they did so on the facts—and the courts seemed ready to accept, in principle, that these Articles could apply against prison sentences that are completely disproportionate to fault. As the Criminal Justice Act 2003 has now prescribed mandatory prison sentences for a list of Firearms Act offences that carry strict liability, the day may come when this argument succeeds.

J.R. SPENCER

RECKLESSNESS RESTORED

Two boys, aged 11 and 12, go camping one night without their parents' consent. In the early hours of the morning they wander into a supermarket car park, set fire to some newspapers which they find there, bundle these under a pair of plastic wheelie-bins against the wall, and leave. A million pounds of fire later, they are charged with arson of the supermarket and of buildings standing nearby. Such in a nutshell are the simple facts of *G and another* [2003] UKHL 50, [2003] 3 W.L.R. 1060. The law is no less simple. There was no question of the boys having intended to burn down the buildings, and it was accepted that neither foresaw any risk of this (para. [2]). But the risk was one which would have been obvious to a reasonable person—a reasonable adult person, that is—and, impeccably directed along the lines laid down in *Caldwell* [1982] A.C. 341 that the failure to give thought to such an obvious risk was sufficient *mens rea* for the offence, the jury duly convicted them. The Court of Appeal, bound by *Caldwell*, upheld the convictions. The House of Lords was not so constrained and reversed them. Departing from *Caldwell*, they reinstated the law as it was thought to stand before 1982, in line with the test associated with *Cunningham* [1957] 2 Q.B. 396: in offences under the Criminal Damage Act 1971 a person will be "reckless" only if he or she foresees a risk and nonetheless goes on to take it unreasonably.

Caldwell was a terrible decision, and no lawyer will lament its consignment to the scrap-heap of legal history. It introduced into the criminal law an unprincipled distinction between criminal damage and offences against the person. Its mechanical application led to palpably unjust results, particularly where the defendant was young or educationally sub-normal. And as a piece of statutory interpretation it was shoddy, if not downright shocking. Whatever the threshold for the House of Lords to depart from its own previous decisions, it was comfortably satisfied here. None the less, it would be premature simply to breathe a sigh of relief. For all its

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faults, *Caldwell* was a genuine response to problems which were perceived to exist in the criminal law in the late 1970s, and not all of these have simply disappeared through the effluxion of time.

Central is the case of the angry defendant, typified by *Parker* [1977] 1 W.L.R. 600. D, in a fit of temper, slammed down a telephone receiver, breaking it; he was charged with recklessly causing criminal damage. His story, that it did not occur to him for a moment that he might damage the receiver, is perfectly believable, and if recklessness is to be defined in purely subjective terms it appears that he should be acquitted. The Court of Appeal, clearly unhappy with this, upheld his conviction on the grounds that he was deliberately closing his mind to an obvious risk, but (as was immediately pointed out) such an explanation was hardly convincing. At no time did Parker stop and decide not to think whether there was a risk of causing damage. He simply slammed down the receiver. If we believe that Parker should be convicted, and if we are honest in our use of language, we have no choice but to recognise that the purely subjective analysis of recklessness is not in itself enough. The same is true of the defendant in a state of self-induced intoxication. There is nothing to stop us saying that it is reckless to take drink or drugs to excess (as do Lords Elwyn-Jones, Edmund-Davies and Russell in *Majewski* [1977] A.C. 443), provided that we recognise that "reckless" means something different from what it meant in *Cunningham*; it is a huge leap to say that the person who gets intoxicated has foreseen that he or she might get into a fight and do someone else an injury. We might as well say that the person who intentionally goes on a binge is intentional as to all the consequences.

It is regrettable that the House of Lords does not squarely face up to this. For Lord Bingham, with whom Lord Browne-Wilkinson and Lord Hutton agree, it is clearly culpable consciously to take an unacceptable risk of causing injury, and not clearly culpable to do something involving a risk of injury if, for reasons other than self-induced intoxication, one genuinely fails to perceive the risk (para. [32]) (though confusingly, Lord Bingham also says that it is clearly blameworthy to take an obvious and significant risk, a slip of the tongue—presumably—which will no doubt provide a handhold for prosecuting counsel in some future case). But the question why it is that self-induced intoxication makes a difference, and whether other situations might fall within the same principle, is ignored. Lord Steyn is not so explicit in his commitment to a purely subjective approach to criminal liability, saying simply that the re-adoption of the subjective interpretation of recklessness in the Criminal Damage Act is consistent with the modern trend of

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the criminal law (para. [55]); it is ironic that three of the four cases relied upon to show this trend (*Morgan*, *B (A Minor)* and *K*) were reversed or qualified by statute within weeks of the decision in *G* (see Sexual Offences Act 2003, ss. 1, 9, 10). Lord Rodger alone reveals a degree of hesitancy, seeing that there are powerful arguments against the subjectivist analysis of criminal responsibility as well as in favour of it (paras. [65]–[69]), but even he fails to give a lead in the resolution of this tension.

The problem is at least as old as Aristotle, for whom knowledge or foresight could be attributed to a person who had failed to recognise some circumstance or the risk of some consequence as a result of intoxication or rage, and possibly also in other situations where the failure of cognition was blameworthy. There is much to be said for this approach, retaining as it does at its core the principle that individuals should be judged according to their own states of mind but accepting that there will be cases where this is not in itself sufficient. It may be that it would be enough to mark out intoxication and rage as factors triggering this exceptional liability (arch-subjectivist though he was, it seems that Glanville Williams would have accepted this: [1981] C.L.J. 252, 258–260), though it is not difficult to think of other situations in which we might want to argue that criminal liability should be imposed on the thoughtless person. Say, for example, a grossly negligent anaesthetist fails to recognise a malfunction in equipment and the patient suffers brain damage; or a person engrossed in sending a text message walks into the road, knocking a cyclist into the path of an oncoming car; or a person who doesn't bother to read the instructions before using his newly-acquired flame-thrower; and so on. It is impossible to give a closed list of such situations, and it might be thought that it would have been easier to start with the objective test of *Caldwell* and exclude situations where the actor was not to blame for having failed to recognise the risk (perhaps leaving it to the jury to say when such blamelessness existed), an alternative rejected in *G*. But whatever route is followed, some principled mid-position between objectivism and subjectivism has to be reached if unacceptable results are to be avoided.

DAVID IBBETSON

PUTTING THE CART BEFORE THE HORSE? PRIVACY AND THE WAINWRIGHTS

As Lord Hoffmann opined, "[s]trip searching is controversial because having to take off your clothes in front of a couple of

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