

Mens rea and the general inchoate offences: *another new culpability framework*

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Introduction

This article examines approaches to reforming the mens rea of inchoate offences, focusing in particular on recently published proposals of the Irish Law Reform Commission,¹ and contrasting them with very different recommendations recently adopted by the English Law Commission.² Both sets of proposals recommend a departure from the orthodox position which is that for a defendant to be liable for an inchoate offence they must *intend* that the full offence be committed. In recommending a departure from that approach, each Commission's proposal involves an expansion of the scope of inchoate criminal liability, though, as we will see, the Irish Commission goes considerably further in this regard. In exploring the commissions' proposals, we are concerned to identify and evaluate the implications of the approaches they suggest. We will argue that deciding what the mens rea of inchoate offences should be requires a clear conception of what the wrong is that is inherent in these offences which it is proposed to criminalise. Furthermore, any culpability framework must be rational and coherent, and therefore must consistently accord with whatever wrong it is claimed inchoate liability is there to penalise.

By way of introduction, it is useful to draw attention to the centrality of the mens rea of inchoate offences in characterising the wrong which is being criminalised. In the case of completed offences, in most cases the wrong in question comprises engaging in conduct which amounts to a concrete realised harm, combined with some element of fault on the defendant's part in bringing about that harm. For inchoate offences, the defendant's conduct is often significantly removed from that harm and, by definition, the objective harm encompassed by the completed offence is not realised. In the case of inchoate offences then, we are, at best, concerned with a *prospective* harm which *may* result/have resulted from the defendant's conduct. In the absence of the concrete realised harm contemplated by the

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1 Law Reform Commission of Ireland, *Inchoate Offences* Consultation Paper No 48 (Dublin: LRC 2008) and *Inchoate Offences* No 99 (Dublin: LRC 2010), hereinafter, Ire. Consultation No 48 and Ire. Com. No 99 respectively.

2 See, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* No 300 (London: Law Commission 2006), hereinafter Eng. Com. No 300; Law Commission, *Conspiracy and Attempts: A consultation paper* Consultation No 183 (London: Law Commission 2007) and *Conspiracy and Attempts* No 318 (London: Law Commission 2009), hereinafter Eng. Consultation No 183 and Eng. Com. No 318 respectively.

completed offence, the defendant's mens rea as regards prospectively bringing about the commission of that offence plays a crucial role in characterising the wrong encompassed by inchoate criminal liability. For that reason the commissions' proposals have considerable importance. In suggesting a departure from the orthodox approach and proposing alternative culpability frameworks for the mens rea of inchoate liability, the commissions are not merely recommending changes to the technical basis upon which criminal liability will be imposed. More fundamentally, they are, whether or not they expressly acknowledge it, proposing that inchoate criminal liability should target wrongs which are different to the wrongs which were previously identified as the target of inchoate criminal liability, and in respect of which criminalisation was substantively claimed to be justified.

In the sections which follow, we first seek to explain the implications of each Commission's proposals, and in so doing we endeavour to identify the wrong, or indeed wrongs, which their proposals seem to imply underlies inchoate criminal liability. We then proceed to explore possible principled justifications which may exist for criminalisation on that basis. However, before examining these matters, we first begin with an explanation and an analysis of the orthodox approach. Our objective in so doing is, in particular, to explain why the orthodox approach was thought by both commissions to present difficulties which required that alternative approaches be formulated.

The orthodox position and its apparent problems

The orthodox position regarding the mens rea for inchoate offences is reflected in the current law in England and Wales,³ Northern Ireland,⁴ and the Republic of Ireland,⁵ along with most of the common law world.⁶ In general, for a defendant to be liable for an inchoate offence they must: intend to commit the substantive offence (for attempt); intend that the person encouraged commit the offence (for incitement); or in agreeing with someone else to commit the offence, intend that the offence be committed (for conspiracy).⁷ According to McAuley and McCutcheon:

3 See, the Criminal Attempts Act 1981, s. 1 (attempt) and the Criminal Law Act 1977, s. 1 (conspiracy). The recently created offences of assisting and encouraging (which also apply to Northern Ireland) set out in the Serious Crime Act 2007, Part 2, depart from the orthodoxy as far as incitement is concerned. This offence replaces common law incitement and its creation follows (partly) the English Commission's recommendations set out in Eng. Com. No 300, discussed below.

4 Criminal Attempts and Conspiracy (Northern Ireland) Order 1983, No 1120 (NI 13), Articles 3 and 9.

5 *The People (Attorney General) v Thornton* [1952] IR 91, 93, and P Charleton, P McDermott and M Bolger, *Criminal Law* (Dublin: Butterworths 1999) [4.105–7] and [4.134].

6 The main exception arises in Scot's law of criminal attempts. See *Cawthorne v HM Advocate* 1968 SLT 330. As Plaxton notes: "The idea that someone can attempt something recklessly is peculiar to Scotland – and, in fact, is simply peculiar." See further M Plaxton "Foreseeing the consequences of Purcell" (2008) *SLT* 21, especially pp. 23–4. See also T H Jones and M Christie, *Criminal Law* (Edinburgh: W Green 2008) [6–09] and [6–10]. Thanks to Luke Price, research assistant at Birmingham Law School, for his help in finding a range of relevant Scot's law materials.

7 In the case of conspiracy, the position is more complicated. For instance, in England and Northern Ireland the common law offences of conspiracy to corrupt public morality, conspiracy to outrage public decency and conspiracy to defraud, involve agreements to engage in conduct which are not themselves substantive offences. In the Republic of Ireland, the position in law remains that set out in *R v Parnell* (1881) 14 Cox 508 where it was explained that in addition to catching agreements to commit a crime, conspiracy also includes agreements "where the object is lawful, but the means to be resorted to are unlawful; and where the object is to do injury to the third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime". The specific common law conspiracies noted above are also offences. The Irish Law Reform Commission has recommended the enactment of a statutory version of conspiracy limited to agreements to carry out a crime, with the exception of conspiracy to defraud which they think should be retained. See Ire. Com. No 99, [3.64], [3.87–93], [3.106–9].

The logic of this arrangement is easily explained: since incitement, conspiracy and attempt are auxiliary crimes, it is a necessary condition of relational liability that the defendant's factual objective, the state of affairs he set out to achieve, must have amounted to an intention to commit whatever substantive offence they are being used to complement.⁸

Not only does the requirement of intention to commit the substantive offence fit with this dominant rationale for these species of offences, it is deceptively attractive, since being easy to state, it might be assumed that it is easy to apply. Furthermore, requiring intention to commit the substantive offence assuages concerns about criminalising actions which may, relatively speaking, be remote from the *harm* of the prospective offence, thus ensuring that "as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability . . . become more narrow".⁹

It might be useful to take the offence of criminal damage as an example to illustrate the orthodox approach. In both of the jurisdictions under discussion, a person will be liable for criminal damage where they damage property belonging to another intending to damage the property or being reckless as to whether the property would be damaged.¹⁰ Imagine that D tries to wake up V by throwing small stones at V's window. D does not want to damage the window, but foresees the possibility that one of the stones may cause damage. If one of the stones thrown by D were to cause damage to V's window, D will be liable for criminal damage having damaged property belonging to another, and being reckless as to whether damage would be caused. However, where D does not cause damage, the current law will only impose liability where D intended to cause the damage. This is because under the orthodox approach to inchoate liability, the underlying wrong which is thought to justify criminalisation is that the person intends to commit the full offence, which is not the same wrong as consciously risking commission of the full offence.

However, in some situations a rigid application of these general principles to particular substantive offences has been objected to because it is thought to give rise to unacceptable under-criminalisation by producing outcomes which fail to catch culpable behaviour that many argue ought to be caught. One well-known example that exercised both the Irish and English commissions,¹¹ and has appeared central to their proposals departing from the orthodoxy, is the crime of attempted rape. Say D and P go out to find a person (V) with whom to have sex. Without caring whether V consents or not, but recognising the likelihood that V will not, both D and P attempt penetration. Only P is successful. In this example,¹² P has committed the offence of rape.¹³ P commits rape because at the time of penetration he is reckless/does not reasonably believe¹⁴ V is consenting. However, if the orthodox

8 F McAuley and P McCutcheon, *Criminal Liability: A grammar* (Dublin/London: Roundhall 2000), p. 445.

9 A Ashworth, *Principles of Criminal Law* 4th edn (Oxford: OUP 2003), p. 425. For further analysis of this principle, see J Child and A Hunt, "Risk, pre-emption, and the limits of the criminal law" in J Child, K Doolin, A Beech and J Rain (eds), *Whose Criminal Justice? Regulatory state or empowered communities* (Sheffield-on-Loddon, Hook: Waterside Press 2011), pp. 51–68.

10 See Criminal Damage Act 1991, s. 2(1) (Ireland) and Criminal Damage Act 1971, s. 1(1) (England). The position is the same for Northern Ireland, see Criminal Damage (Northern Ireland) Order 1977, No 426 (NI 4), Article 3 (1).

11 See, Ire. Com. No 99, [2.93], and Eng. Com. No 318, [8.116], which makes reference to Eng. Consultation No 183, [14.37–45].

12 Loosely based on an example from A Ashworth, *Principles of Criminal Law* 5th edn (Oxford: OUP 2006), pp. 448–9.

13 We are assuming that V does not consent to sexual intercourse and that P does not have a valid defence.

14 In the Republic of Ireland, the mens rea of rape is knowledge or subjective recklessness as to lack of consent: Criminal Law (Rape) Act 1981, s. 2(1)(b). In England and Wales (and Northern Ireland), the Sexual Offences Act 2003, s. 1(1)(c) provides that the defendant must "reasonably believe" that the other person is consenting to penetration.

position for criminal attempt (*intending to commit the offence*) is to require intention as to every element of the substantive offence, including what might be referred to as a *circumstance* (i.e. V's lack of consent), D's recklessness/lack of reasonable belief as to that element would not be sufficient to ground his liability in attempt. Therefore, D would not be liable for attempted rape. In fact, to be liable for attempted rape, it would appear necessary for D either to intend V to lack consent, or at best to have full knowledge of V's lack of consent, both of which the commissions (and many other commentators)¹⁵ find unduly restrictive.

The problem identified above does not merely apply to the offence of attempted rape. It would apply to any substantive offence that, like rape, includes a circumstance element which requires a mens rea less than intention or knowledge. However, rather than applying the intention-based framework rigidly in line with the orthodox position, the courts have instead shown willingness to distort the framework in certain cases. In *Khan*,¹⁶ for example, where the English Court of Appeal was presented with the sort of attempted rape problem described above, the court proceeded to interpret the intention requirement in s. 1 of the Criminal Attempts Act 1981 to apply only to the consequence and conduct elements of the substantive offence (the sexual penetration) and not the circumstance element (V's lack of consent). The court held that recklessness as to the circumstance element would suffice.

Similar to circumstance elements, issues have also arisen with substantive offences requiring that D's conduct causes particular consequences. For example, in the English case of *AG's Reference (No 3 of 1992)*,¹⁷ D was charged with the offence of attempted arson, being reckless as to whether life be endangered arising from his throwing of a petrol bomb at an occupied car where the bomb missed the car and smashed against a wall behind it. The Court of Appeal's decision was to the effect that whatever mens rea is sufficient for any "present consequence" for the full offence would suffice for attempt liability, provided that D intends to bring about a "missing" consequence. Therefore in this case, D's intention to set fire to the car (the missing unrealised consequence) combined with his recklessness as to whether life might be endangered thereby (the present realised consequence)¹⁸ was sufficient.¹⁹

It is possible to defend *Khan* and *AG's Reference (No 3 of 1992)* on their own facts, or even to defend them as reinterpretations or reform of the original orthodox position. However, the central problem which these examples illustrate for present purposes is that they involve bespoke solutions departing from the orthodoxy for individual substantive offences only. They are not therefore consistent with the treatment of other offences, such as criminal damage, where the orthodox position is rigidly applied. The desire of the Irish and English commissions to move away from the orthodox position is therefore motivated both by a belief that rigid application of an intention-based framework would lead to unacceptable under-criminalisation, and the observation that if not applied rigidly then it can lead to inconsistency.

However, the observation that problems may be identified with the orthodox approach does not mean devising an alternative is likely to be any less problematic. This is partly

15 See, for example, Ashworth, *Principles*, n. 12 above.

16 [1990] 1 WLR 813.

17 [1994] 1 WLR 409.

18 It might be contended that a better analysis for the court to have adopted would have been to treat the stipulation that D be reckless as to whether life be endangered as ulterior mens rea, comparable to crimes of ulterior intent, albeit in this instance recklessness as distinct from intent is sufficient for the substantive offence. See, generally, J Horder "Crimes of ulterior intent" in A P Simester and A T H Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press 1996), p. 153.

19 For discussion of an approach based on missing elements, see J Stannard, "Making up for the missing element – a sideways look at attempts" (1987) *LS* 194.

because, as the problems just discussed illustrate, there is a tension between the relational and parasitic nature of inchoate offences, and the fact that the general inchoate offences have been developed as part of the general part of the criminal law.²⁰ The solutions adopted in *Khan* and *AG's Reference (No 3 of 1992)* were adopted because of a focus on the former, being derived from an analysis of what should constitute inchoate versions of the individual substantive offences themselves. They were not the product of a fully theorised account of what wrongs inchoate liability should target for the purposes of formulating a general doctrine of inchoate liability. However, if general inchoate offences are to be devised and are to be useful at all, the legitimacy of criminalisation of, say, attempted murder, or conspiracy to rape, or inciting criminal damage, and so on, are not core questions which arise when one comes to decide what the general rules for inchoate liability should be. Rather the core question is, more generally, when is it legitimate to criminalise attempt/conspiracy/incitement to commit any substantive offence?

The interplay between the relational and the general therefore presents considerable challenges in framing alternatives to the orthodox approach: what is required is a set of general principles which accurately capture a conceptually coherent approach, which when applied to individual substantive offences ensures that inchoate liability consistently attaches in situations which properly accord with principled views as to what it means to attempt, incite or conspire to commit the offence in question. To some extent the routes chosen by the Irish and English commissions fall on very different sides of the relational/general divide. The Irish Commission's proposals involve abandoning any particular or additional mens rea requirements for inchoate liability. It recommends that, with the exception of inchoate versions of murder, "the culpability for [attempting, inciting and conspiring to commit] a substantive offence ought to track the culpability for that substantive offence".²¹ In contrast, the English Commission's recommendations involve an effort to generalise and elevate to the level of general doctrine some of the solutions reflected in the individual situations described above. This is to be done by distinguishing generally between conduct, circumstance and consequence elements of substantive offences, and stipulating particular approaches to the mens rea in respect of each of those elements for the purposes of inchoate liability.

In the sections which follow we examine the justifications for, and implications of, the adoption of these different approaches.

The Irish Commission's approach

In proposing that the mens rea for inchoate offences simply track the mens rea requirements for the relevant substantive offence, the Irish Commission's proposed culpability framework represents a radical departure from the orthodox position. It means that where the substantive offence imposes liability upon persons who are reckless as to consequences and/or circumstances, such persons will be liable for the inchoate version of the offence if they are reckless as to consequences which do not actually result from their conduct, and/or are reckless as to the existence of circumstances which may not objectively exist. However, the Irish Commission's proposals have more far-reaching effects than this. This is because if the substantive offence does not require any mens rea at all as regards consequences or circumstances – as is the case with strict liability offences – then neither will inchoate versions of the offence.

Therefore, these proposals involve a dramatic expansion of the scope of criminal liability, bringing within its ambit many players who currently sit outside its boundaries.

20 Apparently this was not always the case. See F B Sayre, "Criminal attempts" (1928) *Harvard LR* 881; J Hall "Criminal attempt – a study of foundations of criminal liability" (1940) 49 *Yale LJ* 789.

21 *Ire. Com. No 99* [2.123]. In relation to conspiracy and incitement see [3.61] and [4.13] respectively.

Furthermore, in abandoning the requirement that D must intend the consequences of actions which do not come about, or circumstances that do not exist, it involves adopting a different view as to the underlying wrong which inchoate criminal liability may target. However, the Irish Commission does not itself engage in a process of identifying the wrongs which its proposed approach to inchoate criminal liability will target, let alone engage in a principled justification for criminalising such wrongs as it might identify. Rather, it is content for the most part to rely on a critique of the difficulties described above in relation to the orthodox position,²² as well as more specific criticisms of the complexity of the English Commission's alternative approach which will be discussed later in this article. Whilst appeals to consistency, certainty and simplicity are not without merit, they do not in and of themselves stand as a coherent principled justification for adopting the Irish Commission's solution.

Therefore, in examining the implications of the Irish Commission's proposals we attempt to subject some of the key implications of the proposed culpability framework to principled examination. We shall do so first in respect of the criminalisation of persons who engage in conduct whilst being reckless as to the consequences of their action when such consequences do not actually result from their conduct. Second, we consider principled arguments concerning the imposition of criminal liability through forms of inchoate strict liability offences.

RECKLESSNESS AS TO CONSEQUENCES

One implication of the Irish Commission's proposal that the mens rea of inchoate offences should track the mens rea of the full offence arises where the substantive offence imposes criminal liability on persons who are reckless as to the consequences which their conduct brings about. In these cases, persons will be liable for inchoate versions of the offence where they are reckless as to whether the consequences that do not actually come about might have done.

We can illustrate this by returning to the example of criminal damage discussed above involving D who tries to wake up V by throwing small stones at V's window where, although D does not want to damage the window, he foresees the possibility that one of the stones may cause damage. We saw above that where D does not cause damage, the current law will only impose liability for attempt where D intended the damage to be caused. However, the Irish Commission's proposal that the mens rea of inchoate offences track the mens rea of substantive offences means D's recklessness would render him liable for attempted criminal damage. So, despite not intending to cause damage, despite no damage being caused, and if stopped by V just before throwing the first stone, despite not having thrown a stone, D would be liable for attempted criminal damage because he is reckless as to whether damage might be caused. Furthermore, it ought not to be forgotten that the Irish Commission's proposed culpability framework also applies to conspiracy and incitement. Therefore, if D had discussed his plan to wake V in this manner with X, and if X were to agree with the plan, or to encourage it in any way, X would be liable for conspiracy or incitement if she too is reckless as to whether damage will be caused.

Although the Irish Commission does not expressly acknowledge it, the above account shows that in the case of criminal damage, and indeed every other similarly configured substantive offence (of which there are many), its proposals involve changing the wrong targeted by inchoate criminal liability from engaging in conduct with the intention of bringing about the prohibited consequence, to engaging in conduct which consciously risks

22 Ire. Com. No 99, ch. 2(C).

the prohibited consequence being caused.²³ The question which arises in this context therefore is whether there is any principled justification for imposing a form of generally applicable inchoate liability to the latter?

The prevailing weight of opinion in common law thought and jurisprudence would say there is not.²⁴ Indeed, both the so-called *subjectivist* and *objectivist* schools are at one in so far as they identify the intention of a person to achieve the prohibited consequence of his conduct as central to justifying the imposition of inchoate liability. In the case of the so-called subjectivist position, it has been argued that “the emphasis in criminal liability should be upon what D was trying to do and believed he was doing, rather than upon the actual consequences of his conduct”.²⁵ In the case of the so-called objectivist position, it has been argued that

[w]hen harm or injury to some legally protected interest is potential rather than actual, the ascription of criminal liability must depend on whether, and how intimately, the agent's action is related to that potential harm. Someone who thus attacks, intending harm to, a legally protected interest relates himself, as an agent, as closely as he can to that harm. His intention defines his action as an attack on that interest as an action whose intrinsic character is structured by the harm it is intended to do. His action is, we can say, essentially harmful even when no harm is actually caused; the actual occurrence of that harm completes the action's character, rather than giving it a harmful character which it did not already have.²⁶

However, whilst these positions certainly provide a basis for justifying inchoate liability, they do not of themselves provide a basis for saying there can be no principled justification for criminalising individuals who engage intentionally in conduct whilst being recklessness as to the consequences of such conduct, even if those consequences do not come about.

Indeed, as regards the point of principle, Ashworth concedes that there is “no relevant moral difference” between reckless persons whose conduct fails to bring about the relevant consequences, as distinct from reckless persons whose conduct succeeds in doing so, and he observes that this provides a “principled” basis for imposing inchoate liability in such cases.²⁷ However, he also argues that the fact that there is no relevant moral difference between the two situations does not “inexorably lead to the conclusion”²⁸ that liability for attempt should be imposed because he is mindful of the practical effects of increasing the scope of criminal liability. These include an “increase in the powers of the police” and “an individual's liability to both lawful and unlawful police intervention”.²⁹ For this reason he seems more comfortable that imposition of inchoate liability in this form be effected by means of bespoke endangerment offences, as distinct from adopting a general doctrine of *reckless* attempts.³⁰ Nonetheless, the issue of principle has not been denied, though Ashworth has rightly argued that other principles may well lead to the conclusion that a narrower and more focused approach be adopted.

23 Though this is by no means the full extent of the change, see our discussion of “Substantive offences lacking mens rea” below pp. 255–8.

24 Even though those explanations do not themselves all speak with one voice: see R A Duff “Subjectivism, objectivism and criminal attempts” in Simester and Smith, *Harm and Culpability*, n. 18 above, and A Ashworth, “Taking the consequences” in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (Oxford: Clarendon Press 1993), pp. 105–24.

25 A Ashworth, “Criminal attempts and the role of resulting harm under the code and in the common law” (1988) *Rutgers LJ* 726, p. 736.

26 Duff, “Subjectivism”, n. 24 above, pp. 40–1.

27 Ashworth, “Criminal attempts”, n. 25 above, pp. 756–7.

28 Ibid. p. 756.

29 Ibid. p. 757.

30 Ibid. p. 757.

The objectivist position, as espoused by Duff, is fundamentally different and does not on its face at least provide any basis for justifying reckless attempts of the sort which would be criminalised under the Irish Commission's proposals. In the first place, Duff would not accept the equivalence Ashworth draws between reckless persons whose conduct fails to bring about the relevant consequences and reckless persons whose conduct succeeds in doing so. This is because, from Duff's perspective, for the purposes of ascribing criminal responsibility and attaching criminal liability thereto, "objective aspects are also relevant: what I am properly held liable for, what can properly be ascribed to me, is my action as it actually impinges on the world – as it actually engages with the material world, and with the social world of rational thought and deliberation".³¹ Therefore, on this basis, a distinction would need to be drawn between those whose conduct does result in the particular consequence and those whose conduct does not result in that consequence, even if they are both reckless. Secondly, Duff argues that in cases where the conduct does not actually bring about the relevant consequence, as is the case in criminal attempts, there is a difference between a person who intends that it should do, and a person who is reckless as to whether it will, since the latter's

action's intrinsic character is not structured by the prospect of doing harm, in the way that that prospect does structure the action of someone who intends harm. Both an action which is intended to injure some legally protected interest, and one which recklessly endangers such an interest, threaten harm: but the character of that threat differs significantly in each case, since only the former is directed against the threatened interest.³²

The argument here then is that the *wrong* where a person is reckless as to the consequences is not the same *wrong* where the person who intends the consequences of their conduct and that this is a categorical difference such that inchoate versions of the substantive offence should not catch those who are merely reckless as to consequences.

As for resolving the substantive debate, we would observe that both schools of thought are concerned with intentional conduct that fails, but nonetheless culpably risks bringing about the consequences which the substantive offence prohibits. The core issue then is how differing degrees of fault in creating that risk should be regarded by the law. We have seen above that reducing the level of fault to recklessness is not inconsistent with the underlying rationale of the subjectivist position. However, we would also argue that it is not inherently inconsistent with Duff's objectivist position either. This is because Duff's guiding principle is:

[w]hen harm or injury to some legally protected interest is potential rather than actual the ascription of criminal liability must depend on whether, and how intimately, the agent's action is related to that potential harm.

It does not *necessarily* follow from this that the line for inchoate liability has to be drawn at the point where the agent's action is related to that potential harm because he intended it, as distinct from being reckless as to whether it might ensue. It is true that the action of D who throws stones at V's window being reckless as to whether damage may result is not *as* intimately related to the (same) harm which might have been caused if he had intended to damage the window. The "character of the threat", to use Duff's terminology, is not "directed against the threatened interest". However, as he admits, it does "recklessly endanger" it. Even if we accept this is a categorical difference, as distinct from being a difference of degree, it is not self-evident to us why this distinction of itself should definitively determine where the line should be drawn between inchoate liability, on the one

31 R A Duff, *Criminal Attempts* (Oxford: Clarendon Press 1996), p. 237.

32 Duff, "Subjectivism", n. 24 above, p. 41.

hand, and other forms of criminal liability, such as a general or a bespoke set of endangerment offences, on the other. Indeed, it is significant that Duff, and others who espouse an objectivist stance³³ do not deny that those who recklessly risk a consequence, which in the event does not result, should necessarily escape criminal liability altogether. Thus, for instance, Duff concedes that in certain situations we may wish to criminalize some “relatively serious kinds of endangerment”.³⁴

The account of these perspectives has been necessarily brief. However, our conclusion is that it tends to demonstrate that, despite the Irish Commission’s lack of engagement with the principled debate, there is some principled basis to justify a form of inchoate criminal liability targeting persons who knowingly risk the impugned consequences even when they do not in the event result. Having said that, this does not serve to justify the totality of the Irish Commission’s approach. The Irish Commission’s approach is that the mens rea of inchoate offences should be whatever the mens rea of the substantive offence is. Therefore this is an approach which is by no means confined to criminalising the wrong of knowingly risking the prohibited consequences of one’s conduct. Most significantly, as we shall now go on to examine, it would include forms of *objective fault*, and indeed situations where there is no fault at all.

SUBSTANTIVE OFFENCES LACKING MENS REA

Whatever may be one’s view of the lowering of the mens rea for inchoate liability as regards potential consequences, one can at least say that the Irish Commission’s tracking proposal would require some level of subjective fault *when* the substantive offence requires it. The approach may therefore be logically underpinned by an identified wrong for inchoate criminalisation that maintains that it is legitimate to criminalise conduct that *culpably* risks achieving the harm that the substantive offence is designed to prohibit. However, the Irish Commission’s tracking approach loses such a logical connection when it is applied to offences which it calls “crimes that feature non-traditional forms of mens rea”.³⁵ These are substantive offences where liability is based on negligence or is strict. The Irish Commission’s discussion of this category of offence concentrates principally upon strict liability offences, and therefore so shall we.

Say D attends a party where X, anxious that D should have a good time, spikes D’s non-alcoholic drinks with alcohol. At the end of the evening, despite being over the proscribed alcohol limit, D drives home. In this example, D has committed an offence of driving “while under the influence”.³⁶ D commits the offence despite his lack of knowledge regarding the presence of alcohol. We may feel some sympathy for D and, indeed, strict liability offences are a contentious species of liability.³⁷ But the imposition of criminal liability may be argued to be justifiable due to the risk created to other road users by D’s intoxicated state (the actus reus).

However, now let us consider an inchoate version of the offence. Imagine that D is stopped by X just as he is about to switch on the ignition of his car, and X tells D what he has done suggesting that D should not drive. In this situation, if D does not in fact drive, our response is surely one of relief. We may be unhappy with X’s conduct throughout the affair, but it would surely strike us as excessive to punish D for *attempting* to drive over the

33 See A Enker, “Mens rea and criminal attempt” (1977) *American Bar Foundation Research Journal* 845, p. 859.

34 Duff, “Subjectivism”, n. 24 above, p. 41. See further R A Duff, *Answering for Crime Responsibility and Liability in the Criminal Law* (Oxford: Hart 2009), ch. 7.

35 Ire. Com. No 99 [2.120].

36 Road Traffic Act 1961, s. 49 (Ireland).

37 See, generally, the essays in A P Simister (ed.), *Appraising Strict Liability* (Oxford: OUP 2005).

proscribed limit. Yet, applying the Irish Commission's proposal that the mens rea of the inchoate offences should track the mens rea of the substantive offence, D would be liable for attempting to commit the offence.³⁸

Equally, imagine that Y asked D if he could provide a lift home from the party. In this case, if Y was unaware of the fact that D's drinks had been spiked and may even have been assured by D that he had not been drinking alcohol, surely Y is not doing anything wrong. Yet, applying the Irish Commission's tracking approach, Y will have committed the offence of inciting D to drive while under the influence.

The Irish Commission recognises that the expansion of inchoate liability to include these situations may attract the objection of over-criminalisation.³⁹ However, the Irish Commission does not propose that these types of situations should be an exception to its tracking approach. A number of reasons are offered for this position, which we examine below.

First, the Irish Commission relies on the role of strict liability offences in targeting certain types of *harms* and *risks*. For the Irish Commission,

[a]ttempt liability using the tracking principle merely carries through this choice, and because an attempt, by definition, will have come close to the prohibited harm, such harm has been *risked*.⁴⁰

The main problem with this justification is the assumption that if certain risks can be the target of an offence, then all related risks should also be targeted. Operating as strict liability offences do at the edges of the criminal law, this assumption is highly debateable. For example, despite the absence of fault, we concluded above (in line with the current law) that the offence of drink-driving could be justified because of the risk of harm other road users are exposed to. However, the provision of attempt liability does not centre on this same risk: someone attempting to drink-drive does not pose a direct risk to other road-users; they merely create a risk of posing that risk in the future. Therefore, whilst we may accept the strict nature of a drink-driving offence, this does not necessitate also accepting strict liability for attempt: the wrongs involved are different.

Similar objections arise in relation to strict liability offences that criminalise harms, as distinct from risks. For example, the Irish Commission discusses the example of a person who commits a strict liability offence by pouring pollutants into a river⁴¹ reminding us in a footnote that the Irish Supreme Court has recognised the pollution offence as being constitutionally valid.⁴² For the Irish Commission,

If this is acceptable and correct then so too it is in respect of a prosecution for attempted river pollution. The logic and rationale of a strict river pollution offence . . . is pursued in respect of the attempt offence also.⁴³

This is unconvincing reasoning. Whilst the aim of protecting rivers may be shared between the strict polluting offence and a strict attempt offence, this does not mean we cannot accept that liability may be imposed for the former but not the latter. To take one extreme example, banning people from going anywhere near all rivers would undoubtedly protect from pollution, but such an offence would be vastly disproportionate to the aim and therefore unacceptable. The criminal law represents a balancing of priorities and rights, not a simple means to a single end. Extending strict liability from the harm-based polluting

38 Assuming that being in the process of switching on the ignition is a sufficiently *proximate* act.

39 Ire. Com. No 99 [2.120].

40 Ibid. [2.121].

41 Contrary to the Fisheries (Consolidation) Act 1959, s. 171(1)(b). Ire. Com. No 99 [2.121].

42 The reference is to *Shannon Regional Fisheries v Cavan County Council* [1996] IESC 33; [1996] 3 IR 267.

43 Ire. Com. No 99 [2.121].

offence to a risk-based attempt would represent a significant expansion of the law, and again, a different set of wrongs. Although we recognised the potential for strict liability to target risks above (in relation to drink-driving), this does not mean that risks should always be targeted in this manner. Unlike the risks associated with drink-driving, for example, the risk associated with the pollution is a contained one: D's handling of the pollutant is not an active risk to the river, it merely becomes a risk when D unleashes it into the river (by which time D will have committed the substantive offence). We may wish to intervene if D, unaware of the polluting nature of the waste, is about to dispose of it in the river. However, if D is informed and prevented from polluting the river then no harm or risk of harm has been unleashed and, therefore, no use of the criminal law is justified.

The pollution example also provides a useful illustration of further problems encountered by the Irish Commission's justification, outside of its focus on attempts. It must be remembered that although many of the examples we are using focus on attempt, the Irish Commission's inchoate framework is intended to operate in the same manner across each of the inchoate offences. This is undoubtedly a benefit of the scheme, bearing in mind the overlap between offences. However, it must also be carefully considered when extending liability in this area. For example, when the Irish Commission considers the attempted river pollution example, it is clearly envisaging D on the edge of the river about to pour in the waste. On this basis, the Irish Commission is able to claim (in our view unconvincingly) that D's behaviour is so closely connected to that required for the substantive offence that strict liability for the attempt is also justified. However, such close proximity is not required for the other inchoate offences. For example, if X saw D with a bucket of what looked like dirty water and suggested that D throw it into the river, X would be liable under the Irish Commission's framework for inciting river pollution. X will be liable despite her belief that the bucket simply contained dirty water, and despite the fact that, for the harm to be caused (or the potential risk of harm to be unleashed), D would have had to decide to follow that advice. However, where D knows that the bucket contains a pollutant, it is more likely that he will simply inform X and they will both agree that it should not be disposed of in the river after all.⁴⁴ Criminalising X in this example begins to show the true breadth of liability which the tracking approach would entail.

In defending its position, the Irish Commission also argues that in so far as problems may be raised concerning these inchoate versions of strict liability offences, they arise from the substantive offence and not its inchoate derivative and it is not its task here to "second guess"⁴⁵ the legislature's decision as to the appropriateness of strict liability offences. Therefore, its position regarding inchoate versions of strict liability offences is presented as the necessary corollary of those decisions. However, blame-shifting of this kind will only be effective if the culpability framework recommended by the Irish Commission was the only one available. Since this is not the case,⁴⁶ simply claiming that other areas of the law should adapt to accommodate the new framework, and not telling us how that could be achieved, is surely insufficient.

Although strict liability remains controversial, there are many such offences within the criminal law and their continued existence does not seem in any doubt. We do not claim that strict liability offences cannot be justified *and therefore* inchoate versions of strict liability offences are not justified. Rather, we contend that, whilst many strict liability offences are

44 Of course, if they do not come to this conclusion, and X still recommends that D should dump the pollutant in the river then she will be liable under the current (fault-based) inchoate liability framework.

45 Ire. Com. No 99 [2.120].

46 One could, for example, decide that the mens rea for inchoate versions of such offences should require knowledge or recklessness as to the relevant consequence.

justifiable, it would not be acceptable to allow inchoate versions of these offences to also lack mens rea. Inchoate liability may have a role to play in relation to strict liability offences, however, that role should be restricted to where D attempts/conspires/incites a strict liability offence with some mens rea as to every element of the (not completed) actus reus. If such fault is not required, this form of inchoate liability involves criminalising behaviour where, by definition, no *risk* is actually posed or no *harm* is caused, and there is no subjective fault of any kind. The implications of the Irish Commission's proposal, therefore, are that it positively promotes targeting behaviour where there is no *wrong* at all such as might justify criminalisation.

SOME CONCLUSIONS ON THE IRISH COMMISSION'S PROPOSALS

Stepping back from the detailed implications of the Irish Commission's proposed culpability framework, a number of more general observations may usefully be made at this juncture. First and foremost, we would contend that the Irish Commission has failed properly to recognise the role of mens rea as an essential feature in characterising the distinct wrong which inchoate criminal liability may legitimately target. To say that the mens rea for inchoate offences should be whatever the mens rea of the substantive offence is, is to leave all of the work in distinguishing between the substantive offence and the inchoate version of the offence to the actus reus part of the inchoate offence. The position adopted by the Irish Commission then is that there should be no general doctrine of mens rea of inchoate liability. One of the consequences of this approach is that it leads to a considerable expansion of the scope of inchoate liability because inchoate offences will target a whole range of different wrongs depending on the mens rea of the full offence. Only some of these manifestations of inchoate liability are capable of being justified on a principled basis, and indeed in the case of strict liability offences, inchoate liability will operate so as to criminalise persons who have committed no discernible wrong whatsoever.

It is instructive to note, however, that the Irish Commission proposes that inchoate versions of murder should be an exception to its tracking approach methodology. The mens rea of murder in the Republic of Ireland is an intention to kill or cause serious injury.⁴⁷ So, taking attempted murder as an example, if the tracking approach was to be applied to murder for the purposes of attempt liability, a person would be liable for attempted murder where he or she acted with the intention to cause serious harm, even where death does not result. However, the Irish Commission concluded that "such a person is not accurately labelled as attempting to kill"⁴⁸ and can more appropriately be held liable for one of the offences set out in the Non-Fatal Offences Against the Person Act 1997⁴⁹ (or, one assumes, an inchoate version of one or other of them if appropriate). Clause 2 of the draft Bill that the Irish Commission appends to its report therefore proposes to define the fault element for inchoate versions of murder solely as an intention to kill.

The difference between the Irish Commission's approach to inchoate versions of murder and its approach to inchoate versions of every single other offence serves to highlight the problem generally with its approach to all other offences. In the case of murder, the Irish Commission has engaged in the process of examining precisely what is the underlying wrong that inchoate versions of murder should target and, having done so, has quite rightly decided that the mens rea of inchoate versions of murder requires a

47 Criminal Justice Act 1964, s. 4(1) (Ireland).

48 Ire. Com. No 99 [2.102].

49 This Irish statute very usefully replaces and/or codifies common law assault, as well as most of the Offences Against the Person Act 1861 offences which had formerly applied in the Republic of Ireland. See Charleton et al., *Criminal Law*, n. 5 above, [9.77–185].

particular approach which does not wholly reflect that of the complete offence. However, for all other offences currently in existence, and indeed for any substantive offence to be created in the future, the Irish Commission has not properly examined the question of what is the underlying wrong that may legitimately be targeted by inchoate offences.

The Irish Commission's principal justification for eschewing a generally applicable substantive doctrine for mens rea of inchoate offences is that any such doctrine would have to be overly complex if it is to deal with the sorts of problems that the orthodox approach presents. It is for this reason that examination of the English Commission's proposals (to which we now turn) may be especially instructive, since it recommends such a "complex" different solution to the same problems.

The English Commission's approach

The development of the English Commission's approach presents something of a convoluted picture because the English Commission divided the matter into two separate stages. First it produced a consultation paper and a report examining reform of incitement (extended to include assisting crime),⁵⁰ and then in a separate consultation paper and report it addressed conspiracy and attempt. Matters are even further complicated by the fact that, whereas the recommendations as regards conspiracy and attempt have yet to be incorporated into legislation, the UK Parliament has legislated to amend the law concerning incitement, but in so doing departs significantly from the approach that the English Commission recommended as regards mens rea of incitement. Whereas the English Commission recommended that liability for incitement should, at a minimum, require D to *believe* that each element of the principal offence would be committed,⁵¹ the Serious Crime Act 2007 provides that criminal liability for incitement arises where D is *reckless* as to any circumstances or consequences required for the principal offence.⁵²

Despite Parliament's preference for adopting a recklessness standard for *both* circumstance and consequence elements in the case of incitement, when the English Commission subsequently turned to attempt and conspiracy (our major focus below) it opted for a more restricted approach. Thus, it proposed that D must *intend* the conduct and consequence elements of the principal offence, and his fault in relation to circumstances should be permitted to track that required by the principal offence *to a minimum level of recklessness*.⁵³ This recommendation therefore embraces *both* a distinct approach to the mens rea of inchoate liability (through the requirement of intention for acts and consequences) *and* a relational approach (through a tracked circumstance element though not permitting it to "go below" recklessness).

Despite the apparent complexity that the sequence of events just described presents, a core methodological consistency may be identified in the English Commission's approach. First, in like manner to the Irish Commission, the English Commission's analysis was rooted

50 Eng. Com. No 300.

51 This was also combined with the requirement that D must believe that his acts will, in fact, assist or encourage P to commit the offence. See Eng. Com. No 300, cl. 2 of the appended Bill. See also, G R Sullivan, "Inchoate liability for assisting and encouraging crime – the Law Commission report" (2006) *Criminal LR* 1047.

52 Serious Crime Act 2007, s. 47.

53 This is not a new approach. In fact, it was first mooted by the Law Commission's Working Party in 1968, and even formed the basis of its approach to inchoate liability in the 1989 Draft Criminal Code. See, Law Commission, *Codification of the Criminal Law General Principles: Working Party's preliminary working paper – The field of inquiry* Consultation No 17 (London: Law Commission 1968), p. 11; and Law Commission, *A Criminal Code for England and Wales vol. 1: Report and Draft Criminal Code Bill No 177* (London: Law Commission 1989); *A Criminal Code for England and Wales vol. 2: Commentary on Draft Criminal Code Bill No 177* (London: Law Commission 1989).

in uneasiness concerning the way in which the orthodox approach operated,⁵⁴ highlighting the problem cases, such as attempted rape, and the ad hoc solutions adopted by the courts to resolve them.⁵⁵ Second, however, despite highlighting the “unduly restrictive”⁵⁶ nature of the orthodox position, the English Commission nonetheless adopted the principled position that the remoteness of the *actus reus* of inchoate offences from the eventual substantive offence made an “uncompromisingly narrow fault element essential”.⁵⁷ Thus, in the case of incitement, the English Commission’s proposal that D must believe that each element of the principal offence will be committed is only a modest adjustment to the orthodox position. Furthermore, in the case of attempt and conspiracy, the English Commission continued to stress the view that the wrong which these forms of inchoate liability should target is engaging in conduct with the intention that this should lead to the commission of the substantive offence.⁵⁸ Therefore, the English Commission maintains the position that its proposals as regards attempt and conspiracy do not undermine its desire that these inchoate offences target only those who intend that the full offence be committed.

In our analysis below, we concentrate in particular on the English Commission’s recommendations as regards the fault element for attempt and conspiracy. It should be apparent at the outset that by requiring a minimum level of subjective fault for every element of the substantive offence (regardless of the *mens rea* requirements of that particular offence), the English Commission is able to avoid what we have identified as some of the worst excesses of the Irish framework. D will not be liable for attempting or conspiring to drive over the prescribed alcohol limit, or for offences in relation to polluting rivers, unless he intends to drive or intends to discharge pollutants (conduct) and is at least reckless as to his intoxicated state or the fact that what he is discharging into the river is in fact a pollutant (circumstances). Likewise, D will not be liable for attempted murder unless he intends to kill, not because of a statutory exception, but because of a framework that requires D to intend consequence elements in order to establish liability. On the other hand, the largely relational posture adopted towards the circumstance element will expand the scope of liability beyond that under the orthodox position. In relation to the problem case of rape, for example, D would be liable for attempt or conspiracy if he intended sexual penetration (conduct/consequence) and was reckless as to consent (circumstance). In this manner, the breadth of inchoate liability is expanded, but it is not expanded to criminalise simple proximity to risk. Unlike the Irish framework, subjectively innocent and objectively non-harmful defendants are kept outside of the general inchoate offences.

Nonetheless, below we examine two objections to the English culpability framework. The first harks back to the aversion to “complexity”, which we have noted above was a matter about which the Irish Commission was especially concerned. We deal with this only briefly, since the arguments are well known.

The second objection is more fundamental, we believe. Above we argued that the Irish Commission’s approach to its task was defective because it failed properly to focus on the role of *mens rea* as an essential feature characterising the distinct wrong that inchoate criminal liability may legitimately target. The same criticism does not apply to the English Commission’s approach. However, as we will discuss below, although the English

54 See, Eng. Com. No 300; Eng. Consultation No 183; and Eng. Com. No 318.

55 For incitement, distortion was found to have occurred as a result of an overly narrow *actus reus* (not allowing for assisting as well as encouraging). However, for attempts and conspiracy, similar problems related to the narrowness of the *mens rea* (see discussion of the orthodox position above).

56 Eng. Com. No 300, [5.88].

57 Ibid. [5.117].

58 Eng. Consultation No 183, [1.2–7].

Commission does purport to identify the wrong that is the target of its culpability framework, in fact, the operation of that framework does not rationally or consistently cohere with the wrong identified.

COMPLEXITY AND THE SEPARATION OF ELEMENTS

The issue here arises out of the English Commission's proposal that the mens rea for attempt and conspiracy should require intention as regards the conduct and consequence elements of the substantive offence but that, as far as the circumstance element is concerned, the fault requirement should track the substantive offence to the minimum of recklessness. The adoption of such an approach seems necessarily to require that the conduct, consequence and circumstances elements of the substantive offence be individually identified in order that the different mens rea standards just mentioned may be applied for the purposes of inchoate liability. This is therefore clearly a more complex scheme than is required under the orthodox approach, which simply requires that intention is required for all elements. It also seems more complex than the scheme favoured by the Irish Commission, which simply proceeds on the basis that mens rea for inchoate liability should just be whatever the mens rea of the substantive offence is.

We have already observed that an objection on the grounds of complexity alone is rather weak. The general inchoate offences are always going to be complex due to their unique relationship with substantive offences, and a technique that is complex but effective is infinitely preferable to one that *simply* reaches undesirable conclusions.⁵⁹ However, in the context of the English culpability framework, "complexity" is a criticism that has an added significance. This is because there is a wide body of scholarship that contends that substantive offences cannot be objectively dissected into individual elements in the manner required by the English Commission.⁶⁰ An offence often used to illustrate this point is the "abduction of an unmarried girl under the age of sixteen from her parent or guardian",⁶¹ where critics have claimed that the task of separating offence elements becomes "virtually a matter of taste"⁶² in which different parts of the offence can be defensibly placed in almost any of the elements. For example, although one commentator might describe D's conduct element as "taking" with all other aspects of the offence considered circumstances, another might legitimately claim that D's conduct element is the "taking of a girl" or even the "taking of an unmarried girl under the age of sixteen from her parent or guardian". Further, as one looks to isolate the consequence element, the same problems arise.

59 Indeed, it is possible that any merit of simplicity within the Irish Commission's approach could be compromised by judicial interpretation seeking individual case justice, an experience that we have already seen in relation to the equally simple orthodox approach. Certainly, arguments may well be made canvassing the guarantee in Article 38.1 of the Irish Constitution that "no person shall be tried on any criminal charge save in accordance with due course of law", along with Articles 40.3.1 and 2 and 40.4. Whether such claims would succeed may be debated, see F McAuley, *Report of the Criminal Law Rapporteur for the Legal Protection of Children* (Dublin: Office of the Minister for Children/Department of Health and Children 2007), [2.01–3.59]. However, the willingness of Irish Supreme Court judges to employ these constitutional provisions, especially where strict liability offences are at issue, cannot be gainsaid. See Keane J (dissenting) in *Shannon Regional Fisheries v Cavan County Council* [2006] IESC 33; [1996] 3 IR 267, 289–92. Hamilton CJ in *Article 26 of the Constitution and the Employment Equality Bill 1996, In Re* [1996] IESC 6; [1997] 2 IR 321, 373–4; and Hardiman J in *CC v Ireland & Others* [2006] IESC 33; [2006] 4 IR 1, 74–87.

60 See, for example, R Buxton "The working paper on inchoate offences: incitement and attempt" [1973] *Criminal LR* 656; and G Williams, "Intent in the alternative" (1991) 50(1) *CLJ* 120; Duff, *Criminal Attempts*, n. 31 above.

61 Sexual Offences Act 1956, s. 20 (repealed by the Sexual Offences Act 2003, s. 42, sch. 7, para. 1). Although the offence was abolished in 2004, its provisions are mirrored to a large extent by the Child Abduction Act 1984, ss. 1–3.

62 Buxton, "The working paper", n. 60 above.

Difficulties of this kind do not directly undermine the principled justification of the English Commission's approach, but they do have the potential to do so *indirectly*. This is because, although we might agree that intention should only be required for conduct and consequence elements, if we are unable to distinguish what those elements are, then our agreement is meaningless. This is a concern that led several common law jurisdictions to reject this approach.⁶³ Indeed, it was this concern that led the English Commission 30 years ago to reject this approach in favour of the orthodox position.⁶⁴

The *current* English Commission denies the destructive effects of this criticism, and even contends that subjectivity as regards the separation of elements can be beneficial.⁶⁵ It is in any event an old debate that still lacks a clear resolution. Without taking it any further in this paper, our point at this juncture is to draw attention to what we see as a missed step. Before we discuss further *how* to separate offence elements, it must surely first be established that such separation is *necessary* and this is the issue to which we now turn.

IS IT NECESSARY TO DISTINGUISH BETWEEN CIRCUMSTANCES AND CONSEQUENCES?

We have noted above that the view that it is necessary to distinguish between circumstance and consequence elements seems logically to follow from the desire, as reflected in the English Commission's culpability framework, to allow for the orthodox approach to prevail as regards conduct and consequences, but to allow for a different approach towards *mens rea* to suffice for circumstance elements. It may seem therefore that, as far as the English Commission's culpability framework is concerned, distinguishing between these elements is essential.

However, we question whether this is really the case. Our starting point for doing so is to refocus our thinking on the central theme of this article thus far: what is the wrong which inchoate liability does or should target? It is our contention that this is a prior question to the question of what the culpability framework for inchoate liability should be. Only if one has a clear view of the rationale for criminalisation can one proceed to construct one's culpability framework. Furthermore, for any such culpability framework to be rational, and coherent, there must be a clear and consistent relationship between the culpability framework and the wrong that, it is claimed, inchoate criminal liability may justifiably target. It follows therefore that whether it is necessary to distinguish between circumstance and consequence elements turns on whether distinguishing between them is necessary for the purposes of targeting the wrong that, it is claimed, justifies imposing criminal liability.

In the case of the orthodox approach then, the distinction is not necessary. Liability is imposed on a person because he or she performs proximate acts⁶⁶ with the intention that the substantive offence should be completed; the person intends every element of the

63 It is a pattern that has been particularly evident in jurisdictions such as Canada, Australia and New Zealand. In each case, a similar approach to that recommended by the English Commission has either been recommended by law reform bodies or through the courts, only to be rejected as unworkable. See Law Reform Commission of Canada, *Secondary Liability: Participation in crime and inchoate offences* Working Paper No 45 (Ottawa: LRCC 1985); Law Reform Commission of Canada, *Re-codifying the Criminal Law* Report No 30 (Ottawa: LRCC 1987); R Cooke, "The Crimes Bill 1989: a judge's response" (1989) *New Zealand Law Journal* 235; Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand: Crimes Consultative Committee 1991).

64 Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* No. 102 (London: Law Commission 1980), [2.11–13]. This was a reiteration of its position from the two previous reports: Law Commission, *Criminal Law: Report on conspiracy and criminal law* Reform No 76 (London: Law Commission 1976), [1.41–2] and *Criminal Law: Report on the mental element of crime* No. 89 (London: Law Commission 1978), p. 61.

65 Eng. Com. No 318, [2.19–29].

66 The proximate act is defined separately between the *actus reus* of the three inchoate offences.

principal offence. We agree with both commissions that this gives rise to understandable objections concerning under-criminalisation. However, this criticism does not undermine its internal coherence as an approach to inchoate liability.

The approach of the English Commission, in contrast, is less clear and, we would argue, confused as to what precisely is the wrong that inchoate liability should target. In its report the English Commission repeatedly refers to the importance of “intending the principal offence”.⁶⁷ For example, referring to the need for D to intend the consequence element in conspiracy, the English Commission states: “It would not be appropriate, in the case of an inchoate offence such as conspiracy, to impose liability in the absence of an intention to commit the offence.”⁶⁸

However, the problem here is that the English Commission’s approach to mens rea does not match with this identified wrong; it does not require D to intend every element of the principal offence. The court in *Khan*, forced to manipulate the wording of the Criminal Attempts Act 1981, may have opened the way for this interpretation, but it is a fiction.⁶⁹ Taking the rape example, let us imagine that D attempts to sexually penetrate V whilst being reckless as to V’s non-consent. As outlined above, unlike the orthodox position, the English Commission’s approach will provide for D’s liability for attempted rape where he intends the conduct and consequence elements (sexual penetration) and is reckless as to the circumstance element (non-consent).⁷⁰ We may agree with this outcome, but we cannot say that the justification for criminal liability lies in the fact that D has acted with the intention to commit the substantive offence. D acts with the intention to sexually penetrate V, but he is not *intending* that V should not consent. D could achieve his desired aims without committing rape. D’s behaviour is still culpable, he is still intentionally doing something that risks rape, but it is this accepted *risk-taking* and not an intended *offence* that signifies the wrong being targeted.

Therefore, when the English Commission’s recommended culpability framework is analysed in this way, we must now conclude that the wrong underpinning its approach must be (at minimum) *an intention to do something that knowingly risks the completion of a substantive offence*.⁷¹ Once acknowledged, we can now straightforwardly explain the requirement under the English Commission’s culpability framework for D to intend the conduct element of the principal offence, as D’s inchoate culpability is contingent on his intention that the future risk should be run. Beyond this, it also explains and supports a minimum requirement of subjective fault (recklessness) as to the circumstance and consequence elements, as D’s inchoate liability is also contingent on his awareness of the risk being run.

However, once it is accepted that this is the true rationale for inchoate liability as reflected in the English Commission’s approach, it exposes the inconsistency in its framework. If the wrong underpinning the English Commission’s approach must be (at minimum) *an intention to do something that knowingly risks the completion of a substantive offence*, why is it necessary to apply a different mens rea standard as between circumstances and consequences, and, in particular, why is it necessary to require intention as to consequences? If the wrong being targeted is

67 For example, Eng. Com. No 318, [2.131–4], [3.130–8.133].

68 Eng. Com. No 318, [2.50].

69 R Buxton, “Circumstances, consequences and attempted rape” (1984) *Criminal LR* 25, pp. 33–4. Compare G Williams, “The problem of reckless attempts” (1983) *Criminal LR* 365.

70 Note that although English law of rape merely requires an objective standard of fault as to the circumstance of non-consent, the minimum fault required within the English Commission’s scheme for inchoate liability is subjective recklessness.

71 Our views about this expansion of the wrongs targeted by the general inchoate offences will be discussed later.

an intention to do something that knowingly risks the completion of a substantive offence, then recklessness could suffice for each of these elements.

We can support this argument by considering the following scenario.

D finds two vases. He is not sure whether he owns them, or whether they belong to his neighbour V.

- a) Vase 1: D throws to the floor, intending to damage it.
- b) Vase 2: D throws into the air, intending to catch it again but reckless as to whether it might be damaged.

In the event, neither vase is damaged.

In relation to the first vase, although D would not be liable for attempted criminal damage under the orthodox position – because he does not know the property belongs to another – he would nonetheless be liable under the English Commission's framework. This is because, although he does not intend every element of the substantive offence, he does intend the conduct and consequence elements (causing damage) and his recklessness as to the circumstance element (ownership of the vase) is all that is required by the substantive offence.⁷² As with reckless sexual penetration, D is not *intending* to complete the substantive offence because it is possible for D to achieve his aim (damaging the vase) without completing the substantive offence.⁷³ However, the imposition of inchoate liability under the English Commission's culpability framework may be thought justifiable here so long as the wrong which that framework is targeting includes consciously *risking* the completion of a substantive offence.

Turning to the second vase, here the English Commission's culpability framework will allow D to escape liability for attempted criminal damage. Although recklessness as to the consequence element (damage) is sufficient for the substantive offence, the English Commission's mens rea framework for inchoate liability will always require intention as to that element. But is this coherent? If D is intentionally throwing the vase and is reckless as to whether the vase will be damaged, surely D is *trying* to do something that *knowingly risks* the completion of the principal offence.⁷⁴ If this is the wrong that underpins the English Commission's culpability framework for inchoate liability, some justification is required as to why this form of intentional risk-taking is not caught by this framework, when D's treatment of the first vase would be.

It could be contended that criminal liability should not be imposed in respect of the second vase because of the desire to maintain inchoate liability as *more* of a distinct, as opposed to relational, form of liability. Thus, although it may be tolerable to allow for a mens rea of less than intention for one offence element, it should not be allowed to spread to other elements. However, although this might be a basis for distinguishing between each of the vase scenarios above, such a defence still requires an explanation as to why the *circumstance* element warrants special treatment but the consequence element does not.

To illustrate the need for such a justification, let us consider the following scenario. Imagine that D finds a third vase that is clearly marked as belonging to his neighbour. D throws the vase into the air, intending to catch it again but being reckless as to whether it

⁷² Criminal Damage Act 1971, s. 1.

⁷³ If the vase in fact belongs to D, then damaging it will not constitute criminal damage.

⁷⁴ We accept that where the mens rea of the principal offence requires intention or a higher level of fault then recklessness for the inchoate offence should not be sufficient, as this would have the potential to undercut and undermine the principal offence. However, in cases such as criminal damage where only recklessness is required for the principal offence, we believe that there is no reason (short of the orthodox approach) for requiring intention. For a discussion of the former point, see Child and Hunt, "Risk", n. 9 above, pp. 51–68.

might be damaged. In the event, the vase is not damaged. Here, D intends/knows that the third vase does not belong to him (circumstance). This, combined with D's intentional conduct, therefore provides intention for two of the three offence elements, with recklessness as to the consequence element. However, despite recklessness not having spread across more than one element, and despite D intentionally acting in a manner that knowingly risks the completion of the substantive offence, the English Commission's culpability framework will not allow for inchoate liability here either.

This seems incoherent. As we have seen, the fact that liability will ensue where persons are reckless as to circumstances means that the wrong targeted by the English Commission's framework includes consciously risking the commission of the substantive offence. However, the strict requirement of intention as to consequences which the framework demands means that conscious risk-taking by being reckless as to consequence elements does not attract liability. Whereas the wrong in each case seems to be the same, criminal liability turns solely on the mode/means through which that wrong is achieved.

However, it will rightly be pointed out that our claim that this is incoherent would only hold if there is no qualitative difference for inchoate liability between a person being reckless as to circumstances and being reckless as to consequences. Enker, who also bases his theory of inchoate liability on conscious risk-taking,⁷⁵ argues that such a qualitative difference does exist and therefore it is necessary to treat circumstances and consequences differently for mens rea purposes. He contends that the essential difference is that, although consequences relate to the *harm* of a substantive offence (and so an intention to bring them about demonstrates a harmful intention), circumstances are merely conditions of culpability and unrelated to that harm.⁷⁶ Therefore, unlike vases two and three, where D throws the first vase with the intention of causing damage, Enker would argue D has engaged in harmful risk-taking regardless of his mens rea as to the vase's ownership.⁷⁷ If this approach is accepted, the English Commission would be able to point to a rationale for inchoate liability between the orthodox approach and that of intentional risk-taking that would justify treating circumstances and consequences differently since the wrong being targeted is a form of intentional *harmful* risk-taking and the distinction between circumstances and consequences becomes essential to its success.

However, we do not believe this analysis is correct. We would contest Enker's claim that the harm of a substantive offence lies solely within the consequence element. This is because the various consequence elements discussed above, including damage and sexual penetration, are not *necessarily* harmful. It is not harmful, for example, to intentionally damage one's own property or to have consensual intercourse. It is only harmful to do these things in certain proscribed circumstances, where you do not own the property damaged, or where intercourse is not consensual. Therefore, it is surely more accurate to describe the *harm* within a substantive offence as being an amalgam of each element, with each playing an equal role. If the harm within the substantive offence is in fact an amalgam of each of the elements, then it is difficult to see any basis at all for distinguishing between circumstances and consequences for the purposes of attaching mens rea for inchoate liability.

75 Enker, "Mens rea", n. 33 above, p. 874.

76 Ibid. pp. 869–71.

77 The structure of this point is modelled on Enker's discussion of attempted child abduction. Again, in his example, Enker contends that it is the intention to abduct and not the knowledge of V's age that risks the harm of the offence: *ibid.* p. 869.

SOME CONCLUSIONS ON THE ENGLISH COMMISSION'S APPROACH

It may be worthwhile at this stage to draw together the threads of our argument here. We have seen that, although the English Commission identifies wrongs to be targeted by the inchoate offences, those orthodox intention-based wrongs are undermined by a recommended culpability framework that goes beyond intention, and actually criminalises certain conscious risk-taking. However, if we allow the wrongs to be reinterpreted to include such risk-taking, the framework seems incoherent. This is because the English Commission's scheme adopts a different approach to mens rea as to consequences of the substantive offence, on the one hand, and circumstances on the other, when in fact recklessness as to either element would mean that D is consciously risking the commission of the substantive offence. Since this is the case, the distinction that the English Commission's culpability framework for inchoate liability draws between consequences and circumstances is difficult logically or coherently to link with the wrong being targeted. A distinction of this kind, with such a significant effect on the boundaries of liability, requires a justification that ties back to the wrongs being targeted and those we wish to exclude from liability. However, as we have argued in our examination of Enker's analysis, those who have attempted such a justification have not done so successfully.

It follows, therefore, that even if we are able to separate circumstances and consequences in the manner required by the English Commission's approach, it would be a distinction without a principled justification.⁷⁸ There may be analytical differences between the two elements, but whether the wrong being targeted by inchoate criminal liability is an intention to commit a substantive offence (the orthodox position), or as an intention to knowingly *risk* committing a substantive offence, the common role of circumstances and consequences within the definition of the substantive offence requires a consistent approach to them both in defining the mens rea requirements for inchoate versions of those offences.

Alternative approaches

Having questioned the viability of approaches of both the Irish and English Commissions, it may now appear that our options for moving away from the orthodox position are fundamentally reduced. For example, in order to bring coherence to the English Commission's culpability framework in a manner that expands liability from the orthodox position, it may appear that the mens rea requirement for consequences will have to be adapted in line with the circumstance element, tracking the principal offence to a minimum of recklessness. However, the objections to this have already been briefly canvassed above in our discussion of the Irish approach. Although we explained that there may be a principled justification for targeting conscious risk-taking, we also drew attention to misgivings expressed by Ashworth⁷⁹ that such an expansion of inchoate liability may be unacceptable in the eyes of many, and may also pose the added risk of police abuse.

With this in mind, it may therefore be useful briefly to examine two alternatives that share similar ambitions of the English (and Irish) Commission, but avoid the expansion of liability inherent in a culpability framework that allows recklessness for circumstances and consequences. Our aim here is not to provide an *answer* as to what reform in this area should be. Rather, it is simply to highlight the fact that constructing a culpability framework for mens rea of inchoate offences does not necessarily mean simply choosing between the orthodox intention-based framework and one centred on recklessness.

⁷⁸ Buxton, "The working paper", n. 60 above; P H Robinson, "A functional analysis of the criminal law" (1994) *Northwestern University LR* 891.

⁷⁹ See text at nn. 28–30 above.

The first alternative is provided by Duff. His approach was not explicitly considered by either Commission and may (at first glance) appear attractive.⁸⁰ Duff claims that it may be possible to expand the orthodox position regarding mens rea, and yet maintain that the wrong targeted by inchoate liability should be confined to acting with the *intention to commit* a substantive offence. Unlike the English Commission, Duff is able to maintain this line by supplementing his approach with objective factors. Thus, if D does not intend a particular circumstance of an offence, D may nevertheless be inchoately liable if (a) he has the requisite mens rea required by the substantive offence, and (b) the circumstance *is (objectively) present*. For example, if D attempts to sexually penetrate V whilst reckless as to V's (actual) non-consent, then he will be liable for attempted rape under Duff's approach. As V lacks consent in fact, D's intention *objectively* constitutes an intention to commit the principal offence.⁸¹ In this manner, although not discussed by either Commission, Duff's objectivist approach is both able to maintain a narrow focus on intending an offence, whilst broadening liability to include a number of the problem cases.

Although Duff's approach may have some appeal, it shares several of the problems identified above. First, as the *broadening* of liability under Duff's approach (allowing a mens rea of less than intention) only occurs when circumstances are objectively present, it will only take effect in a minority of cases. This is because, although we may know whether a circumstance is or is not present in the context of a completed attempt, such knowledge in relation to incitement and conspiracy (and even incomplete attempts) will involve future states of affairs. Therefore, unless we encourage courts to speculate as to what might be the case at some future time, without the benefit of objective facts, Duff's framework will revert to the orthodox position in a whole range of situations.⁸² The second objection to Duff's approach is that in cases where the objective facts are known, we encounter problems tending to the other extreme. This is because, in common with the Irish Commission's approach, in these cases Duff allows the mens rea of the inchoate offence to track the principal offence even below a floor of subjective fault. Therefore, we may again have cases, such as those discussed in the first part of this article, where D seems to be criminalised on the basis of mere proximity.⁸³ Finally, although this cannot be fully explored here, it is also contended that Duff (like the English Commission) relies on a distinction being made between circumstances and consequences:⁸⁴ accepting that objectively present circumstances can allow for a tracking of mens rea, but not allowing the same in relation to consequence elements.⁸⁵

Having questioned the viability of Duff's approach, it is the second approach that we believe has the most potential *if* a middle ground is required between the orthodox and recklessness-based culpability frameworks. This would involve accepting the known risk model, but trying to limit the class of risks targeted within that model by requiring a

80 Duff, *Criminal Attempts*, n. 31 above. It is notable that, despite several references to Duff's work, neither Commission explicitly engaged with his approach to mens rea.

81 Ibid. pp. 321–2 and 362–78 generally.

82 This is not necessarily a compelling criticism of Duff's approach, which was constructed in relation to attempts alone (although it does stand as a criticism in relation to incomplete attempts). However, if we (in line with both commissions) value the importance of a consistent approach to mens rea across the inchoate offences, then it is a reason for rejecting this approach.

83 Duff recognises this problem, but does not attempt to provide a solution: Duff, *Criminal Attempts*, n. 31 above, pp. 374–8.

84 This claim is contrary to Duff's expressed aim to create an approach that does not rely on such distinctions: *ibid.* p. 27.

85 See, for example, Duff's discussion of the reckless hunter who intentionally kills "that thing", reckless as to whether it is a person: *ibid.* pp. 28–9.

minimum mens rea of belief, as distinct from recklessness, for both circumstances and consequences. This approach is still based on targeting the wrong of consciously risking the completion of the substantive offence because, unlike intention, belief allows for the possibility of the believed circumstance or consequences not coming about without D having failed in his endeavour. However, requiring *belief* means that the expansion of inchoate liability to include known risks will be tailored to exclude less significant risks that D does not *believe* will come about.

Such an approach to mens rea of inchoate offences will not be universally acceptable. It represents only a modest extension from the orthodox position, only convicting in our previous examples if D believes V does not consent, or does not own the vase etc. However, any further defence of this approach will have to wait for another time.

Conclusion

The reports of both commissions examined in this article contain a host of valuable and well-reasoned recommendations concerning the reform of various aspects of inchoate liability. However, our concern has been with their approach to mens rea, and it will be apparent from the analysis set out above that our view is that both approaches should be questioned. The Irish Commission's mens rea framework is the product of focusing on individual offences and failing more generally clearly to identify the wrong being targeted by inchoate liability. The result is a scheme for mens rea for inchoate liability that, in our view, would lead to unwanted and unjustifiable results, and we hope that those proposals never see "the light of legislative day".

However, as our analysis of the English Commission's recommendations indicate, the process of formulating alternatives to the orthodox position requires not simply that the wrong inherent in inchoate liability must be properly identified. Criminalisation will only be justified if the framework for mens rea coherently and consistently reflects that wrong. If this means that the scope for reform is reduced, because, for example, a coherent framework would have to permit liability to arise where there is recklessness as to consequences, and this might not be considered acceptable, then so be it. If this alternative framework may nonetheless lead to outcomes that people think "go too far" in terms of criminalisation, then we will find ourselves having to consider some other approach that is nonetheless rationally coherent. We have briefly outlined one possibility based upon *belief* which is rooted in a known risk-based approach. However, should one be wedded to an "intention" based-rationale, then the only principled and coherent framework is one where the orthodox approach is applied rigidly, without exception.