcohol and violence might be challenged on the basis that it appears to suggest that there is a single universal standard of moral culpability for all those individuals who get drunk. This causes three problems that must be addressed.

It firstly suggests that, regardless of what harm he caused, the defendant’s culpability remains a constant. Thus, a drunken defendant who caused another to apprehend immediate and unlawful violence would, according to such a rationale, appear to have displayed the same level of moral culpability as another who killed the victim whilst in a similarly intoxicated state. This problem is easy to resolve as, in order to make a distinction between the moral culpability of these individuals, we do not need to prove that the second defendant foresaw more serious consequences. We could make a distinction by virtue of an objective standard assessed at the time the harm was caused, as even this would ordinarily require that the proscribed consequences, or something proximate to those consequences, were a foreseeable result of the defendant’s actions. Thus, we would not consider an intoxicated individual who created an obvious risk of actual bodily harm to display the same degree of culpability as one who created an obvious risk of death, even if both individuals caused the death of the victim.

¹¹⁰ Law Commission 314 above, fn.56 at para 2.19

¹¹¹ Paley, *Moral and Political Philosophy* (1837) Book IV Chap. 2

Secondly, and perhaps more significantly, it might be feared that the one constant standard of moral culpability for all drunken offenders suggests that an individual who habitually becomes violent whilst intoxicated would be considered no more morally culpable than someone who causes harm the first time they become drunk. Simester observes that, whilst the link between violence and drunkenness may be the only manner in which the evasion of subjective principles can be justified, something more than a mere statistical link is needed. Violence is often accompanied by intoxication, but the same is not necessarily true vice versa and so it might not even be reasonably foreseeable, if the defendant was drunk, that he would go on to commit an offence.¹¹² Thus, it is sometimes thought that the defendant's culpability ought to depend upon whether or not he usually becomes violent when drunk.¹¹³ However, it is doubtful that this really causes so much of a problem as Simester suggests. Although the defendant who is regularly violent when drunk is undoubtedly more culpable than one who is not, it does not necessarily follow that the first-time drunken offender is not at all morally culpable. If culpability is based, as the Law Commission suggest, on the fact that the high correlation between alcohol and violence means the defendant ought to have known of the increased risk of offending, then the first-time drinker still carries some degree of moral blame for what he has done. For example, we may not think that an 18-year old, who is able for the first time to drink legally and so drinks ten pints, should be considered completely morally innocent for any criminal offence he subsequently commits. Consequently, although there may be a difference between the moral culpability of the first-time and frequent drunken offenders, the former still displays sufficient moral culpability to be held to account for the harm he causes. The discrepancy between the degree of moral culpability of these two individuals is therefore one of degree that can be represented by the judge's discretion in sentencing.

The third problem with the above analysis of the moral culpability of the intoxicated offender is whether the law should continue to make a distinction between offences of specific and basic intention. It may appear illogical that voluntary intoxication, if it can be considered to be a morally culpable state of mind in itself, can

¹¹² Simester above, fn.57 at 8-9

¹¹³ Orchard above, fn.89 at 430

act as a defence to an offence of specific intent. Virgo argues that there is a conflict, given that an individual who committed an offence of specific intent whilst drunk will not face liability for that crime. Instead, he will face liability only for a lesser crime or even escape liability altogether if there is no 'fall-back' offence.¹¹⁴ The very existence of specific intent offences may therefore question whether or not intoxication really can be regarded as a morally culpable state of mind; it risks suggesting that there ought not to be a distinction between basic and specific intent offences. There is, however, a way in which the outlined basis for blaming the drunken offender can be considered to be consistent with the distinction between basic and specific intent offences. Firstly, if there is a fall-back offence, for example: manslaughter as a fallback to murder, the intoxicated offender's moral culpability can be observed to match the lesser offence rather than the greater one. The intoxicated state of mind is morally equivalent to recklessness or indifference and so the drunken defendant cannot be considered to be as culpable as one who intended the outcome. Those specific intent offences with no fall back are more problematic as it follows that, although the defendant may be considered morally culpable to some degree, he would not be liable for any offence at all. An example is theft: the drunken offender may have been incapable of forming intention of permanent deprivation and, if so, he cannot be convicted of any offence. This may not be an unjustifiable outcome, however, and there is considerable debate as to the nature of specific intent crimes such as theft. Simester¹¹⁵ describes theft as a crime that punishes for the defendant's wrong, not the harm caused. In the absence of an intention of permanent deprivation and dishonesty, his conduct is morally ambiguous unlike a violent offence or criminal damage where physical harm has been caused. Thus, Simester claims:

“If, when he picks up something of V's in the pub, D lacks the intent to deprive, there is no theft. Whatever the cause, whether intoxication or otherwise, his conduct lacks the criminal character, the *animus furandi*, of theft... The doctrine [of

¹¹⁴ Virgo, 'The Law Commission Consultation Paper on intoxication and criminal liability: Part 1: Reconciling principle and policy' [1993] Crim. L.R. 415 at 419

¹¹⁵ Simester above, fn.57

intoxication] is designed to construct a defendant's *culpability* for a wrong. It cannot be used to invent a wrong that doesn't exist.”¹¹⁶

A victim unwillingly deprived of his property is still wronged, however. The point here is that the defendant lacked the particular kind of moral culpability required for this offence. The nature of theft is that it is conceived in terms of a narrowly-described state of mind: a defendant who is dishonest intends permanently to deprive the victim of the property.¹¹⁷ Without this state of mind, the action of the defendant *vis à vis* the property is not regarded as stealing.¹¹⁸ Furthermore, the required *mens rea* is entirely different from the nature of the defendant's intoxicated state of mind, which is more akin to indifference. Therefore, the reason that voluntary intoxication exculpates the defendant in this context is that it may evidence a lack of the very mental elements that convert action regarding property belonging to others into theft. Accordingly, the distinction between basic and specific intent crimes does not constitute a difficulty for the argument that a voluntarily intoxicated offender is morally culpable.

Thus, there is no argument that can undermine the claim that the intoxicated offender is morally culpable because he

“voluntarily made himself dangerous in disregard of public safety.”¹¹⁹

Indeed such an individual could be considered morally innocent only if we were to strictly follow subjectivist logic and deny that any factors other than actual foresight of the consequence may affect moral culpability. The obvious need to convict voluntarily intoxicated offenders forces us to consider other factors that render the defendant morally blameworthy beyond those designated by traditional subjective principles. Even the Law

¹¹⁶ *Ibid* at 10

¹¹⁷ Theft Act 1968 s1(1)

¹¹⁸ Horder, 'Questioning the correspondence principle - a reply' [1999] Crim. L.R. 206 at 210

¹¹⁹ To quote the Law Commission 314 above, fn.56 at para 2.45

Commission have recognised that the subjectivist criticism of the outcome of such cases following *Majewski* stems from an overly narrow view of criminal liability.¹²⁰

¹²⁰ *Ibid* at para 1.2

Chapter 4: The Subjectivist Response to Culpable Inadvertence

Three conative states of mind have been identified, all of which are manifestations of indifference. Each can be considered to be morally culpable states of mind because of the attitude displayed by the defendant, and so are blameworthy regardless of whether or not the defendant foresaw the possible consequences of his actions. This is a claim that poses a very strong challenge to the way in which subjectivist principles determine moral culpability. Subjectivists have not ignored the challenges these examples of culpable inadvertence pose. However, they have asserted that these conative states of mind can be punished in a manner consistent with subjectivist principles in one of three ways. Some contend that the punishment of these states of mind can be regarded as legitimate exceptions to the normal principles of *mens rea*. Others claim that, although a subjective test is theoretically unable to encompass these states of mind, the practical application of that test means there is no need for the law to change. Finally others suggest alterations to the existing subjective test so that it is capable of punishing these states of mind. However, it will be shown that each of these subjectivist responses tacitly necessitates a complete abandonment of subjectivist principles, an inference that their subjectivist supporters are unwilling to admit. Therefore, if it is recognised that indifference, anger and intoxication can be considered to be as morally culpable as conscious risk taking, then the law cannot possibly take a consistently subjectivist approach to formulating *mens rea*.

4.1: Making an Exception

It was noted above that some subjectivists might take a relaxed approach to subjectivism, regarding it as a policy preference rather than an obligation.¹ Thus exceptions to the norm can exist so long as there is a persuasive reason for a deviation from the usually applied principles. This argument was observed to apply to those particular situations in which negligence can be regarded as particularly culpable.² However, Dashwood, who advances such a theory, believes that the retreat from

¹ Dashwood, '*Logic and the Lords in Majewski*.' [1977] Crim. L.R. 532 above, Ch. 3.1

² Above, Ch. 3.1

subjectivist principles where the defendant was involuntarily intoxicated may also be regarded as an exception to the norm. However, Dashwood lacks a clear and principled basis for singling out intoxication as an exception to the normal standard. Why should we punish intoxication and not other types of inadvertence such as absent-mindedness? Furthermore, the generalisability of the intoxication issue amongst offences challenges the notion that subjectivist principles ought to form our central basis for assessing *mens rea*. If anger and indifference also count as exceptions, subjectivism runs the risk that there is no general principle left.³

4.1.1: Creating a specific offence as an exception

Many subjectivists therefore favour limiting the punishment of drunken offenders to an offence specifically designed to deal with that problem, thus leaving the application of the subjective standard untouched in all other offences. For example, they approve of the approach of some European Penal Codes such as Germany's where there exists a charge of committing offences in a senselessly drunken state.⁴ The basis of such a provision is considered to be that, in getting drunk, the defendant negligently took the risk that he might do a wrongful act whilst in that state.⁵ Fletcher, commenting specifically on the German approach, praises the offence on the basis that it:

“pinpoints the social danger of improperly using alcohol and drugs, yet retains the principle of culpability as a requirement of liability.”⁶

Sellers also considers that such an offence would clarify the law by penalising the behaviour of the intoxicated offender within an offence designed to deal with such conduct.⁷ Subjectivists are under no delusion that punishing these states of mind by inventing a specific new offence strictly follows subjectivist logic, as the new offence

³ Strict liability, gross negligence manslaughter and dangerous driving all having been conceded as exceptions by subjectivists.

⁴ Strafgesetzbuches s323(a)

⁵ Fletcher, *Rethinking Criminal Law* (3rd ed 1978) at p847

⁶ *Ibid* at p852

⁷ Sellers, 'Mens Rea and The Judicial Approach to Bad Excuses in The Criminal Law' [1978] 41 M.L.R. 245 at 253 footnote 46. Here, Sellers was offering a critique of a similar proposal by The Committee on Mentally Abnormal Offenders (1975) Cmnd. 6244

would inevitably suggest a basis for moral culpability other than conscious awareness of the risk.⁸ However, it would at least invoke an offence as a single exception to normal subjectivist principles rather than a generalisable version of *mens rea* that would apply to all offences – a much trickier concept to narrow down and justify. Intoxication could thus be placed within the same category as driving offences – continuing the ‘exception’ that negligence⁹ may be considered to be as morally culpable as conscious risk-taking only where the particular factual context of the defendant’s actions render it so.

However, voluntary intoxication cannot be placed in a unique category in the same way as driving offences and homicide, as we are blaming the drunken offender not so much for his inadvertence, but rather for the attitude he displayed. A defendant who was driving was in a particular situation in which any degree of negligence was likely to cause harm, and thus he can be expected to have taken more care. However, we do not consider the drunken offender to be morally culpable for the same reason. We are not claiming that his negligence is more blameworthy because he was drunk, but rather we blame that individual because of the attitude towards the possible risks he displayed in voluntarily becoming drunk.¹⁰ Creating a specific offence to deal with him therefore merely glosses over the fact that, regardless of the external context in which the defendant was placed, we think that his attitude displayed a high degree of moral culpability. This point becomes clearer if we also take anger into consideration. Again, anger shows that the defendant did not display a proper kind and degree of practical concern for the outcome.¹¹ Like intoxication, there is a link between rage and violence that even subjectivists have recognised.¹² Surely then anger is just as deserving as a specific offence as voluntary intoxication? However, an offence of committing an offence whilst enraged is more obviously artificial. Can we really say that the defendant was negligent in becoming angry, or would it be more appropriate to blame him for the state of mind he actually displayed?

⁸ Some remain critical of such an offence precisely because of this: Sellers *ibid* at 253 footnote 46 and Orchard, ‘*Surviving Without Majewski – A View from Down Under*’ [1993] Crim. L.R. 426 at 431

⁹ Again, because the argument is that the defendant is blamed for negligently becoming intoxicated rather than for the intoxication itself: Fletcher above, fn.5 at p852

¹⁰ Above, Ch. 3.4.4

¹¹ Above, Ch. 3.3.2

¹² Williams, *Textbook of Criminal Law* (2nd ed. 1983) at p106

Therefore, because we place moral blame upon the drunken or angry individual according to the attitude he displayed, these states of mind pose a rather more serious challenge to subjectivists than previous ‘exceptions’ such as those seen in driving offences. We cannot simply say that these conative states of mind are forms of negligence that display a greater degree of moral culpability than normal because of the contexts in which they were held, but rather they show that subjective foresight is too narrow a basis for moral culpability in relation to almost any offence. Thus, even if we were to impose specific offences designed to punish these states of mind as exceptions to the normal subjectivist approach, they would do little more than superficially conceal a fundamental inconsistency in the logic that underlies subjectivist principles.

4.2: Reliance on the practical application of the subjective test

It was noted above¹³ that some subjectivists, by virtue of the unconvincing claim that an unaltered subjective test is nonetheless capable of punishing angry or indifferent individuals in practice, dismiss the problems these states of mind present to subjectivism. It has been shown above that these states of mind can in fact preclude subjective foresight,¹⁴ and so the most obvious problem with this argument is that it assumes the jury will always infer foresight despite any evidence to the contrary, be it because they do not believe the defendant’s claim or because they have no sympathy with his story. For example, Ashworth is not suggesting that indifference is not morally culpable, but rather that the practical operation of the law makes it unnecessary to make any changes. The jury would simply not believe that the defendant was unaware of the obvious consequences of his actions.¹⁵

This might possibly work where the defendant was still capable of foreseeing the consequences. For example, if an individual did not care about the welfare of the victim, it may be difficult, for the jury, to tell whether or not he foresaw the outcome. Thus, the jury’s choice to convict might plausibly be based on their lack of sympathy for the defendant’s defence. However, we surely cannot pretend that the jury will ignore evidence that makes it more obvious that the defendant was incapable of foreseeing the

¹³ Ch. 1.4.4

¹⁴ Above, Ch. 3.2 (indifference) and Ch. 3.3.1 (anger).

¹⁵ Ashworth, *Principles of Criminal Law* (5th ed. 2006) p184

consequences. There may be cases of anger or indifference where the defendant's emotions or attitudes are obvious from the facts presented to the jury. If the defendant was so angry that he held little to no awareness of what he was doing, the jury would have a very clear basis for finding that at the relevant time he had no subjective foresight of the consequences. The subjectivist's argument must equally apply to voluntary intoxication, and here the problem is much more obvious; it was seen above that subjectivists cannot claim that the heavily intoxicated individual will always be capable of forming subjective foresight.¹⁶ As a person becomes heavily drunk, his condition will be increasingly obvious because of his erratic actions or unusual behaviour, and so, if evidence of intoxication is adduced at the trial, it will frequently be a factor that the jury cannot help but consider.¹⁷ Therefore, properly following the direction given to them, they could only acquit the defendant regardless of any lack of sympathy for him they might feel.

It is surely an illegitimate position to require the jury to infer subjective foresight whilst at the same time hoping that they will disregard the evidence presented to them if it does not achieve the 'correct' result. Indeed, neither Ashworth nor Williams appear to contest the fact that the indifferent or angry defendant might not foresee the possible outcomes in actual fact, but rather it appears that they are suggesting that the jury will simply infer that the defendant did foresee the risk regardless of his claim. This inevitably raises the question: why is it necessary to impose a subjective assessment of *mens rea* at all? To an impartial observer, the argument appears to suggest that foresight is not really important to moral culpability. This surely cannot be the outcome subjectivists want.

4.3: Modified subjectivism

In order to justify punishment of the angry or intoxicated (but not necessarily the indifferent)¹⁸ defendant whilst still applying the normal subjective test, various solutions have been suggested.

¹⁶ Above, Ch. 3.4.1

¹⁷ It will be considered below whether evidence of intoxication (and other conative states of mind) can be excluded from the subjective test. Below, Ch. 4.3

¹⁸ Because of the above, observed problem that indifference is not an easy attitude to infer. Ch. 3.2.1 To see suggested ways around this problem, refer to chapter 7

4.3.1: 'Conditional Subjectivity'

One example can be found in an evidential argument that arose from the *Majewski* decision:¹⁹ evidence of a morally reprehensible state of mind such as voluntary intoxication should be deemed inadmissible. Therefore the jury, because they will not know that the defendant was intoxicated at the time, will infer his foresight from the other evidence available. This interpretation neatly prevents intoxication from being a defence whilst also ensuring that the normal subjective test is applied by the jury, but it does not by itself give any particular reason as to why intoxication should be simply excluded from the jury's consideration in this way.

Such thinking may explain the 'conditional subjectivity' arguably espoused in *Caldwell*, and seized upon by Professor Williams, that labels the defendant as reckless where he did not foresee:

“[a risk that] would have been obvious to... the defendant (this very person) *if* he had thought about it (and, perhaps, if he had been in a fit state to think about it).”²⁰

It is possible that *Majewski* itself was interpreted in this way by the House of Lords in *Caldwell*, as Lord Diplock held that the effect of the judgment in *Majewski* was that where the actor was unaware of a risk, of which he would have been aware of if sober, because of his intoxication, his unawareness is immaterial.²¹ A similar interpretation was made in the case of *Woods*²² where the jury were told to disregard the fact that the defendant was intoxicated and ask themselves the entirely hypothetical question: 'would the defendant, had he been sober, have realised the victim was not consenting?' Williams recognises that this would not be, strictly speaking, a subjective test, but thinks it would allow for intoxicated or enraged defendants to be blamed on the basis of what they would have foreseen had they not been in that condition. Thus Williams feels that it would impose 'acceptable restrictions' upon *mens rea*.²³ In essence, conditional subjectivity

¹⁹ [1977] A.C. 433

²⁰ Williams, '*Recklessness Redefined*' [1981] C.L.J. 252 at 268

²¹ *Caldwell* [1982] A.C. 341 at 356. This was a requirement Lord Diplock thought necessary in respect of intoxication, but he did not mention it in relation to recklessness.

²² (1981) 74 Cr. App. R. 312

²³ *Ibid* at 252

differs little from simply excluding evidence of the intoxication, and by analogy anger, from the jury's consideration. Essentially the jury, without considering the effect the intoxication or anger had on the defendant's state of mind, reach a conclusion, based on any other evidence available, as to whether he would have foreseen the risk. However, the crucial difference is that 'conditional subjectivity' at least purports to assess the intoxicated individual's moral culpability according to a factor that is familiar to subjectivists: his foresight. Therefore, to a subjectivist, the test allows for the effective punishment of those who were drunk or enraged on the basis of what they *would have* foreseen had they not been in that condition. They are not punished merely because the reasonable person would have foreseen that outcome.

We cannot know for sure how successful a test of conditional subjectivity would be in practice. It is not entirely clear whether Lord Diplock, when deciding *Caldwell*, actually intended the objective standard to be read in this way. It was only in his judgment relating to intoxication that he spoke about the defendant's failure to foresee a risk that would have been obvious to him had he been sober.²⁴ Furthermore, the appellate courts have seldom recognised conditional subjectivity as a legitimate test of *mens rea*. It is possible that it was once intended as a solution to the uncertain meaning of recklessness in sexual offences. In *Satnam and Kewal*,²⁵ Bristow read the requirement of an 'obvious' risk as being one that was obvious to the defendant had he given thought to the matter. However, there has been disagreement as to whether this was really the true effect of *Satnam*.²⁶ Furthermore, conditional subjectivity was expressly rejected as a method of testing liability in *Elliott v C*.²⁷

At any rate, there are three criticisms that can be made of conditional subjectivity that, were it to ever be applied in practice, would greatly undermine its effectiveness as a solution to the difficulties caused by culpable inadvertence.

Firstly, it may often be difficult for the jury to tell what the defendant would have foreseen if a given factor was absent. As a result, the test is sometimes said to ask the

²⁴ *Caldwell* above, fn.21 at 355

²⁵ (1984) 78 Cr. App. R. 149

²⁶ Power, 'Towards a redefinition of the mens rea of rape' [2003] 23(3) O.J.L.S. 379 at 388

²⁷ (1983) 77 Cr.App.R. 103 per Lord Goff at 118 where he expressly refers to Williams' conditional subjectivity above, fn.20

impossible of jurors since it requires them to ignore the facts and instead ask an entirely imaginary question.²⁸ This can be resolved, but only by following the interpretation of *Majewski* noted above: if the evidence of the defendant's intoxication is simply excluded from the jury's consideration then they will simply have to decide, based on the evidence available to them, whether or not the defendant foresaw the outcome. The jury would thus not be expected to ask any hypothetical questions. If challenged, subjectivists can still claim that the test punishes the defendant for what he would have foreseen had he been sober.

The second problem is that the exact basis by which the defendant is deemed to be morally culpable remains unclear under a test of conditional subjectivity. Although it might be said that culpability is based on what the defendant *would have* foreseen if sober, this requirement is somewhat fictitious and so does not offer any clear explanation as to why we consider that individual to be morally blameworthy. It certainly does not blame the defendant according to anything resembling traditional subjectivist principles. We might blame a conscious risk-taker because, having recognised the risk, it is one he can be expected to have avoided. The same cannot be said of one who was unaware of the risks but would have foreseen them if not drunk.²⁹ The requirement that the defendant *would have* foreseen the outcome therefore looks very much like a red herring - designed to make the test look as though it bases culpability upon the familiar subjectivist criterion of foresight when in fact the defendant's actual foresight is unimportant. Since a moral judgement is made on a basis of something other than what the defendant himself *actually foresaw*, the test is inconsistent with traditional subjectivist principles.

Thirdly, even if the above basis for blame were legitimate, why should it be limited to certain states of mind such as intoxication or rage alone? Professor Duff³⁰ wonders why we would be happy to say that a drunk or enraged person would have recognised the risk had he not been drunk or enraged but not to say that the normal person would have

²⁸ Virgo, 'The Law Commission Consultation Paper on intoxication and criminal liability: Part 1: Reconciling principle and policy' [1993] Crim. L.R. 415 at 418

²⁹ Duff, 'Recklessness' [1980] Crim. L.R. 282 at 283-4

³⁰ Of course, we might take Duff's appraisal (above, Ch 3.2.1 fn.15) that conscious risk-taking displays a lack of the proper kind and degree of practical concern, in which case the failure to foresee something because one was too drunk or angry could be condemned on the same basis. However, this would surely still undermine the minimum level of moral culpability imposed by subjectivist principles.

noticed the risk had he not been callous or overly-excited at the time?³¹ The question is a good one; why should we be able to cherry-pick certain inadvertent states of mind for the purposes of conditional subjectivity and leave out all other reasons for inadvertence? Conditional subjectivity, if it were to be considered a satisfactory solution to the challenge posed to subjectivism by states of mind such as anger, voluntary intoxication and indifference, would need to demonstrate why the rule applies to those states of mind alone.

4.3.2: Closing one's mind to the risks – The Parker solution

Because of these problems with conditional subjectivity, a subjectivist might prefer to apply the normal subjective definition of recklessness and follow the rationale of the judgments in *Parker*³² and *Stephenson*.³³ It was noted above that subjectivists consider this to be an answer to the problem posed by enraged defendants;³⁴ Lane LJ held in *Stephenson*, affirming *Parker*, that a defendant in a rage may have held some knowledge or foresight of the risk, although he may have driven that knowledge to the back of his mind. Thus, Lane LJ was satisfied that bad temper or excitement could be excluded as a defence without the subjectivity of the test being altered. The effect of the decision in *Parker* is again to render evidence of the defendant's rage inadmissible. A similar test could be applied where the defendant was indifferent or intoxicated.

This test, if applied more generally, at least offers an improvement over a more basic definition of conditional subjectivity in two ways: firstly, *Parker* much more clearly identifies a subjectivist basis by which the defendant can be considered morally culpable; he is considered to have been aware, on some mental level, of the risk. *Parker* thus appears to assess the defendant's moral culpability according to what he was actually aware of, something that Williams's conditional subjectivity does not achieve. Secondly, *Parker* attempts to explain why we should focus on certain inadvertent states of mind and exclude others, such as ignorance or stupidity. The assertion is that we can punish anger because the defendant, despite his rage, can still be inferred to have had, at the back of his

³¹ Duff, 'Professor Williams and Conditional Subjectivism' [1982] C.L.J. 273 at 276

³² [1977] 1 W.L.R. 600

³³ [1979] 3 W.L.R. 193

³⁴ Above, Ch. 3.3.1

mind, a degree of awareness of the risk. By contrast, someone who was too stupid to foresee the risk lacked the capacity ever to foresee it and so cannot be said to have held such knowledge at the back of his mind. The same might be said of someone who simply was not paying attention to what he was doing.

Unfortunately, the factual assertion in *Parker*, that the angry defendant will nonetheless have been aware of the possible outcomes on some level, is disputable. For a start, *Parker* simply does not work when applied to an intoxicated defendant. It may be difficult enough to infer that the heavily intoxicated defendant held ‘at the back of his mind’ knowledge of the risks. It would become all but impossible where his intoxication rendered him completely unaware of what he was doing. Can we really say that *Lipman*,³⁵ whilst he fought off imaginary snakes, was aware, at the back of his mind, of the risk of suffocating his partner? If an intoxicated defendant cannot be said reliably to have held at the ‘back of his mind’ knowledge of the risk, then either we are compelled to acquit him or we have to convict him in the acceptance that something other than his subjective awareness has rendered him morally culpable. Taking into account all other examples of culpable inadvertence: it is similarly doubtful that a defendant, if he was too angry or indifferent to form cognitive foresight, can always be said reliably to have actually held ‘at the back of his mind’ knowledge or foresight of the risks. Duff argues:

“I may fail to see my present act in the light of my general knowledge of the likely effects of certain kinds of action, and thus fail to notice its likely effects.”³⁶

For example, in the case of *Briggs*,³⁷ the defendant broke a car door handle with what was apparently a normal, albeit violent, arm movement. Can we still say for sure that he was aware ‘at the back of his mind’ that he was being more violent than usual, or was he simply too angry to realise this at all? If he was not aware of this, how can we then say that he was aware, on some mental level, that he would damage the car door? There may be no basis whatsoever for finding that a defendant such as in *Briggs* had subjective *mens*

³⁵ [1970] 1 Q.B. 152

³⁶ Duff above, fn.31 at 274-5

³⁷ [1977] 1 All E.R. 475

rea, but he was nonetheless still thought to have been ‘closing his mind’ to the risks in the same way as the defendant in *Parker*.

It may be argued that these problems will not manifest themselves in practice because of the way in which the jury will apply the *Parker* test, but such arguments are unconvincing. For example, one argument is that it would not matter what the defendant actually foresaw at the material time, since the jury would be able to infer what was supposedly ‘in the back of his mind.’ Leigh and Temkin suggest that this may lead to the jury choosing to convict where the defendant gave no explanation, beyond his rage, as to his conduct.³⁸ The same could perhaps also be said of the voluntarily intoxicated or indifferent defendant; the jury may infer that he held the risk at the back of his mind when, other than his intoxication or indifference, there is no explanation for his lack of foresight. However, hoping that the jury will apply *Parker* in this way is no better than saying that the jury will simply not believe that the defendant was unaware of the obvious consequences of his actions, or that they will not sympathise with his plea.³⁹ The practical effect would be that the enraged, intoxicated or indifferent defendants will be convicted whether or not, at the material time, they actually foresaw the risk on any conscious level. Although this might be considered to be the morally correct result, it again must appear to the impartial observer that actual foresight is not really important when determining moral guilt. It can thus be observed that the idea that the defendant will have been ‘aware at some mental level of the risk’ is in reality little more than a veil to hide the fact that the defendant is condemned for his lack of control due to rage rather than for his actual foresight. As a result, the test from *Parker* is not as subjective as the persistent reference to the defendant’s mind might initially suggest. If we can infer that the defendant held foresight of the risk at the back of his mind because he was angry or drunk in any case, then the standard appears to be more of an objective one in practice: a point that is especially obvious if the test were to be applied in this way to defendants, such as *Lipman*, who were completely unaware of what they were doing. It seems that the only way to ensure that the *Parker* solution follows subjectivist principles is to demand factual accuracy on the question of whether the defendant held, at the back of his mind, some

³⁸ Leigh and Temkin, ‘*Recklessness Revisited*’ [1982] 45 M.L.R. 198 at 206

³⁹ Below, Ch. 4.2

knowledge of the risk. However, this would logically result in undeserving acquittals, including many defendants, such as *Lipman*, who were heavily intoxicated. Additionally, it would hardly be fair or realistic to require the jury to make the enquiry.

These modified subjective tests can be seen to have reached a dead-end. Regardless of whether we are asking what knowledge the defendant supposedly held at the 'back of his mind' or whether we ask what he would hypothetically have foreseen if sober or calm, we still appear to be blaming the defendant for the condition he was in rather than for his actual foresight of the possible consequences of his actions. In other words, the attempts to modify subjectivism amount to an admission that there are morally culpable states of mind to which a subjective test of criminality does not apply. Something other than subjectivist principles must therefore be important when determining culpability.

Part 1 Conclusion: A Flawed Approach to Moral Culpability

It would thus be inappropriate for the law to take an exclusively subjectivist approach to assessing *mens rea*. If it did, there would be no way in which we could rationalise the punishment of angry, indifferent or intoxicated individuals. We would even be unable to punish those who drove dangerously or carelessly, or caused death because of their gross negligence; the law cannot logically mark these offences out as special exceptions. It has been shown that we ought to punish such negligence because it can be considered morally culpable regardless of whether or not the defendant foresaw the possible outcomes. It then follows that the law must also take into account any other examples of culpable inadvertence. We cannot say that negligence ought to be punished where it is morally culpable and then ignore anger, indifference and voluntary intoxication. Furthermore, because these conative states of mind can arise in relation to almost any offence, subjectivist principles are questioned across the scope of the criminal law. We must not say that culpably negligent, angry, indifferent or voluntarily intoxicated individuals ought to be acquitted solely for the sake of preserving the traditional subjectivist approach to assessing moral culpability.⁴⁰ Clarkson and Keating rightly argue:

“the true basis of *mens rea* is the attribution of blame, which might, or might not, coincide with a defendant’s subjective foresight of the consequences.”⁴¹

Consequently, it can no longer be thought that those who foresee the risks they are creating are the only individuals that can be considered morally culpable.

⁴⁰ As Sellers notes; it is more important that the law be perceived to be working properly than that it is for it to follow the logic that a defendant without subjective *Mens Rea* must be acquitted. ‘*Mens Rea and The Judicial Approach to Bad Excuses in The Criminal Law*’ [1978] 41 M.L.R. 245 at 265

⁴¹ Clarkson and Keating *Criminal Law Text and Materials* (6th ed. 2007) p423

Part 2: Problems with an Entirely Objective Test

Just as it would be unwise to adopt an entirely subjectivist approach to moral culpability, an exclusively objectivist approach would be also unsound. Unlike subjectivism, the criminal law of England and Wales has shown in recent years no enthusiasm for an entirely objective approach to criminal liability. It is helpful, however, to focus on those objective standards that have been applied in English and Welsh law, most notably *Caldwell* recklessness,¹ and assess why, ultimately, such reasoning has been limited or rejected.

Chapter 5: What is wrong with objectivism?

The application of an objective standard as an assessment of *mens rea* has always been controversial; often causing problems, not only with subjectivists, but also with the notions of justice of ordinary people.² That said, many of the criticisms that have been levelled at an objective assessment of *mens rea* are flawed or inaccurate. For example, contrary to a common claim made by some purist subjectivists, an objective standard cannot be said to be wholly unconcerned with the defendant's state of mind.³ Accordingly it will be contended here that, although Professors Williams and Smith are right to argue that objectivist principles ought not to be commonly used to assess *mens rea* in serious criminal offences, there are different reasons for reaching this conclusion. This chapter will establish what objectivist principles are, and will make it clear why those principles are not fit for consistent application within the law. The way in which those principles assess moral culpability is far too broad, so universal application would lead to the criminal convictions of individuals that we might ordinarily consider to be blameless.

¹ [1982] A.C. 341

² e.g. the reaction of the Jury to the objective test applied at trial in *G&R* [2004] 1 A.C. 1034

³ Above, Ch. 2.3.

Chapter 5.1: Identifying objectivist principles

Like subjectivism, objectivism follows a set of principles that determine how morally culpable an individual is. Although the defendant's foresight is no longer of central importance, objectivism nonetheless conforms to the principles of autonomy, correspondence and follows a hierarchy based on the likelihood of the risk.

5.1.1: Objective liability and the Principle of Individual Autonomy

The Autonomy Principle was recognised earlier as a 'permissive' principle of liability; that is, it determines whether or not the defendant can be held responsible for the proscribed outcome.⁴ If the defendant was not fully in control of his own actions then he cannot be considered morally culpable. According to a subjectivist, an objective standard is inconsistent with the Principle of Individual Autonomy; the inadvertent defendant may have been completely unaware of the possible consequences of his actions, and therefore had no opportunity or choice to desist from the conduct in question.⁵ This is just one interpretation of this principle however, as it is not universally thought that it allows for the punishment of only those defendants who avert to the risks their actions create.⁶ In fact, the Autonomy Principle requires that punishment may be inflicted only:

“on those who know what they are doing, and thus could, but do not choose to, desist.”⁷

Nothing in this definition conclusively indicates that the defendant must have been aware of the possible consequences of his actions, but it instead appears rather more concerned that the defendant must have been in *conscious control* of his own conduct. In other words, the Autonomy Principle may simply require that the defendant's actions are

⁴ Ch. 1.1.1

⁵ Above, Ch. 1.2

⁶ Clarkson, 'Law Commission report on offences against the person and general principles: Part 1: Violence and the Law Commission' [1994] Crim. L.R. 324 at 330

⁷ To take the Law commission's own definition; Law Commission, 'Legislating the Criminal Code: Offences against the Person and General Principles' (1993) No. 218 Cm. 2370 para 14.14

performed with ‘action-intention.’⁸ The issue of whether the defendant foresaw or intended a certain outcome is, as was noted above, unrelated to whether or not he intended to carry out those actions. Given as an example earlier: the brick thrower C,⁹ regardless of whether he realised that he might hit anyone, was in full control of the throwing and thus could, but did not choose to, desist. This interpretation of the Principle can be observed in Scottish law, where the concept of recklessness does not depend upon the defendant having foreseen the risk¹⁰ but is concerned with ‘deliberate’ conduct. Lord Murray stated in *HM Advocate v Harris* that there must:

“be conduct deliberately done in fact of potential danger to another or others in complete disregard of the consequences for him or them.”¹¹

This would appear to be the proper application of the Principle of Personal Autonomy; the defendant’s actions are performed deliberately, in other words with ‘action-intention,’ as opposed to those who acted clumsily or those who lacked conscious control over their actions. It distinguishes the defendant who struck out at the victim from the one who tripped and stumbled into him. An objective assessment of *mens rea* in England does not offend the Autonomy Principle so long as it does not punish the defendant for his unconscious actions or clumsiness.¹²

5.1.2: An objectivist principle of correspondence

As was the case with subjectivism, there are also restrictive principles of liability within objectivism that determine how culpable an individual is considered to be. One of these principles can be shown to amount to a principle of correspondence very similar to the one followed by subjectivism.¹³ An objective assessment of *mens rea* follows the correspondence principle insofar as the defendant can be considered culpable only where the harm caused corresponded with the harm that the reasonable person would have

⁸ Above, Ch. 1.1.3

⁹ Above, Ch. 1.1.3

¹⁰ *Cameron v Maguire* [1999] S.C.C.R. 44

¹¹ *HM Advocate v Harris* [1993] S.C.C.R. 559

¹² Hence the need for defences based on the defendant’s involuntary conduct: Clarkson above, fn.6 at 330

¹³ Above, Ch. 1.1.2

foreseen. Therefore, if a defendant was charged with manslaughter, death would have had to be a foreseeable result of his actions. If the defendant's actions created a risk of only minor injury, then the death caused would not correspond to the defendant's objective *mens rea* and so the objective test would not show him to be culpable for that harm. This differs from the subjectivist correspondence principle only in that the defendant need not foresee the degree of harm that a reasonable person would have foreseen in the circumstances.

However, it may not be practical for every objective standard to adhere closely to a correspondence principle. For example, the judgment in *Adomako*¹⁴ was vague on the issue of what degree of harm must have been obvious in the context of gross negligence manslaughter, but subsequent case law appears to have restricted it to those cases where the risk was of death only. The trial judge in *Singh* suggested that the circumstances must be such that the ordinary person would have foreseen a high risk of death, expressly rejecting those cases where there was a risk of serious injury only.¹⁵ This direction was later affirmed by Judge LJ, who noted that the proper standard is gross negligence in circumstances where what is at risk is the life of the individual to whom the defendant owes a duty of care.¹⁶ However, such a strict observation of the objective correspondence principle may be impractical, as it may not always be clear that the obvious risk was of death only. A convincing practical issue was flagged up by the Law Commission, who observed:

“[there is] a very thin line between behaviour that risks serious injury and behaviour that risks death, because it is frequently a matter of chance...”¹⁷

Thus it may be difficult to say that there is a substantial moral difference between the defendant who did not care about an obvious risk of death, and one who kills without caring about an obvious risk of very serious harm. Accordingly, it might be preferable

¹⁴ [1995] 1 A.C. 171

¹⁵ This direction was subsequently approved by the Court of Appeal: [1999] Crim. L.R. 582

¹⁶ *Misra* [2005] 1 Cr. App. R. 21 at para 49

¹⁷ Law Commission '*Legislating the Criminal Code: Involuntary Manslaughter*' (1996) Law Com No. 237 para 4.19

that objectivism follows a principle of proximity rather than one of correspondence,¹⁸ thus the law would enjoy the same flexibility that it does in relation to subjective standards.

5.1.3: Demonstrating an objective hierarchy

It can also be shown that objective standards, much like subjective ones, can be placed in a hierarchy according to the degree of moral culpability that they display. However, whereas the subjective hierarchy focuses on the level of risk foreseen, the objective hierarchy can be shown to depend upon how objectively foreseeable the risk was.

5.1.3.1: The importance of distinguishing degrees of negligence

A good starting point in demonstrating the objective hierarchy is an example given by Williams in the context of his critique of *Caldwell*¹⁹ recklessness: a man who opens his car door without considering that a cyclist might be coming.²⁰ In Williams' view this is mere negligence. He points out that, according to the law prior to *Caldwell*, the driver is liable, under the Construction and Use Regulations, for a maximum penalty of £100. According to *Caldwell*, he is reckless and therefore liable for criminal damage to the bicycle, and so would potentially face much heavier penalties. Williams points out that Lord Diplock gave recklessness the definition of 'careless, regardless or heedless'. Because carelessness is often thought to be synonymous with negligence, Williams suggests that Lord Diplock was saying that recklessness is mere negligence.

Whilst it is true that *Caldwell* recklessness overlaps with negligence, Williams' argument overlooks the fact that the same can be said of *Cunningham*²¹ recklessness. As noted above,²² in addition to the requirement that the defendant must have recognised the risk, subjective recklessness requires an objective assessment of the defendant's behaviour. Having foreseen the risk, it must have been objectively unjustifiable for the defendant to have acted in the way that he did. Therefore, a degree of overlap is not

¹⁸ i.e. comparable to Horder's subjectivist proximity principle. Above, Ch. 1.5.1

¹⁹ Above, fn.1

²⁰ Williams, '*Recklessness Redefined*' [1981] C.L.J. 252 at 260

²¹ [1957] 2 Q.B. 396

²² Above, Ch. 1.4.1

significant. The more pertinent consideration would be whether a particular test of recklessness punishes *all* instances of negligence. Subjective recklessness certainly does not; if the defendant foresaw the risk, even if it was very small, he was in a position to avoid that risk. He is therefore punished only for his conscious risk-taking. Of course, if recklessness were to punish all instances of negligence it would appear draconian. As Williams points out, liability based on any degree of negligence would involve every person, on pain of criminal sanction, having to review every single act for any risks that might arise. Life cannot be lived on these terms.²³ But just as the subjective hierarchy observed in chapter 1.1.3 indicates degrees of fault in subjective terms, there is a hierarchy within the objective approach that distinguishes gross negligence, which is deserving of criminal punishment, from mere negligence, which generally is not.

5.1.3.2: What separates mere and gross negligence?

Mere and gross negligence are often distinguished by how far below an ordinary standard of conduct the defendant has fallen. This is the way in which driving offences are distinguished. For dangerous driving, the defendant must have fallen far below the standard of the ordinary, prudent driver, thus displaying a higher degree of negligence than the careless driver, who must fall merely below that standard.²⁴ Sheriff Gordon argues that this distinction depends on the number and importance of precautions that were not taken, or by the magnitude and the degree of probability of the risk involved.²⁵ Thus the objective hierarchy identifies the most culpable defendants as those whose actions could be described as exceptionally bad or shocking.

That said, the factors suggested by Gordon are related to the obviousness of the risk. On most occasions, the number of precautions the defendant ought to have taken and how important they were will inevitably be related to the likelihood of the risk; the more obvious the risk, the more precautions the defendant ought to have taken in order to avoid that risk. It is for this reason that many objective tests, focussed on punishing high degrees of negligence, assess the defendant's culpability according to how obvious the risk would have been to an ordinary person. The Australian Commonwealth Criminal

²³ Williams above, fn.20 at 271-2

²⁴ s3ZA(2) Road Traffic Act 1988

²⁵ Gordon, *The Criminal Law of Scotland* (2nd ed. 1978)

Code, for example, defines negligence as meriting criminal punishment where the defendant's conduct falls far below the standard of care of the ordinary person, coupled with a *high risk* that the physical element of the offence exists or will exist.²⁶ In Ireland, the Court of Criminal Appeal, in *The People (AG) v Dunleavy*²⁷, held that gross negligence sufficient for manslaughter is not satisfied unless it can be proved that the negligence *involves a very high degree of risk or likelihood* of substantial personal injury to others.²⁸ Some American states have also adopted this method for determining what constitutes criminal negligence. In the American Model Penal Code, a person is criminally negligent where he fails to foresee a *substantial risk*.²⁹

Caldwell recklessness³⁰ similarly imposes the requirement that a risk, although not foreseen, must be an obvious one. Hence *Caldwell* cannot be said to punish all forms of inadvertent negligence. Upon a more careful inspection, Williams' example of a man who opens his car door without considering that a cyclist might be coming only serves to highlight this point.³¹ In Williams' opinion, the driver is merely negligent, but that issue is more complex than the bare facts suggest. There is no account taken of the context of the defendant's actions, and thus the likelihood of the risks involved. Consider Driver A who parks next to a very busy road or who stops on a well-used cycle lane compared to Driver B who is on a quiet country road. If A opens his car door onto a busy road without thought to an approaching cyclist (or, for that matter, any vehicle), he fails to consider a very obvious risk; given the large number of vehicles also on the road, it is very likely that the door may open into a cyclist or another driver's path. Thus, A may be said to be grossly negligent because of his failure to recognise that obvious risk. It is not, in this context, a matter of having to consider the potential risks of every act he takes from one hour to the next. Rather he is in a situation that demands that he gives thought to the matter and check to make sure the way is clear. In the case of B, it would be false to state that the risk is really an obvious one. There is *some* risk that B will cause a collision

²⁶ Australian Commonwealth Criminal Code; Criminal Code Act 1995 s5.5 emphasis added.

²⁷ [1948] I.R. 95

²⁸ Emphasis added

²⁹ s2.02(2)(d) of the American Model Penal Code. Emphasis added. The Penal Code is not mandatory, but is closely followed by some states. For example: New York Penal Code § 15.05(4) where criminal negligence is defined in terms almost identical to the Model Penal Code.

³⁰ Above, fn.1

³¹ Williams above, fn.20 at 271

when he opens his door without looking, but the likelihood of harm being caused is far lower. If B does hit a cyclist, he is merely negligent as to the damage caused. He cannot be said to be grossly negligent, nor reckless as to that damage according to the objective test from *Caldwell*, thus he would not be found criminally liable for the damage he causes.

Caldwell and the cases that followed it illustrate the point. In *Caldwell* itself, the defendant set fire to the hotel at night creating an overwhelmingly obvious risk that it might harm those staying inside. In *Miller*³² the defendant was squatting in a house. He fell asleep on a mattress while smoking. When he woke to find the mattress smouldering, he made no attempt to address the obvious risk of a fire starting and instead simply moved to another room and fell back to sleep. In *DPP v K*³³ the defendant left sulphuric acid in a hand-dryer, creating the obvious risk of injury to the next person who used it. In each case the defendant's conduct clearly went beyond Williams' criticism that people would be expected to consider the risk of every single action they take. In each case, the risk was such an obvious one that we would say the defendant's course of conduct was shocking.

The reason that subjectivists such as Williams dismiss the *Caldwell* requirement that the risk be obvious is linked to the subjectivist assumption that inadvertence is not a state of mind; this means that there are no degrees of objective liability because 'all blanks are equally blank.'³⁴ However, even if this questionable proposition were to be correct,³⁵ we could not even say that all blanks are necessarily of the same size.³⁶ Therefore, even from a subjectivist point of view, a failure to avert to an obvious risk must be considered to display a greater degree of negligence than a failure to avert to a less obvious one.

³² [1983] 2 A.C. 161

³³ [1990] 1 All E.R. 331

³⁴ Turner, 'The Mental Element in Crimes at Common Law' in Radzinowicz and Turner (eds), 'The Modern Approach to Criminal Law' (MacMillan 1945) 195-261 at 211.

³⁵ Above, Ch. 2.3, which shows that inadvertence is just as much a state of mind as actual foresight of the risk.

³⁶ Sheriff Gordon makes the same argument as this: above, fn.25

5.1.3.3: *The relationship between the subjective and objective hierarchies*

One common subjectivist assumption to be noted here is that objective tests, because they are unconcerned with the defendant's actual foresight of the consequences, cannot show the defendant to be as morally culpable as a subjective test. Hence all subjective states of mind are more blameworthy than inadvertence. However, close analysis shows there to be considerable overlap between the two hierarchies – inadvertence to an obvious risk can sometimes even be considered to display an equal or greater degree of moral culpability than conscious risk-taking. In fact, it was on this basis that subjectivist principles were shown to be too narrow. We saw in chapter 3 that the subjective hierarchy, by focussing on foresight alone, ignored examples of inadvertence such as voluntary intoxication that may be as culpable, if not more so, than some examples of conscious risk-taking. In contrast, the objective hierarchy is naturally capable of punishing these conative states of mind.³⁷

This overlap between the degrees of culpability indicated by the respective hierarchies can be illustrated by a comparison between the different forms of manslaughter. Simester and Sullivan argue that gross negligence manslaughter contrasts with constructive manslaughter, as the latter requires that the defendant displayed subjective awareness of the wrongfulness of his act.³⁸ For this reason, some subjectivists argue that the objective standard, as it operates in manslaughter cases, risks too wide a gulf between murder and manslaughter, requiring that a form of subjective manslaughter should sit higher up the scale.³⁹ However, to place gross negligence manslaughter 'below' constructive manslaughter in this manner would be to ignore the way in which objectivist principles determine culpability. Although constructive manslaughter requires that the defendant displayed some degree of subjective awareness, the risk of causing death does not need to have been foreseen by the defendant, nor does it need to be a reasonably foreseeable consequence of his actions at all.⁴⁰ By contrast, gross negligence manslaughter, following the objective Correspondence Principle, requires an obvious risk

³⁷ For example, s8.3(1) Australian Commonwealth Criminal Code; *Criminal Code Act* 1995 states that where an offence can be satisfied by evidence of negligence, all that needs to be considered is the standard of the ordinary sober person where the intoxication was voluntary.

³⁸ Simester and Sullivan, *Criminal Law Theory and Doctrine* (2nd ed. 2004)

³⁹ Virgo, 'Reconstructing Manslaughter on Defective Foundations' [1995] C.L.J. 14 at 15

⁴⁰ *Church* [1966] 1 Q.B. 59

of death (or possibly grievous bodily harm)⁴¹ arising from the defendant's actions. Gross negligence may in fact involve shocking conduct on the part of the defendant, and so arguably could show a greater degree of moral culpability. Baker points out that conduct such as careless use of firearms in a crowded area, or speeding through a school zone whilst engrossed in conversation would be considered more serious than, for example, intentionally taking a \$0.50 item from a store.⁴² The same comparison can be made in respect of those unlawful acts that can lead to a charge of constructive manslaughter. All constructive manslaughter requires is that the defendant formed the *mens rea* for a criminal offence that was dangerous.⁴³ The hypothetical individuals in Baker's examples quoted above, although oblivious to the dangerous or even criminal nature of their conduct, are grossly negligent and can be considered more morally culpable for the deaths they cause than someone who punches his victim and happens to cause a death that was not reasonably foreseeable.⁴⁴ Therefore gross negligence manslaughter, although objective, can arguably be said to set the threshold of criminal culpability for manslaughter higher than constructive manslaughter. There is thus nothing to suggest that the objective hierarchy is any less suitable for a consistent application within the law than the subjective hierarchy.

Chapter 5.2: Merits of an Exclusively Objective Formulation of Mens Rea

There are a number of ways in which the objectivist assessment of moral culpability can be challenged.⁴⁵ Some of these criticisms are resolved by a practical solution, as was the case with motive and subjectivism.⁴⁶ The most significant criticism of objectivist principles, however, is that they set the threshold of criminal culpability too broadly. Thus, the fatal flaws in objectivist logic begin to mirror those outlined in subjectivist logic in Part 1. Just as subjectivism cannot be applied consistently because it compels the

⁴¹ See the ambiguity of the current test above at Ch. 5.1.2

⁴² Baker, '*Mens Rea, Negligence and Criminal Law Reform*' (1987) 6 *Law and Phil.* 53 at 81

⁴³ *Church* above, fn.40

⁴⁴ Given that there only needs to be foreseeable that the victim would suffer some harm. *Church ibid*

⁴⁵ Excluding the claim that objective tests are unconcerned with the defendant's state of mind – a claim that has already been disproved in Ch. 2.3

⁴⁶ Above, Ch. 1.4.1

acquittals of those we consider to be morally culpable, objectivism is defeated by the fact that it compels the convictions of those we may consider blameless.

5.2.1: Objective tests and laudable motive

As is the case with subjectivist principles, objectivist principles face the problem that they provisionally identify an individual as morally culpable regardless of why they acted as they did, even if they held some commendable motive for having acted in that way. To offset this problem, objective tests contain two distinct objective enquiries: how obvious the risk was (the objective hierarchy) and whether the defendant's actions fell below the standard of the reasonable person. In most cases, it was seen above that acting in the face of a risk that a reasonable person would have foreseen is evidence that one has fallen below the standard of that reasonable person.⁴⁷ However, this latter inquiry ensures also that the defendant faces conviction for his unjustified risk-taking only. In a previously mentioned example: driver 1 is aware of the risk of stopping suddenly but does so in order to avoid a pedestrian.⁴⁸ Despite that foresight, he is not reckless because it is reasonable for him to run that risk in the circumstances. Now imagine Driver 2 stops suddenly in the same circumstances but lacks the foresight of the risk of other drivers crashing into him. If objectivist principles alone are applied, he would be considered negligent on the basis that a reasonable person would have foreseen that risk. However, objective tests also impose the requirement that his actions must be unreasonable before he can be convicted,⁴⁹ and it is this proviso that offers driver 2 protection.

Because both tests use the reasonableness of taking the risk to embrace laudable motive, both face similar problems when dealing with a defendant who acted with honourable motive but was under some misapprehension about the circumstances.⁵⁰ Whenever the defendant pleads a general defence such as self-defence, objectivism is, like subjectivism, forced to view that claim as a 'confession and avoidance' plea rather than a denial of *mens rea*. Therefore, objectivists are also forced to rely on categories of justification and excuse to explain how and when an individual's mistaken belief is

⁴⁷ Ch. 5.1.3.2

⁴⁸ Above, Ch. 1.4.1

⁴⁹ i.e. fell below the standard of the reasonable person.

⁵⁰ Above, Ch. 1.4.1

capable of exculpating him. This remains a complicated issue that, to both subjectivists and objectivists, is not relevant to *mens rea*. It will therefore be dealt with in more detail in chapter 9.

5.2.2: Intention cannot be objective

In the early 1960s, intention was assessed objectively. In the case of *Smith*⁵¹ the old presumption of intention⁵² was upheld, rebuttable only by evidence of insanity or diminished responsibility. Thus Lord Kilmuir held that, where the defendant caused a death whilst engaged in an unlawful and voluntary act, the question was not what the defendant himself contemplated, but rather what in all the circumstances the ordinary reasonable man would have contemplated to be the natural and probable result. Such a test for intention is unsupportable. Some crimes of specific intent require that the defendant displayed the highest degree of moral culpability, and so he will face the greatest penalties within that category of harm. Thus murder is distinguishable from manslaughter and section 18 from section 20 Offences Against the Person Act 1861. However, if the defendant was unaware of the natural and probable consequences of his actions, he would have been grossly negligent as to those consequences. If this test was used in place of subjective intention, then both murder and manslaughter would be based on gross negligence with little to distinguish the two. It is therefore unsurprising that this objective test for intention found no subsequent favour. Lord Diplock in *Hyam*⁵³ considered that it overlooked historical developments in the procedure of the law. Until the Criminal Evidence Act 1898, the defendant was not allowed to give evidence as to his state of mind, and so the objective test was the only way in which his intent could be inferred.⁵⁴ Lord Bridge⁵⁵ subsequently claimed that the *Smith* decision had provoked Parliamentary intervention in the form of section 8 Criminal Justice Act 1967. It is stated that the tribunal of fact should not be bound to infer that the defendant intended or foresaw a result simply because that result was the natural and probable consequence of

⁵¹ [1961] A.C. 290

⁵² i.e. it was presumed that a defendant intended the natural and probable consequences of his unlawful and voluntary act. *Rex v Lamely* (1911) 22 Cox C.C. 635 per Avory J at 636; *Ward* [1956] 1 Q.B. 351 at 356

⁵³ [1975] A.C. 55

⁵⁴ *Ibid* at 94

⁵⁵ *Moloney* [1985] A.C. 905 at 928

his actions. Instead a decision is made by reference to all the evidence, drawing inferences as appears proper in the circumstances.

Any modern reformulation of the *Smith* test would similarly resemble the standard of gross negligence, which would be sufficient *mens rea* for manslaughter. It is therefore clear that intention must remain a subjective concept based on what consequences the defendant either actually desired or appreciated to be virtually certain. This will ensure that a clear distinction between the *mens rea* required for murder and manslaughter is maintained.

5.2.2.1: Why does this not defeat consistently applied objectivism?

There is no reason in principle why a subjective definition of intention within an otherwise objectivist approach to the criminal law could not be justified in terms of the need to distinguish the most serious offences in a single category of harm from lesser offences relating to the same kind of harm. Even the most heinous instances of inadvertence do not necessarily attract the harshest punishment that the law has to offer. An individual who does not notice the obvious risk of death arising from his actions because he does not care is deplorable, but he fades in comparison to one who kills whilst actively trying to bring about the death or serious injury of the victim, or knowing that such an outcome is certain. Therefore, a subjective definition of intention, within an otherwise objectivist approach to moral culpability, would be justified by the need to distinguish offences of basic and specific intent.

This explanation may appear to be challenged by some specific intent offences, such as theft, where there is no basic intent offence within the same category of harm with which a distinction is required. However, this does not mean that intention in theft ought to be assessed objectively. It was observed earlier that the aim of the Theft Act 1968 is to punish a particular sort of wrongdoing; it is not merely the fact that the victim has been deprived of the property, but rather that the defendant did it with that particular state of mind.⁵⁶ Indeed, an appropriation need not be wrongful in itself,⁵⁷ and so it is the dishonesty of the defendant and his intent to permanently deprive the other of the

⁵⁶ Above, Ch. 3.4.4

⁵⁷ *DPP v Gomez* [1993] A.C. 442 and *Hinks* [2001] 2 A.C. 241

property that gives the theft its ‘criminal character’.⁵⁸ If it is accepted that theft is designed to punish the ‘wrongfulness’ of the defendant, then it is easy to see why it requires his intention to permanently deprive rather than punishing him merely for his gross negligence. By contrast, criminal damage is an offence more focussed on the harm caused by the defendant, and so the focus of the offence would be unchanged if an objective assessment of *mens rea* was required.⁵⁹

5.2.3: The problem of those who cannot meet the reasonable standard

It was noted above that an objective test is capable of punishing conative states of mind such as indifference, anger and voluntary intoxication.⁶⁰ However, the major criticism that I will level at objectivist principles is that they do not limit the punishment of inadvertent individuals to these particular states of mind. Instead, the degree of culpability displayed by the grossly negligent individual is determined merely according to how obvious the risk would have been to a reasonable person. Thus, we can regard *any* failure to foresee an obvious risk as grossly negligent regardless of whether the defendant was drunk, angry or merely too young to realise what was going on. This is because, by focussing an assessment of moral culpability solely upon what the reasonable person would have considered obvious, objectivism assumes that all individuals are capable of attaining to that standard of foresight. Indeed the objective standards that have been applied in the criminal law of England and Wales can be criticised because they punish those individuals who, on account of personal limitations short of what is legally required for the defences of automatism or insanity, cannot measure up to the ‘reasonable’ standard of foresight and responsibility. This could be by virtue of some mental illness or simply because of youth or inexperience. In such cases we would not regard the inadvertent defendant as morally at fault. It was in fact this problem that eventually defeated the much-maligned⁶¹ *Caldwell* test of recklessness.

⁵⁸ Simester, ‘*Intoxication is Never a Defence*’ [2009] Crim. L.R. 3 at 10

⁵⁹ This is possible because of the very wide definition of ‘damage.’ In *Whiteley* (1991) 93 Cr.App.R 25 at p29 Lord Lane CJ held that any impairment to the value or usefulness of the property to the owner could be considered damage. This would of course require that the owner actually suffered the ‘harm’ of permanently losing the property, a requirement that is absent in theft. Of course, if the property was not lost or damaged, and so returned safely to the victim, then a charge of criminal damage could not be brought.

⁶⁰ Above, Ch. 5.1.3.3

⁶¹ Above, Ch. 1.2

5.2.3.1: The emergence of 'Elliott objectivity'

The problem of uniform standards of behaviour was not expressly considered by Lord Diplock during his judgment in *Caldwell*. It was left to the Divisional Court and Court of Appeal subsequently to decide whether an objective standard would nonetheless compel the conviction of individuals who are unable to attain the reasonable standard of conduct. Generally, *Caldwell* was interpreted strictly, and so every individual, notwithstanding their lack of capacity, was assessed according to what the reasonable person would have foreseen. For example, it was claimed that the fourteen-year-old defendant in *Elliott v C*,⁶² because of her limited intelligence and experience, had no idea that the white spirit she lit would ignite in the manner that it did. Even assuming this to be correct,⁶³ it was held on appeal to be irrelevant to the definition of recklessness given in *Caldwell*. It is debateable how far the decision in *Caldwell* actually compelled the decision in *Elliott*, but there was certainly a distinct lack of guidance in *Caldwell* and *Lawrence* on the subject of disadvantaged defendants. *Elliott* is less ambiguous. Any defendant is reckless where he fails to foresee a risk that would be obvious to the reasonable man. We cannot take into account any peculiarities of the defendant that affect his ability to foresee the risks created by his actions. This strict interpretation of objective standards will herein be termed 'Elliott objectivity.'

Although the discussion on *Elliott* objectivity has thus far been made in regard to objective recklessness, there are indications that gross negligence has been interpreted just as strictly. However, the issue is markedly less clear in this context due in part to the somewhat indefinite requirements of the archaic *Bateman* test for gross negligence.⁶⁴ Lord Hewart stated that:

⁶² *Elliott v C (A Minor)* (1983) 77 Cr.App.R. 103

⁶³ There is room for the view that such an individual might foresee the risks despite her limited intelligence; indeed, the magistrates themselves in *Elliott* did in fact think that the defendant was aware of the inflammable nature of white spirit: Syrota 'A reply' [1984] Crim. L.R. 476 at 478

⁶⁴ The possibility that *Adomako* (above, fn.14) is capable of taking the defendant's inability to foresee the risk into account will be discussed below, at Ch. 6.5.3

“the jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence.”⁶⁵

Although *Bateman* was followed by *Adomako*,⁶⁶ their Lordships in the later case were unclear on the relevance of the defendant’s lack of capacity within the ‘circular’ test. Instead, we are probably⁶⁷ bound by the authority of *Stone*.⁶⁸ This case is often thought to have ruled out the possibility that the capacity of the defendant is relevant to a finding of gross negligence. The trial judge directed the jury that, if the defendant did her incompetent best, she should be acquitted. However, Lane LJ referred to this direction as overly favourable to the defendant.⁶⁹

5.2.3.2: *The fall of Elliott Objectivity*

Elliott objectivity is generally considered to be unsatisfactory as a general standard of *mens rea* in the criminal law of England and Wales. In *Elliott* itself, Goff LJ expressed a very clear dissatisfaction at the result he felt bound to reach:

“[If I] ask myself the question – would I, having regard only to the ordinary meaning of the word, consider this girl, on the facts found, reckless...my answer would, I confess, be in the negative.”

He continued:

“This is a case where it appears that the only basis upon which the accused might be held to be reckless would be if the appropriate test to be applied was purely objective.”⁷⁰

⁶⁵ (1925) 19 Cr. App. R. 8 at 12

⁶⁶ Above, fn.14

⁶⁷ Albeit not definitely: Syrota, ‘*Mens Rea in Gross Negligence Manslaughter*’ [1983] Crim. L.R. 776 and below, Ch. 6.5.3

⁶⁸ *Stone & Dobinson* [1977] Q.B. 354

⁶⁹ *Ibid* at 363

⁷⁰ *Elliott v C (A Minor)* above, fn.62 per Goff LJ at p118.

Indeed it was juror reaction to the test that ultimately saw its rejection in the criminal law of England and Wales. In *G and R*,⁷¹ the defendants were children aged 11 and 12 but the trial judge felt compelled to direct the jury according to the strict objective standard imposed by *Elliott*. The jury returned from their retiring-room to question the application of this standard, no doubt because (as pointed out by counsel for the appellants in the House of Lords) the law as it stood resulted in children being tested by a mature, adult standard. This result was clearly unfair. It was said in the House of Lords:

“The sense of fairness of twelve representative citizens sitting as a jury... is the bedrock on which the administration of Criminal Justice in this Country is built. A law that runs counter to that must cause concern.”⁷²

In other words, the reluctance of the jury to apply *Elliott* objectivity to children gives the strongest possible indication that the standard offends the ordinary notions of justice. This sense of injustice arises because, although a reasonable prudent adult would have realised the risk posed by the fire, the juvenile defendants here may not have had the capacity to foresee this outcome. They might not have the same experience as the ‘reasonable prudent man’ in the way a fire might behave, and so may have genuinely believed that there was no risk to the victim’s property. Their conviction thus conflicts with the moral feeling that they should not have been held criminally responsible for that failure. There would be a similar sense of injustice if *Elliott* objectivity were to be applied to a defendant who has a mental illness or a learning disability. Lord Bingham asserted that it would not be morally right to convict a defendant on the basis of what someone else would have apprehended if the defendant did not share that apprehension.⁷³ Although this can be disputed on the basis that a defendant with normal capacities who did not foresee an obvious risk can be considered morally culpable from a broader point of view, the same cannot be said of a defendant who was incapable of assessing his or her actions for risks. It is therefore clear that the *Elliott* objective test carries an overwhelming potential for injustice to an individual with limited capacity. If the

⁷¹ Above, fn.2

⁷² *Ibid* per Lord Bingham at 1055

⁷³ *Ibid* per Lord Bingham at 1055

defendant cannot attain the reasonable standard imposed by *Elliott* objectivity, then it is clear that it is unfair to impose that standard on him because he may have been unable to fully appreciate the risks his actions were creating.

Chapter 6: Unworkable tests of ‘mitigated objectivity’

6.1: What is mitigated objectivity?

There have been efforts to modify objectivism; Honoré notes that those legal systems that make an objective assessment of *mens rea* do not always expect everyone to reach the same standard. Thus it is common for children, the insane¹ or even the elderly² to be exempt from a normal objective standard. A test that attempts to take account of the defendant’s capacities in this way will be termed as ‘mitigated objectivity’ and its purpose can be summarised by the work of Hart: it is important to ensure that all defendants are punished only where they had, at the material time, *the capacity to do otherwise*.³ Therefore, if we punish a defendant who did not have this capacity, then we are punishing him despite the fact that he ‘could not have helped it,’ which would be plainly immoral. Applying a test of mitigated, rather than *Elliott*,⁴ objectivity would therefore hold a firm moral basis. It would ensure that most individuals must act within the same standard of reasonableness, but at the same time it would ensure that those defendants who cannot attain that standard are not measured by it. Indeed this concession to the capacities of the defendant within an objective enquiry appears to be widely accepted as necessary where an objective test is imposed.⁵ Mitigated objectivity can in fact be found in the criminal law of England and Wales. For example: in the case of *RSPCA v C*, Mr Justice Newman thought that the objective test should take into account all of the circumstances in which the 15-year old defendant failed to act, including her

¹ In the USA; *Miller v Trinity Medical Centre* 260 NW 2d 4 6-7 (1977)

² Also the USA; *Johnson v St Paul City R Co* (1897) 67 Minn 260

³ Hart ‘*Negligence, Mens rea and the Elimination of Responsibility*’ in *Punishment and Responsibility* (Essays in the Philosophy of Law) 1968 p152 emphasis added.

⁴ (1983) 77 Cr.App.R. 103

⁵ Law Reform Commission of Ireland, ‘*Homicide: Murder and Involuntary Manslaughter*’ Report 87 (2008) paras 5.61 & 5.65; Keating, ‘*The Law Commission report on involuntary manslaughter: the restoration of a serious crime*’ [1996] Crim. L.R. 535 at 543 Even some subjectivists, although they might prefer the imposition of a subjective standard, accept such consideration of the defendant’s capacities as a compromise where an objective standard is actually imposed. See also Ormerod, ‘*Manslaughter: manslaughter through gross negligence - whether sufficient certainty as to ingredients of offence*’ [2005] Crim. L.R. 234 at 238; Law Commission ‘*Legislating the Criminal Code: Involuntary Manslaughter*’ (1996) Law Com No. 237 paras 4.43 & 5.29; Ashworth ‘*Principles of Criminal Law*’ 2nd ed (1995) pp 84–85.

age and the fact that she did not have sole responsibility for the cat.⁶ A test of mitigated objectivity may also be observed in the partial defence of provocation.

However, mitigated objectivity does not provide a satisfactory solution to the broad approach objectivist principles take towards moral culpability. It attempts to ensure that the correct result is achieved, but signally fails to offer a workable test, as the history of the partial defence of provocation clearly demonstrates.

6.2: Mitigated objectivity in provocation

The objective hierarchy identifies inadvertence to a risk that a reasonable person would consider obvious as a highly culpable state of mind. The simplest form of mitigated objectivity would therefore be a test that adapts the concept of the reasonable person to fit the individual charged with an offence. Thus, if the defendant were a manic depressive, we would apply the test of what the ordinary manic depressive, rather than someone without that characteristic, would have foreseen. The result would be a test that has been observed to be neither wholly subjective nor objective, but instead one that combines the qualities of both.⁷ This was precisely the approach once taken by the law in regard to provocation, where a modification of the reasonable person test was developed subsequent to the very strict approach taken prior to the Homicide Act 1957. The objective question in issue was whether the provocation would have driven the reasonable man to do as the defendant did; a standard that did not originally take any of the defendant's peculiarities into account. However, applying the test so strictly led to unfair results, just as it did when *Elliott* objectivity was used as an assessment of *mens rea*. For example, in *Bedder v DPP* it was held that a taunt about the defendant's impotence should be assessed as though it were made against a reasonable man who was not impotent.⁸ The Homicide Act 1957 was interpreted to have mitigated this outcome to an extent,⁹ and this was confirmed in *Camplin*.¹⁰ However, following *Camplin*, a series

⁶ [2006] EWHC 1069 at para 15. Note, however, that the construction of this test resembles that used in the new sexual offences act (discussed below in chapter 6.3).

⁷ Hart above, fn.3 at p152

⁸ [1954] 2 All E.R. 801

⁹ Arguably because the Act allowed provocation by words alone to be considered.

¹⁰ [1978] A.C. 705

of Court of Appeal judgments, culminating in the House of Lords decision in *Smith*,¹¹ left the test in a mess.

The *Smith* judgment has been subjected to heavy criticism for many reasons,¹² and was eventually overruled by an unusually large panel of the Privy Council in *Holley*.¹³ However, although subsequent tests of mitigated objectivity have been attempted, they often deal with only the most commonly recognised criticism of *Smith* - the illogical modification of the reasonable person. It will be shown that that failing was in fact merely a superficial difficulty, and instead there were two greater failings that prevented this attempt at mitigated objectivity from being a workable test.

6.2.1: *The unsuitability of the reasonable person test*

One of the most obvious and commonly recognised problems with the *Smith* judgment is the continued use of the terminology of the ‘reasonable person’ or ‘reasonable man’. Section 3 Homicide Act 1957 required that the question for the jury is:

“whether the provocation was enough to make a *reasonable man* do as he [the defendant] did...”¹⁴

Their Lordships, when creating a mitigated objective test in *Smith*, were thus bound to use this terminology. It could be said that applying a reasonable person test in relation to provocation was flawed from the very outset; even an entirely objective assessment is forced to assume that, on some occasions, the ‘reasonable person’ will do the wholly unreasonable act of intentionally and unjustifiably killing another. However, once the reasonable person was anthropomorphised according to the characteristics of the defendant, he became an even more peculiar creature.

¹¹ [2001] 1 A.C. 146

¹² Gardner and Macklem, ‘*Compassion Without Respect? Nine Fallacies in R v Smith*’ [2001] Crim. L.R. 623 for a comprehensive overview of these criticisms.

¹³ *AG for Jersey v Holley* [2005] 3 All E.R. 371. The Court of Appeal has since held that the size of the panel was intended to be the equivalent of a sitting of the House of Lords; *James; Karimi* [2006] 1 Cr App R 29

¹⁴ Emphasis added

The House of Lords in *Morhall*¹⁵ ruled that all relevant circumstances and characteristics should be taken into account within the reasonable person test, thus overruling the Court of Appeal's earlier judgment¹⁶ that any characteristics repugnant to the notion of the reasonable person should not be relevant. It should be noted, however, that their Lordships in *Morhall* followed the *Camplin* requirement that any characteristic of the defendant, other than age or gender, is in issue only where it was the subject of provocative taunts.¹⁷ However, the *Camplin* distinction was eroded by later judgments,¹⁸ and so the effect of the *Morhall* judgment became that the jury would be required to consider the level of self control that would be displayed by, for example, a 'reasonable' glue-sniffer.¹⁹ Such a question is nonsensical; there can be no 'reasonable drug addict' because, strictly speaking, the reasonable person must be considered to be law-abiding and therefore not addicted to narcotics. Even if we do want to take account of the abnormalities that such an addict might display, we cannot do so by reference to the reasonable person. This remains true even of characteristics not reprehensible in themselves; a typical manic depressive may act in a way that is wholly unreasonable, and an 'ordinary' paranoid person would not necessarily show a reasonable level of self-control. We may have sympathy for such defendants, but that does not suggest that it is helpful to apply the standard of the 'reasonable person' who may in fact act in an unreasonable way.

Their Lordships were not completely oblivious to this illogicality, and they did in fact attempt to explain it away with claims that provocation's reasonable person:

"is concerned not with ratiocination, nor with the reasonable man whom we know so well in the law of negligence... nor with reasonable conduct generally."²⁰

Instead it seems that they used the test simply to indicate the standard of self-control that ought to be complied with. However, this argument does little to rationalise the

¹⁵ [1996] A.C. 90

¹⁶ *Morhall* (Court of Appeal judgment) [1993] 4 All E.R. 888

¹⁷ Above, fn.10 at 717. Herein referred to as the '*Camplin* distinction', and discussed in more detail below, Ch. 6.2.2

¹⁸ Below, Ch. 6.2.2

¹⁹ Consider Lord Hoffman's disapproval of such a requirement in *Smith* above, fn.10 at 172

²⁰ *Morhall* above, fn.15 per Lord Goff at 97-8

provocation test, which might have been better framed by dropping all reference to the reasonable person. Of course, it is likely that the express reference to the standard in the Homicide Act prevented the courts from doing so.

Although the test of a ‘reasonable person’ who acts unreasonably may offend common sense, it has to be said that this criticism of the *Smith* judgment is merely a matter of semantics. It therefore is not the most damning criticism of the *Smith* test that can be made.

6.2.2: *The over-inclusiveness of the provocation test*

Perhaps the greatest criticism of the test of mitigated objectivity created in *Smith* is instead that it is over-inclusive; the judgment apparently imposed no control on what characteristics of the defendant we might include and what should be excluded from the test. The original judgment handed down in *Camplin* did actually attempt to impose some guidance over which of the defendant’s characteristics should be taken into account within the objective enquiry; age and gender alone were considered to be relevant characteristics when considering what level of self-control the reasonable person would have displayed. However, the issue became somewhat clouded by Lord Diplock’s distinction between that question and the issue of the gravity of the provocation.²¹ It was held that the reasonable person could be considered to share characteristics of the defendant that were the subject of the provocative taunts. Thus, a taunt directed at a defendant’s:

“race, his physical infirmities or some shameful incident in his past”²²

would appear to the jury to be more offensive to the person addressed, if the foundations of the taunt were true, than to a person without them. Hence, any characteristic relevant to the gravity of the provocation should be included within the objective test. However, the reasonable person, in terms of the level of self-restraint to be expected, was still regarded as someone with a reasonable level of self-control, modified only by age and

²¹ Referred to above, as the ‘*Camplin* distinction’, above, fn.17

²² *Camplin* above, fn.10 per Lord Diplock at 717, a view with which Lord Simon agreed.

gender. Despite this early attempt by Lord Diplock to suggest which of the defendant's characteristics should be relevant, the *Camplin* distinction can be observed to have caused a great deal of confusion in subsequent cases. The problem was there was no express guidance from Lord Diplock as to whether, once a characteristic had been considered in relation to the nature and 'bite' of the provocation, it should also be taken into account on the question of the appropriate level of self-control; that is, whether the jury should consider the characteristic for one part of the objective test and ignore it for the other.

The problem this might cause can be illustrated by an example based on the facts of *Lesbini*.²³ If a defendant was taunted for being Italian, his nationality is clearly relevant to the question of how such insults would have impacted upon the reasonable person. However, if the defendant also successfully maintains that his Italian blood made him more prone to loss of temper, should that issue be excluded from the consideration of what level of self control the reasonable person would have displayed? If it is, then the jury would have to consider how serious the provocation would have been to a reasonable Italian who did not share the alleged hot-bloodedness of his countrymen. The distinction may become a very difficult one for them to make. The distinction would be even more problematic if the disputed characteristic is a mental disorder, the precise effect of which might be unclear to the jury. Horder also acknowledges this difficulty, pointing out that we cannot assess the provocation's effect where we consider the reasonable person's powers of self-control to be unaffected by a factor, and yet the provocation is directed at that factor.²⁴ It is therefore arguable that, if we wish to take account of subjective characteristics within any part of the 'reasonable person' test, then those characteristics ought to be relevant across the scope of the test for the sake of clarity and consistency.

In the lead-up to *Smith*,²⁵ the Court of Appeal appeared to adopt this line of thought. Emphasis was placed on the New Zealand authority of *McGregor*,²⁶ where North J resolved the ambiguity in *Camplin* by stating that the defendant's characteristics, if relevant to the gravity of the provocation, should also be considered in reference to their

²³ [1914] 3 K.B. 1116

²⁴ Horder, 'Provocation's 'Reasonable Man' Reassessed' [1996] 112 L.Q.R. 35 at 38

²⁵ Above, fn.11

²⁶ [1962] N.Z.L.R 1069

effect on self-control. However, once this step is taken, then the next logical step surely must be to reject the *Camplin* distinction altogether; why should a mental characteristic, normally irrelevant to what level of self-control the reasonable person has, suddenly become relevant across the scope of the whole test if it was the subject of the taunt? Why should an Italian who was racially taunted be able to rely on his 'hot-bloodedness' when another Italian provoked by some other means is not?²⁷ Subsequent decisions of the Court of Appeal appeared to resolve this conundrum by holding that the defendant's characteristics may be relevant regardless of whether or not they were the subject of the provocative taunts. Of particular note is *Humphreys*²⁸ where the defendant had killed in reaction to a taunt about her attention-seeking tendencies. On appeal it was argued that her immaturity should have been taken into account. Lord Hirst recognised the risk of leaving too much room for the introduction of subjective considerations to the reasonable person test. He feared that combining the 'discordant notions' of subjectivity and objectivity would cause difficulty if no limitation was made. Despite this, Lord Hirst read the judgment of North J in *McGregor* as saying that the 'objective' standard was of 'a person with ordinary self-control *but otherwise*²⁹ having the characteristics of the offender. Lord Hirst distinguished this from saying that the reasonable person would have a reasonable level of self control but '*in other respects*' would share the characteristics of the accused on the basis that the former seems to suggest that the reasonable man will have normal self-control *except* where some characteristic affects his control. Therefore, Lord Hirst felt unable to exclude any of the defendant's characteristics that had a bearing on her level of self-control.

Thus, we can see that the *Camplin* distinction was completely set aside by the time the House of Lords reconsidered the issue in *Smith*. As a result, although their Lordships at least recognised the need to exclude certain characteristics from provocation's reasonable person test, their solution was to simply leave the decision up to the jury. The only guidance their Lordships provided was that the test was supposed to take account of

²⁷ It should be noted that North J's conclusions were inevitably influenced by the absence of any equivalent to the defence of diminished responsibility in New Zealand Law. Thus, there was a greater need to mitigate the murder charges facing those with mental abnormalities.

²⁸ [1995] 4 All E.R. 1008

²⁹ Hirst LJ's emphasis

true abnormalities and not mere ‘character flaws’ - such as pugnacity and excitability³⁰ - or any self-induced conditions. The problem is: how do we clearly distinguish these ‘character flaws’ from aspects of the defendant’s personality that we wish to take account of? The distinction cannot be based on the fact that a defendant will be capable of controlling his character flaws. Vuoso claims that a greedy person is capable of acting as generously as he likes on an occasion, whereas a stupid person can only ever act stupid and so ought not to be punished for his stupidity.³¹ If greed is considered a character flaw, however, in that respect is it not a constant? If a character flaw leaves a defendant with no self control, that lack of self-control means that the person lacks the capacity for self-control,³² and thus the capacity to do otherwise. Furthermore, although self-induced characteristics were expressly excluded, many defects of character are not self-induced. Thus the *Smith* judgment, because it provided no way of distinguishing mere character flaws from legitimate disorders, failed to exclude those flaws from the mitigated objective standard.³³

With no firm guidance as to which of the defendant’s characteristics should be included within the test, the distinction would likely have depended upon a jury’s moral assessment of the characteristics in question. This would have been unacceptable. Judgments on moral issues may vary from one jury to the next to a greater degree even than jury judgments on traditional elements such as foreseeability. A recent empirical study by Finch and Fafinski found that different people will take largely different interpretations of what constitutes a dishonest action sufficient for theft.³⁴ This lack of consistency is therefore likely also to have a large effect on jury decisions in relation to which of the defendant’s characteristics ought to be relevant to an objective standard.

Since, from *Smith*, potentially any of the defendant’s characteristics might fall within the standard of behaviour to be applied, the test begins to look very much like a subjective one. However, it is clear that the attribution of any and all of the defendant’s

³⁰ *Smith* above, fn.11: for example per Lord Clyde at 180. Lord Diplock had also opined in *Camplin* above, fn.10 at 716 and Lord Simon at 725 that the purpose of the reasonable man test was to exclude such factors.

³¹ Vuoso, ‘*Background, Responsibility and Excuse*’ (1987) 96 Yale L.J. 1661 at 1671

³² Gardner and Macklem above fn.12 at 626

³³ This was a criticism made of the House of Lords by Gardner and Macklem, *ibid* at 626

³⁴ Finch and Fafinski, ‘*No Public Agreement on Dishonesty*’ Presented at British Science Festival (2009) The research was conducted as an anonymous online survey so some of the results may be skewed.

characteristics to the objective reasonable person poses a significant problem. In addition to those character flaws that their Lordships in *Smith* wished (but ultimately failed) to exclude, there are a number of other abhorrent characteristics that could easily be attributed to the reasonable person if no clear line is drawn. In *Weller*,³⁵ it was confirmed that trial judges cannot exclude considerations such as racism and homophobia from the jury's considerations. Additionally, there has been some concern that there seems to have been little basis under *Smith* that would prevent a defendant such as the stalker in *Stingel*,³⁶ when pleading provocation, from being allowed to rely on his obsession.³⁷ The over-inclusiveness of provocation's reasonable man therefore provides a very strong challenge to the legitimacy of any objective test that has been modified to give weight to the defendant's inherent personality problems. If all personal characteristics are included within the test, then it will inevitably fail to convict some individuals that we may consider morally culpable.

There were good reasons for the drift towards over-inclusiveness in the reasonable man test for purposes of the law of provocation. For example, there was pressure from feminist groups to render the enquiry a more subjective one in order to better protect those women who killed after years of abuse from their husbands or partners. The strict objective standard, or even the standard imposed by *Camplin*, would be unable to include the effect the defendant's 'battered wife syndrome' might have on her level of self-control, and thus provocation would be unavailable to such women.³⁸ Although a plea of diminished responsibility would be available, provocation is considered the preferable plea because it imposes the burden of proof on the prosecution rather than the defence and, perhaps more significantly, it inherently acknowledges that the husband's wrongdoing brought about the killing, rather than merely focussing on the defendant's mental disorder.³⁹ However, this does not mean that other tests of mitigated objectivity

³⁵ [2003] Crim. L.R. 724

³⁶ (1990) 171 CLR 312

³⁷ Norrie, 'From Criminal Law to Legal Theory; The Mysterious Case of the Reasonable Glue-Sniffer' [2002] 65 M.L.R. 538 at 548 although Lord Hoffman in *Smith* above, fn.10 at 169 at least recognised that such pleas ought not to be successful.

³⁸ *Thornton (No. 2)* [1996] 1 W.L.R. 1174 and *Ahluwalia* [1992] All E.R. 889

³⁹ Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill' *Feminist Legal Studies* 111/2 (1995); Wells and Lacey 'Reconstructing Criminal Law' (2nd ed. 1998)

would not also face the risk of over-inclusiveness. Once any of the defendant's characteristics are attributed to the reasonable person, it naturally becomes very difficult to prevent an analogy being drawn between those and other similar characteristics. For example, *Camplin* attempted to restrict consideration to physical age, but if we varied our perception of the reasonable person for the sake of immaturity because of physical age, then why would we not do so equally for immaturity caused by a lower mental age as well? Both individuals might show a similar reaction to provocation or degree of foresight, and so there is little to distinguish them morally. Then, if we include a low mental age, the question becomes why not include other mental characteristics as well? The problem is, if the courts are prepared to extend the relevance of subjective factors beyond the question of physical age to include mental characteristics such as depression, is it not veering toward the inclusion of mere character flaws like pugnacity or excitability? It was therefore inevitable that the test of mitigated objectivity in provocation, by taking account of some characteristics of the defendant without any clear restraint over what ought to be relevant, would potentially also include the very traits that the reasonable person test was originally created to exclude. Therefore the over-inclusiveness of the test in *Smith* can be blamed neither on the feminist pressure for a changed focus in provocation nor on ambiguities of the *Camplin* distinction. Accordingly, it is clear that a test of mitigated objectivity would be workable only if it clearly identifies which characteristics ought to be relevant without simply leaving it to the jury.

6.2.3: A logical circle

A second serious defect with provocation's test of mitigated objectivity was that the test, when followed to its logical conclusion, was somewhat circular. In the Privy Council case of *Luc Thiet Thuan*,⁴⁰ Lord Goff considered the case of *Raven*⁴¹ and the difficulty caused by asking the jury to consider the exact standard of self-control of a 22-year old man with a mental age of nine. In the case before him, Lord Goff thought for the jury to consider the effect of brain damage on the ordinary person's power of self-control would

⁴⁰ [1997] A.C. 131

⁴¹ [1982] Crim. L.R. 51

be even more difficult.⁴² The danger is that it is all too likely that the jury, if they are unfamiliar with the effect of the defendant's characteristics, will find the reasonable person with those characteristics would have reacted in a certain way precisely because the defendant himself acted in that way. Thus, the test would effectively be subjective; the defendant would be judged on the level of self-control or foresight that he or she actually displayed. Creach observes that, in American law, the reasonable man test was becoming more particular. He points out that considering the test as 'the reasonable assault victim' could lead to logical extensions such as the 'reasonable battered wife with the history of the particular defendant' and at the extreme:

“What a reasonable ‘Mary Doe’ would do in the precise circumstances that ‘Mary Doe’ actually faced; of course, she would do precisely what ‘Mary Doe’ actually did.”⁴³

In the context of an objective test of *mens rea* such as *Elliott* objectivity,⁴⁴ an equivalent attempt to mitigate would ask what the reasonable person, sharing the characteristics of the defendant, would have foreseen. The drawbacks with such a test can be illustrated using the following example. A defendant flicks matches into a shed and causes it to burn down, killing someone she knows to be inside. If judged by the ordinary standard of reasonableness, she is grossly negligent as her actions create an obvious risk of death. If we impose an objective standard of *mens rea* then, even if the defendant does not foresee that the matches would cause the shed to catch fire, she is culpable because the fire is something that an ordinary person would have foreseen, and so she should have realised herself. If the defendant is a 14-year old girl with severe learning difficulties, a test of mitigated objectivity insists that she should not be judged by the same standards as other 'normal' defendants, but by the lesser standard of a 'reasonable' 14-year old girl with learning difficulties. This is easy to support in theory; why should she be judged by a standard that she is unable to measure up to? It would be unfair to convict her on a

⁴² *Luc Thiet Thuan* above, fn.39 at 145

⁴³ Creach, 'Partially Determined Imperfect Self Defence: The Battered Wife Kills and Tells Why' [1982] 34 Stan. L.R. 615 at 620 The argument was also made by Gardner and Macklem above, fn.12 at 626

⁴⁴ I.e. a test based on the defendant's failure to foresee an outcome that the reasonable person would have foreseen. Above, Ch. 5.2.3.1

strictly objective basis given her low intelligence and immaturity. However, if we are applying a standard adapted to the defendant's specific circumstances and characteristics, then it is far too easy to fall into the trap of applying the standard of the defendant herself; a standard that she is conceptually unable to fall short of. We may not expect a reasonable 14-year old girl with learning difficulties to foresee the risk of death precisely because this defendant, with those characteristics, does not foresee the risk of death.

If this just applied to defendants like the girl in my example, we might accept it as a necessary evil; we might feel sympathy for the defendant because of her youth and severe learning difficulties, and so an acquittal would be the preferred outcome. However, this problem does not exist in isolation and so it is greatly exacerbated by the previously observed over-inclusiveness of the *Smith* test.⁴⁵ Because there was no distinction between excusable characteristics and mere 'character flaws,' then it is clear that the overall approach of *Smith* was very unsatisfactory. It is as Norrie states:

“An ‘ordinary’ person with an obsessive character or addiction acts like an obsessive or addicted person acts.”⁴⁶

If the girl does not foresee the risk merely because she is 'prone to rage' and so is angry on this occasion, how could this test of mitigated objectivity deal with her? Could we expect an enraged person to have foreseen the same risks as a calmer one? If not, would we wish to excuse her based on her reduced capacity? We may not think that such an individual should be able to rely on her condition as an excuse, but a modified objective standard such as that in *Smith* might very well compel us to take account of her pugnacity. In that case, the jury may be compelled to find that she acted just as a reasonable pugnacious person would have acted. The law's inability to identify exactly which personal characteristics should be considered in relation to an individual's culpability mean that a mitigated objective standard would be objective in name alone.⁴⁷ We could say only that the reasonable person with the defendant's exact characteristics would not have foreseen the risk because the defendant herself did not foresee it.

⁴⁵ Above, fn.11. Ch. 6.2.2

⁴⁶ Norrie above, fn.37 at 548

⁴⁷ Such as was feared for provocation by Gardner and Macklem above, fn.12 at 626

The law on provocation was the first clear example⁴⁸ of an objective test being modified in order to take some account of the defendant's characteristics, and so subsequent attempts at mitigated objectivity have had the opportunity to learn from its failure. However, these alternative efforts ultimately face many of the same flaws, demonstrating that such problems may very well be insurmountable.

6.3: Regard to all the circumstances – The Sexual Offences Act's solution

6.3.1: Is it mitigated objectivity?

It appears that the newly imposed objective assessment of *mens rea* in sexual offences has elements of mitigated objectivity. Section 1(2) Sexual Offences Act 2003 states:

“Whether a belief is reasonable is to be determined *having regard to all the circumstances*,⁴⁹ including any steps A has taken to ascertain whether B consents.”

The wording of the Act by itself does not expressly allow for the inclusion of any of the defendant's characteristics within the objective test. The primary purpose is apparently to ensure that, if the defendant made a reasoned and careful inquiry that did not shift his belief in consent, he should be acquitted.⁵⁰ However, support for an assertion that the reference to ‘circumstances’ can allow for consideration of the defendant's capacity can be drawn from some of the Parliamentary debates on the Sexual Offences Bill.⁵¹ During discussions about the Sexual Offences Bill, it had been a worry in Parliament that an objective standard of liability would result in injustice for those defendants who are incapable of attaining the reasonable standard. Lord Carlisle in particular warned that

⁴⁸ Although it will be argued below that the *Bateman* test ((1925) 19 Cr. App. R. 8 at 13) may also be a test of mitigated objectivity, there is little in the way of express authority as to how the defendant's capacity may be relevant. *Camplin* therefore remains the first example of an individual's characteristics being used to mitigate an objective test.

⁴⁹ Emphasis added

⁵⁰ An argument made by Power, ‘Towards a redefinition of the *mens rea* of rape’ [2003] 23(3) O.J.L.S. 379 at 396

⁵¹ Although, as Clarkson and Keating point out, it is still too early to be able to tell the precise effect the provision will have: Clarkson and Keating, *Criminal Law Text and Materials* (6th ed 2007) p649

there are many people in society with mental illnesses who may interpret relationships wrongly and, despite their mistake, an objective test would hold these people guilty of the very serious offence of rape.⁵² Lord Falconer, on behalf of the government, claimed:

“All the circumstances could be taken into account. It is for the judge and the jury together to work out the extent to which they should take into account the particular attributes of the defendant.... it is possible to ask the jury the question, ‘Did the defendant act reasonably in all the circumstances?’”⁵³

This opinion indicates that the provision may well be intended to take account of the defendant’s characteristics as are claimed to be relevant. Whether this is a matter of law for the judge or of fact for the jury as in *Smith*⁵⁴ remains to be seen, but the Select Committee on Home Affairs thought it a jury matter:

“[b]y focussing on the individual defendant’s belief, the new test will allow the jury to look at characteristics—such as a learning disability or mental disorder—and take them into account.”⁵⁵

The benefits of such an approach are clear. It could provide protection to, for example, defendants with learning difficulties or those who were unaware of the effect of a date-rape drug upon someone they believed to be consenting.⁵⁶

Members of Parliament were alert to the failings that had beset the test in provocation, and so there was an obvious desire to avoid making the same mistakes in relation to sexual offences. However, although the *Smith* test was recognised as an undesirable outcome, it seems that Parliament placed too much blame upon the anthropomorphic terminology of the provocation test without considering whether this

⁵² HL Deb Volume No. 644 Part no. 45 13th February 2003 col 806

⁵³ HL Deb Volume No. 646 Part no. 73 31st March 2003 cols 1095 per Lord Falconer

⁵⁴ Above, fn.11

⁵⁵ Select Committee on Home Affairs Fifth Report 24 June 2003 para 23

⁵⁶ Ashworth and Temkin, ‘Rape, Sexual Assault and the Problems of Consent’ [2004] Crim. L.R. 328 at 340 Tadros, ‘Rape Without Consent’ [2006] 26(3) O.J.L.S. 515 at 534

was really the reason the test was so problematic. In other words, Parliament almost exclusively focused on the problems caused by a subjectively modified reasonable person.⁵⁷ Earlier versions of the Bill had included reference to what the reasonable man would have believed, but Lord Thomas warned that the courts may well choose to redefine that reasonable man in the same way as had been attempted in provocation.⁵⁸ The alternative solution was the creation of a test that does not refer to the reasonable person at all, instead requiring that the court consider all the circumstances in which the defendant found himself. However by concentrating on this one particular defect of mitigated objectivity in provocation, which was admitted above to be largely an aesthetic problem,⁵⁹ Parliament overlooked the rather more damning criticisms that such a test is over-inclusive and risks circular reasoning. Indeed, the judgment in *Smith*, although it eschewed direct reference to the reasonable person, was nevertheless criticised on the same grounds that can be levelled at the sexual offences solution.

6.3.2: *The test remains over-inclusive*

It was made clear above that not every characteristic of the defendant ought to be relevant to the question of how a reasonable person would have acted, and so a test of mitigated objectivity ought to provide some guidance to the jury as to what characteristics are relevant.⁶⁰ Likewise, in the context of sexual offences, there are certain characteristics a defendant should not be entitled to have taken into account. Lord Falconer, on behalf of the Government, gave some guidance as to what characteristics and circumstances might be relevant: suggesting age or an identifiable mental impairment. He added that this provision would not cover all possible characteristics,⁶¹ so it is likely that the test was *intended* to stop short of mere simple-mindedness or the effect of personal prejudices. Similarly, Lord Rix suggested that examples such as:

“hot blood, drink, darkness and the silence of the victim”

⁵⁷ Lord Ackner HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1073 and lord Thomas HL Deb Volume No. 646 Part no. 73 31st March 2003 cols 1102-3

⁵⁸ HL Deb Volume No. 644 Part no. 45 13th February 2003 col 782

⁵⁹ Above, Ch. 6.2.1

⁶⁰ Above, Ch. 6.2.2

⁶¹ HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1105

should not be taken into account.⁶² However, Parliament failed to consider how these less-favourable characteristics could be reliably excluded. For example: would we consider the sexual experience of the defendant, his past sexual history with the complainant or even his upbringing to be relevant? This version of mitigated objectivity thus also risks being over-inclusive.⁶³

As yet, it is unclear how over-inclusive this provision might be. The only clear restrictions on possible defences are contained within sections 75-6 the Sexual Offences Act 2003. These list situations in which the defendant is presumed to hold no reasonable belief in consent. However, these evidential presumptions apply only to specific circumstances, and have been criticised as merely stating the obvious.⁶⁴ For example, section 75 states that, where the victim was asleep or was threatened by violence, there will be a rebuttable presumption that the defendant did not have reasonable grounds for his belief in consent. Similarly, section 76 imposes a conclusive presumption that there were no reasonable grounds for the defendant's belief in consent if that consent was obtained by deceiving the victim - if the defendant lied about his identity or if he lied about the nature or purpose of the act. Outside these situations, a plea of belief in consent is not constrained in terms of what evidence may be adduced to show that there were reasonable grounds for the belief. Similarly, the argument that a plea of belief in consent where there was none will be relatively rare⁶⁵ offers little consolation in cases where the defendant's personal deficiencies explain that belief. The defendant who misinterpreted the complainant's actions, either because of his learning disability or because of his prejudices, may accept in hindsight that she did not consent. However, he will be able to offer a plausible explanation for his belief, based on grounds with which the court may or may not sympathise. Thus, a plea of belief in consent is more consistent with his case than a defendant whose account conflicts with the complainant's.

It therefore appears that the trial judge has no express power to prevent the defendant from adducing evidence of his characteristics, favourable or otherwise, to show

⁶² HL Deb Volume No. 644 Part no. 45 13th February 2003 col 792

⁶³ Although it is still too early to tell for sure how it will develop

⁶⁴ Baroness Noakes HL Deb Volume No. 644 Part no. 45 13th February 2003 col 777

⁶⁵ As opposed to a plea of consent. McEwan, ‘“*I thought she consented*”: *Defeat of the Rape Shield or the defence that shall not run?*’ [2006] Crim. L.R. 969

that, in his particular circumstances, he held reasonable grounds for belief in consent. It would simply be up to the jury to assess his claim in the light of that characteristic. Ultimately, this is not dissimilar from the provocation test. Indeed, their Lordships in *Smith*, having already recognised the contradictions within the reasonable person test, preferred to leave it to the jury to decide whether or not:

“the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter.”⁶⁶

Given this similarity, it is rather alarming that no limits have been imposed upon what evidence of the defendant’s characteristics can be adduced. Worse still: the possibility for jury discretion on what characteristics of the defendant can exculpate him appears to have been deliberately left open by Parliament. Indeed, section 1(2) is thought to mean that:

“if no amount of careful and reasonable interrogation of the victim shifts the defendant's implacable belief in his victim's consent, he is not liable.”⁶⁷

This leaves room for just about any factor of the defendant’s circumstances to be relevant. For example, if the defendant held the prejudiced view that women say ‘no’ when they mean ‘yes’ then, if there was any evidence to support that claim, would the jury really find that his belief would have been shifted by careful interrogation? Although such defences might be withdrawn from the jury for lack of evidential foundation, the problem will undoubtedly become more pronounced near the borderlines of what we would or would not accept. If the defendant claimed he was particularly prone to lust or thought he was irresistible to women, how could we deal with that claim? These may be mere ‘character flaws’ in the same way as pugnacity; but given those flaws, we could not have expected the defendant to have done other than he did or to have believed other than he believed. We again face the difficulty that, in any given case, whether or not a characteristic is accepted will depend entirely upon the jury’s moral assessment of that

⁶⁶ *Smith* above, fn.11 per Lord Hoffman at 173

⁶⁷ Power above, fn.50 at 396

characteristic. There is therefore no clear basis for saying that character flaws such as pugnacity, lustfulness or prejudices, if they are presented to the jury, will *always* be excluded from the objective standard. Thus, the *mens rea* for sexual offences would face the same problems as the law on provocation at the turn of the century, despite the deliberate attempt to avoid basing the test on the standard of the reasonable person.⁶⁸

6.3.3: *The test still involves circular reasoning*

Participants in the House of Lords debate clearly considered the test in the Sexual Offences Bill to be one that was much easier for the jury to understand than the modified objective standard in provocation. Lord Ackner made clear the importance of distinguishing the reasonable person test and a test of what forms the basis for a reasonable belief:

“The problem with introducing this hypothetical ‘reasonable man’ is how to determine who he is. What standard is a jury to apply? That is rather different from looking at the defendant in the dock and saying, ‘When that person tells us he had an honest belief that the girl consented, was that a reasonable belief?’”⁶⁹

However, it is doubtful that this new standard is all that much clearer than provocation’s reasonable person test, or, indeed, any less circular. If the sexual offences solution was expressed in terms of foresight, we would ask what we would reasonably expect the defendant, given her circumstances, to have foreseen or to have done. Returning to the example of the match-flicking girl:⁷⁰ asking what we would reasonably expect her to have foreseen, given that she was 14 and had learning difficulties, would still risk compelling the conclusion that we cannot reasonably expect her to have done other than she did.⁷¹

⁶⁸ This regrettable outcome has been recognised by some critics of the Act: Ashworth and Temkin above fn.56 at 341

⁶⁹ HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1073; Lord Falconer at HL Deb Volume No. 646 Part no. 73 31st March 2003 col 1095

⁷⁰ Above, Ch. 6.2.3

⁷¹ See again the way the test was expressed in *RSPCA v C* above Ch.6.1

6.4: ‘Conditional Subjectivity’ as a form of mitigated objectivity

Professor Williams’ conditional subjectivity was another attempt to mitigate the harshness of an objective standard.⁷² Conditional subjectivity was recognised and rejected in chapter 4.3.1 as a potential solution to the overly narrow approach to moral culpability taken by subjectivist logic. In the context of mitigated objectivity, we say not that the risk must be one that would have been obvious to the defendant on trial *had he given any thought to the matter*, but that the risk must be one that would have been obvious to the defendant on trial *had he not been drunk or enraged*. It would be an objective standard that punishes only those individuals who had the capacity to recognise the risk, expressly preventing certain unfavourable conditions, such as intoxication or rage, from having an exculpatory effect. This could be extended to other unfavourable characteristics as well; for example, if the defendant believed that the complainant consented to sexual intercourse because of his prejudiced view that women always put up a ‘token resistance’,⁷³ then the jury would have to ask whether he would have believed that she consented if he was not prejudiced in this way. As noted before, we cannot be sure how successful a test of conditional subjectivity would be in practice. Although Williams was able to read conditional subjectivity into the judgment in *Caldwell*,⁷⁴ the test has never been favoured by the courts.⁷⁵ However, it seems likely that it would fall into many of the same traps as other tests of mitigated objectivity.

Viewed as a test of mitigated objectivity, conditional subjectivity appears to be just as over-inclusive as the provocation and sexual offences tests. Duff summarises Williams’ test thus:

“To decide whether an agent was reckless ... we thus first ask whether he was aware of the risk, if he was not *and* he was drunk or enraged we then ask whether he would have noticed the risk had he not been drunk or enraged.”⁷⁶

⁷² Williams, ‘*Recklessness Redefined*’ [1981] C.L.J. 252

⁷³ To use one of Temkin’s examples; Temkin, ‘*Rape and The Legal Process*.’ (2nd ed 2002) p122

⁷⁴ [1982] A.C. 341

⁷⁵ Above, Ch. 4.3.1

⁷⁶ Duff, ‘*Professor Williams and Conditional Subjectivism*’ [1982] C.L.J. 273 at 275-6

In other words; we would apply a normal subjective standard except for those cases in which the defendant was, for example, drunk or enraged. We therefore face the same risk of over-inclusiveness as we did with the previously mentioned tests of mitigated objectivity. We exclude anger and intoxication from the test, but on what basis? What other characteristics should be excluded? Nothing in Williams' definition of conditional subjectivity itself helps us to identify which of the defendant's characteristics ought to be included and which should be excluded. According to Williams the only factors excluded are anger and intoxication, but this is comparable in its logic to the *Camplin*⁷⁷ decision's inclusion of age and gender alone; if we exclude these, then why do we not exclude other causes of inadvertence such as prejudices, thoughtlessness or absent-mindedness?⁷⁸ Clearly, anger and intoxication are not the only characteristics we wish to exclude, and so there still needs to be a clear dividing line between favourable and unfavourable characteristics. It thus appears that we are once again falling into the same traps that we did when altering a reasonable standard. Furthermore, we could not make new specific additions to the rule, as and when necessary, in order to provide some control. Duff rightly warns that this would result in a series of '*ad hoc*' decisions, leaving the scope of the test unclear and lacking in theoretical coherence.⁷⁹ As with the other solutions, it is thus unclear how we can determine what factors should or should not be capable of showing that the defendant lacked *mens rea*.

Similarly, conditional subjectivity is likely to fall into the same difficulties in terms of circular reasoning as other forms of mitigated objectivity. Indeed, the problem is greatly accentuated here: we are asking what the defendant would have foreseen had he given thought to the matter, but where he gives some characteristic as an excuse (unless it has already been identified as a factor that ought to be excluded) we risk ending up bound to the conclusion that he wouldn't have foreseen the risk had he given it thought precisely because he did not foresee it. This is because conditional subjectivity is simply the practical result of an objective test that is modified by almost all the characteristics of the defendant. If we are asking if it is reasonable to expect this defendant, with all his

⁷⁷ Above, fn.10

⁷⁸ Smith, '*Letters to the Editor – Reply to G. Syrota*' ([1981] *Crim. L.R.* 658) [1981] *Crim. L.R.* 660 at 660 Although Smith at least considers conditional subjectivity to be a 'marginal improvement' over an objective test.

⁷⁹ Duff above, fn.76 at 283

characteristics, to have foreseen the result, then that is virtually the same as asking whether he would have foreseen it had he given the matter sober thought. Both are effectively applying a standard of the ‘reasonable defendant.’ Consequently, conditional subjectivity is no more appropriate for a universal application than either of the attempts at modifying a reasonable standard mentioned above.

6.5: A ‘Bipartite’ test of mitigated objectivity

6.5.1: What is a bipartite test?

There are some examples of mitigated objectivity that maintain a fixed standard of care regardless of the defendant’s capacity, and instead take account of any of his relevant characteristics in a second question for the jury. Hart thought it important to keep two questions separate: firstly, what the reasonable man with ordinary capacities would have done; secondly, whether the defendant with his capacities could have done that.⁸⁰ Thus, rather than altering the objective standard being applied in each case, there is one fixed standard that applies to all. The fact that the reasonable person would have foreseen the risk as an obvious one means that the defendant can *prima facie* be called reckless or negligent. However, where the defendant gives some explanation as to his state of mind that excuses him for falling short of that standard, then that explanation can displace the *prima facie* finding. This structure of test can be termed a ‘bipartite’ test. An example can be taken from the judgment in *Lawrence*,⁸¹ which was identical to the definition of recklessness in *Caldwell* apart from Lord Diplock’s added proviso in *Lawrence* that:

“Regard must be given to any explanation he gives as to his state of mind that may displace the inference [that he was in one of the states of mind required to constitute the offence.]”⁸²

Lord Diplock did not give any particular mention as to what might constitute a mitigating explanation. It can safely be assumed that it is not supposed to extend to a defendant who

⁸⁰ Hart above, fn.3

⁸¹ [1982] A.C. 510

⁸² *Lawrence* *ibid* per Lord Diplock at 527. There were no comments to this effect in *Caldwell*

drove dangerously because he was intoxicated, and it would be surprising if it extended to a driver who claimed that he did not realise his driving was dangerous because he was in a rage. However, the scope of the proviso from *Lawrence* was naturally limited by the nature of the offences concerned; any driver is in a situation that carries an innate risk of harm and there is therefore a clear minimum level of skill that should be exercised by *all* drivers.⁸³ This means that it is naturally very dangerous for those with a lower capacity, such as children, to be driving at all, and thus there is no desire to make exception for them. Accordingly, the number of characteristics that may be considered to exculpate the defendant in relation to such offences will be very limited. By contrast, had this same proviso been included in *Caldwell*, it would clearly impose a much fairer standard than *Elliott* objectivity.⁸⁴ We would be able to say that, for example, the fact that an individual was too young to realise the likely effect of lighting a fire would displace the inference that he was reckless. This differs from asking what standard of foresight we would have expected of someone of the defendant's age; a bipartite test of mitigated objectivity finds that the young defendant can be considered *prima facie* reckless, but that inference is displaced if the jury think that the defendant's youth excuses his failure to foresee what a reasonable adult would have foreseen.

It is submitted that this bipartite test, because it no longer involves any circular reasoning, is at least an improvement over other examples of mitigated objectivity. However, the bipartite test still risks being over-inclusive in that it imposes no concrete control over what characteristics ought to be capable of excusing the defendant, and thus ultimately does not provide a workable solution to the broadness of objectivist principles.

6.5.2: *No circular reasoning*

To show that a bipartite test does not involve a logical circle, we can return to our match-flicking defendant. If we were to judge her based on a reasonable standard we would consider that she fell short of it. However, her reduced capacity could mean that she may have been unable to appreciate the risk of the shed catching fire, and this would be part of the circumstances the jury would consider when deciding whether or not her

⁸³ Above, Ch. 2.4.1

⁸⁴ Ch. 5.2.3.1

conduct was so bad as to warrant criminal conviction, or amount to recklessness. Although it achieves the same outcome as a test that alters the standard of the reasonable person, the bipartite test makes the whole process much simpler. For a variable standard of reasonableness, the jury have to consider exactly how, for example, a 14-year old with learning difficulties would have reacted, or whether she would have foreseen the danger she was creating. By contrast, the bipartite test allows the jury to make the initial observation that the defendant had fallen below the standard that is ordinarily imposed. The jury therefore do not need to know what the reasonable standard we would expect of a 14-year old with learning difficulties actually is. Instead, they can simply make a value judgement on the factors that affected the defendant at the material time and assess how much those factors exculpate her failure to meet the ordinary standard of reasonableness. The bipartite test would therefore not always compel an acquittal whenever the defendant raises some characteristic as an excuse for not foreseeing the outcome or for acting as he did. The jury, because they do not have to decide what a person with the defendant's characteristics would have been reasonably expected to do, would not be bound to the conclusion that that person would have done as the defendant did. Instead, it would be clear to the jury that the defendant has fallen short of the ordinary standard, and so they will have to assess whether any of his characteristics can actually excuse him for having done so.

6.5.3: The risk of over-inclusiveness

Unfortunately, it seems that bipartite tests of mitigated objectivity may still fail to impose any clear rationality in respect of which characteristics ought to be capable of excusing the defendant for his failure to foresee an obvious risk. It is impossible to say for certain whether or not it would be just as over-inclusive, in terms of the defendant's characteristics, as other types of mitigated objectivity as such a test has rarely been applied in practice. That said, there are examples of a bipartite test being applied to judgments, on non-mens rea issues, which suggest a tendency to over-inclusiveness as far as defendant characteristics are concerned.

The first of these can be found within the offence of dangerous driving. Section 2A(3) of Road Traffic Act 1988⁸⁵ provides that regard should be had to circumstances within the knowledge of the accused. This was originally interpreted to act only to the detriment of the accused; where some particular incapacity of the defendant made it more dangerous for him to drive.⁸⁶ However, for the first time in *Milton v DPP*,⁸⁷ it was held that some knowledge on the part of the defendant, such as the knowledge that he was an advanced driver, could displace the finding that his driving was dangerous, and thus act to his benefit. This displacement was not actually based on the defendant's driving skill *per se*; Gross J expressed concern that the introduction of consideration of the defendant's driving skill would risk trials becoming burdened with unnecessary evidence.⁸⁸ Instead it seems that, because the defendant had the objectively supportable *knowledge*⁸⁹ that he was an advanced driver (presumably supportable by his training and rank as a grade 1 advanced driver) that knowledge was capable of excusing actions that would otherwise be considered objectively dangerous. This test therefore followed a bipartite structure: Milton was driving dangerously according to a strict objective standard, but that finding was displaced by the fact that he knew he was a much better driver than the reasonable person.

The question here is: should the defendant's knowledge of his own advanced driving skills really be capable of excusing him from the fact that he drove dangerously?⁹⁰ The judgment from *Milton* suggests that a driver, if he knew that he was a good driver, can drive in a manner that would be dangerous by ordinary standards, but is this a result we would want to apply to other professional drivers? A professional racer, for example, might have objectively supportable knowledge that he is a better driver than others, but does that mean the law should be capable of excusing him where he drives at top speed around public roads? The sort of circumstances we should be considering are those which indicate that the defendant needed to react to an emergency and it should not

⁸⁵ as amended by s1 Road Traffic Act 1991

⁸⁶ *Marison* [1997] R.T.R. 457 re: hypoglycaemic attacks

⁸⁷ [2007] R.T.R. 43

⁸⁸ *Ibid* at para 34

⁸⁹ As distinct from mere perception, which would remain irrelevant following *Collins* [1997] Crim. L.R. 578

⁹⁰ Bearing in mind that Milton was not responding to an emergency call, but rather was merely test-driving a new police car.

follow that the defendant should be excused for driving in a manner that is objectively dangerous just because he knew that he was an advanced driver. Milton's speed was excessive and, although late at night, would have posed a danger to less skilled road users that he may have encountered. Even though the risk was arguably reduced, it still existed notwithstanding his advanced driving skills. Thus, if the defendant's advanced driver training was capable of exculpating him under a bipartite test, then that test may be considered to have been interpreted too generously. Support for the suggestion that allowing consideration of Milton's training was too generous to the defendant can be found in a Home Office Consultation Paper:

“When risks are habitually taken, the chances are that eventually they will materialize, with potentially awful consequences.”⁹¹

The Court of Appeal has now correctly recognised that *Milton* was a step too far, and overruled the decision in the case of *Bannister*.⁹² But why did Milton's claim succeed in the first place? As was noted earlier, driving is a naturally dangerous activity. There is no sympathy for an individual who lacked the capacity to attain the standard of the ordinary and prudent driver. He should not have been driving in the first place.⁹³ The bipartite test in relation to driving offences is therefore naturally restricted due to the very nature of the offence charged. Nonetheless, a bipartite test applied to a driving offence has been shown to be overly-generous to the defendant; it wrongly allowed the defendant's knowledge that he was an advanced driver to mitigate the normal objective standard. This questions how well that test would perform if it had to deal with more complex issues such as mental disorders.

Another example of the overly-generous tendencies of bipartite tests of mitigated objectivity can be found in gross negligence manslaughter. It is not immediately obvious that gross negligence is currently tested using a bipartite test of mitigated objectivity; it

⁹¹ Home Office Consultation Paper, 'Review of Road Traffic Offences Involving Bad Driving' (2005) para 1.6

⁹² [2010] 1 W.L.R. 870

⁹³ This lack of sympathy will be explained below, Ch. 8.2.3.2.

was observed above that gross negligence may be regarded as an example of *Elliott* objectivity as exemplified in *Stone*.⁹⁴ However, Syrota considers that to read *Stone* in a strict objectivist way is to take the comments of Lane LJ out of their proper context.⁹⁵ Lane LJ claimed that, if any criticism of the trial judge's direction to the jury could be made, it would be that it was unduly favourable to the defence.⁹⁶ However, as Syrota points out, he would ultimately not have approved the trial judge's direction if he wished for the issue of capacity to be excluded completely. Indeed, Syrota raises the possibility that the accusation of excessive generosity was directed at some other part of the trial judge's direction to the jury, which included the comment:

“Mr Stone says ‘nothing was done because I was not aware of the gravity of the matter of the danger to Fanny’s life and of the situation. I did not know the actual conditions in which my sister was lying.’ If that is true or if it may be true then you will acquit him.”⁹⁷

Thus, it is not necessarily true that Lane LJ was criticising the subsequent reference to the defendant's ‘incompetent best,’ and so gross negligence may still be open to being interpreted as a standard of mitigated objectivity.

Indeed, some aspects of the *Bateman* judgment can show this to be a test of mitigated objectivity. The test stipulates that the defendant's negligence must go:

“beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.”⁹⁸

However, this test is by no means clear on what actually aggravates negligence to the extent that it may be considered to amount to a crime. The obvious answer would be that

⁹⁴ Above, Ch. 5.2.3.1. *Stone & Dobinson* [1977] Q.B. 354

⁹⁵ Syrota, ‘*Mens Rea in Gross Negligence Manslaughter*’ [1983] Crim. L.R. 776 at 778

⁹⁶ *Stone & Dobinson* above, fn.94 at 363

⁹⁷ *Ibid*: Lane's citation of the Trial Judge's direction at 362

⁹⁸ Above, fn.48 per Lord Hewart CJ at 13. More recently affirmed as correct in English law in *Adomako* [1995] 1 A.C. 171. However, this test is somewhat circular – a problem that will be considered below at 7.3.4

the obviousness of the risk is the factor in keeping with the above analysis of the objective hierarchy.⁹⁹ This indeed appears to be the approach adopted in the Corporate Manslaughter and Corporate Homicide Act 2007 section 2(4)(b), which states that there is a gross breach of a duty where the conduct fell ‘far below’ what is expected in the ordinary circumstances. This is expanded on in section 8(2) by requiring that the jury have regard to how serious the failure¹⁰⁰ was and how much of a risk of death it posed. However, if the passage from the *Bateman* test quoted above requires solely that the proscribed outcome was an obvious result of the defendant’s actions, then it is not clear in the context of the criminal law what purpose the duty of care serves. Although the normal requirements of the duty of care in civil law are proximity between the parties and foreseeability of harm,¹⁰¹ it was suggested in the case of *Alcock v Chief Constable of South Yorkshire Police*¹⁰² that, where the harm is physical injury, proximity is not an issue. Given also the rejection, in a criminal law context, of *ex turpi causa* in *Wacker*,¹⁰³ it is therefore unclear what the duty of care in manslaughter can mean other than a simple requirement that the harm must be foreseeable. However a test of gross negligence must, according to the objective hierarchy, at some point require that harm was an obvious risk. If the second part of the *Bateman* test meets this requirement then the duty of care, by asking only what was foreseeable, appears superfluous. Therefore, if the duty of care is to have any function at all in manslaughter, then it may perhaps require an obvious risk.¹⁰⁴

The second part of the *Bateman* test, if it does not need to ask whether the risk was obvious, may be supposed to take account of the defendant’s capacity in some way. This analysis could be supported by the fact that Lord Mackay in *Adomako* made reference to the extent to which the defendant had fallen below:

“the proper standard of care incumbent upon *him*...”¹⁰⁵

⁹⁹ Ch. 5.1.3.

¹⁰⁰ ‘Failure’ refers to a failure to observe health and safety regulations, relevant to Corporate Homicide.

¹⁰¹ *Caparo Industries v Dickman* [1990] 2 A.C. 605

¹⁰² [1992] 1 A.C. 310

¹⁰³ [2003] Q.B. 1207

¹⁰⁴ The merits of the duty of care within a criminal law test of gross negligence are discussed in more detail below, Ch. 7.4.1.

¹⁰⁵ *Adomako* above, fn.98 at 187 (emphasis added)

Lord Mackay added that it should be considered in *all the circumstances* in which the defendant was placed at the time.¹⁰⁶ Judge LJ in *Misra*¹⁰⁷ held that these circumstances could include the defendant's subjective awareness of the risk, evidence that would inculpate him, and so the question inevitably asked was whether a defendant's subjective characteristics or awareness could serve also to exculpate him.¹⁰⁸ With reference to the fact that Lord Mackay referred to the importance of *all* the circumstances, the Court of Appeal considered that other subjective factors were not irrelevant when considering the degree of the defendant's negligence. It has also been suggested that the defendant in *Prentice*¹⁰⁹ was inexperienced and reluctant to administer potentially dangerous medical treatment to the victim without supervision, and that these were factors that the jury were entitled to consider when deciding how far below the ordinary standard the defendant had fallen.

There is unfortunately no clear example of the Bateman test actually being interpreted in this way. However, if it is capable of taking account of the defendant's capacity then it would do so using a bipartite test. Where the defendant did not have the capacity to reach the standard of the reasonable person, that factor is surely part of the circumstances that affect whether the defendant's negligence was so bad as to be considered criminal.¹¹⁰ This is not the same as saying that a lesser standard would be applied solely in the case of those defendants who could not measure up to the normal standard. Instead we would apply the ordinary objective standard imposed by the duty of care equally to every defendant. The fact that the defendant could not be expected ever to conform to that standard would then be interpreted to be a relevant factor when deciding whether or not the defendant's negligence was so bad as to be deserving of criminal punishment, and thus a factor in deciding whether or not the defendant who failed to observe the duty of care should be convicted or excused under the criminal law. Because *Adomako* considers whether the defendant failed to observe his duty of care separately

¹⁰⁶ Emphasis added

¹⁰⁷ [2005] 1 Cr. App. R. 21

¹⁰⁸ *R (on the Application of Brenda Rowley) v D.P.P* [2003] EWHC 693 (Admin)

¹⁰⁹ [1994] Q.B. 302 *ibid* at paras 37-8

¹¹⁰ Gardner, '*Manslaughter by Gross Negligence*' [1995] 111 L.Q.R. 22 at 24

from the consideration of whether his negligence was so bad as to amount to a criminal offence, the test is ideally suited to such an interpretation.

However, where this bipartite interpretation of *Adomako* has been applied in practice, it has been done in a manner that appears too generous towards the defendant, as can be observed in the case of *Rowley*.¹¹¹ Here it was accepted that the conduct of the carer, in leaving a severely disabled person alone in the bath, was plainly unsafe and posed an obvious risk of death. The factors taken into account in favour of the carer, to displace the inference that she was grossly negligent, were the practices of other carers and the lack of any formal policy in identifying risks. Given all of the circumstances, it was concluded that her actions would not be considered grossly negligent by a jury. This decision was made despite the acceptance that the carer was aware of the deceased's poor control of his head. Leaving aside for the moment the question of whether her employers should have faced any corporate liability, which is not relevant to this discussion, would we not have expected her to have been aware of the obvious risk of the death of the victim if he was left alone in the bath? Even if there was some past practice to suggest that this had caused no harm on other occasions, would we not still think that the reasonable person would have considered this conduct very likely to cause harm to a person who lacked proper control over his head? Regardless of these questions, no prosecution was brought despite the extreme carelessness that was displayed. Are past practices really so relevant that they precluded the need for the defendant to assess the risks for herself? Does the fact that the risks from similar behaviour in the past did not manifest themselves make the negligence less culpable when the death did eventually occur? By allowing circumstances such as these to act in the defendant's favour, the test again appears to be too generous. If the bipartite test is interpreted in a manner that is too generous to the defendant when considering aspects of the factual circumstances, then how can we expect it to be capable of imposing any clear control over the rather more difficult issue of a defendant who lacked the capacity to attain the reasonable standard? Just as with the other solutions in sexual offences and provocation, it may appear as if the bipartite test is incapable of identifying which of the defendant's characteristics are relevant.

¹¹¹ *R (on the Application of Brenda Rowley) v D.P.P* above, fn.108

Since there are no clear examples of the bipartite test being applied in practice, we cannot see for sure whether it is capable of distinguishing those characteristics that we wish to include such as learning disabilities, and those we wish to exclude such as pugnacity or drug addiction. However, it is likely that the absence of guidance would leave jurors exercising their own moral judgments. We have already seen that, if left to apply their own understanding of morality, the outcomes between different juries may be too inconsistent.¹¹² For that reason, something more would be required to allow the bipartite test to form the basis of a consistent and workable assessment of *mens rea*. In other words, there would need to be a more concrete basis for distinguishing those characteristics that should and those that should not be taken into account.

6.6: Can we define relevant characteristics for the jury?

An alternative to a reliance on the moral judgements of juries would be to allow trial judges to determine which of the defendant's characteristics must be considered and therefore what evidence of his personality should be adduced at the trial. This would then allow the jury to consider, for example, the bipartite test in relation to the permissible characteristics only. However, this would succeed only if it was made clear on what basis the judge can exclude such evidence. This extra control clearly could not be ensured by an exhaustive list of what characteristics should be allowed; given the vast diversity in emotions, psyches and abnormalities that can or may exist, such a list would inevitably be *ad hoc* and under-inclusive. Nor can we go the opposite way and list what characteristics of the defendant should not be relevant, as this was effectively all that Williams' conditional subjectivity achieved.¹¹³

6.6.1: A distinction between normal and abnormal

The original control imposed over the relevant characteristics in *Camplin* was between 'normal' characteristics that every person shares and those we would deem to be 'abnormal.'¹¹⁴ The idea would then be that only 'normal' characteristics, such as Lord

¹¹² Finch and Fafinski above, fn.34

¹¹³ See again the criticisms of the test in Duff above, fn.76

¹¹⁴ *Camplin* above, fn.10 per Lord Diplock at 718

Diplock's categories of age and gender, would be relevant to the objective standard. All others would be ignored. This approach is clearly fraught with difficulties.

For a start, drawing a line on these grounds would inevitably present us with the need to define what characteristics are 'normal,' and this is every bit as problematic as it first appears; we can say that age and gender are universal insofar as everyone can be placed into categories according to these factors, but would this basis for a distinction be extended to other 'normal' factors such as race, culture or sexuality? If we cannot make this distinction by saying that certain factors will be common to everyone, then the differing treatment of normal and abnormal characteristics will inevitably force us to make an evaluative assessment of every characteristic to decide whether or not it can be considered 'normal.' However, by whose standard should those characteristics be assessed? It can be argued that, given the very broad scope of human diversity, a truly objective standard is unattainable. It is therefore questionable whether or not we ought to leave such a contentious question as 'what is normal' simply to the opinion of the trial judge. Although judges are expected to maintain impartiality, it is arguable that there is precedent that the prejudices of even appellate judges have influenced decisions.¹¹⁵ Therefore, any attempt to draw our line on this basis would ultimately force judges to make some uncomfortable decisions as to what they consider 'normal' or 'universal.'

Even if we were able to make such a distinction with any degree of clarity, how would we justify omitting evidence of other factors that, although unusual, would render the defendant just as blameless for his conduct as a 'normal' characteristic? An example can be found in a submission by the counsel for the Crown in *Camplin* that,¹¹⁶ if immaturity due to youth is considered a relevant factor, why not immaturity caused by mental illness? If we see the standard as remaining objective in its treatment of abnormal characteristics, then abnormal immaturity could be viewed as falling outside the objective standard. However, this is not necessarily a fair distinction to make, as both of these factors relate to exactly the same issue – a reduced maturity might cause a person to perceive risks differently – and so we might not consider one individual to be any more blameworthy than the other. A distinction based on what is normal or abnormal therefore

¹¹⁵ For example: the controversy surrounding *Brown* [1994] 1 A.C. 212

¹¹⁶ Above, fn.10 at 708

artificially distinguishes two individuals who display an equal lack of moral culpability. This is a point that has been raised on numerous occasions. Lord Bingham stated, in the context of a similar problem in recklessness:

“If the rule were modified in relation to children on the grounds of their immaturity, it would be anomalous if it were not also modified in relation to the mentally handicapped on the grounds of their limited understanding.”¹¹⁷

Lord Steyn also concurred with this view:

“If it is wrong to ignore the special characteristics of children ... an adult who suffers from a lack of mental capacity or a relevant personality disorder may be entitled to the same standard of justice.”¹¹⁸

It therefore seems clear that, if we are to find a way to draw a line between characteristics that should or should not be relevant, then it cannot be on such arbitrary grounds as a distinction between ‘normal’ and ‘abnormal.’ A more principled basis is required.

6.6.2: *Quantifiable factors*

The Irish Law Commission propose that capacity should refer only to the defendant’s physical or mental ability (or lack thereof) and so should not extend to other factors such as inexperience.¹¹⁹ Their reasoning for this appears to have been taken from the Law Reform Commission of Victoria’s analysis that such an approach would restrict capacity to those mental and physical factors that are more readily quantifiable than other factors such as inexperience.¹²⁰ But why, apart from the fact that experience is not readily quantifiable, should inexperience be excluded in this way? Furthermore, the Irish Law Commission do not expressly consider the role of physical age within their definition of capacity. It may be considered a physical characteristic but then surely age will manifest

¹¹⁷ *G and R* [2004] 1 A.C. 1034 per Lord Bingham at 1056

¹¹⁸ *Ibid* per Lord Steyn at 1061

¹¹⁹ Law Reform Commission of Ireland Report 87 above, fn.5 at para 5.66

¹²⁰ Law Reform Commission of Victoria, ‘*Homicide*’ (Report No 40 1990-1991) at para 270

itself as a lack of experience? The Irish Law Commission presumably do not wish to exclude children, but then how and why do they morally distinguish a lack of experience due to age from a lack of experience due to poor training? For these reasons, the Irish Law Commission's solution appears to be just as arbitrary and unworkable a distinction as the one from *Camplin*.

6.6.3: Severe impairments only?

Honoré argues that:

“To be responsible for fault, morally or legally, the person concerned must in addition understand right and wrong (or lawful and unlawful) and the system of allocation based on that.”¹²¹

If only the most extreme mental impairments will prevent the defendant from understanding right and wrong, then one argument may be that those will be the only characteristics that are capable of mitigating an objective standard. However, it is again doubtful that a satisfactory distinction could be formed on the basis of the defendant's ability to understand right and wrong. An individual who displayed such a severe lack of capacity might well have fallen within the realms of insanity anyway¹²² and thus the objective standard would never require altering. This approach therefore discounts the fact that we might nonetheless be sympathetic to those who, although able to understand right and wrong in general, could not be expected to have foreseen the obvious outcome of their actions and thus there is no way we can have expected them to realise their actions were wrongful.

A broader approach along these lines would perhaps follow Professor Hart's opinion that only 'severe' conditions falling short of insanity should be relevant, and even those would need to be explained appropriately.¹²³ His suggestion may initially appear to work well in conjunction with the bipartite test; if there is one objective standard by

¹²¹ Honoré, 'Responsibility and luck: the moral basis of strict liability' [1988] 104 L.Q.R. 530 at 545

¹²² *M'Naghten's Case* (1843) 10 Cl. & F. 200. The defendant below the age of criminal responsibility would also be thought to lack this capacity, but my point would remain the same.

¹²³ Hart above, fn.3

which most people will be measured, it may be unlikely that more minor characteristics would be enough to persuade the jury that the defendant should be excused from that standard. Thus the trial judge could prevent evidence of anything less than a 'severe' lack of capacity from being adduced. However, there would remain a problem, even with this latter suggestion, in deciding what could be considered a 'severe' lack of capacity. There would undoubtedly be a borderline between a 'severe' and a 'lesser' lack of capacity, and Hart does not offer any guidelines as to how this line could be drawn. Thus, this proposal may risk being just as arbitrary as a distinction between normal and abnormal. For example we might say that, in order to displace the inference that the defendant was grossly negligent, he must have some medically recognised condition. However, this may place too much moral emphasis on medical categories; such an outcome would suggest that someone with a recognised condition would not be considered morally culpable for his gross negligence, whereas someone whose condition fell slightly short of the medically recognised categories would be. If the capacity of the two individuals were to be equally impaired, then we might not wish to infer that there is any moral difference between them.

6.6.4: Ability to foresee the harm

In order to separate those characteristics we may find morally unappealing from those that should be capable of exculpating the defendant, some commentators have retreated to a more recognisably subjective requirement. They propose that an individual who failed to foresee a risk can be considered morally culpable only if he was capable of foreseeing that risk.¹²⁴ Therefore, only evidence of characteristics that negate the defendant's ability to foresee the risk can be used to mitigate the objective standard. However, this proposal relies upon the subjectivist perception that moral culpability is closely linked to the defendant's foresight, even within the field of objective liability. We have already seen that the defendant's foresight is not an accurate indicator of his moral

¹²⁴ Law Commission '*Legislating the Criminal Code: Involuntary Manslaughter*' (1996) Law Com No. 237 at 4.22 Although not strictly compatible with subjectivist principle, this requirement would represent a very clear compromise to the importance of subjective foresight. However, this is not the same as Conditional Subjectivity, which asks whether the defendant *would* have foreseen the risk.

culpability,¹²⁵ and this subjectivist solution inevitably faces problems. For example, the Law Commission propose mitigating the requirements of manslaughter by reference to what the defendant was capable of foreseeing, but note that this terminology would draw no distinction between permanent characteristics and temporary ones such as tiredness.¹²⁶ This is not necessarily an unacceptable outcome from all points of view. Indeed, some commentators are of the opinion that temporary factors such as tiredness should be considered as legitimate excuses. Syrota suggests that in such cases, there has been a breakdown of the defendant's risk monitoring system and so he should be described as absent-minded, not blameworthy.¹²⁷ However, it is questionable from a broader perspective. In cases such as driving offences or accidents involving the defendant's operation of complex machinery, the defendant would surely be considered culpable for having embarked on such a dangerous activity whilst in a fatigued state. Thus it is not necessarily desirable that he should be able to escape conviction by virtue of his tiredness. Even outside the scope of dangerous activities; if the defendant was so tired that he no longer had the capacity to realise that his actions were dangerous, then how should we deal with him? In the example given earlier of the match-flicking girl,¹²⁸ we might wish to excuse her because of her unusually low mental age, but we would surely consider her blameworthy if her only excuse was that she was too tired to realise what the risk was.¹²⁹

Furthermore, distinguishing characteristics based on their effect on the defendant's ability to foresee the risks would logically also allow evidence of the defendant's intoxication or extreme rage to be considered relevant, since such individuals could be said to have been incapable of foreseeing the risks at the time. Such a rule would be unacceptable as once again it fails to properly distinguish those we consider to be morally blameworthy from those we do not. This is perhaps unsurprising here; just as subjectivist principles take too narrow an approach to moral culpability, a focus on the ability to

¹²⁵ Above, Part 1.

¹²⁶ Law Commission No. 237 above, fn.5 at para 5.29

¹²⁷ Syrota above, fn.95 at 785 drawing support from arguments made by Williams, '*Divergent Interpretations of Recklessness*' [1982] 132 New LJ 289

¹²⁸ Above, Ch. 6.2.3

¹²⁹ This of course assumes that the defendant is capable of choosing when to rest. This will not be true in every context; a grossly overworked doctor may simply have no time to rest and so we may have sympathy for him that we would not show a doctor who had been out all night before his shift.

foresee the risk will again not apply to every individual that we might consider to be morally culpable.

The Law Commission offer a slight alteration to this proposal that would at least deal with some of the above problems. They point out that it is generally accepted in English and Welsh law that an *actus reus* can be continuous, starting when the defendant first embarked upon an activity. If the defendant was capable at an earlier time of foreseeing the risks that might arise, he may be blamed for his failure to foresee it at the time the harm was caused.¹³⁰ However, all that this proposal appears to do is simply attempt to exclude temporary characteristics from the test, and so it does nothing to prevent more permanent characteristics such as pugnacity. Furthermore, it does not even deal with temporary characteristics all that well. The Law Commission's suggestion requires us to consider at what point we think the activity was embarked upon, and what capacities the defendant had at that time. This is all very well in many driving cases where we can clearly say that the defendant would not have been tired when he started driving, but it would theoretically cause a problem if the defendant was tired when he first got in the car. There is also a problem with drunk drivers: logically, the Law Commission suggestion would mean that an individual who started to drive whilst he was drunk cannot be considered to have been capable of foreseeing the risk even at the time he embarked upon that particular activity. Therefore, a drunken driver could be said to have had the capacity to foresee the risk at some point within that act only where he became drunk *whilst* driving, or if we view his *actus reus* to have started some time before he actually became drunk. Thus, this solution again appears to be unworkable.

6.6.5: *Explicit reference to the defendant's 'ability to do otherwise'*

It was observed at the start of this chapter that Hart believes it important to mitigate objectivity in order that the law should punish only those defendants who had the *ability to do otherwise* at the time the offence was committed.¹³¹ Therefore, one last way of defining the relevant characteristics for the jury could be to direct them to consider only

¹³⁰ Law Commission No. 237 above, fn.5 at para 4.23

¹³¹ Hart above, fn.3 p152

those characteristics that prevented the defendant from doing other than he did. This suggestion would immediately deal with the problem of intoxication; a defendant who lacked the capacity to foresee the risks he was creating because of some learning disability, for example, cannot be said to have been capable of doing otherwise and so is not morally culpable for the harm caused. By contrast, it could be said of one who could not avoid the risk because he was too drunk that he could have chosen not to get drunk in the first place.

However, a distinction based solely on the defendant's ability to do otherwise would struggle to deal with many other issues such as drug addictions. The law would surely be bound to consider a drug addict reprehensible for his addiction to illegal narcotics, but yet it would be a falsity to claim that he was able to control his addiction. The very nature of an addiction means that the defendant was unable to control his urges, something Lord Millet recognised in his dissenting opinion in *Smith*.¹³² It therefore appears that even a distinction based upon the ability to do otherwise cannot distinguish those we consider blameworthy from those we do not. In that sense, it would need to be supported by the requirement that the defendant's characteristic was not self-induced. Even then we would still face problems. Simply telling the jury that the characteristic must affect the defendant's ability to do otherwise will fail also to distinguish acceptable characteristics from mere character flaws. As noted before,¹³³ we may not wish to take account of the defendant's pugnacity or greed, but that does not mean that the greedy person has the ability to be anything other than greedy, for example. Therefore, if we were to rely on this requirement, we would still face the same problem of over-inclusiveness as their Lordships in *Smith*.

As an alternative, Honoré suggests that the purpose of including the defendant's characteristics should be redefined as ensuring that the defendant had the capacity to do otherwise *in the particular circumstances* in which he found himself.¹³⁴ This would involve a distinction between 'external factors' that the defendant cannot be expected to change (and therefore should be relevant to the test of mitigated objectivity) and 'internal factors' that the defendant must overcome or face the consequences. Thus, if driver X lost

¹³² Above, fn.11 at 212

¹³³ Ch. 6.2.2

¹³⁴ Honoré above, fn.121 at 548

control through a lapse in concentration from fatigue, this was not part of the ‘circumstances’ in which his action should be judged, but an internal factor that he should have overcome. By contrast, driver Y, who skidded on icy roads, might not be expected to have done otherwise. However, Honoré notes that the driver must still drive reasonably in the circumstances; Driver Y, if driving well over the speed limit, would not be able to claim that it was icy and thus that he was not to blame. Honoré’s solution is attractive in that it allows a rational basis for ‘objective’ liability whilst also allowing for some of the subjective peculiarities of the defendant to be considered part of the circumstances. However, Honoré adds that some ‘internal’ factors can be externalised and so be considered to be part of the circumstances. He gives as an example a person who is too short to see over a wall. His height is an ‘internal’ factor that may be externalised. In other words, he cannot control his height and so the law cannot treat him as capable of seeing over the wall. Instead, he can be expected to take account of his height only by walking round or using a ladder. His stature is therefore part of the circumstances in which his actions may be assessed.¹³⁵ Honoré admits that not all factors can be externalised in this way, otherwise there would be no distinction between internal factors for which he could be responsible and external ones for which he could not.¹³⁶ The problem here is the ambiguity as to what characteristics of the defendant could be considered ‘external’ and so part of the circumstances and those that are ‘internal’, so that the defendant remains responsible. Honoré recognises this ambiguity, noting that even for factors such as inexperience there is disagreement as to whether it is internal or part of the circumstances. So how could such a rationale deal with mental disorders, addictions or even youth? It seems that Honoré’s method of externalising certain factors still does not adequately identify a line between characteristics we wish to include and those we do not.

This provides us with a neat summary of why any test of mitigated objectivity will be flawed from the outset. The whole point of mitigating an objective test is to ensure that the defendant is not punished unless he had the ability to do otherwise. If this

¹³⁵ *Ibid* at 548

¹³⁶ *Ibid* at 549

requirement in itself cannot properly distinguish the morally culpable individual from the blameless one, then there can never be a satisfactory test of mitigated objectivity.

Part 2 Conclusion: Another Flawed Approach to Moral Culpability

From the above discussion it is now clear why objectivism cannot be consistently and logically applied across the scope of the law. Those reasons mirror the flaws in subjectivism. Just as subjectivist principles took too narrow an approach to moral culpability by punishing only those who foresaw the risks, objectivist principles are flawed because they subject to criminal liability anyone who was inadvertent to an obvious risk regardless of why they were inadvertent. Thus, for example, a subjective standard used to assess *mens rea* in rape would be unable to convict an individual who, either because he was drunk or because he simply didn't care whether or not she consented, did not realise that his partner was not consenting. On the other hand, an objective assessment would be capable of convicting such individuals, but in doing so it would also compel the convictions of those who were not aware of the lack of consent for morally innocent reasons such as inexperience or a mental disorder. Moreover, the 'quick-fixes' that were attempted in order to resolve the deficiencies in both subjectivist and objectivist principles in fact sought merely the 'correct' outcome, and in doing so failed to resolve the central problems. For example, the *Parker* judgment does little more than gloss over the narrowness of subjectivist principles, just as tests of mitigated objectivity fail properly to address the broadness of objectivist principles. Thus, it is unsurprising that these solutions equally fail accurately to convey the moral culpability displayed by the defendant.

So where does this leave us? Both the subjective and objective hierarchies determine the threshold of criminal culpability according to foresight: be it what the defendant actually foresaw as a possibility or what the reasonable man would have foreseen as obvious. Given that both of these hierarchies have respectively been shown to take too narrow or broad an approach to moral culpability, it is by now obvious that the continued debate surrounding the subjective and objective dichotomy serves only to mask the fact that it is this continued insistence, that foresight is important to moral culpability, that is in fact flawed. In order to find an approach to moral culpability that allows the law to assess *mens rea* consistently and logically, it is therefore apparent that we must find some threshold for criminal culpability that is no longer defined solely according to who would have foreseen what.

Part 3: A Conative Approach to Moral Culpability

Chapter 7: Expressing a new threshold of criminal culpability in a workable test

7.1: An alternative to foresight

What both approaches using subjective and objective tests fail to do is make any enquiry as to *why* the defendant foresaw or failed to foresee a risk, and it is submitted that it is this enquiry that would provide us with a more accurate assessment of the defendant's moral culpability. This realisation has in fact been made already by Scottish lawyers. Scottish law applies a definition of recklessness that may initially appear to be an objective one, but it in fact places little importance upon the objective hierarchy. The prevalent definition of recklessness in Scotland comes from the judgment in *Quinn*¹, which was outlined in chapter 3.2. An individual is reckless where he displays a degree of negligence amounting or analogous to criminal indifference to the consequences.² Unlike either *Cunningham*³ or *Caldwell*⁴ recklessness, this definition holds an individual culpable because of the reasons for his conscious risk-taking or inadvertence. This interpretation is entirely consistent with the work of both Sheriff Gordon and, prior to him, MacDonald, who both believe that:

“The modern tendency of the common law is to desiderate, as a breach of the public duty, indifference to safety or disregard for safety,”

adding that:

¹ [1956] S.C.(J.C.) 22

² *Paton v HM Advocate* [1936] S.C.(J.C.) 19 at 22

³ [1957] 2 Q.B. 396

⁴ [1982] A.C. 341

“although acts of rashness... are punishable even where no accident follows, they are only held to be so because of their manifest wilfulness, and of the general danger caused by such wanton proceedings.”⁵

In the discussion that follows, I will show that, in order to find a workable approach to moral culpability that can be consistently applied, the criminal law of England and Wales ought similarly to make an enquiry as to why the defendant consciously took the risk or did not foresee it, rather than merely punishing him for either of those facts alone. Thus, the law would move away from the persistent focus on foresight, subjective or objective, and would instead focus upon the defendant’s conative state of mind:⁶ his blameworthy reasons for acting, such as his rage, voluntary intoxication or indifference.

7.2: Setting a threshold for criminal culpability

One initial problem with basing an approach to moral culpability upon conative states of mind such as intoxication, indifference and anger is that they do not share a common factor, such as degrees of foresight or negligence, that allows them to be placed in a hierarchy. Accordingly, this chapter will not attempt to establish a hierarchy of states of mind within a conative approach to assessing culpability. Instead, this chapter will establish a test based on conative states of mind that would act as the minimum threshold for criminal culpability. This new test could then act in place of the existing tests of gross negligence and subjective recklessness.

7.2.1: Would the new test set an accurate threshold of criminal culpability?

A test based on the defendant’s blameworthy attitude towards the victim, for example his anger, indifference or voluntary intoxication, would more appropriately impose a minimum degree of criminal liability than a subjective one. It would include the majority of those individuals that the law currently labels as reckless. As observed earlier,⁷ an individual who caused harm, having foreseen a possible risk of harm to the

⁵ Macdonald, *Practice Treatise on the Criminal Law of Scotland* (1867 – 5th ed. 1948 by Walker and Stephenson) at pp141-2

⁶ See the explanation of this terminology in Ch. 3.1

⁷ Above, Ch. 3.2.1 also Duff, *Recklessness* [1980] Crim. L.R. 282 at 283-4

victim, can be blamed for his lack of the proper kind and degree of practical concern for that victim's welfare. Additionally, the new approach would also be capable of addressing culpable inadvertence; if the test is based on punishing attitude then obviously it will encompass the conative states of mind observed to fall beyond the scope of subjectivism.⁸

Additionally, according to a test based on conative states of mind, those blameless individuals who lack the physical or mental capacity of the reasonable person will not be labelled morally culpable merely because they fell short of the reasonable standard. It can be seen that an assessment of *mens rea* based on attitude allows for a more detailed investigation of the moral guilt displayed by those who did not foresee an obvious risk. It asks *why* the defendant failed to notice that risk, and will find the defendant to be culpable only where the reasons for that failure were morally blameworthy in themselves.⁹ Indeed, Scottish recklessness, despite its apparently 'objective' nature, does not appear to be as broad a standard as *Caldwell*. Among Scottish commentators, there has been comparatively little concern that those who do not have normal capacities might nonetheless be labelled as reckless. Where it is mentioned, academics often express the view that the standard does not need to be changed at all in order to take account of such individuals.¹⁰ This apparent lack of concern may stem from the fact that a test such as *Quinn* recklessness¹¹ does not label those who, because of a mental or physical disability, lacked the capacity to conform to the ordinary standard of care as morally culpable. This is because, if a test of *mens rea* is based on attitudes such as indifference, it could be said that it covers something more than simple mistakes in judgement.¹² That test does not condemn someone merely because they failed to foresee a risk that the reasonable person would have foreseen. Instead, it blames the defendant for the attitude that failure displayed, for example his indifference. Crucially, not every inadvertent individual can be called indifferent. For example, based on the facts in *Prentice*, the defendants were

⁸ Above, chapter 3

⁹ Simons, '*Culpability and Retributive Theory: The Problem of Criminal Negligence*' (1994) 5 J. Contemp. L. Issues 365

¹⁰ McCall-Smith & Sheldon, *Scots Criminal Law* (1992) and Gordon, *The Criminal Law of Scotland* (2nd ed. 1978)

¹¹ Above, fn.1

¹² Monico, Kulkarni, Calise and Calabro: '*The Criminal Prosecution of Medical Negligence*' (2007) The Internet Journal of Law, Healthcare and Ethics Vol. 5 No. 1

inexperienced doctors forced to perform a procedure unfamiliar to them and so their incompetence did not suggest indifference in this context.

7.2.2: *Creating a workable test based on conative states of mind*

Although tests based on the defendant's conative state of mind may allow for a more accurate assessment of his moral culpability, we face the problem that such tests, especially those based on indifference, have often been rejected in the criminal law of England and Wales for being vaguely conceived and thus unworkable in practice.¹³ Therefore, if the law's assessment of *mens rea* is to be based on the defendant's attitude rather than what he foresaw or should have foreseen, then there would need to be a new test capable of clearly expressing what attitudes can be considered morally culpable and how they can be identified. Only then would we have a workable test of *mens rea* that could act as the threshold for criminal culpability in the place of recklessness and negligence.¹⁴

It is submitted that a test capable of achieving this aim would adopt a bipartite structure, and would therefore contain two questions:

Question one: was there an obvious risk that serious harm would occur?

Question two: were the defendant's actions so unreasonable in the factual circumstances as to evidence a blameworthy disregard of the consequences of his actions?

If the answer to both questions is yes, then the defendant would be considered to have displayed at least the minimum degree of criminal culpability required for the harm caused. What follows is an explanation as to why the bipartite test is the ideal structure, accompanied by a closer look at the crucial parts of the two questions.

¹³ Smith and Hogan, *Criminal Law* (11th ed. 2005); Stannard, 'From Andrews to Seymour and Back Again' [1996] 47 N.I.L.Q. 1 at 6-7 and The Law Commission, 'Murder, Manslaughter and Infanticide' (2006) Law Com no 304 paras 2.103-107

¹⁴ Because this test is based on indifference, anger and intoxication it would be unable to replace tests looking for more specific wrongful states of mind such as dishonesty and intention. It will be discussed in chapter 8.1 how this does not threaten the new approach to moral culpability's claim to consistent application.

7.3: Criticism of existing tests of indifference

Tests for voluntary intoxication and anger do not specifically pose any obstacles to devising a workable test, as it will often be obvious from the defendant's actions that he was enraged or drunk. Thus, where his actions created an obvious risk of the proscribed harm, he may be regarded as having had a blameworthy attitude towards that harm.¹⁵ However, indifference poses more of a problem as it is not a state of mind that is necessarily obvious from the defendant's actions. If indifference can be considered for the moment to be a 'disregard' of the risks of one's actions, a practical test of indifference would require the jury to engage in a difficult inquiry.

7.3.1: Difficulties in expressing indifference

This difficulty has been the cause of some problems in Scottish law. An alternative definition of recklessness to *Quinn*¹⁶ was given in the judgment in *Allan v Patterson*,¹⁷ instead of making reference to the defendant's blameworthy disregard of the risks, this latter definition was constructed in terms that will be more familiar to English lawyers. Lord Justice-General Emslie held that the ordinary meaning of 'reckless' was that the act, viewed objectively, showed a very high degree of negligence supporting an inference that the risks were deliberately taken or that they ought to have been obvious to any observant and careful driver but were not noticed due to the defendant's gross inattention. He thus stated that:

"Driving 'recklessly'... is driving which demonstrates a gross degree of carelessness in the face of evident dangers."¹⁸

¹⁵ This is true regardless of the defendant's reasons for being drunk or angry. If someone provokes you into a rage and you hit them, your culpability may be mitigated but you are not completely absolved from criminal punishment. For this reason, s3 Homicide Act 1957 does not act as a complete defence and it seems anger will now be very rarely an excuse at all under s54 Coroners and Justice Act 2009. Above, Ch. 3.3.2 fn.47

¹⁶ Above, fn.1

¹⁷ [1980] S.C.(J.C.) 57 The decision was subsequently followed in the context of dangerous discharge of firearms in the case of *Gizzi v Tudhope* [1983] S.L.T. 214

¹⁸ *Allan v Patterson* *ibid* per Lord Justice-General Emslie at 59

This, in his view, was a proper application of the provisions of the Scottish Road Traffic Act 1977. As to the definition of recklessness itself Lord Emslie held that juries ought to be reminded that the adverb ‘recklessly’ can be applied only where the defendant’s driving:

“fell far below the standard of driving expected of the competent and careful driver and that it occurred either in the face of obvious and material dangers which were or should have been observed, appreciated and guarded against, or in circumstances which showed a complete disregard for any potential dangers which might result.”

It can be seen that this definition actually followed the objective hierarchy detailed in chapter 5.1.3. The degree of negligence or recklessness displayed by the defendant is defined by reference to how far he fell below the standard expected of him, and there must have been an obvious risk that the harm would be caused. The only potential reference to the defendant’s attitude towards the risk is the requirement that the defendant observed or *should have observed* the dangers. However, this is an enquiry that Gordon describes as:

“at once more sophisticated and more confused,”¹⁹

on the basis that it risks equating a state of knowledge with a state of foresight. Indeed, this appears dangerously close to saying that the outcome is one the defendant should have foreseen because he was capable of foreseeing it. Accordingly, it is not clear that the test is blaming the defendant for his indifference, and instead the test suffers from the drawbacks of mitigated objectivity.

This apparent application of the objective hierarchy in Scottish law was relatively short-lived. The *Quinn* test, which is more clearly based on indifference, was later reaffirmed in *Cameron v Maguire*,²⁰ but even then the appropriate standard has since

¹⁹ Gordon, *The Criminal Law of Scotland* (2nd ed. 1978) p247 at para 7-55

²⁰ [1999] S.C.C.R. 44

been expressed in several different ways. For example, in *Byrne v HM Advocate*,²¹ it was held that:

“the property must have been set on fire due to an act of the accused displaying a reckless disregard as to what the result of his act would be.”

This test has been criticised as circular, since it defines recklessness by reference to recklessness.²² However, it is also expressed in markedly different terms from *Quinn* recklessness, betraying some uncertainty within the Scottish courts as to how indifference can be clearly expressed.²³ This strongly suggests that a test based on indifference, although in theory it conveys the correct basis for moral culpability, cannot be so easily defined.

In 2003, the Scottish Law Commission attempted to resolve all these problems, but instead merely confused the law further by once again expressing Scottish recklessness in objectivist terms. The Scottish Law Commission published a draft criminal code for Scotland that included an attempt to clarify the definition of Scottish recklessness based on the existing common law. Recklessness was defined as where the defendant either was or *ought to have been* aware of an obvious and serious risk that it would be unreasonable for him to take.²⁴ In their commentary, The Scottish Law Commission claimed that the requirement that the risk was an obvious and serious one prevents the threshold of recklessness from being placed too low.²⁵ These proposals have been met with some approval,²⁶ and it is certainly true that their new definition would set a much easier task for the jury than the test in *Quinn*. Even the American commentator Simons, who is an advocate of the use of the defendant’s conative²⁷ desires as a basis for determining culpability, acknowledges that such a test could be difficult to express and so from that

²¹ [2000] S.L.T 233 per Lord Coulsfield.

²² Chalmers, ‘*Fireraising: from the ashes?*’ [2000] S.L.T 57

²³ Chalmers, *ibid*. This uncertainty has also been recognised by the Scottish Courts themselves: *W v HM Advocate* [1982] S.C.C.R. 152 per Lord Hunter at 155

²⁴ Scottish Law Commission, ‘*A Draft Criminal Code for Scotland, With Commentary*’ (2003) s10 emphasis added.

²⁵ *Ibid* at p32

²⁶ Corporate Homicide: Expert Group Report (Scotland)(2005) paras 7.2-4

²⁷ The phrase ‘conative states of mind’ refers to the defendant’s attitudes or reasons for acting, and so would include the attitude of indifference. See the discussion in Chapter 3.1.

point of view an enquiry based on what the defendant believed or should have believed could be viewed as more tractable.²⁸ Indeed, the clearer and more precise nature of the suggested test is quite possibly why the Scottish Law Commission felt it necessary to move away from reference to the defendant's disregard of the consequences, and it is certainly why the Expert Group applauded this move. However, the Commission's definition of recklessness, whilst rectifying the vagueness of tests based on indifference, involves once again having to resort to mitigated objectivist principles. In that respect, their definition is markedly similar to the test defined in *Allan v Patterson*.²⁹ The defendant is considered reckless and thus morally culpable because he failed to foresee a risk he was capable of foreseeing. From a theoretical point of view, the Commission's proposal can therefore be regarded as a step backwards. If the new test were accurately to reflect the traditional Scottish approach to culpability, it would have to be demonstrated that the defendant's failure to foresee an obvious risk that he should have foreseen can reliably show that he was indifferent. This is not an argument that is expressly considered by either the Scottish Law Commission or the Expert Group. There is, therefore, a risk that the Commission may have oversimplified the test of recklessness to the point that it can no longer be said to accurately reflect the moral culpability of the defendant it is testing, and instead follows the flawed definition of recklessness given in *Allan v Patterson*.

7.3.2: Seeking a clearer inference of indifference

The Scottish experience suggests that the jury cannot be fairly expected to tell for sure whether or not the defendant cared about the outcome of his actions. Of the criticisms that were levelled at subjective tests, one is equally relevant here; the jury cannot read the defendant's mind³⁰ and will only ever be able to infer the defendant's indifference. However, the fact that indifference can only ever be inferred is not a fatal objection. Arguably, attitude and indifference are much easier to infer than a cognitive state of mind; we do not ordinarily consciously weigh up all the possible consequences of

²⁸ Simons above, fn.9 at 377. However, Simons argues that a test that was actually based on the concept of culpable indifference itself would provide a more subtle analysis of desire than a test of what the defendant should have foreseen.

²⁹ Above, fn.17

³⁰ Above, Ch. 1.4.3.

each of our actions, while we would undoubtedly always have a particular attitude towards any given action or consequence. In the absence of any other evidence, this attitude can be inferred from our actions, the circumstances and the probable consequences. Duff, for example, argues that the requisite absence of a minimum kind and degree of practical concern could be inferred where the defendant failed to notice obvious and important aspects of his actions.³¹ This apparent ease can be illustrated by reference to Professor Simons' example of two drivers: Betty who hits a pedestrian when she deliberately runs a red light and Carl who, not violating any traffic laws, simply does not notice a pedestrian who is about to cross. Simons claims that, in running the red light, Betty clearly displays an attitude of indifference towards the safety of others. Conversely, Carl can be blamed for nothing more than merely not paying attention.³² He is negligent, but his actions display no blameworthy attitude towards the safety of others.³³

That said, it may not always be so easy to infer the defendant's indifference in practice. The criteria proposed by Duff are criticised by Simons as too vague.³⁴ Not every individual who fails to notice obvious and important aspects of his actions will necessarily do so because of indifference. The test then depends upon the jury's understanding of what constitutes the 'minimum kind and degree of practical concern' that we expect of an individual. Other tests are vaguer still. The Scottish Law Commission's proposed test for recklessness, as noted before, could be regarded as an attempt to create a test for the drawing of an inference of indifference. The same may have been true of Lord Diplock in *Caldwell*,³⁵ given the analogy between his judgments in that case and the earlier *Sheppard*³⁶ as discussed above.³⁷ However, it is not terribly clear that a test based on what the defendant ought to have foreseen will reliably allow for indifference to be inferred in every case. As noted above,³⁸ such tests appear to be more

³¹ Duff above, fn.5 at 292

³² Although this might still be considered sufficiently blameworthy for a criminal offence in the context of driving. Below, Ch. 8.2.3.2

³³ Simons above, fn.9 at 365

³⁴ *Ibid* at 390

³⁵ Above, fn.4

³⁶ [1981] A.C. 394

³⁷ Ch. 3.2.1; Stannard, 'Subjectivism, Objectivism and the Draft Criminal Code.' [1985] 101 L.Q.R. 540 at 548

³⁸ Ch. 7.3.1

similar to a test of mitigated objectivity and so would suffer from the same flaws. Any attempt to create a test that infers indifference must not be oversimplified to this extent.

However, it is equally important that the inference is not over-complicated. As an alternative to Duff's test of indifference, Simons suggests that more concrete guidelines for the jury would be beneficial in order to ensure reliable and predictable verdicts. He proposes criteria including considerations such as whether the defendant posed a risk to himself as well as others, and whether he would have done otherwise had he known about the risk.³⁹ The fact that the defendant posed a risk to himself may in some cases be useful in determining whether or not the defendant was indifferent, but of course it would be of little help in the context of dangerous driving where the defendant will inevitably have posed some risk to himself. Indeed, in any context, the defendant may fail to notice the risk to himself precisely because, in caring so little about the harm that might be caused to others, he had given the possible outcomes no thought whatsoever. Additionally, it is not particularly useful to ask whether the defendant would have done otherwise had he known about the risk, as once again, the jury cannot read the defendant's mind. They would have to infer his likely response had he known about the risks, and then infer his attitude from that imaginary reaction. This clearly cannot be the route the law should take.

7.3.3: Indifference in English and Welsh law: Bateman

It is submitted that the *Bateman*⁴⁰ test for gross negligence in manslaughter may help us find a test that allows the jury to accurately infer indifference. *Bateman* requires the jury to consider whether there was a duty of care that was breached and then decide whether the breach goes beyond the scope of civil law, thus requiring criminal punishment.⁴¹ This has been condemned as 'circular' because it requires the jury to convict the defendant of a criminal offence where they consider his conduct to be 'criminal.' This, the Law Commission states, is a question of law that has been left to the

³⁹ Simons above, fn.9 at 390-1

⁴⁰ (1925) 19 Cr. App. R. 8

⁴¹ *Ibid* at 13

jury, and must inevitably lead to uncertainty in the law.⁴² Put another way, the jury can simply convict whenever they follow a gut reaction that the defendant is guilty.⁴³ However, despite this circular nature, the *Bateman* test has shown remarkable resilience whenever it comes under the scrutiny of the appellate courts. For example, in *Misra*,⁴⁴ Judge LJ justified the terms of the *Bateman* test by claiming that the use of the word ‘crime’ was a way of expressing the well established principles on which the law of manslaughter was based. It prevents the jury convicting the defendant on the basis of mere negligence by giving an indication of how bad the defendant’s negligence must be. Judge LJ ultimately held that:

“The decision whether the conduct was criminal is described not as ‘the’ test, but as ‘a’ test as to how far the conduct in question must depart from accepted standards to be ‘characterised as criminal’.”⁴⁵

However, this explanation has been described as ‘perplexing’⁴⁶ and creating ‘a distinction without a difference’.⁴⁷ It thus does little to quell the criticism that the test is circular. The standard still appears to depend entirely on what the jury considers to be criminal.⁴⁸ It instead seems that the courts appear willing to accept this circular test as a ‘necessary evil’,⁴⁹ because the test is viewed as the best way of expressing what constitutes a gross departure from the ordinary standards of behaviour. In other contexts, this is a distinction made by the objective hierarchy; and yet here the courts favoured the circular test over simple reference to the obviousness of the risk. Under the *Bateman* test, the fact that the defendant failed to avert to an obvious risk is not necessarily enough. It is not even sufficient that the defendant fell far below the standard of the ordinary person.⁵⁰ It

⁴² Law Commission ‘*Legislating the Criminal Code: Involuntary Manslaughter*’ (1996) Law Com No. 237 para 3.9

⁴³ Virgo, ‘*Reconstructing Manslaughter on Defective Foundations*’ [1995] C.L.J. 14 at 16

⁴⁴ [2005] 1 Cr. App. R. 21

⁴⁵ *Ibid* per Judge LJ at para 62

⁴⁶ Ormerod, ‘*Manslaughter: manslaughter through gross negligence - whether sufficient certainty as to ingredients of offence*’ [2005] Crim. L.R. 234 at 237

⁴⁷ Ashworth, *Principles of Criminal Law* (5th ed. 2006) p294

⁴⁸ Ormerod above, fn.46 at 237

⁴⁹ Leigh, ‘*Liability for Inadvertence: A Lordly Legacy?*’ [1995] 58 M.L.R. 457 at 469

⁵⁰ As it would be in *Dangerous Driving*

requires that the defendant's negligence fell so far below the reasonable standard that it can be considered to be 'criminal.'

This reference to what can be considered 'criminal' is in fact a clumsy attempt to punish the attitude displayed by the negligence. The language used in many of the judgments that shaped this test of gross negligence can support this claim. The Appellate courts have often used the term 'recklessness' as an alternative to 'criminal'; thus recklessness can be considered an alternative epithet to describe how serious the negligence has to be before it can be considered gross negligence. For example, in *Andrews v DPP*,⁵¹ it was made clear that the level of care required for civil liability was not enough for criminal law. What was required was a very high degree of negligence, which Lord Atkin described as 'reckless'. This use of recklessness as a synonym for gross negligence is unsurprising given the close historical relationship between the terms.⁵² However, it seems that neither the *Caldwell*⁵³ nor *Cunningham*⁵⁴ definitions have been attributed to the concept of recklessness in this context. In *Adomako*,⁵⁵ Lord Mackay claimed that recklessness should be used in its ordinary connotation and expressly rejected the need for a reference to the objective requirements of *Lawrence*.⁵⁶ The subjective definition does not appear to have been intended either, as he later stated that:

"circumstances to which a charge of involuntary manslaughter may apply are so various that it is unwise to attempt to categorise or detail specimen directions. For my part I would not wish to go beyond the description of the basis in law which I have already given."⁵⁷

Since Lord Mackay simply left it up to the jury to apply its own definition of recklessness, we cannot know precisely what he thought recklessness meant – if he held an opinion at all. However, the judgments handed down in other cases appear to indicate

⁵¹ [1937] A.C. 576 at 583 per Lord Atkin See also *ex Parte Jennings* [1983] 1 A.C. 624 where the terms were similarly considered to be synonymous.

⁵² Stannard above, fn. 13 at 10

⁵³ Above, fn.4

⁵⁴ Above, fn.3

⁵⁵ [1995] 1 A.C. 171

⁵⁶ [1982] A.C. 510

⁵⁷ *Ibid* per Lord Mackay at 188

that recklessness in this context is considered to be closely related to the concept of indifference. In *Stone*,⁵⁸ the trial judge had suggested to the jury that some advertence to the risk was required in order to separate those who are ‘not very bright’ and those who are reckless.⁵⁹ However, drawing on authority from *Andrews* that recklessness involves an indifference to a risk,⁶⁰ Lane LJ thought it clear that both indifference to a risk and appreciation of a risk but running it anyway could both be considered forms of recklessness. He added that:

“Mere inadvertence is not enough [for a conviction]. The defendant must have been proved to have been indifferent to an obvious risk of injury or health, or actually to have foreseen the risk but to have determined nevertheless to run it.”⁶¹

A similar stance was taken in *Gray*,⁶² and the approach was broadly approved in *Adomako*.⁶³ This limited use of recklessness in relation to gross negligence was further upheld in *Attorney-General's Reference (No. 2 of 1999)*,⁶⁴ where Rose LJ also approved of the ‘definition’ of recklessness given in *Stone* that could show that the defendant’s negligence is gross. Thus, the reference to recklessness as an indicator of moral culpability in gross negligence would appear to be based on neither the existing *Cunningham* nor *Caldwell* definitions, but is instead analogous to indifference.

Assuming this is true, we have isolated the element of indifference as the factor that separated mere inadvertence and ‘reckless’ or ‘criminal’ inadvertence according to *Stone*. Given the approval of *Stone* in *Adomako*, and the occasional use of ‘reckless’ as an epithet to show gross negligence, it is clearly arguable that indifference could also be the reason we consider a grossly negligent defendant’s conduct to be so bad as to be criminal. It is thus a more important factor than the obviousness of the risk the defendant failed to foresee or how far below the ordinary standard of conduct he fell. This assertion can be further supported by a comparison of the terminology used in Scottish recklessness and

⁵⁸ [1977] Q.B. 354

⁵⁹ Cited by Lane LJ *ibid* at 362

⁶⁰ Above, fn.51 at 583

⁶¹ *Stone* above, fn.58 at 363

⁶² *R v West London Coroner, Ex parte Gray and Others* [1988] Q.B. 467

⁶³ Above, fn.55 per Lord Mackay at 187

⁶⁴ [2000] Q.B. 796

the English and Welsh definition of gross negligence. In *Bateman*, Lord Hewart CJ held that the defendant was grossly negligent where he showed:

*“such disregard for the life and safety of others as to amount to a crime.”*⁶⁵

It was seen above that the Scottish definition of recklessness in *Quinn*, which is more expressly based on indifference, also refers to the defendant’s ‘disregard’.⁶⁶ Given the focus on indifference in *Stone*, it could be argued that references to disregard carry the same meaning in both legal systems. Therefore, we can see that the *Bateman* test of gross negligence in fact provides us with a test of *mens rea* that condemns the defendant for his wrongful attitude towards the risk.

7.3.4: Adapting Bateman to facilitate the inference of indifference

It was observed in chapter 6.5 that *Bateman* could be interpreted as a ‘bipartite’ test of mitigated objectivity on the basis that it asks whether the defendant breached his duty of care, and then subsequently assesses whether or not this can demonstrate gross negligence in the circumstances. Thus, it kept separate those significant questions according to Hart: ‘what would the reasonable person have done?’ and ‘could the defendant have done that?’ From this, we can see that the first question restricts the second; we need only consider whether the defendant could have done otherwise once it is first established that the reasonable person would have done otherwise. This point is obvious in the context of gross negligence as an objectivist concept, but it is useful to see how it can be transferred across to a test based upon a conative state of mind such as indifference. If the second question is taken to be ‘was the defendant indifferent to the risk of harm’, then the first question limits the occasions in which the jury may consider that second question. Thus, the jury receive better guidance; they do not have to infer whether or not the defendant cared about the outcome in every case where harm is caused. Rather, they must decide whether or not to infer indifference only in those cases where they have firstly found that the defendant has, for example, acted in the face of an

⁶⁵ Above, fn.40 at 13 emphasis added

⁶⁶ Above, fn.1 per Lord Justice-General Clyde at 24

obvious risk of serious harm. Therefore, the structure of the *Bateman* test allows the whole enquiry to be much more workable than other tests of indifference.

That said, although the *Bateman* test can be shown to base a moral assessment of the defendant on his indifference, the language remains clumsy. Accordingly, it would be unwise to apply the test consistently to a wider range of offences than manslaughter in its unaltered state. What follows is therefore a discussion of how the two questions asked by the *Bateman* test (i.e. was there a duty of care that was breached, and was that breach so bad as to be characterised as criminal) could be altered in order to create a more workable test clearly based on conative states of mind. If so, we would have a suitable replacement for recklessness and gross negligence as *mens rea* for all offences of basic intent.

7.4: The Bipartite test: Question 1 – was there an obvious risk of the proscribed harm?

The purpose of this first question is to restrict how the defendant's conative state of mind can be inferred, thus making the whole process clearer for the jury. It is submitted that asking whether the defendant acted in the face of an obvious risk of serious harm will be suitably restrictive. An individual whose actions created an obvious risk of death may ordinarily be considered indifferent for his failure to notice that risk. The second question would then be free to adjust that inference where the facts of the case make the issues less clear-cut.

7.4.1: Replacing the Duty of care with the requirement for an obvious risk

In the existing *Bateman* test,⁶⁷ the first question for the jury to answer is whether there was a duty of care. However, the scope and operation of the duty of care in criminal law has been unclear even when it has been relevant to manslaughter only. It will be argued that, if the new test is to be applied to other offences of basic intent, requiring an obvious risk will be an improvement; it would perform the same task as the duty of care but without the lack of clarity surrounding that concept in the criminal law.

The replacement of the duty of care requirement in *Bateman* might not be thought to be a good move universally. Even though the new focus is on punishing the defendant's attitude towards the risk, rather than degrees of negligence, it may

⁶⁷ Above, fn.40

nonetheless be thought that the duty of care still has a part to play. After all, we are looking at prerequisites to an inference that the defendant was indifferent. If a duty of care could be established, then there would be a clear basis for saying that the defendant ought to have recognised and avoided that risk, thus making it easier to say his failure to avoid that risk displayed indifference towards the outcome. However, as noted in chapter 6.5.3, it is somewhat unclear what the duty of care currently means in the context of the *Bateman* test. Little guidance was given in *Adomako* beyond Lord Mackay's statement that the normal principles of negligence in civil law would apply.⁶⁸ This suggests that the guidance given in *Caparo Industries v Dickman*⁶⁹ should be used in respect of the criminal law as well as the civil law. The normal criteria from *Caparo Industries* are whether the damage was foreseeable and whether there was proximity between the parties, but it can be argued that, since manslaughter is concerned with physical harm alone, the only relevant question is whether the harm was reasonably foreseeable or not.⁷⁰ A more precise definition in the criminal context, rather curiously, has not been considered in any great depth by the appellate courts,⁷¹ or even by the Law Commission.⁷² The only thing we know for sure is that the duty of care in the criminal law does not follow the exact same principles that govern the civil law concept. For example, the civil law of negligence observes *ex turpi causa*; that a claim cannot be founded on illegal activity. In *Wacker*,⁷³ for example, the defendant would not have been considered liable for the civil tort of negligence when he negligently killed illegal immigrants in his lorry. It was initially thought by the trial judge that *ex turpi causa* would apply equally to the criminal law, but on appeal Kay LJ considered the potential results of this to be 'palpably wrong'.⁷⁴ The Court of Appeal later addressed the question of why there was a distinction between the principles of the civil and criminal law.⁷⁵ Rose LJ held that the criminal law's function is to protect, and to charge those who deprive

⁶⁸ Above, fn.55 at 187

⁶⁹ [1990] 2 A.C. 605

⁷⁰ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310; *Wacker* [2003] Q.B. 1207

⁷¹ Herring & Palser, 'The duty of care in gross negligence manslaughter' [2007] Crim. L.R. 24

⁷² Law Commission 'A New Homicide Act for England and Wales' (2005) LCCP 177; Herring & Palser, *ibid.*

⁷³ Above, fn.70

⁷⁴ *Ibid* at para 30

⁷⁵ *Willoughby* [2005] 1 Cr App R 29 at para 33

others of life and limb. This aim extends its ambit in relation to negligence beyond that of the civil law.

It is therefore arguable that a duty of care in the criminal law is merely a question of whether or not the defendant's actions created a foreseeable risk of harm. Thus, the duty of care in gross negligence manslaughter is somewhat superfluous; howsoever the test for gross negligence is framed, it would still require the jury, at some point in their reasoning process, to decide that there was an obvious risk of harm as opposed to a merely foreseeable one. Far simpler, then not to refer to the duty of care at all; instead it would be best to refer simply to the obviousness of the risk without any reference to a civil law concept.

However, the rejection of the duty of care in most criminal law offences would mean that individual manslaughter would be inconsistent with the terms of the new Corporate Homicide and Corporate Manslaughter Act 2007, which follows the first requirement of the *Adomako* test in that it retains the requirement that a duty of care must be established. The act deals with the problem of where a duty can be imposed by giving a list of the relevant duties that a company would owe.⁷⁶ It allows a duty of care to be found only where the defendant had a specific relationship with the victim, for example a duty on employers towards employees and their families, or a duty owed for commercial reasons, such as supply of goods. Thus, this is more restrictive than the simple requirement that the harm be obvious. However, it is doubtful that the terms of the Corporate Homicide and Corporate Manslaughter Act should compel us to retain the reference to the duty of care in other contexts. The specific categories imposed by the Act may operate well enough in the context of corporate killings, but in other contexts there are undoubtedly many more situations in which one individual may be expected to take care not to harm another. An exhaustive list would therefore risk being too restrictive. Additionally, it is worth noting that Scotland does not apply the duty of care in relation to any objective standard of *mens rea*, and the use of the duty of care was expressly rejected, by the Scottish Parliament's Expert Group on Corporate Homicide,⁷⁷ on the

⁷⁶ Corporate Manslaughter and Corporate Homicide Act 2007 s2(1)(a-d)

⁷⁷ Corporate Homicide: Expert Group Report (2005) para 8.2

basis that it contained too much potential for unintended consequences and very little benefit. In truth, it can be said that requiring proof of a 'duty of care' confers little to no improvement to a legal system, such as Scotland, that incorporates an assessment of *mens rea* based on indifference

It is therefore submitted that, instead of invoking the civil law concept of a duty of care, the first part of this new bipartite test simply should ask whether there was an obvious risk of the proscribed harm. This requirement would mean that the defendant can be inferred to be indifferent (or if angry or voluntarily intoxicated, can be considered sufficiently morally culpable) only where he acted in the face of an obvious risk of the proscribed harm. This will be the only allusion to the objective hierarchy within this test, and it should be noted that the hierarchy would no longer be the sole determinant of the seriousness of the charge or the culpability of the defendant. Instead, a finding that the defendant acted in the face of an obvious risk (whether he recognised it or not) would be a prerequisite to an inference that he held a blameworthy attitude towards the outcome. It is because the risk was an obvious one that we might expect the defendant to have noticed and avoided that risk, and so his failure to do so is more likely to indicate that he lacked the proper kind and degree of practical concern for the welfare of others. By contrast, the jury would be unable to infer indifference where the defendant was merely negligent as to the outcome. Thus, the scope of the new test of *mens rea* would be prevented from being too wide.

7.4.2: The influence of risk and consequences upon our perception of the defendant

Although a requirement that the risk must have been an obvious one is one way of restricting the number of occasions in which the defendant's indifference can be inferred, it is submitted that the seriousness of the harm risked by the defendant will also play a part. It was observed in chapter 2.4.2 that, where death was a consequence of the defendant's actions, we are more willing to condemn grossly negligent conduct. This is not a case of mere bad luck, but rather that the defendant has acted so poorly that he has 'deserved his luck.'⁷⁸ However, although the fact that death was caused may influence

⁷⁸ Ch. 2.4.2

our moral perception of the defendant, this is not to say that the seriousness of the consequences should be a central issue in determining moral culpability. Indeed, it would be plainly wrong to say that every defendant who caused death should be considered morally and criminally culpable because of that outcome. If the defendant were to be criminally penalised based on the outcome alone, it would of course mean that we were dealing with some sort of absolute liability. Thus, there remains a distinction between criminal homicide and merely negligent or accidental killing; the fact that death has been caused is insufficient by itself to show that the defendant is morally culpable for the harm. If we consider this in relation to a general bipartite test based on indifference, then it follows that the harm caused alone is also insufficient as an initial indicator as to whether the defendant can be inferred to be indifferent.

So, if not a central factor in all this, what influence does the seriousness of the consequences caused by the defendant actually have? It was noted above that we may consider the grossly negligent⁷⁹ killer to be more morally culpable than the merely negligent killer because, where there was an obvious risk of death, we expect all individuals with the capacity to recognise such risks to have taken extra care to avoid that outcome. Accordingly, it is not solely because death was caused that we find the defendant's actions to be so shocking. We are more willing to blame the defendant because he caused that death having failed to notice the obvious risk that it would occur. Thus, the degree of harm risked may be even more important in our moral assessment of the defendant than the degree of harm actually caused. Where the defendant acted in the face of an obvious risk of death it becomes much easier to infer that he was indifferent; if there was an obvious risk of death, we expect him to have taken extra care to avoid such an appalling outcome. If he failed to do so and in the event caused death, that failure, in the absence of any other evidence, then manifested a lack of the proper kind and degree of practical concern for the welfare of those affected by that action, and this indifference resulted in a permanent mark for which the defendant can be considered responsible. This would of course mean that it would be much harder to infer that an individual who caused harm significantly greater than that risked was indifferent as to that greater harm. This analysis thus necessitates some adherence to a principle of correspondence.

⁷⁹ In terms of someone who falls far below the ordinary standard, i.e. following the objective hierarchy.

The next question is: what is the minimum degree of harm that will alter our perception of the defendant in this way? Is death the only type of harm that we would expect individuals to do all they can to avoid, or will degrees of non-fatal harm be sufficient? Clarkson suggests that the highest degree of non-fatal harm, which he labels permanent injury, is one which has a very high impact on the living standards of the victim.⁸⁰ If the harm risked by the defendant's gross negligence fell within this highest category, it could clearly alter the way we perceive his culpability. The same can be said of many instances of causing grievous bodily harm and would almost certainly be extended to violation of sexual autonomy as well. However, it may not be practical to allow the harm risked to influence an inference of indifference in this way where the risk is of causing only a very minor degree of harm. For example, if the defendant's actions carried an obvious risk of applying only minor but unlawful force to another, can we still say that risk was so important that we would have expected the defendant to take all care to avoid it? If we did, then we would surely have to visit criminal liability upon every individual who, in a hurry and without thought to the effects of his actions upon others, commits a battery by forcing his way through a crowd.⁸¹ It is therefore arguable that an individual who created an obvious risk of minor harm, although they may technically have been indifferent to a certain extent, cannot be held to have fallen below the very minimum degree of practical concern we expect of them. They therefore do not meet the threshold for criminal culpability.

Clearly not all degrees of harm risked could prompt an inference of indifference. It may be that, for the purposes of criminal law, we would expect individuals to have done all they could to avoid an obvious risk of serious harm such as some physical injury, property damage or sexual violation. This means that individuals who created an obvious risk of minor harm whilst voluntarily intoxicated or angry would also fall short of the minimum degree of criminal liability under the new test. This may be an acceptable

⁸⁰ Clarkson, 'Law Commission report on offences against the person and general principles: Part 1: Violence and the Law Commission' [1994] Crim. L.R. 324 at 327-8. Clarkson suggests that recognising this highest degree of harm would present us with one way of categorising non-fatal offences against the person more precisely.

⁸¹ Assuming no-one in that crowd was so obviously frail that they would be likely to be injured if pushed aside.

outcome; whilst we might disapprove of such individuals, the risks they created are of too little damage to justify infliction of criminal punishment.⁸²

7.5: The Bipartite test: Question 2 – Did the defendant show culpable disregard?

The first element of the new test, then, is that a defendant may be criminally liable where he did not avoid an obvious and serious outcome. The second element consists of close consideration of what attitude this failure displayed; for example, did the defendant's failure to avoid the risk suggest that he lacked the proper kind and degree of practical concern for the welfare of those who might be affected by his actions?⁸³ It is submitted that, once the first question has been passed, indifference can be easily inferred in most 'normal' cases without need to consider the second question. Consideration of the second question becomes necessary only where there is some other evidence that may challenge the initial assumption that the defendant lacked the proper kind and degree of practical concern for those affected by his actions. So, for example, if there is evidence that the defendant did not foresee the risk because he lacked the physical or mental age to be able to recognise that risk, then that is something the jury may take into account when deciding whether or not his inadvertence displayed an indifferent attitude towards the victim. Accordingly, the function of the second question is to indicate what the jury ought to look for to infer indifference if the first question alone is inconclusive.

Consequently, in addition to telling us what attitudes may be considered criminally culpable (i.e. indifference, rage and voluntary intoxication) this question must be capable of expressing to the jury in more detail what indifference actually is.⁸⁴ The corresponding *Bateman* requirement was that the defendant must have showed such disregard as to amount to a crime.⁸⁵ Although this may be interpreted as an attempt to punish indifference, it is far from the best way of doing so.⁸⁶ Instead, the function of this second question is best achieved by asking: given the defendant's actions in the face of an

⁸² The implications of this will be discussed in relation to specific offences against the person below, Ch. 8.2.2.

⁸³ Duff's test of practical indifference Above, Ch. 3.2.1 fn.16

⁸⁴ Given that definitions for anger and intoxication are not really required

⁸⁵ Above, fn.40 at 13

⁸⁶ Above, Ch. 7.3.4

obvious and serious risk, were those actions so unreasonable in the factual circumstances as to evidence a blameworthy disregard of the consequences of his actions?

7.5.1: Differing meanings of indifference?

If this second question is to convey the concept of indifference to the jury properly, then we must be clear what indifference actually is. Much was said in Chapter 3.2 about the meaning of indifference and it can be seen that the general consensus is that it concerns an attitude of ‘not caring’ about or disregarding the consequences of one’s actions, or not displaying the proper kind and degree of practical concern for the welfare of those affected by one’s actions.⁸⁷ Indeed, the concept of indifference referred to in the context of gross negligence also appears to fit this definition: an indifferent defendant having been described as one who ‘did not trouble himself to consider the likely result of his neglect.’⁸⁸ However, there is room for the argument that indifference, much like the concept of recklessness, is capable of carrying different meanings.

The case of *Sheppard*⁸⁹ poses us with a potential difficulty as here. As was done in *Stone*,⁹⁰ an analogy was drawn between recklessness and indifference. As observed above,⁹¹ Lord Diplock’s interpretation of wilful neglect had been that, if the parents did not know that the child required medical attention, they would be liable if:

“[the defendant] had so refrained [from providing medical treatment] because he did not care whether the child might be in need of medical treatment or not.”⁹²

Lord Diplock described this state of mind as recklessness,⁹³ but Stannard adds that in this context it appears that mere inadvertence would not be enough. He claims that indifference to the child’s welfare was required,⁹⁴ and this is certainly supportable if

⁸⁷ Duff above fn.7; Goff, ‘*The Mental Element in the Crime of Murder*’ [1989] 104 L.Q.R. 30 at 55 cf. The Law Commission LCCP177 above fn.72 at para 3.150 although this definition included the need for subjective foresight.

⁸⁸ Syrota, ‘*Mens Rea in Gross Negligence Manslaughter*’ [1983] Crim. L.R. 776 at 778 and 784-5

⁸⁹ *Sheppard* above, fn.36

⁹⁰ Above, fn.58

⁹¹ Ch. 3.2.1

⁹² *Sheppard* above, fn.36 per Lord Diplock at 405

⁹³ *Ibid* per Lord Diplock at 405

⁹⁴ Stannard above fn.37 at 548

indifference is considered to be an attitude of ‘not caring’ what the risks are. The *Caldwell* and *Lawrence*⁹⁵ definitions of recklessness were created by Lord Diplock very soon after *Sheppard*, and it was seen above that they might have been similarly intended to be based on indifference.⁹⁶ In *Caldwell*, Lord Diplock held that a defendant would be reckless where he:

“has not given any thought to the possibility of there being any such risk...”⁹⁷

Although not quite the same as requiring that the defendant did not care about the possible risks, this is at least distinct from saying that the defendant simply failed to foresee the risk. It instead seems to point towards an individual who did not bother to give the matter thought. Indeed, Lord Diplock stated in *Caldwell* that inadvertence could be *just as culpable* as advertence to a risk. When this comment is viewed in the light of the defendant’s intoxication or the indifference perceived in *Sheppard*, it appears to be more rational than some commentators have previously thought.⁹⁸ However, the *Lawrence* definition of recklessness was expressly rejected as an epithet for gross negligence in *Adomako*, where Lord Mackay preferred the approach to recklessness taken in *Stone*.⁹⁹ Does this mean that indifference according to Lord Diplock in *Sheppard*, *Caldwell* and *Lawrence* is somehow different from the concept referred to in *Stone*? Fortunately, it seems doubtful that case law has created two distinct definitions of indifference. The most likely explanation is that Lord Mackay rejected a direction based on *Lawrence* recklessness to the jury because neither *Lawrence* nor *Caldwell* was widely recognised to be based on indifference. Lord Mackay was rejecting the operation of ‘*Elliott* objectivity’,¹⁰⁰ not an alternative definition of indifference.

⁹⁵ Above, fn.56

⁹⁶ Above, Ch. 3.2.1

⁹⁷ *Caldwell* above, fn.4 per Lord Diplock at 354

⁹⁸ See again the above arguments on the moral culpability of indifference: Ch. 3.2.1

⁹⁹ *Adomako* above, fn.55 per Lord Mackay at 188

¹⁰⁰ Ch. 5.2.3.1

7.5.2: Why express indifference as a 'disregard of the risks'?

Directing the jury that the defendant's failure to avoid the obvious risk must have displayed a lack of the proper kind and degree of practical concern for those affected by his actions may not be too complex an enquiry for them. The jury will have already found that there was an obvious risk of serious harm; it would surely not be too difficult for them, following on from that decision, to decide whether, given all the circumstances, the defendant could be said to have 'not cared' about the outcome. However, a test that requires the failure to avoid an obvious risk of serious harm to be due to a failure to care for the welfare of the victim may be too restrictive. It identifies indifference alone as the threshold of criminal culpability. As well as providing an easier way of inferring indifference, the new test must remain capable of punishing other culpable conative states of mind. Therefore, the second element of that test must use broader terminology in order to encompass anger and voluntary intoxication.

This task is not impossible. Although we cannot linguistically describe an intoxicated or enraged defendant as indifferent, these states of mind all share a similar basis for blame. As was noted in Chapter 3.4.4, a defendant who causes criminal harm whilst voluntarily intoxicated is morally culpable because he got himself into such a state without caring what the consequences might be. An enraged defendant can also be said not to care about the consequences in that he has failed to control his emotions properly.¹⁰¹ One possible way of encompassing all of these states of mind would therefore be to refer to a disregard of the risks. As was noted above this is terminology that is used by both Scottish courts and the courts of England and Wales as a reference to indifference.¹⁰² Although indifference is undoubtedly a species of disregard, the two terms are not completely synonymous. A disregard of a risk in fact covers a wider range of states of mind, from those who recognise the risk but run it anyway to those who simply do not pay attention to the possible existence of a risk for some reason. Thus, the defendant who acted in a rage or while drunk could be said to have disregarded the risks his actions created because of his condition, just as the indifferent defendant can be said to have disregarded such risks because he did not care. The use of the term 'disregard'

¹⁰¹ Ch. 3.3.2

¹⁰² *Quinn v Cunningham* above, fn.1 per Lord Justice-General Clyde at 24 and *Bateman* above, fn.40 at 13

would therefore allow for a broader approach to moral culpability than use of the term indifference alone.

7.5.3: *The need to refer to a 'blameworthy' disregard*

However, if reference to the defendant's disregard of the risks is considered broader than indifference, it may run the risk of being too wide, thus including states of mind that we do not consider to be sufficiently morally culpable for criminal liability. It was observed above that a test based on indifference would naturally take account of the defendant's capacity,¹⁰³ and therefore any alternative terminology should also be capable of doing so. The problem then is there is a risk that an individual who could not recognise an obvious risk because he lacked the mental capacity to do so might broadly be said to have disregarded the risk in the same way as the heavily intoxicated individual. Accordingly, there ought to be some safeguard to prevent this sort of finding. This may have been one aim of the 'circular' question in the *Bateman* test,¹⁰⁴ but the required degree of culpability may be better expressed by replacing the word 'criminal' with the word 'blameworthy'. There is still some circularity in defining a criminal state of mind as a 'blameworthy' disregard of a risk, but that may be difficult to avoid and not entirely unhelpful. A test expressed in this way may be the best way of ensuring that criminal liability is based on the defendant's culpability for his conative state of mind as opposed to what an ordinary person would have done. The search is for an epithet or other linguistic manner of conveying to the jury the level of selfish indifference they are looking for.¹⁰⁵

There are still some further problems. In answering the question of whether the defendant's disregard of the risks can be considered blameworthy, the jury would inevitably be compelled to make a moral assessment.¹⁰⁶ However, it is submitted that these problems have less import here than they do in relation to a bipartite test based on 'mitigated objectivity'. In that context, the jury were given no guidance as to what can be considered morally wrongful or innocent, which created the risk of greatly inconsistent

¹⁰³ Ch. 7.2.1

¹⁰⁴ Above, Ch. 7.3.4.

¹⁰⁵ Of course, an individual who disregarded the risk because of anger or voluntary intoxication can be assumed to have displayed a blameworthy disregard anyway. Above, Ch. 3.3.2 and 3.4.4.

¹⁰⁶ Finch and Fafinski 'No Public Agreement on Dishonesty' Presented at British Science Festival (2009)

verdicts. By contrast, the second part of a bipartite test based on conative states of mind is now directly linked to moral culpability. The jury would have to decide, according to the available evidence, whether the reason for the defendant's actions was that he did not care, or whether something else, such as a mental incapacity, played a part.

In most cases, the jury would not have to make such an enquiry anyway. Where it is accepted that the defendant was voluntarily intoxicated or angry, then his disregard of the risks can be considered morally blameworthy without any need for the jury to make their own moral assessment of the defendant's condition. Similarly, as was noted before, where the defendant gives no other believable explanation for his inadvertence (or indeed for the fact that he consciously ran the risk if such evidence is available) then he can be easily assumed to have been indifferent and thus the jury's own moral perception of his disregard of the risk is irrelevant. It is therefore only where the defendant provides some other reason for his inadvertence that the jury will have to place a moral judgement on whether his disregard of the risk can still be considered blameworthy. Given the inevitable complexity of the defendant's circumstances in such cases, a more complex enquiry is unavoidable.

7.5.4: Acting unreasonably in the factual circumstances

In addition to the requirement that the defendant's failure to avoid an obvious and serious risk must have shown a blameworthy disregard towards those affected by his actions, this second part of the bipartite test asks whether the defendant acted unreasonably in the factual circumstances. This may appear to point towards the traditional objective hierarchy, as in most cases where the defendant acted in the face of an obvious risk of serious harm it might be said that he fell far below the standard of a reasonable person. However, the main purpose of an express requirement would be to ensure the protection of those who, despite an obvious risk of serious harm, acted as a reasonable person or professional would have done in the actual circumstances and thus cannot be considered morally culpable. Thus, for example, a surgeon may act in the face of an obvious risk that his patient will die, but, if he acts as any other professional would have done, he should not be convicted of manslaughter.

It was seen above that a similar proviso is necessary in both subjective and objective tests in order to take account of the defendant's laudable motive.¹⁰⁷ Of course, the defendant's motive will inevitably affect the defendant's attitude towards the victim anyway; the above surgeon does not show a blameworthy disregard towards the patient, but instead acts in the patient's best interests. On that basis, a requirement that the defendant was acting unreasonably is somewhat superfluous in a test designed to punish attitudes. However, the requirement at least ensures a blameworthy disregard of the risks cannot be found in certain contexts; therefore, its inclusion can be justified as a safeguard to ensure that individuals like the surgeon are expressly protected. Additionally, this requirement will ensure that laudable motive is not always an excuse. For example, if the surgeon performed the surgery badly and the patient died as a result, the jury may think that the defendant has acted so unreasonably as to nonetheless evidence a blameworthy disregard of the consequences despite his motive. The same is inevitably true of the surgeon who killed because he was too drunk or angry to perform the operation properly.

7.6: Conclusion

This new test involves enquiries that are undoubtedly objective in nature; the jury primarily have to consider what the reasonable person would have foreseen in that situation. However, the test can be regarded as an objective one only the same way that recklessness in Scotland can be described as objective. Although the questions asked may appear familiar to objectivists, in that we are prepared to infer that the defendant was indifferent because the risk was such an obvious one, culpability is not merely based on the defendant's inadvertence but rather upon what that inadvertence tells us about the defendant's attitude.

Conversely, it might be argued that, since this basis for moral culpability is based on the defendant's actual attitude, it can be described as a subjective test. However subjectivist principles, as established in chapter 1.1, are generally based on the defendant's foresight, perceptions, knowledge or beliefs, described above as cognitive states of mind.¹⁰⁸ Thus the defendant is considered morally blameworthy because of his

¹⁰⁷ Above, Ch. 1.4.1 and Ch. 5.2.1 respectively.

¹⁰⁸ Simon above, Ch. 3.1. fn.3

awareness of the possible outcome, which means he could have been fairly expected to ensure that outcome did not occur. By contrast, the new test is based upon conative states of mind; the defendant's attitudes or his reasons for acting are inferred from his conduct. He may have held such a blameworthy attitude even where he was not aware of the outcome or where he was unable to foresee the outcome.¹⁰⁹ The basis for blaming the defendant is therefore completely different.

In reality, the proposed new test is therefore neither subjective nor objective. It is seeking a state of mind that transcends both categories.¹¹⁰ A defendant may be said to have disregarded a risk where he foresaw it and acted anyway, just as he may have disregarded a risk by not bothering to give it thought. We thus have a test that no longer relies on the concepts of subjectivism and objectivism for setting the minimum degree of criminal culpability, nor the reliance on foresight that those concepts entail. What we have is a completely new way of looking at moral culpability which, it is submitted, is far more suitable for a consistent application within the law.

¹⁰⁹ I.e. if he was enraged or intoxicated.

¹¹⁰ This is certainly the view of Professor Duff's indifference taken by Norrie in '*Subjectivism, Objectivism and the Limits of Criminal Recklessness.*' [1992] 12 O.J.L.S. 45 at 46

Chapter 8: How a conative approach would affect English and Welsh law

The test suggested in the previous chapter would base a moral assessment of the defendant upon his conative state of mind, setting a blameworthy disregard of the outcome as the threshold of criminal culpability. This chapter will outline how well that new test might operate as a replacement for existing tests of *mens rea* in the current criminal law of England and Wales. As the threshold for criminal culpability, the new test would act as an alternative to the subjective threshold test of recklessness or the objective threshold test of gross negligence. This of course means that the new test would not be appropriate *mens rea* for every existing offence; for example, murder requires a significantly higher threshold of moral culpability than the new test represents, and theft is based on punishing the defendant's intention and dishonesty rather than his callous attitude. However, the law can nonetheless be regarded as taking a consistent approach to moral culpability so long as any deviations from the norm can be explained. This chapter will firstly identify offences where the new test could not be applied; be it because the offence requires a particularly high degree of moral culpability or because it is based on punishing a specific attitude. In each case it will be shown why *mens rea* must be formulated in different terms and, if we view the required state of mind in conative terms, how the new approach would offer improvements over the current law.

Chapter 8.1: Conative states of mind not covered by the new test

8.1.1: A distinct test of Intention

8.1.1.1: Why do we need a distinct test of intention?

In the current law, we require proof that the defendant intended an outcome in order to distinguish the greatest offence in a single category of harm from lesser offences. For example, there is a clear moral distinction between an individual who committed murder and one who committed manslaughter; a distinction that is especially important given the mandatory life sentence that accompanies a murder conviction. This remains true no

matter how the threshold for criminal culpability is defined.¹ Therefore, there must exist a concept of intention that is distinguishable from lesser states of mind such as indifference; whilst a blameworthy disregard of the risks can be considered morally culpable to some extent, it is not so culpable on its own as to warrant the most serious charges available.

The only alternative would be to adopt an approach similar to that of Scottish law, where there have been attempts to distinguish murder and manslaughter according to differing degrees of indifference. However, their example demonstrates how inaccurate such an approach can be. In Scotland, murder can be a crime of intention, which carries a strict definition, but the offence is also made out where the defendant acted with ‘wicked recklessness.’ This has been defined as where the defendant displayed:

“such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.”²

Unlike direct intention, it appears that wicked recklessness can exist regardless of whether or not the defendant realised there was a risk of death. Sheriff Gordon claims that:

“the grossness of the carelessness is important as a pointer to the wickedness – a wickedness which can be revealed as much, if not more, by lack of foresight as by acceptance of risk.”³

Even if he did not subjectively foresee the risk that his actions created, an individual can be said to have ‘not cared’ whether or not the victim would die. Thus, ‘wicked recklessness’ would appear to be consistent with the new approach to assessing *mens rea* that has been suggested in this chapter.

¹ As was seen above, even if we were to consistently formulate *mens rea* in objective terms, we would still require a ‘subjective’ definition of intention for the most serious offences. Above, Ch. 5.2.2

² Macdonald, ‘*Practice Treatise on the Criminal Law of Scotland*’ (1867 – 5th ed. 1948 by Walker and Stephenson)

³ Gordon, *The Criminal Law of Scotland* (2nd ed. 1978) p242 para 7-47

However, if we were to adopt a similar assessment of *mens rea* in murder, it would be unclear precisely what would distinguish the sort of indifference required in wicked recklessness and ‘normal’ indifference that would be sufficient *mens rea* for lesser offences. This is a problem that affects the current Scottish law as well; recklessness is defined in *Quinn* in terms of the defendant’s disregard of the risks.⁴ Sheriff Gordon claims that the Scottish courts were taking steps towards a definition of wicked recklessness⁵ limited to:

“blatant failures to take account of risk: cases of extreme callousness which exhibit the depravity of the agent and reveal him as a person of criminal mentality... cases where it is proper to equate the man who does not know with the man who does not care.”⁶

This language appears to be much stronger than that used in *Quinn*; it is a callous disregard of the consequences rather than an indifferent disregard, and involves the sort of conduct that Sheriff Gordon describes as ‘outrageous.’ Indeed, he considers that the difference between ‘wicked recklessness’ and gross negligence⁷ is not merely one of degree, but rather that the wickedly reckless defendant inspires a much larger sense of moral indignation than a grossly negligent defendant. Gordon further claims that, although normally it would be unsatisfactory to base criminal culpability in general on the jury’s moral assessment of the defendant, such an approach is sometimes necessary. Making a moral distinction between culpable homicide and manslaughter would be one of those occasions.

However, Gordon’s claim relies on his perception that wicked recklessness is not the sole *mens rea* requirement of murder, and that the defendant must also have formed an intention to injure the victim. If this is true, the only moral choice for the jury is between manslaughter and the substantive rule that an individual will face a murder

⁴ [1956] S.C.(J.C.) 22

⁵ Although when Sheriff Gordon was writing recklessness had only really been judicially considered in the context of murder.

⁶ Gordon above, fn.3 at p252 para 7-59

⁷ Gross negligence, subsequent to the work of Sheriff Gordon, became virtually synonymous with recklessness in Scots law.

charge if he assaulted another and caused death, as opposed to a choice between different degrees of indifference. Conversely, the Scottish Law Commission makes no such requirement in section 37(1) of their draft criminal code. The Code would instead provide only that:

“A person who causes the death of another person with the intention of causing such a death, *or with callous recklessness as to whether such a death is caused*, is guilty of the offence of murder.”⁸

If the distinction was made merely between degrees of indifference in accordance with the Law Commission’s proposals, then that distinction would need to be much clearer. As noted before: we cannot expect safe and reliable verdicts if we require the jury, without any guidance as to what can be considered sufficiently morally culpable, to make a moral assessment of the defendant.⁹ Thus, although the jury can be told that the defendant is morally blameworthy if he does not care, we cannot expect them to clearly distinguish murder and manslaughter solely according to either their sense of moral outrage at what the defendant has done or an unspecified distinction between different levels of ‘not caring.’

Consequently, if any degree of indifference were to be considered sufficient *mens rea* for murder, the only way to clearly distinguish murder and manslaughter would be to formulate *mens rea* in objective terms for the lesser charge – someone who is indifferent to the risk may be considered more morally culpable than one who simply does not foresee what the reasonable person would foresee. This is, broadly speaking, the approach the Scottish Law Commission appear to take. In their commentary they describe wicked recklessness, which they rename ‘callous recklessness’ as:

⁸ Scottish Law Commission, ‘*A Draft Criminal Code for Scotland, With Commentary*’ (2003) emphasis added

⁹ See the report by Finch and Fafinski: ‘*No Public Agreement on Dishonesty*’ Presented at British Science Festival (2009)

“more than ordinary recklessness. It must involve a callous acceptance of the risk of death created by the acts or a callous indifference to the possible fatal consequences of the acts.”¹⁰

This is clearly distinct from their definition of normal recklessness, which was observed above to be more analogous to an objective standard than indifference.¹¹ We already know that objectivist principles are flawed, so distinguishing murder and manslaughter in this way is not acceptable. Thus, we can see the problems that would be caused by substituting intention with an equivalent test of *mens rea* expressly based on indifference.

8.1.1.2: *A cognitive or conative state of mind?*

If a separate test of intention is to be retained, then the question is what the relationship, in moral terms, is between intention and practical indifference. Intention must be shown to display a significantly higher degree of culpability than a blameworthy disregard of the risks. The problem is that intention, as it is currently applied in English and Welsh law, appears to blame the defendant for his cognitive awareness of the outcome; on one view, the defendant is considered culpable because, by acting in order to bring about a particular consequence, he may be thought to have displayed the very highest degree of awareness that the outcome will occur. Conversely, the basis for moral culpability in the new approach I am proposing in this part is based on conative states of mind rather than cognitive ones. The retention of a test of intention therefore appears to create a conflict. However, it does not follow from the fact that in English and Welsh law the definition of intention relates to the defendant’s conscious thought process, that it is those thought processes we are punishing. Rather, an intention to cause harm to another person inevitably displays a particularly blameworthy attitude towards that other, and it is this attitude that attracts the very highest criminal penalties.

To show that an intention to cause harm invariably displays a particular blameworthy attitude, we can compare intention with recklessness. Recklessness, whether subjective or objective, can be considered a purely cognitive state of mind

¹⁰ Scottish Law Commission above, fn.8. See the commentary at p87.

¹¹ Above, Ch. 7.3.1

because it is based on the fact that the defendant acted in the face of a foreseen risk, or failed to foresee an obvious risk. This provides us with no concrete indication of why the defendant acted as he did. There is undoubtedly an overlap between recklessness and indifference as the equivalent conative state of mind. It was noted earlier that Duff considers the subjective definition of recklessness can sometimes identify the defendant's indifference towards the victim – because he consciously ran the risk, his actions manifested a lack of the minimum kind and degree of practical concern that we would expect of him.¹² However, subjective recklessness is not exclusively concerned with punishing indifference, as not every reckless individual will be indifferent. There are some, such as those who foresee a risk as only a slight possibility, who can still be considered reckless so long as they were not justified in taking that risk. However, if the risk is only slight, they are not necessarily indifferent to the victim's welfare.¹³ It is also true that subjective recklessness cannot punish all manifestations of indifference; we have seen that an individual can also display indifference even though he did not foresee the risk.¹⁴ Because the subjective definition of recklessness cannot make these distinctions by itself, it is therefore a test that focuses merely on the defendant's cognitive awareness of the outcome. The overlap with indifference is coincidental.

Intention, much like the subjective definition of recklessness, initially appears concerned with the defendant's awareness of the outcome rather than the attitude he displayed. If the defendant's purpose was to produce a particular outcome, then this suggests that he displayed the highest possible degree of awareness that the outcome would occur. As with recklessness, there is an overlap here between the defendant's cognitive awareness and the attitude he displays; Duff argues that intention manifests hostility towards, or at least an 'extreme practical indifference' to, the welfare of others.¹⁵ However, unlike recklessness, there is no flexibility in the degree of awareness required for intention, and therefore all defendants who intended to harm another will almost invariably¹⁶ have displayed the same degree of extreme practical indifference towards the

¹² Above, Ch. 3.2.1

¹³ Duff thus thought such individuals to be 'consciously negligent.' Duff '*Recklessness*' [1980] Crim. L.R. 282 Above, Ch. 1.4.1

¹⁴ Ch. 3.2

¹⁵ Duff above, fn.13 at 285

¹⁶ Leaving aside the issue of laudable motives which will be discussed below, Ch. 8.1.1.5

other. Therefore, the existing test of direct intention, as well as demonstrating a highly blameworthy cognitive state of mind, will accurately represent the very worst attitude one individual can hold towards another.

8.1.1.3: *Intention and voluntary intoxication*

This extreme practical indifference can be considered to display a greater degree of moral culpability than a blameworthy disregard of the risks, hence intention would remain the required *mens rea* in the most serious criminal offences within a category of harm. This of course means that the existing distinction between offences of specific and basic intent will also remain in relation to the defence of voluntary intoxication. This is the correct outcome; it was seen in chapter 3 that voluntary intoxication and indifference both share a similar basis for moral culpability. It follows that the degree of moral culpability displayed by these states of mind is analogous, and so the intoxicated offender, like the indifferent offender, is not as blameworthy for the harm he caused as one who intended that harm.

8.1.1.4: *How does the Woollin test fit in with this analysis?*

A stumbling block to the above analysis is presented by the *Woollin* test¹⁷ as an alternative to a strict definition of intention. The test is again formulated in subjectivist terms; the jury are entitled to infer intention if satisfied that the defendant appreciated that death or serious harm would be virtually certain to occur from his actions.¹⁸ This would pose little trouble if it were to be accepted that *Woollin* does not actually provide an alternative definition of intention, but rather that it simply allows foresight of a virtual certainty to be considered evidence of intention. However it was seen above that the ‘evidential approach’ creates a logical difficulty in identifying what intention actually is.¹⁹ On the other hand, if we were to resort to the ‘definitional approach’ to *Woollin*,²⁰ then we face the problem that it appears to be based on subjectivist principles rather than on conative states of mind. Unlike direct intention, it is unclear whether this standard is

¹⁷ [1999] 1 A.C. 82

¹⁸ *Nedrick* [1986] 1 W.L.R. 1025 per Lord Lane CJ at 1028 affirmed in the House of Lords in *Woollin* *ibid*

¹⁹ Above, Ch. 1.4.1

²⁰ Clarkson and Keating *Criminal Law Text and Materials* (6th ed. 2007) p126 above, at Ch.1.4.1.

actually punishing the defendant for a particular attitude that he held towards the victim, but rather it appears to be focussed upon his cognitive awareness of the outcome in keeping with subjectivist principles.

To preserve a conative approach, we have two options. The first would be to reject the *Woollin* test altogether and simply apply the strict definition of intention. The problem is that this would prevent a murder charge in many cases in which the defendant might be thought deserving of the highest penalties. For example, in Williams' example of a man who blows up a plane mid-flight for insurance money, that defendant would not be convicted for a murder charge even though he is fully aware that his actions will cause the death of those on board the plane. This therefore is not a tenable solution. The preferable alternative would be to find a conative state of mind that the *Woollin* test invariably punishes. Once again, the mere fact that a test is based on degrees of foresight of a risk does not suggest that we cannot consider what attitude towards the victim has been displayed. Unlike subjective recklessness, *Woollin* punishes a very specific degree of cognitive awareness: the defendant is found morally culpable only where he appreciated that the proscribed outcome was a virtually certain consequence of his actions. If he acted in full acceptance that his actions were almost certainly going to cause the death or serious injury of another, for example, then he displayed a very high degree of practical indifference, analogous to intending the outcome, towards the welfare of that other.²¹

8.1.1.5: *Conative Intention and laudable motive*

The proposed new test of blameworthy disregard deals with the defendant's laudable motive in a more logical manner than tests based on the defendant's cognitive awareness of the consequences; a benefit that equally applies to both 'direct' and 'oblique' intention²² if we interpret them also to be conative states of mind. For example, the father who throws his child out of a burning building does so, not because of an extreme practical indifference towards the welfare of his child, but because of a desperate

²¹ Indeed, Duff believed that 'oblique' intention was a manifestation of 'extreme practical indifference' above, fn.13 at 285

²² It is possible that the *Woollin* test already allows laudable motive to be taken into account: above, Ch. 1.4.1. c.f. Wilson '*Doctrinal rationality after Woollin*' [1999] 62(3) M.L.R. 448

attempt to save her life. It is for this reason that he is morally innocent.²³ Similarly, the surgeon, if acting in the best interests of the patient, lacks the blameworthy attitude normally associated with an intention to injure. Although this analysis provides a much better moral account of the individuals in these examples than subjectivism or objectivism, there may be a problem where the defendant commits a ‘mercy killing.’ Can we really say that a woman who kills her terminally ill husband to end his suffering displays an ‘extreme practical indifference’ towards his welfare? Does this new approach to moral culpability necessitate the legalisation of euthanasia? This issue is a legal and political minefield, and it is therefore well beyond the scope of this work to determine whether one who commits a mercy killing can be said to have held a blameworthy attitude towards the victim; there would have to be a political decision as to whether killing another as an act of kindness is a criminally punishable attitude or not.

As a final note, it will be seen in the following chapter that some general defences, such as self-defence, can similarly be interpreted to operate by showing that the defendant’s attitude was, notwithstanding his purpose, not blameworthy.²⁴

8.1.2: Sexual motives as mens rea for sexual assaults

8.1.2.1: Why a different formulation of mens rea is needed in sexual assaults

It has been observed that, if *mens rea* is formulated in conative terms, the defendant’s laudable motive is actually capable of demonstrating that he lacked *mens rea*. However, this is not the sole context in which motive may be relevant to moral culpability according to the proposed new approach; the defendant’s sexual motive, or lack of it, is crucial to his moral culpability for sexual assaults. The offence of sexual assault exists to punish the defendant’s intention to carry out an act, against the wishes of the victim and for his own sexual gratification. Indeed, it will often be the sexual nature of the act alone that distinguishes a sexual assault from a non-sexual assault, and yet there is a significant difference in sentencing between these offences. Mere unlawful touching will constitute only battery and carries a maximum penalty of 6 months.²⁵ If the touching

²³ Contrast this with the subjectivists’ position at Ch. 1.4.1.

²⁴ Ch. 9.3.4

²⁵ Criminal Justice Act 1988 s39

is of a sexual nature, it can carry a penalty of 10 years.²⁶ Additionally, a conviction for a sexual offence bears a significantly worse stigma than a conviction for normal assaults. The defendant's motive is the only way of representing this difference. Accordingly, although the new test outlined in chapter 7 would be used in relation to the victim's non-consent,²⁷ it would not be sufficient *mens rea* by itself. Where the requirement that the defendant held a sexual motive forms part of the *mens rea* of sexual assaults, there clearly is no need to consider whether the defendant displayed a blameworthy disregard of the risk that the act would be sexual. However, this would not cause inconsistency; an individual's motive is, by its very definition, his reason for acting and thus the focus is still upon what conative state of mind is sufficiently blameworthy for a given offence.

8.1.2.2: Improvement over the current law

If the full *mens rea* for sexual assaults were to require evidence of the defendant having a sexual motive, it would be an improvement over the current law. There has been recognition of the importance of sexual motive in sexual (previously indecent)²⁸ assaults. However, as noted earlier,²⁹ motive is a concept that the law cannot properly deal with all the while it formulates *mens rea* in terms of the defendant's cognitive awareness or lack of it. It is therefore unsurprising that, according to the current law, the defendant's sexual motive is not part of the required *mens rea* for sexual assaults at all but rather it is evidence of the *actus reus* only. Prior to the Sexual Offences Act 2003, the requirement was that the act must be indecent,³⁰ and the leading case was *Court*.³¹ The counsel for the Appellant argued that, if the test was objective under section 14(1) Sexual Offences Act 1956,³² then the defendant's fetish was irrelevant. The question would simply be whether the assault was one that right-minded people would consider sexual. Thus, despite the defendant's clear sexual motive, his actions did not amount to a sexual assault. The response of the House of Lords appeared to have separated sexual assaults into three

²⁶ Sexual Offences Act 2003 s3(4)(b)

²⁷ Below, Ch. 8.2.4

²⁸ In future, I will refer to the offence as 'sexual assault' for the sake of clarity.

²⁹ Chapter 1.4.1 re subjective tests and chapter 5.2.1 re objective tests

³⁰ 'Indecent' carried by and large the same connotation as 'sexual nature' in the current law. For the sake of clarity, I will refer to this requirement as the need for a sexual nature from here on in.

³¹ [1989] A.C. 28

³² Which was then the relevant provision

categories. There are those that anybody would consider sexual, and so the defendant's motive cannot show that it was otherwise. Similarly, where the action could not possibly be considered sexual, the defendant's motive would not be able to show that that it was. The defendant's motive was therefore relevant only where the act itself was sexually ambiguous. The Sexual Offences Act 2003 sought to modernise the law, and section 3 covers sexual assaults. However, this is the latest incarnation of the old offence of indecent assault, and so the test for what makes an act sexual in section 78 closely follows the test imposed in *Court*.³³ Section 78(a) appears to impose an objective test as to what can be considered sexual. It applies regardless of the surrounding circumstances and looks at whether the act itself is inherently sexual, and so it is not necessary to subjectively prove that the defendant had any sexual motive in such cases. Subsection (b) covers ambiguous conduct: when establishing whether or not ambiguous conduct was sexual, the defendant's circumstances and purposes are to be considered. The case of *H* has subsequently confirmed that where the defendant's conduct cannot be considered at all sexual, the defendant's purpose cannot demonstrate that it was.³⁴ Thus, the question to the jury is first whether they:

“consider that because of its nature the touching that took place in the particular case before them could be sexual?”³⁵

If the answer to this is 'no', they must find the defendant not guilty. The only time the defendant's actual sexual motive is relevant is again where the act is one that falls under section 78(b), that is, it is not immediately clear whether or not this was sexual conduct. This is consistent with the *Court* judgment that, where the assault was capable of being sexual, other factors become relevant in deciding whether right-minded people would consider it sexual in the circumstances. How and why the defendant was acting in this

³³ Ashworth and Temkin, *The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent* [2004] Crim. L.R. 328 at 331

³⁴ Thus following the pre-act case of *George* [1956] Crim. L.R. 52

³⁵ *H* [2005] 2 Cr App R 9 per Lord Woolfe CJ at para 13.

way would be part of this. In *Court* itself, it was the assault coupled by its true nature; that is, sexual gratification, that made it sexual rather than innocent.³⁶

Some have criticised the law's current approach on the basis that the defendant's motive, and thus his *mens rea* for sexual assaults, is not always assessed in the same manner; if the defendant's actions are unambiguously sexual or non-sexual, then no consideration of his motive need to be made at all. From this point of view, the offence does not appear to have a consistent application.³⁷ However, from the above account of the law, we can in fact see that motive is not actually being used as an assessment of the defendant's *mens rea* at all. Instead, their Lordships in *Court* had constructed, and the Sexual Offences Act 2003 has adopted,³⁸ a set of evidential rules that assist the jury in deciding what makes an act sexual. Indeed, Lord Griffiths made it clear in *Court* that the *mens rea* required for a sexual assault is intention to carry out an act that is sexual and this is not the same as requiring a sexual motive for carrying out an assault.³⁹ The two extreme categories (inherently sexual and non-sexual acts) show this to be true. Lord Keith stated that there could not be a sexual assault where the features of the act that made it sexual were not intended.⁴⁰ His example was where a defendant jostles past a woman on a train and accidentally rips off her top. This act exposes the victim in a public place, which as Lord Ackner suggested would be inherently indecent,⁴¹ and yet the defendant intends only to push her out the way. He does not intend, nor does he foresee, the actual indecent element of the act, and thus he lacks *mens rea*. However, had he intended to remove the woman's top during those actions, he would have formed *mens rea* regardless of whether he intended to do it for sexual purposes.⁴²

Although the above analysis shows that the assessment of *mens rea* in sexual assaults cannot be criticised for inconsistency, the fact that any evidence of sexual motive is part of the *actus reus* rather than *mens rea* causes some logical difficulties. Firstly, regarding motive as irrelevant to *mens rea* may result in some nonsensical conclusions. If a doctor was forced to remove an unconscious patient's clothes in an emergency, it can

³⁶ Above, fn.31 at 33

³⁷ Professor Smith's Commentary on *Court* [1988] Crim. L.R. 537 at 538-9

³⁸ Excepting any allowance for the defendant's chaste purpose where the act is inherently sexual

³⁹ Above, fn.31 at 35

⁴⁰ *Ibid* at 33

⁴¹ *Ibid* per Lord Ackner at 42-3

⁴² Assuming the removal of clothing is an inherently sexual act.

be assumed that he held no sexual motive in that context. Even if motive was a *mens rea* issue that could be assessed objectively, then the reasonable person would surely hesitate to regard this as sexual because of the circumstances in which the doctor was acting. However, section 78 labels the act itself as sexual where a reasonable person would consider that act, by its very nature, to be sexual regardless of the defendant's motives or even the circumstances he was in. Thus, because motive is unrelated to *mens rea*, the doctor's actions can be identified as a sexual assault according to the current law. Secondly, and perhaps more significantly, keeping an individual's motive distinct from his mental culpability does not provide us with an accurate reflection of why we blame him. As noted earlier in this section, a sexual offence is regarded as more serious than a non-sexual one in terms of the available penalties available and the social stigma placed upon the defendant. However, if a sexual motive need not be proved in a sexual assault, it is possible in theory that the defendant displayed the exact same *mens rea*, and therefore level of culpability according to the law, as a defendant who carried out a non-sexual assault. For example, someone who removed an item of the victim's clothing for a non-sexual reason is regarded to be as morally culpable as another who does have a sexual motive. Similarly, at the other end of the scale, an individual who carried out an innocuous action with an obviously sexual motive is considered by the law to have displayed the same degree of moral culpability as one who did not have such a motive, even though we may consider the former to have displayed a greater degree of moral culpability. Surely the defendant's sexual (or innocuous) motive ought to have some effect on our moral assessment of him?

These problems arise only because both subjectivist and objectivist principles struggle to take account of the defendant's motives.⁴³ If we formulate *mens rea* in terms of what the defendant foresaw or failed to foresee, then that leaves no room for consideration of why he acted as he did. Conversely, if we focus upon the defendant's conative state of mind, then it is clear that a sexual motive must be relevant to the *mens rea* of sexual assaults. The proposed new approach to moral culpability therefore allows the *mens rea* for sexual assaults to more accurately reflect the defendant's degree of

⁴³ Above, Ch. 1.4.1 and Ch. 5.2.1 respectively

moral fault. Of course, the defendant's sexual motive will not always have been evident: so where most people would regard an act as sexual there would be a strong inference that there was a sexual motive and *vice versa* where the act is widely considered innocuous. However, any evidence as to the actual motive of the defendant might displace these inferences, and thus the issue of motive would be treated in the same manner in all cases. In cases where the act is ambiguous, using motive as an element of *mens rea* will not achieve different results to the current law. However, the difference in the extremes is important. Of particular note are medical cases which would no longer need to be made an exception. If the 'victim' was unconscious and so unable to give consent, then there could no longer be any suggestion that 'inherently sexual' acts done for medical purposes constitute a crime. At the other end of the scale, innocuous touching carried out with a sexual purpose can be deemed to be sexual touching if that motive can be proved. The case of *George*⁴⁴ involved a shoe salesman with a foot fetish. The defendant was accused of sexual assault for removing customers' shoes. It was held that his actions were innocuous and thus not capable of being sexual at all, but his sexual motive must have been obvious in the way he removed the shoes or else the incident would not have come to the attention of the courts at all.

8.1.3: Dishonesty as a conative state of mind

The suggested new test of *mens rea* would also have no application in the offence of theft. As noted earlier, theft is a crime that focuses on punishing a particular state of mind: an intention permanently to deprive the victim of his property,⁴⁵ as well as dishonesty. Dishonesty can very clearly be seen to be a conative state of mind, and thus consistent with the claim that moral culpability ought to be founded on the defendant's wrongful attitude. Indeed, an approach to moral culpability that focuses on the defendant's attitudes is much better equipped to deal with dishonesty than subjectivism or objectivism, which are based on cognitive states of mind. A purely objective assessment of dishonesty would falter in the face of, for example, a tourist who comes from a country

⁴⁴ Above, fn.34

⁴⁵ Theft Act 1968 s1(1)

in which public transport is free and so travels on a bus without paying.⁴⁶ Simply asking whether his conduct can be considered dishonest in the absence of any consideration as to what he is aware of would inevitably result in an affirmative response, despite his moral innocence. Similarly, an enquiry based purely on an individual's own subjective awareness of the honesty of his actions is no better an indicator of his actual dishonesty. In *Greenstein*,⁴⁷ the trial judge told the jury:

“It is no good ... applying the standards of anyone accused of dishonesty otherwise everybody accused of dishonesty, if he were to be tested by his own standards, would be acquitted automatically.”

The current law, in an apparent attempt to seek a compromise between the inherent unsuitability of both objectivist and subjectivist principles in this context, rather clumsily attempts to combine both approaches. The defendant's conduct must have been dishonest according to the ordinary standards of reasonable and honest people. However, he can be convicted only if the jury also find that the defendant himself realised that what he was doing was, according to those standards, dishonest.⁴⁸ The problem is: we cannot assume that there is a universal standard of dishonesty. Therefore, the 'objective' standard that is applied by the test is inevitably going to impose the standards of the jury themselves. Accordingly, it is utterly unrealistic to ask whether or not the defendant was aware that his actions were dishonest according to that standard. Indeed, because the perception of what is dishonest may vary so much from person to person,⁴⁹ asking whether the defendant was aware that what he was doing was dishonest by other people's standards may, somewhat predictably given the observed narrowness of subjectivist principles, end up taking too restrictive a moral assessment of that defendant. For example, Lord Lane CJ in *Ghosh* apparently thought that his test would be capable of finding people dishonest even if they believed that their actions were morally justified:

⁴⁶ To take Lord Lane CJ's example: *Ghosh* [1982] Q.B. 1053 per Lord Lane CJ at 1063

⁴⁷ [1975] 1 W.L.R. 1353

⁴⁸ Above, fn.46

⁴⁹ Consider Finch and Fafinski above, fn.9

“Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.”⁵⁰

However, on what basis can we say that such individuals are aware that ordinary people would consider their actions to be dishonest? If the anti-vivisectionists firmly believe that their actions are not dishonest, are they really aware that the ordinary person would consider their actions to be dishonest? And if they are not, does this mean that we do not regard them as dishonest?

Better then to think of the problem in terms of the attitude displayed by the defendant; we can simply ask the jury whether they think the defendant was dishonest. Although the jury may have their own definitions of dishonesty, this approach would not be the same as asking them to apply an entirely objective standard. They are assessing the defendant’s conative state of mind; if the defendant is a tourist from a country with free public transport, then they may not think him dishonest if, unaware of the difference in this country, he rides our buses without paying. Similarly, any individual who is too young or lacks the mental capacity to understand the importance of property may not be thought to be dishonest. However, this is distinct from the *Ghosh* test as we no longer have to ask whether the defendant is aware that his actions would be perceived as dishonest. Thus the anti-vivisectionist, who erroneously believes that the right-thinking world would agree with his actions, can still be regarded as dishonest as he inherently knows stealing to be wrongful. Accordingly, the 1968 Theft Act itself, by providing no definition at all,⁵¹ is far closer to an accurate test of dishonesty than the *Ghosh* test. The only alternative would be to impose a statutory or common law standard of what can be considered dishonest which would inevitably be overly restrictive and thus impractical.

⁵⁰ Above, fn.46 Per Lord Lane CJ at 1064

⁵¹ Beyond certain examples of where the defendant’s conduct cannot be considered dishonest. Theft Act 1968 s2(1)(a-c)

Chapter 8.2: Scope of the new test

The above discussion shows that the use of the apparently ‘subjective’ concepts of intention in offences of specific intent, sexual motive in sexual assault and dishonesty in theft is distinct from, but nonetheless consistent with, the punishment of indifference, intoxication and anger elsewhere. These offences stand out because culpability must be based fully or partially on a specific attitude displayed by the defendant: be it an exceptionally shocking lack of practical concern for the welfare of the victim, a desire for sexual gratification or dishonesty. Criminal liability in most other offences could be satisfied by the defendant’s blameworthy disregard of the obvious risks. However, we could not achieve a consistent assessment of *mens rea* by simply substituting the new test for that currently applied by the law. Many existing offences in the criminal law of England and Wales are structured in unusual ways that are not immediately compatible with the new test.

8.2.1: Applying the new test: Fatal offences against the person

The new test would be an obvious replacement for the standard of gross negligence currently imposed in manslaughter. In this respect, the new test would offer four improvements over the current law.

8.2.1.1: No more ‘Elliott objectivity’

It is currently unclear whether the existing *mens rea* for manslaughter is an example of ‘Elliott objectivity’⁵² following *Stone*,⁵³ or whether it offers any protection for the individual who lacked the capacity to attain the reasonable standard.⁵⁴ By contrast, it was seen above that the new test would not label such individuals as morally culpable and so no further consideration is needed.

⁵² *Elliott v C* (1983) 77 Cr.App.R. 103. Above, Ch. 5.2.3.1

⁵³ [1977] Q.B. 354

⁵⁴ Above, Ch. 6.5.3

8.2.1.2: What degree of harm should be obvious?

Under the current law regarding manslaughter, it is not entirely clear whether the defendant has to be acting in the face of a risk of death, in order to fully observe the correspondence principle, or whether all that is required is that risk was one of serious bodily harm, thus following what Horder would call the proximity principle.⁵⁵ The suggested requirement under the new test is that the defendant would be culpable for manslaughter where the risk was of death or a very high degree of bodily harm. This is not necessarily a direct adaptation of the approach that the law currently takes.⁵⁶ However, there has been a substantial difference in opinion as to whether the obvious risk should be of death or serious harm⁵⁷ and the Law Commission has displayed indecision when discussing the issue.⁵⁸ As it is, I remain influenced by the argument that it may sometimes be hard to distinguish an obvious risk of serious harm and an obvious risk of death.⁵⁹ That said, not all examples of 'grievous' or serious bodily harm, according to its rather vague definition,⁶⁰ will necessarily carry an obvious risk of death also. If there was an obvious risk that the victim would break a limb, for example, then that is harm that might be considered serious but not life-threatening. If death itself was not at least a foreseeable result, then the harm risked by the defendant might be considered too remote from the harm caused for us to consider his indifference sufficiently morally culpable for an offence as serious as manslaughter.⁶¹ Thus, we would say the defendant showed such a blameworthy disregard sufficient for manslaughter only in such cases where the harm risked was so serious as to create a risk of death anyway.

This analysis leaves us with two options. Firstly, we could say that it is unnecessary to refer to any degrees of non-fatal harm, as the most serious degrees will inevitably also carry a risk of death. Therefore, it may not be too restrictive to say that, for a charge of

⁵⁵ Horder, 'A critique of the correspondence principle in criminal law' [1995] Crim. L.R. 759 at 770

⁵⁶ Above, Ch. 5.1.2

⁵⁷ Smith, 'Case Comment on Adomako' [1994] Crim. L.R. 757 at 759 but cf. Leigh, 'Liability for Inadvertence: A Lordly Legacy?' [1995] 58 M.L.R. 457 who implies serious harm will do at 469

⁵⁸ Consider how Law Commission, 'Murder, Manslaughter and Infanticide' (2006) Law Com no 304 at paras 3.58-9 conflicts with Law Commission 'Legislating the Criminal Code: Involuntary Manslaughter' (1996) Law Com No. 237 para 4.19

⁵⁹ Law Commission No. 237 *ibid* para 4.19. Above, Ch. 5.1.2

⁶⁰ *DPP v Smith* [1961] A.C. 290

⁶¹ It was noted above that we can infer the defendant to be indifferent partially because of how serious the risks were. This necessitates some adherence to the proximity principle.

manslaughter, there must have been an obvious risk of death before the first question of the bipartite test will be satisfied. Conversely, the better approach would be to leave in reference to the very highest degrees of non-fatal injury in order to better convey to the jury that death need not be the only possible consequence of the defendant's actions. This would not result in the net of manslaughter being cast too wide, as the degree of injury required is high enough that it would inevitably pose a risk of death as well. All it would do is make it clear that death need not be an inevitable outcome. Therefore, there appears to be little harm in such a requirement, even if it is technically superfluous. Either way, it is clear that it would be inappropriate for the required level of harm that was risked to be any lower than the very highest degrees of non-fatal harm. Although death need not have been an inevitable consequence of the defendant's actions, it must still have remained a foreseeable risk.

8.2.1.3: *Rejecting constructive manslaughter*

Leaving aside the partial defences to murder, there are two ways in which manslaughter can currently be charged: where the defendant was grossly negligent or where death was caused during the commission of an unlawful and dangerous act. However, if the new test of *mens rea* were to be applied to constructive manslaughter, then it would inescapably undermine the need to prove that the defendant disregarded an obvious risk of death or very high degree of harm. This is because the *mens rea* for constructive manslaughter currently requires only the *mens rea* for the unlawful act in the face of an objectively foreseeable risk of some harm being caused.⁶² If the new test were imposed, it would therefore require merely that the defendant did not care about an obvious risk of some less-than-fatal harm. Accordingly, there would never be any need to consider whether the defendant was indifferent to an obvious risk of death or a very high degree of harm.

This raises the question whether we should retain the offence of constructive manslaughter at all if we wish to consistently apply the new test. The answer, I think, is no. Although we may consider indifference in the face of an obvious risk of death to be sufficiently morally culpable for a manslaughter charge, we cannot say the same of

⁶² *Church* [1966] 1 Q.B. 59

someone who causes an unforeseeable death whilst indifferent to the risk of a lesser degree of harm. We might not even think an individual to be sufficiently morally culpable for manslaughter where he intends some lesser degree of harm. Therefore, where the defendant has the *mens rea* for a lesser degree of harm, or some other dangerous offence, he would be liable only for the non-fatal offence and not for the death that occurred. Accordingly, the law would no longer be confused by two different and inconsistent definitions of the same offence.

8.2.1.4: A consistent treatment of fatal and non-fatal offences against the person

Although the current law is prepared to punish an individual where their grossly negligent conduct causes death, it shies away from holding him responsible for inadvertently causing really serious injuries, regardless of how shocking his conduct or how little he cared for the safety of others. This is in spite of the fact that an individual who causes injury whilst creating an obvious risk of death or extremely serious injury might very well display the same level of moral culpability as one who kills. An example can again be made of the French Paratrooper who, during a training exercise, fired live rounds, thinking they were blanks, into onlookers.⁶³ No deaths were caused, but his negligent actions carried a very obvious risk of death or serious injury, and in the event he severely injured seventeen people, including children. He faced prosecution for his actions,⁶⁴ but had the incident occurred in England he would have fallen outside the scope of the criminal law unless death had been caused. This is not a rational approach for the law to take. The new test for *mens rea* would be applied to non-fatal offences against the person as well as manslaughter and so this unnecessary distinction would no longer apply.⁶⁵

Unfortunately, a discrepancy would still remain between corporate manslaughter and breaches of health and safety regulations causing something less than death. However, the Corporate Manslaughter and Corporate Homicide Act 2007 is not designed

⁶³ The Times, 'Soldier to be prosecuted after shooting live rounds into crowd' July 1st 2008
Above, Introduction fn.1

⁶⁴ The French Code Pénal Article 222-19 (Act no. 2000-647 of 10 July 2000 Article 6 Official Journal of 11 July 2000) (Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September into force 1 January 2002)

⁶⁵ See above the discussion on how death differs from other degrees of harm Ch. 2.4.2-4.

to punish individuals, which sets it apart from other criminal offences. The discrepancy may be due to the added need for retribution where the negligence of a company has caused the death of one of its employees.⁶⁶

8.2.2: Applying the new test: Non-fatal offences against the person

8.2.2.1: Incompatibility of existing offences

The existing definitions of many non-fatal offences against the person, which are currently defined within the Offences Against the Person Act 1861, cannot follow the proposed pattern of punishing attitudes rather than cognitive awareness. This is because the charge that the defendant will face depends on the consequences of his actions. With the exception of section 18, the offences are primarily distinguished by reference to the actual harm caused; the more serious the injury, the more serious the offence the defendant will be charged with. As a result, the *mens rea* required for the offence does not always correspond to the harm caused. For example, the *mens rea* required for section 20 displays one of the criminal law's departures from the correspondence principle. If grievous bodily harm has been caused, the only *mens rea* that need be proved is subjective foresight of some degree of harm, not necessarily grievous bodily harm.⁶⁷ This would not work so well if the test were to be formulated in terms of the defendant's conative state of mind. We cannot assume that all individuals who caused grievous bodily harm displayed the same attitude towards the victim. If the defendant acted as he did in the face of an obvious risk of grievous bodily harm, we may consider that he showed a blameworthy disregard of the consequences of his actions. Conversely, where the risk was of only very minor harm, we might feel less able to say that he showed such a disregard of the risks and so he is less morally culpable; the risk was not necessarily such a serious one that we would expect him to have taken all possible care to avoid it.⁶⁸ Section 47 of the act is also incompatible with a test based on conative state of mind. As interpreted, it requires an assault or battery that results in:

⁶⁶ S1(4)(c) The penalties are designed to punish the company and not the individual; such as fines (s1(6)) and publicity of failures (s10)

⁶⁷ *Mowatt* [1968] 1 Q.B. 421 and *Savage v Parmenter* [1992] 1 A.C. 699

⁶⁸ Above, Ch. 7.4.2

“hurt or injury calculated to interfere with the health or comfort of [the victim.]”⁶⁹

All that is required for the *mens rea*, however, is recklessness as to the assault or battery.⁷⁰ There need be no subjective awareness of the risk of any bodily harm at all, nor does it even need to be objectively foreseeable that such harm will result. If using the new test, is someone who disregards an obvious risk of nothing more than the application of unlawful force sufficiently blameworthy for a serious criminal charge?⁷¹ This problem would be even more pronounced if the new test were to be applied to the common law offences of assault or battery. Imagine that the defendant did not foresee an obvious risk that he would apply nothing more than unlawful force and, although he applied that force, his actions in fact caused no injury. An individual may hurry down the street not caring whether he bumps into anyone, but is this really the sort of conduct that we wish or need to penalise?

8.2.2.2: Revising the definitions of non-fatal offences against the person

Unfortunately, we cannot resolve the above problems by saying that, along with the proposed test of blameworthy disregard, the *mens rea* for these offences should follow the correspondence principle more closely. If the defendant was inadvertent to an obvious risk of serious bodily harm, we might indeed consider his inadvertence to have shown an indifference to the risks sufficient for section 20. However, if the defendant was merely inadvertent to an obvious risk of the lower level of harm required by section 47, is that a risk that we would really expect the defendant to have noticed and avoided? It is difficult to say that the risk was so serious that he ought to have taken all possible care to avoid it, and so his actions do not fall below the minimum degree of practical concern that we expect of him. This reasoning suggests that, according to the proposed new approach, a charge of section 47 would be somewhat pointless and so it ought to be abolished altogether. However, if this was so, how would the criminal law deal with individuals who caused a degree of injury less than that identified by section 20?

⁶⁹ *Donovan* [1934] 2 K.B. 498

⁷⁰ Simester and Sullivan *Criminal Law Theory and Doctrine* (2nd ed. 2004) p388

⁷¹ Above, Ch. 7.4.2

A better alternative would be to do away with the current English and Welsh offences completely. The approach in some other jurisdictions is to organise non-fatal offences against the person depending on the level of *mens rea* displayed by the defendant rather than the degree of harm caused. We ought to be prepared to follow the example of these jurisdictions, as only then would non-fatal offences be properly equipped to impose tests of *mens rea* formulated in terms of the defendant's conative state of mind. It is suggested that offences against the person ought to be organised into two categories: intentional and unintentional offences.

8.2.2.3: *Intentional offences*

There could be two offences designed to punish intentional attacks: assault and aggravated assault, which would resemble assaults in the jurisdictions of Scotland, Canada and the American State of Louisiana.⁷² The offences of assault and battery in these jurisdictions all share a similar *actus reus* to their English and Welsh counterparts: for example, an assault in Scotland is defined as an attack (application of force) by either (i) a direct physical onslaught with body or weapon, (ii) use of indirect means or (iii) physically threatening gestures which cause a reasonable anticipation of harm.⁷³ Although no harm need actually be caused in order for assault or battery to be charged, the sentencing available upon conviction in Scotland is broad enough to be capable of encompassing those cases where harm has been caused. As an alternative to a very broad single offence, Canada⁷⁴ and Louisiana⁷⁵ both take account of the harm caused by charging an aggravated offence where necessary. In addition to the fact that they can potentially encompass a wider range of harm than in the criminal law of England and Wales, assault and battery are crimes of intention according to all three of the identified jurisdictions. In Scotland, it had occasionally been suggested that recklessness might suffice for this offence,⁷⁶ but this view was expressly rejected in *HM Advocate v Harris*.⁷⁷

⁷² These jurisdictions have been highlighted as they all are all unwilling to prioritise subjective foresight in offences against the person and organise the offences in the way stated.

⁷³ *Macpherson v Beath* [1975] 12 S.A.S.R 174; McCall-Smith & Sheldon, *Scots Criminal Law* (1992).

⁷⁴ Criminal Code of Canada C-46 ss267 (assault causing bodily harm or with a weapon) and 268 (aggravated assault i.e. wounded or maimed the victim.)

⁷⁵ Louisiana Revised Statutes of 1950 RS 14:34.1 (second degree battery)

⁷⁶ *Connor v Jessop* [1988] S.C.C.R. 624

⁷⁷ [1993] S.C.C.R. 559

Similarly, assaults in Canada require either the intentional application of force or a threat or an attempt to apply such force.⁷⁸ Louisiana law defines a battery as the intentional application of force⁷⁹ and assault as the intentional placing of another in reasonable apprehension of receiving a battery.⁸⁰

However, the definition of assault used in Canada and Louisiana is not ideal. The defendant who intended to apply nothing more than minimal force may be deemed sufficiently criminally culpable for any serious degree of injury that he happened to cause, even if that greater injury was unforeseeable. This constructive liability is especially obvious when an aggravated offence is charged.⁸¹ It is interesting to note that Scotland sets itself apart from these other jurisdictions in this respect, as a Scottish assault requires an ‘evil intent’ to injure and do bodily harm,⁸² and not just the intention to apply or cause the apprehension of unlawful force. Although this means that the *mens rea* at least corresponds to *actus reus* if the defendant caused really serious harm, it may be that assaults in Scotland are defined too narrowly; what of the defendant who intends to apply unlawful force?

Hence the proposed solution is to split the category of intentional attacks into two offences, taking account of both of these differing approaches. The first offence could be ‘simple’ assault defined in the same way as in Canada and Louisiana; the intentional application of force or intentionally causing the victim to apprehend immediate and unlawful violence. The sentencing for this offence could be similar in scope to that of section 20 Offences Against the Person Act 1861 under the current law, as it would have to penalise conduct ranging from intentional attacks that cause no harm to those that cause serious harm. A second offence, resembling the Scottish definition of assault, would be called ‘aggravated’ assault. Thus, the most serious penalties imposed for offences against the person would be reserved for those instances where the defendant intended to cause serious harm. This aggravated offence would cover the same range of

⁷⁸ Criminal Code of Canada C-46 s265

⁷⁹ Louisiana Revised Statutes of 1950 R.S. 14:33 where battery is separated into degrees (aggravated, second degree and simple batteries) depending on the manner in which it was caused (aggravated) or whether or not serious harm was intentionally inflicted (second degree.)

⁸⁰ Louisiana Revised Statutes of 1950 R.S. 14:36

⁸¹ i.e. The assault or battery becomes aggravated merely because of the extra harm caused.

⁸² *Smart v HM Advocate* [1975] S.L.T 65

injuries as simple assault,⁸³ but a higher sentence would be available due to the intent to cause serious harm rather than a mere intent to apply force. Aggravated assault would therefore closely resemble the existing section 18 offence. However, one notable difference would be that the *Woollin* test⁸⁴ could be applied to aggravated assaults.⁸⁵ The Court of Appeal in *Belfon*⁸⁶ held that the *Hyam*⁸⁷ direction assisted the finding of malice aforethought and thus had no application in section 18. As noted above⁸⁸ this is likely due to the fact that *Hyam* falls too low on the subjective hierarchy to be reflective of intention. In terms of the defendant's conative state of mind, we have seen that the *Woollin* test identifies an attitude the same or very similar to that of an individual who directly intended the outcome⁸⁹ and so its application can be justified in the context of non-fatal offences against the person.

8.2.2.4: An unintentional offence

Whereas assault and aggravated assault would require evidence of intention, the proposed test of blameworthy disregard of the risks would apply to offences where the victim's injury was not caused by an intentional attack upon the victim. Indeed, the above jurisdictions do not restrict criminal liability for non-fatal offences against the person to intentional attacks. They all retain an alternative offence of 'causing injury',⁹⁰ where the defendant has caused harm by some other means. There can be little doubt that this is how the offence operates in Scottish law; Lord Justice-Clerk Ross held in *HM Advocate v Harris* that there was strong authority showing that reckless conduct causing an injury could be considered to be a crime in Scotland.⁹¹ Similarly, according to section 221 of the Criminal Code of Canada, a defendant is liable for an offence where, by criminal

⁸³ I.e. anything from unlawful application of force up to really serious harm.

⁸⁴ Above, fn.17

⁸⁵ As well as simple assaults

⁸⁶ [1976] 2 Q.B. 396

⁸⁷ [1975] A.C. 55

⁸⁸ Ch. 1.3

⁸⁹ Ch. 8.1.1.4

⁹⁰ This is the Scottish label for this offence - *Quinn v Cunningham* above, fn.4 – and it is the label I will propose for the corresponding offence in English Law.

⁹¹ *HM Advocate v Harris* above, fn.77. Recklessness in this context follows the definition in *Quinn v Cunningham* above, fn.4

negligence, he causes bodily harm to another person.⁹² The State of Louisiana also follows this model by defining a separate offence of ‘negligent injury.’⁹³ Unlike assault and battery as crimes of specific intent, these offences of causing injury cannot be charged unless the defendant actually caused injury.⁹⁴ That said, the offences do not appear to require particularly serious injury. In Scotland, it has been held that the offence can be charged where the harm caused was only very slight.⁹⁵ Likewise, in the Canadian offence of causing bodily harm, that harm is defined in a very similar way to actual bodily harm under section 47 Offences Against the Person Act, so again it does not appear to require any particularly serious injury to have been caused.⁹⁶

Therefore, the *actus reus* for a new offence of ‘causing bodily harm’ in English and Welsh law, like the corresponding offences in Canada, Scotland and Louisiana, would share the existing definition of Actual Bodily Harm.⁹⁷ However, the required *mens rea* would be the defendant’s blameworthy disregard of an obvious risk of at least some degree of injury. If the obvious risk was of only very minor harm, such as the unlawful application of force, then we cannot say that the risk was so serious that the defendant’s indifference to that risk was criminally culpable. Thus, even if drunk or enraged, the defendant would be protected if the victim was unexpectedly injured by his actions.⁹⁸ So what degree of injury must have been risked? It was noted above⁹⁹ that it may also be difficult to say that a risk of minor injury, such as the current degree of harm required in section 47, is so serious that the defendant ought to have taken all care to avoid it. However, this does not mean that the offence of causing injury ought to be restricted to cases where it was obvious that really serious injury would be caused. Attempts to draw a

⁹² Criminal Code of Canada C-46 s221

⁹³ Louisiana Revised Statutes of 1950 R.S. 14:39. The offence covers only criminal negligence, despite the title, and applies to any degree of injury without any requirement based on severity.

⁹⁴ Although Scotland differs from other jurisdictions in this respect as Scottish law also imposes criminal liability on those who cause a danger to others. This will be discussed in more detail below.

⁹⁵ Lord Prosser in *HM Advocate v Harris* above, fn.77 at 577

⁹⁶ “Bodily harm” is defined in s2 of the Criminal Code of Canada C-46 as harm that interferes with the health or comfort of the victim and is more than merely transient or trifling in nature. Compare this to the definition of Actual Bodily Harm in *Donovan* above, fn.69.

⁹⁷ S47 as interpreted in *Donovan ibid*

⁹⁸ i.e. not even a reasonable person would have foreseen harm being caused.

⁹⁹ Ch. 7.4.2

distinction between different degrees of injury have encountered problems,¹⁰⁰ and so a concrete distinction would be unwise. Therefore, so long as some injury was risked, it would be simply up to the jury or magistrates to decide whether the risk in the particular case was serious enough that the defendant's failure to care about it can be considered to display a sufficiently blameworthy disregard of that risk.

8.2.3: Applying the new test: the influence of dangerous activities

8.2.3.1: Do we need endangerment offences?

The suggested new structure of non-fatal offences against the person shows that the defendant can be held criminally responsible for his blameworthy disregard of the welfare of others only where he has actually caused some degree of physical injury. Although this is comparable to the structure of offences against the person in Canada and Louisiana, Scottish law differs in that an additional offence is capable of punishing an individual who, whilst acting without thought to the consequences, endangered the public. Thus, an individual can be penalised for risking harm that he did not in fact cause. Indeed, this offence of 'endangering the lieges' existed as an offence in Scottish law even before recklessly causing injury could be considered its own separate offence.¹⁰¹ MacDonald wrote in his practice treatise that:

"Firing into a house to intimidate the residents, or in wanton recklessness, are offences, although no one was in the room into which the shot was fired. If anyone who happened to be in the room, unknown to the accused, should receive injuries, that would be an aggravation."¹⁰²

In the current Scottish law, it is not enough that the defendant merely acted without regard to the consequences, but rather it is required that he actually created a risk to the public at large.¹⁰³ Although these judgments relate to innately dangerous activities such

¹⁰⁰ As can be evidenced by the overlapping requirements in s20 and s47.

¹⁰¹ *HM Advocate v Harris* above, fn.77 where the existence of the offence of causing injury was considered in the context of the existence of causing a danger to others.

¹⁰² Macdonald above, fn.2

¹⁰³ In cases where no harm is caused. *HM Advocate v Harris* above, fn.77 per Lord Prosser at 573 and 577-8

as driving or discharging firearms, there is no authority to suggest it cannot equally be applied to other situations in which the defendant's reckless actions caused a danger to the public.

There may be a need to impose endangerment offences in the criminal law of England and Wales as well. However, it is doubtful whether the broad approach taken by Scotland is necessary, even though the new test of *mens rea* resembles Scottish recklessness. It may simply be impractical to punish every individual who, whilst indifferent to the welfare of others, endangered those others but in the event caused them no harm. In many cases it may also be hard to even prove, if no harm was caused, that there was such an obvious risk of harm arising. Although it is not established that there is a need for a general endangerment offence, there is nonetheless a need to punish an individual for the danger he created in the context of a dangerous activity that ought to have been performed carefully. For example: if the defendant created an obvious risk of harm by discharging a firearm towards public property or whilst jumping a red light in his car, then we may feel, even if he did not actually cause any harm, there is more of a need to penalise his conduct. These are activities that carry a serious risk of injury if performed badly, and so it may be the innate dangerousness of the situation the defendant was in that necessitates an endangerment offence. This idea, as was noted in chapter 2.2.4, invokes the theory of deterrence. The individual was in a situation in which he ought to have been alert, upon pain of criminal conviction, to the need to take more care. We need to ensure that individuals take more care when taking part in dangerous activities such as driving, and the existence of an endangerment offence in driving will persuade drivers to do so.

8.2.3.2: *Dangerous driving and disregard for others*

The fact that the defendant was involved in an innately dangerous activity has a greater impact than merely allowing him to be punished even where he did not in fact cause any harm. Indeed, it can also affect the way in which we assess that individual's moral culpability. It is submitted that we do not need the new test of *mens rea* in relation to offences that regulate dangerous activities such as driving offences, but rather it would

be far more practical to assess an individual's culpability merely according to the degree of negligence his driving displayed.

It was observed in chapter 2.4.1 that driving offences can be justified within the current law because the defendant's negligence behind the wheel can be considered morally culpable. However, this is not to say that the objective hierarchy suddenly becomes an important indicator of moral culpability in driving offences. Blame is more legitimately placed upon an individual who fails to meet the standard of the ordinary and prudent driver whilst behind the wheel because that failure will have inevitably demonstrated selfish disregard for others. We normally cannot infer the defendant's attitude from his negligence accurately; the objective standard makes no distinction between the defendant who did not care and the defendant who could not care. However, as was noted in chapter 2.4.1, where the defendant was engaged in a dangerous activity such as driving he was performing an activity *in which he was expected to take a certain amount of care*. If a motorist drove without lights at night, Fletcher suggests that we would blame him for doing so. We would expect him to have made sure that his lights were on, so if he did not realise his lights were off then his failure to find out would be a basis in itself for blaming him.¹⁰⁴ Accordingly, his failure to find out whether or not his lights were on allows a certain attitude towards the consequences to be presumed; he knew of the risks created if he did not display the proper degree of care and so, by driving without lights, he demonstrated a blameworthy attitude towards those risks.

Clearly a blameworthy attitude can be presumed from dangerous driving, but what of lesser mistakes behind the wheel? The current definition of careless driving imports mere negligence; the defendant is guilty where he simply falls below the standard of the prudent driver. Although in most contexts mere negligence is no help at all when trying to infer the defendant's wrongful attitudes, it can nonetheless show that he was sufficiently blameworthy for a criminal conviction if the negligence occurred while he was performing a dangerous activity. Again, the defendant was in a situation in which he was expected to have taken more care and thus *any* degree of negligence in that situation can be said to have displayed a lack of the proper kind and degree of concern for the welfare of others. Although the merely negligent defendant's attitude may not be as

¹⁰⁴ Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis* (1971) 119 U. Pa. L. Rev. 401

morally culpable as a grossly negligent one, he still attracts some degree of blame and so can still attract criminal penalties, albeit lower ones to reflect his lower culpability.

Therefore, where the defendant was performing a dangerous activity such as driving, a simple objective assessment based on degrees of negligence will invariably be sufficient to demonstrate that he held a blameworthy attitude towards others. Even if his inadvertence was due to a reason such as fatigue or a mere lapse in attention, the defendant is presumed to have known how dangerous such factors can be whilst driving and so should have paid more attention or taken a break. Of course, a strict objective assessment of culpability in driving offences would mean that any individual who lacked the capacity to measure up to the normal standard would have no protection from conviction in such circumstances. However, in the context of innately dangerous activities this does not cause any problems, again because we expect a very clearly defined minimum standard of care from people who embark on such activities. In the context of driving, individuals need to have attained a certain level of competence and care before they will be allowed to drive and so they cannot make any excuse on the basis of incapacities that prevented them from attaining that standard.¹⁰⁵ Instead, they should not have undertaken that activity in the first place. This is not a novel concept, but one that can be tracked back to Roman Law. Honoré directs attention to an argument by Gaius¹⁰⁶ that:

“no one should undertake a task when he knows or should know that his infirmity will make its execution dangerous to others.”

Of course learner drivers, by definition, will have to drive before they are fully capable of safely doing so. On the above analysis, learners would nonetheless be expected to attain the same standard as more experienced drivers. This is the approach of the current law. In *Nettleship v Weston*, Lord Denning stated:

¹⁰⁵ Simester and Sullivan above, fn.70

¹⁰⁶ *Digest* 9.2.8.1 (Gaius 7 ed. prov) cited in Honoré, ‘*Responsibility and luck: the moral basis of strict liability*’ [1988] 104 L.Q.R. 530 at 536

“The criminal law insists that every person driving a car must attain an objective standard measured by the standard of a skilled, experienced and careful driver.”¹⁰⁷

Because the dangerous or careless driver arguably may be blamed for similar attitudes to those covered by the new test of *mens rea*, there will inevitably be some overlap between fatal driving offences and manslaughter. This may be a problem; as with the current law, the difference in sentencing between causing death by dangerous driving and manslaughter suggests that the latter is the more serious offence, despite the fact that, in both offences, the defendant is blamed for essentially the same reasons. This raises several questions. Should we even have separate offences for vehicular killings, or can we just say that manslaughter can be satisfied by simple tests of negligence where the defendant was engaged in a dangerous activity? Alternatively, does this suggest that tests of negligence in fact demonstrate a less blameworthy attitude towards the risks than the attitude punished by manslaughter? The answer in relation to the new approach to moral culpability is that the test of *mens rea* used in manslaughter covers a greater range of culpable attitudes than dangerous and careless driving; i.e. anything above the minimum standard for criminal culpability right up to the most callous examples of indifference falling just short of intention in their degree of blameworthiness. The blameworthy attitudes displayed by dangerous and careless drivers both sit somewhere within this range, hence the ‘overlap,’ but they are not the very worst possible attitudes that manslaughter may condemn. Thus, the most callously indifferent killers will be more morally culpable than grossly negligent drivers, and so it follows that it would be appropriate to charge someone who displayed such callousness behind the wheel with manslaughter rather than a driving offence. This may explain why dangerous and careless drivers ought to face lesser penalties than the maximum available for manslaughter, but it still does not suggest why a separate offence ought to exist, as the trial judge’s discretion in sentencing could reflect this difference. However, the existence of a separate offence would avoid the often observed trouble that juries may be reluctant to find drivers guilty of so serious an offence as manslaughter.¹⁰⁸ Furthermore non-fatal driving offences

¹⁰⁷ *Nettleship v Weston* [1971] 2 Q.B. 691 at 698

¹⁰⁸ Above, Ch. 2.1.2

cannot be integrated with other offences against the person, as they are uniquely capable of punishing the defendant where he merely created a danger and regardless of whether or not any harm was actually caused. Thus, keeping vehicular homicide and manslaughter distinct would clearly set out endangerment offences as a unique category of offence. Causing death by dangerous or careless driving would thus be considered aggravated forms of non-fatal driving offences rather than lesser forms of manslaughter.

8.2.3.3: *Defining other 'dangerous activities'*

So far, the scope of dangerous activities has been considered regarding driving offences, but these should not necessarily be the only endangerment offences that exist. There are other dangerous activities, such as the handling of firearms, in which it is possible, and therefore much more practical, to infer a blameworthy attitude using tests of negligence rather than the new test. However, such an approach would work only if the definition of a 'dangerous activity' was suitably restrictive; simple tests of negligence obviously do not accurately represent the defendant's moral culpability if applied in a wider range of offences. For a start, any definition of dangerous activities would have to ensure that negligence can be punished only if it occurs during a specified activity, such as driving or handling firearms. Only then would the law be able to alert the defendant to the need to take extra care, thus allowing us to consider any degree of negligence to be evidence of a blameworthy attitude.¹⁰⁹ However, we would still need some way of identifying whether or not that given activity was dangerous of its nature. When defining what constitutes a dangerous activity, other jurisdictions that have wrestled with this problem have inevitably come up with solutions that may be interpreted too broadly. Thus, it can be shown that an exhaustive list of activities may be a more appropriate way of limiting this particular category of offences.

American law presents us with two alternative methods of identifying a dangerous activity. The American State of Alaska applies what can be regarded a basic, although

¹⁰⁹ c.f. the offence of doing or omitting anything to endanger passengers by railway (s34 Offences Against the Person Act 1861) which currently does not specify any particular activity that the defendant must have been engaged in. It thus covers too broad a range of activities for us to say for sure that the negligent defendant held a blameworthy attitude towards the victim. A test based on the defendant's attitude would therefore be a more appropriate *mens rea* for this offence.

somewhat broad, test of what is dangerous. In *Beran v State*,¹¹⁰ it was held that negligence was all that needed to be proved where the defendant's activity was 'dangerous to the public.' A more specific test that is adopted by some other American jurisdictions is a limitation of what can be considered a dangerous activity to those situations in which the defendant was handling an 'inherently dangerous instrument.'¹¹¹ The latter is the better of these two approaches. It may be difficult to tell whether an activity was 'dangerous' retrospectively if harm was actually caused by the defendant's actions. If all that needs be defined is, not a 'dangerous activity', but a 'dangerous instrument' then the law in theory would be more restrictive; the use of negligence as sufficient *mens rea* would be limited only to those cases where an objective enquiry is particularly necessary. However, this approach in turn suffers the difficulty of actually defining a 'dangerous instrument'. Garfield notes that offences designed to punish negligence during dangerous activities used to be based solely on the negligent handling of weapons,¹¹² but were later expanded to include other objects that, whilst not weapons, could become dangerous if handled carelessly. For example, subsequent to *Gilliam*, which involved the use of firearms, the definition of dangerous instruments in South Carolina was extended to include automobiles.¹¹³ Subsequent definitions of dangerous instruments have gone beyond weapons and cars. For example, it has been held in New York that a narcotic such as heroin can be considered a 'dangerous instrument'¹¹⁴; a perfectly rational decision swayed by the need to offset the high incident of drug-related deaths in the State. However, other examples are less clear-cut than this: there are cases that have accepted chairs¹¹⁵ and torches¹¹⁶ as 'dangerous instruments.' It must be noted that these cases did not involve criminal liability for negligence. For example, in *United States v Reese*, the point in question was whether an attack with a torch could be

¹¹⁰ 705 P.2d 1280, 1284 (Alaska Ct. App. 1985)

¹¹¹ For example, this is the approach in South Carolina. *State v Gilliam* 45 SE 6 – 1903. The case involved the careless use of a firearm.

¹¹² Garfield 'A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature' (1997-1998) Vol. 65 Tennessee Law Review 875 at 895 She cites as an example of this *Commonwealth v. Pierce* (1884)138 Mass.165, 178-80

¹¹³ *State v. Barnett* 63 SE 2d 57 (SC 1951)

¹¹⁴ *People v Cruciani* 334 N.Y.S.2d 515, 521-22 (Suffolk County Ct 1972) although consider the requirement of criminal negligence.

¹¹⁵ *United States v Williams* 954 F.2d 204, 206 (4th Cir. 1992)

¹¹⁶ *United States v Reese* 2 F.3d 870, 876-77, 890, 894 (9th Cir. 1993)

considered to be excessive force. However, these cases still serve as a useful example of how broadly a 'dangerous instrument' might be defined. Almost any object can be considered 'dangerous' if handled dangerously, especially if serious harm was caused, and so hindsight may dictate the definition. This would risk leading to degrees of negligence being deemed sufficient *mens rea* in relation to too wide a range of activities. We therefore still require a more restrictive way of identifying dangerous activities.

Garfield's suggested alternative is to focus not upon dangerous instruments, but rather to impose three prerequisites upon the creation of any endangerment offence. Firstly, in order to necessitate a deterrent effect, there ought to be a significant portion of the population that engages in the specified activity;¹¹⁷ secondly, that the conduct could cause harm to a significant portion of the population; thirdly, that a reasonable person would know that such conduct is likely to cause harm, ensuring that it is the defendant's failure to use due care that is punished.¹¹⁸ Using driving as an example, the South Carolina Court in *Barnett*¹¹⁹ recognised the increasing incidence of injuries caused by driving, thereby meeting the criteria that Garfield provides.¹²⁰ This is a common activity that may often cause harm to many people if commonly performed badly and most people understand the risks involved. Thus, punishing negligence will alert drivers to the need to take care and so it is fair to punish them where they fail to do so. However, Garfield's proposals are underlined by a desire to ensure that the negligent use of safety devices can be punished. She expresses dismay that the death of a young child caused by the negligent maintenance of a smoke detector was not criminally punishable under existing American law.¹²¹ She thus tries to find a way in which the maintenance of a safety device such as smoke alarms can be categorised as a dangerous activity in the same way as driving. Her justification for punishment in such situations is that society increasingly relies on safety devices such as window guards, safety seats for children and helmets. However, it seems unnecessary to define endangerment offences so widely. There is no particular need to punish failures to use essential safety devices any more

¹¹⁷ Presumably in order to ensure that the restrictions placed upon the activities are widely-known.

¹¹⁸ Garfield above, fn.112 at 917

¹¹⁹ *State v. Barnett* above, fn.113

¹²⁰ See Garfield's appraisal of this case above, fn.112 at 918-9

¹²¹ Hanna, 'Dismantling of Smoke Alarm Not Criminal, Jury Finds Aurora Man Not Guilty in Sister's Death' CHI. TRIB., June 19, (1997) at p1.

harshly than the law currently does; Garfield acknowledges that strict liability offences already exist in this context¹²² and so it is questionable whether the negligent use of such devices is really so heinous that a strict liability offence, with its minor penalties, is wholly insufficient. Is there really a need to punish the offender for any additional harm caused where he was merely negligent? An individual who simply forgets to check the batteries of a smoke detector may certainly be liable for civil penalties (presuming it was his duty to maintain the alarm), but can we say that mere negligence will in this context invariably display a blameworthy attitude towards others in the same way as negligence behind the wheel? Of course, we may sometimes consider the negligent treatment of fire alarms to show indifference: for example, if an individual actively disables the alarm in order to smoke and does not turn it back on. However, the new test based on conative states of mind would be capable of reflecting this degree of culpability anyway. Conversely, if a blameworthy attitude cannot always be reliably inferred from negligence in this context, then a test based on negligence would be unsuitable.

The definition of an innately dangerous activity must therefore be as restrictive as possible to ensure the appropriate standard is being applied in all other offences. Accordingly, it would be better to avoid any general definition of dangerous activities altogether. Instead, the law would be best restricted by creating unique offences, each designed to punish a particular dangerous activity such as driving or the operation of firearms, as these represent a specific context in which negligence is capable of demonstrating a blameworthy attitude. If more were considered necessary, for example; the handling of illicit substances, then an extra offence would need to be created. Such a restriction would ensure that the defendant is liable for his negligence only in very exceptional circumstances.

8.2.4: Applying the new test: sexual offences

As noted before, the *mens rea* of rape and sexual assault is satisfied currently by mere negligence.¹²³ We have now seen that, according to a conative approach to moral culpability, we can justify liability for negligence in such a serious offence only if it is

¹²² *People v Nemadi* 531 N.Y.S.2d 693 (NY Crim Ct)(1988) re. window guards; Alabama Code § 32-5A-283(2) re. safety seats.

¹²³ Above, Ch. 2.1.4

classified as an endangerment offence; where the defendant was engaged in a dangerous activity and thus was expected to take more care. The question is: is sexual intercourse such an inherently dangerous activity (in terms of the risk that the partner did not consent) that any defendant is expected to be aware of the need to take extra care? It is submitted that it is not, especially if we are to impose an exhaustive selection of endangerment offences rather than seek some sort of definition of what a dangerous activity is. It must be remembered that the imposition of an objective standard, such as mere negligence, will punish any failure to meet the reasonable standard of care. Thus the indifferent individual is, according to an objective standard, as morally culpable as one who lacked the capacity to attain the reasonable standard. In the context of activities such as driving, this causes no problem as the incapable individual should not be driving in the first place. However, we can hardly say the same of sexual intercourse. Accordingly, there would be too much risk of injustice if sexual offences were deemed to be endangerment offences.

This necessitates an abandonment of the terms of the Sexual Offences Act 2003, and the introduction of a test of *mens rea* that more accurately assess the defendant's moral blameworthiness. The Sexual Offences Act 2003 has ended up punishing mere negligence with a test of *mens rea* that is solely concerned with the reasonableness of the defendant's belief in consent. A test based on belief is not one that is readily translated into a test based on the defendant's blameworthy disregard of the risks; we are punishing the defendant for his unreasonable belief in consent which, by itself, does not necessarily indicate his reasons for acting. Indeed, there is a chance that a genuine belief that the victim consented, even if unreasonable, might suggest that he was not indifferent to her welfare. Conversely, to require an intention to have sexual intercourse without the victim's consent would take account of conative states of mind, obviously, as would a requirement for blameworthy disregard of whether or not the victim consented. Indeed there has already been a definition of recklessness applied to rape that focussed on the defendant's indifference rather than his subjective foresight. In the case of *Thomas*,¹²⁴ Lord Lane had described a defendant as reckless where:

¹²⁴ [1983] 77 Cr App R 63 at 66

“he was indifferent and gave no thought to the possibility that the woman might not be consenting, in circumstances where, if any thought had been given to the matter, it would have been obvious that there was a risk that she was not.”¹²⁵

Although it was not implemented within the Sexual Offences Act, the Home Office also expressed a preference for a concept of recklessness that incorporated the lack of any thought as to consent within the required *mens rea*: in other words, that the defendant ‘could not care less.’¹²⁶ These methods are not dissimilar from asking, as the new test would, whether the defendant’s failure to consider the victim’s non-consent displayed a blameworthy disregard of her wishes. However, the new test again offers an improvement over older tests of indifference such as *Thomas* because of its bipartite structure;¹²⁷ the jury can infer indifference (or regard the defendant’s voluntary intoxication or rage to be blameworthy,) in the absence of any other evidence, because the defendant acted in the face of an obvious risk that the complainant did not consent.¹²⁸ The *mens rea* for sexual assaults can be formulated in a similar way; the defendant is morally culpable if he displayed a blameworthy disregard of the risk that the complainant was not consenting. However, it was seen above¹²⁹ that a sexual motive is also important to culpability in this latter offence.

That said it could be the case that, in practice, it is very difficult to prove that there were such obvious signs, sufficient to infer indifference, that the victim was not consenting. This is a particular problem for an offence where, frequently, the evidence consists solely of the defendant’s word against the victim’s. Nevertheless, a test of blameworthy disregard of the risks would provide a more principled basis for determining criminal culpability than a test based on mere negligence such as that used in the Sexual Offences Act 2003. The jury would have to decide on the evidence available

¹²⁵ This restated a definition given in the earlier case of *Pigg* (1982) 74 Cr. App. R. 352

¹²⁶ Home Office, ‘*Setting the Boundaries: Reforming the Law on Sexual Offences*’ (2000) paras 2.12.4-5

¹²⁷ Consider the proposed bipartite structure in chapter 7 and the observation that *Pigg* was short-lived Ch. 3.2.1.

¹²⁸ The harm risked will always be serious; the non-consensual violation of the victim’s sexual autonomy. Above, Ch. 2.4.4. Although the ‘harm’ caused in sexual assaults may not be as severe as in rape, it is still serious enough that the defendant’s failure to consider the obvious risk of non-consent can evidence a blameworthy attitude towards that non-consent.

¹²⁹ Ch 8.1.2.1

to them whether or not it would have been obvious that the victim was not consenting. If yes, they would then decide whether the fact that the defendant did not desist displayed a blameworthy disregard of the victim's consent.

Although the defendant's belief in consent would no longer be the central issue relating to *mens rea* in these offences, this does not mean that the defendant's claim, that he believed that the victim consented, is irrelevant. There may be occasions where the defendant's belief that the complainant consented might be presented as evidence that he was not indifferent as to whether or not she consented. However, if we are seeking a consistent approach to assessing *mens rea*, then it should also be shown that the defendant's mistaken beliefs can be assessed consistently, and this is something that ought to be addressed in relation to any mistaken belief rather than merely those relevant to sexual offences. Hence, this is an issue to be discussed in the next chapter.

Chapter 9: Conative states of mind and mistaken belief

9.1: Recap of the existing approach

In this chapter I will attempt to show that, as well as allowing *mens rea* to be assessed consistently in a number of offences, my suggested new approach to moral culpability would also allow for the defendant's mistaken beliefs to be assessed in a consistent and logical manner. The defendant's belief in consent is not currently assessed in a consistent manner. For example, the Sexual Offences Act 2003 rejected the longstanding *Morgan*¹ decision in favour of a requirement that only a reasonable belief in consent to sexual intercourse will avail the defendant.² In contrast, the common law still governs consent as to non-sexual harm, and a subjective standard is used. Thus, an individual who genuinely but unreasonably believed that the complainant consented to sexual intercourse will be guilty of the very serious offence of rape, whereas an individual will be guilty of no offence whatsoever if he caused physical harm in the genuine but unreasonable belief that the complainant consented to rough horseplay,³ even if, so it seems, that belief was drunkenly formed.⁴

Inconsistency arises in the current law because, as was observed above, many of the defendant's beliefs are irrelevant to a cognitive formulation of *mens rea*.⁵ According to a subjectivist approach, the defendant's belief is relevant to *mens rea* only where it is inconsistent with any assertion that he foresaw the risk of harm being caused; where he believed his actions would cause no harm. For example, in the context of sexual offences, consider an individual (D)'s mistaken belief that his sexual partner (C) consents. If a subjective test of *mens rea* is applied, then D's belief that C consents shows that he lacks foresight of the risk that she does not consent. Conversely, most other beliefs can exist even where the defendant has formed subjective or objective *mens rea*. For example, F wrongly believes that E consents to physical harm. Unlike sexual offences, E's consent or lack of it does not form part of the offence itself; it is irrelevant whether F is aware of the risk that E does not consent to the physical harm, all that is required is that F intends to

¹ [1976] A.C. 182

² s1(1)(c)

³ *Jones* (1986) 83 Cr.App.R 375 at 378.

⁴ *Richardson* (1999) 1 Cr.App.R 392

⁵ Ch. 1.4.2 and Ch. 5.2.1

cause harm or foresees that harm might be caused. Thus, irrespective of his mistaken belief that E consents, F still intends to cause, or foresees the possibility of, harm. F's mistaken belief therefore has no bearing on *mens rea* formulated in subjectivist or objectivist terms – F, despite his *mens rea* escapes liability because he believed that his actions were lawful.

9.2: Why justification and excuse categories do not work

As a result, where a belief is not considered relevant to an individual's *mens rea*, both subjectivists and objectivists are forced to rely on the distinction between 'justifications' and 'excuses' in order to determine whether that mistaken belief should be assessed subjectively or objectively. These beliefs are thus relevant to confession and avoidance pleas: for example, a defendant who pleads a justification admits that he committed the act with *mens rea*, but claims that it was the right thing to do. A distinction between justification and excuse pleas can be useful. For example a justification means that the defendant's actions were lawful; an individual who acts in self defence has done no wrong. By contrast, a defendant who pleads an excuse is saying that his actions were wrongful but excusable. However, it will be seen that the distinction between justifications and excuses is in fact not always an easy one to make. As a result, these categories are unhelpful when trying to rationalise a differing treatment of the defendant's mistaken beliefs; although it may appear that justifications require a reasonable belief whereas a genuine belief will do for an excuse, we cannot always follow this template.

9.2.1: Justifications and reasonable beliefs

Justifications amount to an admission of the *prima facie* wrongdoing coupled with, in essence, a plea that the defendant was ultimately doing the right thing. Professor Gardner describes a justificatory plea as a rational explanation for wrongdoing:

“[I]t cites reasons that the agent had *for doing whatever she did*. It points to features of her situation that militated in favour of the action she took.”⁶

Accordingly, we do not impose sanctions on a police officer who applies force in order to apprehend a criminal; his actions are fully justified and therefore lawful.

Since a justification is an assessment of the lawfulness of the action, then it will inevitably compel a strict treatment of the defendant’s beliefs. The question of what is the correct and lawful action must be addressed to society as a whole and not the individual on trial. Therefore, as was noted above,⁷ the very strict view would be that the defendant can plead a justification only where the facts actually justified his actions, and therefore any belief he held, whether reasonable or not, is irrelevant. This would not be fair on an individual who held an entirely reasonable belief in facts that, if true, would have justified his actions. A more generous view might therefore be that the defendant’s actions may be justified where any reasonable person in those circumstances would also have believed that those facts existed, and therefore the defendant still can be broadly regarded as having done the right thing in the circumstances. Conversely, if the defendant had no reasonable grounds for having formed his belief, and thus no ordinary person would have done the same thing, this analysis suggests that the defendant cannot claim that his actions were justified. Therefore, logic dictates that a mistaken belief relevant to a justificatory plea can only be accepted where it was a reasonable one.

9.2.2: *Excuses and genuine beliefs*

Whereas justificatory pleas appear best suited to an objective assessment, the defendant’s genuine beliefs seem to be more relevant where he pleads an excuse. There are numerous excuses that may be raised in response to a criminal charge. Some of these amount to a complete denial of responsibility. For example, a plea of automatism is a denial that the defendant had any conscious control over his actions and thus was not responsible for them. Technically, the question of belief in relation to such denials of responsibility can be dealt with in the same way as any belief that would evidence a lack

⁶ Gardner, ‘*In Defence of Defences*’ at p86 published in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007)

⁷ Ch. 1.4.2

of *mens rea*, although it is difficult to imagine how a belief could ever be raised in conjunction with a plea in automatism or insanity. Leaving aside these complete denials of responsibility, some excuses also amount to an admission of the *prima facie* wrongdoing in the same way as a justification. However, an excuse could be described as a plea that the defendant himself, given the circumstances he was in or any inherent weaknesses he had, could not have been expected to have reacted any differently. Gardner also describes an excuse as reasons the defendant had for thinking he could do as he did:

“[E]xcuses point to features of one’s situation that do not militate in favour of the action one took, but nonetheless do militate in favour of the beliefs or emotions or attitudes (etc.) on the strength of which one took that action.”⁸

In the current law this means that, although an individual may have intended the proscribed harm or foreseen the risk that it would occur as a result of his actions, he is excused if his reasons for having done as he did are sufficiently understandable. This assessment of the defendant is unaffected by any genuine mistake about the factual circumstances he might make, and so that belief logically should be accepted.

9.2.3: *Self-defence and genuine beliefs*

There can be no doubt that a successful plea of self-defence⁹ acts as a justification; the paradigm of self defence examples would be the defendant who killed or injured another whilst staving off a lethal attack, and his claim would clearly be that his actions were lawful. The defendant’s reason for acting was to protect himself or another from unlawful harm, and the threat upon his or another’s safety created the need to subject the attacker to a degree of force. Indeed, few would argue that the idea of justified force in defence of one’s personal safety is an outdated concept; Reed notes that the defence

⁸ Gardner, ‘*In Defence of Defences*’ above, fn.6 at p86

⁹ The term ‘Self-defence’ is also used to cover the defence of preventing a crime. Although the discussion below focuses on common law following the Criminal Law Act 1967, the treatment of the defendant’s mistaken belief in the need for defensive force and the question of what degree of force is reasonable is now covered by 76 Criminal Justice and Immigration Act 2008. However, s76 codified the existing law, and so nothing has changed.

operates as a justification regardless of what the defendant was acting in defence of.¹⁰ It is therefore clear that any mistake the defendant made regarding the nature of the threat or the degree of force needed to repel that threat, if the above logic is followed, ought to be judged objectively. Despite this, subjectivists often argue in favour of a subjective assessment of mistaken beliefs on the basis that to punish the defendant, where he held an unreasonable but genuine belief in the need for force, amounts to punishing him for his mere negligence.¹¹ Because he was merely negligent, subjectivists assert that the defendant cannot be considered morally culpable for the harm he caused. However, this argument alone is not a persuasive reason for accepting a genuine belief as it takes no account of the fact that the defendant, because he will almost inevitably have intended some degree of harm to the imagined attacker, cannot be said to have been merely negligent as to the harm caused.

Nonetheless, whether or not the subjectivist opinion, that an unreasonable belief in the need for defensive force is tantamount to mere negligence, is correct, the main issue is that we may feel sympathy with an individual who acted as he did having believed that he was under attack. If he genuinely believed he was in some sort of danger, then his actions appear completely understandable and not necessarily those that we would wish to punish. Such sympathy is not universal however, and the acceptance in the current law¹² of the defendant's genuine beliefs has been criticised. The strongest of these criticisms is that, by allowing evidence of the defendant's genuine but unreasonable belief to exculpate him, the law takes insufficient consideration of the victim's rights. Lord Simon commented in *Morgan*:

“It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused.”¹³

¹⁰ Reed, ‘*Self-Defence – Applying the Objective Approach to Reasonable Force*’ [1996] 60(1) J of Crim. L. 94 at 94

¹¹ Glanville Williams, ‘*Offences and Defences*’ [1982] 2(3) Legal Studies 233 at 241-2 and *Williams (Gladstone)* (1984) 78 Cr. App. R. 276 per The Lord Chief Justice at 281

¹² *Williams (Gladstone)* *ibid*

¹³ Above, fn.1 per Lord Simon at 221

There has been some academic scepticism also. Leverick gives as an example the case of a man, wrongly thought to be carrying a gun, who was shot dead by police.¹⁴ Leverick acknowledges that, according to *Williams*¹⁵ and *Beckford*,¹⁶ the officers were entitled to an acquittal if they genuinely believed the victim was carrying a gun, regardless of whether it was reasonable for them to have believed that this was the case. She thus notes that the main moral criticism that can be levelled against self-defence is that:

“it fails to respect the right to life of the innocent person who is unreasonably mistaken for an attacker.”¹⁷

However, such criticisms hold weight only if we consider self-defence, even where the defendant was mistaken as to the need for defensive force, to amount to a justification alone. Lord Simons would be correct to say that in such circumstances we would be unjustly ‘fobbing off’ the victim if he were to be told that the defendant’s actions were ‘justified.’ Conversely, the sympathy we might feel for the defendant who unreasonably believed that he was under attack suggests that we *excuse* his actions rather than *justify* them. We are not saying that the defendant’s actions were the right thing to do, but we can understand why he took those actions, and so we may sympathise with his reasons for acting. The same is true even where the defendant’s belief was a reasonable one. Although we can broadly say, as noted above, that the defendant can be considered to have ‘done the right thing’ because any other person would have believed that force was necessary, he was not, in fact, under attack and the victim was innocent. It would therefore be more accurate to say that the defendant’s actions were excusable even where his belief was a reasonable one to hold; he has done wrong, but the circumstances he was in render the wrongdoing understandable.

¹⁴ Leverick, ‘*Is English Self-Defence Compatible with Article 2 of the ECHR*’ [2002] Crim. L.R. 347 at 349. Leverick’s assertion is that this moral criticism of the *Williams* test is linked to its incompatibility with article 2 of the European Convention on Human Rights – that the victim killed for no good reason has been denied this protection if his killer cannot be convicted of a criminal offence.

¹⁵ Above, fn.11

¹⁶ [1988] A.C. 130

¹⁷ Leverick above, fn.14 at 349

The problem is: although we may feel that the defendant who mistakenly believed in the need for defensive force ought to be excused, our desire to allow the defendant's genuine but mistaken belief in the need for defensive force cannot be rationalised simply by saying that the plea becomes an excuse rather than a justification in such a case. There would be two problems with such a claim. Firstly, although allowing the defendant's genuine belief in the need for force would introduce an excusatory element to the defence, the defendant who acted in self-defence in response to a real threat was undoubtedly justified. If the attack existed, we can say that he has done the right thing and it would be wrong conceptually to regard his claim as an excuse. Therefore, either self-defence would transcend the distinction between justifications and excuses, thus questioning the validity of that distinction, or it would require that the plea was split in two: a justified response to a real threat and an excusable response to an imagined threat. Secondly, even if dividing the law on self-defence in this way was thought to be acceptable at all, the defendant who reacted to an imagined threat may still only use such force as was reasonable to repel that threat. His plea therefore cannot to be said to be purely an excuse all the while it retains the requirement that the degree of force used must be proportionate. According to the principles laid down in *Williams*, the defendant may use such force as is *justifiable* in the circumstances of the imagined threat, therefore adding a justificatory element to an 'excusatory' plea. We cannot resolve this quandary by also accepting the defendant's genuine but unreasonable beliefs in the degree of force necessary; indeed, even subjectivists have endorsed the use of an objective test here.¹⁸ Instead, those cases¹⁹ that allowed the defendant to rely on his genuine belief as to the amount of force to be used faced very heavy criticism; the lack of any external control on the defendant's response to a threat could result in, for example, a robust man claiming the defence where he reacted to the attack of a small boy by splitting his head with an axe.²⁰ Furthermore, if a defendant can simply use whatever force he believed to be reasonable, the law would be unable to prevent citizens taking the law into their own hands. The most well-known argument along these lines is the idea that the Englishman

¹⁸ Smith, '*Commentary on Williams (Gladstone)*' [1984] Crim. L.R. 163 at 164; '*Commentary on Owino*' [1995] Crim. L.R. 743 at 744 and Reed above, fn.10 at 96 & 99

¹⁹ *Scarlett* (1994) 84 Cr. App. R. 290

²⁰ Smith, '*Justification and Excuse in the Criminal Law*' (1989)

is entitled to kill in the defence of his castle, an argument that might lead to sympathy with defendants such as *Martin*²¹ who defend their homes by shooting intruders. This argument would also offer a complete defence to an individual who, in his kitchen, killed a boy who was stealing apples. Although a burglar was in the wrong, this does not mean that he automatically forfeited all of his rights.²² This is even more true of the victim who was perceived by the defendant to be an aggressor, but was in fact wholly innocent. Thus, the defendant should be entitled to use only a reasonable degree of force in order to repel the perceived threat, and so the justificatory element to the defendant's plea remains necessary even if the defence is regarded as an excuse.

9.2.4: *Duress and reasonable beliefs*

As with self-defence, the proper treatment of a mistaken belief in the existence of a threat in the context of duress also defies the distinction between justifications and excuses. Duress takes two forms, the older defence of duress by threats and the relatively new introduction of duress of circumstances, but it seems to be generally accepted that the same principles apply in both defences.²³ The defence initially appears to be concerned with excusing the defendant's actions; although the defendant under duress acted in order to protect himself, much like self-defence, the criminal offence he committed is against an innocent third party and not the individual or group that made the threat. Thus, the defence is often regarded as a 'concession to human weaknesses'²⁴ and not a claim that the defendant 'did the right thing.' Horder describes it thus: the excusatory element lies in:

“[the] uniqueness of the pressure to act, generated by a genuine threat of imminent coercion, which makes resistance to the pressure something we cannot morally expect of ordinary people.”²⁵

²¹ [2002] 2 W.L.R. 1

²² Clarkson and Keating, *Criminal Law Text and Materials* (5th ed. 2003) p311

²³ Smith, Commentary on *R v Hegarty* [1994] Crim. L.R. 353 at 355

²⁴ Law Commission No 83. 'Defences of General Application.' (1977) para 2.27

²⁵ Horder, 'Autonomy, Provocation and Duress' [1992] Crim. L.R. 706 at 707

If duress can be considered an excuse, then applying the above analysis of excuses would suggest that any relevant mistaken belief should be assessed subjectively. Therefore, where the defendant genuinely but unreasonably believed that he was being threatened he would be able to rely on that belief.

However, the law's current assessment of a duress plea does not fit with this analysis.²⁶ Whilst it has accepted that an individual under pressure may have mistaken the nature of another's behaviour as threatening death or serious harm²⁷ to himself, and so there is no requirement that there must have actually been an existing threat,²⁸ the current stance of the law appears to be that, in a duress plea, the defendant can rely on a mistaken belief only where it was a reasonable one. In *Graham*,²⁹ Lord Lane LJ stated *obiter* that the jury should be asked whether the defendant took part in the crime because of a well grounded fear. Despite the inconsistency with self defence created following the *Williams* judgment, Lane's *obiter* comments were affirmed as law in *Howe*.³⁰

Although the requirement that beliefs must be reasonable conflicts with the logical analysis of justifications and excuses, it can be argued that the current approach of the law is the correct one. This objective assessment of a mistaken belief is compelled, certainly in recent cases, by a recognition that, in the context of duress, allowing for the defendant's genuine belief in the existence of a threat may give rise to the risk of a

²⁶ Not in the least because of the pseudo-objectivist assessment of the defendant's 'steadfastness.' The *Graham* ((1982) 74 Cr. App. R. 235) test imposes a mitigated objective standard very similar to the *Smith* test from provocation (above, fn.62) when assessing whether a reasonable person would have reacted to the threats in the same way. These mitigated objective tests do not immediately relate to the defendant's state of mind, rather they appear to place some limitation on the defences by assessing the severity of the threats or provocation required before the defendant's plea will be accepted. Accordingly, a detailed examination of these issues (apart from the use of provocation as an illustration of mitigated objectivity in chapter 6) goes beyond the scope of this work. In the context of duress, I will therefore be referring solely to the treatment of the defendant's mistaken beliefs in the existence of a threat.

²⁷ As is required for duress; *Hudson and Taylor* [1971] 2 Q.B. 202, *DPP v Lynch* [1975] A.C. 653.

Anything less is merely a matter of mitigation: *Hasan* [2005] 2 A.C. 467 per Lord Bingham

²⁸ *Safi* [2004] 1 Cr. App. R. 14 Of course, any other approach would suggest that an individual threatened with an unloaded gun would be unable to plea duress: Smith and Hogan Criminal Law (11th ed. 2005 D. Ormerod)

²⁹ Above, fn.26. The facts of this case involved an existing threat

³⁰ [1987] 1 A.C. 417. This is not at all clear cut however, as some genuine beliefs have been accepted: *Martin (David Paul)* (2000) 2 Cr. App. R. 42. However, the subsequent position appears to be that the requirement for a reasonable belief is correct in order to ensure juries do not accept 'bogus' defences. *Safi* above, fn.28 and *Hasan* above, fn.27

‘terrorist’s charter.’ For example, it was feared in *Safi*³¹ that the defendants might simply be claiming that they were in fear for their lives in order to be able to raise the defence. The counsel for the Crown thus warned that, if there was no requirement that there must be an existing threat, the jury might too easily accept bogus defences from the defendant. It should not be the case that any asylum-seeker, who believed that his life was in danger, should be entitled to hijack an aircraft.³² Clearly then, an acceptance of the defendant’s genuine but unreasonable beliefs would be unsatisfactory.

Furthermore, just as the subjective assessment of belief in self-defence could not be rationalised by claiming that the plea had become an excuse, we cannot rationalise the objective assessment of belief in duress by saying that a successful plea justifies the defendant’s actions. Fletcher gives an example of a woman kidnapped and forced to rob a bank: if her actions were deemed to be justified, then we would be saying that her actions were the lawful and rightful thing to do and so other people in the bank would be entitled to assist her. Fletcher further points out that it may be difficult to label the kidnapers guilty as accessories to the robbery if we considered the defendant’s actions to be justified.³³ Duress therefore remains an excuse in which the defendant’s mistaken beliefs ought to be assessed objectively.

9.2.5: *Can we combine justifications and excuses in a single plea?*

Holder suggests that the above confusion between justifications and excuse, and the subsequent inconsistency in the assessment of the defendant’s mistaken beliefs, could be caused by the fact that defences such as self-defence and duress employ qualities of both justifications and excuses.³⁴ For example, Honoré argues that, in duress, the defendant is justified for having yielded to the threats, and so her actions were excusable.³⁵ A similar explanation could apply to self-defence; we may excuse a mistake and justify the defendant’s actions on the basis of that mistake. However, to rationalise these defences

³¹ Above, fn.28

³² Commentary; Reed, ‘*The Court of Appeal: The Objective and Subjective Tests for Duress*’ [2003] 67(5) J. of Crim.L. 379

³³ Fletcher, ‘*Rethinking Criminal Law*’ (1978)

³⁴ Holder above, fn.25 at 709

³⁵ Honoré, ‘*A Theory of Coercion*’ [1990] 10 O.J.L.S. 94 at 100 Honoré expresses this by reference to *Bourne* (1952) 36 Cr. App. R. 125; the defendant was not bound to resist her husband’s threats, but yet she was not entitled to commit the act of bestiality either.

on the basis that they employ qualities of both justifications and excuses is much like saying that a test based on indifference employs qualities of subjectivism and objectivism. It may be true that indifference is concerned with a 'conscious' state of mind whilst also punishing inadvertence, but ultimately the test is dealing with a state of mind that transcends both concepts. The same is true of defences such as duress and self-defence. If we attempt to apply labels such as justification or excuse, or even both, then we are only missing the point that each defence has its own unique way of exculpating the defendant.

9.3: How the defendant's mistaken belief relates to his attitude

If *mens rea* were to be formulated in conative terms, then any mistaken belief would be relevant to the defendant's state of mind. The focus would be on punishing the defendant for his blameworthy attitude towards the victim, and so we would be able to look at what the defendant's beliefs tell us about his attitude. This offers an improvement over the current approach of the law, as it allows the defendant's beliefs to be assessed in a consistent and logical manner. Of course, to say that the defendant's mistaken beliefs must be assessed in a consistent and logical manner is not the same as saying that those beliefs will be assessed in an identical manner. It will be proposed that some mistaken beliefs ought to exculpate the defendant where they were genuinely held, whilst others must be reasonable. For example, the case of *Williams* overturned 100 years of the common law rule that beliefs in self-defence must be reasonable; the standard is now subjective.³⁶ But where the defendant believed that he was entitled to use a greater degree of force than necessary to repel the threat, the belief may only be accepted where it was a reasonable one to hold.³⁷ Despite this apparent inconsistency, it will be contended that this is the correct and logical way to assess belief in the context of self-defence.³⁸ What is needed therefore is not a general rule such as, for example, a requirement that mistaken beliefs may only be relied upon where they are reasonable. Instead we must take an in

³⁶ Above, fn.11 The decision was largely upheld by the subsequent Privy Council decision in *Beckford* [1988] A.C. 130 above, fn.16

³⁷ *Owino* (1996) 2 Cr. App. R. 128

³⁸ Below, Ch. 9.3.5

depth look at how a mistaken belief can affect attitude in relation to each plea the defendant might make.

9.3.1: Does a genuine belief that no harm would be caused always negate indifference?

There is some opinion that, if the defendant formed a genuine belief that no harm would be caused as a result of his actions, he cannot be said to have been indifferent as to the outcome. As observed in chapter 3.2, a defendant such as Shimmen may pose a problem for a test based on punishing indifference because he has at least considered the risk and ruled it out. Similarly, if the *mens rea* of rape is based on D's disregard of the risk of whether or not C consented,³⁹ then D's belief that C consented, if accepted as true, shows that he at least gave the matter some thought. Does this mean that we are always bound to accept the defendant's genuine beliefs if we punish the defendant for his attitude?

Developments in Scotland appear to suggest that we are. Scottish criminal law defines the *mens rea* for rape in a similar way to that suggested above:⁴⁰ it is intention to have sexual intercourse through the overpowering of the will, or reckless indifference as to the possibility that the act is performed against the woman's will.⁴¹ It was originally held that, where the defendant believed the victim consented, his belief could exculpate him only where it was a reasonable one.⁴² However, subjectivism achieved a rare victory in Scotland with the decision in *Meek*⁴³ that endorsed the English and Welsh approach in *Morgan*. This part of the *Meek* judgment was merely *obiter*, but was subsequently upheld in *Jamieson v HM Advocate (No. 1)*⁴⁴ where Lord Justice-General Hope stated that rape was an offence of carnal knowledge of a woman without her will, and so intention to have intercourse without her consent or recklessness as to that non-consent was an essential part of the defendant's *mens rea*. Thus, if a man had intercourse in the genuine belief that the woman consented, he was not reckless as to her non-consent and so he

³⁹ As it would be if the new test were applied to rape as suggested above, in Ch. 8.2.4

⁴⁰ Above, Ch. 8.2.4

⁴¹ I.e. in the absence of consent. *Meek v HM Advocate* [1982] S.C.C.R. 613; *Lord Advocate's Ref (No. 1 of 2001)* [2002] S.L.T 466.

⁴² *Sweeny v X* [1982] S.C.C.R. 509 per Lord Ross at 515

⁴³ *Meek v HM Advocate* above, fn.41. However, a genuine belief in relation to other offences can only be accepted where it is reasonable, as *Owens v HM Advocate* [1946] S.C.(J.C.) 119 is still followed.

⁴⁴ [1994] S.C.(J.C.) 88

cannot be considered guilty of rape. Since Scottish recklessness is based on the defendant's indifference to the risk, the implication seems to be that an honestly held belief in consent is just as inconsistent with any assertion that the defendant was indifferent as it was with the claim that he foresaw the risk. Similar conclusions have been reached in the criminal law of England and Wales. Lord Diplock considered in *Sheppard*⁴⁵ that where a defendant made an honest mistake as to whether his conduct would cause injury, he could not be described as wilful (or indifferent⁴⁶). In the context of sexual offences, it has also been recognised that an assessment of *mens rea* based on indifference such as that in *Pigg*⁴⁷ may fail to place any blame on an individual who considered the existence of the risk of non-consent and unreasonably concluded that there was consent.⁴⁸ This logic would therefore suggest that even the use of a conative test of *mens rea* would not necessarily prevent the defendant from being able to rely on his genuine beliefs to negate *mens rea*. This would mean that a defendant would once again be able to rely on his genuine but unreasonable belief in consent – an outcome that the Sexual Offences Act 2003 desperately tried to avoid.⁴⁹

9.3.2: *Genuine but indifferent beliefs?*

However, just as an individual may have run or ignored the possibility of the risk because he did not care, he may also have formed a belief based on a rushed assessment of the circumstances because of his desire to take his chosen course of conduct regardless of any other consideration. Where the non-consent was obvious and the consequences of the defendant's inattention were severe, we can thus consider him indifferent for making insufficient inquiry. An example can again be made of the French Paratrooper mentioned above.⁵⁰ The incident was described by the prosecutor as:

“a blunder, a human error [and] a major imprudence...”

⁴⁵ [1981] A.C. 394

⁴⁶ See the above, discussion on *Sheppard* at Ch. 3.2.1

⁴⁷ (1982) 74 Cr. App. R. 352

⁴⁸ Temkin 'The Limits of Reckless Rape.' [1983] Crim. L.R. 5 at 9

⁴⁹ Above, Ch. 2.1.4

⁵⁰ The Times, 'Soldier to be prosecuted after shooting live rounds into crowd' July 1st 2008

Nonetheless, it was considered that no harm was intended. The defendant had simply believed that he was not using live ammunition, and so had failed properly to check that the bullets were blanks. Had the defendant not checked the bullets at all, and so had not formed any belief, we would have little difficulty in inferring that he simply did not care enough about the safety of the crowd. If he claims that he looked at the rounds and genuinely believed they were blank (and so believed that no harm would be caused) we therefore might say that his actions created such an obvious risk of very serious injury or death that we would have expected him to take more care when forming that belief. If live and blank rounds were distinct and he formed his belief having not looked carefully enough at them, then he clearly paid so little attention to the ammunition he was using that he can be described as indifferent notwithstanding his genuine belief. Thus we can see how an individual such as Shimmen can be considered morally culpable.⁵¹ If his was an unreasonable belief, then it is one that can be considered to have been formed based on a rushed assessment of the circumstances and is therefore not capable of disproving any inference that he was indifferent. Although Shimmen is described in the report as an expert at Taekwondo it is not the case that he had completely mastered the art. Indeed, it appears that he was still relatively new to the discipline – yellow and green belts are respectively one and two steps up from beginner level. There thus remained an obvious risk that his actions would cause harm. Furthermore, Shimmen had been drinking – a factor that makes an inference of a guilty state of mind all the more likely as the alcohol would have impeded his control over his actions.⁵² Similarly, a defendant who held no reasonable belief as to his sexual partner’s consent where her non-consent was obvious could be said to have failed to observe the minimum kind and degree of practical concern for his victim’s sexual autonomy. In short, we are saying that, if the defendant formed his genuine but unreasonable belief based on a rushed assessment of the circumstances, we can say that belief was formed indifferently.⁵³

The claim that a genuinely held belief might be considered to have been formed indifferently may be a controversial one, but it is certainly not unprecedented. It appears to be the general stance adopted by the Scottish criminal law where, outside the context

⁵¹ Above Ch.3.2

⁵² It would also have impeded his judgement – an issue that is considered below in chapter 9.4

⁵³ Duff, *‘Recklessness’* [1980] Crim. L.R. 282 at 290 for a similar appraisal.

of sexual offences, a belief can currently exculpate the defendant only where it was reasonable. The reason for this appears to be that a belief can be formed recklessly (i.e. indifferently) and so *mens rea* can still be found in the presence of such a belief.⁵⁴ This is further evidenced by the fact that the judgments in *Meek* and *Jamieson* are considered to be at odds with the normal Scottish principles of *mens rea*. Indeed, in their draft criminal code, the Scottish Law Commission propose a reversion to the law prior to *Meek* where the *mens rea* was solely based on the ordinary Scottish concept of recklessness.⁵⁵ In order to accept this argument, it must be understood that the use of labels such as ‘genuine’ or ‘honest’ in relation to an unreasonable belief are perhaps misleading. Although they indicate that it must be a belief the defendant actually and subjectively held at the time, these labels do not necessarily indicate that it was an ‘innocently’ formed or a blameless belief. Therefore, an unreasonable belief in the face of an obvious risk of harm is not inconsistent with any finding that a defendant was indifferent.

9.3.3: Attitude and belief in consent in general

The above discussion thus shows how we can assess the defendant’s belief that the complainant consented to sexual intercourse. If she obviously did not consent, we may blame the defendant for his blameworthy disregard of her sexual autonomy.⁵⁶ His genuine but mistaken belief that she consented is not capable of disproving this, as that belief is considered to have been formed on a rushed assessment of the circumstances. By contrast, *mens rea* would naturally be absent where the defendant’s belief was an entirely reasonable one – it suggests that any other person might have taken the same degree of care in forming that belief, and indeed it might very well suggest that the risk of harm or non-consent was not in fact an obvious one in the first place. Note that this does not mean that the defendant is blamed merely because his belief in consent was unreasonable. As noted in Ch. 8.4.2, according to a conative approach the *mens rea* for sexual offences would be the defendant’s intention to have intercourse despite the victim’s non-consent or his blameworthy disregard of her non-consent. This *mens rea* would still need to be

⁵⁴ McCall-Smith & Sheldon, *Scots Criminal Law* (1992) p106

⁵⁵ Scottish Law Commission, ‘A Draft Criminal Code for Scotland, With Commentary’ (2003) s61 and commentary at p125

⁵⁶ Ch. 8.2.4

proved using the test from Chapter 7. That said, we can now see that an unreasonable but genuine belief in consent is not capable of disproving *mens rea* formulated in these terms.

We can in fact assess any mistaken belief in consent in the same way. If F inflicts non-consensual physical harm upon E, it can be said that F displays a blameworthy disregard of E's welfare.⁵⁷ An unreasonable belief cannot disprove this blameworthy disregard; again, we may think that F forms that belief based on a rushed assessment of the circumstances. This analysis carries a significant advantage over the current law. It shows that all mistaken beliefs in consent can be assessed in the same way. The law would therefore achieve a consistency that it currently lacks.⁵⁸

9.3.4: *The state of mind of one who acts in self-defence*

Whereas a belief in consent will be accepted only where *reasonable*, we can rationalise an acceptance of the defendant's *genuine* belief in the need for defensive force if *mens rea* is formulated in conative terms. The paradigm example of a self-defence case, as well as showing that the defendant's actions were not unlawful, indicates that the defendant's attitude towards the victim was not a blameworthy one. The defendant acted because of a desire to escape or protect one's self or another, and that desire was a result of fear or compassion. These are understandable or favourable attitudes that we do not wish to punish. For example, Horder describes *Williams*⁵⁹ as a defendant who:

“acted under the influence of a desire associated with an emotion that creates the kind of imperative for immediate action that understandably and excusably leads people to do wrong.”⁶⁰

Accordingly the defendant, who acted in self defence, lacked the crucial element of blameworthiness sought by the new approach to moral culpability even though he may have intended to harm the attacker. Although the defendant may still have displayed a certain degree of disregard for the welfare of his attacker, as evidenced by the fact that he

⁵⁷ Assuming the test from chapter 7 is satisfied.

⁵⁸ Above, Ch. 9.1

⁵⁹ Above, fn.11

⁶⁰ Horder, '*Cognition, Emotion and Criminal Culpability*' [1990] 106 L.Q.R. 469 at 479

has formed an intention to cause harm, it is the case that he was entitled to consider his own welfare to be more important in such circumstances and do what was necessary to protect himself. In this sense, a plea of self-defence is analogous to any other laudable motive; it shows that the defendant's intention to cause harm lacked the 'extreme practical indifference' towards the victim that normally forms the basis for moral culpability.⁶¹

Additionally, the requirement for a proportionate response is fully consistent with this analysis. If the defendant's response to an attack was disproportionate, then his disregard for the welfare of the attacker went beyond what was necessary to protect his own interests and thus he displayed a much greater disregard of the welfare of the victim. It would be a matter of debate whether the state of mind of such an individual still falls short of malice aforethought. Although he still displayed some indifference, he did not necessarily display sufficient culpability for murder. This may initially appear to justify a partial defence to murder where the defendant responds to an attack with unreasonable force, but then again would we still not wish to brand as a murderer an individual who uses an axe to split the head of a young boy stealing apples? A vastly disproportionate response to the threat displays a complete disregard of the right to life of the attacker, notwithstanding the crime he was committing, that the proportionate response does not display. Thus, the defendant's attitude may have been that the attacker had forfeited all his rights, which is not one the law can commend.

9.3.5: The effect of a mistaken belief in the need for defensive force

Where the defendant holds a genuine but mistaken belief as to the need for defensive action, there is no evidence of selfish disregard even where the belief is unreasonable. The very nature of a self-defence plea is that the defendant was forced to act on the spur of the moment and in the face of danger. Thus, unlike an unreasonable belief in consent, there can be no suggestion that the belief itself was founded on indifference. The immediacy of the defendant's decision is a point that has frequently been recognised by the appellate courts. Lord Morris commented in *Palmer*⁶² that the

⁶¹ Above, Ch. 8.1.1.5

⁶² [1971] A.C. 814

defendant being attacked would be acting in a moment of ‘unexpected anguish’.⁶³ In circumstances such as these, the defendant has had no time to reflect on how true his perception of the events was, but instead he has seen a danger and reacted accordingly. Had the defendant hesitated to see if his belief was true, he would have risked serious and unlawful harm to himself or another. Furthermore, as Horder correctly observes, one of the features of emotions such as fear or compassion is that the defendant might not have taken rational thought before acting. Therefore, the fact that the defendant formed an unreasonable belief based on a rushed assessment of the circumstances does not show that he was indifferent towards the outcome, but rather it is the case that we simply cannot expect him to have formed a fully-considered belief in such perilous circumstances. This contrasts greatly with one who unreasonably believed, for example, that the complainant was consenting to physical harm or sexual intercourse. Such an individual did not form his belief out of anxiety or immediacy, and so can be considered to have ‘leapt before he had looked properly’.⁶⁴

Conversely, this analysis does not suggest that the defendant is also entitled to rely on whatever he believed to be a proportionate response to the threat. If the defendant believed that he was, for example, entitled to shoot intruders dead on sight, then that belief was not one formed on the spur of the moment but is surely one he held beforehand. Of course, there will also be occasions where the defendant had simply taken the most obvious response available to him even though a calm objective analysis of that response may deem it disproportionate. Such an individual may not have shown the same disregard towards the attacker, but then the law is already capable of showing him some leniency anyway. In *Attorney General of Northern Ireland’s Reference [1977]*⁶⁵ Lord Diplock recognised that there was potentially very little time for the defendant to have reflected on what degree of action was necessary. On the facts of that case, there was a risk the target would have committed further terrorist atrocities, and was so far away that the soldier had only two options – shoot or let him go. Lord Diplock thus thought it important that the reasonable person test:

⁶³ *Ibid* per Lord Morris at 832

⁶⁴ Horder above, fn.60 at 477

⁶⁵ [1977] A.C. 105

“is not undertaken in the calm analytical atmosphere of the court room after counsel, with the benefit of hindsight have expounded at length the reasons for and against the kind and degree of force that was used by the accused; but in the brief second or two which the accused had to decide whether to shoot or not and under all the stresses to which he was exposed.”⁶⁶

9.3.6: *State of mind of one who acts under duress*

The conative state of mind associated with duress is undoubtedly similar to that of self-defence. Again, the defendant committed a criminal act out of a desire for self-preservation, which may counteract the disregard of the victim’s welfare his intentions displayed. Conversely however, the defendant did not commit a criminal act against the person threatening him, but rather against an innocent third party. The defendant who caused harm under duress acted according to a desire to protect the welfare of himself or those close to him at all costs. So, in contrast to one who opted to protect his own welfare over that of an attacker, the defendant acting under duress chose his welfare over some individual unrelated to the threat he faced. We therefore may still consider him to have been indifferent to the welfare of his victim to some extent, and thus we are not quite so sympathetic towards his desire for self-preservation in this context. Indeed, the law expressly prevents him from placing his own welfare above the right to life of the innocent victim.⁶⁷ This rule would also exist under a conative approach to *mens rea*; the defendant who chose to preserve his own life over that of an innocent victim may be considered to have still displayed the ‘extreme practical indifference’ towards the welfare of that victim that intention normally infers. The law also requires that the defendant displayed a reasonable amount of steadfastness to the threat,⁶⁸ thus ensuring that he is not too readily exculpated where he committed an offence against an innocent third party. Therefore, unlike self-defence, a duress plea cannot be considered a complete denial of *mens rea*, even if *mens rea* is formulated in terms of attitude. The defendant still showed some disregard of the victim’s welfare. The question is thus how far we are prepared to excuse the defendant for his criminal actions.

⁶⁶ *Ibid* per Lord Diplock at 138

⁶⁷ *Howe* above, fn.30

⁶⁸ *R v Graham* above, fn.26

There are two different theories as to why we sympathise at all with an individual who, under duress, committed a criminal act against an innocent third party. On the one hand, some claim that the defence appears concerned with the fact that the threat had overborne the defendant's will and thus we cannot fairly blame him for what he did.⁶⁹ For example, Lord Lane CJ in *Graham* claimed:

“In duress, the words or actions of one person break the will of another.”⁷⁰

However others, including some judges, consider that the defendant who acted under duress made a decision (be it conscious or subconscious) to submit to the threat.⁷¹ Thus, he chose the ‘lesser of two evils’. There are indeed some cases in which it appears inappropriate to refer to the defendant's overborne will, especially where the plea is duress of circumstances rather than duress by threats. In *Harris*,⁷² for example, the defendant was forced to drive onto the pavement in order to avoid an out of control car, and it has been argued that, in scenarios such as this, language suggesting a case of overborne will is clearly inappropriate.⁷³

In truth, if we are looking for reasons as to why we sympathise with the defendant's conative state of mind, it is inappropriate to refer solely to either factor. Different people will react to threatening behaviour in different ways and so a reference to either of these reasons alone will inevitably be too narrow. For example: A and B are forced, at gunpoint, to rob a bank.⁷⁴ A might comply having calmly realised that following such orders would be the lesser of two evils. Conversely, B might panic and, out of fear, simply do whatever he is told. Furthermore, duress does not require that the threat will be carried

⁶⁹ Horder above fn.25 at 707

⁷⁰ *R v Graham* above, fn.26 per Lord Lane CJ at 241.

⁷¹ *Lynch* [1975] above, fn.27 per Lord Morris at 918, Lord Simon at 931-2, Lord Kilbrandon at 944-5 and Lord Edmund-Davies at 951; KJM Smith, ‘*Duress and Steadfastness: In Pursuit of the Unintelligible.*’ [1999] Crim. L.R. 363 at 367-8; Wasik, ‘*Duress and Criminal Responsibility*’ [1977] Crim. L.R. 453 at 454

⁷² (1995) 1 Cr. App. R. 170

⁷³ KJM Smith above fn.71 at 367-8

⁷⁴ To take Fletcher's example; above fn.33 at p830

out immediately upon non-commission of the offence⁷⁵ and so C, who is told that he may be harmed at a later time if he does not commit the offence at a given time is less likely completely to give way to panic than D, who is given mere moments to carry out a criminal act or be killed immediately. Because duress potentially covers such a wide range of situations, it is best to regard the defendant's conative state of mind thus: the defendant has placed his own welfare above that of an innocent victim but, although this may be regarded as displaying a disregard for the victim's welfare, this disregard is excused either by the fact that the defendant was forced to make such a choice or by the fact that his will was overborne. Thus, the defendant's conative state of mind is one that we find understandable, so we do not wish to see him convicted. We do not commend his attitude towards the victim, unlike the individual acting in self-defence, but we at least understand why he held that attitude.

9.3.7: The effect of a mistaken belief in the existence of a threat

We would obviously still sympathise with the defendant's conative state of mind if his belief that he was threatened was untrue but nonetheless a reasonable one to hold. However, given the variety of case and contexts in which duress may apply, it is much harder to identify how an unreasonable belief will affect moral culpability, and thus whether that belief should be accepted. The problem is that the threat of serious injury or death need not be imminent for a duress plea to be made out. Were it otherwise, then a genuine belief that a threat existed could again be accepted on the basis that the defendant had no time to properly consider its veracity and so that belief was understandable: whether the defendant panicked or had to pick the lesser of two evils in a hurry, it would not be the case that he rushed that judgement because he cared so little about the welfare of the victim. However, if the defendant unreasonably believed in a threat that was not immediate, we would find less sympathy for that belief. If the defendant was not acting on the spur of the moment, then he was less likely to have acted because of his overborne

⁷⁵ See *Hudson and Taylor* [1971] 2 Q.B. 202 where Lord Parker CJ held that duress could apply to threats of violence that may not follow instantly, but after an interval, following the non-commission of the offence. It is a matter that should be left to the jury. However, consider the disapproval of this decision in *Hasan* [2005] 2. A.C. 467 per Lord Bingham at 494, who considered that a key principle of duress was that there was no evasive action the defendant could reasonably have been expected to take; a requirement Lord Bingham considered to have been weakened by Lord Parker CJ's judgment.

will and instead it is likely that he had chosen what to him appeared to be the lesser of two evils.⁷⁶ If he had the time to give the existence of the threat rational thought, then his belief may still have been formed based on a superficial judgement of the circumstances. It could therefore be said that he would rather harm the welfare of the victim 'just in case' his own is at risk; an attitude that we would not find so excusable.

However, the above analysis is difficult to express as a practical assessment of the defendant's belief. There would be two options. The first would be to distinguish imminent threats from all others, thus allowing for what the defendant genuinely believed in the former category and requiring a reasonable belief in the latter. The problem with this suggestion would be ensuring that the distinction is a clear one, which in turn would rely on what is or is not considered to be imminent. Wherever the distinction is set, there inevitably will be borderlines in which there would be uncertainty as to whether the defendant's genuine belief can be accepted or not. The second option would thus grant the law a greater deal of certainty: we could always require that, for the purposes of duress, mistaken beliefs in the existence of a threat must have been reasonable but approach that objective enquiry in the same way as an assessment of an individual's belief as to what degree of defensive force was necessary. Thus, the jury must remember that a belief that may be wholly unreasonable from a calm, analytical point of view may be considered a more reasonable one when it is formed in particularly strenuous circumstances. If the threat was an imminent one, the defendant will have been forced to rush his judgement and thus it is less appropriate to say that belief was born of his indifference towards the victim.

9.3.8: *Summary*

We therefore have a clearer indication of how an individual's mistaken belief ought to be assessed. If we follow a conative approach to *mens rea*, then *any* belief may be relevant to the defendant's attitudes or reasons for acting, not just those that disprove the whole or part of the required *mens rea*. We can thus assess the defendant's mistaken belief according to whether or not it taints the central claim that his intentions displayed

⁷⁶ For example, Hudson (*ibid*) had known about the threats for some time before giving evidence in Court - Lord Parker CJ states at 205 that she had been threatened 'shortly after' the assault on Mulligan - and so had more time to consider the veracity of those threats.

an extreme practical indifference towards the victim, or whether it displays some other less blameworthy attitude.⁷⁷ Some beliefs, even if unreasonable, may nonetheless be consistent with the claim that the defendant's intention to cause harm was not based on an attitude of extreme practical indifference towards the victim.

9.4: How an intoxicated belief affects the defendant's attitude

Whilst all this may allow for the defendant's sober mistaken beliefs to be assessed in a consistent manner, the above analysis must also be capable of dealing with those beliefs induced by intoxication.

9.4.1: Unreasonable beliefs induced by intoxication

One problem with the above analysis is that, by accepting the defendant's genuine beliefs in the need for defensive force, we face potential difficulty where that belief was induced by voluntary intoxication. The intoxicated individual's state of mind falls within the scope of the new test for *mens rea* as intoxication is a form of blameworthy disregard. Therefore, it would logically follow that an unreasonable belief induced by intoxication should not be relevant, even in relation to self-defence. The reason a genuine belief is normally relevant where the defendant pleads self-defence has been observed to be that even an unreasonable mistake will have resulted from a favourable emotion such as fear or a desire to protect. However, where the defendant made a wholly unreasonable mistake merely because he was drunk, then his attitude towards the outcome was tarnished by his intoxication and so we may not feel the same sympathy for him.

This approach would be entirely consistent with the law as it is currently applied in the cases of *O'Grady*⁷⁸ and *O'Connor*.⁷⁹ Lord Lane CJ in *O'Grady*⁸⁰ noted that there needs to be a balance between the interests of the defendant, who has reacted in a manner that he believed was necessary, and the victim who, possibly without fault, has been injured or even killed because of that drunken mistake. Lane LJ commented that:

⁷⁷ Or, in the case of duress, whether or not his attitude was an excusable one: above, Ch. 9.3.6

⁷⁸ [1987] 1 Q.B. 995

⁷⁹ [1991] Crim. L.R. 135. See also s76(5) Criminal Justice and Immigration Act 2008

⁸⁰ Above, fn.78

“Reason recoils from the conclusion that in such circumstances a defendant is entitled to leave the court without a stain on his character.”⁸¹

Thus, a complete acquittal where the defendant has committed a serious crime labouring under a drunken mistake is undesirable.

There are, however, two further issues that the current law has never really resolved. It is submitted that if we apply the proposed new approach to moral culpability to these problems then solutions can be found.

9.4.2: Do we accept drunken but reasonable mistakes?

Firstly, the current law does not appear to allow an individual to rely on *any* drunken beliefs, regardless of whether or not that belief was a reasonable one to hold. Because there was no consideration of drunkenly induced mistakes in *Williams*,⁸² Lord Lane CJ felt satisfied that where such a case arose the defence must fail.⁸³ This suggests that any mistake, reasonable or not, automatically becomes irrelevant where the defendant has been drinking or taking drugs. This is not an outcome that has found much favour with commentators.⁸⁴ Furthermore, if *mens rea* is formulated in terms of attitude, then logic suggests that we ought to take account of a drunken mistake if it was nonetheless a reasonable one to have made. After all, if the defendant had actually been under attack, or the attack had been as severe as he had imagined, the defence would clearly have been available to him notwithstanding his intoxicated state.⁸⁵ He still acted in order to protect himself and others and thus we would not think his conative state of mind to be a morally culpable one. We therefore cannot simply disregard that attitude just because he was drunk; if, for example, any reasonable sober person would have believed in the existence of an attack, we can still say that the defendant caused the harm for the right reasons. This differs from an individual who was so drunk that he believed in a threat that no-one else would have perceived, and thus whose attitude remained

⁸¹ *Ibid* per Lord Lane CJ at p1000

⁸² Above, fn.11

⁸³ Above, fn.78. See also s76(5) Criminal Justice and Immigration Act 2008

⁸⁴ Clarkson and Keating, *Criminal Law Text and Materials* (6th Ed 2007) at p426; Simester and Sullivan, *Criminal Law Theory and Doctrine* (2nd ed 2004) at p265 but c.f. Giles, ‘*Self-Defence and Mistake: A Way Forward*’ [1990] 53 M.L.R. 187 at 195 who thought that such a mistake is automatically unreasonable.

⁸⁵ Assuming that his response was proportional to the threat.

sufficiently tarnished by his voluntarily induced condition for him to face criminal charges.

9.4.3: *Intoxicated mistakes and charges of basic and specific intent*

The second issue is that, if we do not allow an individual to rely on his drunkenly induced unreasonable mistakes at all, an individual who drunkenly believed he was under attack would face a murder charge if his victim died. There would therefore be no distinction between charges of basic and specific intent in this context. The current law takes the same approach. Lord Lane held in *O'Grady*⁸⁶ that the question of mistake ought to be a separate issue to the question of intention.⁸⁷ In other words, even if the defendant had intentionally killed labouring under a drunken and unreasonable mistake,⁸⁸ he would not be able to rely on that mistake in response to a murder charge. This is inconsistent with the effect of a *Majewski* decision that intoxication may be used as a defence to a crime of specific intent such as murder.

The Law Commission argue that a person who acted thinking he was doing so to save his own life should not be convicted of murder, and thus they think that the law should uphold the distinction between specific and basic intent offences in relation to drunken mistakes.⁸⁹ Therefore, they assert that an approach akin to that in *Majewski* ought to be adopted.⁹⁰ Similarly, Ashworth claims:

“Just as a person acquitted of murder for lack of intent may be convicted of manslaughter, so a person acquitted of murder on grounds of mistake may be convicted of manslaughter.”⁹¹

However, the rationale behind *Majewski* is not simply that individuals who act whilst drunk should be protected from the full brunt of the law, and this is why these criticisms

⁸⁶ Above, fn.78

⁸⁷ This aspect of *O'Grady* was later affirmed in *Hatton* [2006] 1 Cr. App. R. 16 at p247

⁸⁸ If it was a reasonable mistake, he would be able to claim the defence in any case.

⁸⁹ Law Commission, 'A Criminal Code for England and Wales' (1989) LCCP 177 para 8.42. This view was echoed by Professor Smith, 'Commentary on *O'Connor*' [1991] Crim. L.R. 135 at 136

⁹⁰ Smith, Commentary on *O'Grady* [1987] Crim. L.R. 706 at 707, Ashworth, Commentary on *Hatton* [2006] Crim. L.R. 353 at 355, Simester and Sullivan above fn.84 at p565

⁹¹ Ashworth, Commentary on *Hatton* [2006] Crim. L.R. 353 at 355

of *O'Grady* somewhat miss the point. Under the current law, intoxication acts as a defence to an offence of specific intent where the defendant's intoxication was severe enough to be inconsistent with any claim that he formed an intention to cause the proscribed harm. It can amount to a complete denial of *mens rea* for crimes of specific intent. Indeed, *Majewski* does not render intoxication an automatic defence to murder; if the defendant still intended to cause the harm, then his condition does not protect him at all. This rationale cannot be translated straight across to intoxicated mistakes. For a start, if the defendant was too drunk to form intent he would not face a murder charge at any rate. Conversely, if he remained capable of forming intention, then the *Majewski* distinction is completely irrelevant in his case. In the context of self-defence we can then see that, although his perception of events may have been skewed by his condition, if he was responding to a perceived threat then he almost invariably would have formed intention to cause harm despite his intoxication. According to the subjectivist and objectivist approaches, this is therefore not a *mens rea* issue so long as it is proven that the drunken defendant nonetheless intended to harm the victim.

Conversely, a conative approach to *mens rea* does allow us to show some leniency towards the individual who, having formed an unreasonable belief induced by intoxication that he is under attack, kills another person. As noted before, a conative approach punishes the attitude - not the awareness - displayed by an individual who intended to cause harm: his 'extreme practical indifference' towards the welfare of the victim.⁹² In the context of self-defence we have already seen that, because the sober defendant acted with the laudable desire to protect himself or others from a criminal attacker, this extreme practical indifference is absent. The voluntarily intoxicated defendant who, because of his condition, unreasonably believed that he was under attack nonetheless shares this laudable desire to protect. The defendant's favourable motive is undoubtedly tainted by his voluntary intoxication, but not to the point that he is as morally culpable as one who displayed an extreme practical indifference towards the victim. It is therefore arguable that the drunken individual who unreasonably believed that defensive force was necessary should not face a murder charge. Although he should still face criminal penalties for what he has done, his moral culpability falls short of that

⁹² Above, Ch. 8.1.1.5

required for murder and so the law should be capable of reflecting this. The question is: how can we take account of this reduced moral culpability in practice?

One argument is that we will never face this problem anyway, and thus there needs to be no special rule. If the defendant is so drunk that he is incapable of forming intention, he cannot be convicted of murder. In *O'Connor*;⁹³ although the plea of self-defence was denied, it was found that the defendant nonetheless did not have specific intent and so was not guilty of murder. However, this will not always work. The fact that the defendant was defending himself against a perceived threat might very well indicate that, notwithstanding his intoxication, he formed the intention to harm the victim. Accordingly, there would still be some cases where the defendant who drunkenly and unreasonably believed that he needed to defend himself would face a murder charge. Indeed, if this were to be the law, it would mean that it would be better for the intoxicated defendant to not plead self-defence at all; his plea might amount to evidence of an intention to kill or cause grievous bodily harm.

Therefore, if it is accepted that the defendant who kills in the drunkenly induced and unreasonable belief in the need for self-defence displays a lower degree of moral culpability than is required for murder, the better solution would be to create a new partial defence to murder. This defence would automatically impose a manslaughter, rather than murder, charge upon the defendant who drunkenly formed the unreasonable belief that he needed to defend himself. The defendant's wrongdoing could still be punished by the criminal law, but we would no longer brand him as a murderer and place upon him the sentence and social stigma that label carries. This partial defence would be required only in relation to murder; although there are some other charges that can be satisfied only by intention such as section 18 Offences Against the Person Act and the proposed equivalent charge of aggravated assault,⁹⁴ these offences do not impose a mandatory sentence and so the defendant's less-blameworthy intention could instead be taken into account during sentencing.

⁹³ Above, fn.79

⁹⁴ Ch. 8.2.2.3

Chapter 10: Conclusion

This thesis has aimed to expose the long-standing conflict between subjectivists and objectivists as misleading; so long as we remain fixated on the idea that an individual's moral culpability should be determined solely according to what he did or did not foresee, the law will be unable to assess *mens rea* in a consistent and logical manner. Instead, in order to ensure that the morally correct results are achieved, the law is inevitably forced to make exceptions from and impose provisos onto existing tests of *mens rea*.

Part 1 focussed upon proving that subjectivism cannot be applied consistently. Once subjectivist principles are laid out, deviations from those principles can be observed in the current criminal law of England and Wales. Some of the greatest deviations are offences in which negligence is sufficient *mens rea*, termed as 'punishable negligence'. Such offences are often accepted by subjectivists for utilitarian reasons, but such arguments have been observed to justify a deviation from subjectivist principles only if either the available penalties are light enough that the deviation falls within the bounds of the welfare principle or if the deviation from subjectivist principles is relatively insignificant. It has therefore been observed that none of these utilitarian arguments can justify the offences in which negligence is currently punished.

However, it has also been shown that the offences identified as 'greater deviations' are not entirely unjustifiable. It has been demonstrated that negligence in the context of homicide, driving and sexual offences can be considered to be 'culpable inadvertence'; negligence in these contexts displays a greater degree of moral culpability than is generally recognised by subjectivists. Furthermore, it has been shown that punishable negligence is not alone in this category: anger, indifference and voluntary intoxication are all culpable states of mind that can exist in the absence of, and indeed may be inconsistent with, any evidence that the defendant was aware of the possible consequences of his actions. These conative states of mind pose a significant challenge to subjectivism: unlike punishable negligence, they are culpable in any context and so will be relevant to the *mens rea* of most criminal offences.

It is not defensible to conclude, as a subjectivist might, that all culpably inadvertent individuals should be considered beyond the reach of the criminal law. One would feel unsettled at the idea that an individual who caused serious injury will be labelled as morally innocent because he was too drunk, angry or callous to have thought about the consequences of his actions,¹ or that the negligent driver who killed should not be punished.² We cannot accept such outcomes solely for the sake of preserving the traditional subjectivist approach to assessing moral culpability.³ However, whilst the need to hold culpably inadvertent offenders accountable for their actions has been recognised by some subjectivists,⁴ there exists no convincing argument that reconciles the punishment of these states of mind with subjectivist principles. In reality, solutions such as conditional subjectivism, *Parker*⁵ and an offence of causing harm while drunk are little more than ‘quick-fixes’ designed to cure the symptoms of subjectivism’s narrowness – the logical conclusion that culpably inadvertent individuals should be acquitted – without resolving the central problem: the fact that subjective foresight is not an accurate indicator of moral culpability.

Part 2 subjected objectivist principles to similar scrutiny. Although subjectivists have already written much about the flaws of objectively assessed liability,⁶ many of these criticisms have been shown to be based on equally flawed subjectivist assumptions. Objectivism cannot be rejected on the basis that subjective foresight is the only legitimate basis for moral culpability. Instead, the true criticisms of objectivist principles in fact mirror those that were made of subjectivist principles; whereas subjectivist principles have been observed to be too narrow to take account of every state of mind that might be considered morally culpable, objectivist principles have been shown to fail because they

¹ See again Lord Bingham’s comments on intoxication in the otherwise subjectivist triumph of *G* [2004] 1 A.C. 1034 at 1056

² Above, Ch. 2.4.2

³ As Sellers notes; it is more important that the law be perceived to be working properly than that it is for it to follow the logic that a defendant without subjective *Mens Rea* must be acquitted. ‘*Mens Rea and The Judicial Approach to Bad Excuses in The Criminal Law*’ [1978] 41 M.L.R. 245 at 265

⁴ Which is the view of some subjectivists: Dashwood, ‘*Logic and The Lords in Majewski*.’ [1977] Crim. L.R. 532, Law Commission, ‘*Intoxication and Criminal Liability*’ (2009) LC314 and Lord Bingham in *G & R* above, fn.1 at 1056 but cf. Orchard, ‘*Surviving Without Majewski – A View from Down Under*’ [1993] Crim. L.R. 426 and Glanville Williams, *Criminal Law, The General Part* (1953) p373

⁵ [1977] 1 W.L.R. 600

⁶ Ch. 1.2

are broad enough to encompass the morally innocent. The objective test identified as ‘*Elliott* objectivity’,⁷ was overruled in the criminal law of England and Wales precisely because of this: it resulted in children being labelled morally culpable because they fell short of a standard that they arguably could not attain.

As with subjectivism, it has been shown that there is no realistic way around objectivism’s broadness. Most tests of ‘mitigated objectivity’ attempt to solve this problem by altering the reasonable standard: either by creating a reasonable person who shares the relevant characteristics of the defendant or by asking what we would have reasonably expected of that defendant in the circumstances in which he was placed. However, the wording of such tests results in circular reasoning: there is little point in asking what a reasonable person with the characteristics of the defendant would have done; the reasonable man with the defendant’s exact characteristics could only have done as the defendant did. The bipartite test of mitigated objectivity evaded this particular problem because it did not rely on a continually changing standard of reasonableness. However, like all other tests of mitigated objectivity, it fails to provide any way of restricting which of the defendant’s characteristics may be taken into account. Thus, all tests of mitigated objectivity risk allowing the defendant a concession for characteristics such as an addiction to narcotics or a tendency to be pugnacious. Furthermore, it has been shown that there is no basis by which the trial judge can prevent evidence of unfavourable characteristics from being adduced. Thus, whether or not a characteristic is deemed relevant to a test of mitigated objectivity will entirely depend upon the jury’s moral assessment of that characteristic. This is an unacceptable outcome. Ultimately, tests of mitigated objectivity fail because they attempt to treat the symptoms of objectivism’s broadness – the unfair convictions of those who cannot meet the reasonable standard – and so do nothing to resolve the central problem: the fact that objective foresight does not provide an accurate reflection of an individual’s moral culpability.

Accordingly, I have attempted in part 3 to present a morally based approach to criminal liability that would rely upon neither subjective nor objective foresight. I have shown how a new test could express the threshold of moral culpability in terms of the

⁷ Ch. 5.2.3.1 *Elliott v C* (1983) 77 Cr.App.R. 103

defendant's conative state of mind; how a focus upon the defendant's attitudes or reasons for acting would allow *mens rea* to be formulated consistently across a range of offences where inconsistency is currently found. The proposed solution would achieve this consistency because the defendant's conative state of mind is a much more accurate indicator of his moral culpability than his cognitive state of mind. It neither provides too broad nor too narrow an account of moral culpability. It has been shown also how the proposed new test, because it adopts a bipartite structure, would allow the jury to more easily understand and infer indifference. Furthermore, a conative approach to moral culpability would offer more than merely an alternative to the existing tests of recklessness and gross negligence. It would also make better sense of concepts such as intention, sexual motive and dishonesty. We had already seen that both subjectivist and objectivist principles could not deal with laudable motive; they are instead forced to adopt a somewhat artificial solution. Conversely, once we viewed intention as a conative rather than cognitive state of mind, we were able to see how motive can be a relative consideration: it shows why the surgeon, who intends to cut open his patient to perform necessary surgery, is not morally culpable.

The proposed conative approach, because it can encompass the defendant's motives in this way, also provides a solution to the current law's inconsistent treatment of mistaken beliefs. The present law has been observed to take a somewhat fractured approach to this issue: because subjectivism and objectivism are only concerned with cognitive states of mind, most mistaken beliefs are not thought to be relevant to an individual's *mens rea* at all. As a result, the current law is unable to explain properly why an individual who killed another in cold blood is morally culpable in a way that the individual who killed in the mistaken belief that he was under attack is not. In terms of the defendant's attitude, however, this distinction becomes clear; the defendant who acted in self-defence did not display the same 'extreme practical indifference' towards the victim as the one who killed without such a worthy purpose. Because of this, *mens rea* based on conative states of mind would allow us to determine properly how the defendant's genuine beliefs affect his criminal liability, without needing to resort to the occasionally foggy distinction between justifications and excuses. This is not by virtue of any extra requirements or convoluted logic. Rather, a test that assesses the defendant's

attitude towards the victim, because it would naturally take the defendant's motive into account, would show us what conative state of mind may be associated with his mistaken belief.

It is conceded that the proposals set out in this thesis reflect the author's own moral perceptions. Others may hold different views: for example, some may not agree that an intoxicated individual can be blamed for reasons similar to those attaching blame to an indifferent individual, or they might think that someone who disregards the welfare of another by consciously taking a risk is significantly worse than someone who disregards another's welfare by not bothering to think about the risks. However, any such disagreement effectively reinforces the call for a consistent approach to culpability. Compromise is clearly necessary and has been attempted in the current the criminal law of England and Wales, but the manner of it has resulted in incoherence and unpredictable deviations from the subjectivist principles that are supposed to be dominant.

In truth, the subjective/objective dichotomy only distracts us from a proper, in-depth discussion as to what constitutes a 'guilty mind'. The criminal law does not truly punish individuals merely for what they have or have not foreseen, and so it is unsurprising that these criteria are insufficient indicators of criminal liability. Instead, the criminal law punishes selfishness in relation to the autonomy and welfare of others. Future discussion ought therefore to be directed towards ways in which this can be expressed: how do we convey this requirement to the jury, and will they be able to decide whether or not the defendant before them held such an attitude? Until this is done, the doctrine of *mens rea* will be unable to achieve theoretical coherence.

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