Murder Without an Intention to Kill

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MURDER WITHOUT AN INTENTION TO KILL

On an objective interpretation of section 300(c) of the Penal Code, an offender may be convicted of murder, and the death penalty imposed, if he or she intentionally inflicts even a minor injury, which happens to cause death. This article defends the view that the objective approach is indefensible both legally and theoretically, and offers in its place a qualified subjective approach, which imposes liability under section 300(c) only where the offender intends to inflict what is subjectively known to be a serious injury that might possibly cause death.

I. INTRODUCTION

BY far the most frequently used murder provision in Singapore is section 300(c) of the Penal Code, which regards as "murder" any act that causes death, where the act "is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."[1] Anyone convicted for murder in Singapore under this or any of the other section 300 provisions faces a mandatory death penalty.[2] The legal controversy over section 300(c) relates to whether, once an intention to inflict the bodily injury that in fact caused death is established, anything more need be proved in relation to the mental element. The trend in the case law has largely been to treat the second clause of section 300(c) as imposing liability on an objective, external basis without concern for the accused person's subjective (actual) awareness of the possibility that death could result. Once an intention to inflict a bodily injury is established, the rest of the inquiry is said to be "purely objective."[3] Indeed, recent cases have gone so far as to say that an intention to inflict a *minor* injury (and nothing more) is sufficient to attract liability for murder if the injury "is sufficient in the ordinary course of nature to cause death."[4]

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1 Cap 224, 1985 Rev Ed.

2 S 302.

3 See, for instance, *Virsa Singh* v *State of Punjab* [1958] SCR 1495 at 1500 (India SC); *PP* v *Visuvanathan* [1978] 1 MLJ 159 at 160 (Singapore HC).

4 *Ong Chee Hoe* v *PP* [1999] 2 CLAS News 211 (CA).

This paper argues that the objective approach to section 300(c) is problematic both in terms of pure legal doctrine and in its coherence with fundamental legal and philosophical principles relating to criminal responsibility. The recommended approach, however, is not to turn to the legally untenable "pure" subjective approach, but rather to adopt a qualified subjective approach, which makes liability under section 300(c) conditional on an intention to inflict an injury known by the offender to be serious. It will be argued that this approach is both consistent with the scheme of section 300 of the Penal Code and acknowledges the significance of the moral culpability of the offender and the proportionality of punishment in imposing criminal liability.

II. The Legal Context of Section 300(C)

Much has been written about the historical background to the culpable homicide (section 299) and murder (section 300) provisions in the Penal Code and about the evolution of the section 300 jurisprudence in India and Singapore.[5] These efforts will not be duplicated here. However, some legal context is required before we turn to the objective approach to section 300(c) as it has developed in Singapore.

Section 300(c) is one of four murder provisions in the Penal Code. The first two provisions, set out in sections 300(a) and 300(b), relate respectively to intentionally causing death and intentionally inflicting "such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused." Both of these provisions expressly require that the offender have some subjective foresight of death, either in the form of an intention to cause death or knowledge that the death of the particular victim is likely to result. In contrast, section 300(c) does not *expressly* require foresight of death – a fact that is not lost on those who advocate an objective approach to this provision. Section 300(d) relates not to intentionally causing death or intentional infliction of bodily injury, but rather to knowledge that an act is so "imminently dangerous that it must in all probability cause death."[6] In contrast with section 300(c), this provision is concerned not

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5 See, for instance, M Sornarajah, "The Definition of Murder Under the Penal Code" [1994] SJLS 1. On the historical development of criminal law in Singapore, see: Andrew Phang, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990), esp Chapter 4, 167-251.

6 Specifically, s 300(d) defines as murder instances in which "the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

with the intentional infliction of bodily injury *per se,* but with intentional conduct that the offender *knows* is imminently dangerous to life.

The murder provisions of the Penal Code are themselves part of a broader category of offences referred to as *culpable homicide not amounting to murder* or, in short, *culpable homicide.* Although the offence of murder is defined in terms of culpable homicide, culpable homicide functions in practice as a less culpable form of homicide, in circumstances where the likelihood of death is lower or where an offence that would otherwise be classified as murder is statutorily reduced to culpable homicide by virtue of the mitigating "special exceptions" set out in section 300. The second clause of section 299, which corresponds to section 300(c), provides that a person commits the offence of culpable homicide by causing death by doing an act "with the intention of causing such bodily injury as is likely to cause death."[7] It is, of course, no small matter to distinguish section 300(c) from section 299(2). Suffice it to say for now that the distinction between the two provisions appears to turn solely on the *degree* of probability that death will result.

The difficult task of interpreting the murder provisions in section 300 consists not only in distinguishing them from one another, but also in distinguishing them from the corresponding culpable homicide provisions. Professor Sornarajah has argued that whatever the flaws in the drafting of these provisions by Thomas Macaulay and the Indian Law Commission, it nevertheless represented a significant advance beyond the "shoddy mess" in the English law of homicide and struck a delicate balance between the objective and subjective approaches to criminal liability that divided English jurists.[8] But his argument also implies that this delicate balance in the Indian Penal Code has been upset in Singapore by the imposition of a mandatory death penalty for murder. Singapore courts are prevented from adjusting the level of the penalty for murder to reflect the form of liability, whether subjective or objective.

It is an open question whether the original provisions in the Indian Penal Code in fact struck a proper balance between subjective and objective forms of liability and, further, whether this distinction between these forms of liability was articulated in a clear and conceptually coherent fashion. These, however, are questions for another day and ones that might best be addressed by Indian jurists, for whom the original provisions of the Penal Code relating to culpable homicide and murder remain largely unadulterated. What is clear in Singapore, however, is that the normative structure of the murder provisions

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[7] Following convention, I shall refer to the second clause of s 299 as s 299(2).

[8] *Supra,* note 5, at 6.

in the local Penal Code has to be assessed in light of the mandatory death penalty. An important part of the task, of course, is understanding where section 300(c) fits in this structure.

III. The Development of the Objective Approach

In Singapore, the section 300(c) jurisprudence continues to be dominated by the objective approach, which finds its genesis in the well-known 1958 Indian Supreme Court case, *Virsa Singh* v *State of Punjab.*[9] The facts were straightforward: the victim was injured by a spear thrust by the accused and died 21 hours later from peritonitis caused by the wound. Defence counsel argued that the prosecution had to prove that the intention in the first clause of section 300(c) must also relate to the second clause, "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." That is, it was argued that the prosecution had to establish that accused intended to cause the injury *and* knew that the injury was sufficient in the ordinary course of nature to cause death.

The Supreme Court rejected this argument, arguing that the prosecution need only prove the following elements (which, for convenience, have been separated):[10]

> First, it must establish, quite objectively, that a bodily injury is present.
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> Secondly, the nature of the injury must be proved.

These first two elements, which relate to the *actus reus* element in the first clause of section 300(c) are said to be "purely objective investigations."

> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
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> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature.

Of the fourth and final stage of the test, the court explains that it is also "purely objective and inferential and has nothing to do with the intention of the offender."[11] It is said to be a question of fact whether the injury

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9 [1958] SCR 1495 (India SC).
10 *Ibid*, at 1500.
11 *Ibid*, at 1501.

is "sufficient in the ordinary course of nature" to cause death and does not depend on the knowledge of the accused. The *Virsa Singh* test thus openly espouses an objective approach to the second clause of section 300(c). Once the intention to inflict the bodily injury is established, the offender's mental state falls out of the analysis.

There is, however, an important qualification that emerges in the third branch of the *Virsa Singh* test. The prosecution must prove not that the accused intended to inflict the injury that in fact caused the death. This follows from the wording of the second clause of section 300(c) in that the prosecution must prove that the injury *intended to be inflicted* was sufficient in the ordinary course of nature to cause death. The *Virsa Singh* decision therefore explains that the prosecution must prove that the injury "found to be present was the injury that was intended to be inflicted" or, in the words of the third branch of the test, that the injury inflicted was "not accidental or unintentional."[12]

Nevertheless, in asking whether the accused intended to inflict the injury actually found to be present, it is said that the inquiry must proceed along "broad lines."[13] That is, the issue is "whether there was an intention to strike at a vital or dangerous spot" and "whether with sufficient force to cause the kind of injury found to have been inflicted."[14] However, "it is not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or kidneys or the heart."[15] Otherwise, someone with no knowledge of anatomy could never be convicted. The inquiry is therefore (again, in the court's words) "broad-based and simple and based on commonsense."[16]

As we shall see later on, the interpretation of the words "the injury intended to be inflicted" holds the key to understanding section 300(c). For now, it is enough to observe the potential difficulties that these words might cause. What are the consequences if, say, the offender intends to inflict a serious injury in the neck, but misses and stabs the victim in the heart, killing her? The discrepancy between the injury intended to be inflicted (an injury to the neck) and the injury actually inflicted (the injury to the heart) seems to imply that the latter injury was accidental and, therefore, that the accused should not be liable under section 300(c). The *Virsa Singh* test leaves this sort of conundrum unresolved. I shall argue, in due course, that properly

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12 *Ibid*, at 1500.
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 *Ibid.*

understood section 300(c) does have an answer to this sort of difficulty; for now we must continue with our survey of the objective approach to section 300(c).

The next case that we must consider in the development of the objective approach in Singapore is *Mohamed Yasin bin Hussin*.[17] While it is not entirely clear whether this case itself adopts the objective approach or in fact suggests a more subjective approach, what is significant is the judicial reaction to this case in Singapore. The facts of the case are straightforward. The accused went to the victim's hut to burgle it. While inside, he grabbed the victim, threw her on the floor and raped her. The victim was a 58-year-old woman weighing 112 pounds. When he finished raping her, he discovered that she was dead. The evidence established that the cause of death was cardiac arrest, caused by the accused forcibly sitting on the victim's chest during the struggle.

The case worked its way up to the Privy Council, which allowed the accused's appeal.[18] According to Lord Diplock, the prosecution failed to prove that when he sat forcibly on the victim's chest during the struggle, he "intended to inflict on her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being the victim's apparent age and build."[19] Further, it was essential that the prosecution prove that in sitting on the victim he intended to inflict "some internal, as distinct from mere superficial, injuries or temporary pain."[20]

So far, the argument here is consistent with reasoning in *Virsa Singh*. Lord Diplock's conclusion is based on failure on the part of the prosecution to prove that the accused intended to cause the injury that in fact killed the victim. He might have intended the injuries caused by raping her, but he did not intend the injuries caused by restraining her when he sat on her chest. The injury that in fact caused the victim's death was "accidental or unintentional." On the *Virsa Singh* test, this conclusion would have been sufficient to secure an acquittal.

The difficulty arises in the following passage in the judgment, in which Lord Diplock seems to be modifying the *Virsa Singh* test:

> [T]he act of the appellant which caused the death, *viz* sitting forcibly on the victim's chest, was voluntary on his part. He knew what he

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[17] [1976] 1 MLJ 156 (PC, on appeal from Singapore) [hereinafter *Mohamed Yasin*].

[18] The Privy Council set aside the conviction and remitted the matter with the direction to enter a conviction for causing death by rash or negligent act: *ibid*, at 158.

[19] *Ibid*, at 157.

[20] *Ibid*, at 158

> was doing; he meant to do it; it was not accidental or unintentional. This, however, is only the first step. ... Not only must the act of the accused which caused the death be voluntary in this sense; *the prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.*[21] (emphasis added)

The difficulty lies in the passage that begins with the words: "the prosecution must also prove." This passage might plausibly be interpreted as a subjective reading of section 300(c). On this view, the intention requirement in the first clause would extend to the second clause, such that the accused must have intended to cause a bodily injury which he is subjectively aware is sufficient in the ordinary course of nature to cause death.

The Singapore courts responded to *Mohamed Yasin* in *Visuvanathan*,[22] a 1978 decision of the Singapore High Court. In *Visuvanathan*, the accused stabbed the victim in the chest with a knife. The prosecution relied on section 300(c) and the accused argued, on the basis of the controversial passage from *Mohamed Yasin*, ("the prosecution must also prove"), that the accused must know that the bodily injury is sufficient in the ordinary course of nature to cause death.

The court rejects this argument, holding instead that once the intention to cause the kind of injury found to be inflicted is proved, the only relevant question is whether the injury is whether, "as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict."[23] The court then sets out the following test:

> In our judgment for the application of clause (c) of section 300 of the Penal Code, all the prosecution must prove is –
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> 1. that the accused did an act which caused the death of the deceased;
> 2. that the said act was done with the intention of causing bodily injury;
> 3. that the injury caused –

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[21] *Ibid*, at 157

[22] [1978] 1 MLJ 159.

[23] *Ibid*, at 160.

(a) was intended and was not accidental or otherwise unintentional; and

(b) was sufficient in the ordinary course of nature to cause death.

There is no other requirement.[24]

It is noteworthy that the court expressly rejects the subjective reading of *Mohamed Yasin,* preferring instead a return to the more objective approach in *Virsa Singh.* In fact, it has been suggested that the court has gone even further than *Virsa Singh* by "dispensing with the need to prove that the accused intended to cause the injury of the type that was in fact caused."[25] At the same time, however, the court insists on proof that the injury caused was "not accidental or otherwise unintentional," implying on the contrary that an inquiry into the kind of injury that the accused intended is indeed still relevant.

The internal tension that we observed in *Virsa Singh,* between the objective approach and the need to prove that the injury was not accidental or unintentional, lurks beneath the court's judgment in *Visuvanathan,* notwithstanding the attempt to entrench a purely objective approach. None of this should be surprising, given that the statute itself insists on a distinction between the actual injury and the injury that the accused intended to inflict. Attempts to reassert the objective approach are necessarily confronted with the express language of the statute.

Nevertheless, the objective approach remains the preferred approach in Singapore. This can be seen in *Tan Joo Cheng* v *PP,* a 1992 decision of the Court of Appeal.[26] The facts here are quite simple: the accused, armed with a knife, tried to rob the victim's flat. A struggle ensued and the victim resisted. In the course of the struggle, the victim was stabbed in the neck. Defence counsel argued that the accused did not intend to cause any serious injury, but rather that the stab wound occurred accidentally, in the course of the struggle. The court rejected this interpretation of the facts, finding instead that the accused intended to inflict the injury that was actually present.

Basing its decision on the reasoning of the court in *Visuvanathan,* the Court of Appeal concludes, contrary to the express reasoning in *Virsa Singh,* that the prosecution does not have to establish "that the accused intended

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[24] *Ibid,* at 161. This test was reaffirmed by the Court of Appeal in *Tan Cheow Bock* [1991] SLR 293, 3 MLJ 404 at 410 (Singapore CA).

[25] Sornarajah, *supra,* note 5, at 18.

[26] [1992] 1 SLR 620.

to cause an injury at a vital spot or injury of a type that would be sufficient in the ordinary course of nature to cause death."[27] The court explains:

> Even if an accused intended to inflict only a relatively minor injury, if the injury that he *in fact inflicted* pursuant to that intention was an injury sufficient in the ordinary course of nature to cause death, the provisions of cl(c) of section 300 would be attracted.[28]

The court then refers to the passage in *Virsa Singh,* where the court warns that "[no] one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder."[29] The implication of these passages is that the court will not be concerned to inquire into the precise mental element of the accused at the time the injury is inflicted. Moreover, it is enough that the accused intended to inflict a relatively minor injury; no further inquiry is required.[30] The court simply ignores the language of the statute, which indicates that it is "the injury intended to be inflicted" and not the injury that the accused "in fact inflicted" that is the subject of the inquiry.

Some recent cases in both the High Court and the Court of Appeal have attempted to break away from the objective approach. For instance, in both *Ow Ah Cheng*[31] and *Sim Eng Teck*[32] the court implies that the kind of injury that the accused intended to inflict is a relevant part of the inquiry. In *Ow Ah Cheng,* the accused went to the victim's flat looking for her father to ask him about a loan. He went into the bedroom where he found some money and jewellery, and decided to take them. He was caught red-handed by the victim. He pushed her onto the bed and, to stop her from screaming,

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27 *Ibid,* at 625.

28 *Ibid.* Emphasis added.

29 *Ibid,* citing *Virsa Singh, supra,* note 9, at 1501.

30 There is some question, however, as to whether the court's decision here should be regarded as strictly binding. Having rejected earlier in the decision defence counsel's argument on the evidence that the injury was not intentionally caused, it was not necessary for the court to consider whether the accused intended some other sort of injury. The court had already determined that "the [trial] judges were entitled to draw the inference that the appellant intended to cause the injury *that was found on Lee*" (at 624; emphasis added). There was thus no need for the court to inquire into whether the accused intended a less serious injury than the injury he actually inflicted; it was already determined that the accused intended to inflict the injury that was actually present. The balance of the judgment can therefore be regarded as *obiter dicta.*

31 [1992] 1 SLR 797 (HC).

32 [1998] 3 SLR 618 (CA).

he covered her face with a pillow and grabbed her throat. She died from asphyxiation. Bruises were evident on the victim's neck. Defence counsel argued that he did not intend to kill her, but rather to stop her from screaming.

The court accepted this argument. The issue that the court focussed upon was the degree of force used:

> The question was whether the degree of force used was so extreme as to be consistent only with an intent to cause bodily injury, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. If the accused wanted to kill Ah Lian, the pressure that he would have applied to the larynx would have in all likelihood resulted in a fracture of the larynx or more serious injuries. The degree of force used would have been *extreme as to be consistent only with an intent to do serious harm.*[33]

In other words, the High Court seems to be accepting here that the seriousness of the injury that the accused *intends* to inflict is relevant to a section 300(c) inquiry.

The Court of Appeal adopts a similar approach in *Sim Eng Teck*. The facts of this case are again relatively straightforward: the accused stabbed the victim three times with a knife, twice in the head and neck region and once in the hand, as the victim tried to grab the knife. The accused argued that he intended only to slash the victim a few times on the upper arm, and did not intend to kill him.

Applying *Ow Ah Cheng*, the court held that issue was whether the degree of force was "so extreme as to be consistent only with an intent to cause bodily injury and that the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death."[34] The court found that the degree of force used by the appellant "was consistent with an intent to do serious harm."[35] Once again, the court seems to acknowledge that the gravity of the harm intended by the accused is important. The implication of both of these cases is that it is relevant to inquire into the kind of injury that the accused intended to inflict. In particular, an intention to inflict a serious injury must be shown.

Notwithstanding these attempts to distinguish between the actual and intended injury, the objective approach was again reaffirmed in *Ong Chee Hoe*. The Court of Appeal simply asserts that the "law in this area is clear

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[33] *Supra*, note 31, at 804 (emphasis added).
[34] *Supra*, note 32, at 627.
[35] *Ibid*, at 627.

that the prosecution need not show that the accused intended to inflict a serious injury that is sufficient to cause death in the ordinary course of nature."[36]

IV. Problems with the Objective Approach

Notwithstanding the recent dominance of the "pure" objective approach in cases such as *Tan Joo Cheng* and *Ong Chee Hoe*, there is reason to believe that this interpretation of section 300(c) is inconsistent with a plain reading of section 300(c). Consider once again the wording of the provision:

> Except in the cases hereinafter excepted culpable homicide is murder –
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> ...
>
> (c) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

It has been recognized in the jurisprudence at least since *Virsa Singh* that the injury that in fact causes death "in the ordinary course of nature" must have been the injury that the accused "intended to inflict." Indeed, it was this dichotomy between the intended injury and the actual injury that justified the requirement in the third branch of the *Virsa Singh* test, that the injury inflicted was "not accidental or unintentional."[37] It also enabled Lord Diplock to conclude in *Mohamed Yasin* that although the accused might have intended the injuries caused by raping her, he did not intend the internal injuries and cardiac arrest that were caused by restraining her, which actually caused her death. The line of cases from *Visuvanathan* to *Tan Joo Cheng* and *Ong Chee Hoe* brushes aside this difficulty without explanation.

This is not to say that an articulation of the significance of the distinction between the actual injury and the intended injury is a simple matter. The next section attempts to articulate an interpretation of section 300(c) that makes sense of this distinction within the broader scheme of section 300. However, interpretive considerations aside, there are other principled objections to the objective approach.

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[36] [1999] 2 CLAS News 211 (CA).

[37] *Ibid*, at 221.

A. *The Objective Approach Does Not Acknowledge Differing Degrees of Culpability*

The first and perhaps the most serious problem with the objective approach is its failure to recognize the difference in culpability between someone who has killed intentionally under section 300(a) and someone who intends only to inflict a minor injury, but happens to cause death. The blatant unfairness of this approach can be seen in Sornarajah's example:

> The offender cuts the victim on his foot with the specific idea of avoiding the causing of a fatal injury. But an artery is severed and the medical evidence is that in the ordinary course of nature the injury would prove to be fatal. He could be liable for murder under the third clause on the basis that there was an intentional causing of bodily injury and that the bodily injury so caused was fatal in the ordinary course of nature. Such a result would obviously be unjust.[38]

Why is it so obvious that the result is unjust? In both our everyday attributions of blame as well as in the basic principles of criminal law we tend to make a distinction between harm that is caused intentionally and harm that is caused negligently. We might well say that the offender in Sornarajah's example is negligent in relation to the death and, to the extent that a reasonable person would have been aware of the danger of death and the criminal law permits liability for negligence, we might be prepared to find him liable.[39] But the objective approach to section 300(c) makes him liable *as if he had intended to kill* even though he intended only to cause *hurt* "voluntarily" (a separate offence under section 321 of the Penal Code).

In essence, the objective approach to section 300(c) amounts to an offence of constructive murder.[40] The "constructive" dimension of objective approach is reflected in the *first* sentence of this passage from *Virsa Singh,* which is often quoted in support of the objective approach:

> No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must

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[38] *Supra*, note 5, at 14.

[39] For instance, a conviction under the negligence branch of s 304A, causing death by rash or negligent act, might be appropriate.

[40] Felony murder, which is an offence in other jurisdictions, is another form of constructive murder.

> face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.[41]

What makes the objective approach to section 300(c) objectionable is the assumption that the intention to inflict injury in itself is sufficient to attract liability for murder, whether or not the accused *intended* to cause a serious injury. The accused can be convicted of murder even though he or she did not intend to kill, but only to inflict a much less serious injury which happens to kill.

What further limits the ability of the Singapore courts to accurately reflect the degree of culpability of the accused is their tendency to defer to expert evidence on the question of whether the injury *actually* caused is "sufficient in the ordinary course of nature to cause death,"[42] even in cases where the injury actually inflicted is not the precise injury that the accused intended to inflict. The courts typically do not consider, as section 300(c) expressly directs them, whether "the injuries *intended to be inflicted* were sufficient in the ordinary course of nature to cause death."

Once the pathological evidence is approached in this way, considering only whether the *actual injury* was sufficient in the ordinary course of nature to cause death, it is difficult to imagine a situation in which the court would *ever* conclude that it was not, except on the most unusual facts The test of whether the injury "intended to be inflicted is sufficient in the ordinary course of nature to cause death" has become legally irrelevant. Thus, in most cases the fact that the accused died from the injuries actually inflicted will be enough to secure a conviction.

The result of these specific doctrines is that a person can be convicted of murder even if he or she intended to inflict only the most trivial of injuries if somehow the injury results in death. The *mens rea* for the lesser offence

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[41] *Supra*, note 9, at 1501. The second sentence in this passage, which reminds us that the mere infliction of the injury is *not* sufficient, is typically ignored by the courts. It is clear, however, that the accused will not be convicted (of murder, in any case) if the injury was accidental or unintentional. But this leaves open the following question: What does it mean for the injury to be accidental or unintentional? The answer to this question requires that we reject a pure objective interpretation of the first sentence.

[42] For a recent example of this phenomenon, see *Ong Chee Hoe* v *PP*, *supra*, note 36. In this case, the Court of Appeal found based on the forensic pathologist's evidence that "the injuries found on the deceased's head were sufficient in the ordinary course of nature to cause death" (at 215), even though there was some question as to whether the accused intended to inflict serious injuries.

of voluntarily causing hurt[43] is sufficient to attract liability for murder. Punishment is thus imposed out of proportion to the degree of culpability of the offender.

B. *The Objective Approach Makes Criminal Liability a Matter of Luck*

It might be argued on utilitarian grounds that constructive liability is justified for reasons of deterrence. Even apart from the concerns about proportionality and culpability expressed above, a serious difficulty with the objective approach is that it introduces an element of what philosophers call "moral luck"[44] into the assessment of criminal responsibility. To say that a person's criminal liability depends on "moral luck" is to say that it depends on luck or chance and, in any event, on circumstances that are beyond that person's control as a moral agent.

As noted earlier, a moment's reflection confirms that whether a person is convicted of murder under section 300(c) and sentenced to death, or of voluntarily causing hurt under section 321 and sentenced to imprisonment for a term of one year or a fine (or both),[45] is simply a matter of chance. Consider these two variations of Professor Sornarajah's hypothetical situation:[46]

> X cuts the victim on his foot with the specific idea of avoiding the causing of a fatal injury. But an artery is severed and the medical evidence is that in the ordinary course of nature the injury would prove to be fatal.
>
> Y cuts the victim on his foot with the specific idea of avoiding the causing of a fatal injury. The knife misses an artery by two millimetres and the victim suffers but a minor injury.

Assuming that neither offender has any special knowledge of human anatomy, it is purely a matter of chance that X happens to hit an artery but Y does not. Yet X and Y face profoundly different penal consequences: under the objective approach, X faces a charge of murder and a mandatory death penalty, while Y faces a charge of voluntarily causing hurt[47] and a maximum of one year imprisonment.[48] This result is manifestly unfair and

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[43] S 321 of the Penal Code.
[44] See generally, Daniel Statman, ed, *Moral Luck* (Albany: SUNY Press, 1993).
[45] S 323.
[46] *Supra*, note 38, and accompanying text.
[47] S 321.
[48] S 323.

inconsistent with a criminal justice system that has any concern for the moral culpability of the offender. Surely it cannot be a matter of luck whether a person faces the death penalty or a few months' imprisonment.[49]

It might be argued in response that the imposition of a harsh penalty for inflicting even a minor injury serves to deter individuals from engaging in activities that might *potentially* be fatal. But whatever the merits of deterrence as a foundational theory of criminal liability, if the objective is to deter the voluntary infliction of hurt, then the offence of voluntarily inflicting hurt should be amended accordingly. It is unclear what purpose, utilitarian or otherwise, is served by labelling as a murderer one who is not. If our goal is to impose a mandatory death penalty for the inflicting of a minor injury that *happens* to cause death, we should be forthright about what we are doing rather than cloaking capital punishment for voluntarily causing hurt under the guise of murder. Not only does the objective approach to section 300(c) impose punishment out of proportion to fault, it stands in stark violation of the principle of fair labelling,[50] denouncing and executing as a murderer someone who is morally responsible only for having inflicted hurt.

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[49] One implication of the moral luck argument is that we must, to be consistent, punish attempts with the same amount of punishment as the completed offence. I have few reservations in accepting this proposition, subject to two qualifications. First, it is acceptable to punish attempts with the same level of punishment as the completed offence provided that the accused has done everything that depends on him or her to bring about the result. Attempts should not be treated in the same fashion as the completed offence if the offender is apprehended even one moment before taking the very last step towards the commission of the offence. In these circumstances, there remains a possibility that the offender might reconsider and hence would be less culpable than the one who completes the offence. Thus, in situations where the offender is caught in the act, before taking the last step that depends on him or her, we should not impose the same level of punishment. Second, attempts should be punished to the same degree as the completed offence only if the punishment for the completed offence is *also* proportional to the degree of culpability of the offender. It is inconsistent and unfair to insistent on equivalent treatment of attempts for reasons of fairness or retributive justice if those principles are not adopted consistently in the attribution of criminal liability. For a contrary argument concerning moral luck and attempts, see Steven Sverdlik, "Crime and Moral Luck" in Daniel Statman, *supra*, note 44, 181-94.

[50] The principle of fair labelling insists that "distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking": Andrew Ashworth, *Principles of Criminal Law* (3rd ed) (Oxford: Oxford University Press, 1999), at 90.

C. *The Objective Approach Confuses Evidentiary Considerations with Substantive Ones*

Another problem with the objective approach is that it confuses matters of evidence with substantive issues. This problem can best be seen by comparing section 300(c) to section 299(2). Section 299(2) provides as follows: "Whoever causes death by doing an act ... with the intention of causing such bodily injury as is likely to cause death ... commits the offence of culpable homicide." Both provisions impose liability where the accused intended to inflict a bodily injury that in fact causes death. Section 299(2) provides that the injury must be "likely" to cause death while section 300(c) provides that the injury must be "sufficient in the ordinary course of nature to cause death." On the objective approach, the only plausible difference between these two provisions is the degree of likelihood that death will result, based presumably on such objective factors as the sort of weapon[51] that is used.

But the significant difference in the penalty as between these two provisions implies that a person convicted of murder under section 300(c) is more culpable than one convicted under section 299(2) and yet it is not clear how the weapon used or any other objective factor, such as the degree of force with which the blow is inflicted, could have any bearing on culpability. A person can, in using a knife or even a firearm, intend an injury other than death. In the same vein, a person can inflict a serious blow without intending to do so, as might a large man who does not know his own strength. There is thus no necessary correlation between either the weapon used or the degree of force and culpability. This is not to say that these factors would not constitute *evidence* from which a culpable intention might be inferred in light of other evidence. They might even justify a rebuttable evidentiary presumption.[52] But the objective approach to section 300(c) implies that there is a *necessary* correlation between culpability and matters of evidence that in fact are inconclusive as to the substantive question of culpability.

V. The Qualified Subjective Approach

The objections canvassed above suggest that the objective approach is both unfair and, inasmuch as it ignores the intended injury, is inconsistent with the wording of section 300(c). But a rejection of the objective approach

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[51] See, for instance, *Tan Buck Tee* v *PP* (1961) 27 MLJ 176 (Malaya CA).

[52] M Sornarajah, "The Definition of Murder under the Penal Code," *supra*, note 5, at 24-25.

does not mean that we are compelled to accept a "pure" subjective approach, such as is sometimes attributed to the judgment of Lord Diplock in *Mohamed Yasin*. As we have seen, the subjective interpretation of his judgment implies that the prosecution would have to prove that the accused intended to cause the sort of bodily injury that the accused *knows subjectively* is sufficient in the ordinary course of nature to cause death. This is, of course, the argument that was made by the accused in *Visuvanathan*, which was roundly rejected by the Court of Appeal.[53]

Professor Morgan argues, however, that a subjective approach does not necessarily render section 300(a) otiose.[54] Section 300(a), he explains, could be restricted to cases in which the direct aim is to kill, while section 300(c) would cover those cases where the direct aim was not to kill, but where the accused was *subjectively* aware that the bodily injury was sufficient in the ordinary course of nature to cause death. Morgan admits that on this reading, the meaning of sections 300(a) and 300(c) would be very close, but this reading of section 300(c) would not necessarily render section 300(a) otiose. Having said this, Morgan goes on to show that although a purely subjective reading of 300(c) could co-exist with 300(a), the problem is that section 300(b) would render 300(c) otiose, as subsection (b) requires *only* knowledge of the subjective likelihood of death. This textual analysis suggests, then, that a purely subjective reading of 300(c) is inconsistent with the scheme of section 300.

While a pure subjective approach may be problematic, the possibility of a *qualified* subjective approach emerges from a careful analysis of section 300(c) and the dichotomy between the actual and intended injury. Not only is this approach doctrinally coherent, it is consistent with the overall scheme of section 300 and more fairly reflects the offender's culpability.

On the qualified subjective approach, an accused person would attract liability under section 300(c) only if he or she intended to inflict a serious bodily injury. There are two main features of this approach. First, the accused must be aware of the *seriousness* of the injury. Second, while the accused may not have specifically intended to kill, the accused must have some subjective awareness that the injury was of a sort that *might* kill. This approach does not justify equating the penalty for section 300(c) liability with the penalty for intentional killing under section 300(a), but it does bring the

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[53] *Supra*, note 22, at 160.

[54] KL Koh, CMV Clarkson and NA Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Singapore: Malayan Law Journal, 1989), at 412.

degree of culpability closer to that of intentional homicide.[55] What I hope to show now is that it does so in a manner that is consistent with a careful reading of section 300(c) and much of the earlier jurisprudence.

The first feature of the qualified subjective approach, the *seriousness* requirement, is best understood by considering two types of fact patterns that arise in section 300(c) cases.

> *Scenario A:* The injury that X actually inflicts is precisely the same injury that X intended to inflict, and V dies as a result.
>
> *Scenario B:* The injury that Y actually inflicts is a different injury from the injury that Y intended to inflict, and V dies as a result.

If the only situations that arose were of the first sort, then the objective approach might be a plausible interpretation of section 300(c). In scenario A, the actual and intended injuries are identical. But often the facts in section 300(c) cases are closer to scenario B, where there is a divergence between the actual and intended injury. When we consider the application of section 300(c) in these situations, the objective approach no longer makes sense.

As we observed earlier, when we are faced with a divergence between the actual and the intended injury, section 300(c) directs us to consider whether "the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." But to answer this question, we need to know what is meant by "the bodily injury intended to be inflicted." There are at least three possibilities.

The first possibility is that the accused must have intended the precise injury, in physical or anatomical terms, that is actually inflicted. As the courts have pointed out, this approach borders on being absurd. Must it be shown that the accused intended (to use an example for *Virsa Singh*) that "the bowels fall out or [that] he intended to penetrate the liver or the kidneys or the heart"?[56] As the court correctly points out, this would mean that someone with no knowledge of anatomy could never be convicted.[57]

A second possibility is that the accused must have intended to inflict an injury to the particular part of the body that is actually injured. Again, this does not seem to make sense. Suppose that the accused intends to stab the victim in the stomach, but instead stabs the victim in the heart. Does it make sense to say that he should not be liable only because, by chance,

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[55] In fact, the only truly fair solution would be to amend s 300(c) and introduce a graduated scheme of penalties in proportion to the degree of culpability for each offence.

[56] *Supra*, note 9, at 1500.

[57] *Ibid.*

a stab in the heart was not in the area of the body that the accused wanted to strike? In these circumstances, the precise area of the body that the accused intended to strike is irrelevant to our assessment of criminal liability.

The third, more compelling, view of the intended injury is this: The accused need not intend the precise anatomical injury that leads to the person's death, but must intend to inflict an injury *as serious as* the injury actually inflicted. In other words, if the accused intended a superficial injury, and this injury were to result in death, he would not be guilty because the injury that he (or she) "intended to inflict" was not, as a matter of fact, sufficient in the ordinary course of nature to cause death. On the other hand, if the accused intended to inflict an injury that, as a matter of fact was serious enough to cause death (say, an injury to the stomach), but in fact caused a different injury (an injury to the heart) which nevertheless kills the victim, then the accused would still be guilty because the injury that he intended to inflict, while not the actual cause of death, was serious enough to have caused death in the ordinary course of nature.[58] The inquiry in *Virsa Singh* as to "whether there was an intention to strike at a vital or dangerous spot"[59] ought thus be seen as an inquiry not into the particular part of the body that the accused intended to strike, but rather into the seriousness of the injury that the accused intended to inflict.

On this approach, so long as the accused intends to inflict a serious injury, it does not matter that the death does not come about in the precise manner that the accused intended. What is important is that the injury that the accused intended to inflict is sufficiently serious and the accused caused the victim's death. Once these elements are present, that the accused could be seen to attract liability under section 300(c) of the Code. Conversely, an injury

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[58] Consider another example. Suppose the accused intends to inflict a serious injury (say, a stab wound to the chest) which would be sufficient in the ordinary course of nature to cause death, but does not succeed in inflicting the injury. Rather the victim escapes through a window and falls to her death. Would the accused be guilty under s 300(c)? Causation is unlikely to be a problem here, as we can assume that the victim's conduct was neither unreasonable nor unpredictable: see *R* v *Roberts* (1971) 56 CrAppR 95 (England CA) and *R* v *Halliday* (1889) 61 LT 701. But if the death was caused not by the intended injury, but by the fall from the window, would the accused be guilty under s 300(c)? The third approach suggests that we are concerned not with the actual injuries, but about the injuries that the accused intended to inflict. In this case, the accused intended to inflict a serious injury (a knife wound) that would have been sufficient in the ordinary course of nature to cause death. And even though the death was not caused by the injury that the accused intended to inflict, and the accused did not intend the actual injuries, the accused could fairly be regarded as liable under s 300(c) since the injuries that the accused intended to inflict would have been sufficient in the ordinary course of nature to cause death. I owe much of the analysis of this point to Felix Maultzsch.

[59] *Supra*, note 9, at 1500.

would be regarded as "accidental or unintentional"[60] and hence excluded from section 300(c) liability if it was more serious than the injury that the accused intended to inflict.

However, even if we accept the need to distinguish between the actual injury and the injury that the accused intended to inflict, and that the seriousness of the intended injury is important, two possibilities nevertheless remain:

(1) We might accept the need to inquire as to the objective seriousness of the injury that the accused intended to inflict, and ask whether that injury was sufficient in the ordinary course of nature to cause death without regard for whether the accused was subjectively aware of its seriousness.

(2) Alternatively, we could assess the seriousness of the injury based on the seriousness of the injury that the accused *intended* to inflict.

The problem with the first option is that it requires considerable speculation as to the precise sort of injury that would have resulted had things gone according to plan. It would be necessary, for instance, to have regard to the angle, depth, force, and target of the intended wound (for instance, of a knife wound) to be able to determine whether the intended injury (had it materialized) would have been sufficient in the ordinary course of nature to cause death. But it is unlikely that the accused would have had so specific an intent. It is much more likely that the accused intended to inflict either a serious injury or a minor injury to, say, the abdominal region. It would be rare that the accused would ever have so specific an intention that it would be possible to answer with any acceptable degree of certainty whether the injury that the accused intended to inflict was "sufficient in the ordinary course of nature to cause death."

This brings us to the second option – that in assessing whether the intended injury was sufficient in the ordinary course of nature to cause death, we look to the seriousness of the injury that the accused actually intended to inflict. The question then becomes whether the accused intended to inflict a minor or a serious injury. If a minor injury was intended, then the intended injury could hardly be sufficient in the ordinary course of nature to cause death. On the other hand, if the accused intended a serious injury or was indifferent as to whether the victim died from the injury, an inference that

[60] *Virsa Singh*, *supra*, note 9, at 1500; *Visuvanathan*, *supra*, note 22, at 161.

"the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death" would be much more reasonable.[61]

If we accept, then, that we must consider the seriousness of the injury that the accused intended to inflict in cases where the actual injury differs from the intended injury, we must finally consider whether this approach should also be adopted in cases in which the actual injury coincides with the intended injury. The first argument here is based on consistency. It is inconsistent to say that sufficiency of the injury to cause death is determined in one case by a scientific assessment of the actual physical injury, but in another case by the seriousness of the injury that the accused intended to inflict. A second, more compelling point is the one made above, that the accused would rarely intend the *precise* injuries inflicted. In other words, in almost all cases, the accused will have a generic intention to inflict a minor or serious injury, but not an intention to inflict the precise injury that is scrutinized by the forensic pathologist. If not all, then the vast majority of cases of intentionally inflicted injuries collapse into Scenario B (where the actual injury and intended injury diverge), so the appropriate test would then be the seriousness of the injury that the accused intended to inflict; the accused must *know* the seriousness of the injury that he or she intends to inflict.

VI. Defending the Qualified Subjective Approach

The qualified subjective approach to section 300(c) might be attacked on both legal and theoretical grounds. First, it might be argued that the qualified subjective approach is inconsistent both with the case law and with the broader scheme of section 300. Second, it might be argued on a theoretical level that the approach rests on the unfounded assumption that principles of culpability and proportionality, which are fundamental to what contemporary criminal law theorists call *retributive justice*,[62] ought to be taken into account when imposing criminal liability in Singapore.

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[61] It is still necessary to develop an account of what a "serious" injury means, but it would certainly involve at least some subjective awareness of the possibility of death or indifference as to whether death results. This point is addressed at greater length below (Part VI), in my response to anticipated *legal* objections.

[62] Although there is a wide spectrum of theories that might plausibly be characterized as "retributive," most contemporary retributive theories of criminal law share the following key features: they are *backward-looking* based on what the offender *did*; they are *actor*-centred, not act-centred; they insist that punishment be imposed only on the basis of *desert* (that is, that the accused must be culpable or *at fault* before punishment is imposed); and

A. *Legal Arguments*

The objection that the qualified subjective approach, which focusses on the seriousness of the injury that the accused intended to inflict, finds *no* support in the case law is simply incorrect. The distinction between the actual and intended injury is evident in the third branch of the *Virsa Singh* test, according to which "it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, *or that some other kind of injury was intended.*"[63] It was also this distinction that allowed the Privy Council in *Mohamed Yasin* to insist that the prosecution prove "at the very least, that the appellant did intend by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial, injuries or temporary pain."[64] This passage is important because it acknowledges *both* the distinction between the actual and intended injury *and* the importance of asking how serious an injury the accused intended to inflict.

This brings us to the recent line of cases that focus on the seriousness of the intended injury. As we noted earlier in the discussion of *Ow Ah Cheng,* the High Court, in its analysis of section 300(c), asked whether the degree of force used by the accused was so extreme "as to be consistent only with an intent to do serious harm."[65] Other cases, even in the Court of Appeal,[66] applied this reasoning before the Chief Justice put an end to it in *Ong Chee Hoe.*[67]

With all due respect to the learned judgment of the Chief Justice, the logic of the qualified subjective approach continues to attract his colleagues on the bench and remains consistent with the scheme of section 300(c) and with the early case law and the Indian jurisprudence. Indeed, under the Indian approach, it is considered preferable to prosecute under section 300(d) because under section 300(c) "the question then would arise what

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they demand that punishment is *proportional* to the *degree* of culpability of the offender. On theories of criminal law, see generally, "The Moral Justifications for Punishment" in Leo Katz, *et al*, eds, *Foundations of Criminal Law* (Oxford: Oxford University Press, 1999), 59-84.

63 *Supra*, note 9, at 1500. Emphasis added.

64 *Supra*, note 17, at 158.

65 *Supra*, note 31, at 804.

66 See *Sim Eng Teck*, *supra*, note 32.

67 *Supra*, note 4, *per* Yung Pung How CJ.

was the extent of the injury which [the accused] intended to cause or knew would be caused."[68]

But even if the qualified subjective approach does find some support in the case law, it might still be argued that, on this approach, section 300(c) would collapse into one of the other subsections to section 300. But the qualified subjective approach avoids being *purely* subjective, precisely because it does not ask, as section 300(a) does,[69] whether the accused *intended* to kill. Rather, it asks whether the accused intended to inflict a *serious* bodily injury. The accused might have been indifferent as to whether death would result, but this would fall well short of the mental element of purpose[70] required for a conviction under section 300(a).

The qualified subjective approach to section 300(c) also remains distinct from section 300(b) which requires *knowledge* of the likelihood of death to the person to whom the harm is caused. There is a subtle, but important, conceptual difference between *knowledge* that the bodily injury is likely to cause death (that is, knowledge of a high probability that death will occur) and *indifference* as to whether death results (awareness of the mere possibility that death *might* occur). In the former case, the accused commits the act knowing that death is a likely result; in the latter case, the accused commits a bodily injury which he or she knows is serious, but either does not specifically think about how likely it is that death would result or is indifferent as to whether death results. This distinction is one that is recognized in the philosophical literature on responsible agency:

> [O]ne who foresees some harm only as a *possible* side-effect of her action is at worst a reckless, not an intentional agent of that harm: her responsibility for it (her relationship to it as an agent) is qualified by the fact that its occurrence is more a matter of luck or chance than it is in the case of one who expects to cause harm. The harm occurs unluckily and against her expectation: but one who expects harm as a certain or probable effect of his action cannot say that it was unlucky

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[68] *State of Madhya Pradesh* v *Ram Prasad* [1968] CrLJ 1025 (India SC) at 1027. Professor Sornarajah, *supra*, note 5, comes to a similar conclusion in his analysis of the Indian cases. Specifically, he concludes that in the Indian law, "in addition to the subjective element in the first phrase, there is also an element of intention that is involved in the second phrase" (at 16).

[69] S 300(a) imposes liability for murder "if the act by which the death is caused is done with the intention of causing death."

[70] Professor Morgan (*supra*, note 54) argues that the mental element for s 300(a) must be the accused's "direct aim or purpose" since ss 299(3) and 300(d) "already provide for cases where the mental state is one of knowledge" (at 406).

> that that harm actually occurred (what else did he expect?); it would rather be lucky if that harm did *not* ensue. To do what I realize will possibly cause harm is, of course, to create the *risk* of that harm intentionally: but the actualization of that risk does not fall within the scope of my intention.[71]

This argument regarding the distinction between intentional and reckless agency can easily be extended to the distinction between knowledge and indifference. There is an important conceptual difference between knowledge that death will result and awareness that death is a *possible* side-effect of one's action, which signals an important difference in the degree of culpability of the offender.

The charge that the qualified subjective reading of section 300(c) would collapse into the second branch of section 300(d) is untenable for similar reasons. This branch of section 300(d) requires an intention to act in a manner that the person knows "is so imminently dangerous that it must in all probability cause ... such bodily injury as is likely to cause death." As we have just seen, *knowledge* that death is likely is distinct from indifference as to whether death results, although both involve subjective awareness that death might result.

The distinction between knowledge and indifference is admittedly a fine one, but it is important to observe that a categorical distinction between section 300(c) and section 300(d) or, indeed, between any of the subsections in section 300, is unwarranted in light of the uniform penalty for all four offences. The fact that a uniform penalty for all four offences is imposed implies that there is little or no difference in culpability as among these offences. It should not alarm us, then, if the interpretation of these provisions tend to converge around a few closely related forms of subjective *mens rea*.

Finally, the qualified subjective approach would enable us to distinguish in a principled way between section 300(c) and section 299(2). While section 300(c) would cover those cases in which the accused inflicts a bodily injury which he or she knows is serious (being indifferent as to whether death results), liability under section 299(2) would be imposed in those cases in which the accused intentionally inflicts a bodily injury which, objectively, is likely to cause death. The distinction between section 300(c) and section 299(2) would reflect a principled distinction between subjective and objective liability respectively. This is not to say, however, that someone convicted

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[71] RA Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990), at 96-97.

under section 299(2) (thus understood) would be sufficiently culpable as to deserve the maximum permissible penalty. Perhaps the maximum penalty should be reduced. But section 304 at least allows the court to impose a penalty proportional to the culpability (in this case, the lesser degree of culpability) of the offender.

B. *Theoretical Arguments*

The theoretical objections to the qualified subjective approach are based on the premise that principles of retributive justice[72] have no place in the criminal law of Singapore. On the contrary, it is urged that considerations of deterrence ought to take precedence. A brief digression is needed here regarding the idea of retributive justice. Retributive justice, in its most compelling form, is distinct from the principle that the harm inflicted by the offender should be visited upon the offender in kind – the principle of *lex talionis* (or, colloquially, "an eye for an eye"). What is crucial, for most retributive theorists, is that in punishing an offender for an offence, we respect the offender's status as a person. It is through the imposition of punishment that we recognize the free will of the offender and honour the offender as a rational being.[73] It is precisely because the offender is a person, capable of acting freely, that the imposition of criminal liability on the basis of desert is justified.

Retributive justice, then, can be understood to comprise two interrelated propositions: that the punishment ought to be inflicted *whenever* (or only if)[74] it is deserved and that punishment is deserved only if, and to the extent that, the offence is culpable in that it reflects the offender's will. Thus, for most contemporary retributive theorists, an offender must, at a minimum, be culpable before punishment is imposed and punishment must be proportional to the degree of culpability. Retributive justice, as it is understood in this essay, insists on the *culpability* of the offender and the *proportionality* of the punishment as preconditions to the imposition of criminal liability.

The argument that these retributive principles have no place in the criminal law of Singapore can be understood in two ways. First, it can be understood as an empirical claim about the particular doctrines of criminal law in Singapore, that the criminal law of Singapore is *in fact* premised on utilitarian

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72 See, for instance, Moore, *supra*, note 62, passim, and accompanying discussion of retributive theories of criminal law.

73 GWF Hegel, *Philosophy of Right* (Oxford: Oxford University Press, 1967) [translated by TM Knox], at ¶100; see also Herbert Morris, "Persons and Punishment" (1968), 52(4) The Monist 475-501.

74 See *infra*, note 85.

principles. Alternatively, it can be viewed as a general normative claim that criminal law ought to be based not on retributive, but rather on deterrence-based or broadly utilitarian foundations.

My first response to the first version of this argument is that the objection is, at the very least, overstated. The assumption of retributive justice that the punishment of the offender ought to be proportional to fault is reflected in the broad scheme of murder (section 300), culpable homicide (section 299), and death by rash or negligent act (section 304A), which tries to reflect a descending degree of culpable fault. Moreover, the local courts have insisted that the penalty for negligent conduct should be lower than the penalty for rash conduct (conscious risk-taking)[75] and have questioned the propriety of imposing strict liability without permitting a defence of due diligence[76] or mistake in good faith.[77]

It might be argued, however, that for every example of retributive principles that is used in the criminal law, there is another equally tenable instance of a utilitarian doctrine or principle. But if this claim were true, it would imply that the criminal law is premised not on a single, coherent theory, but on a jumbled mess of *ad hoc* inconsistent principles. This, in turn, would invite the unsettling claim, advanced by some, that the criminal law is fundamentally indeterminate; that however much we might try to resolve legal controversies in a principled, coherent fashion, we are in fact engaging in a "rational rhetoricism" that disguises our unconsciously held political or moral beliefs.[78] The only viable response to this sort of thoroughgoing scepticism about law is the articulation of a coherent theory of the criminal law that might, in principle, be able to resolve doctrinal controversies.[79]

We might therefore look beneath the individual instances in which principles of utility or deterrence-based reasoning are invoked and consider whether, when we look at the criminal law as a whole, we can identify a coherent normative framework. If we do so, we may well find a framework of *culpability*-based, retributive justice. The principle of *mens rea,* understood

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75 *PP* v *Teo Poh Leng* [1992] 1 SLR 15 (HC).

76 *Balakrishnan* v *PP* [1998] 1 CLAS News 357 (HC).

77 *Tan Khee Wan Iris* v *PP* [1995] 2 SLR 63 (HC).

78 See, for instance, Mark Kelman, "Interpretive Construction in the Substantive Criminal Law" (1981) 33 *Stanford Law Review* 591.

79 Alan Brudner, "Agency and Welfare in the Penal Law" in Stephen Shute, John Gardner and Jeremy Horder, *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993), 21-53, argues that in the absence of a principle for demarcating retributive (agency) and utilitarian (or, more broadly, welfarist) paradigms of the law, "those dissatisfied with the consequences of either extreme position will tend to mix agency and welfarist doctrines throughout, leaving the penal law in the muddle in which we currently find it" (at 26).

in a normative sense, is entrenched both in the jurisprudence and in the interpretation of the basic principles of criminal liability under the Penal Code. Those persons who are unable to act as responsible moral agents are excluded from criminal liability.[80] Similarly, the Penal Code permits a defence of mistake of fact in good faith[81] and excludes from criminal liability harm that is caused by accident or misfortune.[82] These features of the criminal law are all consistent with a concern that criminal liability not be imposed in the absence of culpability or fault. We might therefore conclude that, notwithstanding a few isolated instances of utilitarian reasoning, the basic principles of the general part[83] of the criminal law in Singapore are based on principles of culpability (and proportionality), signaling a foundation of retributive justice.[84]

It is, of course, a separate question whether the principles of criminal liability in Singapore *ought* to accord with retributive justice. A comprehensive defence of a retributive theory of criminal law requires a much more involved argument which would take me too far afield for present purposes. For now, I need only advance the more modest proposition that principles of retributive justice and, in particular, the principle that the individual ought not be punished more than they deserve, have at least *some* normative force that ought to be recognized within the criminal law. However much social utility one's goals might have, the claim that these goals ought to be tempered by the degree of moral culpability of the accused, has at least an intuitive appeal, as does the so-called *negative* retributivist's prescription that one "who is not guilty must not be punished."[85]

This *prima facie* argument in support of retributive constraints on utilitarian goals is buttressed by the fact that the two other alternatives are problematic.

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80 See, for instance, ss 82 and 83 (infancy) and s 84 (insanity).

81 Ss 76 and 79.

82 S 80.

83 The "general part" of the criminal law refers to those doctrines of the criminal law that apply to all crimes, and is taken to include the basic principles of criminal liability, such as *mens rea, actus reus*, and excuses and justifications of general application: see, for example, Michael S Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), 31; Glanville Williams, *Criminal Law: The General Part* (2nd ed) (London: Stevens & Sons, 1961).

84 See Moore, *Placing Blame*, *supra*, note 83, at 35-64 (arguing that the principles of Anglo-American criminal law are based on retributive theory).

85 JL Mackie, "Retributivism: A Test Case for Ethical Objectivity" in Joel Feinberg and Hyman Gross, *Philosophy of Law* (3rd ed) (Belmont: Wadsworth Publishing, 1986), 622-29 at 623. The proposition that punishment must not be imposed in the absence of moral culpability (that is, that moral culpability is a necessary but not sufficient condition of punishment) has come to be known in the philosophical literature as *negative* retributivism.

The utilitarian approach is inconsistent with the language of *mens rea*. The elimination of culpability from the criminal law would require a fundamental rethinking and recasting of the criminal law. Second, an *ad hoc* mixture of utilitarian and retributive principles leads, as we have seen, to the devastating objection that the criminal law is indeterminate and political such that it is the personal values of judges, rather than legal principles, that determine criminal liability.[86]

Finally, it might be suggested that considerations of social utility should be accorded a special weight in Asia because of the importance attached to the community over the individual.[87] Whatever the merits of this sort of argument in the human rights context, it can scarcely be claimed that there is anything *uniquely* Asian about a deterrence-based theory of criminal law. Western legal theorists from Jeremy Bentham[88] to Richard Posner[89] have passionately defended the view that collective goals such as utility and economic efficiency ought to inform the principles of the criminal law. By the same token, concerns about culpability and proportionality of punishment

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[86] See Kelman, *supra*, note 78. This is not to say that a mixed theory of the criminal law is necessarily incoherent. But such a theory would have to draw a principled line between the respective spheres of retributive and utilitarian theory, as HLA Hart is sometimes said to be doing in distinguishing between "excusing conditions" and the "general justifying aim" of the criminal law in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), at 8-13. Nicola Lacey, in particular, interprets Hart in this way: see *State Punishment* (New York and London: Routledge, 1988), at 47-49. While Hart's general approach to criminal law is clearly utilitarian, his approach to criminal liability reveals striking similarities with the retributive approach. Indeed, Hart himself concedes that, on his theory, "excusing conditions" are accepted as *independent* of the efficacy of the system of threats (Hart, *supra*, at 48). In any event, Hart's approach suggests that a principled "mixed theory" of the criminal law need not be hopelessly indeterminate.

[87] The argument that Asian societies may have a different understanding of human rights from that espoused in the West because of its distinct cultural values has often been advanced in response to Western criticisms of the practice of human rights in Singapore. For an overview and critical analysis of these arguments, see Simon SC Tay, "Human Rights, Culture, and the Singapore Example" (1996) 41 McGill Law Journal 743. According to Tay, among the shared national values that have been identified by the Singapore government are: "(1) nation before community, society over self; (2) upholding the family as the basic unit of society; (3) regard and community support for the individual; (4) resolving issues through consensus instead of contention; and (5) racial and religious tolerance and harmony" (at 764).

[88] "Cases Unmeet for Punishment" in *An Introduction to the Principles of Morals and Legislation* (London: Athlone Press, 1970), 158-64.

[89] "An Economic Theory of the Criminal Law" (1985) 85 Columbia Law Review 1193-1231.

that are the essence of retributive justice are reflected not only in the principles of criminal law in Singapore, but also in the formulation of policy.[90] The philosophical problem of reconciling collective goals, such as crime prevention, with retributive principles, is, I suggest, a problem that cuts across cultural and political boundaries.[91]

However, even if we ignore the problems of indeterminacy and concede provisionally that there is a place for considerations of social utility (including deterrence) within the principles of criminal liability, we might still question whether considerations of deterrence necessarily imply an objective interpretation of section 300(c). As noted earlier, if Parliament's goal is to prevent individuals from inflicting injuries that, unknown to them, are potentially fatal,[92] *this* objective could be achieved quite effectively by punishing the intentional infliction of injuries as, for instance, through the offence of voluntarily causing hurt.[93] So even accepting deterrence (as

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90 Consider a recent example: Even in its attempt to deter residents in HDB flats from throwing household items out of their windows or leaving various items precariously on the railing of their balconies through a regime of criminal and civil penalties, the Singapore government, through its National Development Minister, Mah Bow Tan, has shown a willingness "to see whether we can calibrate the penalties to punish individual cases more fairly": see "Killer-litter penalties being relooked (*sic*)," The Straits Times, 12 August 2000, at 4. A concern for fairness of the quantum of punishment (that is, proportionality) is a cornerstone of the retributive theory of criminal law: *supra*, note 62.

91 This tension can been seen in the national values identified by the Singapore government (see Tay, *supra*, note 87): "society over self" (which suggests a focus on crime prevention and deterrence) and "regard...for the individual" (which implies a regard for the culpability of the offender).

92 Or in the words of *Virsa Singh*, *supra*, note 9, to prevent individuals from "running around *inflicting injuries* that are [as a matter of fact] sufficient in the ordinary course of nature to cause death" (at 1501; emphasis added).

93 Compare the reasoning of Lamer J (as he then was) in the Canadian decision, *R* v *Vaillancourt* (1987) 39 CCC (3d) 118 (SCC), which struck down the felony-murder provisions in the Criminal Code. The provision in question (what was then s 213(d) of the Code) imposed liability for murder where the accused caused the victim's death in the course of a serious offence (such as robbery) and had a weapon on his or her person. It was unnecessary to prove, even on an objective standard, that the accused could have foreseen the possibility of death. After finding that the provision in question amounted to a violation of s 7 of the *Canadian Charter of Rights and Freedoms* (which guarantees the right to "life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"), Lamer J goes on to ask whether s 213(d) could be upheld under s 1 of the *Charter* as a "reasonable limit imposed by law as can be demonstrably justified in a free and democratic society." In finding that it could not, he argues: "It is not necessary to convict of murder persons who did not intend or foresee the death and who could not even have foreseen the death in order to deter others from using or carrying weapons. If Parliament wishes to deter the use of weapons, it should punish the use or carrying of weapons" (at 139).

opposed to the retributive goal of punishing in proportion to culpability) as a legitimate legislative objective of the criminal law, it does not follow that an objective reading of section 300(c) is necessary.

VII. CONCLUSION

Without a coherent theory of criminal law we are left with no principled way of resolving doctrinal controversies. My *prima facie* argument in the previous section of this article suggests that notwithstanding particular instances of utilitarian reasoning, the fundamental principles of criminal liability in Singapore reflect, and *ought* to reflect, an underlying retributive theory of justice. A comprehensive defence of this argument requires a systematic examination of the criminal law jurisprudence in Singapore. But even if it were possible to do so, we need not settle definitively the philosophical conundrums of the criminal law to acknowledge the significance of culpability and proportionality in our attributions of criminal liability.

Section 300(c) represents but one example from the criminal law of Singapore where criminal liability is imposed out of all proportion to the degree of culpability of the offender. It is a particularly egregious (but not isolated) example because a person convicted of this offence must be sentenced to death.[94] This article has sought to demonstrate that an objective approach to section 300(c) is problematic both on a legal and theoretical level. A qualified subjective approach, in contrast, is consistent both with the wording of section 300(c) and with a broad range of cases. At the same time, though, it recognizes that a person who did no more than to intentionally inflict a minor injury does not deserve to die.

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94 Compare, under s 33 of the *Misuse of Drugs Act*, Cap 185, and the Second Schedule thereto, the penalties for trafficking in a controlled drug, which, in some instances, impose a mandatory death sentence.

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Pierre Elliot Trudeau, the former Prime Minister of Canada, passed away on 28 September 2000, while this essay was in its final stages of preparation. His compelling vision of a just society was an inspiration to many Canadians, including myself. The *Canadian Charter of Rights and Freedoms*, perhaps his greatest legacy, continues to transform the substantive criminal law according to principles of fairness and retributive justice. This essay is for him.