Cambridge Law Journal, **72(1)**, March 2013, pp. 155–177
doi:10.1017/S0008197313000056

IT'S ONLY WORDS: ON MEANING AND MENS REA

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ABSTRACT. *In English law, mens rea terms can be defined differently depending on the context. This article attacks this approach, arguing that it pays insufficient attention to the criminal law's twin needs to communicate effective guidance to citizens who wish to avoid punishment, and to control the discretion accorded to the criminal law's institutions. It would be preferable to have clear definitions of mens rea terms applied uniformly across the criminal law. If there are gaps, these ought to be filled by additional mens rea terms. The practical issues raised by this argument are considered briefly.*

KEYWORDS: *Criminal law, mens rea, communication, legality*

I. INTRODUCTION

This article argues for the uniform definition of mens rea terms, such as recklessness and intention, in English criminal law.[1] It will be demonstrated in section II that the English courts have defined these terms in various ways in different circumstances. Section III will then consider a defence of this approach offered by Victor Tadros. This will be attacked from two perspectives in section IV. First, the role of mens rea terms in providing ex ante guidance to citizens hoping to avoid the threat of punishment will be considered. It will be contended that the criminal law's communicative function is compromised when the same words are used in different ways depending on the context. Secondly, it will be suggested that clear, uniform definitions of mens rea terms are required to limit adequately the discretion accorded to criminal justice actors, including trial judges and juries deciding questions of blame.

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[1] The same type of analysis could be applied to the Scottish courts' abject failure to define mens rea terms consistently. On recklessness, see F. Stark, "Rethinking Recklessness" 2011 Juridical Review 163.

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Then, in section V, some practical difficulties emerging from this account will be discussed.

II. Two Examples

This section demonstrates that the English courts have shied away from defining mens rea terms uniformly. The jurisprudence on intention and recklessness will be focussed upon here, as these are the most widely used and discussed fault terms.

A. Intention

In *R. v Woollin*,[2] it was accepted that intention means either acting to bring about a particular result ("direct intention") *or* acting in the face of the acknowledged virtual certainty that a particular result will come about ("indirect intention" or "oblique intention").[3] This definition of intention was not provided in general terms. Lord Steyn was clear that "it does not follow that 'intent' necessarily has precisely the same meaning in every context in the criminal law. The focus of the present appeal is the crime of murder."[4]

This leaves open the possibility that intention might be taken to mean something other than purpose/foresight of virtual certainty in other contexts. Textbook writers thus have to write equivocal sentences such as "English criminal law *consistently, though not invariably*, permits inferences of intent to be drawn with respect to side effects which are the virtually certain outcome of [the defendant's] conduct".[5] Trial judges are similarly cautious: they might have to give the jury directions on intention in the law of murder, whilst leaving the word undefined in relation to counts on the indictment alleging other offences.[6] The conservatism of the House of Lords in *Woollin* leaves room, in short, for inconsistency and uncertainty in English criminal law's understanding of intention.[7] The appellate courts will have to

[2] [1999] 1 A.C. 82.

[3] The House of Lords concluded that intention could be *found* if the defendant acted in the face of acknowledged virtual certainty: *R. v Woollin* [1999] 1 A.C. 82, 96 per Lord Steyn, 97 per Lord Hope. The Court of Appeal had, in *R. v Nedrick* [1986] 1 W.L.R. 1025, talked in terms of *inferring* intention from foresight of virtual certainty (at p. 1028 per Lord Lane C. J.). The distinction is unimportant for present purposes, but see *R. v Matthews and Alleyne* [2003] EWCA Crim 192, [2003] 2 Cr. App. R. 30, at [43]-[46] per Rix L. J.; M. C. Kaveny, "Inferring Intention from Foresight" (2004) 120 L.Q.R. 81 (hereafter Kaveny, "Inferring Intention from Foresight").

[4] At p. 90.

[5] A. P. Simester, J. R. Spencer, G. R. Sullivan and G. J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed. (Oxford 2010), 315 (emphasis added) (hereafter Simester et al, *Criminal Law*).

[6] See e.g. *R. v Rowbotham* [2011] EWCA Crim 433, at [15] (the trial judge's direction on intention was not criticised, but the defendant's appeal was allowed on another ground).

[7] Further difficulties are caused by the fact that the jury *may* find intention where there is foresight of virtual certainty – they are not obliged to do so. See A. W. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd ed. (London 2001), 56–58 (hereafter Norrie, *Crime, Reason and History*).

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confirm whether foresight of a virtual certainty will lead to a permissible inference or finding of intention in relation to each offence,[8] or each area of the law (for instance, attempts).[9]

The legislature has managed to complicate matters further, with the Serious Crime Act 2007 demonstrating how legislation might contain uncertainty over the meaning of intention, leading to guess work on the part of lawyers (and, it must be assumed, bemusement on the part of any laypersons who try to establish what the law is). Section 44 of the Act makes it an offence *intentionally* to encourage or assist an offence. By section 44(2), a defendant is not "to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act". This is consistent with the definition in *Woollin* as the core question in the House of Lords' approach to intention is whether it is virtually certain that a consequence will be brought about and the defendant realised this. Mere foreseeability is not enough.[10] Foresight of a virtual certainty that somebody will be encouraged to commit, or assisted in committing, an offence will, nevertheless, not satisfy the mens rea requirement of section 44.[11] This is because it is a separate offence, under section 45, to encourage or assist an offence *believing* that it *will* (not might) be committed.

Foresight of a virtual certainty that the defendant's conduct will (not might) encourage or assist the commission of an offence is thus presumably not enough to lead to the finding of intention under section 44.[12] In this context, foresight of a virtual certainty that somebody will commit an offence constitutes "belief", and will lead to liability under section 45 (if the defendant believes he will encourage or assist the commission of a certain offence) or section 46 (if he believes a number of offences might be committed, and is sure one will be, but is not sure *which* one).[13] Lawyers might well

[8] See e.g. the discussion of the offence of possession of firearms and ammunition with intent to enable another to thereby endanger life (Firearms Act 1968, s. 16) in *R. v Jones and Others* [1997] 2 W.L.R. 793.

[9] See *R. v Pearman* (1985) 80 Cr. App. R. 259. Here, it was emphasised that the jury could *infer* an intention to commit an offence if there was foresight of virtual certainty. The trial judge's direction was wrong because it *equated* intention with foresight. The status of this decision is unclear following *Woollin*, given the change from "infer" to "find" in the model direction (see n. **3**, above). For discussion of whether, in theory, foresight of a virtual certainty should suffice for intention in the law of attempts, see R. A. Duff, *Criminal Attempts* (Oxford 1996), 369–371.

[10] It is odd to talk about intention being found where a consequence was simply foreseeable. This view of intention was adopted in the law of murder in *D.P.P. v Smith* [1961] A.C. 290, and reversed promptly by legislation (Criminal Justice Act 1967, s. 8).

[11] Strictly, the defendant's mens rea should stretch to some aspects of the eventual crime. See Serious Crime Act 2007, s. 47(5).

[12] This is the view presented in Simester et al, *Criminal Law*, p. 294. There are further problems associated with the 2007 Act's mens rea requirements. See J. J. Child, "Exploring the Mens Rea Requirements of the Serious Crime Act 2007 Assisting and Encouraging Offences" (2012) 76 J. Crim. L. 220.

[13] The line between foresight of virtual certainty and belief is thin in other areas of the law. See *R. v Hall* (1985) 81 Cr. App. R. 260, 264 per Boreham J. For an excellent summary of the doctrinal confusion concerning belief (until 1978), see E. Griew, "Consistency, Communication and

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struggle to grasp these niceties in the definition of intention (law students do!). It is thus doubtful that laypersons, who must (at least in an ideal world) plan their conduct around what the law declares to be wrong, if they wish to avoid the threat of punishment, can understand it.

B. Recklessness

This same analysis can be applied to the case law and legislation on recklessness. Like intention, recklessness continues to mean different things depending on the situation. It is well known that, in *R. v G and Another*,[14] the House of Lords defined recklessness as follows: the defendant must foresee an unjustified risk attendant upon his conduct and go on to take it regardless.[15] In common with Lord Steyn's approach in *Woollin*, Lord Bingham started off his opinion in *G and Another* by noting that he wanted to "make it as plain as I can that I am not addressing the meaning of 'reckless' in any other statutory or common law context".[16] If the context changes, so might the definition of recklessness. Once again, authors are forced into being equivocal: "English law has progressed to the point where there is, *for almost all offences*, now only one test of recklessness".[17]

The courts' approaches to recklessness support this line of thinking. First, where the defendant is acutely, voluntarily intoxicated, he can be "reckless" with regard to a circumstance or consequence, even if he was too drunk to notice the relevant risk at the time of acting.[18] There is no need to inquire into his foresight of risk at the time of becoming intoxicated.[19] All that need be established is that the risk was one that, if the defendant had been sober at the time of acting, he *would have* noticed.[20]

Secondly, juries trying cases of "gross negligence" manslaughter can be told that they may convict if the defendant was "reckless" – so

Codification – Reflections on Two Mens Rea Words" in P. R. Glazebrook (ed.), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London 1978), 57 at pp. 69–75 (hereafter Griew, "Consistency, Communication and Codification").

[14] [2003] UKHL 50, [2004] 1 A.C. 1034.

[15] Based upon *A Criminal Code for England and Wales* (Law Com. No. 177, 1989), cl. 18(c). The defendant need only foresee the risk, not that it is *unjustified* for him to take it.

[16] At [28].

[17] C. M. V. Clarkson, H. M. Keating and S. R. Cunningham, *Clarkson and Keating: Criminal Law*, 7th ed. (London 2010), 173.

[18] *D.P.P. v Majewski* [1977] A.C. 443, 474–475 per Lord Elwyn-Jones. The Court of Appeal has distanced itself from the reading of *Majewski* that implies that proof of intoxication is *itself* proof of recklessness: *R. v Heard* [2007] EWCA Crim 125, [2008] Q.B. 43, at [30] per Hughes L. J. It nevertheless remains a viable reading of that case (see, also, *R. v Kingston* [1995] 2 A.C. 355, 369 per Lord Mustill).

[19] For two theoretical treatments of this point, see: S. Dimock, "What Are Intoxicated Offenders Responsible For? The 'Intoxication Defense' Re-examined" (2011) 5 Criminal Law and Philosophy 1; A. P. Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3.

[20] See *R. v Brady* [2006] EWCA Crim 2413.

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long as the "ordinary" sense of that word is being employed by the trial judge.[21] "Gross negligence" does not require advertence of risk,[22] and thus it can be assumed that "ordinary" recklessness does not either. Indeed, the Court of Appeal has made clear that *G and Another* as no relevance in "gross negligence" manslaughter cases.[23]

Thirdly, where the defendant "closes his mind" to a risk, and claims that he was not consciously aware of it at the time of acting, he will still be treated as reckless.[24] The courts here will engage in a fiction that the defendant had *decided* to ignore the relevant risk, even in circumstances where the defendant claims he *never* foresaw it. Such a fiction is unconvincing because, surely, a person can only choose to ignore that which he believes exists.[25] What this rule seems to allow, then, is the conviction of inadvertent risk-takers who missed the relevant risk for unacceptable reasons.[26] This does further damage to the idea of recklessness as advertent risk-taking.

Finally, the legislature might create offences that define recklessness in a more expansive way than the House of Lords did in *G and Another*. For instance, the Uranium Enrichment Technology (Prohibition on Disclosure) Regulations 2004[27] provide that:

> (2) For the purposes of these Regulations, a person is reckless as to whether a disclosure made by him might assist or enable any person who is undertaking or proposes to undertake a specified activity to undertake that activity if–
> (a) at the time he makes the disclosure–
> (i) he has recognised that the disclosure would create a risk that any person who is undertaking or proposes to undertake a specified activity might be assisted or enabled to undertake that activity; or
> (ii) he is indifferent as to whether the disclosure would create such a risk or not; or

[21] *R. v Adomako* [1995] 1 A.C. 171, 187 per Lord Mackay. See, further, *R. v Mark and Nationwide Heating Services Ltd* [2004] EWCA Crim 2490.
[22] *Attorney-General's Reference (No. 2 of 1999)* [2000] Q.B. 796, 809 per Rose L. J. Confusingly, Rose L. J. proceeded to explain how *sometimes*, proof of advertent recklessness will be crucial to establishing gross negligence, but other times it will not be. See, further *R. v D.P.P.* [2003] EWHC 693 (Admin), at [29] per Kennedy L. J.
[23] *R. v Misra* [2004] EWCA Crim 2375, [2005] 1 Cr. App. R. 21, at [55] per Judge L. J.; *R. v* Mark and Nationwide Heating Services Ltd [2004] EWCA Crim 2490, at [31] per Scott Baker L. J.
[24] *R. v Parker* [1977] 1 W.L.R. 600, 604 per Geoffrey Lane L. J.; *Booth v C.P.S.* [2006] EWHC 192 (Admin).
[25] *R. v Caldwell* [1982] A.C. 341, 358 per Lord Edmund-Davies; D. J. Galligan, "Responsibility for Recklessness" (1978) 31 C.L.P. 55, 68.
[26] See K. Crosby, "Recklessness: The Continuing Search for a Definition" (2008) 72 J. Crim. L. 313.
[27] Cited in D. Ormerod, *Smith and Hogan: Criminal Law*, 12th ed. (Oxford 2008), 109 (n. 86). Although the Regulations remain in force, this offence is not cited in the most recent edition of *Smith and Hogan*.

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(b) the disclosure creates an obvious risk that any person who is undertaking or proposes to undertake a specified activity might be assisted or enabled to undertake that activity, but at the time he makes the disclosure he has failed to give any thought to the possibility that the disclosure would create such a risk.[28]

Regulation 2(a)(i) coheres with the understanding of recklessness in *G and Another*. The other two conceptions (indifference and failure to think of an "obvious" risk) do not, and resemble understandings of recklessness developed following *R. v Caldwell*[29] (a decision which was departed from by the House of Lords in *G and Another*).

Foresight of risk is therefore central to recklessness in English criminal law, but it is not essential to it in all contexts. For all the talk of "general principles [being] laid down" in *G and Another*,[30] recklessness still means various things depending on the context.[31] Again, lawyers and laypersons might both develop a sense of real confusion when looking at recklessness as it applies throughout the criminal law. This makes decisions about what is, and is not, prohibited seem unnecessarily complicated. Despite this point, the English approach to defining mens rea terms has received theoretical defence from Victor Tadros. The next section outlines his argument.

III. Tadros on "Localised Concerns"

Tadros's defence of the approach to definition adopted in cases like *Woollin* and *G and Another* arises in the context of a wider discussion of the "general part" of the criminal law – those rules and principles that apply across all, or at least two categories of, offences.[32] Mens rea terms are, clearly, aspects of the "general part"[33] because they are used across different categories of offences. It is murder, an offence against the person, to cause the death of another human being whilst *intending* to kill or cause grievous bodily harm.[34] It is theft, an offence against property, to appropriate dishonestly the property of another, *intending*

[28] S.I. 2004/1818, reg. 2.
[29] [1982] A.C. 341.
[30] *Attorney-General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] Q.B. 73, at [12] per Pill J. See, similarly: *R. v Brady* [2006] EWCA Crim 2413, at [13] per Hallett J.; *R. v C* [2007] EWCA Crim 1068, at [20] per Hughes L. J.
[31] An additional problem arises where the term recklessness is applied in relation to both conduct *and* consequences/circumstances. See: S. Cunningham, "Recklessness: Being Reckless and Acting Recklessly" (2010) 21 King's L. J. 445; Simester et al, *Criminal Law*, p. 145.
[32] V. Tadros, "The System of Criminal Law" (2002) 22 L.S. 448 (hereafter Tadros, "The System of Criminal Law").
[33] It is possible to be more specific. See e.g. J. Gardner, "On the General Part of the Criminal Law" in R. A. Duff (ed.), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge 1998), 205. Gardner suggests mens rea terms are part of the "definitional general part".
[34] *R. v Cunningham* [1982] A.C. 566.

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to deprive the owner permanently of that property.[35] Intention thus cuts across these different classes of offences. Although there are notable exceptions (for instance, dishonesty is only really an element of one category of offences),[36] most other mens rea terms operate similarly.

Tadros does not, however, think that this means that mens rea terms such as intention and recklessness must be overly "general", i.e. defined uniformly throughout the criminal law. This is because, Tadros explains, different categories of offence, and even different offences within each category, are sensitive to what might be called "localised concerns". The principles, policies and other types of moral and political argument that bear upon a polity's understanding of culpable wrongdoing will vary from context to context.[37]

For instance, Tadros thinks *Woollin*'s definition of intention works well in some offences (his examples include murder, theft and causing grievous bodily harm with intent),[38] but is less appropriate where the harm threatened is usually less serious (his examples include criminal damage, and attempts at less serious offences such as common assault).[39] In those latter circumstances, finding intention in foresight of a virtual certainty is illegitimate as it is likely to miss the core wrong that the criminal law is aiming to combat. In consequence it would be "crude" to define such a crucial mens rea term as intention, which is used throughout the criminal law, uniformly.[40]

Tadros was writing before the decision in *G and Another*, but his thinking could be applied to the law on recklessness following that decision. The localised concerns which impact on how wrongs should be conceived of in the law of property offences mean, the argument would go, that a foresight-based understanding of recklessness should be applied there. Where these concerns change, perhaps because the defendant was at fault for not recognising a risk, recklessness might be understood in a wider sense. In the context of manslaughter, where

[35] Theft Act 1968, s. 1.

[36] Principally theft and fraud. On the difficulties with the definition of dishonesty in English criminal law, see A. Halpin, *Definition in the Criminal Law* (Oxford 2004), 150–166 (hereafter Halpin, *Definition in the Criminal Law*).

[37] See, also, J. Gardner, "Wrongs and Faults" in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford 2005) 51 at 72 (hereafter Gardner, "Wrongs and Faults"). There is not space here to enter the debate over what "principles" and "policies" are, and what role they – and other concepts such as "values" – ought to play in the criminal law. They are used simply as shorthand for the various types of arguments that can affect the decision over what constitutes culpable wrongdoing. See, however, J. Gardner, "Ashworth on Principles" in L. Zedner and J. V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford 2012), 3.

[38] Tadros, "The System of Criminal Law" at 453.

[39] Ibid. at 454. Tadros also includes incitement in his list. Common law incitement was abolished, and replaced with the "assisting and encouraging crime" offences, after he was writing: Serious Crime Act 2007, pt. 2.

[40] Tadros, "The System of Criminal Law", at 455.

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the law is concerned with the taking of risks with people's lives, it might be appropriate to have an even wider conception of recklessness. Given these points, the adoption of *one* understanding of the word "reckless" would be over-simplistic and potentially damaging to the criminal law's enterprise of defining wrongs accurately.

Before challenging Tadros's defence of the current English approach towards definition in the following sections, it is important to be clear about what aspects of his account are not disputed here. There is no problem with Tadros's endorsement of a conservative approach to defining culpable wrongdoing, which is opposed to attempts to create "grand theories", which explain in general terms large swathes of the criminal law and are likely, as a result, to miss important distinctions.[41] Tadros's fear, for instance, is that if the understanding of intention in *Woollin* were applied across the criminal law, some offences of intention would not be defined in a way that reflects fairly the relevant moral and political concerns relating to the defendant's culpability or the nature of his wrongdoing. Grand theories will tend to do this, and there is an obvious evil to be avoided here. The criminal law might well fail to maintain its necessary moral legitimacy if its rules are clumsy and indifferent to what are no doubt important concerns in the eyes of the citizens bound to live according to the criminal law's declarations, lest they be punished.

Furthermore, Tadros is correct that, to avoid this evil, different offences need different fault elements – a view shared by other writers.[42] What is taken issue with here is the idea that this makes it proper for courts and legislatures to use the *same word* to mean different things in different contexts. Tadros and the English courts (and particularly the House of Lords, in the mens rea cases mentioned in section II, above) appear to think that the argument from competing localised concerns of principle, policy, etc. validates this approach. They seem to view important mens rea concepts such as intention and recklessness as mere words – empty vessels to be filled with whatever meaning courts think the context calls for – rather than key tools in a communicative enterprise.

It is the increased popularity of the view that criminal law and criminal justice ought to be communicative exercises[43] that first gives rise to the suspicion that this apathy towards the uniform definition of

[41] For cynicism about grand theory, see: R. A. Duff, "Theorizing Criminal Law: A 25th Anniversary Essay" (2005) 25 O.J.L.S. 353; R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford 2007), 7–8 (hereafter Duff, *Answering for Crime*).

[42] E.g. J. Gardner and S. Shute, "The Wrongness of Rape", reproduced in J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford 2007), 27.

[43] Communication plays a large part in many contemporary theories of criminalisation, criminal responsibility, the criminal trial and punishment. For references, see V. Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford 2011), 88.

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core mens rea terms is misguided. The next section explains how a focus on communication and discretion can be used to build a case for the clear and uniform definition of general mens rea terms such as intention and recklessness, whilst meeting Tadros's worry about localised concerns.

IV. An Alternative Approach

The principle of "fair warning" – that citizens should not be surprised to find out that they have committed a criminal offence – is of core importance to any defensible system of criminal law.[44] It helps to secure the rule of law, insofar as it ensures that the criminal law is capable of guiding conduct.[45]

A crucial aspect of fair warning is that citizens should have access to clear and stable guidance on what is proscribed as culpable wrongdoing, so that they can avoid criminal punishment.[46] A key aspect of the *communicative* enterprise of criminal law is to provide such guidance. Effective communication, it will be contended here, requires a language that is comprehended by all potential and existing parties in a criminal case. It is not fostered by malleable mens rea definitions that vary with context. This argument will be developed from Antony Duff's discussion of punishment, language and communication.[47]

A. Duff on Communication

Duff's core point is that, if trials are communicative endeavours leading to punishments which communicate authoritative censure, it is important that those involved in the criminal justice process can communicate with each other throughout, and this requires a shared language. It is not simply lawyers and judges who must be able to communicate effectively with the language of the law and be able to understand its nuances and inconsistencies. The language of the criminal law should be accessible to those lay actors who must argue about it to avoid the pain of punishment. It must also be accessible to

[44] For discussion, see: G. Williams, *Criminal Law: The General Part*, 2nd ed. (London 1985), 578–588 (hereafter, Williams, *The General Part*); A. Ashworth, *Principles of Criminal Law*, 6th ed. (Oxford 2009), 63–66 (hereafter Ashworth, *Principles*); Simester et al, *Criminal Law*, pp. 26–31; A. P. Simester and W. Chan, "Four Functions of Mens Rea" (2011) 70 C.L.J. 381, 388–393 (hereafter Simester and Chan, "Four Functions of Mens Rea").

[45] On the necessity of law to guide conduct and secure liberty, see: J. Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA 1999), 210–212; J. Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford 2009), ch. 11 (hereafter Raz, *The Authority of Law*); J. Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford 2011), 283.

[46] Raz, *The Authority of Law*, pp. 214–216; Griew, "Consistency, Communication and Codification" at p. 68.

[47] R. A. Duff, *Punishment, Communication and Community* (Oxford 2001), 188–193 (hereafter Duff, *Punishment, Communication and Community*). This develops points first made in R. A. Duff, "Law, Language and Community: Some Preconditions of Criminal Liability" (1998) 18 O.J.L.S. 189, 197–201. See, further, Duff, *Answering for Crime*, p. 43.

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those laypersons called to give judgment on their peers, be they jurors or magistrates. And it must be accessible to those lay members of the public who hear of the case. Otherwise, the wider message of criminal liability could be lost in translation.[48]

A crucial aspect of this accessible language, for Duff, is that it allows citizens to argue about, and (if they disagree with the courts' view) ultimately to understand the nature of their culpable wrongdoing. He is concerned primarily that those being tried are able to understand the normative nature of their acts (why they are *wrongful*) and their mental states and attitudes (why they are *culpable*), but it will be contended here that this kind of argument goes beyond Duff's ex post perspective, and applies also in the area of ex ante guidance. It is from the anticipatory perspective that the need for clear and uniform definitions of mens rea terms begins to become clear.

In planning their lives, citizens must be able to understand properly the nature of what the law declares to be a criminal offence, and it is obvious that this will usually be conducted without the benefit of legal advice. Duff's points about the ability to *translate* the law for laypersons (developed in a discussion on the *trial*) are thus less crucial here.[49] In the trial, such translation is readily available; in fact the state provides it through arrangements such as legal aid. But by the trial stage, a vital avenue for communication has already been missed. It is surely vital that citizens can *avoid* being put on trial in the first place by understanding clearly the law's normative notions of wrongdoing and culpability and acknowledging the steps needed to avoid committing offences.[50] The law should thus be clear in its message, and applied consistently, so that non-specialists can utilise it effectively at the stage of planning their conduct, as well as in later stages of the criminal process. This need for clarity is particularly vital in the criminal law context, as misunderstandings can have severe consequences.

It is necessary to clarify exactly what effective communication is thought to involve.

B. The Boundaries of Definition

The paragraphs above might be read to constitute an argument for a return to the search for "ordinary" understandings of core criminal

[48] This point brings up considerations relating to the "fair labelling" of offenders. See: Ashworth, *Principles*, pp. 78–80; J. Chalmers and F. Leverick, "Fair Labelling in Criminal Law" (2008) 71 M.L.R. 217. Fair labelling might be able to play a role in guiding conduct: V. Tadros, "Fair Labelling and Social Solidarity" in L. Zedner and J. V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford 2012) 67 at p. 72.

[49] Duff, *Punishment, Communication and Community*, p. 189.

[50] See, similarly, *McBoyle v US*, 283 U.S. 25 (1931), 27 per Holmes J.

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law concepts,[51] which could be grasped easily by laypersons by (moral) intuition. For those familiar with the history of mens rea terms in England and Wales, this will bring up (bad) memories of the search for "ordinary" recklessness in *Caldwell*,[52] and the search for a suitable definition of intention, which culminated in *Woollin*.[53] These exercises were not entirely useless, because it is important that, if laypersons are to understand the language in which it expresses itself, the criminal law is related sufficiently to terms that non-lawyers employ in their everyday lives.[54]

To see why, consider if recklessness were to be defined as desiring to bring about a certain result. This would surely be an understanding of recklessness which had strayed too far from "ordinary" understandings, as it seems more akin to "everyday" understandings of intention. The language of the law, if it bore absolutely no relation to the language of laypersons, would be beyond citizens not because it was applied inconsistently (perhaps it would be applied consistently by faithful judges and juries), but rather because it had drifted too far from the normal language of blame utilised by citizens.[55] The law must be anxious to avoid this result. This is because a convincing account of the criminal law's legitimacy, on communication grounds, is that citizens should be able to identify with the criminal law and view it as *theirs*, rather than some "alien" imposition.[56] Inaccessible language is likely to appear "alien".

This is, however, as far as the argument for "ordinary" understandings of criminal law concepts goes. It sets boundaries within which the law should operate when defining its concepts in *semantic* terms.[57] Recklessness can sensibly be defined, as it is in a range of contexts in English law, as the conscious taking of an unjustified risk. This is close enough to the "everyday language" and normative understanding of recklessness to be comprehended by a layperson, and this ensures that – although the law has adopted a definition of recklessness which might not quite match perfectly a layperson's intuitive understanding[58] – communication is possible because it is *close enough*

[51] It is doubtful that such "everyday" understandings of words exist. A useful introduction is G. Ryle, "Ordinary Language" (1953) 62 Philosophical Review 167.

[52] [1982] A.C. 341, 351 per Lord Diplock. On the historically chaotic jurisprudence on recklessness in English criminal law, see Halpin, *Definition in the Criminal Law*, ch. 3.

[53] See Norrie, *Crime, Reason and History*, ch. 3.

[54] See, similarly, D. N. MacCormick, *Rhetoric and the Rule of Law* (Oxford 2005), 126–127.

[55] Duff, *Punishment, Communication and Community*, pp. 190–191.

[56] Ibid., pp. 192–193. See, also, J. Gardner, "Rationality and the Rule of Law in Offences against the Person", reproduced in J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford 2007), 33 at pp. 45–53 (hereafter Gardner, "Rationality and the Rule of Law").

[57] And the law ought to *define* terms within these boundaries, rather than asking juries to do it themselves, if only for accountability reasons. See, further, A. Briggs, "Judges, Juries and the Meaning of Words" (1985) 5 L.S. 314.

[58] *R. v Caldwell* [1982] A.C. 341, 357 per Lord Edmund-Davies.

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and semantically graspable. Citizens could understand easily that they ought not to take certain risks that they have foreseen as being attendant on their conduct, or else they might be penalised.

The difficulty complained of here arises where that definition of recklessness is not applied consistently. As the citizen grasps recklessness in one context, he is surprised or embarrassed to learn that it might mean something else in another (see above). Although both of these definitions might end up being close to an intuitive understanding of recklessness, matters are complicated by the difference in semantic understanding propagated by the courts and the legislature. This is not conducive to citizens feeling confident in their ability to plan and communicate via the language of *their* law; a law that respects them as planning agents.[59] This has implications for the certainty with which citizens can view their prospective conduct or argue about their alleged misdeeds. Again, given the special context of the criminal law, such uncertainty can have severe consequences, which ought to be avoided.

If the language of the law and the language of extra-legal discourse are to be bridged successfully, so that a communication about culpable wrongdoing can be engaged in at the planning stage of conduct, it is crucial that citizens can be on firm ground in their understanding of the normative *and* semantic contours of mens rea concepts, rather than on shifting sands. They should not feel, when trying to engage with the criminal law's content on such a core matter, that they are engaged in a discussion with Humpty Dumpty, where the meanings and content of certain terms can change unexpectedly, frustrating real dialogue.[60] If a statute or common law offence can be committed intentionally, or recklessly, that should mean *one* thing, rather than various things.

This account raises immediate objections, which will be dealt with in the following sections.

C. Robinson on Conduct and Adjudication

The first challenge to the communicative account sketched above arises from the work of Paul Robinson, who has done most to divide criminal prohibitions and defences into "rules of conduct" and "principles of adjudication".[61] Rules of conduct are addressed to citizens, and ought

[59] See, further, Raz, *The Authority of Law*, pp. 221–222.

[60] L. Carroll, *Through the Looking Glass and What Alice Found There* (London 1970 [first edition 1871]), ch. 6.

[61] His most important works in this area are: P. H. Robinson, "Rules of Conduct and Principles of Adjudication" (1990) 57 U. Chicago L. Rev. 729 (hereafter Robinson, "Rules of Conduct and Principles of Adjudication"); P. H. Robinson, *Structure and Function in Criminal Law* (Oxford 1997) (hereafter Robinson, *Structure and Function*). Robinson credits the rediscovery of the conduct/adjudication distinction to George Fletcher and Meir Dan-Cohen. See: G. P. Fletcher, *Rethinking Criminal Law* (Boston, MA 1978), 456–459 (hereafter Fletcher, *Rethinking Criminal Law*); M. Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1983–1984) 97 Harv. L. Rev. 625 (hereafter Dan-Cohen, "Decision Rules and Conduct

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to be clear and concise in order to give meaningful ex ante guidance and communicate to the public the criminal law's prohibitions.[62] Principles of adjudication, by contrast, do not guide the actions of citizens. They are useful instead from an ex post perspective; when a court is assessing the blameworthiness of the defendant's alleged wrongdoing.

Given that courts are accorded time for thought and reflection about the defendant's actions (time which he might often be denied), Robinson contends that principles of adjudication can be drafted more imprecisely than rule of conduct, lest their ability to assess blameworthiness accurately be compromised.[63] A simple answer to the above confusion in the English jurisprudence, then, is that mens rea terms like intention and recklessness are *always* principles of adjudication: they play no part in giving ex ante guidance to citizens, and thus it does not matter if they are confusing or not.[64] If lawyers *can* understand these terms, and judges and juries *can* – with suitable direction – apply them, then that is sufficient. The argument for clear and uniform definitions of mens rea terms presented above thus fails.

There are three responses to this argument. First, Robinson provides uniform definitions of mens rea terms in his draft "Code of Adjudication" appended to the most worked-through model of his theory.[65]

Secondly, Robinson himself notes that mens rea terms are not *always* principles of adjudication, because sometimes they will play a part in defining a wrong.[66] His work has concentrated on inchoate offences[67] – where mens rea is an essential part of establishing when a person has "crossed the line" into criminal liability – but Andrew Simester and Winnie Chan also give the example of theft.[68] It is not wrong, in itself, to pick up an item of property such as a bag. It *is*

Rules"). On Dan-Cohen, see R. Singer, "On Classicism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen" (1986) 77 Journal of Criminal Law and Criminology 69.

[62] P. H. Robinson, "Structuring Criminal Codes to Fulfill Their Function" (2000) 4 Buffalo Criminal Law Review 1, 7.

[63] Robinson, "Rules of Conduct and Principles of Adjudication" at p. 770; P. H. Robinson, "Fair Notice and Fair Adjudication: Two Kinds of Legality" (2005–2006) 154 U. Penn. L. Rev. 335, 378.

[64] Robinson, "Rules of Conduct and Principles of Adjudication" at p. 769. Peter Alldridge once supported this line of thinking: P. Alldridge, "Rules for Courts and Rules for Citizens" (1990) 10 O.J.L.S. 487, 489, 494–495. His view now appears to be much more nuanced: P. Alldridge, "Making Criminal Law Known" in S. Shute and A. P. Simester (eds.), *Criminal Law Theory: Doctrines of the General Part* (Oxford 2002) 103 at pp. 113–115.

[65] Robinson, *Structure and Function*, p. 237.

[66] Robinson, "Rules of Conduct and Principles of Adjudication", at pp. 733–736. See, further: Fletcher, *Rethinking Criminal Law*, pp. 566–569; Simester and Chan, "Four Functions of Mens Rea" at pp. 385–388.

[67] See e.g. Robinson, *Structure and Function*, pp. 133–134, 157–164. Despite noting the importance of mens rea in inchoate offences, Robinson's "Code of Conduct" states simply that "You may not attempt to commit a crime" (p. 218). This is rather unclear with regard to whether mens rea matters – demonstrating that Robinson's codes of conduct and principles of adjudication distinction is drawn far too sharply.

[68] Simester and Chan, "Four Functions of Mens Rea" at pp. 385–386.

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wrong, however, to pick up a bag knowing that it belongs to someone else and intending to deprive the true owner permanently of her property in dishonest circumstances.[69] If this is the case, then surely those mens rea terms which make conduct wrongful need to be defined clearly to ensure that citizens are capable of planning their affairs so as to avoid potential criminal liability. Those mens rea terms are, after all, elements of conduct rules. They ought, then, to be expressed in clear and consistent language upon which confident plans regarding liability can be made.[70]

This point might be taken further: if the criminal law prohibits the intentional causing or risking of a certain result, then a person who takes the time to think about whether or not he *is* intending a result (or simply taking the risk of its occurrence) is entitled, surely, to guidance on the possible penal consequences. If this is the case, then surely it *does* make sense to direct citizens not to do certain actions when they are doing them with certain mental states.[71] In fact, some writers seem to note that this is *the* role of mens rea terms: to ensure that fair warning and ex ante guidance were available to the defendant prior to the alleged offence.[72] This suggests that Robinson is being too restrictive in his concession that mens rea terms are not always aspects of principles of adjudication.

As argued above, since the criminal law is a communicative enterprise, such ex ante guidance as can be provided through the law's definitions of its mens rea terms should be presented clearly. Malleable definitions of mens rea terms hinder this process unnecessarily, and reduce the polity's confidence that the criminal law belongs to *it*. Uniform definitions would help to avoid this difficulty.

Thirdly, even if English law were reformed in order to implement Robinson's dichotomy between conduct and adjudication, it would presumably still use the same mens rea words (intention, recklessness, etc.) to give both ex ante and ex post guidance about wrongdoing and culpability. It would seem then that the definition of terms like intention would have to be consistent and clear in some contexts (where intention forms part of a rule of conduct for citizens), but not in others (where intention becomes part of a principle of adjudication for courts). This would produce a perplexing account of the criminal law, and it must be remembered that not all of those who Robinson would

[69] Theft Act 1968, s. 1.

[70] See, similarly, Gardner, "Wrongs and Faults" at p. 70.

[71] See, in a similar vein, Dan-Cohen, "Decision Rules and Conduct Rules" at p. 652; R. A. Duff, "Rule-violations and Wrongdoing" S. Shute and A. P. Simester (eds.), *Criminal Law Theory: Doctrines of the General Part* (Oxford 2002) 47, at pp. 69–70. There are more convincing reasons for excluding defences from offence definitions, but that is beyond the scope of this paper. See, however, Fletcher, *Rethinking Criminal Law*, p. 457.

[72] Dan-Cohen, "Decision Rules and Conduct Rules" at p. 662; H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford 2008), 181–182.

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give principles of adjudication to will be trained legal specialists. Jurors would soon get confused if they understood intention in one context, but not in another. Those planning their conduct might be puzzled when they hear of court judgments that can only be explained by reference to the defendant's mens rea (or lack thereof), and fail to accord with their "conduct rule" understandings. Again, this would shake their confidence in the criminal law's declarations of culpable wrongdoing. It is therefore submitted that uniform definitions and a wide range of fault terms used across the criminal law would remain necessary from a communicative perspective, even if Robinson's conduct/adjudication distinction were applied faithfully.

Robinson's conduct/adjudication dichotomy does not, then, render redundant the communicative argument outlined above. It is now necessary to consider a second objection.

D. "Thin Ice" and Discretion

The second attack on the communicative account offered above concerns its transition from *normative* to *semantic* clarity. It might be wondered whether such a move is necessary, or whether it would defeat the purpose of the criminal law in punishing culpable wrongdoing.

This objection arises from a qualification to the requirement of "fair warning" of potential criminal liability: the "thin ice principle".[73] The idea is that, as long as citizens can appreciate that their conduct is of dubious legality, they are sufficiently warned about the prospect of punishment.[74] This would mean, in the context of mens rea words, that variation in definition would be permissible so long as all definitions remained sufficiently close to the morally intuitive understanding mentioned above. In such cases, citizens presumably could sense their conduct sailed close to the wind, and would not be surprised unfairly if they were held liable for an offence. If so, the argument for uniformity in definition falls away: all that can be argued for is that mens rea words should be defined within the broad parameters of everyday (moral) understanding.[75]

Again, there are two responses available to this claim. The first is that the "thin ice principle" is itself not conducive to a clear criminal

[73] See: Williams, *The General Part*, pp. 589–590; D. Husak, *Philosophy of Criminal Law* (Totowa, NJ 1987), 69–72; A. Ashworth, "Interpreting Criminal Statutes: A Crisis of Legality?" (1991) 107 L.Q.R. 419, 443–444 (hereafter Ashworth, "Interpreting Criminal Statutes"); Ashworth, *Principles*, p. 63. This principle is accepted both in England and Wales and, to an extent, by the European Court of Human Rights. See: *Knuller v D.P.P.* [1973] A.C. 435; C. C. Murphy, "The Principle of Legality in Criminal Law under the European Convention on Human Rights" [2010] E.H.R.L.R. 192, 199–201.

[74] On some accounts, mere negligence as to being on "thin ice" might be sufficient to secure fair warning. See D. Husak, "Strict Liability, Justice and Proportionality" in A.P. Simester (ed.), *Appraising Strict Liability* (Oxford 2005) 81, at p. 99.

[75] See Gardner, "Rationality and the Rule of Law".

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law that citizens can feel confident in utilising when planning their conduct. In short, it undermines the requirement of "fair warning" to a very large extent. It is hence a troubling principle. This will no doubt strike some as being unproblematic because of the very function of the principle – to catch those who, although not caught by a *core* understanding of fault, are still, given their awareness of the dubiety of their conduct, *bad enough* to warrant conviction.[76]

But acceptance of that viewpoint would lead to something of a Pyrrhic victory, because of a second, more troubling, concern over discretion.[77] The "thin ice" principle might allow a wide margin of appreciation for criminal justice actors, including those in the courts, in their definition or application of mens rea concepts. The risk is that this allows arbitrary distinctions (just *when* is this definition to be applied?) and bias to creep into the criminal justice system, as well as usurping the legislature's role in criminalisation decisions.[78] An additional benefit of adopting clear and consistent definitions of mens rea terms is that it would ensure that the discretion accorded to bodies like the police and courts to "do justice" in individual cases, would be reduced to a degree that these dangers could be minimised.[79]

There is still the point, however, of what to do if there are perceived gaps, which those who *should* be convicted of an offence are falling through. Furthermore, there remains a need to respond to the localised principles that Tadros identified as being so important to the present English approach. These points are discussed in the next section.

V. Practical Concerns

It has been argued that, if the criminal law is to live up to its communicative ideal, citizens must be able to understand (normatively and semantically) and use the language of wrongdoing and liability adopted by the courts and the legislature in planning their conduct. Similarly, if the discretion accorded to criminal justice actors is to be controlled adequately, the criminal law's mens rea terms should be defined clearly and consistently.

But what are the courts and the legislature to do if they accept the argument from communication made here, yet want to ensure that the law can react appropriately to the competing principles and policies which affect different areas of the criminal law? As noted above,

[76] Ashworth, "Interpreting Criminal Statutes" at p. 443.

[77] A similar criticism has been made of the conduct/adjudication distinction: L. Alexander and K. K. Ferzan with S. J. Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge 2009), 300.

[78] Raz, *The Authority of Law*, p. 218; Ashworth, *Principles*, pp. 65–66.

[79] Even those who support discretion in the definition of concepts such as mens rea accept that this power must be controlled to avoid damaging respect for the criminal justice system: P. H. Robinson, "Legality and Discretion in the Distribution of Criminal Sanctions" (1988) 25 Harvard Journal on Legislation 393, 398.

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Tadros suggests that the courts may, in interpreting terms such as intention, be conservative and not seek to make generalisations which might damage some parts of the law. This approach results, however, in the courts using a small number of mens rea terms in different ways and leads to the potential confusion pointed to above. A better solution, it is submitted, would be to expand the range of mens rea terms presently utilised in the criminal law, and ensure that, when they were used, these words are defined consistently across offences.[80]

A. A Way Forward

Consider again the definition of intention. Sometimes there does not seem to be a significant moral difference between meaning to bring about a certain result (for instance, death) and failing to be motivated sufficiently by the realisation that it is virtually certain that, if the defendant proceeds with his plan, that result will be brought about. It might be argued that the law would be missing something morally significant if it defined murder as only desired and purposeful killings. Therefore, foresight of a virtual certainty might be treated, for the law of murder, as being sufficient mens rea to secure culpability. This is the position at present in English law (with the added complication that nobody is sure if foresight of a virtual certainty *is* intention, or just something *morally equivalent* to it).[81]

Rather than doing what the English courts have up until now done, however, and simply expanding the concept of intention *in this area* to include foresight of a virtual certainty, it would be more conducive to clarity if the mens rea of murder were expressed in terms of an intention to kill (or cause grievous bodily harm)[82] *or* foresight of virtual certainty that death (or grievous bodily harm) would result from the defendant's action. "Foresight of virtual certainty" could be conceived of as a separate category of mens rea from intention. This is a solution which Tadros[83] and others[84] have alluded to,[85] but it is submitted that the argument should be made far more strongly, and rooted in the communicative enterprise of the criminal law and the need for control over the discretion accorded to its institutions. It is *unacceptable*, because it makes inaccessible the message (and undermines the communicative enterprise) of the criminal law, to be conservative in the way that

[80] See, similarly, Griew, "Consistency, Communication and Codification", at p. 68.
[81] For discussion, see Kaveny, "Inferring Intention from Foresight".
[82] There is not space here to engage in the debate over whether an intention to cause grievous bodily harm ought, in itself, to be sufficient mens rea for murder. I suspect it ought not to be.
[83] Tadros, "The System of Criminal Law" at p. 452.
[84] E.g. J. Gardner and H. Jung, "Making Sense of Mens Rea: Antony Duff's Account" (1992) 12 O.J.L.S. 559, 578 (hereafter Gardner and Jung, "Making Sense of Mens Rea").
[85] The addition of new fault elements has also been suggested in the context of the US Model Penal Code. See A. Michaels, "Acceptance: The Missing Mental State" (1997–1998) 71 S. Cal. L. Rev. 953.

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the English courts have been and, as a result, use the same words in different ways in different contexts.[86] The courts should thus refuse to do so, and should define mens rea terms in a uniform fashion wherever they are encountered.

The benefit of using different *terms*, rather than different *definitions*, is obvious. It would avoid the need for the courts to *decide* when intention ought to include foresight and when it ought not to. This decision would be left to Parliament in drafting an offence.[87] It would avoid problems such as in the Serious Crime Act 2007, where lawyers have to work out how the legislature meant "intention" to be defined in a particular context. Intention would mean, if foresight of virtual certainty were separated from it, meaning to bring about a certain result – a definition that coheres sufficiently with the "everyday" understanding of that term that it could be utilised effectively by citizens in planning or arguing about their conduct. It would also be clear to citizens what "foresight of virtual certainty" means, and it would not be difficult to explain to them that, where foresight of virtual certainty *is* viewed as being sufficiently culpable to constitute mens rea then the definition of the crime is satisfied. Plans could be made fairly, on this basis, to avoid liability.

By now, an obvious practical objection to this argument will have arisen in the mind of the reader: the courts cannot just invent new mens rea terms in the law of murder. The main difficulty focussed on by this suggestion is obvious when one considers the House of Lords' decision in *Woollin*. The Lords were tasked with setting out the law on murder, a crime with two forms of mens rea: an intention to kill or an intention to cause grievous bodily harm. In endorsing, with minor modification, the direction on intention developed by the Court of Appeal in *R. v Nedrick*,[88] the Lords accepted that foresight of a virtual certainty could lead to a *finding*[89] of intention in murder cases. They reached the conclusion that, in such cases, there is no significant moral difference between these two types of killing. In Tadros's terms, localised concerns pointed towards an expanded concept of intention, as that was the word with which the courts could work.

The argument above was that this was wrong as it complicated the law's understanding of intention and a preferable course would have been for the criminal law to declare that foresight of a virtual certainty was sufficient mens rea for murder. The House of Lords could not, of

[86] See, in a broadly similar vein: Dan-Cohen, "Decision Rules and Conduct Rules" at p. 659 (distinguishing between indeterminacy and inaccessibility); G. Williams, "Criminal Omissions: The Conventional View" (1991) 107 L.Q.R. 86, 94.

[87] This would necessitate a change in Parliament's infuriating habit of often leaving an offence definition silent on the matter of mens rea.

[88] [1986] 1 W.L.R. 1025.

[89] See n. **3** above.

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course, achieve this result. It would have been conspicuous, to say the least, to hold that, although the modern mens rea of murder had been settled for almost twenty years,[90] there was now a new form of guilty mind (foresight of virtual certainty) sufficient for conviction where the defendant had caused the death of another person. Concerns about precedent, and of judicial law making, prevented such a course.[91] These are the same concerns that ought to make the variable use of mens rea terms by courts troubling.

A similar difficulty is visible in the context of the definition of recklessness developed in the law of rape in the 1980s. By the late 1970s, rape required an intention to have sexual intercourse and either knowledge that the woman was not consenting, or recklessness as to her consent.[92] If recklessness was understood to mean advertent risk-taking in this context, then that would mean that a man, who failed to notice blatantly obvious signs of non-consent from his partner, would have to be acquitted of rape (in theory, at least). At least some such actors are going to be more morally reprehensible than some advertently reckless actors (i.e. the man who notes a minuscule risk of non-consent, but concludes it is not worth investigating). The wholesale exclusion of those who were simply *indifferent* – and, as a result, inadvertent – "rapists" from punishment was unacceptable; again, localised concerns pointed towards the expansion of the law's understanding of recklessness in this context. It is therefore not incredibly surprising that the courts moved to consider an indifferent actor as being reckless.[93]

This no doubt did violence to the idea of advertent recklessness (which was already in tatters following *Caldwell*), but it is quite clear that the judges might have felt that they had no other choice. Once again, they could not simply declare that indifference was a new form of mens rea, distinct from recklessness (as, following the argument above, would have been ideal). So the integrity of recklessness as advertent risk-taking was further surrendered, beyond the extent to which the majority's decision in *Caldwell* had already done so, to ensure that those who surely deserved punishment for their culpable wrongdoing got it.

[90] *R. v Cunningham* [1982] A.C. 566.

[91] There are other practical constraints on judicial activism. See Ashworth, "Interpreting Criminal Statutes", at 422; J. D. Heydon, "Limits to the Powers of Ultimate Appellate Courts" (2006) 122 L.Q.R. 399.

[92] *D.P.P. v Morgan* [1976] A.C. 182.

[93] "Indifference" played a large part in the law of sexual offences during the *Caldwell* era: see e.g. *R. v Kimber* [1983] 1 W.L.R. 1118. For a theoretical defence of indifference's place at the heart of recklessness, see R. A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford 1991), ch. 7. Duff does not recognise recklessness-as-indifference as an appropriate concept for use in every context, but does not give it a different label from recklessness-as-advertent-risk-taking. His account is thus open to the objection levelled at English law in this article. See, similarly, Gardner and Jung, "Making Sense of Mens Rea", at 578.

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These decisions probably "did justice", but only at a price: the clarity of the law for laypersons. Furthermore, the courts exercised discretion in the definition of mens rea terms that was not subject to clear boundaries. It is submitted that it would have been preferable for the courts to stick to a uniform definition of mens rea terms and require Parliamentary intervention. For instance, the legislature has, through the Sexual Offences Act 2003, amended the definition of the mens rea of rape to more clearly locate culpable wrongdoing, without endangering the clarity of the definition of recklessness in other contexts. If the defendant lacks a reasonable belief in consent, he is to be convicted if his partner was, in fact, not consenting.[94] The type of case mentioned above is thus captured well, and recklessness can go back to meaning (usually)[95] advertent risk-taking. This makes it easier to argue about the application of the law of rape to particular circumstances, and makes it clear to citizens (in normative and semantic terms) what the polity takes to constitute rape.

Judges would do well to spur on such legislative clarifications. If a statute defines a crime in terms of recklessness, but the defendant clearly did not notice the relevant risk, he might still *appear* culpable (and perhaps, though not always, was on "thin ice"). The trial judge might reach the conclusion that, had Parliament thought about it, they would have included inadvertent risk-taking within the ambit of the offence (by outlining a distinct definition of recklessness, or including a mens rea term that includes inadvertent risk-taking, such as negligence). The judge may feel inclined, in light of this conclusion, to fudge the issue of foresight for the jury.

The appellate courts might well support this, claiming that this is one instance where – because of concerns local to that offence – recklessness includes inadvertence (it has happened before and, in *G and Another*, Lord Rodger very clearly left the door open for it to happen again).[96] But the point is that this decision is based on supposition and no real democratic discussion of the localised concerns that the criminal law is meant to reflect. It would be preferable to permit the occasional "injustice" to occur, in order to allow a proper discussion to take place in the legislature.

An analogy can usefully be drawn here from the law on conspiracy. Trial (and appeal) judges were presented, in section 1 of the Criminal Law Act 1977, with an offence which very clearly required knowledge or intention as to every element of the contemplated offence before a conspiracy would be made out. They tried, nevertheless, to interpret that section in terms of mere suspicion to catch seemingly culpable

[94] Sexual Offences Act 2003, s. 1.
[95] See the above discussion of recklessness in English law.
[96] [2003] UKHL 50, [2004] 1 A.C. 1034, at [70].

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actors.[97] This did violence to the notion of knowledge as it is applied more generally in the criminal law, and the decision in *R. v Saik*[98] – which re-emphasised the clear meaning of the statutory text – ought therefore to be celebrated. It makes clear that, if Parliament wants to capture such suspicious actors, it must say so specifically. The discretion to think up mens rea terms to capture distinct types of culpability is with them, in an ideal system, not the courts.

B. Two Concerns

Things being as they are, the obvious danger with the argument above is that Parliament would, hoping to avoid unmerited acquittals, make every offence overbroad, with the lowest form of fault element possible. They could, for example, make all offences capable of commission through negligence or (if they can justify it) offences of strict liability, to ensure that no "culpable" wrongdoers go free. This is no doubt a concern, but it would make it very clear to the public what Parliament was doing. However tough on crime "the public" is thought to be,[99] if every offence had a flimsy fault element (or no fault element at all) attached to it, convictions would be avoided through "jury equity", and citizens would soon become attuned to the fact that the criminal law no longer reflected anything like *their* ideas about wrongdoing and culpability. As contended above, this would compromise the moral legitimacy of the criminal law, and jeopardise the sense of obligation that citizens have towards it. It must be asked whether Parliament would take this sort of risk. If not, then the concern about over-criminalisation is not unreal – and would have to be guarded against – but it is less significant than it might otherwise be.[100] What is required is keen attention to the role of different mens rea terms in criminalisation decisions, a topic which cannot be done justice here.[101]

A second concern is to do with the potential for achieving rationality and coherence in a system as messy as English criminal law. The argument in this article presupposes a clear range of distinct terms applied consistently, and this would be difficult to impose on English law. One (perhaps easy) answer is that a wholesale codification exercise would have the best potential to realise this ambition. If a code could employ consistent language throughout, and develop a rich vocabulary

[97] Simester et al, *Criminal Law*, pp. 312–314.
[98] [2006] UKHL 18, [2007] 1 A.C. 18.
[99] It is difficult not to have sympathy with Horder's view that "[l]ay people are not the wild-eyed retributivists that it suits many liberal-progressive scholars or would-be law reformers to regard them as being": J. Horder, *Homicide and the Politics of Law Reform* (Oxford 2012), 42.
[100] For a useful introduction to the problem of overcriminalisation, and potential checks on legislative power in the criminal context, see D. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford 2007).
[101] See, however, Chan and Simester, "Four Functions of Mens Rea" at pp. 393–395.

https://doi.org/10.1017/S0008197313000056 Published online by Cambridge University Press

to ensure its messages about wrongdoing and culpability were clear, then this would be a large step forward in endorsing the point defended in this article.

One objection to this is that the law might end up with a *very* rich vocabulary. There might be "*Caldwell* recklessness" (for the unthinking), "*Majewski* recklessness" (for the acutely voluntarily intoxicated) and so on, and this would result in a clunky and confusing text. This is not necessarily the case. Many of these judicial devices overlap with each other and they could be rationalised down to a manageable number. What would need to happen is a debate, and a long reflection, upon what it means to be culpable. The issues of morality and politics would have to be engaged with head-on, with an eye on the general landscape of the criminal law, rather than smuggled in through scattered decisions that scarcely look beyond the offence or circumstances at issue.[102] Parliament, not the courts, is the place to have such a debate, after preparatory work by institutions such as the Law Commission.

The real difficulty is, of course, that such a comprehensive clarification exercise is extremely unlikely to happen.[103] The Law Commission has – despite its *raison d'etre* being to reform the law, including in particular the codification of that law[104] – abandoned the idea of a criminal code,[105] and it is easy to see why. Law Commission proposals for reform of the criminal law, if they are acted upon at all, often undergo an unfortunate metamorphosis during the Parliamentary process. The result is sometimes scarcely ever what the Commission envisioned, and their views might be utterly irrelevant when it comes to divining sense from a statute.[106] The reality is that a code which went through Westminster would almost necessarily be confused. The most plausible way out of the doctrinal "make-do-and-mend" attitude towards general definitions, outlined in Part II above, is probably closed.

This is no doubt a disappointing conclusion, but that is not because the theoretical point defended in this article is impractical *in itself*. It is the politicisation of issues of criminal law and justice that makes the quest for clarity and coherence – for mens rea terms that citizens can identify with readily and utilise effectively in planning their affairs or defending themselves in questioning or in court – beyond simple reach.

[102] See Halpin, *Definition in the Criminal Law*, pp. 194–196.
[103] See J. Lavery, "Codification of the Criminal Law: An Attainable Ideal?" (2010) J. Crim. L. 557.
[104] Law Commissions Act 1965, s. 3(1).
[105] See I. Dennis, "RIP: The Criminal Code (1968–2008)" [2009] Crim. L.R. 1. The previous Chairman of the Law Commission described codification as a "distant memory": Munby L. J., "Shaping the Law: the Law Commission at the Crossroads", Denning Lecture (29 November 2011) at 11 (available at http://www.bacfi.org/files/Denning%20Lecture%202011.pdf). The Law Commission now appears to be engaged in a process of "simplification" of the criminal law, which it distinguishes from codification: *Annual Report 2011–2012* (Law Com. No. 334, 2012), para. 2.34.
[106] See e.g. the recent decision on the partial-defence of "loss of control" in *R. v Clinton, Parker and Evans* [2012] EWCA Crim 2, [2012] 3 W.L.R. 515.

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This should be a cause for much concern, given the problems with the present approach to the definition of mens rea terms identified in this article. If the courts can make these difficulties more immediate for Parliament, so that a more sensible debate over criminal fault can commence, then they should.

VI. Conclusion

Tadros is correct to point out that different localised concerns may apply to the ascertainment of culpable wrongdoing in different contexts, and that – if it is to fulfil its function properly – the criminal law should be sensitive to this. This has, in English law, traditionally meant that a limited number of mens rea concepts are defined in various ways, but it was argued in this article that this approach is unhelpful. It impedes the communicative endeavour of the criminal law and its institutions, and the answer is not simply to point out that lawyers might translate this language for citizens charged with offences. Citizens should feel confident in their assertions about the law applicable in certain situations, and this means utilising a rich vocabulary which is applied consistently to identify, in normative and semantic terms, wrongdoing and culpability. They should also feel confident that criminal justice officials cannot frustrate such plans through exercising undue discretion with regard to the definition of mens rea terms in distinct contexts.

Once this is accepted, any mask of theoretical legitimacy should be removed from English law's present approach to defining key concepts used throughout the criminal law. The full realisation of law as a communicative endeavour is prevented at present by the politicisation of criminal justice and fears about what codification (the easiest manner in which to attempt coherence and consistency in the law) might bring. This should be a source of much regret.

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