

Recklessness in Traffic Criminal Law: A Comparative Study and Policy Reconstruction Based on the Principle of Substantive Justice

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ABSTRACT

Traffic accidents in Indonesia, which claim tens of thousands of lives each year, are not only a human tragedy but also a reflection of the systemic failure of criminal law to respond proportionally and fairly to reckless driving behavior. This study examines the issue of recklessness, a form of error that positions itself between intent (*dolus*) and negligence (*culpa*) within the framework of Indonesian traffic criminal law, with the aim of identifying existing normative references, conducting a comparative study of more advanced legal systems, and formulating policy reconstruction based on the principle of substantive justice. This study uses a normative juridical research method that combines legislative, comparative legal, and conceptual approaches. This study finds that Law Number 22 of 2009 concerning Traffic and Road Transportation, especially Articles 310 and 311, leaves a significant normative gap because it does not accommodate recklessness as an independent form of error, so that perpetrators who consciously ignore the risk to the safety of others are often only charged with negligence articles whose criminal penalties do not reflect the true gravity of moral error. The research results conclude that the reconstruction of Indonesian traffic criminal law to explicitly accommodate recklessness is a legal and moral necessity, especially in the momentum of the enactment of Law Number 1 of 2023 concerning the Criminal Code in 2026.

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Introduction

Indonesia's roads harbor a bitter irony. On the one hand, motorized vehicle mobility has become the lifeblood of modern society's economic and social life; on the other, these same

roads have become the scene of endless tragedies. Data from the Indonesian National Police Traffic Corps (Korlantas Polri) shows that the number of deaths due to traffic accidents has consistently hovered between 25,000 and 31,000 per year over the past decade, placing Indonesia among the countries with the highest traffic fatality rates in Southeast Asia. However, behind these sobering figures lies a far more fundamental legal issue that has not received serious attention from the national criminal justice system. How should the law view and account for the behavior of drivers who knowingly take unreasonable risks to the safety of others on the road. (Aulia & Suherman, n.d.)

The question boils down to a concept known in criminal law doctrine as recklessness, a form of wrongdoing that positions itself between two poles: intent (*dolus/intention*) on the one hand, and ordinary negligence (*culpa levis/negligence*) on the other. (Aprideano & Gultom, 2024) Recklessness refers to the state of mind of an offender who is aware of the substantial risks of their actions, yet continues to act despite unjustifiable disregard for those risks. In the context of traffic, its manifestations are concrete and easily recognized: drunk drivers driving at extreme speeds in densely populated areas, illegal street racing participants using public roads as a circuit in the middle of the night, truck drivers who force their way through a twenty-hour journey without rest, or smartphone users who are busy texting while driving on a toll road at high speed. All of these behaviors have one common thread: the perpetrators do not intend to harm others, but consciously choose to ignore the real risks they themselves are aware of. (Syamsudin, 2011)

Law Number 22 of 2009 concerning Traffic and Road Transportation (UULLAJ), the primary legal instrument governing criminal liability in traffic accidents, is apparently unable to adequately accommodate this conceptual complexity. Article 310 of the UULLAJ regulates accidents caused by driver negligence, while Article 311 targets drivers who intentionally drive vehicles in an unreasonable and dangerous manner. Structurally, both articles leave a significant gap; neither norm explicitly addresses the behavior of drivers who are aware of the risks but choose to ignore them—the very area where recklessness resides. As a result, law enforcement officials are faced with the equally unsatisfactory choice of charging perpetrators with negligence, which carries a penalty too light to reflect the true level of moral culpability, or imposing a deliberate charge that is difficult to prove because there is no direct intent to cause harm. (Ali, 1996)

This lack of clarity in normative boundaries has given rise to a series of systemic, detrimental consequences. Judicial practice demonstrates alarming disparities. A driver who is drowsy and inattentive can receive the same sentence as a driver who consciously chooses to accelerate at up to 200 kilometers per hour in heavy traffic. Both are charged with negligence, despite the fundamentally different gravity of their moral culpability. This situation not only violates the sense of justice for victims and their families but also undermines the principle of proportional punishment, a key pillar of legitimate criminal law. The resulting legal uncertainty opens up too much discretion for investigators and prosecutors, ultimately leading to the failure of the preventive function of punishment, as disproportionate sanctions will never be an effective deterrent to reckless driving.

The necessary policy reconstruction cannot rely solely on technical-legal logic. It requires a solid philosophical foundation, and that foundation is none other than the principle of substantive justice. Formal justice, which demands consistent application of existing norms, has proven inadequate to address the complexities of recklessness. Substantive justice requires legal recognition of the gradation of moral wrongdoing, punishment proportionate to the degree of wrongdoing, and a system that is not only retributive but also capable of encouraging behavioral change. (Moeljatno, 1993)

The urgency of this study gains momentum in the context of the ongoing national legal reforms. Law No. 1 of 2023 concerning the Criminal Code (the new Criminal Code), which

will come into effect in 2026, brings significant changes to the architecture of the doctrine of criminal liability and opens up opportunities to more systematically integrate the concept of recklessness into Indonesian criminal law. At the same time, demographic pressures and massive urbanization continue to push traffic congestion in major cities to a critical point, while the number of motorized vehicles continues to grow exponentially. Every year of delay in clarifying criminal liability for recklessness is another year in which thousands of lives are lost without the certainty of legal justice they deserve. This article aims to contribute to this urgent conversation: through a systematic comparative study and critical analysis based on the principles of substantive justice, recommendations are formulated for the reconstruction of Indonesian traffic criminal law policy that is fairer, more certain, and more effective in protecting the safety of all road users. (Abidin, 1995)

Method

This research uses a normative legal research approach by combining three approaches simultaneously: the statute approach, the comparative legal approach, and the conceptual approach. (Helmi, 2020) Legal materials were collected through a literature study that includes primary legal materials in the form of laws and regulations and secondary legal materials in the form of doctrinal literature and scientific journal articles as well as tertiary legal materials in the form of legal dictionaries and encyclopedias. All legal materials were analyzed qualitatively using deductive-inductive reasoning layered with grammatical, systematic, historical, and teleological interpretation techniques, with the principle of substantive justice as an evaluative framework that unites all analyses to produce recommendations for the reconstruction of traffic criminal law policies that can be justified legally and philosophically.

Results and Discussion

1. Conceptual Construction of Recklessness in Criminal Law Doctrine

A comprehensive and precise understanding of the concept of recklessness cannot be built without first placing it squarely within the architecture of the fault theory (*schuldlehre*) of criminal law. (Nurhayati et al., 2022) Fault theory in modern criminal law stems from the fundamental principle of *nullum crimen sine culpa*, which asserts that punishment can only be imposed when there is proven to be a blameworthy spiritual connection between the perpetrator and the act and its consequences. Within this principle, fault is not merely a technical-legal element that must be fulfilled to fulfill the elements of a crime, but rather a moral foundation that legitimizes the state to impose criminal sanctions on an individual. Recklessness, in this context, occupies a conceptually strategic position and is vulnerable to misunderstanding because it lies precisely at the intersection of two more established forms of fault: intent and negligence. (Suheri, 2018)

Intention (*dolus* in the civil law tradition, intention in the common law tradition) is classically defined as the will of the perpetrator directed towards the realization of an act and its consequences. An perpetrator acts intentionally when he or she actually desires the consequences of his or her act, or at least is aware with a very high degree of certainty that those consequences will occur as a direct consequence of his or her action. (Karina, 2023) In the civil law tradition, intent has evolved into various gradations, from first-degree *dolus directus*, which directly intends the result, to second-degree *dolus directus*, which recognizes the result as a definite consequence, to *dolus eventualis*, which requires acceptance of the possibility of the result. At the opposite pole, negligence (*culpa* or negligence) is characterized by the absence of due care. The perpetrator is unaware of the

risks posed by their actions, or is aware of them but mistakenly believes they will not materialize, even though a reasonable and prudent person should have recognized and anticipated them. Negligence is thus a cognitive failure or a failure of the standard of care, not a conscious choice to disregard the safety of others.

Recklessness occupies a structurally distinct space from both. It does not qualify as intentional because the perpetrator neither intended nor accepted the occurrence of harmful consequences; he or she did not wish for anyone to be harmed. However, it cannot be equated with ordinary negligence because the perpetrator is not unaware of the risks involved. On the contrary, the most fundamental distinguishing feature of recklessness is that the perpetrator is aware of the substantial risks posed by their actions, but consciously chooses to ignore those risks and proceed with their actions. This is what is referred to in criminal law literature as conscious disregard of a substantial and unjustifiable risk – the conscious disregard of a substantial and unjustifiable risk. This structural difference has significant moral implications. A reckless perpetrator is not simply someone who fails to pay attention to the safety of others out of negligence, but someone who actively chooses to prioritize their own interests or pleasure over the safety of others, knowing they are risking it. The moral blame for such a conscious choice is far greater than the blame for mere cognitive failure. (Siswanto & Nainggolan, 2023)

Doctrinally, recklessness is built on three elements that must be cumulatively fulfilled. The first element is awareness of risk: the perpetrator must be fully aware that their actions pose a substantial risk to the safety or legal interests of others. The risk in question must be real and significant, not speculative or highly unlikely. In the context of traffic, a driver who drives at speeds far exceeding the speed limit in a densely populated residential area clearly realizes, or at least should, as a reasonable adult, that their actions pose a real threat to pedestrians and other road users. The second element is conscious disregard: after realizing the risk, the perpetrator does not take steps to eliminate or minimize it, but instead chooses to continue their actions. This is the element that most sharply distinguishes recklessness from ordinary negligence: disregard is not a product of unconsciousness, but rather a product of choice. The third element is unjustifiability: the disregard of the risk cannot be objectively justified from the perspective of prevailing law and societal values. (Badrulzaman, 1983)

By understanding recklessness as an independent conceptual construct, rather than simply a variant of more serious intent or negligence, it becomes clear that it requires separate and proportionate legal recognition within the criminal law system. Ignoring this conceptual independence, as is the case in the current UULLAJ, not only results in normative inaccuracy in responding to dangerous behavior on the road, but also violates the fundamental principle that the level of punishment must proportionally reflect the level of moral culpability of the perpetrator. A person who knowingly risks the lives of others for the pleasure of driving fast deserves a qualitatively different legal response than someone who, due to fatigue, fails to notice that their vehicle is starting to veer into the opposite lane. Equating the two under the same legal category is not only a technical-legal failure; it is an injustice structured within the norm.

2. Indonesian Positive Legal Regulation and Normative Identification

The Indonesian traffic criminal law system is basically based on two main provisions in Law Number 22 of 2009 concerning Traffic and Road Transportation (UULLAJ), namely Article 310 and Article 311. Article 310 threatens criminal penalties for drivers who, due to their negligence, cause accidents with injuries or death, with the threat of a maximum prison sentence of six years and a maximum fine of twelve million rupiah for accidents

resulting in death. (Undang-Undang Nomor 22 Tahun 2009)

Meanwhile, Article 311 threatens criminal penalties for drivers who intentionally drive a vehicle in an unreasonable manner and engage in other activities, are under the influence of alcohol, or use a mobile phone, resulting in an accident. This carries a heavier penalty of up to twelve years in prison. At first glance, the construction of these two articles seems adequate because they distinguish between negligence and intent. However, this is precisely where the most fundamental problem lies: both articles together leave a large normative void precisely in the area where recklessness resides. (Taufiq, 2014)

This normative reference manifests itself concretely in two directions simultaneously. Regarding Article 310, the negligence provision does not distinguish between pure negligence (*culpa levis*), which is a mere cognitive failure, and negligence accompanied by full awareness of the risks. A driver who falls asleep due to fatigue and a driver who consciously drives a vehicle at two hundred kilometers per hour on a busy road can both be charged under Article 310, even though the gravity of their moral culpability is fundamentally different. Regarding Article 311, the phrase "intentionally driving a vehicle in an unreasonable manner" actually has the potential to capture reckless behavior, but without a clear normative definition of what is meant by "unreasonable" and how to prove the element of intent in the context of risky behavior, this provision is difficult to apply in practice and is often avoided by public prosecutors due to its high burden of proof.

As a result, perpetrators who substantially meet the criteria for recklessness almost always end up under the threat of a much lighter sentence under Article 310, not because they do not deserve a heavier sentence, but simply because the normative system does not provide the appropriate instruments to hold them accountable proportionally. The new Criminal Code, which will come into effect in 2026, has not explicitly filled this gap by defining recklessness as an independent and graduated form of wrongdoing, so this normative lacuna has the potential to continue if not immediately addressed through planned and systematic legislative reform.

3. Comparative Study of the Legal Systems of England, the United States, and Germany

Comparative law in this study does not merely document textual differences between normative systems, but is directed at revealing how each legal system functionally resolves the same problem and how to criminally account for the behavior of drivers who are aware of the risks but choose to ignore them. The selection of the three jurisdictions of England, the United States, and Germany is based on the consideration that all three represent different legal traditions but are equally relevant as references for reforming Indonesian law, while also offering models for regulating recklessness that are conceptually and normatively complementary. (Asshiddiqie, 2012)

The English legal system developed the doctrine of recklessness through a long jurisprudential journey. It began with *R v Cunningham* in 1957, which emphasized the subjective standard that the perpetrator must be fully aware of the risks of their actions. It then shifted to an objective standard through the controversial *R v Caldwell* in 1982, before finally *R v G and Another* in 2003 definitively restored the supremacy of the subjective standard. In traffic law, the Road Traffic Act 1988 operationalized this concept through dangerous driving: driving that falls far below the standard of a competent and careful driver, and is clearly dangerous for anyone in that position. The English model teaches that the subjective standard is not only more morally just but also more consistent with the basic principle of criminal law, which requires correspondence between punishment and the

actual mental state of the perpetrator. (Barakatullah, 2013)

The United States contributed through the 1962 Model Penal Code (MPC), which established a systematic four-level hierarchy of culpability in Section 2.02: purposefully, knowingly, recklessly, and negligently. Recklessness in the MPC is defined as a condition in which the perpetrator knowingly disregards a substantial unjustifiable risk, and such disregard constitutes a significant departure from the standard of care expected of a law-abiding person under similar circumstances. The two key elements of conscious disregard and gross deviation provide clear and measurable normative boundaries. The MPC's hierarchical framework has been adopted by nearly all states, and its relevance for Indonesia lies in its potential as a blueprint for restructuring Articles 310 and 311 of the UULLAJ into a more proportional system of culpability grading.

Germany, through its Strafgesetzbuch (StGB), recognizes the concept of *Leichtfertigkeit* as the functional equivalent of recklessness in the civil law tradition gross negligence in which the perpetrator disregards risks that should be obvious to anyone in his or her position. In traffic law, Article 315c of the StGB criminalizes driving behavior that is grossly reckless and reckless, violating traffic rules seriously and without consideration for the safety of others. The most interesting thing about the German model is the separation between dangerous offenses (*Gefährdungsdelikt*) that do not require concrete consequences and accident offenses (*Verletzungsdelikt*) that require concrete consequences, so that the law can reach reckless behavior even before an accident occurs, much more preventatively than the UULLAJ construction that only moves after the consequences arise.

From these three systems, there are three comparative lessons directly relevant to Indonesia. First, recklessness is consistently recognized as a distinct form of wrongdoing that cannot be reduced to either negligence or intent. Second, the elements of awareness of risk and unjustified disregard are at the core of recklessness, universal across legal traditions. Third, the normative recognition of recklessness is always accompanied by a proportionally heavier criminal penalty more severe than ordinary negligence but less severe than full intent reflecting a clear moral gradation across the spectrum of human behavior. These lessons provide a concrete roadmap for Indonesian policymakers in filling the normative lacuna that has so far allowed perpetrators of recklessness to escape appropriate accountability.

4. The Principle of Substantive Justice as a Basis for Policy Reconstruction

Efforts to reconstruct criminal traffic law that address the issue of recklessness cannot be built solely on technical-juridical logic. It requires a deeper philosophical foundation, and that foundation is none other than the principle of substantive justice. Justice in criminal law is not simply a matter of whether norms are applied consistently and uniformly that is, what is called formal justice. Substantive justice demands more than that; it requires that the norms applied themselves are intrinsically just, that they reflect the moral gradations that actually exist in the reality of human behavior, and that they are able to provide a proportional response to each form of wrongdoing of varying gravity and character. In the context of Indonesian criminal traffic law, formal justice has long been fulfilled, meaning that Articles 310 and 311 of the UULLAJ are consistently applied. However, it is precisely the consistent application of substantively unfair norms that is the root of the problem because it systematically produces disproportionate results and harms society's sense of justice. (Rofifah et al., 2024)

The philosophical foundation of substantive justice in this context can be traced back to the thinking of John Rawls, who defined justice as the fairness of a system that is justifiable

to all parties, including those most disadvantaged by the system's injustice. Rawls, through the concept of the veil of ignorance, invites us to imagine that we design a legal system without knowing our position within it whether we will be the perpetrator of recklessness or the victim hit by a reckless driver. From that position of ignorance, a just system is one that provides adequate protection for potential victims, because any of us could be in that position. A legal system that equates recklessness with ordinary negligence and imposes excessively light sanctions is clearly unjustifiable from behind the veil of ignorance, because it fails to provide adequate protection to members of society who are most vulnerable to reckless behavior on the road.

Operationally, the principle of substantive justice in the context of reconstructing traffic criminal law policy can be broken down into three criteria that must be cumulatively met by any norm to be formulated. The first criterion is proportionality of culpability; the normative system must be able to distinguish and respond differently to morally distinct levels of culpability. A perpetrator who consciously disregards the risk to the safety of others must face legal consequences that are qualitatively different, not merely quantitatively more severe, than those of a negligent perpetrator due to unconscious ignorance or carelessness. This proportionality is not merely a demand for justice for the perpetrator, but also a recognition of the victim's dignity, that a life lost due to a person's conscious choice to disregard the safety of others deserves a more serious legal response from the state. (Santoso, 2012)

The second criterion is legal certainty, meaning that policy reconstruction must produce norms that are sufficiently clear and well-operationalized to provide certainty to all stakeholders: victims are aware of their legal rights, perpetrators are aware of the consequences of their choices, and law enforcement officials have clear guidelines for qualifying actions. Meaningful legal certainty does not mean rigid norms, but rather legible norms that allow for reasonable prediction of the consequences of an action. (Al Kautsar & Muhammad, 2022)

The third criterion is the effectiveness of protection: the formulated norms must actually contribute to reducing reckless behavior on the road, not merely provide symbolic satisfaction of the demands of justice. This means that policy reconstruction must consider not only the retributive dimension of punishment, but also the general and specific deterrent dimensions, as well as the rehabilitative dimension that encourages sustainable changes in driving behavior. These three criteria simultaneously reveal why substantive justice cannot be reduced to simply demanding harsher punishments. (Rosida, 2023)

Reconstructing policies based on substantive justice demands a more holistic approach that ensures that the primary criminal norms governing recklessness are formulated with sufficient conceptual precision, that the threat of sanctions accompanying those norms is proportionate and does not exceed the bounds of propriety, that the evidentiary mechanisms are designed in such a way that they do not unfairly burden victims but also do not sacrifice the basic rights of suspects, and that the entire system is supported by a law enforcement infrastructure capable of implementing the new norms consistently. Substantive justice, in other words, is not just about what is written in the law, but about how the entire legal system actually works to protect the dignity and safety of every road user from the most powerful to the most vulnerable on every corner of Indonesia's highways.

Conclusion

Recklessness, as a form of wrongdoing that stands alone between intent and negligence,

has not received adequate normative recognition in the Indonesian traffic criminal law system. This lack of recognition has given rise to normative references that systematically result in disproportionate punishment and undermine victims' sense of justice. A comparative study of the legal systems of England, the United States, and Germany demonstrates that legal recognition of recklessness as a distinct category of wrongdoing is not only feasible but has also been proven to produce a fairer, more certain, and more effective criminal accountability system in protecting the safety of road users. Based on the principle of substantive justice, which requires proportionality of culpability, meaningful legal certainty, and effective protection, the reconstruction of Indonesian traffic criminal law policy can no longer be delayed, particularly with the momentum of the new Criminal Code coming into effect in 2026. This requires explicitly formulating recklessness as a separate element of wrongdoing, accompanied by proportionate criminal penalties. This ensures that every driver who knowingly risks the safety of others on the road can be held accountable for the moral choices they make.

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