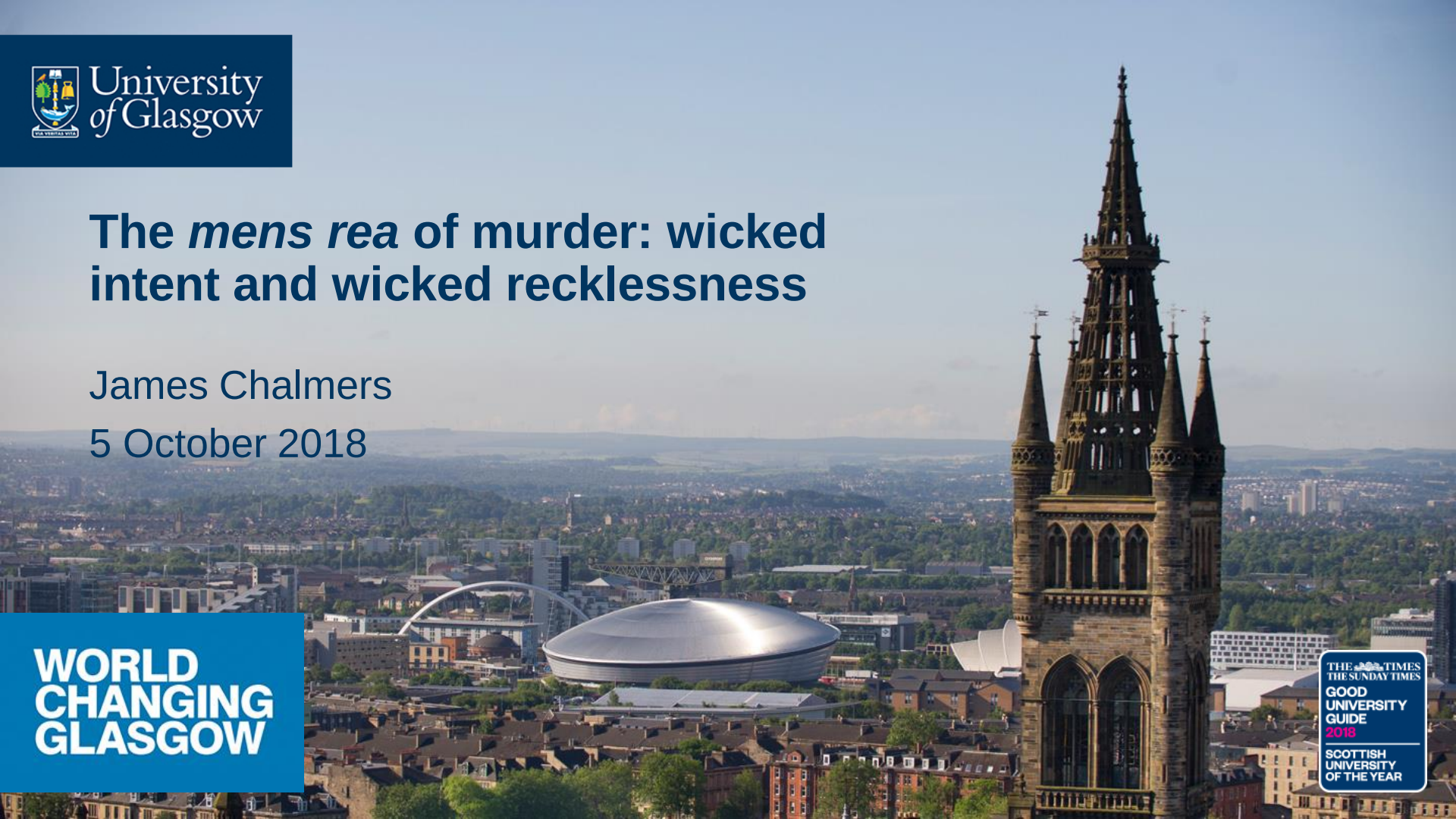

The *mens rea* of murder: wicked intent and wicked recklessness

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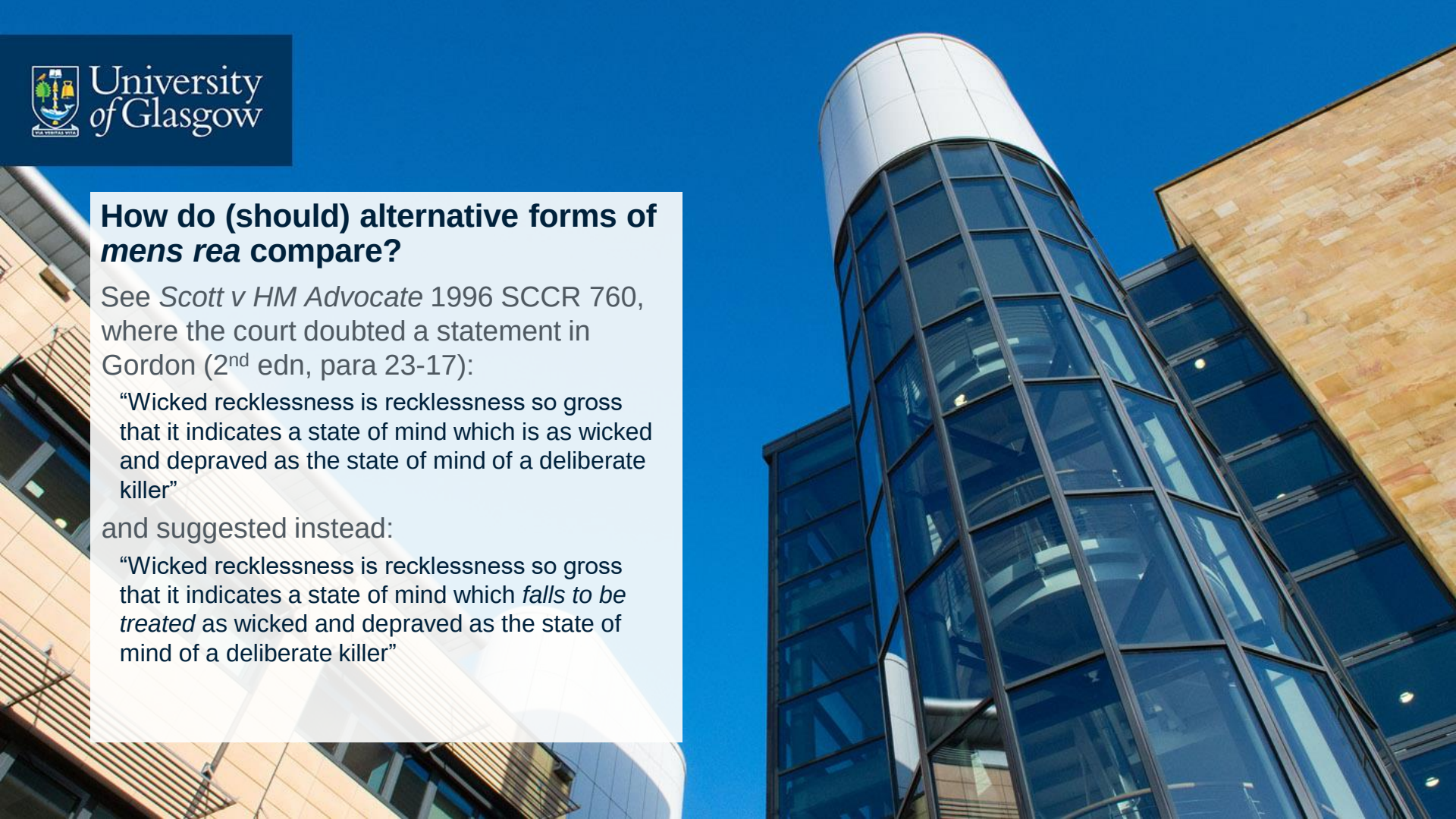
The forms of the *mens rea* of murder

- Two alternative forms
  - wicked intent
  - wicked recklessness
- Occasional suggestions that intent to do serious or grievous bodily harm might be a third form, but it now seems clear this is not the case.



How do (should) alternative forms of *mens rea* compare?

See *Scott v HM Advocate* 1996 SCCR 760, where the court doubted a statement in Gordon (2nd edn, para 23-17):

> "Wicked recklessness is recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer"

and suggested instead:

> "Wicked recklessness is recklessness so gross that it indicates a state of mind which *falls to be treated* as wicked and depraved as the state of mind of a deliberate killer"

The first branch of the definition: wicked intent

- What work is the term “wicked” doing in this definition (cf *Drury v HM Advocate* 2001 SLT 1013)?
  - (Not very much, it seems: *Elsherkisi v HM Advocate* 2011 SCCR 735)
- Note how the courts have thus far been able to avoid dificulties over the meaning of “intent” which have plagued other jurisdictions (but is that sustainable following *HM Advocate v Purcell* 2008 JC 131)?

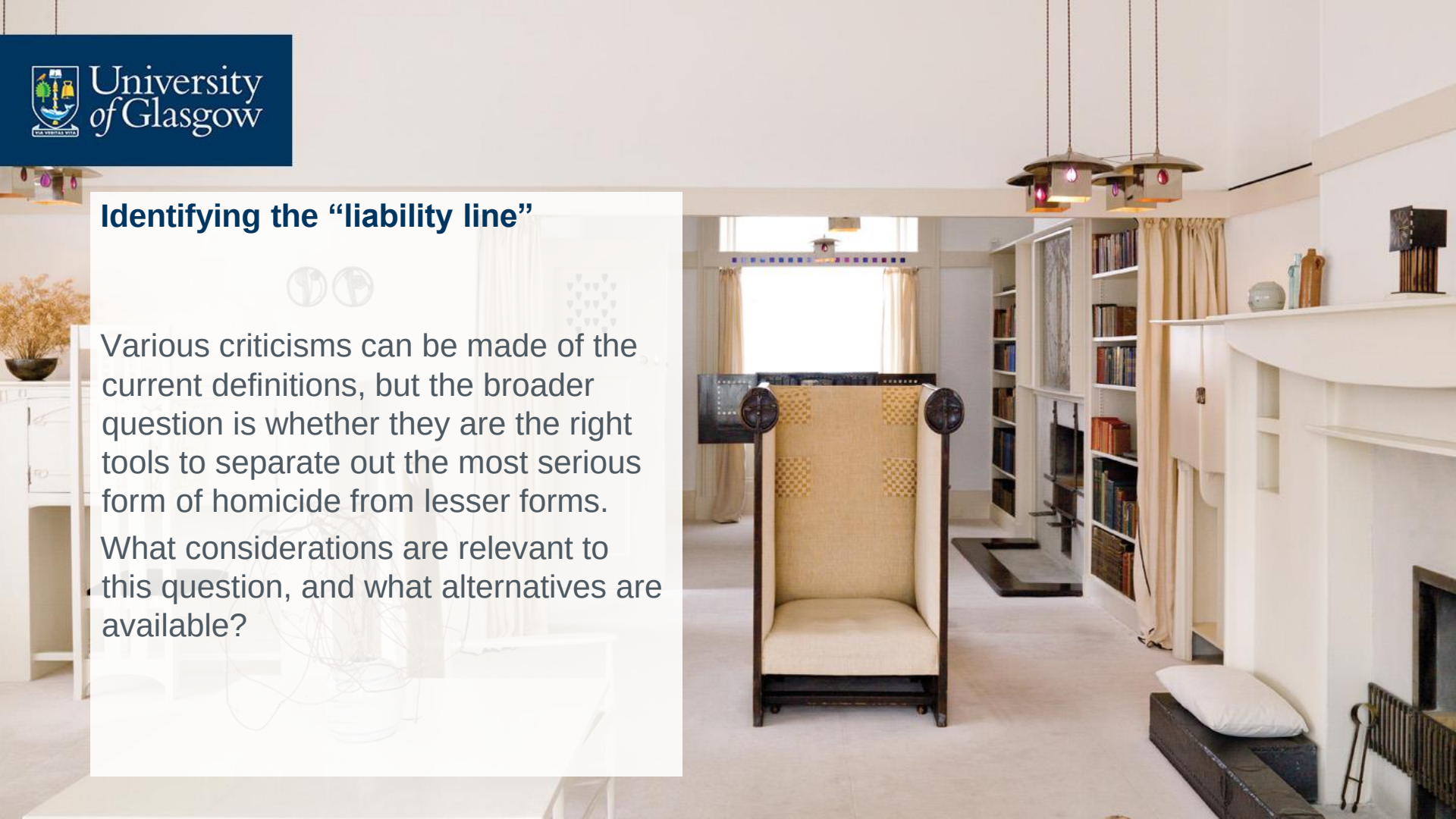
The second branch of the definition: wicked recklessness

What work is the word “wicked” doing here? Was the *Drury* court right to draw a parallel: “just as the recklessness has to be wicked so also must the intention be wicked”?

Is “wicked” simply a technical shorthand for three requirements, i.e. that the accused:

- intended to injure the victim
- acted in a manner that might have resulted in death
- did not care whether the victim lived or died

Are these requirements the right ones? Why is an intent to injure key? (Cf *Petto v HM Advocate* 2012 JC 105)



Identifying the “liability line”

Various criticisms can be made of the current definitions, but the broader question is whether they are the right tools to separate out the most serious form of homicide from lesser forms.

What considerations are relevant to this question, and what alternatives are available?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