CULPABLE CARELESSNESS

The question of when a person is culpable for taking an unjustified risk of harm has long been controversial in Anglo-American criminal law doctrine and theory. This survey of the approaches adopted in England and Wales, Canada, Australia, the United States, New Zealand and Scotland argues that they are converging, to differing extents, around a ‘Standard Account’ of culpable unjustified risk-taking. This Standard Account distinguishes between awareness-based culpability (recklessness) and inadvertence-based culpability (negligence) for unjustified risk-taking. With reference to criminal law theory and philosophical literature, the author argues that, when explained appropriately, the Standard Account is defensible and practical. Defending the Standard Account involves analysing in depth a number of controversial matters, including the meaning of advertence/awareness, the role of attitudes such as indifference in culpable risk-taking, and the question of whether negligence should be used in the criminal law.

Findlay Stark is a university lecturer in criminal law at the Faculty of Law, University of Cambridge, and also a fellow of Jesus College, Cambridge. His research and teaching centres around various aspects of criminal law, criminal procedure and criminal evidence.
CULPABLE CARELESSNESS

Recklessness and Negligence in the Criminal Law

FINDLAY STARK
Faculty of Law, University of Cambridge
Jesus College, Cambridge
For Shona, to whom I owe so much more than a book
dedication
(but it's a start)
CONTENTS

Acknowledgements x
List of Abbreviations xii
Table of Cases xiv
Table of Legislation xx

1 Introduction 1
An Overview of the Argument 5
Risks and Wrongdoing 10
Why Is Justification Required? 11
Justifying Risk-taking 20

2 The Doctrinal Trend towards the Standard Account 26
England and Wales 27
Canada 34
Australia 38
The United States 46
New Zealand 58
Scotland 60
Conclusion 64

3 Consistency in Definition 67
Defending Multiple Definitions 68
An Alternative Approach 71
Practical Concerns 83
Conclusion 89

4 From Awareness to Belief 90
The Necessity of Belief 92
Believing That p 94
Revisiting the Existing Literature 111
Conclusion 122
5 Beyond Belief: Knowledge and Awareness of Risk 123
Husak on Knowledge 124
Believing That It Is Virtually Certain That There Is a Risk 126
Justified, True Belief 128
Conclusion 140

6 The Significance of Awareness of Risk 141
Choice in Doctrine 143
Choice: A Working Definition 145
Choice and Alternatives 147
Choice and Control 151
Choice and Fair Warning 163
Choice and Punishment 166
Choice and Mens Rea 171
The Significance of Choice 174
Conclusion 176

7 Culpability beyond Awareness of Risk: Some Existing Accounts 178
Conduct: Hart’s Insight 179
‘Tracing’ Accounts 192
Culpability and Counterfactuals 201
Attitudinal Accounts 208
Conclusion 225

8 Negligence as Failure of Belief 226
Beliefs, not Behaviour 227
A Preliminary Sketch of Belief Formation 229
Belief Formation and the Will 232
Incorrect Beliefs about Risk 236
No Beliefs about Risk 241
The Reason for the Failure of Belief 243
A Wider View: Reflecting Character 247
Objections and Clariﬁcations 252
Two Examples 266
Tadros’s Account of Recklessness (and/or Negligence) 269
Conclusion 271
TABLE OF CONTENTS ix

9 Some Practicalities 273
  The Substantive Law 273
  Evidential Concerns 284
  Conclusion 291

Bibliography 292
Index 316
ACKNOWLEDGEMENTS

This book began life as a PhD thesis written at the University of Edinburgh between 2008 and 2011. I remain grateful to the Arts and Humanities Research Council and the Clark Foundation for Legal Education for funding my doctoral research and to many friends and colleagues (thanked in the thesis itself) who supported me whilst I was carrying it out.

Four people played a particularly crucial role during my PhD studies. James Chalmers and Sharon Cowan supervised the work with great patience. Antony Duff and Victor Tadros examined the thesis and gave me many ideas to feed into this book project. As a result of their encouragement to better the work (and the helpful comments on the proposal and example text from the Press's readers), this book is a very different beast from the PhD thesis. The text has largely been rewritten, and the central argument in the book has expanded, matured and developed. Primarily, the jurisdictional focus has broadened beyond Scotland and England and Wales to include various other Anglo-American systems. Further, more philosophical material has been consulted and referenced, in the hope of moving the theoretical debate on culpable carelessness (my umbrella term for culpable, unjustified risk-taking) beyond the stage it has got to in criminal law theory.

I have been fortunate to have colleagues give their time to comment on various parts of the book as it developed. Thanks are due, on this front, to Matt Dyson, James Edwards, Chloë Kennedy, Fiona Leverick, Arlie Loughlan, Jo Miles, Michael Plaxton and Andrew Simester. Particular thanks must go to James Chalmers, who went (well) beyond the call of duty and read the entire manuscript before submission. I have also had helpful conversations about the ideas in this book with Antje du Bois-Pedain, Mark Dsouza, Peter Glazebrook, Doug Husak, David Ibbetson, Henry Mares, Mark McBride, Jonathan Rogers, John Spencer and Graham Virgo.

Further feedback on parts of the book has been received at various seminars and conferences. Chapter 3 is a more focussed version of a
wider-ranging paper that was originally presented to the Centre for Legal Theory, National University of Singapore, August 2013 (and published as 'It’s only words: on meaning and mens rea’ (2013) 72 Cambridge Law Journal 155). Chapter 6 (along with ideas from other chapters) was presented at Criminal Law Conversations, Cambridge, June 2015, and Chapter 8 was presented to the Criminal Justice Section of the Society for Legal Scholars conference, York, September 2015. I am thankful to the audience members at these presentations for their comments.

Despite the involvement of so many kind, distinguished and generous people, I remain liable for each and every mistake in this book.

At Cambridge University Press, Finola O’Sullivan has been excellent (and has shown remarkable patience) throughout the process of planning and producing this book. Richard Woodham, Gillian Dadd and Rebecca Jackaman were similarly patient, and helped with preparing the manuscript for submission and planning the cover. I am extremely grateful to Stephanie Sakson for copy-editing the manuscript, to Robert and Cynthia Swanson for preparing the index, and to Anand Shanmugam at SPi for managing the production project.

On the more personal front, I am grateful to my parents for their continued support. I have also had excellent research assistance/emotional support from our cats, and am saddened that Minstrel, who sat on my lap, purring, throughout the writing of my PhD thesis and most of this book, is not here to see the finished product.

Although perhaps a bad thing to admit to at the beginning of a monograph, I cannot quite explain in words how thankful I am to my wife, Shona, for putting up with me whilst I have written this book. She will be very glad that the project is concluded. Shona has had to put up with (too) much, and I look forward to now being able to repay her kindness and patience. The first line of this book is ‘We cannot live without risk’. I could not live without her.

FGFS
Jesus College, Cambridge
ABBREVIATIONS

The following abbreviations are used where the context does not make immediately clear which jurisdiction a case or statute originates from.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AK</td>
<td>Alaska, USA</td>
</tr>
<tr>
<td>AR</td>
<td>Arkansas, USA</td>
</tr>
<tr>
<td>CA</td>
<td>California, USA</td>
</tr>
<tr>
<td>Can</td>
<td>Canada</td>
</tr>
<tr>
<td>Cwlth</td>
<td>Commonwealth of Australia</td>
</tr>
<tr>
<td>DE</td>
<td>Delaware, USA</td>
</tr>
<tr>
<td>E&amp;W</td>
<td>England and Wales</td>
</tr>
<tr>
<td>FL</td>
<td>Florida, USA</td>
</tr>
<tr>
<td>GA</td>
<td>Georgia, USA</td>
</tr>
<tr>
<td>HCA</td>
<td>High Court of Australia</td>
</tr>
<tr>
<td>IA</td>
<td>Iowa, USA</td>
</tr>
<tr>
<td>IL</td>
<td>Illinois, USA</td>
</tr>
<tr>
<td>MA</td>
<td>Massachusetts, USA</td>
</tr>
<tr>
<td>MD</td>
<td>Maryland, USA</td>
</tr>
<tr>
<td>MI</td>
<td>Michigan</td>
</tr>
<tr>
<td>MN</td>
<td>Minnesota, USA</td>
</tr>
<tr>
<td>MS</td>
<td>Mississippi, USA</td>
</tr>
<tr>
<td>NC</td>
<td>North Carolina, USA</td>
</tr>
<tr>
<td>ND</td>
<td>North Dakota, USA</td>
</tr>
<tr>
<td>NE</td>
<td>Nebraska, USA</td>
</tr>
<tr>
<td>NM</td>
<td>New Mexico, USA</td>
</tr>
<tr>
<td>NSW</td>
<td>New South Wales, Australia</td>
</tr>
<tr>
<td>NY</td>
<td>New York, USA</td>
</tr>
<tr>
<td>NZ</td>
<td>New Zealand</td>
</tr>
<tr>
<td>OH</td>
<td>Ohio, USA</td>
</tr>
<tr>
<td>OK</td>
<td>Oklahoma, USA</td>
</tr>
<tr>
<td>PC</td>
<td>Privy Council</td>
</tr>
<tr>
<td>Qd</td>
<td>Queensland, Australia</td>
</tr>
<tr>
<td>RI</td>
<td>Rhode Island, USA</td>
</tr>
</tbody>
</table>

xii
ABBREVIATIONS  xiii

SA  South Australia
SC  South Carolina, USA
SD  South Dakota
Scot  Scotland
Tas  Tasmania, Australia
UK  The United Kingdom of Great Britain and Northern Ireland
VA  Virginia, USA
Vic  Victoria, Australia
VT  Vermont, USA
WA  Washington, USA
WAus  Western Australia
WV  West Virginia, USA
ZA  South Africa
CASES

Australia

Bochkov v. R [2009] NSWCCA 166 (NSW), 40
Callaghan v. The Queen (1952) 87 CLR 115 (HCA), 43
Chen v. R [2013] NSWCCA 116 (NSW), 39
DAB v. Capes [2011] WASC 137 (WAus), 42
Evgeniou v. R (1964) 37 ALJR 508 (HCA), 191
La Fontaine v. The Queen (1976) 136 CLR 62 (HCA), 39
Hall v. Fonca [1983] WAR 309 (WAus), 43
Hurst v. Tasmania [2011] TASCCA 12 (Tas), 43
Ignatova v. R [2010] VSCA 263 (Vic), 39
MacPherson v. Brown (1975) 12 SASR 184 (SA), 5, 39, 41
Mamote-Kulang of Tamagot v. R (1964) 111 CLR 62 (HCA), 41
Nydam v. R [1977] VR 430 (Vic), 41
Pemble v. R (1971) 124 CLR 107 (HCA), 39
R v. Ashman [1957] VR 364 (Vic), 40
R v. BDD [2006] QCA 441, [2007] 1 Qd R 478 (Qd), 43
R v. Crabbe (1985) 156 CLR 464 (HCA), 39, 243
R v. D (1984) 3 NSWLR 29 (NSW), 41
R v. Hodgetts and Jackson [1990] 1 Qd R 456 (Qd), 43
R v. Hodgson [1985] Tas R 75 (Tas), 43
R v. Lavender [2004] NSWCCA 120 (NSW), 41
R v. O’Connor (1980) 146 CLR 64 (HCA), 31, 41–2
R v. T [1997] 1 Qd R 623 (Qd), 43

xiv
## Table of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Volume</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Canada</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Valance (1961) 108 CLR 56 (HCA), 43</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Webb, ex pte Attorney-General [1990] 2 Qd R 275 (Qd), 43</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>England and Wales (Including the Judicial Committee of the Privy Council)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Atwal v. Massey [1971] 3 All ER 881, 124</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commissioner of Police for the Metropolis v. Caldwell [1982] AC 341, 14, 19, 32, 69</td>
<td></td>
<td></td>
</tr>
<tr>
<td>74–6, 221, 265</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DPP v. Beard [1920] AC 479, 30</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
xvi  TABLE OF CASES

Hyam v. DPP [1975] AC 55, 208–21
Lowry v. R [1974] AC 85 (PC), 289
MJJ (A Minor) v. Cooper, unreported, Divisional Court, 2 July 1987, 19
R v. Bateman (1927) 19 Cr App R 8, 28
R v. C [2007] EWCA Crim 1068, 27
R v. Cunningham [1957] 2 QB 396, 10, 27–8
R v. Cunningham [1982] AC 566, 5
R v. G and Another [2003] UKHL 50, [2004] 1 AC 1034, 14, 26, 27–8, 32, 67, 75, 184,
207, 265, 279
R v. Hall [1985] 81 Cr App R 260, 95, 96, 100
R v. Hardie [1985] 1 WLR 64, 33
R v. Harris [1987] 84 Cr App R 75, 94
R v. Lim Chin Aik [1963] AC 160 (PC), 164
R v. M’Naghten (1843) 10 CI & F 200, 286
R v. Mark and Nationwide Heating Services Ltd [2004] EWCA Crim 2490, 29
R v. Morrison (1989) 89 Cr App R 17, 74
R v. Pigg [1982] 1 WLR 762, 218
R v. Reader (1978) 66 Cr App R 33, 94
R v. Reid [1992] 1 WLR 793, 19
R v. Sheehan and Moore [1975] 1 WLR 739, 6
R v. Stephenson [1979] QB 695, 10, 124
R v. Tuaffe [1984] AC 539, 18
R v. Whybrow (1951) 35 Cr App R 141, 231
R v. Williams [1978] 3 All ER 411, 240
TABLE OF CASES

R v. Woollin [1999] 1 AC 82, 69, 127
Redgate v. Haynes (1875–1876) LR 1 QBD 89, 241
Ross v. Moss [1965] 2 QB 396, 241
RSPCA v. C [2006] EWHC 1069 (Admin), 184
Thabo Meli and Others v. R [1954] 1 WLR 228 (PC), 36
Westminster City Council v. Croyalgrange Ltd and Another [1986] 1 WLR 674, 241, 242
Woolmington v. DPP [1935] AC 462, 286
The Zamora (No 2) [1921] 1 AC 801, 241

European Court of Human Rights


Republic of Ireland


New Zealand

D’Almeida v. Auckland City Council (1984) 1 CRNZ 281, 59
Hohaia v. Cairns (1989) 4 CRNZ 558, 59
R v. H (1989) 4 CRNZ 461, 58
R v. Howe [1982] 1 NZLR 618, 58
R v. Kamipeli [1975] 2 NZLR 610, 59
R v. Stephens, unreported, Auckland High Court, 8 December 1983, 183
R v. Storey [1931] NZLR 417, 59
R v. Tihi [1990] 1 NZLR 540, 59
R v. Yogasakaran [1990] 1 NZLR 399, 59
Smith v. Police (1988) 3 CRNZ 262, 58
Sutherland v. Police [2006] NZHC 729, 58
Taylor v. Police (1990) 6 CRNZ 470, 59

Scotland

Allan v. Paterson 1980 JC 57, 61
Brennan v. HM Advocate 1977 JC 38, 63–4
Broadley v. HM Advocate 1991 JC 108, 62
TABLE OF CASES

Cameron v. Maguire 1999 JC 63, 92, 269
Carr v. HM Advocate 1994 JC 203, 61
Cawthorne v. HM Advocate 1968 JC 32, 62
Harris v. HM Advocate 1993 JC 150, 62
HM Advocate v. Hartley 1989 SLT 135, 62
HM Advocate v. McGuinness 1937 JC 37, 218
HM Advocate v. McHaffie (1827) Syme 33, 289
Lord Advocate’s Reference (No 2 of 1992) 1993 JC 43, 5
McDowall v. HM Advocate 1998 JC 194, 109
McNab v. Guild 1989 JC 72, 190
Paton v. HM Advocate 1936 JC 19, 62
Quinn v. Cunningham 1956 JC 22, 62, 144, 210, 266
Roberts v. Hamilton 1989 JC 91, 62
Ross v. HM Advocate 1991 JC 210, 63
Transco plc v. HM Advocate (No 1) 2004 JC 29, 61, 62, 203–5

South Africa

State v. De Bruyn 1968 (4) SA 498, 210
State v. Chretien 1981 (1) SA 1097, 42
State v. Humphreys [2013] ZASCA 20, 2013 (2) SACR 1, 211, 220
State v. Ngubane 1985 (3) SA 677, 210
State v. Sethoga 1990 (1) SA 270, 211
State v. Sigwaha 1967 (4) SA 566, 211

United States of America

Banks v. Commonwealth, 41 Va App 539, 586 SE 2d 876 (2003, VA), 52
Commonwealth v. Henson, 394 Mass 584, 476 NE 2d 947 (1985, MA), 56
Commonwealth v. Pugh, 462 Mass 482, 969 NE 2d 672 (2012, MA), 54
Davis v. State, 522 A 2d 342 (1987, DE), 57
Evans v. State, 562 So 2d 91 (1990, MS), 55
Gills v. Commonwealth, 141 Va 445, 126 SE 51 (1925, VA), 57
Grayson v. State, 687 P 2d 747 (1984, OK), 56
Keye v. State, 136 Ga App 707, 222 SE 2d 172 (1975, GA), 52
McBoyle v. US, 283 US 25 (1931), 73
McDaniel v. State, 356 So 2d 1151 (1978, MS), 57
People v. Angelo, 246 NY 451 (1927, NY), 193
People v. Conway, 6 NY 3d 869, 849 NE 2d 954 (2006, NY), 48, 67
LEGISLATION

Australia

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (NSW), 286
Crimes Act 1900 (ACT), 38, 39, 44
Crimes Act 1900 (NSW), 38, 39, 40, 41
Crimes Act 1914 (Cwlth), 38
Crimes Act 1958 (Vic), 38, 39, 40, 42
Criminal Code 2002 (ACT), 45, 286
Criminal Code Act 1899 (Qd), 38, 45
Criminal Code Act 1924 (Tas), 38, 42, 44, 45, 286
Criminal Code Act 1983 (NT), 38, 44, 45, 179
Criminal Code Act 1995 (Cwlth), 38, 44, 45, 124, 126, 179, 286
Criminal Code Act Compilation Act 1913 (WAus), 286
Criminal Law Consolidation Act 1935 (SA), 38, 39, 40, 42
Model Criminal Code (Australia), 45–6

Canada


England and Wales

Criminal Damage Act 1971, 14, 32, 74, 221, 242
Criminal Justice Act 2003, 207, 289
Criminal Justice and Immigration Act 2008, 240
Fraud Act 2006, 68
Public Order Act 1986, 33
Serious Crime Act 2007, 94
Sexual Offences Act 2003, 30, 86, 218, 264
Theft Act 1968, 68, 79, 94

New Zealand

Crimes Act 1961, 58–60, 286
Summary Offences Act 1981, 58

XX
## TABLE OF LEGISLATION

### Scotland

- Criminal Procedure (Scotland) Act 1995, 286
- Sexual Offences (Scotland) Act 2009, 63, 264

### United Kingdom

- Constitution Act 1867, 34
- Corporate Manslaughter and Corporate Homicide Act 2007, 204
- Human Rights Act 1998, 288
- Law Commissions Act 1965, 273
- Road Traffic Act 1988, 29, 191
- Uranium Enrichment Technology (Prohibition on Disclosure) Regulations 2004 (SI 2004 No. 1818), 29

### United States of America (and Related)

- Alabama: Ala Code 1975, 48, 56, 286
- Alaska: AS, 48, 56
- Arizona: ARS, 48, 56, 57
- Arkansas: ACA, 48, 57
- California: CA Penal, 56
- Colorado: Col Rev Stat, 56
- Connecticut: CGSA, 48, 56, 144, 286
- Delaware: 11 Del C, 48, 56, 57
- Florida: West’s Fl Stat Ann, 57
- Georgia: Ga Code Ann, 52, 57
- Hawaii: HRS, 48, 57
- Idaho: Idaho Code Ann, 57
- Illinois: 720 ILCS, 49, 56
- Indiana: IC, 50, 57
- Iowa: ICA, 52, 56
- Kansas: Kan Stat Ann, 50, 56
- Kentucky: Ken Rev Stat Ann, 56
- Louisiana: LSA-RS, 50, 56
- Maine: 17-A MRSA, 13, 48, 56
- Maryland: Md Code, Criminal Law, 54
- Minnesota: MSA, 52, 56
- Mississippi: Miss Code Ann, 54
- Missouri: VAMS, 16, 48, 57
- Model Penal Code, 2, 13, 16, 24, 46–7, 55, 87, 124–5, 126–9, 130–1, 144, 227–8, 260, 275
- Montana: MCA, 13, 49, 57
- Nebraska: Neb Rev St, 50
- Nevada: NRS, 51, 52, 56
# Table of Legislation

New Hampshire: NH Rev Stat, 48, 56  
New Jersey: NJSA, 47, 48, 56  
New Mexico: NMSA 1978, 55  
New York: McKinney’s Penal Law, 48, 56  
North Dakota: ND Cent Code, 48, 56  
Ohio: C, 51–2, 57  
Oklahoma: 21 Okl St Ann, 52, 56  
Oregon: ORS, 48, 56  
Pennsylvania: 18 Pa CSA, 47, 48, 57  
Rhode Island: Gen Laws 1956, 54  
South Carolina: Code 1976, 52, 53  
South Dakota: SDCL, 51, 56  
Tennessee: TCA, 48, 56  
Texas: VTCA Penal Code, 48, 57  
US Virgin Islands: 14 VIC, 55  
Utah: UCA 1953, 48, 56  
Virginia: VA Code Ann, 52, 53  
Washington, DC: DC St, 52  
Washington: RCWA, 50, 56, 267  
West Virginia: W Va Code, 54  
Wisconsin: Wis Stat, 53  
Wyoming: WS 1977, 48

## Miscellaneous

Treaty of Union 1706, 60