
Introduction

We cannot live without risk. The ‘chance or probability of a bad outcome’¹ infects every human action. For a legal system to be concerned with *every* instance of risk-taking would thus be unmanageable. When attention turns to the question of which instances of risk-taking the *criminal* law should concern itself with, matters move beyond mere practicalities of enforcement. This is because of what criminal convictions communicate.² In Gardner’s memorable phrase, the criminal law’s declarations intend to ‘get personal’ in a way that the law’s other declarations (awards of civil damages in tort/delict cases, determinations of tax liabilities, etc.) do not.³ Criminal conviction (and, for some, punishment)⁴ carries with it a personalised, and intentionally stigmatic, message of condemnation, aimed not only at censuring wrongdoing, but also at censuring citizens for having engaged in wrongdoing.⁵ From this communicative aspect of the criminal conviction, it follows that wrongdoing should reflect adequately on defendants⁶ to make such personal

¹ The definition of risk adopted in Stephen Perry, ‘Risk, harm, interests and rights’, in Tim Lewens (ed.), *Risk: Philosophical Perspectives* (London: Routledge, 2007), p. 190.

² The communicative aspects of the criminal law are discussed in more detail below at Chapter 3.

³ John Gardner, ‘On the general part of the criminal law’, in R.A. Duff (ed.), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998), p. 236, at p. 237.

⁴ See, generally, R.A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001). See further Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1970), ch. 5; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), ch. 5.

⁵ Cf. Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), p. 82. It has been argued that *badness* or *wickedness* is communicated by criminal convictions: Penny Crofts, *Wickedness and Crime: Laws of Homicide and Malice* (London: Routledge, 2013), ch. 1. It is submitted that this view of the message of conviction is too strong.

⁶ The term ‘defendant’ will be used throughout this book unless Canadian, Scottish or South African cases are under consideration (in which case the term ‘accused’ will be used).

condemnation legitimate. Culpability judgements are the law's means of drawing such meaningful connections between defendants and wrongdoing.⁷ Without them, the message of conviction would, it is submitted, be unwarranted and defamatory.⁸

That a defendant took a 'risk' (a concept unpacked in slightly more detail later in this chapter) is not itself a reliable indicator of wrongdoing or culpability. First, as will be explained below, taking a risk is not always something that is *prima facie* wrongful, i.e. something requiring justification. Second, even when risk-taking is *prima facie* wrongful, it does not follow that it is *all things considered* wrongful, i.e. that, when all relevant considerations are taken into account, the reasons against taking the relevant risk defeated or excluded the reasons in favour of doing so, rendering the risk-taking unjustified.⁹ It is *all things considered* wrongs with which the criminal law ought ultimately to be concerned when it convicts defendants.¹⁰

It is because of its concern with all things considered wrongdoing that Anglo-American criminal law concentrates on the idea of *unjustified* risk-taking.¹¹ Importantly, the focus of this book is not on the question of whether risking the interests of others *itself* should be criminalised even where the risked consequence or circumstance does not materialise (in other words, whether simple *endangerment* should be criminalised)¹² or about the idea of justifying risk-taking. Separate books could be

⁷ See A.P. Simester, 'A disintegrated theory of culpability', in Dennis J. Baker and Jeremy Horder (eds.), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (Cambridge: Cambridge University Press, 2013), p. 178, at p. 180.

⁸ There is not space to consider the legitimacy of strict liability in the criminal law. See, however, A.P. Simester (ed.), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005).

⁹ Cf. the conception of 'core wrongfulness' in James R. Edwards and A.P. Simester, 'Wrongfulness and prohibitions' (2014) 8 *Criminal Law and Philosophy* 171.

¹⁰ Cf. Antje du Bois-Pedain, 'The wrongfulness constraint in criminalization' (2014) 8 *Criminal Law and Philosophy* 149 (critiqued in Edwards and Simester, 'Wrongfulness and prohibitions').

¹¹ In this book, 'Anglo-American systems' are characterised by the similarity of their approach to criminal liability. Thus, Scots criminal law is (perhaps controversially) classified as an Anglo-American jurisdiction.

¹² See, however, R.A. Duff, 'Criminalizing endangerment', in R.A. Duff and Stuart Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005), p. 43. Most jurisdictions criminalise some specific instances of endangerment (e.g. around driving). More general offences of reckless endangerment are rarer. Cf. American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)*, 3 vols. (Philadelphia: American Law Institute, 1980), vol. 1, s. 211(2).

written about these topics. More will have to be said about them in this book, but the main focus is on the circumstances in which a defendant is *culpable* for taking an unjustified risk with the interests of others.

The term ‘culpability’ is used loosely in criminal law theory.¹³ There nevertheless appears to be an acceptance, in much of the theoretical literature on criminal law, that culpability is demonstrated through the defendant’s *insufficient concern* for the interests of others. The idea of insufficient concern for the interests of others links those who hold vastly different perspectives on other issues. For instance, Alexander, Ferzan and Morse and Tadros adopt different approaches to the wider matter of criminal responsibility: Alexander, Ferzan and Morse think choice is the sole basis of responsibility;¹⁴ Tadros explains responsibility in terms of character.¹⁵ They also adopt different accounts of the justification of punishment: Alexander, Ferzan and Morse are retributivists;¹⁶ Tadros supports (in *Criminal Responsibility*, where he develops his thoughts on insufficient concern) a communication view of punishment.¹⁷ They agree, however, that the element of culpability required for a criminal conviction is a demonstration (through choices or ‘in-character’ behaviour) of *insufficient concern for the interests of others*.¹⁸ Furthermore, focussing on the defendant’s lack of sufficient concern for others is one way of understanding accounts of culpable carelessness in terms of ‘indifference’ towards risk.¹⁹ The basic understanding of culpability as insufficient concern for the interests of others will thus be adopted in this book. It is *the way* in which this lack of concern is demonstrated that is more controversial, and which requires much more explanation.

As will be seen, taking a risk, even an unjustified one, is not in itself a guarantee of culpability.²⁰ For this reason, Anglo-American criminal law

¹³ For an attempt to apply more structure to culpability, see Leo Zaibert, *Five Ways Patricia Can Kill Her Husband: A Theory of Intentionality and Blame* (Peru, IL: Open Court, 2005).

¹⁴ Larry Alexander and Kimberly K. Ferzan with Stephen J. Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), ch. 2.

¹⁵ See, generally, Tadros, *Criminal Responsibility*.

¹⁶ Alexander and Ferzan with Morse, *Crime and Culpability*, pp. 7–10.

¹⁷ Tadros, *Criminal Responsibility*, ch. 3. Tadros’s views on punishment have since changed: see, generally, Tadros, *The Ends of Harm*.

¹⁸ Tadros, *Criminal Responsibility*, pp. 83–90; Alexander and Ferzan with Morse, *Crime and Culpability*, ch. 2.

¹⁹ Some such accounts are discussed in Chapter 7.

²⁰ See, further, Simester, ‘A disintegrated theory of culpability’, at pp. 181–183.

has developed (with some notable exceptions discussed in Chapter 2) two culpability concepts designed to link defendants to their unjustified risk-taking: recklessness and negligence. This book is, in large part, an effort to best understand and explain these two culpability concepts and how they secure appropriate findings of blame with regard to unjustified risk-taking (in offences of endangerment) and the materialisation of the risked harm (in completed offences).

The treatment of culpable risk-taking in Anglo-American criminal law has not, to date, been the focus of a monograph. Doctrinal and theoretical discussions of the topic have been the subject of many book chapters and articles – too many to survey meaningfully in this introductory chapter. And yet the proper extent of culpable carelessness, and particularly the place of *inadvertent* unjustified risk-taking (typically identified as *negligence*) within the criminal law's arsenal of fault terms, remains controversial.

As well as continued controversy, there remain important gaps in much of the criminal law literature on culpable carelessness. First, there has been an absence of comparative work analysing the approach towards culpable carelessness in different Anglo-American criminal law jurisdictions. A comparative analysis of the approach towards culpable risk-taking in a range of Anglo-American jurisdictions is carried out in Chapter 2. This comparison demonstrates a trend towards a common model – the 'Standard Account' – which the remainder of the book proceeds to analyse from a theoretical perspective.

Such a general, theoretical explanation of culpable carelessness must engage with concepts that have at times been neglected doctrinally and in the associated literature. The fact that certain aspects of culpable carelessness have been neglected to date is another good reason to dedicate a monograph to the topic. A good example is awareness of risk. Awareness of risk is, as will be seen, crucial to the approach towards culpable carelessness adopted in most Anglo-American systems of criminal law. It usually distinguishes recklessness from negligence: reckless defendants are aware of the relevant risk attendant upon a particular token of behaviour (ϕ -ing), whereas negligent defendants lack such awareness (but, on some accounts, *ought to possess it*).²¹ Incidentally, the line between recklessness and negligence is often the line between criminal and civil

²¹ Some accounts of negligence concentrate simply on the defendant's *conduct*, rather than her beliefs about risk. Such accounts are rejected below at Chapter 7, section on 'Conduct: Hart's Insight'.

liability. Negligence is not usually a sufficient form of culpability for serious offences,²² whilst recklessness typically is.²³

Given its importance, the concept of awareness of risk ought to be well understood and developed.²⁴ The concept is, however, ‘radically under-theorized’.²⁵ It is thus worth reflecting in detail on the nature of awareness of risk and on whether it can hold the weight that the Standard Account places upon it. This book provides such reflection on awareness of risk, as well as other important aspects of the debate on culpable carelessness.

The next section of this chapter outlines the book’s argument. This overview is followed by a brief discussion of the aspect of wrongdoing involved in unjustified risk-taking.

An Overview of the Argument

As mentioned already, Anglo-American systems of criminal law usually distinguish between two types of culpability for unjustified risk-taking: recklessness and negligence.²⁶ In everyday language, these concepts have blurred edges:²⁷ persons are labelled reckless or negligent with little thought to the difference – if any – that exists between these terms.²⁸ This is a particular problem in relation to recklessness, the extra-legal meaning of which is painfully unclear.²⁹

Although unproblematic in the ‘everyday’ moral context, this variation in definition is inappropriate in relation to the criminal law, with its

²² The exception is usually involuntary manslaughter, but it will be noted in Chapter 2 that negligence is also used in the law of sexual offences in some jurisdictions.

²³ Some crimes cannot be committed recklessly: e.g. assault requires ‘evil intent’ in Scotland (*Lord Advocate’s Reference (No 2 of 1992)* 1993 JC 43) and murder cannot be committed recklessly in English law (*R v. Cunningham* [1982] AC 566).

²⁴ Glanville Williams, *Textbook of Criminal Law*, 2nd edn. (London: Stephens, 1983), p. 97.

²⁵ Douglas N. Husak, ‘Negligence, belief, blame and criminal liability: the special case of forgetting’ (2011) 5 *Criminal Law and Philosophy* 199 at 207. It is explained in Chapter 4 that Husak’s point, although valid, is slightly overstated.

²⁶ As Chapter 2 demonstrates, different terminology is sometimes used. The core distinction between two ways of being culpable for unjustified risk-taking is nevertheless fairly constant.

²⁷ *Banditt v. R* [2005] HCA 80, (2005) 224 CLR 262 (HCA), at [108]. On the matter of whether settled meanings for ‘everyday’ terms exist, see Gilbert Ryle, ‘Ordinary language’ (1953) 62 *Philosophical Review* 167.

²⁸ *R v. Taylor* [2004] VSCA 189, (2004) 149 A Crim R 399 (Vic), at [42].

²⁹ *MacPherson v. Brown* (1975) 12 SASR 184 (SA), at 188.

requirement that citizens be warned fairly of potential liability.³⁰ As Chapter 2 demonstrates, there is a general trend in Anglo-American criminal law towards the Standard Account, with its distinction between awareness-based recklessness and inadvertence-based negligence. Despite this general trend, *absolute* consistency has eluded some Anglo-American systems, even where statutory definitions of recklessness and negligence exist.

There are two main divergences that have occurred in the treatment of terms such as recklessness and negligence. First, some Anglo-American systems have conflated the concept of recklessness (and occasionally negligence) and rules on voluntary intoxication and criminal liability. Motivating such moves is often the thought that becoming acutely voluntarily intoxicated (i.e. intoxicated to the extent that there is a reasonable doubt over whether *mens rea* was formed)³¹ is itself careless/'reckless'/'negligent' and that this carelessness supplies the culpability usually satisfied by fault concepts such as recklessness and negligence. This conflation of voluntary intoxication and standard fault elements relating to risk-taking will be objected to in Chapter 2. It has complicated discussions of culpable carelessness unnecessarily in a number of jurisdictions. One of the arguments in this book is thus that discussions of voluntary intoxication should be divorced entirely from accounts of culpable carelessness. If acutely, voluntarily intoxicated defendants are to be held to account for the wrongs they commit in that state, it must be on some basis other than their 'recklessness' or 'negligence' in becoming intoxicated.³²

Second, even if the core *terms* used in the criminal law are consistent, sometimes Anglo-American systems use different definitions of the words 'reckless' and 'negligent', or different *types* or interpretations of recklessness and negligence (e.g. 'ordinary'³³ and 'gross'),³⁴ in different contexts. This point threatens to undermine the Standard Account's

³⁰ The concept of fair warning is discussed below in Chapter 3.

³¹ There is general acceptance that lower levels of intoxication are not relevant to criminal culpability – a disinhibited defendant can still be culpable, even if she would not have acted in a prohibited manner had she been sober. See e.g. *R v. Sheehan and Moore* [1975] 1 WLR 739 (E&W), at 744.

³² See, further, Findlay Stark, 'Breaking down Brennan' 2009 *Juridical Review* 155 at 167–169.

³³ Courts do not tend to name this type of negligence. They merely differentiate it from 'gross' negligence, or similar concepts.

³⁴ See e.g. *R v. Adomako* [1995] 1 AC 171 (E&W).

generality. In Chapter 3, a defence of such generality will be mounted. It will be argued that *mens rea* terms such as ‘recklessness’ and ‘negligence’ *should* be defined and interpreted/applied consistently in the criminal law. This argument is premised mainly on the need for the criminal law to provide clear *ex ante* guidance to citizens, in clear and consistent language. Shifting definitions are not conducive to such clarity and might – it will be contended – lead to a degree of mistrust of the criminal law.

A secondary aspect of the argument for consistency in definition points to how it can limit undue flexibility in *ex post* decisions by courts and juries. Although some flexibility in fault elements is necessary, care must be taken not to surrender too much definitional freedom to judges or, worse, unaccountable jurors. The ultimate conclusion of Chapter 3 is that consistency in the approach to defining and interpreting terms relating to the culpability of unjustified risk-taking is necessary. The rest of the book thus proceeds to analyse the best unitary understanding of the Standard Account of recklessness and negligence in Anglo-American criminal law.

To develop such a model, it is necessary to unpack an idea that is central to the Standard Account: awareness of risk. As mentioned above, most understandings of recklessness are premised on the defendant’s awareness of a particular risk attendant upon ϕ -ing, whilst negligence is typically understood as involving *inadvertent* risk-taking (inadvertence being synonymous, for the purposes of this book, with unawareness of risk). Despite the core role that it plays in delimiting recklessness and separating it from negligence on the Standard Account, awareness of risk merits far more analysis than it has, to date, received. Chapter 4 presents an account of awareness of risk in terms of the defendant’s *beliefs* about risk. It is contended that one cannot be aware that there is a certain risk attendant upon ϕ -ing, unless one believes that that particular risk exists.

What might seem like a mere semantic switch from awareness to belief is actually far more significant, but this becomes clear only once the concept of belief is explored in more detail than it has been in previous discussions. The account of belief presented in Chapter 4 presents beliefs as ascriptions made on the basis of the defendant’s dispositions towards thought and conduct. To believe that there is a risk of electrocution attendant upon leaving one’s children unattended in the bath near a plugged-in radio, for example, is not simply to have a conscious experience ‘My children might be electrocuted’. Such a belief can also properly be ascribed on the basis of fidgeting anxiously when away from the room,

regarding a location for the radio to be acceptable only if it is sufficiently far from the water, and so on.

Importantly, on the model defended in Chapter 4, beliefs can *sometimes* be ascribed even when conscious attention is focussed elsewhere. In the bath example, a parent who moves the radio ‘without thinking’ might be ascribed the belief that there is a risk of electrocution if it is left there, even if his conscious attention is focussed on other household tasks. If beliefs cannot be ascribed in such circumstances, a fair amount of human behaviour becomes much less easier to interpret and understand. If belief is understood in the manner outlined in Chapter 4, such interpretation and understanding becomes easier. It can then be seen how the belief-centred view of awareness of risk maps onto the limited number of available existing criminal law discussions of that concept, and can explain much that has, to date, been avoided by courts in their discussions of recklessness and negligence.

Although some authors have gestured towards a belief-centred account of awareness of risk in the past, some have, however, gone further, and argued that one cannot be aware that there is a risk attendant upon ϕ -ing unless one *knows* that the relevant risk exists.³⁵ The accounts of knowledge invoked by criminal theorists are always parasitic on belief,³⁶ and so to require knowledge is to require *more* than a belief. Chapter 5 demonstrates why conceiving of awareness of risk in terms of knowledge does not fit well with the general structure of criminal liability in Anglo-American systems and is otherwise problematic. It will be concluded that knowledge of risk should not play a role in understanding of the Standard Account of culpable carelessness. The best account of awareness of risk available is the one presented in Chapter 4 – i.e. a defendant is aware that there is a risk attendant upon ϕ -ing if she *believes* that that specific risk is associated with ϕ -ing.

Once the concept of awareness of risk has been analysed, it will be necessary to question *why* it is given such a prominent role in Anglo-American accounts of culpable carelessness. This question is answered in Chapter 6, which analyses the relationship between awareness of risk, choice and culpability. The basic premise underlying many accounts of culpable carelessness is that a person can *choose* to take a particular risk

³⁵ The clearest example is Husak, ‘Negligence, belief, blame and criminal liability’.

³⁶ Some philosophers concentrate on senses of knowledge that are not parasitic on belief. See Keith Hossack, *The Metaphysics of Knowledge* (Oxford: Oxford University Press, 2007), ch. 1.

only if she believes that that risk is associated with ϕ -ing. For instance, a person can choose to endanger life only if she believes that life will be endangered as a result of her action. That conceptual point about choice will not be doubted in Chapter 6 – it is unimpeachable. Instead, Chapter 6 addresses what will be termed the ‘Exclusive Thesis’ – the argument that *only* choices can ground culpability.³⁷

The Exclusive Thesis, if accepted, has profound implications for the criminal condemnation of inadvertent, unjustified risk-taking, typically understood as the mark of negligence. If choice is *essential* to culpability, culpability cannot exist in the absence of a belief that the relevant risk exists, and inadvertent risk-taking seems beyond the criminal law’s grasp.

It will be argued that choices are *important* when it comes to culpability but are not the be-all and end-all of culpability. What is required for culpability is a *suitably* clear demonstration of the defendant’s insufficient concern for the interests of others, and the work done so far by theorists to support the Exclusive Thesis does not do enough to show that *only* choices draw a sufficiently clear link between defendants and wrongdoing. The Exclusive Thesis presents an unduly narrow conception of culpability, and what can legitimately be expected of citizens in terms of the formation of beliefs about the risks attendant upon their behaviour.

With the rejection of choice as the *sole* basis of culpability for the taking of unjustified risks, the discussion can move to non-choice-based accounts. Chapter 7 discusses some of the most developed versions of such theories (the insights from others are left to Chapter 8). The contention will not be that these existing accounts are irredeemably flawed. It is rather that the important lessons contained in the accounts discussed in Chapter 7 are clouded by theoretical shortcomings. It will be argued that the lessons gleaned from existing theories can inform an account of negligence that does not share those shortcomings.

Chapter 8 is thus dedicated to constructing a more defensible model of culpability without awareness than exists at present. The best available view is that negligence is an *epistemic* failure – i.e. the failure to form a relevant belief, namely the belief that the relevant risk attendant upon ϕ -ing exists – rather than a failure simply to *act* as a ‘reasonable person’ might have. The starting point for negligence as failure of belief (as it will be called) is what the defendant *did* believe and perceive regarding the

³⁷ For a clear example of this argument, see Alexander and Ferzan with Morse, *Crime and Culpability*, chs. 2 and 3.

situation in which she found herself. If the ingredients of a fresh belief that there is a risk attendant upon ϕ -ing were there, the question becomes whether the *reason* that the defendant failed to form that relevant belief demonstrates something meaningful about *her* and *her* concern for the interests of others. It will be argued that answering this question requires consideration of whether the defendant's epistemic failure reflects something meaningful enough about the defendant's character to tie her, as an agent, to her wrongdoing.

Chapters 3–8 outline a theoretical model of culpable carelessness that, it will be argued, can explain and justify the Standard Account. It is necessary, however, to be realistic about the limitations of that theory. Chapter 9 thus briefly examines the lessons for doctrine to be gleaned from the theory presented in this book, and the kind of compromises that will be required to make it effective in practice. The aim of Chapter 9 is to demonstrate how the Standard Account's approach to culpable carelessness can be given increased theoretical rigour, whilst remaining practically relevant.

Now that a general overview of the book's argument has been presented, it is helpful to return briefly to the aspect of wrongdoing present in unjustified risk-taking. As explained already, justification is not the focus of this book. It is nevertheless important to say something about it, to answer some queries that would otherwise dog the rest of this book's explanation of culpable carelessness. The next section, however, will necessarily have to be more stipulative than the remainder of the book.

Risks and Wrongdoing

Most Anglo-American definitions of recklessness and negligence expressly require that the defendant's risk-taking is *unjustified*.³⁸ This is sometimes explained in terms of 'unreasonable' risk-taking,³⁹ but it is assumed that unreasonable and unjustified amount to the same thing in this context.⁴⁰ As noted above, this focus on unjustified risk-taking ensures that the defendant engaged in *all things considered wrongdoing*,

³⁸ The requirement that the defendant's risk-taking be unjustified is not always spelled out explicitly. See e.g. *R v. Cunningham* [1957] 2 QB 396 (E&W) (which remains binding in offences requiring *malice*).

³⁹ E.g. *R v. Stephenson* [1979] QB 695 (E&W) at 704; *A Criminal Code for England and Wales*, 2 vols. (Law Com. No. 177, 1989), vol. 1, cl. 18(c).

⁴⁰ See, similarly, R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990), p. 143.