

The Journal of Criminal Law

The Fair Labelling Implications of INUS Causation for Strict-Liability Offences Involving Injury or Death by Driving

Journal:	<i>The Journal of Criminal Law</i>
Manuscript ID	CLJ-25-0042
Manuscript Type:	Original Manuscript
Keywords:	INUS causation, fair labelling, moral responsibility, culpable wrongdoing, strict liability
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Abstract

There are current arguments in criminal-law literature for alternative approaches to causation to be used in English criminal law. The most recent proposal has come in the form of replacing the standard tests of causation with a single test, known as ‘INUS’ (or ‘NS’) causation – where a cause is a *necessary* part of a *sufficient* condition. This article discusses one of the potentially problematic implications of adopting the INUS account of causation in English criminal law. It analyses the consequences INUS would have for strict liability result crimes involving injury or death by driving. It argues that INUS would affect the liability outcomes for these stigmatic offences so that instead of being acquitted, the defendant (D) would be criminally liable. However, such liability outcomes would yield fair-labelling concerns as they misrepresent the wrongfulness of D’s conduct. This highlights the fair-labelling concerns with imposing strict liability in stigmatic offences more broadly. It concludes that the fair labelling issues in strict-liability offences involving injury or death by driving could be addressed by importing a blameworthy requirement for the aggravated *actus reus* elements of the offences generally provided by D’s careless driving. This would ensure that these offences appropriately capture the wrongdoing that they aim to target.

Keywords

INUS causation, fair labelling, moral responsibility, strict liability, culpable wrongdoing

Introduction

For a defendant (D) to be criminally liable for result crimes¹ in England and Wales it must be shown that D's conduct *caused* the prohibited outcome. In English criminal law, there are standard tests for causation – legal doctrines that govern the causal connection between D's conduct and prohibited outcome. Many debates in criminal-law literature have focused on the problems to which the standard tests for causation give rise.² This has resulted in some legal scholars proposing alternative accounts of causation to be used in English criminal law.³ The most recent argument has come in the form of proposing to replace the standard tests of causation with a single test, known as 'INUS' (or 'NS') causation – where a cause is a *necessary* part of a *sufficient* condition.⁴ INUS causation stands out as very different approach to causation to be used in English criminal law and is arguably the most plausible account on offer. Unlike other proposed accounts, it would provide a single, non-normative test of causation; a metaphysical one that offers a robust causal enquiry, and which contributes appropriately to criminal-responsibility ascription for result crimes.⁵

This article discusses one of the potentially problematic implications of adopting the INUS account of causation in English criminal law. It analyses the implications INUS would have for strict-liability⁶ result crimes involving injury or death by driving. In particular, s.3ZB of the Road Traffic Act (RTA) 1988 and s.12A(2)(b) of the Theft Act (TA) 1968, by way of case studies. It focuses on these driving offences because they are the two main stigmatic strict-liability offences in English criminal law that appear to have occupied the appellate courts in considering causation, and which raise causal problems. It argues that INUS would affect the liability outcomes in cases involving s.3ZB RTA 1988 (hereinafter, s.3ZB) and s.12A(2)(b) TA 1968 (hereinafter, s.12A) so that instead of being acquitted, the defendants would be

¹ 'Result crimes', such as murder, are so called because they require a proscribed outcome to be caused. Whereas, 'conduct crimes', such as dangerous driving, are so called because they *do not* require a prohibited outcome to be caused.

² See, for example, A. Norrie, 'A Critique of Criminal Causation' (1991) 54 *Modern Law Review* 685-701; S. Shute, 'Causation: Foreseeability v Natural Consequences' (1992) 55 *Modern Law Review* 584-87; and N. Padfield, 'Clean Water and Muddy Causation: Is Causation a Question of Law or Fact, or Just a Way of Allocating Blame?' [1995] *Criminal Law Review* 683-94.

³ See, for example, Hart & Honoré (n 6); D. Klimchuk, 'Causation, Thin Skulls and Equality' (1998) 11 *Canadian Journal of Law and Jurisprudence* 115-41; C. Elliot & C. de Than, 'Prosecuting the Drug Dealer When the Drug User Dies: *R v Kennedy (No 2)*' (2006) 69 *Modern Law Review* 986-95 and A. Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford University Press, 2021) Ch. 5.

⁴ G. Firkins 'Rethinking Causation in English Criminal Law' (2023) 87 *Journal of Criminal Law* 18-38.

⁵ For a detailed discussion on these arguments, see Firkins (n 4).

⁶ This article refers to strict liability in the broad sense where criminal liability is imposed when some element of the *actus reus* of the offence lacks a corresponding *mens rea* requirement.

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3 criminally liable for their respective offences. This is because INUS removes the blameworthy
4 requirement which has been injected into the standard tests of causation. However, such
5 liability outcomes would yield fair-labelling concerns for these crimes. This highlights the fair-
6 labelling concerns with imposing strict liability in stigmatic offences more broadly. It
7 concludes that the fair labelling issues in strict-liability offences involving injury or death by
8 driving could be addressed by importing a blameworthy requirement for the aggravated *actus*
9 *reus* elements of the offences generally provided by D's careless driving. This would ensure
10 that these offences appropriately capture the wrongdoing that they aim to target.

11
12 This article starts, in section 2, by canvassing the strict-liability offences involving
13 injury or death by driving, namely s.3ZB and s.12A. Section 3 then examines the implications
14 of INUS for s.3ZB and s.12A and uses cases drawn from these offences. It contends that,
15 according to INUS, the liability outcomes in cases involving s.3ZB and s.12A would alter so
16 that the defendants would be criminally liable for their respective offences. This is because
17 INUS does not have a blameworthy requirement, unlike the standard tests of causation.
18 However, such liability outcomes would be problematic in terms of fair-labelling.

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20 Then, section 4 discusses the arguments for the imposition of strict liability in stigmatic
21 offences such as s.3ZB and s.12A. It argues that strict liability is generally beneficial in minor
22 non-stigmatic crimes for practical reasons. However, in more serious stigmatic crimes, like
23 s.3ZB and s.12A, practical reasons are outweighed by the need for fair labelling. Therefore,
24 due to fair-labelling concerns, strict liability is not appropriate in these types of offences.

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26 Subsequently, section 5, discusses the potential remedies for the fair-labelling concerns
27 that INUS causation would produce for offences such as s.3ZB and s.12A. It argues that the
28 issue can be addressed by importing a blameworthy element into these types of offences,
29 specifically by importing a blameworthy requirement for the aggravated *actus reus* elements
30 of the offences generally provided by D's careless driving.

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Strict-Liability Offences Involving Injury or Death by Driving

This section will discuss the common-law developments of strict-liability result crimes involving injury or death by driving, namely s.3ZB and s.12A.

Section 3ZB Road Traffic Act 1988

Pursuant to s.3ZB RTA 1988:

“[a] person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under —

- (a) section 87(1) of this Act (driving otherwise than in accordance with a licence),
- (b) ... or
- (c) section 143 of this Act (using motor vehicle while uninsured).”

In other words, it is an offence pursuant to s.3ZB to cause death by driving while uninsured or unlicensed.

The base offence under s.3ZB of driving a car uninsured or unlicensed is an offence of strict liability since it can be committed without any fault or blame on the part of the driver. The aggravating element of causing the death of another can also be constituted by an event for which D is not culpable. As Sullivan and Simester remark, s.3ZB “is a stark example of strict liability. No culpability of any kind on the part of D is required in the matter of causing V’s death”.⁷ This echoed the view of the Court of Appeal in *Williams*⁸ and *Hughes*.⁹ In both these cases, the defendants killed their respective victims (V) with their vehicles whilst driving faultlessly, but uninsured and unlicensed. In *Williams*, V stepped out in front of D’s vehicle, and in *Hughes*, D was involved in a fatal road collision with V who was oncoming in the opposite lane. As an ordinary matter of statutory interpretation, the Court of Appeal on these cases ruled that blame on behalf of the defendants in respect of their victim’s death was irrelevant and causation could be established by the mere presence of the defendants being on the road and being involved in road traffic collision. The defendants were therefore found to have caused the deaths within the terms of s.3ZB.

The Government intended s.3ZB to be a strict liability offence. In the consultation process of s.3ZB, the Government stated that:

⁷ G. Sullivan & A. Simester, ‘Causation Without Limits: Causing Death While Driving Without a Licence, While Disqualified, or Without Insurance’ [2012] *Criminal Law Review* 753-66, 753. See also *R v Hughes* [2013] UKSC 56, at [17].

⁸ *R v Williams* [2010] EWCA Crim 2552.

⁹ *R v Hughes* [2011] EWCA Crim 1508.

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3 “[t]he standard of driving could be perfectly acceptable. For example, this offence
4 could bite on a driver who was driving very carefully, but a child ran out into the road
5 and was killed. The offence will apply where “but for” D’s car being on the road the
6 person would not have been killed”.¹⁰
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11 Thus, with s.3ZB, it seems all that was required is D’s existence on the road whilst he was
12 unlicensed or uninsured and being involved in a fatal collision. Had s.3ZB been interpreted in
13 line with the Government’s intention, it would have been a strict-liability offence requiring no
14 corresponding *mens rea* for the *actus reus* of causing death.
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18 However, the Supreme Court in *Hughes*¹¹ did not want s.3ZB to impose a conviction
19 upon a driver who, other than lacking a valid insurance or driving licence, was entirely
20 blameless for V’s death.¹² The Court worried about: 1) the probability of harsh liability
21 findings occurring;¹³ and 2) the severity of sentence imposed (the sentence may be a term of
22 imprisonment).¹⁴ To use the Supreme Court’s example, if D was driving faultlessly but
23 unlicensed owing, say, to some sort of clerical error, D would be liable under s.3ZB if V, a
24 pedestrian intent on suicide, stepped into the path of D’s vehicle and died, and thus at risk of
25 imprisonment for a substantial term.¹⁵ In effect, the Court was concerned about convicting and
26 sentencing individuals of a serious offence on account of an aggravating element for which
27 they bear no culpability.
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31 In order to deal with such concerns, the Supreme Court interpreted the causal
32 component in s.3ZB to require an element of fault on behalf of D’s driving, thereby imputing
33 a blameworthy requirement into the causal analysis and thus circumventing the Government’s
34 intention to create a strict-liability offence. The Supreme Court held that s.3ZB requires the
35 Crown to prove “something open to proper criticism in the driving of the defendant, beyond
36 the mere presence of the vehicle on the road”.¹⁶ In reversing and overruling the Court of Appeal
37 in *Hughes* and *Williams*, respectively, the causal component in s.3ZB was interpreted to
38 require:
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53 ¹⁰ Home Office, *A Summary and Next Steps: The Review of Road Traffic Offences involving Bad Driving*,
54 Response to Consultation Paper (2005) at p.8.

55 ¹¹ *R v Hughes* (n 7).

56 ¹² C. Newman & A. Lowerson, ‘Causing Death by Unlicensed, Disqualified or Uninsured Driving: Blameless
57 Driving and the Scope of Legal Causation’ (2014) 78 *Journal of Criminal Law* 16-21, 21.

58 ¹³ *R v Hughes* (n 7) at [19].

59 ¹⁴ *Ibid*, at [27].

60 ¹⁵ *R v Hughes* (n 7) at [19]. For other examples, see Sullivan & Simester (n 7) 759.

¹⁶ *R v Hughes* (n 7) at [33].

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3 “at least some act or omission in the control of the car, which involves some element
4 of fault, whether amounting to careless/inconsiderate driving or not, and which
5 contributes in some more than minimal way to the death”.¹⁷
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10 Since, in *Hughes*, there was nothing in the manner of D's driving that was at fault which
11 contributed in any way to the death of V, the conviction was therefore quashed. In effect, the
12 Supreme Court was dealing with moral concerns through the doctrine of causation by injecting
13 a blameworthy requirement into the causal analysis.
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16 The Supreme Court's decision on s.3ZB in *Hughes* has been confirmed in several cases
17 where D was involved in a fatal accident whilst driving uninsured and/or unlicensed but driving
18 faultlessly, including *McGuffog*¹⁸ and the conjoined case of *Uthayakumar*.¹⁹ In the former case,
19 M was involved in a fatal collision with a cyclist, who failed to stop at a roundabout. In the
20 latter case, U was involved in a collision with V, a pedestrian, who had walked out in front of
21 U, and C was involved in a road collision with V who had veered over the centre line of the
22 road into the oncoming lane. In *Uthayakumar*, the court noted that:
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30 “[t]he judgment of the Supreme Court in *Hughes* is clear. The use of the phrase ‘causing
31 death by driving’ in section 3ZB, taken in context, means the Crown must prove
32 ‘something open to proper criticism in the driving of the defendant, beyond the mere
33 presence of the vehicle on the road, and which contributed in some more than minimal
34 way to the death’ (see paragraph 33). Section 3ZB requires ‘at least some act or
35 omission in the control of the car, which involves some element of fault, whether
36 amounting to careless/inconsiderate driving or not, and which contributes in some more
37 than minimal way to the death’. It is not necessary that such act or omission be the
38 principal cause of death”.²⁰
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47 In these cases, since the defendants were not at fault for the accidents, their convictions contrary
48 to s.3ZB were therefore quashed.
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57 ¹⁷ *Ibid*, [36].

58 ¹⁸ *R v McGuffog* [2015] RTR 34

59 ¹⁹ *R v Uthayakumar & Clayton* [2014] EWCA Crim 123.

60 ²⁰ *Ibid*, at [6].

Section 12A Theft Act 1968

In accordance with s.12(1) TA 1968:

“... a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another’s use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.”

S.12A TA 1968 holds that:

“(1) ... a person is guilty of aggravated taking of a vehicle if —
(a) he commits an offence under section 12(1) above (in this section referred to as a “basic offence”) in relation to a mechanically propelled vehicle; and
(b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.

(2) The circumstances referred to in subsection (1)(b) above are —

...

(b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person.”

In other words, under s.12A, it is an offence to knowingly take a motor vehicle without consent and an accident resulted by which injury was caused to another person.

For this offence - aggravated vehicle taking - the base offence of knowingly taking a motor vehicle without consent is a fault-based offence since it can only be committed when D knows that he does not have consent to take the vehicle. As s.12(6) TA 1968 states:

“[a] person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner’s consent if the owner knew of his doing it and the circumstances of it.”

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3 However, the aggravating element of causing injury to another can be constituted by an event
4 for which D is not culpable. Therefore, s.12A represents another example of a strict-liability
5 offence.
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8 This was the view of the Court of Appeal in *Marsh*²¹ and *Taylor*.²² In *Marsh*, D had
9 given a barmaid a lift home to change her clothing using her landlord's car without permission.
10 Through no fault of D, a woman crossed the road and was knocked to the ground resulting in
11 injury. The Court held that to establish an offence under s.12A, there was no requirement that
12 the driver of a vehicle, which had been taken without its owner's consent and was then involved
13 in an accident resulting in personal injury, should be at fault for his driving. The Court stated:
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20 “[a]pplying ordinary canons of statutory construction, it is impossible to say that the
21 words of section 12A(2)(b) import a requirement of fault in the driving of the vehicle.
22 No word suggesting fault appears in the statutory language. It seems to us that the
23 ordinary meaning of the words used is simply to point to a requirement that there be a
24 causal connection between the moving of the vehicle on the road and an accident which
25 follows.”
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31 D was therefore liable for aggravated vehicle taking pursuant to s.12A. In *Taylor*, D borrowed
32 from a friend a truck belonging to the friend's employer who had not given consent to D to
33 drive it. While faultlessly driving the truck to pick up another friend, D was involved in a
34 collision with V (also driving faultlessly), who died. In applying *Marsh*, the Court of Appeal
35 in *Taylor* held that D was liable of aggravated vehicle taking contrary to s.12A.
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40 Like s.3ZB, the Government also intended s.12A to be a strict-liability offence. In
41 debating the Aggravated Vehicle-Taking Bill on the floor of the House of Lords, Ferrers, the
42 Minister of State for the Home Office at the time, stated that:
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47 “[i]n order to obtain a conviction for aggravated vehicle-taking, the prosecution will
48 have to prove both that the accused committed the basic Theft Act offence, either as a
49 driver or as a passenger, and that an aggravating event occurred during the time when
50 the car was taken.
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59 ²¹ *R v Marsh* [1997] 1 Cr App R 67.

60 ²² *R v Taylor* [2014] EWCA Crim 829.

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3 ...It is true that the prosecution need not prove that a particular defendant was
4 personally responsible for a particular aggravating event”.²³
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8 Had s.12A been interpreted in line with the Government’s intention, it would have also been a
9 strict-liability offence requiring no corresponding *mens rea* for the *actus reus* of causing injury
10 and/or death.
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13 However, the Supreme Court in *Taylor*,²⁴ like in *Hughes*, was also concerned about the
14 possibility of harsh liability findings occurring if a blameworthy element on behalf of D’s
15 driving was not imposed in such cases. The Court worried that:
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20 “[i]f the requirement of causation is satisfied by the mere fact that the taking of the
21 vehicle accounted for its being in the place where the accident occurred, then all of the
22 anomalous consequences which this court regarded as extraordinary in *R v Hughes*
23 apply equally to the offence under section 12A. It means that the defendant is liable to
24 be convicted and sentenced to a long period of imprisonment on account of an
25 aggravating factor for which he bears no responsibility”.²⁵
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31 To take another example from the Supreme Court, if D took a vehicle, say, to take someone to
32 the hospital, D would be liable under s.12A if V deliberately rammed D’s vehicle, with intent
33 to kill or cause serious harm to D, and died.²⁶ So, in order to deal with such concerns, the
34 Supreme Court in *Taylor* applied *Hughes* and held that the aggravated element of s.12A –
35 causing injury to another person – needs:
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42 “at least some act or omission in the control of the car, which involves some element
43 of fault, whether amounting to careless/inconsiderate driving or not, and which
44 contributes in some more than minimal way to the death”.²⁷
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48 Since, in *Taylor*, there was nothing in the manner of D’s driving that was at fault which
49 contributed in any way to the death of V, the conviction was therefore quashed. Thereby
50 reversing and overruling the Court of Appeal in *Taylor* and *Marsh*, respectively. As in *Hughes*,
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56 ²³ Second Reading on the Aggravated Vehicle-Taking Bill: HL Deb 17 January 1992, vol 534, cols 480-504, 482.

57 ²⁴ *R v Taylor* [2016] UKSC 5.

58 ²⁵ *Ibid*, at [22].

59 ²⁶ *R v Hughes* (n 7) at [19].

60 ²⁷ *R v Taylor* (n 24) at [32].

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3 the Supreme Court in *Taylor* circumvented the Government's intention to create a strict-
4 liability offence by injecting a blameworthy requirement into the causal element of s.12A.
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8 **INUS Problematising Strict-Liability Offences** 9 **Involving Injury or Death by Driving** 10 11 12

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14 The cases discussed above are, in effect, cases which involve accidents whilst driving
15 unlawfully. In these cases, the standard tests of causation in English criminal law do not render
16 the conduct of the defendants a cause of the death of or injury to the victims. The standard tests
17 therefore do not impose liability in those cases. This section will analyse the implications
18 adoption of the INUS approach to causation will have on these cases. It argues that the conduct
19 of the defendants *is* a cause of death or injury of the victims on the INUS account. This is
20 essentially because INUS removes the requirement of blameworthiness that is currently
21 injected into causation in English criminal law and causation can be established by the mere
22 existence of the vehicles on the road. Therefore, according to INUS, the liability outcomes
23 would change so that instead of being acquitted, the defendants would be criminally liable for
24 their respective offences. However, such liability outcomes would be problematic due to fair-
25 labelling concerns.
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36 *The Implications of INUS* 37

38 According to INUS causation, a cause is an NS condition: A *necessary* part of a *sufficient*
39 'condition' (i.e., a set of factors) for the effect. For efficiency reasons, it helps to apply INUS
40 causation in reverse. In other words, we establish the sufficient condition first, and then
41 consider the necessary factors for that condition. For example, where an electrical short-circuit
42 triggered a house fire. In this situation, the condition sufficient for the house fire is the
43 conjunction of the short-circuit, oxygen and nearby flammable material. In this sufficient
44 condition, the short-circuit is necessary for the fire as the short-circuit was indispensable: The
45 other factors, conjoined with one another in the absence of the short-circuit, would not have
46 produced the fire. In other words, had the short-circuit not occurred, the fire would not have
47 occurred in the manner that it did. Therefore, the short-circuit was a cause of the fire – it was
48 an NS condition of the fire.
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57 In the cases where there has been a collision between the vehicles of D and V, such as
58 *Hughes*, *McGuffog*, *Taylor* and U in *Uthayakumar*, a condition sufficient to bring about the
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3 death of V is the collision which involves V driving on the road and D driving on the road. In
4 this condition, D's driving on the road is necessary: if D had not driven the car and had not
5 been in that position at the time, V's death would not have occurred. Hence D's driving is an
6 NS condition of V's death.
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10 The same analysis is applied in the cases where there has been a collision where V has
11 stepped out in front of D's vehicle, such as *Williams*, *Marsh*, and *C* in *Uthayakumar*. In these
12 cases, a condition sufficient to bring about V's death or injury is the collision which involves
13 V stepping out into the road and D's driving on the road. In this condition, D's driving on the
14 road is necessary: if D had not driven the car and had not been in that position at the time, V's
15 death or injury would not have occurred. Hence D's driving is an NS condition of V's death or
16 injury.
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22 Because causation would be established in these cases, INUS would therefore impose
23 liability on the defendants for their respective offences. It changes all liability outcomes in
24 these cases back to the Court of Appeal decisions which supports the Government's aspirations
25 for the offence but goes against the Supreme Court's position. However, as will be discussed
26 next, this is problematic in terms of fair labelling.
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32 *The Issue of Fair Labelling*

33 The principle of 'fair labelling' was originally recognised by Ashworth.²⁸ The concern of fair
34 labelling, Ashworth states:
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40 "is to see that widely felt distinctions between kinds of offences and degrees of
41 wrongdoing are respected and signalled by the law, and that offences are subdivided
42 and labelled so as to represent fairly the nature and magnitude of the law-breaking".²⁹
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46 In other words, the fair labelling principle states that distinctions among offences should reflect
47 distinctions in the wrongdoing of the conduct that they criminalise.³⁰
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50 Chalmers and Leverick offer two justifications for this principle. The first concerns the
51 right against wrongful condemnation and stigma: offence names must not "create a false or
52 misleading impression of the nature or magnitude of the offender's wrongdoing or encourage
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56 ²⁸ Initially termed 'representative labelling'. See, A. Ashworth, 'The Elasticity of *Mens Rea*' in C. Tapper (ed.)
57 *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth, 1981) 45, 53.

58 ²⁹ A. Ashworth, *Principles of Criminal Law* (6th ed., Oxford University Press, 2009) 78.

59 ³⁰ A. Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 *Oxford Journal of*
60 *Legal Studies* 985–1011, 1011.

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3 an inaccurate conclusion to be drawn”.³¹ The second relates to the communicative function of
4 offence names: they “communicate information about the offender to a number of different
5 bodies ... [who] may form opinions or make decisions about the offender that turn on the
6 information received”.³² Fair labelling is therefore important because there are far-reaching
7 labelling consequences for defendants that follow conviction. Within the criminal justice
8 system, these consequences relate to conviction and sentencing; outside it, such consequences
9 include stigma and public condemnation which can have negative social effects.³³ The need
10 for offences to fairly represent the nature of D’s wrongdoing is commonly accepted as one of
11 various principles governing criminal liability,³⁴ and has been hugely influential across many
12 different areas of criminal law.³⁵

20 In describing offences, one of the main concerns for fair labelling is the description
21 attached to D’s wrongdoing.³⁶ Fair labelling requires that the nature of D’s wrongdoing is
22 accurately described.³⁷ s.3ZB is a form of homicide since it criminalises the killing of another
23 person. The wrong in homicide offences is the culpable killing of another,³⁸ which is what
24 s.3ZB attempts to target. The Government was of the view that “[t]he fault element of this
25 offence would derive from the driver being on the road when he should not have been”.³⁹ This
26 was confirmed in *Hughes* when the Crown argued that the purpose of s.3ZB was:

34 “to impose criminal liability for a death if it involved the presence of the defendant at
35 the wheel of a car on the road where he had no business to be. The fault is sufficient, it
36 is said, in driving at all when he had no right to be on the road”.⁴⁰

41 However, the culpability of D’s conduct in being on the road when he had no right to be cannot
42 logically constitute the *mens rea* appropriate to an offence the essence of which is that it caused
43 V’s death. To say that D is liable for death because he ought not to have been on the road (due
44 to being unlicensed or uninsured) is to confuse criminal responsibility for the offence of driving
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51 ³¹ J. Chalmers & F. Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217-46, 228.

52 ³² *Ibid*, 238.

53 ³³ *Ibid*, 224–239. Such consequences will be discussed in more detail below in §4.

54 ³⁴ *Ibid*, 219. See Cornford (n 30).

55 ³⁵ Cornford (n 30) 986.

56 ³⁶ Chalmers & Leverick (n 31) 222.

57 ³⁷ *Ibid*, 242. See also C. Clarkson, ‘Theft and Fair Labelling’ (1993) 56 *Modern Law Review* 554-58, 555.

58 ³⁸ See, for example, A. Cornford, ‘The Architecture of Homicide’ (2014) 34 *Oxford Journal of Legal Studies* 819-
59 39: 823; 826-30.

60 ³⁹ Home Office, Response to Consultation Paper (n 10) 8.

⁴⁰ *R v Hughes* (n 7) at [15].

whilst uninsured or unlicensed, with criminal responsibility for the infinitely more serious offence of killing another.⁴¹

A plausible explanation for why culpability is assigned to D for the additional *actus reus* element in constructive crimes⁴² generally is that the possibility of the additional *actus reus* occurring is not random and is related to the initial wrong that D commits through the base offence. In other words, the additional *actus reus* is an ‘intrinsic’ risk to the wrongfulness of the base offence.⁴³ Consider the ‘GBH Murder’ case of *Vickers*,⁴⁴ where D, with the intention of causing only serious harm, attacks V which results in V’s death. Here, the risk of death is intrinsic to the wrong that D does in intentionally causing serious harm. The likelihood of death occurring from such harm forms part of the reason why inflicting serious harm intentionally is wrongful and should be avoided.⁴⁵ In failing to engage adequately with the reasons why he ought not to cause serious harm, D fails to engage adequately with the reasons why he should not cause death.⁴⁶ So, not only does D display defective use of his capacities in respect of serious harm, but he also exhibits such deficiencies in respect of death. As a result, there seems no difficulty about holding D blameworthy for V’s death in such circumstances. However, in the context of s.3ZB, the risk of V’s death is ‘extrinsic’ to the wrongfulness of the base offence: it is unrelated to the wrong that D does in driving unlicensed or uninsured. Homicide is a very different type of offence from driving unlicensed or uninsured, and the prospect of death does not supply reasons why driving unlicensed or uninsured is a wrong – there is little, if any, risk of death resulting from driving unlicensed or uninsured.⁴⁷ It is

⁴¹ Ibid, at [17].

⁴² A constructive crime involves an offence structure that typically has a base offence that requires both *actus reus* and corresponding *mens rea* elements. However, in addition to this full base offence, constructive crimes also include additional *actus reus* elements – usually proscribed outcomes – that build upon the base offence to make a more serious crime. But these additional *actus reus* elements usually have no corresponding *mens rea*.

⁴³ On the view that constructive crimes can be justified by distinguishing two types of risk: intrinsic and extrinsic, see J. Horder, ‘A Critique of the Correspondence Principle in Criminal Law’ [1995] *Criminal Law Review* 759-70, 763-69 and A. Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford University Press, 2021) 315-18.

⁴⁴ *R v Vickers* [1957] 2 QB 664.

⁴⁵ A. Simester & G. Sullivan et al., *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (7th ed., Hart Publishing, 2019) 219.

⁴⁶ Simester (n 43) 316-17.

⁴⁷ In the context of driving whilst *unlicensed*, there is no intrinsic risk of death unless it was D’s being unlicensed that made his driving careless or dangerous (i.e., where D does not have the necessary training or skills). However, this narrow view of driving unlicensed is not required by law. Moreover, there are many different reasons why a driving licence could be revoked. For instance, a licence can be revoked if an individual fails to surrender their licence for endorsement. This means that being unlicensed does not necessarily suggest that D lacks sufficient training or skills that makes his driving careless or dangerous. Therefore, it is far from clear that there is an intrinsic risk of death while driving unlicensed. See, also, A. Duff, ‘Whose Luck Is It Anyway?’ in C. Clarkson & S. Cunningham (ed.) *Criminal Liability for Non-Aggressive Death* (Routledge, 2008) 76-7.

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3 therefore inappropriate to ascribe blame to D for the death of V based on only D's driving
4 unlicensed or uninsured.
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7 Moreover, since s.3ZB represents a form of full strict liability, where both the
8 underlying offence of being unlicensed or uninsured *and* the aggravating element of causing
9 death can be constituted by events for which D is not culpable, D can therefore be liable for a
10 homicide offence for which he bears no *mens rea* at all. Thus, s.3ZB does not appropriately
11 capture the wrong of culpable killing. The offence therefore unfairly imposes liability on D for
12 a homicide offence. It makes D criminally responsible as a killer and thus labels D as a culpable
13 killer when D does not culpably kill.
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17 Although s.12A carries a higher sentence if the vehicle is involved in a fatal accident,
18 the death of V is not an element of the offence.⁴⁸ Therefore, it is not strictly speaking a
19 homicide offence. As defined by s.12A, the personal injury which constitutes one of the
20 aggravating circumstances must have occurred after the taking of the vehicle and before its
21 recovery, but there is no requirement that D should have been driving it. All that is required is
22 that D was party to the taking of the vehicle and was in, or in the immediate vicinity of, the
23 vehicle when the accident occurred. Indeed, D may have been a passenger as per *Wilson*.⁴⁹
24 These considerations suggest, then, that the taking and driving of the vehicle is merely
25 incidental to s.12A and it is the injury which is the gravamen the offence. Thus, the wrong that
26 this offence attempts to target is the culpable causing of injury to another. For s.12A, the
27 government was of the view that culpability for causing injury stems from D's role in taking
28 the vehicle in the first place. In debating the Aggravated Vehicle-Taking Bill, the Minister of
29 State for the Home Office stated that:
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43 “[t]he Government believe that anyone who deliberately involves himself in an episode
44 of illegal car-taking incurs moral responsibility for whatever happens – whether or not
45 he was in the driving seat at the time. If things go wrong, he should take the legal
46 consequences, and he has no one to blame but himself”.⁵⁰
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51 But the same reasons for rejecting the Government's argument for culpability vis-à-vis s.3ZB
52 can be invoked here, namely that D's conduct in being involved in taking a vehicle cannot
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57 ⁴⁸ Theft Act 1968, s.12A(4): s.12A carries a maximum sentence of two years' imprisonment, or fourteen years if
58 the accident caused the death of V.

59 ⁴⁹ *R v Wilson* [2022] EWCA Crim 807. In this case, D was convicted of aggravated vehicle-taking involving a
60 fatal accident, allowing himself to be carried, contrary to s.12A TA 1968.

⁵⁰ Second Reading on the Aggravated Vehicle-Taking Bill: HL Deb 17 January 1992, vol 534, cols 480-504, 482.

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3 logically constitute the *mens rea* appropriate to a more serious driving offence the essence of
4 which that it caused injury to V. This is because the risk of injury to V is unrelated and thus
5 extrinsic to the wrongfulness of the base offence: there is little, if any, risk of injury resulting
6 from the wrong that D does in taking the vehicle without consent (whether D was driving or
7 not). As a result, s.12A does not appropriately represent the wrong of culpably causing the
8 injury of another. The offence, then, falsely imposes liability on D for a serious crime that
9 carries connotations of endangerment. It makes D criminally responsible for causing injury to
10 another and thus labels D as a dangerous person when D does not culpably cause injury to
11 another.

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13 Thus, both s.3ZB and s.12A misrepresent the wrongfulness of D's conduct (hence the
14 potential of harsh liability findings occurring in both offences if INUS is applied). That is
15 objectionable of itself since it falsely censures D. But, as will be discussed next, it is especially
16 objectionable because of the negative effects that follow conviction. More worryingly, because
17 INUS causation supports the position of the government on these offences – by establishing
18 causation between D's unlawful conduct and V's injury or death – it therefore imposes liability
19 for offences that have fair-labelling concerns, thereby causing injustice in these cases.

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Is Strict Liability in Stigmatic Offences Ever Justified?

The problem in dispensing with a blameworthy requirement under INUS causation suggests that we should rethink strict liability in stigmatic offences such as s.3ZB and s.12A. However, arguments exist for the general imposition of strict liability which align with the Government's rationale for these offences. Therefore, strict liability in such offences might be justified. This section discusses those views. It argues that strict liability is generally beneficial in minor non-stigmatic crimes for practical reasons. However, in more serious stigmatic crimes, like s.3ZB and s.12A, practical reasons are outweighed by the need for fair labelling. Therefore, due to fair-labelling concerns, strict liability is not appropriate in these types of offences and so a blameworthy requirement needs to be imputed into them.

Arguments in Favour of Strict Liability

There are ostensibly two main arguments in support of strict liability: 1) strict liability offers procedural convenience for law enforcement administration; and 2) strict liability may also

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3 increase the deterrent effect of an offence. So, there are practical arguments for allowing strict
4 liability offences.⁵¹
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8 ***Procedural Convenience.*** First, the use of strict liability arguably increases the
9 efficiency of criminal justice administration. Proof of subjective *mens rea* elements such as
10 ‘intention’ or ‘recklessness’ presents a difficulty for the prosecution. It has been argued that
11 this difficulty of proof arises particularly in prosecutions of corporate bodies, “since there may
12 be no one person whose conduct can be attributed to the corporation and with whom the
13 corporate mind can be identified”.⁵² However, arguably proving *mens rea* is also burdensome
14 for the prosecution in the context of private individuals. This is because D has ‘peculiar
15 knowledge’ of his state of mind at the time of the offence; only D has privileged access to his
16 intention, knowledge or belief. It is therefore difficult for the prosecution to ascertain subjective
17 *mens rea*. As Simester states, “[t]o prove and know the content of a person’s mind is typically
18 harder, because more a matter of inference, than to prove and know the occurrence of physical
19 events”.⁵³ By contrast, strict liability is much more easily applied to both corporations and the
20 conduct of private individuals since it can be administered without reference to D’s mental
21 state. As a result, administration of criminal justice would be greatly slowed if prosecutors are
22 required to prove *mens rea* with respect to all elements of the *actus reus* before the court.
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34 The significance of strict liability in this context is that it would increase the efficiency
35 of administering justice if the prosecution did not have to spend time proving *mens rea* with
36 respect to all elements of the *actus reus*. This is particularly true with offences that regulate the
37 specialist commercial behaviour of corporations (i.e. regulatory offences), because the
38 prosecution is likely to be inadequately placed to learn the nature of D’s own specialist activity
39 in order to prove fault.⁵⁴ In turn, the costs involved in adjudicating strict liability offences are
40 also likely to be decreased, since the number of legal elements required to be proved at trial,
41 and so the number of potential issues, is considerably reduced.⁵⁵
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51 ⁵¹ See Simester (n 43) 294-97.

52 Simester (n 43) 296.

53 Simester (n 43) 295. However, it does not necessarily follow from D’s peculiar knowledge that it is difficult for the prosecution to prove *mens rea*, since D may come across as a poor witness, so that his testimony is unlikely to be believed: as Lord Bingham noted in *Sheldrake v DPP* [2004] UKHL 43, at [51(2)]. In addition, in some cases the existence of *mens rea*, such as intention, may be an overwhelming inference from the circumstantial evidence of what D did at the time: See I. Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ [2005] *Criminal Law Review* 901-28, 914.

54 Simester (n 43) 297.

55 However, this would need to be weighed against any potential increased costs should strict liability lead to a larger number of trials.
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3 There are well over 9,000 criminal offences in the criminal law of England and Wales.⁵⁶
4 If all the current offences in England and Wales required proof of *mens rea* in respect of every
5 element of the *actus reus*, administration of criminal justice would be not merely unmanageable
6 but too expensive. Criminal adjudications need to be efficient and cost effective. Simester
7 therefore argues that the state essentially has two options: first, to eliminate several criminal
8 offences; secondly, to simplify some offences by removing some of their elements, in particular
9 their *mens rea* elements.⁵⁷ However, if all the existing offences are in accordance with the harm
10 principle, then the second option is preferred because it allows these harms feasibly to be
11 proscribed. If it is impossible to prevent all proscribed harms while maintaining an efficient
12 criminal justice system, the conflicting interests of all stakeholders (i.e. defendants and other
13 community members, including victims) may be facilitated in part by excluding the *mens rea*
14 elements of certain criminal offences.⁵⁸

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16 Reducing the *mens rea* element from the definition of an offence can also promote
17 convenience in terms of enforcement. This is seen typically in constructive strict-liability
18 offences as they attribute liability to D for the unforeseen consequences of his conduct. Indeed,
19 the need for enforcement convenience formed part of the Government's rationale for enacting
20 s.12A. The Aggravated Vehicle-Taking Act 1992, which inserted s.12A,⁵⁹ was brought in to
21 tackle the problem of joyriding – the practice of criminal gangs who take vehicles illegally and
22 then drive them dangerously or cause damage or injury.⁶⁰ A particular concern of the
23 Government was that:

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“[a]ll too often it is just not clear which member of a gang caused the particular damage, or who actually had his hand on the wheel when the car crashed and someone was killed or injured as a result. They might all have had a turn; it might have been dark; the car might have been travelling too fast for clear identification; or perhaps the vehicle was found abandoned and burnt out in a wood and the taker simply denies having had any responsibility for it”.⁶¹

Implementing a constructive strict-liability offence in s.12A allows the base offence of taking a vehicle without consent and the aggravating element of causing injury to apply not only to

⁵⁶ J. Horder, *Ashworth's Principles of Criminal Law* (8th ed., Oxford University Press, 2016) 1.

⁵⁷ Simester (n 43) 295.

⁵⁸ *Ibid.*

⁵⁹ Aggravated Vehicle-Taking Act 1992, s.1(1)(3).

⁶⁰ Second Reading on the Aggravated Vehicle-Taking Bill: HL Deb 17 January 1992, vol 534, cols 480-504, 480.

⁶¹ *Ibid.*

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3 the driver, but to anyone else who was party to the basic offence and is in the immediate vicinity
4 of the vehicle at the time of the injury. This means that the prosecution will not have to show
5 which member of the gang was driving at the particular time or who was responsible for the
6 injury. As the Government notes, “[t]he whole episode will be viewed as one offence and all
7 those who are involved will be equally liable to punishment for the aggravated offence”.⁶² The
8 strict liability offence of s.12A can therefore apply to D even though his specific involvement
9 in the crime was uncertain. This, as the Government says, provides a “solution to a problem of
10 enforcement”.⁶³

11
12 Nevertheless, absence of empirical evidence, it is not clear that the criminal justice
13 process will operate more efficiently if *mens rea* is not required to be established at trial.⁶⁴ But
14 even if the removal of the requirement to prove *mens rea* were to increase the efficiency of
15 criminal justice administration, there is a profound moral concern with this argument: it
16 presents an issue of procedural convenience as a reason to do away with one of the key pillars
17 of criminal law – culpability – and thus change substantive law.⁶⁵

18
19 **Deterrence.** Another argument in support of strict liability is that it may increase the
20 deterrent effect of an offence, thereby protecting the public.⁶⁶ That is to say, the imposition of
21 strict liability will likely cause individuals to take more care in their conduct thus more
22 effectively preventing criminal risk-taking.⁶⁷

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24 Such deterrence-based reasoning is implicit in one of the most common arguments for
25 strict liability: that public protection sometimes requires a high standard of care on the part of
26 those who undertake certain risk-creating activities. The rationale for this line of argument is
27 that a high level of care needs to be taken by individuals who perform risk-generating activities,
28 and without strict liability the careless will have little incentive to eliminate or reduce those
29 risks. The threat of strict criminal liability therefore provides motive for individuals involved
30 in risk-creating activities to adopt a higher standard of care which might not otherwise be taken,
31 in order to safeguard against harm.⁶⁸

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⁶² Ibid, 481.

⁶³ Ibid.

⁶⁴ Simester (n 43) 299.

⁶⁵ Simester & Others (n 45) 212.

⁶⁶ L. Levenson, ‘Good Faith Defenses: Reshaping Strict Liability Crimes’ (1993) 78 *Cornell Law Review* 401-69.

⁶⁷ P. Robinson, ‘Strict Liability’s Criminogenic Effect’ (2018) 12 *Criminal Law and Philosophy* 411-26, 412.

⁶⁸ For an example of this type of argument, see B. Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and a Social Scientist* (2nd ed., Steven & Sons, 1981) 46ff.

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3 The deterrence-based argument for strict liability seems to be reflected in the law. This
4 is true particularly in regulatory offences where there is a need to protect the public from risks
5 associated with, say, industrial activities where the harmful impact of the *actus reus* is
6 potentially widespread and severe. For instance, Lord Salmon in *Alphacell Ltd v Woodward*
7 said that strict liability “encourages riparian factory owners not only to take reasonable steps
8 to prevent pollution but to do everything possible to ensure that they do not cause it”.⁶⁹
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13 Indeed, the need for deterrence formed part of the Government’s rationale for enacting
14 both s.3ZB and s.12A. The Road Safety Act (RSA) 2006, which inserted s.3ZB,⁷⁰ was brought
15 in to deal with drivers who put road users at risk through their irresponsible and unlawful
16 behaviour. The Government was concerned that too many people are seriously injured or killed
17 on the roads and sought to reduce the number of those injured or killed.⁷¹ The Government’s
18 aspiration is that s.3ZB works as “a useful general deterrent effect on bad driving” thereby
19 reducing the risk of those killed on the roads.⁷² As discussed above, s.12A was brought in to
20 tackle the problem of joyriding.
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27 However, there is no empirical evidence to suggest that strict liability *is* effective in
28 deterring criminal risk-taking.⁷³ But even if there is a deterrent effect on some conduct, that
29 having strict-liability offences will cause individuals to be more careful in some cases, it is
30 arguable that imposing strict liability is no more effective than a standard of culpable
31 negligence. The negligence standard requires individuals to do all that they reasonably can be
32 expected to do to be attentive and careful. As Robinson states, “the culpable negligence
33 standard already takes into account the seriousness of the risks, and it already demands greater
34 vigilance to avoid greater risks”.⁷⁴ Therefore, the need to increase the deterrent effect of an
35 offence could also be met by a negligence-based standard.⁷⁵
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44 ⁶⁹ *Alphacell Ltd v Woodward* [1972] AC 824, 848–49.

45 ⁷⁰ Road Safety Act 2006, s.21(1). (Hereinafter, RSA 2006).

46 ⁷¹ Home Office, *Review of Road Traffic Offences Involving Bad Driving: A Consultation Paper* (2005) at p.1,
47 para. 1.1.

48 ⁷² *Ibid*, at p.3, para 1.13.

49 ⁷³ See B. Jackson, ‘Storkwain: A Case Study in Strict Liability and Self-Regulation’ [1991] *Criminal Law Review*
50 892; G. Richardson, ‘Strict Liability for Regulatory Crime: The Empirical Research’ [1987] *Criminal Law Review*
51 295; R. Baldwin, ‘Why Rules Don’t Work’ (1990) 53 *Modern Law Review* 321-37. In fact, it is possible that strict
52 liability may lead to *reduced*, rather than increased deterrence. See Simester (n 43) 299-300.

53 ⁷⁴ Robinson (n 67) 412.

54 ⁷⁵ It is argued that providing for punishment in the absence of culpability, criminal law undermines its moral
55 authority with the community and thereby provokes subversion and resistance instead of cooperation and
56 acquiescence. See, generally, Robinson (n 67). Compare with P. Robinson, ‘The Criminal-Civil Distinction and
57 the Utility of Desert’ (1996) 76 *Boston ULR* 201-14, 214: ‘Serious deterrent sanctions can and ought to be imposed
58 [for regulatory violations] but they can as easily and effectively be imposed under an administrative system
59 distinct from criminal law that carries a noncriminal label, such as “violation”.’ Therefore, it is arguable that
60 deterrence could be more effectively met by civil sanctions, and without the need of condemnation that usually
follows criminal conviction.

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3 Proponents of strict liability in criminal law tend to assume that it might encourage
4 individuals to be even more careful than the circumstances reasonably would require.⁷⁶ But
5 even if that were true, such a high standard of precaution (i.e. going beyond what is reasonable
6 in the circumstances) is unnecessary and undesirable because it criminalises reasonable
7 conduct. For instance, it would be reasonable to expect that road users obtain insurance and go
8 about their daily business unless advised that their policy is no longer valid. But if there were
9 a clerical error which invalidated the policy and the road user was not made aware, then that
10 road user would be liable for s.3ZB if they were then involved in a fatal accident. This means
11 that s.3ZB demands going beyond that and requires road users to validate their policy every
12 time they wish to use their vehicles.

13
14 This leads to another concern: that strict liability may also desist individuals from even
15 modest risk-creating activity altogether. But it is surely not the intention of criminal law to
16 discourage people from engaging in risk-creating activity. The economy would not be very
17 productive if that were to be the outcome. So, criminal law's deterrent aim must be to deter
18 people from commencing activity (or from performing it in a manner) which creates
19 *unreasonable* risks of harm occurring.⁷⁷ It is therefore appropriate for criminal law to demand
20 that individuals do only what is reasonable in the circumstances,⁷⁸ but that demand can be met
21 by negligence-based offences.

22 23 24 ***Practicality vs Fair Labelling***

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Strict-liability offences, then, might be procedurally convenient. The prosecution does not have to prove *mens rea* with respect to all elements of the *actus reus* and it also promotes convenience in terms of enforcement whereby D's specific involvement in a crime need not be certain. Strict-liability offences may also have a deterrent effect. For instance, for s.3ZB it is plausible to imagine that if D is aware he is uninsured or unlicensed then he may not run the risk of driving on the road out of fear of conviction for a serious crime if involved in a fatal accident. Similarly, for s.12A it is possible to envisage that D may not run the risk of taking a vehicle and driving on the road out of fear of conviction for a serious crime if involved in an accident. Moreover, because s.12A makes everyone in the car, not merely the driver, liable for

⁷⁶ Robinson (n 67) 412.

⁷⁷ See A. Simester, 'Is Strict Liability Always Wrong?' in A. Simester (ed.) *Appraising Strict Liability* (Oxford University Press, 2005) 31 and Simester (n 43) 301.

⁷⁸ As noted by J. Donovan in *R v St Margaret's Trust Ltd* [1958] 1 WLR 522, at 527: '[t]here would be little point in enacting that no one should breach against a flood, and at the same time excuse any one who did it innocently'.

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3 the aggravated offence, it may deter some joyriders from simply going along for the ride.
4 Therefore, there may be some practical benefits to be gained from strict-liability crimes. It
5 might be the case, then, that strict liability is beneficial, especially in minor ‘non-stigmatic’
6 crimes (those that import little or no element of stigma or condemnation and carry trivial
7 sentences). However, such practical benefits must be weighed against the fair-labelling
8 concerns in more serious ‘stigmatic’ crimes (offences that import and retain an element of
9 stigma or condemnation and impose sentences of imprisonment) such as s.3ZB and s.12A.⁷⁹

15 As identified above, s.3ZB and s.12A breach the fair-labelling principle because they
16 misrepresent the wrongfulness of D’s conduct. S.3ZB unfairly imposes liability on D for a
17 stigmatic homicide offence. It therefore makes D criminally responsible as a killer and thus
18 labels D as a culpable killer when D does not culpably kill. Similarly, s.12A falsely imposes
19 liability on D for a serious crime that carries connotations of endangerment. It makes D
20 criminally responsible for causing injury to another and thus labels D as a dangerous person
21 when D does not culpably cause injury to another. These offences therefore result in false
22 censure.
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29 The reason why D ought not to be falsely censured is supplied by the adverse
30 implications it has on D’s life following conviction. Within the criminal justice system, the
31 offence D is convicted of will have implications for any future conviction. For instance, D’s
32 previous convictions may be admitted during trial as evidence of his bad character, thereby
33 aiding the judge or jury to reach a verdict on D’s guilt or innocence;⁸⁰ and where D is found
34 (or pleads) guilty, the corresponding sentence can also be influenced by D’s previous
35 convictions.⁸¹ It would clearly be unfair to D if his criminal record misrepresented his
36 wrongdoing as it could lead to erroneous judgments about D’s bad character in future trials.
37 Where convicted, it could also improperly increase the sentence imposed on D. As such, there
38 is a need for convictions to accurately capture D’s wrongdoing. As Chalmers and Leverick
39 state, “[i]f decisions are to be made about the offender’s fate that rely on previous convictions,
40 it is only fair that the information communicated is accurate and sufficiently informative”.⁸²

50 Outside the criminal justice system, criminal convictions also have various harmful
51 social consequences. Communities develop negative judgments of wrongdoers through the
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55 ⁷⁹ For the distinction between ‘non-stigmatic’ and ‘stigmatic’ crimes, see Simester (n 77) 23-24.

56 ⁸⁰ Criminal Justice Act (CJA) 2003, ss.101–8. ‘Bad character’ includes ‘evidence of, or a disposition towards,
57 misconduct’: s.98 CJA 2003. ‘Misconduct’ means ‘the commission of an offence or other reprehensible
58 behaviour’: s.112(1) CJA 2003.

59 ⁸¹ CJA 2003, s.143(2).

60 ⁸² Chalmers & Leverick (n 31) 231.

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3 official state censure that is manifested in criminal convictions. Such judgments are the result
4 of complex social phenomena caused by the stigma that is attached to different crimes, and
5 society uses that stigma to disparage and discredit the individual in question.⁸³ As Simester
6 notes, a criminal conviction “marks D out in such a way that it becomes appropriate, within
7 the community, for the regard in which he is held to be affected”.⁸⁴ As such, certain social and
8 professional exclusions typically follow – notably, by “employers or landlords to deny jobs or
9 housing, respectively, to offenders”.⁸⁵ Gibson notes that, “[w]hilst it is not clear exactly how a
10 specific offence label affects access to jobs or housing, it is probable that the more stigmatic
11 the crime, the more likely that access will be compromised”.⁸⁶ But the more stigmatic the
12 crime, the more likely D will also be ostracised by his friends and family, or his wider peers.

20 S.3ZB is undoubtedly a stigmatic offence. As the Supreme Court notes:

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23 “[t]his is a statute creating a penal provision, and one of very considerable severity.
24 The offence created is a form of homicide. To label a person a criminal killer of another
25 is of the greatest gravity. The defendant is at risk of imprisonment for a substantial
26 term. Even if, at least in a case of inadvertent lack of insurance or venial lack of licence,
27 a sentence of imprisonment were not to follow, the defendant would be left with a
28 lifelong conviction for homicide which would require disclosure in the multiple
29 situations in which one's history must be volunteered, such as the obtaining of
30 employment, or of insurance of any kind. Nor should the personal burden or the public
31 obloquy be underestimated; to carry the stigma of criminal conviction for killing
32 someone else, perhaps a close relative, perhaps as in the kind of situation referred to in
33 para 19 an innocent child, is no small thing”.⁸⁷

42 The Supreme Court has also confirmed that s.12A is a stigmatic crime:

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44 “[t]he first point to be made about section 12A of the Theft Act is that it is in no sense
45 a regulatory or “quasi-criminal” enactment. Aggravated vehicle-taking is a serious
46 crime. Driving offences causing serious injury or damage are a source of growing
47 public concern. The aggravating factors which differentiate the section 12A offence

54 ⁸³ See E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Simon & Schuster, 1963) Ch. 1.

55 ⁸⁴ Simester (n 43) 305.

56 ⁸⁵ Z. Hoskins, ‘Criminalization and the Collateral Consequences of Conviction’ (2018) 12 *Criminal Law and*
57 *Philosophy* 625-39, 626.

58 ⁸⁶ M. Gibson, ‘Deceptive Sexual Relations: A Theory of Criminal Liability’ (2020) 40 *Oxford Journal of Legal*
59 *Studies* 82-109, 107.

60 ⁸⁷ *R v Hughes* (n 7) at [26].

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3 from the basic offence expose the defendant to a maximum sentence of 14 years
4 imprisonment, the same as for causing death by dangerous driving. Although the death
5 of the victim is not strictly speaking an element of the offence, the increased maximum
6 sentence for cases where someone has been killed reflects the real stigma associated
7 with it".⁸⁸
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13 Given that both these offences falsely censure D, they therefore unfairly expose D to these
14 negative social consequences.
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16 Thus, the false censure of D – supplied by both s.3ZB and s.12A – not only unfairly
17 condemns D for the misrepresented wrongfulness of D's conduct, but it also has far-reaching
18 implications for D following conviction: it could inappropriately affect any future conviction
19 and sentence, and unfairly exposes D to harmful social consequences. It is arguable, then, that
20 these fair labelling issues outweigh any practical reasons, such as procedural convenience and
21 deterrence, for the use of strict liability in stigmatic offences such as s.3ZB and s.12A.
22 Consequently, due to fair-labelling concerns, strict liability is not appropriate in these offences.
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28 Stigmatic crimes retain an element of moral condemnation which conveys a public
29 implication of culpable wrongdoing.⁸⁹ However, for stigmatic offences, such as s. 3ZB and
30 s.12A, the state does not rely on the proposition that D is *culpable* for their wrongdoing. So,
31 the state cannot claim to be punishing D in accordance with D's overall desert - culpable
32 wrongdoing. Instead, it is simply punishing D in virtue of the fact that only wrongdoing
33 occurred. Therefore, there are fair labelling concerns for imposing strict liability in stigmatic
34 crimes more broadly.
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42 **Remedying the Concerns: Exiling Strict** 43 **Liability in Stigmatic Offences** 44 45 46 47

48 As discussed above, the fair-labelling concerns that INUS causation would produce in
49 stigmatic offences such as s.3ZB and s.12A stems from INUS dispensing with a blameworthy
50 requirement in the causal analysis. It follows that a blameworthy element needs to be imported
51 into these types of offences. For s.3ZB and s.12A, specifically, a blameworthy requirement for
52 the aggravated *actus reus* elements. This would ensure that these offences appropriately
53 capture the wrongdoing that they aim to target (i.e. culpable killing or culpably causing injury).
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59 ⁸⁸ *R v Taylor* (n 24) at [27].

60 ⁸⁹ *Simester* (n 77) 33.

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3 This section discusses how these offences should be transformed if INUS were to be
4 implemented in English criminal law. It claims that the preferred option is to import a
5 blameworthy requirement for the aggravated *actus reus* elements of s.3ZB and s.12A generally
6 provided by D's careless driving.
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10 11 *The Requirement of Careless Driving*

12 The preferred option is that s.3ZB and s.12A each require blameworthiness as to their
13 aggravated *actus reus* elements, generally provided by the poor standard of D's driving. But
14 what should that standard of driving be?
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19 Guidance is given from the main statutory driving offences involving serious injury or
20 death. Excluding both s.3ZB and s.12A, such offences include causing serious injury or death
21 by dangerous driving;⁹⁰ causing serious injury or death by careless, or inconsiderate, driving;⁹¹
22 causing serious injury or death while driving disqualified;⁹² and causing death by careless
23 driving when under the influence of drink or drugs.⁹³
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28 Like s.3ZB and s.12A, these offences are constructive crimes since they all require a
29 base offence of driving to an unlawful standard (sometimes in specific circumstances) and in
30 doing so caused death. What is common amongst these offences is that they all require some
31 form of blameworthiness which derives from D's poor standard of driving. For the offences of
32 causing injury or death by dangerous driving, 'dangerous' driving is the basis on which blame
33 is ascribed. An individual is regarded as driving dangerously if "(a) the way he drives falls *far*
34 below what would be expected of a competent and careful driver, and (b) it would be obvious
35 to a competent and careful driver that driving in that way would be dangerous".⁹⁴ The emphasis
36 on the meaning of dangerous driving is thus assessed objectively and denotes very bad
37 driving.⁹⁵
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45 In relation to the offences of causing injury or death by careless, or inconsiderate,
46 driving and causing death by careless driving when under the influence of drink or drugs,
47 'careless' or 'inconsiderate' driving is the basis on which blame is ascribed. An individual is
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51 ⁹⁰ RTA 1988, s.1A (causing serious injury by dangerous driving) and s.1 (causing death by dangerous driving).

52 ⁹¹ Ibid, s.2C (causing serious injury by careless, or inconsiderate, driving) and s.2B (causing death by careless, or
53 inconsiderate, driving).

54 ⁹² Ibid, s.3ZD (causing serious injury while driving disqualified) and s.3ZC (causing death while driving
55 disqualified).

56 ⁹³ Ibid, s.3A.

57 ⁹⁴ Ibid, s.2A(1) (emphasis added).

58 ⁹⁵ NB: one subjective element is imported into the definition. Under s.2A(3) RTA 1988, if D knows of
59 circumstances making the driving dangerous (e.g. a fault with the car) – even though the driving was not obviously
60 dangerous – this knowledge can be imputed to the competent and careful driver.

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3 regarded as driving carelessly (without due care and attention) if “the way he drives falls below
4 what would be expected of a competent and careful driver”.⁹⁶ Whereas a person is regarded as
5 driving inconsiderately (without reasonable consideration for others) only if other persons are
6 inconvenienced by his driving.⁹⁷ Again, the emphasis on the meaning of careless or
7 inconsiderate driving is assessed objectively.⁹⁸ Careless driving is thus a crime of negligence,
8 but the degree of negligence is below that required for dangerous driving. As the Court of
9 Appeal stated:
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17 “careless driving on its own almost always involves culpability at the lowest possible
18 scale. In one sense, every driver is careless when he makes a mistake. Every driver,
19 even the best, and most experienced, and normally careful, does so from time to time.
20 That does not mean that he has fallen “far below” the appropriate standard”.⁹⁹
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25 It seems, then, that careless driving has a low threshold. Indeed, driving which involves any
26 ‘momentary inattention’ that results in death will likely trigger a prosecution for causing
27 serious injury or death by careless driving.¹⁰⁰
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30 Finally, the offences of causing injury or death while driving disqualified, requires
31 “something open to proper criticism in the way in which he or she was driving which
32 contributed more than minimally to the death”.¹⁰¹ What is needed in terms of the quality of
33 driving to prove this offence remains to be seen. But the Supreme Court noted that the driving
34 does not need to amount to careless or inconsiderate driving, but there must be some conduct
35 that amounts to more than the mere presence of being on the road.¹⁰²
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41 As discussed above, the standard that D’s driving must be ‘something open to proper
42 criticism’ was required in both *Hughes* and *Taylor* regarding s.3ZB and s.12A, respectively.
43 However, given the vagueness of such a test, and the fact that the quality of driving could be
44 less severe than negligence, it is inappropriate as the standard of driving on which blame can
45 be ascribed. Moreover, given the uncertainty surrounding the quality of driving required, it is
46 unclear whether a risk of injury or death is intrinsic to the quality of driving. As discussed
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53 ⁹⁶ RTA 1988, s.3ZA(2).

54 ⁹⁷ *Ibid*, s.3ZA(4).

55 ⁹⁸ S.3ZA(3) imports one element of subjectivity into the definition of careless driving. This is similar to the
56 subjective element imported into the definition of dangerous driving: see fn 90.

57 ⁹⁹ *R v Richardson* [2006] EWCA Crim 3186, at [29].

58 ¹⁰⁰ S. Cunningham, ‘Has Law Reform Policy Been Driven in the Right Direction? How the New Causing Death
59 by Driving Offences are Operating in Practice’ [2013] *Criminal Law Review* 711-28, 717-22.

60 ¹⁰¹ Explanatory Notes to the Criminal Justice and Courts Act 2015, para 279, which amended the RTA 1988.

¹⁰² *R v Hughes* (n 7) at [33].

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3 above, the intrinsic connection between the initial wrong that D commits and the additional
4 *actus reus* in constructive crimes is important to D's blameworthiness for that *actus reus*.¹⁰³ It
5 is for this latter reason that the standard of 'inconsiderate driving' can also be rejected. There
6 is little, if any, risk of injury or death resulting from being inconvenienced: the risk of injury
7 or death is unrelated and thus extrinsic to this standard of driving. This could explain why there
8 are rare, if any, cases prosecuted as causing injury or death by inconsiderate driving.¹⁰⁴ It is
9 therefore inappropriate to ascribe blame to a driver for the injury or death of another based on
10 the driver's inconsiderate driving.¹⁰⁵

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12 But the extrinsic risk of injury or death is not an issue for both dangerous and careless
13 driving. For dangerous driving there is a high risk of injury or death resulting from very bad
14 driving: the risk of injury or death is related and thus intrinsic to this standard of driving.
15 Indeed, the likelihood of injury or death occurring from dangerous driving forms the very
16 reason why such driving is wrongful and illegal in the first place.¹⁰⁶ *Simester et al.* agree.¹⁰⁷
17 They provide an example of a motorist, D, who drives through a village at a speed 20 miles per
18 hour in excess of the speed limit, loses control of his car, mounts the pavement and kills a
19 pedestrian, V. For the authors, D would rightly be liable for causing death by dangerous driving
20 notwithstanding the fact that V's death was a matter of (bad) luck because that luck "is not
21 random or unrelated".¹⁰⁸ They confirm that:

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[i]t is D's dangerous driving ... that brings the uncontrolled factors into play, and
makes the luck relevant. Where the luck is intrinsic, there seems no difficulty about
holding D responsible and culpable for the outcome".¹⁰⁹

Similarly, for careless driving, driving below the standard of competent and careful driver also
increases the risk of injury or death to other road users. For example, if, due to momentary
inattention, D pulled out from a side road into V's path on a main road, this severely increases
risk of injury or death to V. Again, causing injury or death is the actualisation of a risk that

¹⁰³ Thus, a criticism of s.3ZD (causing serious injury while driving disqualified) and s.3ZC RTA 1988 (causing death while driving disqualified).

¹⁰⁴ In a study of s.2B RTA 1988, none of the 22 cases prosecuted were based on inconsiderate driving: *Cunningham* (n 99).

¹⁰⁵ Thus, a criticism of s.2C RTA 1988 (causing serious injury by careless, or inconsiderate, driving), s.2B (causing death by careless, or inconsiderate, driving), and s.3A (causing death by careless driving when under the influence of drink or drugs).

¹⁰⁶ It is an offence to drive dangerously contrary to s.2 RTA 1988.

¹⁰⁷ See *Simester & Others* (n 45) 219.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, 220.

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3 makes this quality of driving wrongful and illegal.¹¹⁰ Therefore, it is appropriate to ascribe
4 blame to a driver for another's injury or death based on the driver's dangerous or careless
5 driving.
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9 However, as discussed above, the rationale for both s.3ZB and s.12A was to reduce
10 injury or death by deterring individuals being on the road when they had no right to be there.
11 But, compared with careless driving, such deterrence may be reduced if dangerous driving was
12 the required standard of driving for these offences. Because of the higher degree of culpability
13 for dangerous driving, individuals are far more likely to run the risk of driving vehicles on the
14 road while unlicensed or uninsured, or after unlawfully taking them, out of a lesser fear of
15 conviction (because of knowledge that liability will not be imposed unless it is in the unlikelier
16 situation that D is driving dangerously). In essence, because of the higher degree of culpability
17 for dangerous driving, such a standard of driving for s.3ZB and s.12A may result in a reduced
18 deterrent effect of those offences, compared with a standard of careless driving. Therefore, the
19 preferred blameworthy requirement for the aggravated *actus reus* elements of s.3ZB and s.12A
20 be provided by D's 'careless' driving. As a result, the wording in these offences should be
21 amended to reflect this.
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31 Indeed, if s.3ZB and s.12A had the requirement of careless driving, then liability in
32 cases such as *Williams, Hughes, McGuffog, Uthayakumar, Marsh* and *Taylor* would not follow
33 from an application of INUS. Although causation would be established in these cases, the
34 defendants were not driving carelessly and thus are not to blame for the injury or deaths of their
35 respective victims.
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41 Conclusion

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46 INUS causation is problematic for stigmatic strict-liability result crimes looked at through the
47 lens of offences involving injury or death by driving, specifically s.3ZB Road Traffic Act 1988
48 and s.12A(2)(b) Theft Act 1968. Unlike the standard tests of causation in English criminal law,
49 the liability outcomes in cases involving these offences, such as *Williams, Hughes, McGuffog,*
50 *Uthayakumar, Marsh* and *Taylor*, would change so that instead of being acquitted, the
51 defendants would be criminally liable for their respective offences. This is because INUS
52 removes the blameworthy requirement which has been injected into the standard tests of
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60 ¹¹⁰ It is an offence to drive carelessly contrary to s.3 RTA 1988.

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3 causation. However, such liability outcomes yield fair-labelling concerns. This is due to both
4 s.3ZB and s.12A misrepresenting the wrongfulness of D's conduct: s.3ZB represents culpable
5 killing when D does not culpably kill; and s.12A represents culpably injuring another when D
6 does not culpably injure another. That is objectionable of itself since it falsely censures D. But
7 it is especially objectionable because of the negative effects that could follow conviction.
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12 Strict liability is generally beneficial in minor non-stigmatic crimes for practical
13 reasons: strict-liability offences might be procedurally convenient, and they may also have a
14 deterrent effect. But in more serious stigmatic crimes, like s.3ZB and s.12A, such practical
15 justifications are outweighed by the need for fair labelling. Therefore, due to fair-labelling
16 concerns, strict liability is not appropriate in these types of offences.
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21 Because of problems in dispensing with blameworthiness under INUS causation in
22 offences such as s.3ZB and s.12A, a solution could be to circumscribe strict liability by
23 importing a blameworthy element into them. For s.3ZB and s.12A, specifically, importing a
24 blameworthy requirement for the aggravated *actus reus* elements of the offences generally
25 provided by D's careless driving. This would ensure that these offences appropriately capture
26 the wrongdoing that they aim to target (i.e. culpable killing or culpably causing injury).
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