



'Jalal's Law': Driving the Law in the Wrong Direction

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Abstract

This article provides a case study of the process of criminalising a form of dangerous driving in Victoria. It examines the process whereby an ostensibly draconian Bill was transformed into one far less damaging to fundamental criminal law principles and illustrates how populism may be tempered by proper parliamentary procedures, cooperation between parties and a desire to balance political and legal imperatives. It also examines the place of constructive offences in the criminal law and the role that the consequences of an offence plays in the structure of the substantive criminal law and in sentencing, particularly in the context of driving offences.

Keywords

Constructive crimes; driving offences; instinctive irrationalism; sentencing.

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Introduction: A Tragic Tale

In March 2017, Jalal Yassine-Naja, a 13-year-old boy, was hit and killed by an unlicensed driver while skateboarding in an outer suburb of Melbourne, Victoria in Australia. A subsequent investigation by Victoria Police found that the driver was not at fault for the child's death. However, she was charged with unlicensed driving under the *Road Safety Act 1986* (Vic) and sentenced to 80 hours of community service, provoking community outrage at the leniency of the sentence (Parliament of Victoria 2018: 1).¹ The substance of the criticism was that if the woman had not been driving while unlicensed, the death would not have occurred. In essence, the community's concern was not only that the sentence imposed for the offence of unlicensed driving was inadequate but, more importantly, with the lack of criminal liability for a more serious offence that reflected the harm caused by the driving.

In March 2018 the *Crimes (Unlicensed Drivers) Bill 2018* was introduced into Parliament by an independent member of Victoria's Upper House, the Legislative Council, intended to be named 'Jalal's Law'. The Bill proposed to amend the *Crimes Act 1958* (Vic) by creating two new offences of causing serious injury or death while knowingly or recklessly driving while unlicensed, carrying maximum penalties of five and 10 years' imprisonment respectively. The offences would not require proof that the driver drove culpably, dangerously, negligently or carelessly. However, it provided that the defendant had a defence if he or she could satisfy the court, among other matters, that they were 'observing the standard of care in relation to the driving of the motor vehicle which a reasonable person would have observed in all the circumstances of the case' (Parliament of Victoria 2018: 33). At the time, such offences had no precedent in Australia² but were similar to offences contained in the *Road Traffic Act 1988* (UK).³

The Bill was accompanied by a petition that was tabled in the Legislative Council, signed by over 1,000 people, calling for a change in the law, claiming that Victorian law as it stood did not reflect the gravity of the unlicensed driver's conduct and calling for substantial penalties in such circumstances. Had the proposed law passed as it was introduced, it may have resulted in convictions for homicide offences in circumstances in which death was unforeseen or unforeseeable and the possible imposition of potentially unfair, illogical and grossly disproportionate sentences. However, as it finally emerged as part of an omnibus Act passed shortly before a state election (*Justice Legislation Miscellaneous Amendment Act 2018* [Vic], s 19A, see now *Crimes Act 1958* [Vic], s 319[1B]), the provisions differed substantially from those first introduced, are likely to be relatively innocuous, more symbolic than substantive and likely to disappoint future victims who might have expected the law to have been significantly altered.

Part 1 of this article examines the process whereby an ostensibly draconian Bill was transformed into one far less damaging to fundamental criminal law principles. Building on the pioneering work of McNamara et al. (2019) investigating and theorising on the processes of criminalisation, it provides a case study of how populism may be tempered by proper parliamentary procedures, cooperation between parties and a desire to balance political and legal imperatives. Part 2 examines the place of constructive offences in the criminal law and the role that the consequences of an offence plays in the structure of the substantive criminal law and in sentencing, particularly in the context of driving offences.

Criminalisation

Otto von Bismarck is said to have observed that 'If you like laws and sausage, you should never watch either one being made'. Despite his warning, scrutinising the processes of law-making is important and can reveal 'the social, cultural and political forces driving change (including the role of the media and interest groups)' (McNamara et al. 2019: 3).

Based on their analysis of 143 criminalisation statutes passed in New South Wales, Victoria and Queensland between 2012 and 2017, McNamara et al. (2019) developed a typology for describing the paths to criminalisation that contains six categories: judge-made, single-stage executive driven, internal government agency initiative, mandated statutory review, government-appointed inquiry/review and independent review by standing commission/committee. As is often the case, no typology is perfect and the present case study reveals a variant of these categories: changes driven not by the executive but by an independent member of Parliament but requiring executive cooperation and involving independent reviews.

In their analysis, McNamara et al. distinguished between a trigger for a particular legislative change, for example a tragic fatality, as it was the present case, and the process by which a Bill is developed and enacted (McNamara et al. 2019: 5):

An incident *may* trigger a hastily enacted legislative change, or it may, for example, trigger a government referral of the matter to an independent inquiry ... A key criterion of differentiation between our six process categories relates to control of the process: institutionally, who is driving and influencing determinations of whether and how there should be an adjustment to the criminalisation status quo. The level of control exercised by executive government is part of this criterion. Other considerations include the speed with which the reform proposal is developed and implemented, the number of stages involved in the process, the degree of openness and transparency, and the extent of consultation with individuals and organisations outside executive government.

Part 1: The Process

The Trigger

As noted above, Jalal died in March 2017 but it was not until one year later that the *Crimes (Unlicensed Drivers) Bill 2018* was introduced into Parliament. This was no 'knee-jerk' reaction to the unfortunate death of the child, but a response to the perceived leniency of the sentence imposed upon the offender nearly a year later, and the view, expressed by a former senior member of Victoria Police, that there was a gap in the law, namely that all that was available to the court was a non-custodial sentence (Parliament of Victoria 2018: 1). What was required, it was believed, was legislative change that would more closely align unlawful road use and death or serious injury.

Driving-related offences have perennially caused concern due to perceived public dissatisfaction with sentences imposed when death or serious injury has been caused but when the offender has been convicted of a minor driving offence (rather than the homicide offence itself). This situation may cause enormous distress to victims' families when it is perceived to devalue the terrible consequence of the death and place insufficient value on the victim's life.

Jalal's Law can be viewed as an example of what has been termed 'victim-driven criminalisation' (Sebba 2009), often expressed in 'named' laws such as Megan's law in the United States (requiring the registration of sex offenders) and a proposed Sarah's law in Tasmania.⁴ The recent spate of legislation in Australia in respect of 'one-punch' homicides (Mitchell 2008, 2009; Quilter 2013, 2014) is another manifestation of populist, emotion-driven law reform that privileges the harm caused by an offence over the culpability of the offender, which accentuates the aspect of risk or endangerment in the criminal law and prioritises short-term political advantage over the long-term interests of the criminal law and the community. McNamara and Quilter described these reforms as representing 'hyper-criminalisation', described as the creation of new offences that cover actions that are already sufficiently addressed by existing laws, that significantly depart

from traditional conceptions of criminal responsibility by removing the element of fault in relation to the causing of death, that exclude or restrict the availability of defences and that, in some jurisdictions, carry mandatory minimum or presumptive sentences (McNamara and Quilter 2016: 16).

Driving Reform

On 27 March 2018, the *Crimes (Unlicensed Drivers) Bill 2018* was introduced by Dr Rachel Carling-Jenkins MLC as a private member's Bill. In a statement to Parliament made soon after a vigil outside the Magistrates' Court where the defendant had been sentenced, she spoke on behalf of Jalal's mother, a constituent of hers, expressing the injustice felt by the mother and others regarding the law's inadequacies. Being unlicensed, she argued should be considered in the same vein as recklessness or negligence in the offence of culpable driving causing death (Victorian Parliament, Hansard, 27 March 2018: 1014).

The Bill was read a second time on the 23 May 2018 (Victorian Parliament, Hansard, 23 May 2018:2003). In her very brief speech, she noted that tragic loss of life, the community's concern and the failings of the existing law. Under Victorian law, a Statement of Compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is required (*Charter of Human Rights and Responsibilities Act 2006* [Vic], s 28). The statement asserted that the Bill did not contravene s 10 of the Charter (protection from cruel, inhuman or degrading punishment), s 21 (the right to liberty and security of person), s 24 (the right to a fair hearing) or s 25 (the defendant's rights in criminal proceedings).

Also required under Victoria law is a review of legislation by the Parliament's Scrutiny of Acts and Regulations Committee (SARC), whose functions are to ensure, among other matters, whether any Bill directly or indirectly trespasses unduly upon rights or freedoms.

On the 5 June, SARC reviewed the Bill and expressed its concerns that the legislation imposed a reverse onus of proof on the accused, contravening s 25(1) of the Charter—the right to be presumed innocent. The SARC resolved to write to Dr Carling-Jenkins to seek further information regarding the meaning of the word 'satisfies' in the Bill (58th Parliament, Alert Digest, No 8 of 2018, 5 June 2018) and received a response on 6 June to the effect that the Bill did impose a reverse onus of proof in relation to the defences provided to the accused person but that this was warranted (58th Parliament, Alert Digest, No 9 of 2018, 20 June 2018).

Debate on the Bill resumed on 20 June 2018, when the government, while expressing its general concern about the death of Jalal, identified several problems with the Bill and unintended consequences should it pass in the form presented. Government member Jaclyn Symes MLC, clearly acting on legal advice, noted that the Bill would probably not apply if the driver was not at fault, that it was unlikely that it could be proved that a person in such a situation 'caused' the death, that the fault element was unclear and that the burden of proof cast an onus on the defendant to prove that they were driving safely (Victorian Parliament, Hansard, 23 May 2018: 2812–2813). She proposed that the Bill be referred to the Law Reform, Road and Community Safety Committee, a joint committee of the Parliament with two members from the Legislative Council and five from the Lower House, the Legislative Assembly. The report back date was 22 August 2018. Dr Carling-Jenkins was a member of the Committee, had been consulted on this proposal and agreed to it, as did the Opposition. All speakers in the debate expressed their sorrow and support for the grief-stricken mother and admiration for her courage.

The Committee was required to work to very tight deadlines, though its deadline was extended from 22 August to 18 September 2018. It did not advertise a formal call for submissions but received correspondence from two interested stakeholders. It held one day of public hearings,

hearing nine witnesses, including Jalal's mother whose moving evidence was acknowledged in the report (Parliament of Victoria 2018: 1–3). It also heard from two members of Victoria Police and four legal academics.⁵ As did the Parliament, the Committee had to tread a fine line between expressing sympathy and upholding the rule of law. The Chair of the Committee noted in his foreword:

It is important to bear in mind that the issues raised about the Bill in this report are separate from the particular circumstances of Jalal's death. As legislators, it is important that we consider not only the policy intent behind legislative change, but the broader implications of the Bill if implemented and any unintended consequences (Parliament of Victoria 2018: ix).

In September 2018, the Committee reported back to Parliament, rejecting the proposed changes. It made a number of findings, namely that the Bill might conflict with the traditional operation of the principles of causation (Parliament of Victoria 2018: 18), that the 'lack of a fault element would impose a significantly lower standard of culpability compared to established criminal law approaches and would likely result in unjust outcomes and be unworkable in practice' (Parliament of Victoria 2018: 21), that the reverse legal onus of proof would conflict with the right to be presumed innocent (Parliament of Victoria 2018: 24) and that the aim of the Bill (to acknowledge the seriousness of unlicensed driving that results in serious injury or death) could be better achieved by other legislative reforms (Parliament of Victoria 2018: 26). Its one recommendation was that the government refer the report to the Department of Justice and Regulation to ensure the issues raised be considered part of its investigations into the need for an offence of unlicensed driving that involves the death or serious injury of another person (Parliament of Victoria 2018: xiii).

The substantive criminal law concerns regarding Jalal's Law are discussed in more detail in Part 2. As Dr Boas observed in his evidence, it is necessary to 'think about what we want to criminalise and where we draw the line between accident, mishap, misadventure and behaviour which should be penalised' (Parliament of Victoria 2018: 36). However, of greater concern to some members of Parliament, and of SARC, were the reverse onus provisions canvassed at length in the Committee's report (Parliament of Victoria 2018: 22–24).

The Committee noted that two witnesses⁶ did not believe that the existing legislation was deficient but in any case, various options for reform were discussed by the Committee. These included changes to the offence of unlicensed driving to include an aggravating circumstance when death or serious injury was involved, or to include aggravating circumstances in existing non-homicide driving offences in which the person was unlicensed and death or serious injury was caused.⁷ Alternatively, as Professor Gans suggested, amendments to the offences of dangerous or culpable driving could include some aspects of unlicensed driving, though he noted that the wording would need be carefully assessed (Parliament of Victoria 2018: 26). Dr Carling-Jenkins did not submit a dissenting opinion.

The Reforms: U-turn or Minor Diversion?

The Committee's report was tabled on 18 September 2018 in the Legislative Council (Victorian Parliament, Hansard, 18 September 2018: 4973). Dr Carling-Jenkins accepted the findings of the reports, acknowledged the defects in the Bill and welcomed the scrutiny. She noted the evidence of Professor Gans, which she described as 'particularly valuable, well-informed and well-articulated' (Victorian Parliament, Hansard, 18 September 2018: 4973) and foreshadowed an amendment to the Bill. It might be surmised that between end of the Committee's hearings and the tabling of the report, negotiations were being conducted between the government and Dr Carling-Jenkins regarding the best way forward.

Later on 18 September, Dr Carling-Jenkins tabled an amendment to a large, complex and controversial omnibus Bill then before the House,⁸ the *Justice Legislation Miscellaneous Amendment Bill 2018*, which sought to amend the *Crimes Act 1958*, s 319 (Victoria). She referenced Professor Gans's suggestions and acknowledged 'the advice and assistance of the Attorney-General' who she said had been supportive of her efforts to remedy the defects in the law (Victorian Parliament, Hansard, 18 September 2018: 5020).⁹ Based on Professor Gans's idea, the amendment provided that in a proceeding for an offence of dangerous driving causing death or serious injury:

it is presumed, *in the absence of evidence to the contrary*, that the accused drove the motor vehicle in a manner that was dangerous to the public having regard to all the circumstances of the case if the prosecution proves that the accused, at the time of driving, was knowingly or recklessly in contravention of section 18 (driving while unlicensed, maximum penalty 6 months' imprisonment) or 30 (driving while disqualified (maximum penalty 2 years' imprisonment) of the *Road Safety Act 1986*.

The maximum penalties remained at 10 years for causing death and five years for causing serious injury. In Victoria, under *Sentencing Act 1991* (Vic), s 5(2H) a custodial order must be imposed for the offence of dangerous driving causing death unless there are special circumstances. The minister representing the government in the debate, Ms Tierney, responded:

The amendment provides that an accused may rebut the presumption that they were driving in a dangerous manner—for example, by pointing to evidence that they were driving safely. The government supports this aspect of the provision, noting that it is intended to provide fairness and to avoid unintended consequences. Can I say that the government will also closely monitor the effect of the amendment to ensure that it achieves the objective of responding to the risks inherent in unlicensed driving and does not apply in an unfair or unintended way (Victorian Parliament, Hansard, 18 September 2018: 5038).

The amendments were agreed to but some doubt remained as to whether the burden cast on the accused was a legal or an evidentiary burden. However, because the *Justice Legislation Miscellaneous Amendment Bill 2018* originated in the Legislative Assembly, it was returned to that House the following day where it was supported by then Attorney-General Martin Pakula (Victorian Parliament, Hansard, 19 September 2018: 3456). In tabling the amendment, the Attorney-General observed that the amendment:

does not create a deeming offence. It does not say that someone who is unlicensed is deemed to be driving dangerously, but it does create a presumption that they are driving dangerously if they are unlicensed. That would be a rebuttable presumption, but once the prosecution has established that the driver is unlicensed, then the *onus would effectively fall on them* to demonstrate that they have not been driving in a dangerous manner, with all of the circumstances being considered. (emphasis added)

This implied that the onus on the accused was a legal onus, not an evidentiary one, a view seemingly supported by the shadow Attorney-General (Victorian Parliament, Hansard, 19 September 2018: 3456–3457). The amendment passed with little debate on the second last day of the Parliament, which saw the Australian Labor Party-led government returned and Dr Carling-Jenkins lose her seat.

However, because the amendment was passed without SARC scrutiny, the Committee noted that there had been no Statement of Compatibility in relation to the amendment and again drew attention to the reverse onus provisions. It asked the Attorney-General who succeeded Pakula for further clarification (58th Parliament, Alert Digest, No 1 of 2019) which was received on the 27 March 2019 to the effect that the language of the new s 319(1B) of the *Crimes Act 1958* (Vic) casts only an evidential burden on an accused person (58th Parliament, Alert Digest, No 5 of 2019). The consequence of this interpretation is that the effect of the law is significantly ameliorated because the presumption can be displaced if there is *any* evidence in the proceeding that the accused did *not* drive in a manner that was dangerous to the public. The prosecution would then have to prove beyond reasonable doubt that the accused was driving in such a manner.¹⁰ If it operates as defence lawyers are likely to contend, the provision may turn out to be more symbolic than substantive and disappoint both the proposer of the original Bill and future victims of this offence.

Brakes on Reform

As McNamara et al. observed, motor vehicle laws are the subject of numerous reforms, often triggered by a tragic road fatality, but are little studied. They have the potential to affect a large number of people but as they note, ostensibly egregious laws may have minimal effects or be rarely invoked (2019: 14).

The passage of Jalal's Law provides a rare insight into how the legislative governance processes, when properly operating, can moderate potentially poor laws. In this case, a private member's Bill, designed to recognise a victim's pain and grief and respond to community emotion, was subject to close scrutiny by a Standing Committee of the Parliament, whose function is to check every piece of proposed legislation, by an inquiry conducted by a bi-partisan committee, albeit hastily called and concluded, and by members of Parliament in debate. In terms of McNamara et al.'s analysis, the executive government did not drive the process, but was intimately involved in negotiating a legally and politically acceptable outcome. The process was speedy, but not rushed. There were many stages to the reform, which was generally conducted openly (albeit there must have been back room discussions) and there were opportunities for individuals and organisations to contribute to the deliberations.

Throughout, a delicate balance was being struck between acknowledging harm to the victim and his family and maintaining the integrity of the law. It seems clear that the proponent of the Bill was willing to negotiate its terms with the government, which was keen to be perceived as supportive of the victim and maintain its law and order profile immediately before an election.¹¹ The final outcome may have been partly accidental: both the Attorney-General and his shadow may have been of the view that the provision cast a legal burden on the defence, which would have been inappropriate, whereas it was an evidential burden, which severely mitigated its effect.

Part 2: The Proposed Law

The intention of Jalal's Law, at least in the contemplation of the family and possibly members of the community, was to hold an alleged offender responsible for the consequences of their acts that they did not intend, foresee or were reckless thereto, on the basis of an illegal act that may not have been causally related to the outcome. In this case, a death that was attributed to a person driving without a licence. Such laws are examples of what have been termed constructive crimes in which consequences matter more than culpability. Often, such laws are the product of what Clarkson termed an 'instinctive irrationalism' (2000: 140) that is increasingly animating law reform in Australia and elsewhere.

Crime and Punishment

Modern criminal law and sentencing theories hold that the assessment of the seriousness of a crime is primarily based on the degree of harmfulness of the conduct and the extent of the offender's culpability, be it intention, recklessness, negligence or dangerousness (von Hirsch 1976: 79–80). The relationship between harm and culpability is complex and the balance:

will vary with respect to the particular offence charged but also changes over time in the light of changing social values, the community's tolerance of risk and the shifting status, influence and attitudes towards victims and offenders (Freiberg 2014: 240–241).¹²

In some cases, such as attempted crimes, an offender's culpability will be greater than the harm caused. In others, the harm may be great, but the culpability limited, in which case the offender's reduced criminality should be reflected in conviction for a less serious offence and a correspondingly lesser sentence. The crucial question is how far the offender should be held criminally responsible for the harm caused to the victim. In weighing the balance between harm and culpability, it is clear that consequences matter and the fact that a death occurs tends to render homicide offences unique. Fletcher argued:

While all personal injuries and destruction of property are irreversible harms, causing death is a harm of a different order. Killing another human being is not only a worldly deprivation; in the Western conception of homicide, killing is an assault on the sacred, natural order (Fletcher 2000: 106; see also Cunningham 2008: 106).

The enormity of this consequence means that there will always be a search for a person who can be held responsible for the death (Fletcher 2000) and the question is often not the whether anyone should be held liable, but who? Indeed, in times past, the law of deodand required that any person or chattel, animate or inanimate, that was the immediate cause of the death of 'any reasonable creature' be forfeited to the crown (Freiberg and Fox 2000: 33). Horses, goring oxen, carts, boats and steam engines could be the subject of deodand¹³ and in some places at some times, animals could be put on trial for the deaths of humans (Dinzelbacher 2002). These laws provide not only an example of the imposition of objective liability for unintended injury or harm (Finkelstein 1973: 181) but also of an expression of emotions such as anger, fear or disgust that attach to death, whether intentional or not and whether the product of human agency or not.

The context of the death is also crucial in the law's response (Clarkson 2000: 133). Killings or deaths are often intentional, but often occur when there has been a breach of some underlying law, such as that relating to occupational health and safety or driving where the activity involves some risk. Similarly, a death may occur in the context of some other serious offence, such as a robbery or burglary when death is not intended or foreseen by the offender, but where, due to the circumstance of the predicate offence, the person is held to be both causally and morally responsible for the resulting harm (Ashworth 2008: 234). In Victoria, for example, a person can be convicted of murder even if they did not intend to cause death or foresee death as likely if the death occurred during the commission of a crime that has an element of violence and which is punishable by imprisonment of at least 10 years (*Crimes Act 1958* [Vic], s 3A[1]). In the case of manslaughter by unlawful and dangerous act, the commission of the unlawful act, such as an assault, is considered sufficient to hold the offender responsible for the death even if the offender did not intend to cause death nor foresaw it as probable provided that the offender's act was objectively dangerous (*Wilson v The Queen* [1992] 174 CLR 313, 335 per Mason C J, Toohey, Gaudron and McHugh J J; *Burns v The Queen* [2012] 246 CLR 334, 341). While consequences are important 'they are not the determinants of the moral turpitude involved in the conduct' (*R v Johnston* [1985] 38 SASR 582 per King C J; see TSAC 2017: 85–86).

Criminalising Risk and Consequences

At the heart of the theory of constructive crimes lies the view that 'as soon as one puts oneself on the wrong side of the law, one must be prepared to be held liable for whatever consequences one causes, since crossing the criminal threshold is morally the most significant step' (Ashworth 2008: 238). Criminal responsibility for creating unjustifiable risk (regardless of actual consequence) can be justified on the basis that such risks are unnecessary and it is appropriate that the law attempts to minimise them. In its simplest form, endangerment can be criminalised through the creation of specific offences:

where the focus is on the risk taking activity alone, irrespective of the any resultant harm that may occur. Such conduct is criminalized because of its potential to cause harm and the seriousness of such offences is loosely linked to the likelihood (and potential gravity) of the harm materializing (Clarkson 2007: 278).

Offences such as conduct endangering life, endangering the safe operation of an aircraft, recklessly endangering persons at workplaces and similar offences in most jurisdictions that carry maximum penalties of 5–15 years are examples of what Duff termed 'explicit endangerment' (2005; see also Clarkson 2007: 278).

More complex and problematic are situations in which, as a result of an offender's risky, dangerous or otherwise illegal conduct, a death or injury occurs that has not been foreseen or which a reasonable person might not have foreseen. The law has long held a person responsible for the unforeseen consequences of their act, albeit that the extent of that liability has been contested (Ashworth 2008: 232). The old felony-murder rule and unlawful and dangerous act manslaughter are two such examples (Bindon 2006); one-punch manslaughter is a more recent manifestation.

There are also a number of offences that hold a person responsible for a dangerous activity but where the offence is aggravated because a harm materialises. Clarkson refers to these as 'aggravated endangerment offences' (2007: 280), examples of which are assault occasioning actual bodily harm, dangerous navigation occasioning death, arson causing death, culpable driving causing death and dangerous driving causing death or serious injury. In these cases, the verb 'occasion' or 'cause' implies that all that needs to be proven beyond the predicate action (assault, arson etc.) is that the specified harm ensues, not that the offender intended or foresaw it. In each of these cases, the underlying endangerment offence is very serious, certainly more serious than driving without a licence.

Under the original Jalal-inspired amendments, the statutory definition of dangerous driving causing death¹⁴ was expanded to provide that a person who drives knowing or reckless to the fact that they are unlicensed or disqualified is presumed to be driving dangerously. By driving in this manner, it can be argued that the 'defendant crosses a significant moral and criminal threshold, and is rightly held not only causally responsible but also morally responsible for resulting harm, since it would not have resulted if D had not crossed the criminal threshold' (Ashworth 2008: 234). Their moral guilt does not depend on their foresight or acceptance of risk but on their conduct, viewed holistically (Gordon 1975: 389).

Thus, it is an offender's *conduct*, not their intention, that is pivotal to ascribing criminal liability: defendants must 'take the rough with the smooth' (Horder 1997: 99). This view of culpability does not require an inquiry into the niceties of mens rea because it recognises that 'once ... a situation is created, it is not possible to control the course of events' (Bindon 2006: 173). In this context, the harm caused is not accidental or 'unlucky' but rather a product of a person's

conscious choice to engage in risky conduct for which they must take responsibility (Bindon 2006: 176). By committing an offence, their 'normative position' has changed, altering their moral standing and exposing them to liability for any consequence, whether contemplated or not (Sullivan and Simester 2012; Horder 1995: 764).

In the context of the proposed Jalal's Law, the question was whether driving without a licence or while disqualified should amount to a sufficient act of criminality (or assumption of risk) to change the offender's normative position. The answer should be no because there is too great a 'moral distance' between the act and the consequence (Ashworth 2008: 240). Even if a case could be made for felony or unlawful and dangerous act manslaughter (based on serious offences or assaults), it cannot be made where the link between the offender's conduct and the death is merely the absence of a permission to drive.

Harm, Luck and Criminal Liability

Was Jalal's death the result of bad luck? Had the defendant not been driving and had he not come into contact with the vehicle, no harm would have been caused. Luck plays an important role in the criminal law (Schulhofer 1974; Ashworth 1993). The difference between murder and attempted murder may be a matter of luck—the victim may move just a moment before the bullet is fired, or they may not die due to the availability of medical treatment. The difference between careless driving and dangerous driving causing death may be the accidental co-location on a road of two vehicles (Clarkson 2007: 81). Whether one person or 20 die as a result of a collision may be entirely fortuitous (Shachar 1987). The harm is far greater in the latter instance, while the offender's intention, foresight or degree of carelessness or negligence is identical in both cases. The concept of 'outcome luck' is problematic in the criminal law in that it raises the questions of the nature and gravity of offence for which a person should be convicted and how a person should be sentenced in circumstances in which the result of their action is beyond their control or contemplation (Duff 2008).¹⁵

In the case of unintended or unforeseen harm, it can be argued that a person should only be criminally responsible for, and sentenced to, an offence that reflects the extent of their degree of intention or negligence regardless of the outcome. However, more than a century ago, Stephen recognised that 'public feelings' play a role in sentencing and that the public may understandably believe that harm should play an important role in assessing the seriousness of an offence. This is the way the criminal law has long been structured and reflects the public's intuitive views of how the law should work. Further, it recognises that emotion is not an irrelevant element of the law or social policy generally. Emotions such as anger, disgust and shame pervade the criminal law. The institutions of criminal justice are designed to control and channel such emotions. Law expresses ideas and emotions such as 'fairness' and 'justice' and in some highly emotive situations, such as that those which preceded 'Jalal's Law', appeals to evidence or rationality are not likely to resonate (Freiberg and Carson 2010: 157). As the Law Commission of the United Kingdom recognised, emotions must be considered in the creation of offences (Clarkson 2000: 141–142 citing Law Commission 1996: para 5.25).

Driving, Danger and Harm

That vehicles, whether horse-drawn, steam-powered or motor-driven, can cause considerable harm has long been known. Deaths and injuries that involved vehicles were originally covered by general criminal law offences such as manslaughter, assaults or offences such as negligently causing serious injury.¹⁶ Maximum penalties for generic or specific offences were generally low, but with the increasing number of vehicles on the road and the concomitant increase in fatalities and injuries, they were gradually increased, primarily on the basis of their purported deterrent value but also in recognition of the harm caused by negligent or dangerous driving, particularly by offenders driving under the influence of alcohol or drugs. The introduction of specific offences

such as culpable driving causing death—introduced in Victoria in 1967—was a recognition of the fact that some juries were reluctant to convict driving offenders of manslaughter. When introduced, it had a maximum penalty of seven years' imprisonment, which was increased to 10 years in 1991, 15 years in 1992 and 20 years in 1997 (VSAC 2007: 20).

Given the prevalence of the problem, it is unsurprising that the 2018 Inquiry by the Victorian Parliament's Law Reform and Community Safety Committee (Parliament of Victoria 2018) has been only one of a number that have examined driving offences and sentencing in Australia and abroad that have arisen from communal distress (VSAC 2007; VSAC 2009; Tasmanian Law Reform Institute 2010 TSAC 2017; see also McPherson and Tata 2018).

Devastating as the consequences are, changes to the criminal law may not be necessary and legislative reform in response to tragic cases may have long-term and undesirable consequences. As originally intended, 'Jalal's Law' represented an attempt to severely distort the relationship that has evolved over the years between harm and culpability. In Clarkson's terms, the proposed provision could be 'regarded as an offence of "aggravated implicit endangerment" ' (2007: 288), that is one in which there was an underlying offence of driving while unlicensed or disqualified producing a serious adverse result—death or serious injury. While such a law might be justified on the basis that laws relating to driving while unlicensed or disqualified are intended to keep dangerous people off the road, and while the evidence for the danger posed by such persons is suggestive,¹⁷ it is not so overwhelming as to overcome the objection that the law was an attempt to connect an offender's low culpability with the very serious consequence—a possible 10-year sentence of imprisonment and a mandatory custodial sentence. It highlights the importance of rejecting a constructivist approach to the problem.

Against Constructivism

Subjectivism

A subjectivist approach to the criminal law holds that a person should be held criminally liable only for harmful consequences that they intended, foresaw or were possibly reckless thereto. Subjectivism holds that *actus reus* and *mens rea* should correspond (the correspondence principle) and that a person should not be found guilty of a crime unless a moral stigma attaches to it (Ashworth 2008; Horder 1997: 97).

The proposition that criminal law has gradually moved or progressed from a more 'primitive' objectivist approach focused on the consequences of a person's conduct to one that examines the offender's state of mind has been questioned (Horder 1997; Leader-Elliott 2009; Bindon 2006). Further, although there are numerous exceptions, contemporary criminal law doctrine is founded on the notion that a responsible individual will be punished primarily on the basis of the degree of their culpability. This model of criminal responsibility was epitomised in the Model Criminal Code developed in Australia in the 1990s, which was intended to modernise and codify the principles of criminal responsibility (Loughnan 2017). The philosophy underpinning this approach was summarised by Loughnan:

Subjectivism is significant because, in its modern form, it is seen as respecting freedom of action and treating individuals as moral agents ... As such, it is held up as a constraint on criminalisation: a way of establishing a limit on permissible state action. (2017: 16)

There are strong conceptual, moral and philosophical justifications for a subjectivist approach. It is proper and appropriate that an individual should be responsible for their actions, including for the risks they create and there should be a close correlation between moral culpability and legal

responsibility (*Wilson v The Queen* [1992] HCA 31 at [50] per Mason C J, Toohey, Gaudron and McHugh J J).

Proportionality

The relationship between moral culpability and harm also informs the principle of proportionality on the basis that both the offence and the penalty must fit the moral blameworthiness of the offender. Proportionality is a fundamental principle that underpins sentencing law in Australia both at common law and under statute (*Veen v The Queen (No 2)* [1988] HCA 14). It holds that the sentence should fit the crime, or that at least it should not exceed 'that which is commensurate to the gravity of the offence for which the offender has been convicted' (TSAC 2017: 16). The gravity of the offence includes an assessment of the degree of harm caused and the offender's culpability considered within the context of the statutory maximum penalty available for the offence. Proportionality underpins the concept of retributive justice—'that the criminal law treats wrongdoers in ways that are appropriate to their wrongdoing' (Duff 2008: 63).

In relation to driving-related offences, legislatures have attempted to match culpability and harm hierarchies, ranging in the former case from the intentional, to the reckless, the negligent, dangerous and the careless, and in the latter case, from death, to serious injury, to injury to no harm caused (VSAC 2007; TSAC 2017: 85–86). Proportionality is embedded in the offence structure of driving-related offences in that in some cases, a relatively low level of culpability combined with a high level of harm may result in a high maximum penalty (e.g., dangerous driving causing death). However, where the offender's culpability may be minimal or non-existent, as may be the case of unlicensed driving causing death, a severe sentence may be regarded as disproportionate because there is too great a 'moral distance' between the harm and the punishment (Horder cited by Ashworth 2008: 249; see also Sebba 1994: 151).¹⁸ Further, it has been argued that there is something objectionable to attaching the label of killer to a person in such a situation, particularly when that person has led an otherwise blameless life and has made the single error of driving while unlicensed, although the same logic might not apply to a disqualified driver who has been before the courts previously (Ashworth 2008: 246). In *Hughes*, the United Kingdom Supreme Court stated, in respect to a similar offence to that proposed in Victoria:

The offence created is a form of homicide. To label a person a criminal killer of another is of the greatest gravity. The defendant is at risk of imprisonment for a substantial term. Even if, at least in a case of inadvertent lack of insurance or venial lack of licence, a sentence of imprisonment were not to follow, the defendant would be left with a lifelong conviction for homicide which would require disclosure in the multiple situations in which one's history must be volunteered, such as the obtaining of employment, or of insurance of any kind. Nor should the personal burden or the public obloquy be underestimated; to carry the stigma of criminal conviction for killing someone else, perhaps a close relative ... is no small thing. ([2013] UKSC 56 at [26])

Why Sentence?

The driver involved in¹⁹ the death of Jalal was sentenced to 80 hours' community service for the offence of driving without a licence, the maximum penalty for which is six months' imprisonment or a fine not exceeding 60 penalty units (\$9,671) (*Road Safety Act 1986* [Vic], s 18[1A]). Under the new legislation, if she were unable to rebut the presumption, she would be liable to a maximum penalty of 10 years. What purposes would be served by imposing a long gaol sentence upon her? The stated purposes of sentencing in the *Sentencing Act 1991* (Vic), s 5(1), are to ensure that a person is justly punished for committing an offence, to deter them and other potential offenders

from committing a crime, to denounce the offence, to provide the conditions under which rehabilitation can occur and generally to protect the community.

Accepting that death is a serious and tragic consequence, it has been argued that subjecting a person whose level of culpability might be considered relatively low to a long prison sentence is a disproportionate response resulting in a sentence that is not 'just in all the circumstances of the case' in the language of *the Sentencing Act 1991* (Vic). While it might be argued that the offender's culpability lies not in their mens rea but in the decision to knowingly drive when not permitted to do, the stronger argument is that the correspondence principle requires a greater moral and conceptual relationship between the traditional categories of culpability (intention or recklessness) and the harm caused. Further, accepting that culpable or dangerous driving should be denounced and the conduct of offenders who kill or maim people on the road should be publicly disapproved, does it accord with a sense of justice to imprison and denounce a person who might otherwise have led a blameless life for an outcome that may have been a product of chance or luck?

Severe sentences have often been justified on the basis of general or specific deterrence. However, the empirical evidence regarding the effectiveness of general deterrence casts doubt as to its validity (VSAC 2011). While a case could be made for attempting to deter those who drive while intoxicated or under the influence of drugs, or in a dangerous manner, as well as serial offenders with a history of defiance of the law and previous harmful conduct (Hirst 2008), the same case cannot be made in relation a driver with an exemplary driving record who made an inadvertent fatal error. In relation to the truly culpable dangerous drivers, community protection can be achieved through the application of provisions that allow the courts to order licence disqualification in addition to a sentence of imprisonment.

Finally, in relation to rehabilitation, there is a question whether the driver in Jalal's case is in need of rehabilitation, given there was no evidence of intoxication, substance abuse or other psychological disorders. Where there is evidence of such problems, it has been proposed that Drive While Impaired or Suspended court lists, which target the underlying causes of offending, be established to provide a better long-term solution than sentences of imprisonment, which have proved ineffective with such offenders (Richardson 2013).

The recent changes to Victorian law, to 'one-punch' and similar laws appear to be primarily justified by the need to recognise the interests of the victims. All jurisdictions provide formally or informally that the effect of the crime on the victim or their family can be considered in sentencing, particularly through such mechanisms as victim impact statements. Experience has shown that the imposition of lengthy sentences will rarely satisfy victims who feel that no period that an offender spends in custody will compensate for the permanent loss of their loved one. However, there are other, and better, means of providing a voice for victims and promoting the rehabilitation of offenders, such as restorative justice programs. In this respect, the Tasmanian Sentencing Advisory Council has recommended that restorative justice procedures should be available as supplementary parts of the criminal justice in cases in which death or serious injury has been caused by the use of a motor vehicle (TSAC 2017: 120). After a successful pilot program of restorative justice for people affected by a serious motor vehicle collision conducted under the auspices of the Centre for Innovative Justice at RMIT University, a restorative justice program was established in Victoria for these and other offences.²⁰ The experience in this respect is instructive. In *Lee v New Zealand Police* ([2006] NZHC 488 at [6]), a case of careless driving causing death and injury, the judge noted that it was to the appellant's credit that he had undergone a restorative justice process, that reparation had been made, that some minor sums of reparation had been paid and that the tenor of the restorative justice conference had been 'that grieving family members wished the appellant no harm offered forgiveness and requested the appellant make

the most of his future as best as his is able to do'. The sentence imposed on appeal was nine weeks' imprisonment.²¹

Conclusion

Tragic events can produce poor, ineffective and counterproductive laws. As McNamara and Quilter (2016) observed, governments can actively exploit crises to 'produce changes to the law that they would find difficult to justify absent the "extraordinary" and/or "novel" circumstances', laws that do not provide a solid foundation for the criminal law. It is tempting to dismiss such laws as cynical populist responses. However, these laws resonate deeply with the emotional responses of some members of the public who place a greater weight on the harm caused by an offender than on the offender's culpability, and who believe that an offender who creates the risk of harm should be accountable for its consequences, whether foreseen or not. As has been indicated, such responses have deep historical roots.

In this case, the agent for change was not the government but an independent member of Parliament responding to a constituent's grief and pressure for reform. These feelings cannot be ignored and in responding to pressures to reform the law relating to vehicle-related harms, policymakers need to be 'acutely aware of the enormous sensitivity of these issues and the grief and trauma to relatives, friends and the broader community that accompany the death or serious injury of a person in a motor vehicle crash' (TSAC 2017: 85–86). However, they also need to understand that it is unlikely that creating new constructive offences with very high maximum penalties will ever close the 'expectation gap' between victims' desires and feelings and the ability of the law to assuage them (TSAC 2017: 114). Ultimately, the law must balance the interests of the defendant, the state and the victim.

In Victoria, the law, as it was ultimately enacted, avoided the worst excesses of constructive crime and is likely to be rarely invoked. When, in a similar case in the future, its limitations are exposed, there is likely to be another outcry and more calls for reform, focusing on the harm to the victim rather than the offender's culpability. However, as the Law Commission of the United Kingdom argued, 'the law should be founded on principle rather than instinct' (Law Commission 1996: para 5.15). The urge to create laws that might hold offenders liable for conduct that cannot be categorised as dangerous, negligent or even careless and possibly impose sentences that are grossly disproportionate to the offender's culpability should be strongly resisted. 'Instinctive irrationalism' should not produce a return to the age of the deodand, in which case the sacrifice may not be a goring ox but a hapless human.

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¹ She had been driving on an expired probationary drivers' licence and had also been charged with a number of other minor offences that are not relevant to this discussion.

² However, in June 2018, Queensland introduced an offence of careless driving causing death or grievous bodily harm. If the person was unlicensed, the maximum penalty is 160 penalty units or 2 years' imprisonment; if they were careless and caused death or grievous bodily harm, the maximum penalty is 80 penalty units or 1 years'

imprisonment, and if they were merely careless, the maximum penalty is 40 penalty units or 6 months' imprisonment, (*Transport Operations (Road Use Management) Act 1995* (Qld), s 83.

- ³ United Kingdom law provides for offences of causing death by driving while unlicensed, uninsured or while disqualified for which the maximum penalties are two years' imprisonment for causing death by driving while unlicensed or uninsured with a minimum disqualification period of 12 months (s 3ZB) and 10 years for driving while disqualified (*Road Safety Act 2006* [UK], s 3ZC) with a minimum disqualification period of two years. For the offence of causing serious injury by driving while disqualified (s 3ZD), the maximum penalty is four years' imprisonment with a minimum disqualification period of two years. The United Kingdom provisions are strict liability offences in that an accused will be guilty of the offence if they are involved in a fatal collision as a driver of a vehicle and at that time did not have a licence, have valid insurance or were disqualified from driving (Sullivan and Simester 2012).
- ⁴ Sarah Paino, a 26-year old pregnant woman, was run down and killed by a 15-year-old boy who was speeding in a stolen vehicle. 25,000 people signed a petition urging longer prison sentences and changes to the law relating to evading police, see *The Mercury* (Hobart), 6 March 2016; TSAC 2017: 85.
- ⁵ The present author was a witness on behalf of the Victorian Sentencing Advisory Council. The others were Professor Jeremy Gans, University of Melbourne and Dr Gideon Boas and Dr Steven Tudor of LaTrobe University (the latter providing a written submission). Professor Gans is an adviser to SARC, so he would have been aware of the background to this inquiry.
- ⁶ This author and Dr Boas.
- ⁷ See also *Road Traffic Act 1961* (SA), s 45 (careless driving with aggravating circumstances).
- ⁸ Among other matters, it contained provisions providing for mandatory gaol sentences for assaults on emergency workers.
- ⁹ It is likely that the amendment was drafted by the Office of Parliamentary Counsel.
- ¹⁰ I am indebted to Stephen Odgers SC for this analysis.
- ¹¹ The government was probably keen to negotiate with her as it did not have a majority in the Upper House.
- ¹² The relatively recent introduction of victim impact statements is an example of the increased emphasis of harm to the victim as a significant measure of offence seriousness (Sebba 2009: 71).
- ¹³ These laws were abolished in the United Kingdom in 1846 and later in Australia (Freiberg and Fox 2000).
- ¹⁴ The statutory definition of dangerous is that the driving must be 'at a speed or in a manner that is dangerous having regard to all the circumstances of the case', *Crimes Act 1958* (Vic), s 319(1); see also *Jiminez v The Queen* [1992] HCA 14 at [13].
- ¹⁵ However, Horder distinguishes between 'sheer luck' which 'covers such situations where a fortuitous result which is unconnected to one's endeavours occurs' and 'making one's own luck' when 'a consequence occurs which is directly connected to one's own endeavours' (Horder 1995: 764; see also Clarkson 2007: 281).
- ¹⁶ For a history of these laws in Victoria see VSAC 2007: 6-7.
- ¹⁷ Some Australian studies have found that disqualified or suspended drivers pose a significantly greater risk than licensed drivers and although this group is small, they account for a disproportionate share of fatally injured drivers (VSAC 2009: 8). A study of current sentencing practices for four major driving offences in Victoria found that unlicensed and disqualified drivers were highly over-represented (VSAC 2015; see also Clarkson 2007: 288.) A distinction needs to be drawn between the risks posed by disqualified or suspended drivers and those who do not drive with a licence for reasons other than disqualification or suspension (Cunningham 2015: 725).
- ¹⁸ There is an offence of careless driving causing death in New Zealand, see *Land Transport Act 1988* (NZ), s 8, the maximum penalty for which is three months' imprisonment or a fine of \$4,500, s 38(2)(a). The United Kingdom also has an offence of causing death by careless driving, *Road Safety Act 2006* (UK), s 2B (maximum penalty of five years' imprisonment in the Crown Court, six months in the Magistrates' Court). The recently enacted Queensland provision is discussed above.
- ¹⁹ I hesitate to use the term 'caused the death' because the notion of causation is problematic in this context (see Parliament of Victoria 2018). While it can be argued that 'but for' the fact that the unlicensed/disqualified driver had been on the road, the victim would not have been killed or injured, the better argument is that it needs to be shown that it was the offender's driving behaviour that was the sufficiently substantial causal effect of the death rather than just the fact that the driver was on the road at the time; see also *R v Hughes* [2013] UKSC 56; [2013] 1 W.L.R. 2461 (SC) overruling *Williams* [2010] EWCA Crim 2552; [2011] 1 WLR 588; see also *R v Hughes* Case Comment [2014] *Criminal Law Review* 234.
- ²⁰ <https://cij.org.au/news-and-views/media-release-cij-launches-new-restorative-justice-service-after-successful-pilot/>
- ²¹ A similar result was reported in the first conviction for the new offence of careless driving causing death in Queensland. The offender, who had no criminal record received a five months' suspended sentence. The victim's daughter said that she was satisfied that the death was an accident and the offender did not intend to drive recklessly, see David Murray, Driver Dodges Jail over 'Careless' Death', *The Australian*, 6 August 2019.

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