



1-1-1982

Subjective or Objective - Ups and Downs of the Test of Criminal Liability in England

John C. Smith

Follow this and additional works at: <http://digitalcommons.law.villanova.edu/vlr>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

John C. Smith, *Subjective or Objective - Ups and Downs of the Test of Criminal Liability in England*, 27 Vill. L. Rev. 1179 (1982).
Available at: <http://digitalcommons.law.villanova.edu/vlr/vol27/iss6/3>

This Article is brought to you for free and open access by Villanova University School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized administrator of Villanova University School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.

1981-82]

SUBJECTIVE OR OBJECTIVE? UPS AND DOWNS OF THE TEST OF CRIMINAL LIABILITY IN ENGLAND *

JOHN C. SMITH †

THE DEFINITION OF A CRIME usually, though not invariably, requires proof of 1) an act by the defendant; 2) certain results caused by that act; and 3) certain circumstances. A simple illustration may be found in the offense of causing criminal damage to property belonging to another.¹ The act is the physical movement made by the defendant. The result is the destruction of, or damage to, the property. The circumstance is that the property belongs to another. The defendant may not be convicted unless each of these elements is proved. It must also appear that the defendant intended to make the physical movement, but there is rarely any difficulty in proving this intent. In those crimes known as offenses of "absolute" or "strict" liability, the duty of the prosecution may end at this point. But in most crimes, particularly serious crimes, they must go on to prove a degree of fault with respect to each element of the offense, whether a result or a circumstance. If the defendant is to be held responsible for causing the result in the circumstances in which it is a criminal offense, it ought to be shown that he was at fault with respect to each of these elements. The question with which I am concerned today is the nature of this fault. Is the test of liability to be subjective or objective?

By a subjective test I mean that, where the definition of the crime requires a result, the defendant may not be held liable unless it is proved that at the time of his act he knew or foresaw that the result would or might be caused by his act. Where the definition includes a circumstance, under the subjective test the defend-

* This article was prepared from the Donald A. Giannella Memorial Lecture of the Villanova University School of Law, April 16, 1982.

† Professor and Head of the Department of Law, University of Nottingham. B.A., 1949; LL.B., 1950; M.A., 1954; LL.D., 1975, University of Cambridge. Queen's Counsel, 1979; Fellow of the British Academy, 1973.

1. See Criminal Damage Act, 1971, ch. 48, § 1(1). Section 1(1) provides that "[a] person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property should be destroyed or damaged shall be guilty of an offence." *Id.*

ant may not be held liable unless it is proved that he knew at the time of his act that the circumstance would or might exist.

By an objective test I mean that the defendant may be held liable where it is proved that he ought to have known or foreseen that the result would or might be caused, and that he ought to have known that the circumstance existed or might exist. Under this test, it does not matter if the particular defendant, in fact, did not know these things; it is sufficient that a reasonable and prudent man would have known them.

DEFINITION-CIRCUMSTANCES AND RESULT-CIRCUMSTANCES

It is necessary to distinguish circumstances which are included in the definition of a crime from circumstances which are, in the particular case, a necessary condition of the occurrence of the forbidden result. If a circumstance of the latter kind is not present when the defendant acts, the result will not occur. I will call the first class "definition-circumstances" and the second class "result-circumstances."² In the offense of criminal damage, for instance, the fact that the property that was damaged belonged to another is a definition-circumstance. Other examples of definition-circumstances are, in bigamy, the fact that the defendant was, at the time of the ceremony, a married person,³ and in the offense of assaulting a police officer in the execution of his duty, the fact that the person assaulted was a police officer engaged in the execution of his duty.⁴ In both examples, the definition of the offense requires proof of these circumstances. On the other hand, in the case of murder by shooting, the circumstance that the gun was loaded when the defendant pressed the trigger is a result-circumstance. If this circumstance does not exist, the result of killing, which is included in the definition of the crime, will not occur. There is

2. See Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422 (1957) (where the same distinction was made but the categories were designated "pure circumstances" and "consequential circumstances," respectively).

3. Offences against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 57. This section defines bigamy as follows:

Whosoever, *being married*, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to [imprisonment] for any term not exceeding seven years.

Id. (emphasis added).

4. Police Act, 1964, ch. 48, § 51. This section provides that "[a]ny person who assaults a constable in the execution of his duty, shall be guilty of an offence." *Id.*

no reference in the definition of murder to a loaded gun, but it happens that, in the particular case, the existence of that circumstance, when the trigger is pressed, is a condition precedent to the commission of the crime.

In the late nineteenth century, the relationship between knowledge of the existence of result-circumstances and foresight of results was considered by Oliver Wendell Holmes in *The Common Law*,⁵ which has had a profound effect on the law in England and elsewhere. In this work, Holmes discussed Stephen's well-known definition of "malice aforethought," the mental element in murder, which required "knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person" ⁶ Holmes pointed out that knowledge that the act will probably cause death is the same thing as foresight of the result of that act.⁷ He then observed:

What is foresight of consequences? It is a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in the relation of effect to cause. . . . If the *known* present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, *knowing the present state of things*, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.⁸

The test of foresight of consequences (or results), according to Holmes, is objective.⁹ The question is, would a man of reasonable prudence have foreseen the result in question? But the knowledge of the circumstances to be attributed to the man of reasonable prudence is that knowledge actually possessed by the defendant. Thus, the test of knowledge of result-circumstances is

5. O. W. HOLMES, *THE COMMON LAW* 53-54 (1881). For a fuller discussion of Holmes's views on this question, see Smith, *Intention in Criminal Law*, 27 *CURRENT LEGAL PROBS.* 93 (1974).

6. J. F. STEPHEN, *A DIGEST OF THE CRIMINAL LAW* 212 (L. F. Sturge 9th ed. 1950).

7. O. W. HOLMES, *supra* note 5, at 53.

8. *Id.* at 53-54 (emphasis added).

9. For a discussion of a modern application of this test, see text accompanying notes 53-61 *infra*.

subjective. Murder by shooting provides a useful example. In such a crime we must inquire whether the defendant actually knew that the gun was, or might be, loaded. So too for any other circumstances upon which the result, killing, depends. In addition, we must then ask whether a man of reasonable prudence, knowing what the defendant knew, would have foreseen that death would or might result. It is immaterial whether the defendant so foresaw or not.

It was this objective theory which was embraced by the House of Lords in *Director of Public Prosecutions v. Smith*.¹⁰ In this case, Jim Smith was driving a car in which there was stolen property. In the normal course of traffic control, a police officer stopped Smith. Another officer came to the window of the car and saw what he rightly suspected to be stolen goods in the back. He told Smith to pull over to the curb. Smith did so and the constable walked beside the car. Smith then suddenly accelerated down an adjoining road. The constable managed to hang onto the car for a time, but eventually was thrown off into the path of an oncoming car and was killed. At his trial for murder, Smith said that his only thought was to get away and that he had no intention of killing, or causing serious injury to the constable. The trial judge, Donovan, directed the jury, "[i]f you are satisfied that . . . he must, as a reasonable man, have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder."¹¹ The Court of Criminal Appeal quashed his conviction for capital murder and substituted a verdict of manslaughter.¹² In their opinion, the judge had wrongly applied an objective test—that of the reasonable man. The real question was whether Jim Smith, in the ten seconds or so during which the entire episode occurred, realized that what he was doing was likely to cause grievous bodily harm.¹³ The House of Lords restored the conviction.¹⁴ In a unanimous judgment, they stated that the "true principle" was that set out by Holmes in *The Common Law*,¹⁵ and they concluded that the trial

10. 1961 A.C. 290, *affirming*, [1960] 2 All E.R. 451.

11. *Id.* at 291.

12. *Id.* at 303.

13. *Id.* at 302.

14. *Id.* at 335-36.

15. *Id.* at 327. For a quotation of the passage by Holmes which was specifically cited by Viscount Kilmuir, see text accompanying note 8 *supra*.

judge had complied with it.¹⁶ While the trial judge had used a subjective test in his instructions to the jury regarding the defendant's knowledge of the circumstances and the nature of the acts done to the constable,¹⁷ he used an objective test, like that set forth in *The Common Law* and in numerous cases cited by the House of Lords,¹⁸ in his instructions regarding the defendant's foresight of the harm that was likely to occur.¹⁹ The House of Lords held that the test of foresight of grievous bodily harm thereafter to be applied was emphatically and wholly objective. As Viscount Kilmuir observed:

[I]t matters not what the accused contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result.²⁰

The decision provoked a storm of criticism²¹ and even led the High Court of Australia to declare that it could no longer regard decisions of the House of Lords as binding.²²

DEFINITION-CIRCUMSTANCES

I now turn to "definition-circumstances." Paradoxically, the traditional view has been that an objective test is to be applied to these. The principal authority relied on here is the 1889 decision of the majority of the Court for Crown Cases Reserved, and, particularly, the judgment of Mr. Justice Stephen, in *Regina v. Tol-*

16. 1961 A.C. at 327.

17. *Id.* at 330-31. Specifically, the judge asked the jury: "[T]o consider what were the exact circumstances at the time as known to the respondent and what were the unlawful and voluntary acts which he did towards the police officer." *Id.*

18. *Id.* at 327-30, citing *Director of Public Prosecutions v. Beard*, 1920 A.C. 479; *Regina v. Ward*, [1956] 1 Q.B. 351; *Rex v. Philpot*, 7 Crim. App. 140 (1912); *Rex v. Lumley*, 22 Cox C.C. 635 (1911); *Regina v. Faulkner*, 13 Cox C.C. 550 (1877).

19. 1961 A.C. at 331.

20. *Id.* at 327.

21. See articles cited in J.C. SMITH & B. HOGAN, *CRIMINAL LAW* 290 n.19 (4th ed. 1978).

22. *Parker v. The Queen*, 111 C.L.R. 610, 632-33 (Austl. 1963), *rev'd on other grounds*, 111 C.L.R. 665 (P.C. 1964). See also *Australia and the House of Lords—Parker v. The Queen*, 1963 CRIM. L. REV. 675.

son,²³ that the defendant was not guilty of bigamy because, at the time of her second marriage she believed, on reasonable grounds, that her husband was dead. In reaching this conclusion, Mr. Justice Stephen observed:

I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith *and on reasonable grounds* believed to exist when he did the act alleged to be an offence.

I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.²⁴

Tolson has ever since been the leading authority for the proposition that a mistake as to a fact in the definition of the crime is a defense only if it is a mistake which a reasonable man might have made.

Thus, according to the accepted theory at the time of *Director of Public Prosecutions v. Smith*, the courts were required to apply

- 1) a subjective test to result-circumstances;
- 2) an objective test to foresight of results; and
- 3) an objective test to definition-circumstances.

THE TREND TO SUBJECTIVISM

The next fifteen years saw a steady, though not uninterrupted, movement towards the application of a subjective test to both the foresight of results and definition-circumstances, a trend which I attempted to describe in a lecture to the Canadian Institute of Advanced Legal Studies.²⁵ Scarcely had I delivered that lecture than the trend began to be reversed and there is now a movement, not only in the courts but also among academic lawyers, back to objectivity.

Let me first discuss the landmarks in the movement to subjectivity. This movement began as a response to the much criticized *Director of Public Prosecutions v. Smith*.²⁶ This decision was referred to the Law Commission, the body charged with the

23. [1889] 23 Q.B.D. 168.

24. *Id.* at 188.

25. Smith, *The Trend To Subjectivism in English Criminal Law*, THE CAMBRIDGE LECTURES 176 (D. Mendes da Costa ed. 1980).

26. For a discussion of *Director of Public Prosecutions v. Smith*, see text accompanying notes 10-22 *supra*.

duty of making proposals for the reform of the law of England. As a result of their recommendation,²⁷ Parliament enacted section 8 of the Criminal Justice Act of 1967,²⁸ which was intended to reverse the effect of *Director of Public Prosecutions v. Smith*. Section 8 provides:

A court or jury, in determining whether a person has committed an offence,—

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.²⁹

Consequently, under section 8, when a question of intention or foresight is in issue a subjective test must be applied, not only to the defendant's knowledge of result-circumstances, but also to his foresight of results. Nonetheless, section 8 is necessarily limited in its application. It says nothing about definition-circumstances and therefore as to that aspect of a crime, the common law still operates.

Nor does section 8 say anything about when intention or foresight is required. That is a matter for the definition of the particular offense.³⁰ If the offense is held to be one of absolute liability, requiring no proof of culpability of any kind, or if it is held to be an offense of negligence, then section 8 does not apply. It applies only when it has been determined that intention or foresight with respect to some particular result must be proved. The effectiveness of this section, therefore, depends on how the substantive law is interpreted.

It appears that English law was at that time moving toward a position in which intention to cause, or at least foresight of, the results included in the definition of the crime was a necessary condition of liability in the case of most serious offenses. In our

27. LAW COMMISSION, IMPUTED CRIMINAL INTENT (DIRECTOR OF PUBLIC PROSECUTIONS V. SMITH), No. 10 (1967).

28. Criminal Justice Act, 1967, ch. 80, § 8.

29. *Id.*

30. See J.C. SMITH & B. HOGAN, *supra* note 21, at 69-72. See also *Director of Public Prosecutions v. Majewski*, [1976] 2 All E.R. 142, 151, 170.

somewhat antiquated Offences Against the Person Act of 1861,³¹ most of the offenses must be committed "maliciously";³² and by 1957, that word had acquired a technical meaning. In *Regina v. Cunningham*,³³ it was held that "malice" meant:

[E]ither (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require, any ill-will towards the person injured.³⁴

In 1971, Parliament, on the recommendation of the Law Commission,³⁵ enacted the Criminal Damage Act,³⁶ repealing the Act of 1861. This greatly simplified the previous law. The archaic term, "maliciously" was replaced by the modern terminology of "intending to" or "being reckless as to whether."³⁷ However, the Law Commission, as its report makes plain, did not intend to effect any substantive change in the law; it was simply inviting Parliament to adopt the law as stated in *Cunningham* and to put it into modern language.³⁸ Parliament, if its members had

31. See Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100.

32. See *id.* §§ 23-24.

33. [1957] 2 Q.B. 396.

34. *Id.* at 399-400, quoting C. KENNY, OUTLINES OF CRIMINAL LAW (16th ed. 1952).

35. LAW COMMISSION, CRIMINAL LAW REPORT ON OFFENCES OF DAMAGE TO PROPERTY, No. 29 (1970) [hereinafter cited as LAW COMMISSION REPORT].

36. For the relevant text of the Criminal Damage Act, see note 1 *supra*.

37. *Id.*

38. LAW COMMISSION REPORT, *supra* note 35, at ¶ 44. In its discussion of the mental element, the Law Commission observed:

In the area of serious crime (in contrast to offences commonly described as "regulatory offences" in which the test of culpability may be negligence, or even a test founded on strict liability) the elements of intention, knowledge or recklessness have always been required as a basis of liability. The tendency is to extend this basis to a wider range of offences and to limit the area of offences where a lesser mental element is required. We consider, therefore, that the same elements as are required at present should be retained, but that they should be expressed with greater simplicity and clarity. In particular, we prefer to avoid the use of such a word as "maliciously," if only because it gives the impression that the mental element differs from that which is imposed in other offences requiring traditional *mens rea*. It is evident from such cases as *R. v. Cunningham* and *R. v. Mowatt* that the word can give rise to difficulties in interpretation.

Id. (citations omitted).

read the report on which the bill was based, must be presumed to have had the same intention. In a series of cases, the Court of Appeal construed "recklessly" to require foresight of the particular result proscribed.³⁹ This concept of recklessness is substantially the same as that to be found in the American Model Penal Code which states that a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk."⁴⁰ When rape was defined by statute for the first time in the Sexual Offences (Amendment) Act of 1976,⁴¹ the *mens rea* specified was knowledge that the woman did not consent or recklessness as to whether she consented to the intercourse. In 1980 the Criminal Law Revision Committee made recommendations⁴² for reform of the whole law of offenses against the person which would generally require recklessness and which would define recklessness to require foresight of consequences. Accordingly, so far as serious crime was concerned, we seemed well on the way to the adoption of a general theory of subjective liability.

There has been no legislation corresponding to Section 8 of the Criminal Justice Act of 1967 in relation to definition-circumstances. It seemed, however, that the decision of the House of Lords in *Director of Public Prosecutions v. Morgan*⁴³ did for definition-circumstances what section 8 had done for results. In *Morgan*, the defendant invited three friends to have sexual intercourse with his wife, telling them that she would like them to do so and ignore any show of resistance because this was merely to add to her pleasure. The three men had intercourse with Mrs. Morgan who did not in fact consent. They were charged with rape and Morgan was charged with aiding and abetting them.⁴⁴

39. See Briggs, 63 Crim. App. 215 (1976) (quashing the trial court's conviction of a man under the Criminal Damage Act of 1861, for using an objective test in instructing the jury on the defendant's state of mind); Parker, 63 Crim. App. 211 (1976); Regina v. Stephenson, [1979] 1 Q.B. 695. For a discussion of *Parker* and *Stephenson*, see text accompanying notes 53-56 & 106-10 *infra*.

40. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).

41. Sexual Offences (Amendment) Act, 1976, ch. 82, § 1. This section provides that a man commits rape if "(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it" *Id.* For a discussion of this act, see J.C. SMITH & B. HOGAN, *supra* note 21, at 400.

42. CRIMINAL LAW REVISION COMMITTEE, OFFENCES AGAINST THE PERSON, FOURTEENTH REPORT, CMND 7844 (1980).

43. 1976 A.C. 182.

44. *Id.* at 185.

The trial judge directed the jury:

Further, the prosecution have to prove that each defendant intended to have sexual intercourse with this woman without her consent. Not merely that he intended to have intercourse with her but that he intended to have intercourse without her consent. Therefore if the defendant believed or may have believed that Mrs. Morgan consented to him having sexual intercourse with her, then there would be no such intent in his mind and he would be not guilty of the offence of rape, but such a belief must be honestly held by the defendant in the first place. He must really believe that. And, secondly, his belief must be a reasonable belief; such a belief as a reasonable man would entertain if he applied his mind and thought about the matter.⁴⁵

Thus the judge told the jury: 1) that they could not convict unless they were satisfied that the defendant intended to have intercourse with a woman without her consent; but 2) they could convict if they found that the defendant believed, without reasonable grounds, that the woman was consenting.

In the House of Lords, counsel for both sides agreed that these propositions were "wholly irreconcilable." Counsel for the defendants argued that the first proposition was correct and the second wrong; whereas counsel for the Crown said that the second proposition was the correct one.⁴⁶ The direction, as Lord Cross pointed out, presented the jury with "two incompatible alternatives."⁴⁷ The majority of the House held that the first proposition was correct; and, as Lord Hailsham said, once it was accepted that the *mens rea* was an intention to commit nonconsensual intercourse, it followed, "as a matter of inexorable logic" that the prosecution failed if it did not prove that intention.⁴⁸ A genuine belief that the woman was consenting, even if unreasonable, was inconsistent with such an intention and an answer to the charge. It should be noted, however, that notwithstanding the misdirection, the convictions of rape were upheld. The evidence established beyond a doubt that the defendants knew Mrs. Morgan was not consenting.⁴⁹

45. *Id.* at 187.

46. *Id.* at 200-01.

47. *Id.* at 203.

48. *Id.* at 204.

49. *Id.* at 214.

Morgan did not overrule *Tolson*,⁵⁰ the bigamy case. Lord Hailsham stated that he viewed *Tolson* as "a narrow decision based on the construction of a statute, which prima facie seemed to make an absolute statutory offence."⁵¹ Lords Cross and Fraser expressed similar views on *Tolson*.⁵²

Thus, by 1976, subjectivism appeared to have triumphed. Section 8 of the Criminal Justice Act of 1967 had established a subjective test for foresight of results; *Morgan* had established a subjective test with respect to definition-circumstances when the fault element extended to them; and the courts' interpretation of "maliciously" and "recklessly" had apparently ensured that generally the law did require that the defendant himself foresee the consequences of his acts and know the possible existence of circumstances. It now appears that the triumph may have been short-lived. Each of these three pillars of the subjectivist trend has been shaken in some degree by their interpretation in recent cases.

DOES THE HOLMESIAN THEORY OF FORESIGHT LIVE ON?

It appeared to me that Section 8 of the Criminal Justice Act of 1967 must have put an end to Holmes' theory in English law. Nonetheless, Holmes' theory persists in England today. In *Parker*,⁵³ the defendant, frustrated by his inability to make a telephone call, slammed the receiver of a public telephone down with such force that he smashed it. He was charged with recklessly causing criminal damage. He said it never occurred to him that he might damage the telephone. He was convicted on a direction by the trial judge that a reckless act is one done "without thought for the consequence[s],"⁵⁴ and his conviction was upheld. The Court of Appeal pointed out that he was fully aware of all the circumstances: that he was handling a receiver made of breakable material, that the cradle was made out of similar material, and that he was aware of the degree of force he was using. In those circumstances if he did not know there was some risk of damage, he was "deliberately closing his mind to the obvious."⁵⁵ I have great difficulty with the last proposition. A person cannot de-

50. For a discussion of *Tolson*, see notes 23-24 and accompanying text *supra*.

51. 1976 A.C. at 215.

52. *Id.* at 202, 238.

53. 63 Crim. App. 211 (1976).

54. *Id.* at 214.

55. *Id.*

liberately close his mind to the existence of a risk unless he knows the risk exists and that, of course, was what Parker denied. Passing over that difficulty, we are left with the apparent holding that, because he knew of the relevant result-circumstances—the fragility of the material and the degree of force used—he must be held to have foreseen the result. This holding seems to resurrect the Holmesian theory. Surprisingly, this aspect of *Parker* has received support from an advocate of the subjectivist theory of criminal liability—Professor Glanville Williams. In 1978 he wrote:

It is impossible to believe that Parker did not know the risk of damaging it [the receiver]. It is a misunderstanding of the legal requirement to suppose that this knowledge of risk must be a matter of conscious awareness at the moment of the act. We grow up in a world in which we come to know, from the earliest age, that things are broken by rough treatment. Some things are more resistant than others: one could, in a temper, kick a farm tractor or the wheel of a lorry without doing damage. But is there anyone who does not know that a telephone receiver can be damaged by being violently slammed down? The fact that it is slammed down because of a feeling of frustration is nothing to the purpose.⁵⁶

Professor Williams' opinion seems scarcely distinguishable from the Holmesian concept of foresight of consequences.⁵⁷ If it is right, it is difficult to see what all the fuss over *Director of Public Prosecutions v. Smith*,⁵⁸ was about—and Williams was one of its most severe critics.⁵⁹ When Jim Smith was sitting quietly in his armchair at home, he was no doubt well aware that, if he drove off in a car at high speed on a busy street with a policeman clinging to the hood, there was at least a high probability that the policeman would suffer serious injury or death. There was no evidence to suggest that Mr. Smith differed from any other reasonable man in this respect. The Court of Appeal, when quashing his conviction, thought that the relevant question was as to the state of mind of the defendant during the ten seconds or so during

56. G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 79 (1978); see also Williams, *Recklessness Redefined*, 40 CAMBRIDGE L.J. 252, 260 (1981).

57. See notes 5-9 and accompanying text *supra*.

58. For a discussion of *Director of Public Prosecutions v. Smith*, see notes 10-22 and accompanying text *supra*.

59. See, e.g., G. WILLIAMS, CRIMINAL LAW 94-95 (2d ed. 1961); Williams, *Constructive Malice Revived*, 23 MODERN L. REV. (1960).

which the whole incident took place.⁶⁰ If they were wrong, the criticism of the House of Lords was unfounded. It is submitted, however, that the Court of Appeal was right and that this opinion has been confirmed by section 8 of the Criminal Justice Act of 1967. Section 8 requires the court or jury to consider whether the defendant, under the circumstances in which the event took place, actually foresaw the event, not whether he *would have* foreseen it had he been sitting quietly at home.⁶¹

The comment made by Professor Williams in the passage quoted would, in my opinion, undermine the whole of the subjectivist's position. If we are to inquire whether the defendant would have foreseen the result had he not been in a state of frustration or anger, ought we not similarly to discount the fact that the defendant was distracted by worry, anxiety, excitement or that he was merely absent-minded or in a panic? On what principle would we distinguish between one emotion and another and how in practice could a court or jury make such distinctions? If the defendant did not foresee in fact, he can be held liable for a crime requiring foresight only by a fiction, through a "constructive crime," of the kind of which the law, in modern times, has been slowly ridding itself.

If Professor Williams' opinion prevails, the reform effected by Section 8 of the Criminal Justice Act will be largely stultified and we will have reverted to the law at the time of *Director of Public Prosecutions v. Smith*, or something very close to it.

MORGAN: DOES IT APPLY TO CRIMES OTHER THAN RAPE?

Apparently alarmed by the boldness of the decision in *Morgan*,⁶² the courts have tended to limit its effect to the law of rape and to state that it lays down no general principle. *Tolson*, far from being reduced to the status of a narrow decision on the construction of a statute, is tending to reemerge as the authority on general principle. The first hint of this came in 1980 with the decision of *Barrett and Barrett*.⁶³

60. 1961 A.C. at 302. Counsel argued, "[p]anic is no defence. It does not go to intent." *Id.* at 297. The Court of Appeal, however, seems to have disagreed.

61. For the relevant passages of section 8, see text accompanying note 29 *supra*.

62. For a discussion of *Morgan*, see text accompanying notes 43-52 *supra*. See also Cowley, *The Retreat from Morgan*, 1982 CRIM. L. REV 198.

63. 72 Crim. App. 212 (1981).

In that case, the defendants were convicted of assault occasioning actual bodily harm. Certain bailiffs were executing a warrant to take possession of a house which belonged to Alan Barrett and which had been sold pursuant to a court order. The defendants used force in repelling the bailiffs. Although they were aware of the court order, they believed that it had been obtained by fraud, that the bailiffs were trespassers, and that, accordingly, they were entitled to use force. The court rejected this defense stating that a losing party in litigation is not "entitled to snap his fingers at the due processes of law just because he is sure that his view is right and the Courts, the judges and everybody else are wrong."⁶⁴ In rejecting the defendants' arguments based on *Tolson*⁶⁵ the court explained that:

The case of *Tolson* and the cases preceding and following *Tolson* correctly affirm the principle that an honest belief in a certain state of things does afford a defence, including an honest though mistaken belief about legal rights. But those cases were never intended to extend and do not extend, to the situation where the rights in question have been the subject of litigation between the parties and a court of competent jurisdiction has stated what the rights are, but the losing party simply refuses, through honest obstinacy, to accept the order of the court.⁶⁶

It is noteworthy that the court referred to an honest belief, not an honest and reasonable belief. The defendants also relied on *Morgan*, but the court observed:

Although we recognise that as a matter of strict logic there is no reason why a logician should not take the view that the principle expressed in the context of the law of rape should equally apply in the field of honest mistake as to civil rights as a defence to a charge of assault, in our view that would be developing the principles applied in their Lordship's House to rape to a quite different branch of the law in a way which is not justified and which is wholly inconsistent with the law as previously understood on this subject.⁶⁷

64. *Id.* at 216.

65. For a discussion of *Tolson*, see notes 23-24 and accompanying text *supra*.

66. 72 Crim. App. at 216 (citations omitted).

67. *Id.*

Considerations of policy no doubt influenced the *Barrett* court to reject the defense advanced in that case. The bailiffs were in fact acting lawfully under a court order and should not so lightly be deprived of the protection of the criminal law. The *ratio decidendi* is probably confined to the case where the defendant does not accept the validity of a court order. His mistake is one of law. If the defendants had mistakenly believed that the men were not bailiffs at all, but imposters, or that they were bailiffs, but the court had made no order, then it would be a different case and, in principle, the defendants ought to have had a defense. They were entitled to use force to repel trespassers and, on the facts as the defendants believed them to be, the bailiffs were trespassers.

Barrett, though containing a disturbing hint that the operation of the principle in *Morgan* is limited to rape, did not actually decide anything incompatible with the principle of that case being one of general application. The same cannot be said, however, of *Phekoo*,⁶⁸ where the Court of Appeal, in a considered obiter dictum, stated that *Morgan* is confined to rape.⁶⁹ In *Phekoo*, the defendant was charged under the Protection from Eviction Act of 1977 with doing certain acts "with intent to cause the residential occupier to give up occupation of those premises."⁷⁰ The two men in occupation of the premises were in fact residential occupiers so the defendant caused the *actus reus* of the crime. His counsel submitted that the defendant had a defense if he believed they were not residential occupiers but squatters. The prosecution contended that, notwithstanding the use of the words "with intent", such a belief was no defense.⁷¹ Courts have sometimes followed reasoning along the following lines:

- 1) A intended to evict B.
- 2) B was a residential occupier.
- 3) Therefore A intended to evict a residential occupier.

The conclusion is, however, fallacious if A did not know B to be a residential occupier. Intention exists in the mind of the defendant. If the defendant believed the occupier to be a squatter,

68. 73 Crim. App. 107 (1981).

69. *Id.* at 116.

70. *Id.* at 108, citing Protection from Eviction Act, 1977, ch. 43, § 1(3).

71. 73 Crim. App. at 115.

it was simply untrue to say that he intended to evict a residential occupier. The distinction is crucial. The eviction of a squatter by the means envisaged was not unlawful. An intention to so evict a squatter was not a criminal intention. The court properly rejected the prosecution's argument on this point and held that "guilty intent does, or ought, when the issue is raised, to comprise proof of intent to harass someone who is known or believed by the offender to be a person who, in effect, is not just a 'squatter.'" ⁷² The court went on, however, to say that "there must be a reasonable basis for the asserted belief." ⁷³

These two statements seem to pose precisely the same incompatible alternatives which the trial judge presented to the jury in *Morgan*. The two propositions cannot stand together. If the second proposition is correct then it is simply not true to say that it must be proved that the defendant knew or believed that the person to be evicted was not just a squatter; it is sufficient that he ought to have known. If the second proposition is correct, a defendant who in fact intends to evict a squatter may, if he had no reasonable grounds for his belief, be held to have had an intention to evict a residential occupier. As the word "intention" is used in the section,⁷⁴ it is submitted that the former of the incompatible alternatives is the proper one and, if so, it follows that the latter is improper.

There were two points in *Morgan*. The first was that the *mens rea* in rape was an intention to have intercourse with a woman without her consent. That aspect of the decision was indeed confined to the law of rape and today has no relevance in English law, being superseded by the Sexual Offences (Amend-

72. *Id.*

73. *Id.* at 117. The court noted that the *Tolson* standard of honest and reasonable belief had been accepted until the decision in *Morgan* which it stated was confined to the offence of rape. *Id.* at 116.

74. *See, e.g.,* Protection from Eviction Act, 1977, ch. 43, § 1(3). The defendant in *Phekoo* was charged with violating this section which provides:

If any person with intent to cause the residential occupier of any premises—

(a) to give up the occupation of the premises or any part thereof;
or

(b) to refrain from exercising any right or pursuing any remedy
in respect of the premises or part thereof;

does acts calculated to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence.

Id.

ment) Act of 1976.⁷⁵ The second point was that any mistake, whether reasonable or not, which was inconsistent with the existence of the necessary intention, must be an answer to the charge. This, as Lord Hailsham said, was a requirement "of inexorable logic," and inexorable logic must be of universal application.⁷⁶ If a rule of law leads to only one logical conclusion, then either that conclusion must be reached, or the rule of law must be modified. Otherwise, a judge directing a jury will be required to put before them two incompatible alternatives and surely the law can never admit that. There may, of course, be cases in which the law does and should say that only a reasonable mistake will excuse. Yet, in such cases the crime, by definition, is not one requiring proof of intention; rather it is one which may be committed negligently.

MORGAN AND DEFENSES

In *Morgan*,⁷⁷ the defense was a simple denial of the prosecution's case. By charging rape, the prosecution alleged that the defendant had intercourse with a woman who did not consent, and that he knew that she did not consent or that he was reckless as to whether she did not consent. The defendants denied the knowledge or recklessness alleged.

There is another type of defense where the defendant admits the allegations made by the prosecution but goes on to set up further facts which, in law, excuse or justify his action. For example, a defendant charged with an assault causing bodily harm may admit that he intentionally caused the bodily harm in question, but assert that he did so to repel an unlawful attack made upon him by the alleged victim of the assault. In the language of civil pleadings, he confesses and avoids. Suppose he believes that he is the victim of an attack but his belief is mistaken. He is not being attacked at all. His mistake is not about how much force the law permits, which is a different question, but simply one of fact. If he had reasonable grounds for that mistaken belief, then it is clear that he has a good defense to the charge. Suppose, however, that the belief, though honest, was unreasonable. Does *Morgan* apply so as to provide a defense? There are dicta in that case which suggest that it does not and, certainly, there is no logical

75. See J.C. SMITH & B. HOGAN, *supra* note 21, at 400.

76. For Lord Hailsham's statement, see text accompanying note 48 *supra*.

77. For a discussion of *Morgan*, see text accompanying notes 43-52 *supra*.

necessity for it to do so.⁷⁸ To require reasonable grounds for the defendant's belief would not involve putting inconsistent propositions before a jury unless some broader requirement of *mens rea* than an intention to use force has previously been accepted. Thus, if it were to be held that the *mens rea* of assault is an intention to use *unlawful force* (a not unreasonable proposition) the inconsistency would again arise.

In 1980, the Divisional Court of the Queen's Bench Division held in *Albert v. Lavin*⁷⁹ that they were bound by authority to hold that an unreasonable belief in facts which would have justified force in self-defense was no defense.⁸⁰ The defendant, unreasonably, but perhaps honestly, refused to believe that the person arresting him was a policeman and forcibly resisted arrest.⁸¹ The case was decided on the assumption (subsequently held to be unfounded)⁸² that the arrest would have been unlawful and the defendant would have been entitled to resist, if the person making the arrest had not been a policeman.⁸³ The court distinguished⁸⁴ between a mistake as to the "definitional elements" of the offense (as in *Morgan*), which need not be reasonable, and a mistake as to the elements of a defense (such as self-defense) which must be reasonable.⁸⁵ Thus, if a defendant were relying on the defense of duress or compulsion, his belief that his own life was threatened if he did not commit the crime could not found a defense if the belief were unreasonable, however convinced the defendant might in fact be as to the dangerousness of his circumstances. This opinion has subsequently received support in *dictum* from the Court of Appeal in *Graham*,⁸⁶ a case involving duress. In *Albert*, the court recognised the anomalous nature of the distinction they felt bound to apply. Mr. Justice Hodgson stated:

78. See 1976 A.C. at 211-12.

79. 72 Crim. App. 178 (1980), *aff'd on other grounds*, [1981] 3 All E.R. 878.

80. *Id.* at 183, 191.

81. *Id.* at 181-82.

82. *Id.* at 190-91.

83. *Id.* at 183.

84. *Id.* at 189-90.

85. *Id.* at 188.

86. 74 Crim. App. 235 (1981). The defendant in *Graham*, who helped his homosexual lover kill the defendant's wife, claimed duress as a defense. In refuting the defense, the court stated:

As a matter of public policy, it seems to us essential to limit the defence of duress by means of an objective criterion formulated in terms of reasonableness. . . . The law requires a defendant to have

And no matter how strange it may seem that a defendant charged with assault can escape conviction if he shows that he mistakenly but unreasonably thought his victim was consenting but not if he was in the same state of mind as to whether his victim had a right to detain him, that in my judgment, is the law.⁸⁷

Lord Justice Donaldson, agreeing, added: "However, an ill-founded but completely honest and genuine belief removes all or much of the culpability involved in the offence. It therefore provides powerful mitigation and in an appropriate case would justify a court granting an absolute discharge."⁸⁸

Of course it must be and is open to a legislature to provide that belief can found a defense only if it is based on reasonable grounds if it considers that policy so requires. In the absence of any declared legislative policy, courts may also so hold. The effect of so limiting such a defense would be, however, to convict the defendant because of his negligence—failure to take sufficient care to ascertain that facts existed which would justify his actions. If the offense with which he is charged is not one which can be committed negligently, such as assault, it is strange that the defendant should be liable when his only real fault is negligence. The better view is that the subjective principle should apply to the definitional elements of a defense just as it does to the definitional elements of a crime.

THE REINTERPRETATION OF RECKLESSNESS

The most severe blow to the subjectivist standpoint has come from the reinterpretation of the concept of recklessness. Decisions in the Court of Appeal had settled, apparently firmly, that the subjective standard was to be applied in the sense proposed by the authors of the American Model Penal Code and the English Law Commission. This standard required proof of the conscious taking of an unjustifiable risk.⁸⁹ The House of Lords had not pronounced on this matter until March 19, 1981, when their

the self-control reasonably to be expected of the ordinary citizen in his situation.

Id. at 241.

87. 72 Crim. App. at 190.

88. *Id.* at 191.

89. For the relevant Court of Appeal opinions and Model Penal Code provisions, see notes 39-40 and accompanying text *supra*.

Lordships delivered judgment in two cases, *Regina v. Caldwell*,⁹⁰ a case under the Criminal Damage Act of 1971,⁹¹ and *Regina v. Lawrence*,⁹² a case of reckless driving.

Caldwell had been doing work for the proprietor of a residential hotel. One night, when very drunk, he took revenge on the proprietor, against whom he had a grievance, by breaking a window of the hotel and starting a fire in a ground floor room. There were some ten guests staying in the hotel. Fortunately, the fire was quickly discovered and put out before any serious damage was done and no one was injured.⁹³ Caldwell was charged in two counts.⁹⁴ He pleaded guilty to the first count brought under section 1(1) of the Criminal Damage Act;⁹⁵ he was charged with causing damage to property belonging to another, intending to damage such property or being reckless as to whether such property would be damaged. To the second, more serious count, Caldwell pleaded not guilty.⁹⁶ This count was brought under section 1(2) of the same Act⁹⁷ and charged him with causing damage to property belonging to another intending by the damage to endanger the life of another or being reckless as to whether the life of another would thereby be endangered. Caldwell claimed that it never crossed his mind that there might be people in the hotel whose lives might be endangered. He relied upon

90. 73 Crim. App. 13 (1981).

91. For the text of section 1(1) of this Act, see note 1 *supra*.

92. 73 Crim. App. 1 (1981). For criticism of the discussion in *Caldwell* and *Lawrence*, see Griew, *Recklessness Damage and Reckless Driving: Living with Caldwell and Lawrence*, 1981 CRIM. L. REV. 743; Leigh & Temkin, *Notes of Cases: Recklessness Revisited*, 45 MODERN L. REV. 198 (1982); Smith, *Commentary: R. v. Caldwell*, 1981 CRIM. L. REV. 393; Smith, *Commentary: R. v. Lawrence*, 1981 CRIM. L. REV. 410; Wells, *Swatting the Subjectivist Bug*, 1982; CRIM. L. REV. 209; Williams, *Recklessness Redefined*, *supra* note 56, at 252.

93. 73 Crim. App. at 15.

94. *Id.* at 15-16.

95. For the text of section 1(1) of the Criminal Damage Act, see note 1 *supra*.

96. 73 Crim. App. at 16.

97. Criminal Damage Act, 1971, ch. 48, § 1(2). This subsection provides: A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

- (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
- (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

Id.

his self-induced drunkenness to support his otherwise implausible story that he did not realize that there was a risk to life.⁹⁸ The argument in the lower courts revolved around the effect of drunkenness and the question which was certified for the decision of the House was whether evidence of self-induced intoxication can be relevant to the questions of whether the defendant intended to endanger the life of another or whether he was reckless, whether the life of another would be endangered.⁹⁹ This, in effect, invited the House to decide whether section 1(2) of the Act created an offense of "specific intent," in which case an intoxicated mistake might be a defense or an offense of "basic" or "general intent," in which case it could not.¹⁰⁰ The House, however, chose to decide the case on a different basis, which did not involve any special rules relating to intoxication. They adopted a new and extended definition of recklessness which enabled them to say that Caldwell was reckless as to whether he was endangering life and was therefore guilty. Lord Diplock, with whom two Law Lords concurred, stated that a person is reckless

[If] (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either had not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.¹⁰¹

In the present case, the act done by Caldwell created an obvious risk that life would be endangered. Therefore, by admitting that he never gave any thought to that possibility, he admitted recklessness thus defined. In *Lawrence*, the House went on to apply the same extended concept of recklessness to the offense of reckless driving,¹⁰² and it is clear that the House intended this

98. 73 Crim. App. at 16.

99. *Id.*

100. See J.C. SMITH & B. HOGAN, *supra* note 21, at 184-88.

101. 73 Crim. App. at 20.

102. 73 Crim. App. at 10-12, *citing* Regina v. Caldwell, 73 Crim. App. 13 (1981). The action against Lawrence was brought under the Road Traffic Act, 1972, ch. 20, §§ 1, 2. These sections, as amended by the Criminal Law Act, 1977, § 50, provide:

1. *Causing death by reckless or dangerous driving*

(1) A person who causes the death of another person by driving a motor vehicle on a road recklessly shall be guilty of an offence.

. . . .

concept to be applicable to statutory offenses where the word "reckless" is used, in the absence of an indication to the contrary. The *Caldwell* definition of recklessness departs from those set forth in the Model Penal Code and recommended by the Law Commission in that under it a person may be convicted of recklessness although he is unaware of the existence of the risk, but ought to have known of it. To this extent, it applies an objective test in the sense in which I have defined the term. Section 8 of the Criminal Justice Act of 1967 is by-passed because foresight is not required by the substantive law. The decision does not, however, affect those cases which decided that the word "maliciously" does require foresight of results.¹⁰³ Thus, we must apply a different and more lenient test in the surviving statutes which use the word "maliciously," including the very important Offences against the Person Act. Under *Caldwell*, Parliament is held to have introduced a stricter test in the Criminal Damage Act and other Acts which use the word "recklessly." This was not intended by the Law Commission which framed the Criminal Damage Act¹⁰⁴ and there are no grounds for supposing that it was intended by Parliament. But it is now settled unless altered by legislation.

AN OBVIOUS RISK—OBVIOUS TO WHOM?

Caldwell stated that risk must be an "obvious" one.¹⁰⁵ Yet the question remains, obvious to whom? Is it sufficient that it would have been obvious to a reasonable and prudent man who gave thought to the matter? Or is it necessary that it would have been obvious to the particular defendant had he directed his mind to the question? The judgments in *Caldwell* and *Lawrence* are unfortunately not clear on the matter. The House in *Caldwell* suggests that we have to consider the particular defendant, whereas in *Lawrence*, the House, while purporting to apply the same principles, was evidently looking to the reasonable man. The difference, in my opinion, is likely to be marginal. It would make

2. *Reckless driving*

A person who drives a motor vehicle on a road recklessly shall be guilty of an offence.

Id.

103. For a discussion of the evolution of the word "maliciously" in cases and offenses, see notes 31-38 and accompanying text *supra*.

104. For the Law Commission's intent, see note 38 and accompanying text *supra*.

105. 73 Crim. App. at 20-21.

a difference only in an exceptional case like that of *Stephenson*.¹⁰⁶ The defendant in *Stephenson* was a tramp who sheltered in a hollow in a haystack and, feeling cold, lit a fire in the hollow. The haystack was destroyed by fire.¹⁰⁷ The evidence showed that the tramp was suffering from schizophrenia and because of his condition, he may not have been aware of the risk.¹⁰⁸ The jury which convicted him was instructed that "a man is reckless if he carries out a deliberate act . . . closing his mind to the obvious fact that there was some risk of danger"¹⁰⁹ and further, that one reason a man might close his mind to the obvious fact might be schizophrenia. They were not instructed that the schizophrenia might have prevented the idea of danger entering the appellant's head at all and, because of this omission, his conviction was quashed.¹¹⁰ Under the circumstances, a reasonable man could hardly fail to be aware of the risk, whereas *Stephenson*, even if he had thought about it, might have come to the conclusion that there was no risk. Unless we are dealing with an abnormal person, the answer to the questions of whether a reasonable and prudent man would have been aware of the risk if he had stopped to think and whether the defendant would have been aware of the risk if he had stopped to think will be the same. The very fact that we have to assume that the defendant had thought about the matter removes any significant distinction between him and the reasonable man. Where we all sometimes differ from the reasonable man is in failing to consider whether there is a risk. Such failure may be attributed to a number of internal states, such as fatigue, excitement, anger, anxiety, or absent-mindedness. The hypothesis that the defendant has thought about it removes any distinction, unless he is an abnormal person.

Why did the House of Lords in *Caldwell* take this step? In the first place Lord Diplock thought that there was no difference in culpability between the defendant in *Caldwell* and one who was reckless in the previously accepted sense:

If it had crossed his mind that there was a risk that someone's property might be damaged but, because his mind was affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk or

106. 69 Crim. App. 213 (1979).

107. *Id.* at 215.

108. *Id.* at 216.

109. *Id.* at 214.

110. *Id.* at 220.

trusted that good luck would prevent its happening, this state of mind would amount to malice in the restricted meaning placed upon that term by the Court of Appeal; whereas if, for any of these reasons, he did not even trouble to give his mind to the question whether there was any risk of damaging the property this state of mind would not suffice to make him guilty of an offence under the Malicious Damage Act 1861. Neither state of mind seems to me less blameworthy than the other.¹¹¹

Is it proper to equate the blameworthiness of a person who fails to realize that there is a risk of some harmful consequence with that of one who does realize that there is such a risk and decides to take it? It is submitted that there is a real distinction in degree of blameworthiness between the two cases.

Secondly, Lord Diplock thought that the distinction made by the pre-*Caldwell* law (and the existing law in offenses which may be committed maliciously) "would not be a practicable distinction for use in a trial by jury."¹¹² Lord Diplock said:

The only person who knows what the accused's mental processes were is the accused himself—and probably not even he can recall them accurately when the rage or excitement under which he acted has passed, or he has sobered up if he were under the influence of drink at the relevant time.¹¹³

If Lord Diplock thought that the new test enabled the court to avoid making fine distinctions, he was, with respect, in error. A person who does an act involving an obvious risk of harm may have one of three states of mind: he may be aware of the risk; he may believe that there is no risk; or he may not have considered whether there is a risk. Before *Caldwell*, only the first state of mind amounted to recklessness. The novel element in the decision is that the third state of mind also amounts to recklessness. The second state still does not. The distinction between the second and third states of mind may involve distinctions as fine and subtle as any of which it is possible to conceive.

Since *Caldwell*, the Court of Appeal has applied the principle of that case to rape because the statutory definition of rape also

111. 73 Crim. App. at 17-18.

112. *Id.* at 18.

113. *Id.*

includes the word "reckless": the defendant is guilty if he is reckless whether the woman consented to sexual intercourse.¹¹⁴ Recently, in the case of *Regina v. Pigg*,¹¹⁵ the court said, in dicta, that a man is guilty of rape where the woman was not in fact consenting and there was an obvious risk that she might not be, if the defendant never addressed his mind to the possibility that she might not be consenting.¹¹⁶ Of course, it remains the law that if he actually believed (even unreasonably) that she was consenting he is not guilty of rape. The distinction requires us to envisage a man who both 1) does not consider the possibility that the woman may not be consenting and 2) does not believe that she is consenting. If the man does not consider the possibility that the woman may not be consenting, does it not follow that he believed she was consenting? If it does, the third state of mind does not exist as a separate entity; yet the judge is bound to direct the jury as if it did. Is not this a much more fine and impracticable distinction than anything involved in the pre-*Caldwell* concept of recklessness? The difficulty of looking into the defendant's mind as Lord Diplock recognizes, is inherent in the whole concept of *mens rea*: "[M]ens rea is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the *actus reus* of the offence; it cannot be the mental state of some non-existent, hypothetical person."¹¹⁷

DOES CALDWELL REQUIRE PROOF OF A STATE OF MIND?

While Lord Diplock seems to consider it axiomatic that *mens rea* requires proof of the state of the defendant's mind, it is by no means clear that this is the effect of *Caldwell*. Whether a risk is "obvious" will almost invariably depend on the evidence as to the external circumstances. This is so whether it must be obvious to the defendant, or merely to the reasonable man. Once the obvious risk is proved, it does not matter whether the defendant realized there was a risk and decided to take it or never even considered whether there was a risk. Either way he is guilty. He can escape only if he considered the matter and decided that there was no risk. It seems that the jury will not need to consider this third possibility unless the defendant has introduced some evidence of it.

114. For the definition of rape in the Sexual Offences (Amendment) Act of 1976, see note 41 *supra*.

115. 74 Crim. App. 352 (1982).

116. *Id.* at 362.

117. 73 Crim. App. at 19.

This appears most plainly in *Lawrence*, the reckless driving case, where Lord Diplock stated that

[i]f satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference.¹¹⁸

The only explanation which could displace the inference would seem to be that the defendant had considered whether there was a risk and decided there was none. The passage suggests that there is a burden on the defendant, not to prove this, but to introduce evidence of it. If that is right, and no such evidence is introduced, then the defendant is liable on proof that the risk was an obvious one—an objective question.

To support the subjectivist theory of criminal liability is not to deny that there is a place for offenses where an objective test is justified, as with offenses of negligence. For example, negligence is the appropriate criterion of liability in many regulatory offenses, the very purpose of which is to ensure a high standard of care in the carrying on of certain activities like the sale of food and drugs, where negligence can be extremely harmful to the public. It is in the case of serious crime, where conviction involves a grave stigma and liability to heavy punishment, that an objective standard is inappropriate. Murder, rape and theft are not offenses for which mere negligence should justify conviction. A person who deliberately chooses to bring about a particular harmful event, or who chooses to take an unjustifiable risk of bringing about that event, may properly be held responsible for the event when it occurs. The person who is merely negligent does not choose to bring it about or choose to take a risk of bringing it about. That is a moral difference which justifies drawing the line at this point. Negligence is, of course, by definition, a fault; but not every fault should entail criminal liability. The process of the enforcement of the criminal law is costly and produces much pain. We should have no more criminal law than is absolutely necessary. The onus of proof should be on the objectivist to show that we need criminal liability for negligence.

118. 73 Crim. App. at 11.