

**HOW IS THE CULPABILITY WE ASSIGN TO RECKLESSNESS
BEST ACCOUNTED FOR IN CRIMINAL LAW?**

Joe Slater

**A Thesis Submitted for the Degree of MPhil
at the
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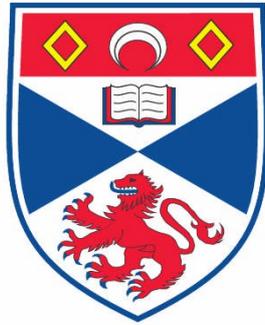
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How is the culpability we assign to recklessness best
accounted for in criminal law?

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This thesis is submitted in partial fulfilment for the degree of MPhil

at the

University of St Andrews

24th September 2013

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Abstract

In order to be properly applied, criminal law must determine what conduct warrants punitive action. Figuring out exactly how one must act to be criminally liable is a difficulty that faces any legal system. In many jurisdictions criminal recklessness is regarded as an important notion for liability. However, recklessness is difficult to define, and attempts at this exercise have been a problem in legal philosophy since the mid-twentieth century, and persist today (Crosby 2008). This thesis discusses accounts of recklessness with the aim of defining it in a way that overcomes several problems which have arisen in recent legal history. It is widely accepted, as well as *prima facie* intuitive, that people can be culpable for acts committed recklessly. Despite this, whether or not a state of mind is reckless is difficult to define, let alone define in a way that is not only conceptually sound, but also pragmatically apt.

Recklessness occurs when an agent engages in some risky activity, but factors like the agent's attitude and whether the risk is foreseen have been cited as relevant when ascertaining their recklessness. I discuss some difficulties in legally framing recklessness, before criticising some definitional manoeuvres made by judges and scholars in the past. With some problems in previous accounts noted, I consider the foundations of culpability in general. I suggest that two accounts of culpability – the agency theory and the choice theory – are both plausible, and each correlates to a prominent contemporary position on recklessness (and criminal law in general). After serious consideration of both positions, I conclude that the position advocated by Antony Duff, which I see as in keeping with the agency theory of culpability, is both more generally useful for criminal law and much more coherent with our everyday practices of blaming and punishing.

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I. Introduction

1. Introduction to recklessness in law

From the mid-twentieth century, there has been controversy in legal philosophy over how recklessness should be defined. It is generally acknowledged that a person who acts recklessly can be culpable for their crimes. One can be blameworthy for acting recklessly. Moreover, one can appropriately be punished for acting recklessly. However, without a sophisticated account of recklessness, this can be very problematic, as was demonstrated through a continuing saga played out in English law¹.

In the following, I will, for the most part, limit the discussion to the laws of the USA and England and Wales, though much of it will be applicable elsewhere. Just what level of culpability attaches to a particular act of wrongdoing, and what level of culpability should be required for conviction of a crime, are pertinent questions for any community. In the United States, the Model Penal Code (MPC) distinguishes four “kinds of culpability”²:

1. Purposely
2. Knowingly
3. Recklessly
4. Negligently

¹ By ‘English law’, I refer to the law of England and Wales, but only because I know of no handy nomenclature for ‘England and Wales’.

² Model Penal Code: §2.02. It should be noted that the MPC is not a binding legal document: it is, as its name indicates, only a model. It is seen only seen as a blueprint for legal framework in the US and has had, according to Dressler, more impact on the direction of American criminal law than any other document (Dressler 1995: p.120). It is also praised for giving legal distinctions a much greater clarity than had existed before its creation (Alexander and Ferzan 2009: p.24).

An offence committed purposely is one wherein the offence isn't merely an accepted consequence of the agent's behaviour, but actually what the agent is trying to do; the agent acts with the purpose of bringing about the illegal consequence. Offences knowingly committed, by contrast take place when an agent realises that his action is practically certain to bring about or involve an offence, but does it anyway. Consider two agents who take a shortcut across a neighbour's garden, in which there are many flowers and signposts informing of their fragility³. The first agent cuts across the garden because the neighbour annoys her and she wants to ruin his flowers. The second, realises that the flowers will be damaged, but walks across the garden because she is in a rush. Both cause the same damage, but the first does so purposefully, whereas the second does so merely knowingly.

Recklessness doesn't require an agent to be certain that a certain material element exists or will exist from their conduct. According to the MPC, it requires that the risk the agent disregards is "substantial and unjustifiable,"⁴ and this disregarding must involve "a gross deviation from the standard of conduct that a law-abiding person would observe"⁵. Recklessness is typically characterised as a willingness to take risks, while having some disregard for consequences of one's actions⁶. Some judges and authors on the subject have suggested that the legal definition tracks the everyday usage of the term, and it is merely the proper analysis of normal use that should guide the legal

3 Antony Duff provides an example similar to this in "Intention, Responsibility and Double Effect" (1982a: p.1).

4 Model Penal Code: §2.02 (c). Even this loose definition is criticised. Larry Alexander argues that the "substantial" factor is inappropriate, as an agent could be culpable and justly subject to legal punishment for taking a very small risk, particularly if it is a small risk of a great harm (Alexander 2011: p.226, Alexander and Ferzan 2009: pp.25-7). Kimberly Kessler Ferzan also criticises the requirement for *conscious* disregarding of the risk, as is discussed in chapter V (2001: p.598).

5 Baron (2001: 26, n.9) has suggested that the comparison of one's conduct to that of a "law-abiding person" is problematic, as it is uninformative at best. She expresses a preference for "reasonable person" in such cases.

6 As in *Cunningham* ([1957] All E.R. 412) "not caring what the result might be".

definition⁷. Negligence, in criminal law, takes place when an agent is not aware of some risk resulting from their conduct, but *should be* aware and the agent's "failure to perceive it...involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation"⁸.

With regard to the law in England and Wales, similar requirements were held to be necessary in *A Criminal Code for England and Wales* (henceforth *1989 Code*)⁹, holding that with the exception of certain specified offences ("pre-Code" offences), "every offence requires a fault element" (*1989 Code*, 20(1)). In the *1989 Code*, however, recklessness is the lowest degree of fault, not negligence, which (generally speaking) does not satisfy the fault requirement in English law. There are exceptions to this, some of which will be mentioned later. There is considerable debate about whether or not negligence should suffice for criminal culpability, or put differently, should satisfy the mens rea requirement.

The paradigm cases of most crimes fit the first or second categories, as the agent knows they are committing the crime. These are the most serious instances of the offences (Duff 1990: p.10). Whether there is a genuine moral difference in resulting blame between offences committed purposely and knowingly (those which are just foreseen) is a common discussion in ethics; the doctrine of double effect (as in the flower stomper case above, and many far more serious examples)¹⁰. Though those

7 For example, Lord Diplock describes 'recklessness' as an "ordinary English word" and treats it accordingly in *Caldwell* ([1982] A.C. 341) and White analyses ordinary concepts similarly (1961: p.594, 1985: p.106).

8 Model Penal Code §2.02 (d).

9 A codified document for criminal law was never established in England (though discussions about producing one continue), but having been produced originally by academic lawyers as the "1985 Draft Criminal Code for English Law" and published as *Codification of the Criminal Law (1985 Code)* and revised by the law commission for the *1989 Code*, it seems fair to suggest that it is (or at least was, at the time) a fair reflection of most criminal law in England and Wales.

10 The doctrine of double effect discussed both in relation to legal philosophy (as in Duff 1982a) and much wider moral questions (Kamm 1991 and many others).

committed purposely and knowingly are the most serious instances of offences, reckless behaviour also warrants censure. Whether or not an agent should be punished for negligent behaviour, when not aware of the risks she creates, is a divisive issue and will be discussed at length later.

That we deem reckless acts not only blameworthy but also deserving of criminal conviction can be demonstrated by considering examples of some serious offences with recklessness as the mens rea element.

The paradigm examples of rape and murder involve knowing that the victim is not consenting and knowing that the victim will be killed respectively. However, the man who has sex with a non-consenting woman, while unsure whether or not she consents not deeming it important to find out, but who continues anyway – who is reckless with regards to her consent – is still generally accepted to have committed a rape.

2. Three questions of recklessness

Before going any further, I would like to discuss three related questions relevant to discussions of recklessness. Sometimes in various literature (and case files), it is unclear which of these questions is being answered and it is far from clear that the answers to these questions are the same. The first question is of conceptual analysis. What does recklessness as a concept actually involve? As in the case of knowledge, where conceptual analysis has operated rigorously for many years, we may search for necessary and sufficient conditions for recklessness, or it may be deemed that finding a definition of that sort isn't possible¹¹. I will suggest that Lord Diplock sometimes seems to try to answer this question in his accounts of recklessness. Norrie also seems to ask this question when concluding that recklessness is indeterminate, and that there is no coherent concept that the law and surrounding literature suggests (Norrie 1992: p. 46)¹².

¹¹ As held in the case of knowledge by Zagzebski (1994).

The second question is what should suffice for criminal responsibility. This isn't necessarily linked to recklessness, but as recklessness is the default minimum requirement for criminal liability in the US, England and Scotland¹³, it often becomes relevant¹⁴. It is generally held that negligence should not be sufficient for an agent to be convicted of certain crimes, as there are worries that merely not paying enough attention isn't enough to make someone an arsonist or a rapist¹⁵. Where this boundary should be drawn is a critical question, as its answer will determine what separates an agent's conviction and acquittal.

The third question is how the law should best account for or define recklessness. This question is separate from the previous questions, as it doesn't presuppose that recklessness is the minimal requirement for one to be generally criminally responsible and it also allows for pragmatic concerns to be taken into consideration. Even if we did believe that recklessness was a concept we could formalise very accurately, it might be the case that applying this is too difficult in certain instances. The account might be too complicated for a jury to properly understand, let alone apply. Pragmatic concerns may lead us to adopt a specific legal definition, distinct from the type of account a philosopher may be disposed to give¹⁶. Alternatively, to properly judge whether

12 This is his reaction to Duff's analysis of recklessness. He suggests that when properly dissected, what seem to be the components of recklessness leave an incomplete and unworkable definition. He claims that the combination of subjective and objective elements it requires (to be discussed later) entail a "logical incoherence" (Norrie 1992: p.47). A similar position in epistemology is argued for by Matt Weiner (2009).

13 This is held true in the *1989 Code* (as well as its predecessor, a similar attempt in 1985).

14 As noted by David Treiman, recklessness "defines the minimal level of culpability for many crimes...thus making the difference between acquittal and conviction" (1981: p.285).

15 Duff notes a worry by Lord Edmund Davies that if negligence was sufficient for rape, a negligent man "could be a rapist *per incuriam*", and mere lack of care seems inappropriate as the fault element in such a severe crime (Duff 1981: p.52, discussing Lord Edmund's comments in *Morgan*, [1975] 2 W.L.R. 947.)

16 This difference of philosophical and legal interests resulting in different solutions is considered in part by Glanville Williams (1982: p.286).

someone has acted recklessly, it might be thought that a jury would need information about which an agent might not be forthcoming, or perhaps might no longer be properly aware of, so finding an agent to be reckless beyond reasonable doubt might seem to be too high an evidentiary burden.

I do not intend to address these questions specifically to begin with, but keeping these distinctions in mind will be useful. I shall return to the individual questions in the later chapters, intending to consider whether significantly different solutions do seem appropriate and whether some authors on the subject have allowed the different questions to affect their solutions.

3. Importance of mens rea elements and their definitions

If it is accepted that recklessness suffices for criminal culpability with regards to (at least) some offences, it might be wondered why the boundary between acts committed knowingly and recklessly is so important, if both are culpable anyway. One might even question why the mens rea should be relevant at all. One might query the relevance of the state of mind of an agent.

After all, the gunshot victim won't recover any more quickly (or be more likely to survive) if the shooter had only hit them by accident. In this section, the relevance of mens rea elements will be discussed and it will be suggested that different mens rea elements may warrant different punitive action.

There are some crimes in English law the convictions of which do not require proof of a mens rea element; the state of mind doesn't matter for the offence to be established. An offence which doesn't need proof of mens rea is called a strict liability offence¹⁷. A strict liability offence doesn't even require negligence on the part of the agent; they can have done everything one could reasonably expect to prevent the consequence and would still be guilty of the offence (Duff 2006: p.101). In English law there are a few

¹⁷ This is sometimes referred to as "absolute liability" (Turner 1936, Hart 2008).

strict liability offences, including the sale of adulterated milk (Sale of Food and Drugs Act 1875) and anyone over the age of 18 having sex with anyone under 13 (Sexual Offences Act 2003, s.9)¹⁸. Why then, should all offences not be treated in this way?

The view that only the actual damages or harms brought about should matter has an obvious counterpart. A similar argument can be made as to whether the harm matters at all. If a person fires a rifle several times into a room with several people in, but, through complete fluke doesn't hurt anyone, he is clearly guilty of risking the lives of everyone in that room. It would seem bizarre to suggest that the fortunate end-result of no one being injured should completely exonerate him. His firing the rifle seems morally equivalent whether or not he is lucky enough to miss the potential victims¹⁹. Here, we might suggest that the action that should be punished is that of putting everyone in the room in danger, which obviously did take place.

One principle that guides criminal law is that of '*actus non facit reum nisi mens sit rea*', that "an act is not guilty unless the mind is also guilty" (Duff 1990: p.8). In support of this maxim, the general purposes of criminal law might be considered. One major purpose of criminal law is preventative, either merely as a deterrent or via the imprisonment of those deemed likely to commit crimes²⁰. This very reason is cited in the MPC (§1.01).

Despite this principle, there are arguments for imposing strict liability upon some actions²¹. For my purposes, however, let it just be accepted that in *most* cases there should be a mens rea requirement. As Duff notes, "it is surely unjust to hold someone

18 This was adopted in the 2003 Act. Before this, the 1956 Act held strict liability for men over the age of 24 having sex with women under the age of 16.

19 This seems to be the consensus from theorists in such cases (i.e. Brady 1980: p.246).

20 Ferzan and Alexander claim this is the only function of criminal law (2009: p.3)

21 Ken Simons makes arguments along these lines in "When is Strict Liability Just?" (1997)

strictly liable for a criminal act he did not commit intentionally, recklessly or negligently” (Duff 1990: p.9).

Taking for granted now that mens rea elements are important when assessing culpability, it could still be doubted whether an act committed knowingly is more culpable than one committed recklessly, or whether one committed recklessly is more culpable than one committed negligently. Prima facie, it does seem plausible that crimes committed with an awareness of the risk involved are more blameworthy than those without. Consider someone throwing knives for fun, and one ricocheting and injuring someone. If the very same injury was caused by a deliberate attempt to injure the victim, it seems intuitive that this is a more serious and culpable crime.

One argument in favour of the degrees of culpability suggested by the MPC is given by Hyman Gross. He claims that culpability consists of four dimensions; intentionality, harm, dangerousness and legitimacy (Gross 1979: p.77). The degree of culpability might be seen as a function of these dimensions²². Gross understands the dangerousness of act in relation to “reasonable expectations” of what the actor “knows or should know about the consequences of what he does” (1979: p.79). In this respect, culpability tracks dangerousness. Gross refers to offences which “leave nothing of the harmful outcome to chance” – those committed purposefully or knowingly – as *imminently dangerous* (1979: p.85). Reckless behaviour is less dangerous, because it leaves open at least *some* chance that the harm will not obtain. As it is less dangerous, it is less culpable.

It also seems to be notable that someone who harms another recklessly may have withdrawn were they informed of the actual result just before they did so. Though they may have acted without regard for the consequences, perhaps – if the negative consequences had been made blatantly apparent, the agent would have desisted. This being the case, if we are to examine culpability on a basis of danger towards general society, it seems obvious that the person prevented from the dangerous act by some clear warning is much less dangerous than the one who would go along with it regardless.

²² Alexander and Ferzan (2009) treat culpability as a function in a similar way, but with only two components: the risk imposed and justification for the risk. This account of culpability is discussed at length in chapter V.

II. History of recklessness in Law

In this section, the history of recklessness in English law will be considered. The focal point of the debate for legal philosophers in recent years has been two particular accounts which have developed, which have framed the debate. Issues regarding the earlier formulations of ‘recklessness’ resulted in the first comprehensive accounts. Thus, understanding the context, and thereby knowing what problems legislators sought to avoid, is important to evaluating the accounts.

1. Early thoughts on Recklessness

For a long time, the term “reckless” was used in English courts without any explicit definition. However, throughout much of its earlier history, the word was not always used in such a way as to imply fault or culpability. For instance, one early example takes place in 1874. Henry Pembliton, a man who had been fighting with some persons in the street outside a pub threw a stone with the intention of hitting one of them. However, he missed, hitting and breaking a window of a pub he had earlier frequented. Pembliton was accused of “unlawfully and maliciously” causing the damage under the Malicious Injury to Property Act²³. He was acquitted on the grounds that he was unaware of the likelihood of breaking the window. His being “reckless whether he did it or not” and “reckless of the consequence of his act” was seen to exculpate him. At this time “malice” was required for crimes of this kind, and being merely reckless was thought to preclude that.

Part of this older meaning is retained in the current use of the word, specifically the lack of knowledge of the consequences. Reckless behaviour concerns actions where there is a risk of some eventuality, but no knowledge, as the eventuality is not certain to obtain. In *Pembliton*, it was judged that as Pembliton had no intent to damage the

23 *The Queen v Pembliton* [1874], L.L. 2, C.C.R.119

window, he could not have “unlawfully and maliciously” broken it. Judge Blackburn argued that it was “impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do”. One might have thought that his intent – to hit people with stones – was malicious anyway, so his action *was* malicious. Throwing stones with the intention of hitting people (absent any mitigating circumstances) is obviously blameworthy. Though not articulated in the case, this is an instance of the ‘doctrine of transferred malice’, which holds that if someone “causes injury to a person or property other than the person or property which he intended to attack, he is guilty of a crime of the same degree as if he had achieved his object”²⁴, but the doctrine holds only when the harm done is of the *same kind* as the harm intended. As Pembrilton intended to hurt people with a stone, not damage property, the intent is seen as non-transferrable. If, however, he had hit some other *people* with the stone, this is of the same *kind* of harm, and the prosecution would have held. Because this case captures one intention – to hit people with a stone – and results in an unforeseen harm of a different kind – the breaking of a window – this case has gone on to be cited in several important cases of recklessness, notably *Cunningham* and *R v G*, which will be mentioned shortly.

Later in the nineteenth century, a more familiar usage of the term “reckless”, as well as suggestions towards a definition were mooted in the context of an alleged fraud case. Without an explicit definition, or restricted sense of the word defined in legislation, judges (and jurors) have to consider the ordinary English meanings of such terms²⁵. Thus, when concepts such as recklessness appear in legislation without any specific or restricted definition, it is up to judges to engage in conceptual analysis of the terms. *Derry v Peek*²⁶ involves a discussion about recklessness in speech.

²⁴ *Archbold 2013 Edition*, Chapter 17, Section I. E.

²⁵ This is expressed explicitly by Justice Donovan in *R v Bates* [1952] Cr. App. R. 175, though Glanville Williams made clear that he thought an established legal precedent for the term was already in place (1953: p.234)

²⁶ *Derry v Peek* [1889] App.Cas.487

Derry and his associates ran a tramway company. A recent act allowed tram companies that had been given the consent of the Board of Trade to move their carriages with steam power as well as merely by animal power. Derry and his colleagues assumed that such permission would be easily acquired, and published prospectuses for their company, with the aim of selling shares. The prospectuses indicated that the company would be able to use steam power for their carriages. William Peek bought shares based on this. However, the company did not get consent, and was later wound up. Peek accused Derry and his associates of fraud. The facts of the case were not in dispute: Derry and his associates believed, though with no good reason, that they would get consent to use steam power.

Fraud was defined as having occurred when a false representation had been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. This begins to suggest a definition at recklessness, but even this is very ambiguous. One interpretation of (3) is that the agent is careless about the truth of the claim, that Derry didn't care whether or not (or did not take care that) what was published in the prospectus was true. A second interpretation is that the agent's beliefs of something's truth or falsity have been formed in a careless way. The Lords opted for the first of these interpretations. Lords Bramwell and Herschell both challenge the equivocation of statements which are made "recklessly, without care whether it be true or false" and those made "without any reasonable ground for believing it to be true"²⁷. The latter may be honest mistakes, whereas the former betrays an attitude of indifference to the consequence, namely whether or not the audience believes something true. As Derry and his associates were judged to be merely careless in forming beliefs without reasonable ground, not deliberately deceiving or risking deception, they were found innocent of fraud.

Although this case focusses on representation, elements can be extrapolated into the general topic of recklessness. To be fraudulent recklessly, it is suggested that one must take some sort of risk (such as that of giving a false representation) and display an indifference or carelessness to some material element (such as another's beliefs).

27 [1889] App.Cas.487, p.350,361.

2. *Cunningham* Recklessness

In discussions of English law in recent years, two particular accounts of recklessness have received significant attention. The first of these is ‘Cunningham recklessness’. This arose from the case *R v Cunningham* in 1957²⁸, wherein a man disconnected and stole a gas meter for the money inside. The gas meter was located in the cellar of a house belonging to his future mother-in-law, but was vacant at the time. In stealing the gas meter, Roy Cunningham released a dangerous amount of gas into the residence, as well as the adjoining residence. The residences were formerly one house which had been ‘roughly’ converted into two, separated by a ‘honeycomb wall’, which it was obvious the gas could penetrate. Cunningham knew that an elderly lady and her husband lived in the adjoining residence. There was a stop tap next to the gas meter, but Cunningham did not turn it off. As a result the gas percolated through the house and “partially asphyxiated” the elderly woman next door endangering her life.

Cunningham was charged with larceny of the gas meter and its contents, which he admitted to, and was sentenced to six months imprisonment. He was also charged with the more serious charge under the Offences Against the Person Act of 1861²⁹ of “maliciously administering poison...so as to endanger life or inflict grievous bodily harm”. At trial, the jury was instructed that “malicious” was to be interpreted as acting “wickedly”, doing “something which he has no business to do and perfectly well knows it”. Cunningham was convicted, but an appeal against this was made on the grounds that the jury were misdirected as to the meaning of “malicious”.

The major claim was that for one to act “maliciously”, a certain mens rea would be necessary, and merely doing something he had “no business to do and he perfectly well

28 [1957] All ER 412.

29 Offences against the Person Act 1861, s.23: “Whoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony”. This law is still in force today.

knows it” fails to suffice. It could be agreed that he had no business in stealing the gas meter without having maliciously causing the neighbour to be exposed to the gas. If, for instance, he thought the neighbour was out, or that the wall wouldn’t let the gas seep through, he certainly wouldn’t seem to have exposed her to gas maliciously. In defence of Cunningham, his lawyer appealed to Professor C.S. Kenny, who had argued that “malice must not be taken in the old sense of wickedness in general, but as requiring either (1) an actual intention to do the particular type of harm that was done; or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular harm might be done and has yet gone on to take the risk of it).”

Applying the verdict of *Pembliton*, that a lack of foresight of the type of harm caused exculpates one of a charge of malice, it was ruled that the trial judge had erred, and an appeal was granted. It was decided that the jury should have been instructed that Cunningham would have acted maliciously only if he “foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it.”

This entrenched Kenny’s definition into law. *Cunningham* recklessness can be defined as acting without intent to cause harm, but with the awareness that the action may cause such harm.

3. Expanding and clarifying *Cunningham* recklessness

The above suggestion from Kenny which forms the foundation of *Cunningham* recklessness obviously leaves a lot open and without additional provisions would be wildly unacceptable. For instance, it would apply to justified risks. A surgeon may well embark upon a dangerous surgery with a very high mortality rate to try to save a dying patient, but doing so does not make them reckless. Appropriately, from *Cunningham* a more sophisticated account of recklessness developed. During the 1970s this became the orthodox view (Duff 1990: p. 144). As described in *1989 Code*, a person acts “‘recklessly’ with respect to -

- i) A circumstance when he is aware of a risk that it exists or will exist.

- ii) A result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk.”

(1989 Code: (cl.18(c)))

There are several features of this account which warrant attention. Primarily, there is the subjective awareness of risk, as featured in *Cunningham*. Whereas crimes committed purposefully or knowingly require certainty (or practical certainty) that an effect will be brought about by one’s actions, for recklessness one need only be aware that the effect *might* be a result.

Secondly, although this is the orthodox *subjectivist* account, it contains elements, which are nonetheless *objective*. The reasonableness of the risk, even in this orthodox subjectivist view, was held to be objective. This has to be the case, as otherwise any agent accused of recklessness could claim that they thought the risk was reasonable. As people may have wildly different values, a person who recklessly endangers another’s life, for example, by shooting errantly while hunting, may even believe that their risk was reasonable, just because they enjoy hunting so much. A reasonable person, however, is likely to think otherwise. It isn’t merely the degree of risk taken by an agent that determines whether it was reasonable either. It is important to take into account what the agent hopes to gain by taking that risk, and making an overall decision based on the entirety of the situation. Courts must “balance the seriousness of the risk against the gravity of the harm” (Elliott 2004: p.32). An agent who drives recklessly fast³⁰ so she can get to the shops before they close, is likely to be deemed unreasonable. However, if the agent is driving in the same manner because of a passenger undergoing a medical emergency and desperately needing to get to a hospital, it may well be reasonable.

Another notable feature of the orthodox subjectivist account is that it doesn’t require that an agent be indifferent to the consequences (Duff 1990: p.143). An agent who unreasonably risks hitting bystanders with rubbish she throws over a wall may be indifferent to that risk, or she may hope she misses any bystanders. Either way, under

30 “Reckless driving” is no longer a crime in the UK, having been replaced by more specific car-specific laws, but I think this point still holds, and illustrates the point nicely.

this account, the act is reckless. The attitude of an agent is seen as irrelevant. An agent can only be held culpable for what she *chooses*.

4. Issues in *Cunningham* recklessness

There are several criticisms and difficulties that arise with *Cunningham* recklessness.

A major feature of *Cunningham* recklessness is that the definition is subjective; it relies on the foresight of risk of the particular agent. Consequently, it fails to attach culpability to any agent who simply doesn't think about the risks of their actions (Crosby 2008: p.314). Some argue that the law would be justified in not requiring the foresight of risk, particularly for more serious harms, so as to impose the duties upon citizens to ensure that they don't commit such crimes (Campbell and Ashworth 1991: p.191). If someone were to cultivate their character such that they didn't consider risks and acted dangerously to themselves and others around them, this would certainly be characterised as reckless, yet this account fails to capture that. This also has the practical consequence that anyone accused of a crime committed recklessly could deny (often plausibly) that they noticed any such risk.

It appears to be a difficulty for *Cunningham* recklessness that a rash act of violence with no thought of the consequences, something that typically would be seen as reckless, might fail to count as reckless. Without any foresight of risk, one cannot be reckless. Duff illustrates an example from Scottish law. In *Miller and Denovan*, two young men commit a robbery, and in the process of doing so, Mr Miller hit a man with a piece of wood so hard that the man later died (Duff 1990: p.157). It was later argued that while hitting the victim with the wood, Mr Miller wasn't thinking at all about any potential risks of his behaviour. If this was in fact the case, and foresight of risk is required – as in *Cunningham* recklessness – Mr Miller would not have been reckless in his action. If a lack of foresight proves an obstacle to a verdict of this type under *Cunningham* recklessness, this needs some justification.

One related problem for *Cunningham* recklessness comes about when we consider self-induced intoxication. If a person is only held liable for committing a crime recklessly if they have an awareness of the risks of their conduct, someone who is blind drunk and thus incapable of acknowledging any such risk becomes exempt from prosecution. In *The Nicomachean Ethics*, Aristotle discussed the position that crimes committed by a drunken people should result in increased punishments, as it would be more expedient (*The Nicomachean Ethics*: Book 3, chap.5, 1113b.32). We might not agree with this, but ordinarily we would blame a drunken person and suppose them to be liable for their actions. It was a scenario such as this that gave the courts reason to acknowledge another form of recklessness.

5. *Caldwell* recklessness

‘Caldwell recklessness’ arose from a 1982 case³¹. James Caldwell had “a grievance” with his employer, who was the proprietor of a hotel. One night, Caldwell got very drunk and in the early hours of the morning he decided to get revenge by setting fire to the hotel. He started a fire on the ground floor of the building, where there were ten guests staying that night. The fire was put out before any serious damage was done and nobody was harmed.

Caldwell faced two counts of arson under the 1971 Criminal Damage Act. The first count, which Caldwell pleaded guilty to, was of destroying or damaging property³². The second charge was of “intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered.” Caldwell denied that he intended to endanger any lives or was reckless about endangering them, claiming he was so drunk that the thought that there were

31 *R v Caldwell* [1982] A.C.341

32 Criminal Damage Act 1971: c.48 (1)(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.”

people in the hotel whose lives may be endangered “had never crossed his mind”³³. Arguments of this sort are also extremely problematic in certain cases of rape, wherein the accused claims that the possibility of a lack of consent hadn’t even crossed their mind.

It was unclear in English law at the time whether a crime like this permitted self-induced intoxication to constitute part of a defence³⁴. Laws in several other countries allowed an appropriate state of mind for any given crime to be imputed to persons who had committed them while intoxicated³⁵. In Scotland, a defendant cannot claim to be too intoxicated to satisfy the required mens rea element, as the intoxication itself counts as a “continuing element and therefore an integral part of any crime”³⁶. With no such exceptions qualified in English law, the standard tests for intending or being reckless applied. At the time, it seemed this would be *Cunningham* recklessness, but Lord Diplock, objected to that account.

Diplock argued, against *Cunningham* recklessness, that it was overly complicated for juries to consider. It required, he supposed, “meticulous analysis...of the thoughts that passed” in the mind of the defendant (pp.351-2). Diplock claimed there was a “narrow dividing line”, and that a jury would need to perceive which side of this line the defendant’s mind was in. According to *Cunningham*, if an agent briefly considered a risk, but because “his mind was affected by rage or excitement or confused by drink”, he didn’t realise the severity of the risk or trusted “that good luck would prevent its happening”, they would be found guilty. However, if for the exact same reasons the agent didn’t consider the risk at all, they would escape conviction. Lord Diplock viewed

33 [1982]A.C.343

34 It was unclear whether or not the *Majewski* verdict ([1977] A.C.443) was applicable in this case. *Majewski* will be discussed later.

35 In *Caldwell* (p.345-6) the law in Scotland is cited as not allowing “self-induced intoxication as a defence to a criminal charge.”

36 [1977] J.C.38, *Brennan v H.M. Advocate*.

neither of these situations as less blameworthy than the other and thought it would fail to be a “practicable distinction” for juries.

Diplock revisited Kenny’s comments on recklessness. Though Diplock lauded Kenny’s comments and *Cunningham* recklessness was based on such comments, Diplock suggested that those comments had been misinterpreted. He considered the requirement of “recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular harm might be done and has yet gone on to take the risk of it)”, which was contained in Kenny’s discussion of what was required for malice. Diplock thought that “recklessness” covered “a whole range of states of mind from failing to give any thought at all to whether or not there is any risk...to recognising the existence of the risk and nevertheless going on to ignore it”. He interpreted Professor Kenny’s passage as saying that a “particular species within the genus reckless states of mind” would constitute malice, and that this species was that specified in the parentheses (p.351). For Diplock then, the description in the parentheses should not be interpreted as an account of recklessness, but merely as an example of when recklessness can constitute legally malicious actions.

As this particular “species” of recklessness was that deemed necessary for malice, the precedent it set was inapplicable to the Criminal Damage Act, which does not use the technical legal expression “malicious”. Lord Diplock then proceeded to provide his own interpretation of what recklessness meant. For this, he insisted that the correct interpretation was based on “recklessness” as an “ordinary English word”.

He suggests, with regard to criminal damage, the meaning of “reckless” requires of an agent that:

- (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and
- (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.

(*Caldwell*: p.354)

This account aims to avoid any defence based upon self-induced intoxication. If, because of rage or excitement or drink, an agent failed to notice an obvious risk, thus didn't give any thought to such risk, they could still be convicted. This allowed Diplock's contention that this type of person was just as blameworthy as the person who had noticed but not appreciated the risk to be reflected in law. Crucially, Diplock's formulation accounts for agents deliberately closing their minds to a risk they may be creating. If the risk is "obvious", they will be liable. The "obvious risk" also seems to apply to rash acts of violence. The risk of such acts would be obvious, so would fall into Diplock's definition.

This redresses three of the difficulties (self-induced intoxication preventing one seeing risk, closing one's mind to risk and impulsive acts of violence) of *Cunningham* recklessness noted above.

6. Clarifying *Caldwell*

A major difficulty that became apparent in *Caldwell* recklessness was that the first clause made reference to the agent creating an "obvious risk", without stipulating how the 'obviousness' of a risk was to be determined. It was made clear in the verdict that "obvious" didn't mean obvious to the person accused at the time of the crime; that would collapse immediately into foresight of the risk.

There are two candidate interpretations of the 'obvious risk'. Either it is to be evaluated in "conditionally subjective terms", or from a reasonable person standpoint (Duff 1990: p.146, G. Williams 1981: pp.267-8, 1988: p.86). The former interpretation holds that the risk would have been obvious to the accused if she had given any thought to the matter. If we imagine that (quite plausibly) James Caldwell didn't notice the risk to those in the hotel, but would have noticed such a risk if he not been drunk, he would then be found reckless. This would still hold culpable the agents Lord Diplock wanted, namely those who failed to consider risk because of rage, excitement or intoxication.

A difficulty here lies determining just how much an agent might need to think to notice an obvious risk. If the condition we are holding them to is that of using all the knowledge they have to an optimal level, this would become a very strict account. This is clearly not intended, but the extent an agent would have to think in order to notice a risk for that risk to be obvious is unclear. Duff criticises the use of this interpretation for these reasons, suggesting that it would erode the distinction between recklessness and negligence (Duff 1982b: p.281). If the condition an agent is compared to is one wherein they would recognise all the factors they *should* recognise this problem becomes apparent. If one should notice all the obvious risks, but for some reason, like drunkenness, grossly deviates from this, a conditional subjective account of recklessness might find them reckless. Ordinarily, however, not noticing some risk that one should notice would class as negligence. The alternative is to accept as ‘obvious’ what would have been obvious to a person meeting some objective awareness standard; that of a reasonable person³⁷, an “ordinary prudent individual”³⁸.

Glanville Williams argues that Diplock actually intended the conditionally subjective interpretation, and favouring this interpretation (1988: p.85, n.23), Williams provides a very interesting example which illustrates its difference to the ordinary person test (1981:p.269). The defendant, Pike³⁹, had an unusual desire to have sex with unconscious women. To satisfy this desire, he sought and got permission from women to be anaesthetised. The women knowingly consented to allowing him to anaesthetise them and have sex with them. Pike would perform this by administering carbon tetrachloride (a readily available household item that carried with it no warning labels).

37 This interpretation receives non-explicit endorsement from Diplock in *Caldwell*. He suggests that considering recklessness does “call for some consideration of how the mind of an ordinary prudent individual would have reacted” (p.354).

38 This apparent equivocation between the “reasonable” person and the “ordinary, prudent” person is certainly possible to challenge, as Baron does in “The Standard of the Reasonable Person” (2011: p.28). This, however, was a commonplace interpretation; Glanville Williams (1981) and Duff (1982b) both take this reading. The potential difference in viability of the theory under these interpretations will be discussed later.

39 [1961] Crim. L.R.547.

He did this several times with no problems resulting, until the final occasion, in which the woman in question died. On the conditionally subjective interpretation, he would not be acting recklessly, as even if the defendant had thought about it he would not have noticed a risk. On the reasonable person interpretation, however, this must be deemed reckless, as reasonable people would deem knocking a person unconscious a risky behaviour. Williams thought that putting controls upon the sales of such goods and having warning labels on them was a better way to protect the public against such risks than punishing someone like Pike. If such a warning label was in place, a subjective conditional test would also find such a person reckless, should they continue to act in such a way.

The question of which interpretation of ‘obvious’ applied was settled in *Elliott v C*⁴⁰. The defendant, a 14-year old girl of low intelligence had been out with a 16 year old friend and had hoped to spend the night at that friend’s house. After she was not allowed to spend the night at the friend’s house, the girl did not go home, but stayed out all night. At around 5am, the girl entered a garden shed for shelter. Among the contents of the shed were a bottle of white spirit and some matches. While playing with the contents of the shed, the girl burned down the shed. It was found by the judges that the minor had no appreciation of how flammable the spirit was, or of the risk she was creating.

In this case it was explicitly considered whether the law had determined how to interpret an “obvious risk”: whether a risk should be obvious to “a reasonably prudent man” or “the particular defendant if he or she had given thought to it” ([1983]1 W.L.R. p. 945). It was held that the “reasonably prudent person” test should determine whether a risk is obvious, so although the minor would not have recognised a risk even if she had considered it, she was found guilty of arson. Though there was no way she could have recognised the risk she created, she was found guilty of being reckless as to creating that risk.

40 [1983] 1 W.L.R.939.

7. Issues with *Caldwell* recklessness and its demise

The objective test for “obvious risks” soon proved to have disturbing implication. In *Elliott v C*, for instance, Judge Glidewell found himself forced by precedent to arrive at the guilty verdict, but didn’t think it was the correct one. The implication of this verdict meant that even those of diminished capacity – a sleep deprived minor of low intelligence – would face the objectivity of the reasonable person standpoint. Worries of this nature might be quelled by the availability of diminished capacity defences, allowing special defences against prosecution in some circumstances for those who would be unable to fully comprehend what they were doing. Despite this, the threat of punishment for those with diminished capacities or minors for not noticing “obvious risks” (as evaluated under the ordinary person test) was a source of major criticism for *Caldwell* recklessness. I will return to this issue later.

The disjunction in the second clause of the *Caldwell* account finds someone reckless if *either* she “has not given any thought to the possibility of there being any such risk *or* has recognised that there was some risk involved and has nonetheless gone on to do it”. There is clearly a gap here for those who consider a risk, but deem that there isn’t one. We might imagine that Cunningham thought about his neighbour’s safety, but then remembered (or misremembered) that she had gone on holiday, so would be in no danger. He then would have thought about the possibility of the risk, but not recognised that there *actually was* a risk, and thus not be reckless. Diplock obviously intended to exculpate those who genuinely considered a risk and through a genuine mistake thought either that there was no risk or that they had taken steps to eliminate the risk⁴¹.

One case where this defence was attempted is *Shimmen*⁴². In this case a man with martial arts training tried to show off some of his skills to a group of friends. He decided he would demonstrate his control by kicking very close to a window, but not touching it. It was argued that he realised some risk, so instead of aiming to miss the window by

⁴¹ If he hadn’t, the second clause of the *Caldwell* account would be entirely redundant.

⁴² Chief Constable of Avon and Somerset v Shimmen [1987] 84 Cr. App. R.7

2mm, as he would often do with such exercises, he aimed 2cm away instead to eliminate the risk. Despite this adjustment, he still hit the window and broke it, causing £495 worth of damage and was charged under the Criminal Damage Act. It was eventually decided that Shimmen was aware of *some* risk, and that he clearly hadn't removed all risk, which could easily have been done by not kicking near the window. If Shimmen genuinely had thought there was no risk in the first place, or that his adjustment had removed all risk, the *Caldwell* verdict must seemingly exculpate him, which seems undesirable.

A similar problem that results from *Caldwell* recklessness is that it lends itself to several loopholes. An agent who sees an obvious risk that would result from some action, but unreasonably disregards it as negligible, before carrying it out, would still be exculpated. In the instance of agents who regard a risk as negligible because of self-induced intoxication, it is hard to imagine that Lord Diplock would have intended to exonerate them. We can imagine a modified version of the *Caldwell* case, wherein James Caldwell did consider the risk to others, but ruled out the risk for a bad reason. Perhaps we might imagine he thought about dangers to people in the hotel, but thought everyone would be home at 3am, so there would be no danger. Presumably such agents would be blameworthy to a similar degree as a person not noticing a risk because of drink, or one who has noticed it but because of a drink-induced optimism trusts that good luck would prevent it.

The application of the reasonable person test for obviousness of risk also arrives at peculiar verdicts in some cases where an agent has specialist knowledge. If someone has specialist knowledge which makes them aware of a risk that would ensue because of some action, the risk would not be an "obvious risk". This could allow situations of educated people taking particular obscure risks at their will. There doesn't seem to be any viable reason why an agent taking a risk which would not be apparent to the majority of people could not be reckless in doing so, yet the *Caldwell* judgment, when interpreted this way, doesn't allow for this.

In 2004, over twenty years after it was implemented, the *Caldwell* account of recklessness was eliminated entirely from English law, leaving the *Cunningham* direction to be relied upon. It was a case similar to *Elliott v C* that finally forced the

change⁴³. Two boys, aged 11 and 12 had gone camping without their parents' permission and started a fire underneath a plastic wheelie bin, not realising that the fire would spread. There was, it was found, an obvious risk of the fire spreading, but not one that the boys had noticed, or would have noticed even if they had thought about it. The resulting fire caused £1 million of damage. Lord Bingham argued that a "conviction of a serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another, but also that his state of mind when so acting was culpable"⁴⁴. Though the lords considered refinements to make the account more palatable⁴⁵, they ultimately decided to dispatch of the entire objectivist notion. Lord Rodger cited the significant academic criticism, particularly that of Glanville Williams, and the clear preference (among legal philosophers and judges⁴⁶) for a subjectivist notion of recklessness, as giving reasons to return to a *Cunningham* account of recklessness.

Though the House of Lords thought that *Caldwell* recklessness was so flawed that it must be entirely abandoned, we can ask whether or not there was something to be salvaged from the objectivist account. This will be discussed in the following section.

43 R v G [2003] UKHL 50; [2004] 1 A.C.1034.

44 R v G, [32]

45 Ibid [62]

46 This preference from judges is discussed in Elliott 2004 (p.31).

III. Problems of *Cunningham* and *Caldwell* Recklessness

In this chapter I shall provide three types of cases that pose particular problems for the *Cunningham* and *Caldwell* accounts of recklessness and also comment on some difficulties relating to the reasonable person standard. I shall then suggest that a general consideration of culpability is required in order to uncover the best way to deal with these issues.

1. Bind-drunk cases

Cunningham recklessness, as depicted, has no way to deal with cases wherein an agent has become so intoxicated he has failed to appreciate a clear risk. It is possible to have a clause, like in Scots law, which removes intoxication as a defence. This can be done in several ways. One possibility is allowing *intoxication* to class as a separate mens rea (R. Williams 2013 p.266). In addition to purpose, knowledge, recklessness and negligence, intoxication would be an available mens rea category. Alternatively, the intoxicated agent could simply not be permitted to provide any evidence of intoxication in his defence⁴⁷. A third option is asking the jury to decide whether or not the accused would have noticed the risks of their behaviour had they been sober (R. Williams 2013: p.268). Rebecca Williams criticises these manoeuvres, arguing that they “punish intoxication itself” (2013: p.267).

More pressingly (philosophically), such account fails to acknowledge what *makes* the agent culpable for their crimes while drunk. If a mens rea is required in order to find

⁴⁷ Rebecca Williams says this avenue must not be taken because of s.8 of The Criminal Justice Act, which holds that:

“A court or jury, in determining whether a person has committed an offence,—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reasons only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

someone culpable, this solution seems to fail. Rather than address a culpable mental state, it requires that a hypothetical mental condition of the agent is considered.

One attempt to amend English law to suitably deal with intoxicated offenders resulted from *Majewski*⁴⁸. Majewski, after taking a combination of drink and drugs, became extremely violent in a public house. After his arrest, he attacked several police officers. He was charged with occasioning bodily harm and assaulting a police officer. Majewski's representatives argued that all crimes other than those of strict liability require intent on behalf of the accused, and that as Majewski was unable to form any intent because of the combination of drink and drugs in his system, he should be exculpated.

The verdict in *Majewski* was that a distinction was to be made between crimes of *basic intent* and crimes also requiring *specific intent*⁴⁹. Most crimes, it was decided, only require a basic intent, which could be satisfied even by the extremely intoxicated. Hitting someone (deliberately) would satisfy the basic intent required for assault, and this could be conducted even when blind-drunk. Crimes of specific intent, however, are generally distinguished by involving some future intention, as well as aware of statutory attendant circumstances (Dressler 1995: §10.06). Larceny, for example, would require the knowledge of the attendant circumstances (that the items taken belonged to someone else) and the intention to deprive the owner of their possessions (to steal). Murder is also an offense of specific intent – to deprive the victim of their life – so could be challenged if the defendant was so drunk they didn't realise what they were doing (as was the case in *Beard*, where a manslaughter verdict was substituted⁵⁰). Even in cases like this it would need to be demonstrated that the accused actually didn't satisfy the mens rea requirement; a jury would need to be convinced that they didn't have the intent required for the specific crime.

48 [1977] A.C.443

49 Basic intent is also sometimes referred to as "general intent" (Dressler 1995: §10.06).

50 [1920] A.C.479

Turner claims that “certain cases of insanity, infancy and drunkenness” make available the same defence as in cases of involuntary action, as when one is hypnotised, or physically moved by another person (Turner 1936: p.37). Though we would probably be sympathetic to many cases of offences committed by infants or the insane, it is unclear what circumstances should exculpate a drunken offender. It is certainly plausible that one may be incapable of truly attempting some crimes because of intoxication, so any constraint on possible defences because of intoxication must be carefully applied. However, it is unclear what marks the distinction, let alone whether it is properly captured by the basic/specific intent.

Cunningham recklessness could be supplemented with additional stipulations, such as *Majewski*, which could allow blind-drunken offenders to be deemed reckless, but without an understanding of what makes the agent reckless, this lacks justification. It is also unclear whether such a stipulation would apply to all and only those culpable (or a close approximation). While *Cunningham* struggles to provide verdicts of recklessness against those who are intoxicated, *Caldwell* seems to suffer the opposite problem. If Turner was correct that in some cases drunkenness should provide a similar defence as insanity or infancy, the *Caldwell* verdict is too strong.

In both *Cunningham* and *Caldwell*, an underlying principle determining when an agent *should* be culpable is lacking. Some such principle seems crucial to ascertaining what circumstances an intoxicated agent should be held criminally responsible.

2. ‘The thought never crossed my mind’

As mentioned previously, *Cunningham* recklessness has a difficulty in accounting for people who don’t perceive a risk, but really should. In *Miller and Denovan*, Mr Miller, who while committing a robbery assaulted someone so hard with a piece of wood that they died as a result, *should* have been aware of the risk to someone else’s life when performing such an action. Duff notes that these ‘the thought never crossed my mind’

cases provide a serious problem for most subjectivist accounts of recklessness⁵¹. Consider again the agent who deliberately trains himself not to notice any risks. This agent, running with sharp objects, playing with fire, juggling with loaded guns, doing anything obscenely risky, would then not be deemed reckless, if his mind were unaware of any associated risks.

This problem was something that concerned Lord Diplock about the *Cunningham* account. If we need to know what was going through a defendant's mind while they were committing a crime, juries will have a very difficult task at hand. This is the "meticulous analysis" Diplock saw as required by *Cunningham* recklessness.

In response to this problem we might consider exactly what the awareness of risk required for culpability here actually entails. Obviously, one does not need to have the risk somehow verbalised in their inner dialogue to be aware of it. If an agent in the process of committing arson was thinking "if I start this fire it could spread and endanger lives" at the time, that would certainly be *sufficient* for awareness of the risk, but it doesn't seem necessary. When crossing a road, an agent doesn't have to think "I need to look left and right to see if there are cars coming, as they could hurt or kill me". One can be well aware of a situation and some of the risks involved without verbalising them.

In relation to this problem, Duff makes a distinction between *actual* knowledge and *latent* knowledge (1990: p.159). Latent knowledge is the knowledge that an agent has whether or not they are making use of it or advertent to it. For example, agents can know how to tie shoe-laces or ride a bike regardless of whether they're near a bike or shoes. This knowledge is stored and available to be called upon when required. If and when called upon, this knowledge then becomes *actual*.

Orthodox subjectivism must be concerned with actual knowledge. When Roy Cunningham unleashed the dangerous gas, (it is fair to assume) he was aware of the risk of the gas, that neighbours lived next door and that the dividing wall between the

51 Duff (1990: pp.157-167) would only argue this against *most* subjectivist accounts because he sees his own account as subjective but holds that it avoids such problems. This will be discussed at length in chapter IV.

residences was of a nature that would allow the gas through, but he only had that knowledge latently. If the knowledge had been called upon and made actual, and Cunningham became aware of the risk but still went on to take it, we would certainly deem him reckless and culpable.

How then does this reflect upon agents who are oblivious to risk? It seems unlikely that a normal person – someone without some sort of diminished capacity – would lack the latent knowledge. The problem would be the application of this knowledge. In appropriate situations, the agent would simply not call upon their latent knowledge. If someone had altered their mental state such that they naturally didn't recall latent knowledge when it was appropriate, it would be hard to see how they would survive. A person cannot choose whether or not to notice a risk, for in doing so they have already acknowledged the risk. They may then go on to block out the risk, to do their best to ignore it, pretend it's not there and perhaps even reach a point where the risk is forgotten, but in doing so they would already have been aware of the risk, which is all the subjectivist needs. As such, the idea of agents who have trained themselves to be globally ignorant of risks seems wildly implausible.

The problems for the subjectivist seem to involve the unawareness of specific risks (or specific classes of risks). There are both practical problems and theoretical problems. One practical problem is this: How can a jury ascertain that an agent was actually unaware of a risk, rather than just claiming so to avoid legal penalties? A second problem occurs in cases where we accept that there was an unawareness of risk, but think not only that the agent *should* have been aware of the risk, but also that they are actually culpable for not being aware of the risk.

The practical problem can be addressed by taking an agent's conduct as a whole.⁵² If a person was truly unaware of some risk they were creating, she is likely to be surprised if the risked situation obtains. A jury could look at the agent's conduct before the risk. If an agent's earlier actions suggest that they have noticed the risk, or if they appear unsurprised by the outcome, a jury is likely to determine that they were aware. In

⁵² Duff and Glanville Williams both suggest this. However, while Glanville Williams looks at the agent's conduct as to determine whether they were aware, from an orthodox subjectivist position (1988), Duff does so to determine the attitude of the agent (e.g. 1990: p.160), which will be discussed in chapter V.

absence of this, the jury could judge that the agent was unaware, which may exculpate them. They might ask why an agent didn't notice a risk in a specific situation. Glanville Williams gives an example of someone who is preoccupied and opens a car door without checking for cyclists (1988: p.82). If the agent did hit a cyclist and cause serious injury, they might relay the fact of their preoccupation to the jury, who in all likelihood would sympathise and accept that the driver wasn't aware of the risk at the time.

The more theoretical problem – whether or not an agent should be culpable for not advertent to a risk that they *really* should have noticed – is somewhat more problematic. If Mr Miller really didn't realise a risk of serious harm to his victim, should he not have been found guilty of the homicide? Similarly, if we consider someone who pulls their car out of their driveway without looking and hits an oncoming vehicle, we are likely to think that though they didn't foresee the risk they created, they certainly *should* have. It might be considered that civil liability should suffice in such cases, rather than criminal proceedings. However, if this were the case, someone who regularly takes serious risks without considering the risks would only face financial penalties. We might imagine that a person like this – perhaps someone with considerable means – would not be dissuaded by the possibility of civil liability, and might continue to risk any surrounding people. If civil liability is inadequate, some way of incorporating this into the criminal law seems needed.

A *Cunningham*-style recklessness test, considering only the awareness of risk, seems unable to find such agents culpable. Tests of the *Caldwell*-style, on the other hand, would easily deal with these, as an ordinary prudent individual would certainly be aware of these types of risks.

A response that might be given to these objections to *Cunningham* recklessness, is that these appear to be instances of *negligence*, rather than recklessness. These are all cases wherein an agent was, for whatever reason, unaware of a risk that they should have been aware of. Several points should be noted here. Firstly, with regard to actual legislation, crimes like criminal damage require a mens rea of recklessness⁵³. Thus,

53 For example, the Criminal Damage Act, as was relevant in the *Caldwell* case.

currently, for an agent to be convicted in such cases, they would need to be found (at least) reckless. This might be a motivation to class someone as “reckless” within the current framework when we deem them liable, but one might alternatively suggest altering the law to require only negligence for arson.

Secondly, and (I think) more importantly, we *do* deem cases like this, of pulling out of one’s driveway without looking as reckless, even if one wasn’t thinking about any risks involved. This *is* a reason to call such a person reckless.

3. ‘I thought she was consenting’ cases

A particular class of cases that provide a serious difficulty for *Cunningham* and *Caldwell* accounts of recklessness are ‘I thought she consented’ cases (Duff 1990: p.167). Several such cases occurred in the 1970s and sparked controversy over the laws concerning rape the time. The first such case was *Morgan*. One of the defendants, Morgan, invited three of his friends to have sex with his wife⁵⁴. The other defendants later told the court that Morgan had informed them that his wife was ‘kinky’ and that they could expect some resistance but that it “would be a mere pretence”. The men proceeded to go to Morgan’s house, whereat they received some genuine resistance, which they later claimed to believe was the ‘pretence’ Morgan had spoken of. They claimed that they believed at the time that Mrs Morgan was consenting, despite the fact that she was dragged into the bedroom struggling, screaming and shouting to her son to call the police.

It was claimed that the defendants mistakenly believed that Mrs Morgan was consenting, despite the overwhelming evidence that she was not consenting. According to the defendants, they each believed that Mrs Morgan consented. It was argued that if that was not the case, they had made an honest mistake, due to the information provided by her husband. At this time, it was still not possible for a husband to be convicted of

54 [1976] A.C. 182

raping his wife, so Morgan himself was charged and convicted of aiding and abetting the rapes committed by the others⁵⁵. The other defendants were convicted of rape.

The trial judge had thought that a reasonable mistake would be required for an acquittal on the basis of the following argument. The trial judge (and later the Court of Appeals) believed the mens rea requirement for rape to be the “intention to do the prohibited act”⁵⁶. If it were accepted that the actus reus – sex “with a woman who at the time of the intercourse does not consent to it”⁵⁷ – had occurred there is a natural presumption that a defendant would know that the woman was not consenting. Consequently, there would be an evidential burden on the defendant to counter this, which the trial judge (and later two of the Lords who were later called with regard to the case) thought would require evidence of a reasonable belief⁵⁸. The trial judge had directed the jury that a mistaken belief in consent should only allow them to be acquitted if the mistake was on reasonable grounds and the defendants were convicted.

This was challenged, but the Court of Appeals dismissed the appeals, after which the case was sent to the House of Lords. The defendants’ solicitors argued that a genuine mistake, reasonable or not, should exculpate for the crime of rape. If the rape verdict was overturned, they argued, the charge of aiding and abetting the rapes against Mr Morgan would also fall, because if no rapes would have taken place then none could have been abetted⁵⁹.

55 *Ibid.* p. 205

56 *Ibid.* p. 209

57 This phrasing was used in the Sexual Offences (Amendment) Act 1976.

58 This argument is given in the original trial ([1976] A.C. 191) and discussed by Duff (1980: p.50)

59 This argument would probably have failed anyway, as it did for the husband in the later case of *Cogan*.

Duff, despite supporting the conviction, also found the jury instruction mistaken (Duff 1981: p.50). Lord Edmund-Davies agreed that the jury instruction was mistaken, but found it convincing that even an unreasonable belief should exculpate, arguing that “honest belief, however foolishly formed, that the woman was willing seems to be incompatible with an intention to rape her⁶⁰.”

Lord Hailsham concluded that the relevant mens rea would be the “intent to do the prohibited act without the consent of the victim” or the intention “to have intercourse nolenis volens, that is recklessly and without caring whether the victim be a consenting party or not”. He took the intent to have sex without the consent of a victim to be legally equivalent to the intent to have sex with her whether she consents or not.⁶¹ At this time, the orthodox subjectivist account of recklessness was in force, thus it was held that awareness of risk would be necessary to find a defendant guilty in this manner. The Lords agreed by a 3:2 majority, rejecting the argument that a reasonable belief of consent would be necessary. However, despite disagreeing with the jury direction, the House of Lords rejected any appeal because they deemed it clear that the jury didn’t accept that the defendants believed Mrs Morgan was consenting and would have found them guilty even if they had been properly directed.

Though none of the defendants in *Morgan* were acquitted, a similar case occurred later the same year⁶². In *Cogan*, after several drinks Mr Leak took a friend, Mr Cogan, back to his house, with the intention of Cogan having sex with his wife. Leak told his wife this. She didn’t want to have sex with Cogan, and told her husband of this, but she was scared of her husband so went upstairs and undressed. Leak had told Cogan previously that his wife wanted to have sex with him, his intention being to force her to have sex with Cogan to punish her for refusing his demand for money whilst drunk. Leak had sex with his wife twice in front of Cogan, after which Cogan had sex with her.

⁶⁰ *Morgan*, p.226

⁶¹ *Morgan*, p.209

⁶² *Cogan*, [1976] Q.B. 217

She did not resist, but kept her head turned away from him and was sobbing throughout the ordeal. Mr Leak could not be charged with rape of his wife, as it was still held that consent was presumed from the marriage ceremony onwards⁶³, but was charged with aiding and abetting a rape, allegedly committed by Cogan.

Originally, both Cogan and Leak were found guilty, but both appealed on the grounds that Cogan believed the wife had consented. It was argued that due to his intoxication and what he had heard from Leak about his wife, Cogan “might have mistaken the wife’s sobs and distress for expressions of her consent”. This was accepted and Cogan was found not guilty, while it was still held that Leak was guilty of abetting the rape, as his wife was unquestionably raped, and he assisted it.

There is a practical concern that men accused of rape will be able to merely claim that they believed the woman was consenting. If this defence was available to all those accused of rape and would result in no rape charges leading to convictions, it would be a very serious concern. Glanville Williams argues, with regards to *Shimmen*, that such concerns are unlikely to be reflected in reality. He argues that in reality, a defendant would face a “hot-time in the witness box” if trying to convince a jury that he didn’t recognise any risk (G. Williams 1988: p.77). Most people, after all, are reasonable and a defendant would be hard-pressed to explain why they did not foresee the sort of risk that would be obvious to any ordinary person. This argument suggests that it is unlikely that the man who falsely claims to have unreasonably thought the woman was consenting would escape conviction. Marcia Baron, however, notes that this argument is misleading. Because the standard of proof juries require for conviction is “beyond reasonable doubt”, they are forced to acquit “even if they are completely convinced that she did not consent and there was no reasonable basis for thinking, at the time of the act, that she did” (2011: p.11).

Other than the practical concern noted above, we must consider the question of whether an unreasonable belief of consent *should* exculpate in such cases. It should be noted that not only did three of the five lords working on *Morgan* think that unreasonable mistakes about consent legally exculpated an agent from an allegation of

63 *Cogan*, p.223

rape, but *four* of the five thought that was how the law should function (Lord Edmund-Davies believed that the law *should* exculpate those who made an honest mistake, but in his interpretation it didn't⁶⁴). Perhaps, an advocate of *Cunningham*-recklessness must hold, like four of the five lords, that an honest mistake does exculpate in cases like *Morgan* and *Cogan*. If this is the case, however, it seems to warrant some explanation. Consider Arrogant, a hypothetical man who makes the honest mistake – and let us accept that it is an honest mistake – that he is irresistible, that no woman could genuinely turn him down, and proceeds to have sex without consent from a woman who physically and verbally protests. The *Morgan* verdict would exculpate Arrogant. Such a counter-intuitive and wildly problematic upshot requires some justification on behalf of the *Cunningham* advocates.

Clearly *Cunningham* recklessness struggles to deal with cases of this nature. If there is no awareness of risk, no matter how unreasonable such an unawareness is, a defendant is exculpated under *Cunningham*. *Caldwell* recklessness, however, we might think, can accommodate such cases better. The risk in *Morgan* was so obvious that a reasonable person would have been aware of it. However, the defendants (if we believed their story) could fall into the loophole of having given thought to the matter and deemed (erroneously and unreasonably) that there was no risk that she didn't consent (Duff 1990: p.167). They might have a “hot-time in the witness box” demonstrating this, but the *Caldell*-loophole would – if the account was correct – require that they be acquitted.

One response that could be given to this is that this is the correct account for recklessness, but the proper mens rea for rape should be negligence. As in the “the thought never crossed my mind cases”, however, it seems that cases such as Arrogant *are* instances of recklessness. His arrogance and refusal to see a clear unwillingness to participate *made* him reckless.

64 *Morgan*, p.235.

4. The alleged problems of the reasonable person standard

In recent years, many objections have been made to the use of the ‘reasonable person’ in legislation⁶⁵. This is clearly of relevance to the *Caldwell* account of recklessness, as this (once formulated properly) required that a risk be obvious “to a reasonable person”.

The equivocation of “reasonable person” to mean “ordinary person” resulting in prosecution in cases like *Elliott v C* is obviously an undesirable outcome. Any account which leads to minors or other non-culpably unaware agents being judged by the same standards as “ordinary” people fails to distinguish the behaviours which make a person reckless – in the everyday use of the word. As Norrie observes, because of its reliance on the notion of the reasonable, *Caldwell* recklessness “fails to distinguish the subjectively stupid from the subjectively callous” (1992: p.49). Any account making similar conflation fails to capture genuine culpability.

Alexander and Ferzan have argued that “there is no principled and rationally defensible way to define the “reasonable person in the actor’s situation”” (2009: p.81). They suggest that the unaware agent, A, has belief set B. Belief set B contains no beliefs about the riskiness of F, where F is some fact A is responsible for. Alexander and Ferzan suggest that the only non-arbitrary interpretations of the reasonable person standard involve considering whether A would have noticed the risks of F if he was 1) an omnipotent epistemic agent (one who knows all the facts that relate to the decision) or 2) an agent with the exact beliefs that A did in fact have (2009: p.82). If the omnipotent agent, Z, is to be considered, one is culpable for *every* risk one did not notice relating to one’s conduct, which is clearly far too strong. If the equivalent agent with the same beliefs, A*, is considered, the agent is never culpable.

If Alexander and Ferzan’s evaluation is correct, then even a properly construed evaluation of the reasonable person standard can result in an arbitrary dividing line between what an agent should and should not be aware of. It would not be undesirable if the distinction between a culpable and non-culpable agent was arbitrary in this manner,

⁶⁵ The number of these objections and difficulties in understanding them are discussed in detail in Baron (2011).

so either an alternative way to think about the standard is necessary, or a rejection of the reasonable person standard entirely.

It should be noted that as well as featuring heavily in *Caldwell* recklessness, reasonableness also features in *Cunningham* recklessness. This is evidenced by the *1989 Code* requirement for recklessness that a risk is foreseen by an agent *and* “it is, in the circumstances known to him, unreasonable to take that risk” (*1989 Code*: (cl.18(c)). The unreasonableness of a risk taken features in both *Caldwell* and *Cunningham*, so if the use of reasonableness is indeed problematic, both these accounts may be jeopardised. In addition, it is not obvious that any alternative standard that conduct could be assessed by could avoid the alleged difficulties of reasonableness.

There are certainly problems related to the *Caldwell* application of the reasonable person standard. The use of the standard will be discussed in light of further objections in chapter VI.

IV. Grounds of Culpability

Criminal liability depends (or to put more specifically, *should* depend) on culpability. If an agent is not culpable for some action, it seems entirely unjust that they should be punished for it. If a driver has a seizure (that could not have been reasonably predicted beforehand) and during the seizure uncontrollably drives the car into a crowd of people, it seems unfair to blame him for this. If someone acts against an assailant in self-defence and causes serious bodily harm, she too – if we deemed the force reasonable – would be blameless. As these agents are not culpable, it would be unfair to punish them.

As such, culpability should to some extent permit us to structure what is and what is not punished. Unfortunately, culpability is not a simple notion. It is readily accepted that culpability requires a moral agent, someone capable of making decisions and making choices on the basis of those decisions. Jeremy Horder discusses five separate accounts which attempt to pin down culpability, based on defiance, character, capacity, agency and choice (1993: p.195). Here, I will analyse these accounts systematically and evaluate their successes, before showing the direct relevance for accounts of recklessness.

With regard to each of these accounts, we can question what they would mean for an account of recklessness, as well as how well they cohere with our general practises. Problems will arise for some of these accounts concerning how best to accommodate negligence, attempt crimes and excuses. The accounts can be evaluated by their success in gratifying or explaining our intuitions in such cases.

In this chapter, I will discuss (and reject) defiance theory, followed by brief discussions of the capacity theory, the character theory and the agent theory, all which are presumed by Horder to offer only partial explanations to culpability. Then, I will begin a serious discussion of choice theory, which is quickly dismissed by Horder. I will argue that he does so too quickly, that choice subjectivism is stronger than he supposes and that prima facie arguments for choice subjectivism have affected legal accounts of recklessness. Despite this, with support of some arguments courtesy of Duff, I argue

that choice theory does not reflect how we view culpability, and thus should not be used in support of orthodox subjectivist approaches to recklessness.

1. Horder's conceptions of culpability

“Defiance”

According to one account, developed primarily by Jean Hampton, the essence of culpability is “defiance”. Hampton argues that there are three ways an agent can be at fault (culpable): they can act illegally, immorally or irrationally. The common factor between them, Hampton suggests, is defiance (1990: p.2). Acting irrationally consists in acting *against* reason, acting immorally consists in acting *against* morality and acting illegally consists in acting *against* the law. For Hampton, legal culpability consists in three subjective elements of an agent. Firstly, the agent “knows that the legal system commands him not to commit the action, i.e. that it is illegal.” He also knows that because of the authority of laws “he is supposed to have better reason to refrain from illegal behaviour than to engage in it in order to do something he wishes.” Finally, he believes that “the authority can be defied, and something else that condones what he wishes can be enthroned in its place, thereby allowing him to satisfy them” (Hampton 1990: p. 24).

Under this account, recklessness is taken to be defiantly risking something ruled out by law. If someone risks a harm forbidden by law, in doing so they undertake the risk in defiance of the law, which makes them legally culpable. Hampton provides an example of an agent driving a power boat too quickly to control and crashing it into a dock full of people. This agent, Hampton claims was reckless not because he deliberately defied the legal imperatives in place (presumably for this example to make sense, there must be no legislation in the jurisdiction about how fast one can drive power boats in the jurisdiction), but because he *risks* doing so, which is sufficient defiance to render him legally culpable (1990: p.25).

Though Hampton's account might provide an interesting explanation for akratic behaviour, as an account of legal culpability it seems wholly inadequate. Hampton herself acknowledges that defiance as a basis for legal culpability struggles to explain negligent crimes (1990: p.1).

It also seems counterintuitive that one must be consciously acting against the law – defying it – in order to be culpable. A common principle of law is *ignorantia legis neminem excusat*: ignorance of the law excuses no one (Dressler 1996: §1303). When Shylock attempts to claim his pound of flesh from Antonio, only to discover that it is unlawful to spill the blood of a Christian, which his contract had not permitted, we do not deem him exculpated because he didn't know about that law. He is culpable purely *because* he wanted to spill the blood of a Christian. Hampton attempts to explain how her account explains why some instances of ignorance are excuses, while usually they are not, by suggesting that in some instances an agent's failure to remedy her ignorance makes her “defiant of the authority of the legal system, and hence legally culpable” (1990: p.25). This would have the upshot of excusing those who could not understand the law, those of diminished mental capacities, as they may be unable to remedy their ignorance. However, this seems to overgeneralise: if one is culpable for not learning the law (supposedly ‘defiantly’), then that is the case even for such agents who do not actually break the law. Anyone who has not properly learned the law and isn't attempting to correct their ignorance would be culpable, which seems to misunderstand the notion.

This account seems to put the cart before the horse. We want to find something criminally liable *because* it is culpable, not the other way around. As Horder argues:

“Surely only the most obsessively authoritarian legal theory... could possibly suggest that what marks out intentional killing or rape as criminally culpable is not the nature of the harm or the way in which it was caused, but simply the defiance of the law the action evinced.”

(1993: p.198)

Due to its unsatisfactory analysis of ignorance, negligence and the direction of fit between culpability and legislation, this account seems largely untenable.

“Capacity”

Capacity theory, attributed to H.L.A. Hart, accordingly places the capacities of an agent at the centre for culpability. An agent is culpable for an action because they were capable of doing otherwise. This has some inherent plausibility to it: a common rebuttal when accused of some wrong is “what else could I have done?” and we deem this appropriate.

Capacity theory also has the upshot of being able to account for negligent crimes. Hart argues that there is good reason for considering the *mens* aspect of *mens rea* not to be limited to knowledge or foresight, but to also include “the capacities and powers of normal persons to think about and control their conduct” (Hart 2008: p.140)⁶⁶. Agents can then be held criminally responsible for their conduct only if they had the capacity to do otherwise, even when they have not foreseen the risks of their conduct.

Consider the parents who forget their young child in the bath because they’re hosting a dinner party and guests have arrived⁶⁷. They do not intend their child to drown and they do not even consciously risk that; they just haven’t thought about it. They became distracted by their dinner guests and the thought of the child was so far from their thoughts that when they recalled it, it was too late. For capacity theory, we can hold them culpable because they had the capacity to remember their child; they *could* have done better.

A benefit of this theory is that it provides a convincing explanation of why children and the mentally ill warrant special treatment. These individuals may plausibly fail to comprehend the risks of certain conduct, no matter how much they think about it or try to do what is right. Particularly when the defendant is “a child of a lunatic”, we may

⁶⁶ This consideration is in opposition to his predecessor J.W.C. Turner (as well as Glanville Williams), who argued that an accused must have “*realized at the time* that his conduct would, or might *produce results of a certain kind*, in other words that he must have foreseen that certain consequences were likely to follow on his acts or omissions” to be liable under the common law (Turner 1936: p.87, original italics). Hart rejects this approach for being insufficiently receptive to subjective elements (2008: p.143).

⁶⁷ Alexander and Ferzan make use of this example (2009: p.77). Their verdict of the situation will be discussed in chapter V.

conclude that he was unable to “distinguish a dangerous situation from a harmless one” or “attend to, or assess its risks” (Hart 2008: p.150).

We might argue that the capacity theory lacks something in its assignment of culpability by making reference to free will literature. Harry Frankfurt’s eponymous examples are designed to show that freedom (and moral evaluation) do not depend on an agent’s ability to have done otherwise. Consider an agent who is about to vote. Unbeknownst to him, a counterfactual intervener in the form of a wizard (or neuroscientist) watches his behaviour, waiting for a certain feature of the agent’s facial expression that would indicate that the agent is about to vote for Gore. The wizard-character knows that this sign would come about if, and only if, the agent was about to vote Gore, and if this happens the wizard will control the agent and *make* him vote Bush⁶⁸. As it is, the agent votes for Bush of his own volition, and the wizard does nothing. Frankfurt argues that the agent could not have done anything differently; if he tried to, the counterfactual intervener would have stopped him. Though the agent could not have done otherwise, as they lacked the actual capacity to do otherwise, we still deem them blameworthy for their action. A capacity theorist might respond to this by suggesting that the agent had the capacity to *choose* otherwise, and this is why such an agent is culpable, but this would only seem to reduce the capacity theory to choice theory.

Possibly more damagingly, Horder argues (1993: p.203), the theory is unable to stipulate what exactly constitutes an unfair opportunity to avoid wrongdoing. It also doesn’t offer an explanation of levels of culpability. Presumably we would like whatever notion is the foundation of culpability to explain why causing some harm purposely is more culpable than doing so recklessly, but capacity theory is unable to do this, which Horder sees as an “important shortcoming”.

“Character”

68 This particular Frankfurt-style example was given by John Fischer in “Frankfurt-style Examples: Responsibility and Semi-compatibilism” (1999).

Character theory holds that culpability is grounded in the bad character of an agent. An agent who kills, rapes or steals is to be found culpable because their actions demonstrate a bad character. He is then convicted because those actions “warranted an inference to some undesirable character trait” (Duff 1996: p.176).

It is important for such a theory that an agent doesn't have to *choose* their character in order to be culpable for it. Michael Moore attributes a form of character theory to Aristotle which has such a requirement (1990: p.50). If that is held, then the theory seems to collapse into a form of choice theory. A character theory must hold that an agent is responsible for their character, because in an important sense, they *are* their character.

Character theory is well-placed to acknowledge culpability even if one takes a hard determinist stance on free will. If one relies on free choices to explain one's culpability, the revelation that no choices are *actually* free, that they are all causally determined in such a way that precludes freedom of choice – as held by the hard determinist – it follows that no actions are culpable. A character theorist can hold what Fischer calls a ‘semi-compatibilist’ position⁶⁹; that causal determinism entails that there is no freedom in the sense of free will, but that this does not preclude responsibility. An agent is responsible for their actions because of their character. That character might well be caused, but as that held as the grounding concept for the culpability, that doesn't matter. As long as the agent's action manifests their character, the agent can be held culpable for it.

One major difficulty that a character theory of culpability faces is that it struggles to accommodate culpability for actions that are “out of character”. If an agent is only culpable when acting upon settled character traits or dispositions, a highly unusual anomaly in an agent's behaviour should not be eligible for punishment. However, this seems highly counter-intuitive, as someone who lives an ordinary life until one day going on a killing spree is still usually seen as criminally culpable.

⁶⁹ See Fischer's “Frankfurt-style Examples: Responsibility and Semi-compatibilism” for an espousal of this view.

In addition to this serious problem, two other difficulties also deserve mention. As Horder observes, the account of culpability provided by character theory seems simply superfluous⁷⁰. If someone has committed an unlawful murder, this seems enough to make them culpable without requiring a bad character. In addition, character theory is no more able than capacity theory to account for differing levels of mens rea. It is sufficient for criminal culpability that an agent has committed the crime intentionally or recklessly (or perhaps even negligently); a court need not make value judgements of the character traits that motivated the crime.

Despite these problems, character theory does seem to have this core insight: the culpability of criminal actions is inherently related to the attitudes of the characters that commit them. But perhaps, as Duff has suggested, this core insight is better captured by focussing more on the role of agency in culpability⁷¹.

“Agency”

The agency theory of culpability holds that an agent is culpable for an action to the degree it reflects her agency. Depending on the agent’s intention when acting and what she actually brings about, her action may reflect her agency in varying degrees. There is a paradigm picture of agency; an agent is culpable for an action to the degree it resembles that paradigm. In a paradigm case of say, assault, there is an intention to inflict a physical harm against someone. Duff makes a distinction between “intended” and “intentional” agency (1990: p.43, 79). If I push you over because I am annoyed at you, I intend to push you over. If I am just in a rush, am running and knock you down, knowing that I will knock you down, but without that being the object of my intention, I intentionally knock you down, but I don’t “intend” to. What is intended “reveals the core meaning of the concept of intention” whereas what is merely intentional “involves

⁷⁰ Horder 1993: p.208.

⁷¹ Duff 1996: p.191

an extension of that notion”. A paradigm case of assault probably only requires a successful, intentional physical attack, and in such a case, the harm foreseen is also caused; I decide to knock you down and I actually do so.

Agency theory is best understood via an archery metaphor. When one aims at a particular result and succeeds, one hits the “bull’s-eye”, accomplishing the paradigm of agency. When the result differs from what one has intended in various pertinent ways, one’s culpability is diminished. The more the action fails to resemble the paradigm (which could be satisfied by the result differing more from what was intended, or the relationship between the agent’s intentions and the outcome being more obscure), the less culpable the agent is.

As Horder observes, the agency theory is superior to the other accounts of culpability in that only it can properly accommodate different levels of mens rea (1993: p.209). Reckless offences are generally less culpable than intentional ones because they do not fit into the paradigm of successful agency. The criminal outcome of reckless actions is not *aimed* at, so incorporating them into the picture of culpability requires an “extension of the paradigm” (Duff 1990: p. 139) If I am reckless about whether or not I harm you, this has less resemblance to the paradigm. Incomplete crimes are also less similar to the paradigm, which supports judgments that these should be punished less severely⁷².

That said, agency theory has problems of its own. One issue Horder suggests is a problem is its supposed inability to account for the non-culpability of children or the insane (1993: p.214). This would be problematic, because, as the responses to cases like *R v G* and *Elliott v C (A minor)* demonstrate, we do deem children to be less culpable in many situations. An agency theorist might suggest that the ‘intention’ element, in the paradigm case is one among a general contextual understanding of a situation. If a child doesn’t realise that the substances they’re playing with are likely to cause a conflagration, their intention is different to the paradigm case of arson. We might even suggest that a child who did understand that there would be a fire and the extent of the

⁷² This will be discussed further in the next section.

fire could be less culpable, because we would not demand them to have the same understanding of the consequences as an adult.

“Choice”

Michael Moore argues for an account of culpability based in choice. Choice theory holds an agent culpable for an action if “at the moment of such action’s performance” the agent had “sufficient capacity or opportunity to make the choice to do otherwise” (Moore 1990: p.29).

Choice theory is easily able to accommodate legal excuses. Excuses in law, like excuses in morality, are factors which mitigate one’s culpability. If during an outburst of delirium while ill, I attack the postman with my slippers, thinking him to be a beast from hell, this is an excuse – an excuse of insanity. Excuses, along with justifications, offer a legal (as well as moral) defence. Excuses differ from justifications in that a justification for some action claims “that though the action is of a type that is usually wrong, in these circumstances it was not wrong” (Baron 2005: p.389). An excuse for an action admits that the action was wrong, even given unusual factors about the situation, but argues that the agent is not blameworthy. I should not be blamed for throwing my slippers at the postman, because my delirious state excuses my behaviour. Throwing the slippers at the postman was still *wrong*, but I shouldn’t be blamed for it. If the postman was kicking the neighbour’s young son, I would claim not only that this excuses my behaviour, but that it makes my behaviour *justified*.

Moore argues that the choice theory best explains the cases of excuses that we are confident of (whether they should or should not excuse the agent) and has an intuitive plausibility, so is the best account of culpability⁷³. When an agent doesn’t have the capacity or opportunity to make the contrary choice there is a legal excuse for the

⁷³ Moore only explicitly endorses choice theory with regards to excuses, but it seems untenable to hold one theory of responsibility for excuses and another for a different aspect of culpability. Despite its implausibility, I will address the possibility of employing different accounts of culpability for different areas in criminal law later.

action. This conception has considerable prima facie appeal. An agent does the choosing, so if the choice is freely made, it is only appropriate that he be deemed responsible for doing so.

The most persuasive reason for adopting choice theory, from Moore's account, is that it best explains two types of situation (compared to character theory, which he sees as the obvious rival theory). According to character theory, an agent's culpability is explained by their bad character. Moore draws out intuitions favouring choice theory by providing examples wherein choice theory and character theory should provide different verdicts, and suggesting that the verdicts provided by choice theory are more plausible. In one type of example, an agent has bad character but makes no free choice to commit some harm. In the other type, an agent makes a free choice to do some wrong but this choice is not reflective of the agent's character.

A case Moore cites of the first type is that of preventative detention. If, after some psychoanalysis, it becomes clear that an agent is of bad character, (Moore argues) that character theory would justify imprisoning them, regardless of any manifestations of this bad character. A case like this would certainly draw on intuitions that the agent in question was not culpable. If someone hasn't *actually done* something wrong – if they lack an *actus reus* – punishment seems inappropriate, undeserved and unjust. This case might seem to interpret the character theorist unfairly, as any serious advocates of character theory require acts that manifest the bad character⁷⁴. However, that acts *are* required surely suggests that the bad character itself is not sufficient for culpability; it at least needs an action on that basis too. It could be argued that choice theory would fall victim to this same criticism, as it's not the cognitive decision-making faculty that grounds culpability; if it did, then it would similarly justify punishment without an *actus reus*. An agent could be punished for making the *choice* to kill his wife, before he has even began moving his body to bring the plan into being. An easy response is available to the choice theorist here, however, that it is the *act* of choosing, which requires more than mere cognitive activity, that grounds culpability. While we might call a mental selection to do an activity a choice, even without any physical indication

74 See Michael Bayles, "Character, Purpose and Criminal Responsibility" (1982).

of this, choice theory must require an actualised choice. It is not clear that the character theorist can easily make the parallel argument, suggesting that culpability requires an actualised character trait.

Among the second type of case, Moore cites Richard Herrin, a graduate student who displayed good character in most aspects of his life, but in an out-of-character act, killed his girlfriend with a hammer (Moore 1990: p.52). Here, it is argued, Herrin freely chose to kill his girlfriend, but this action wasn't reflective of his character, so although the choice theory would find him culpable, the character theory would be forced to exculpate him. Once again, if character theory did entail this conclusion, it would be implausible. However, as Horder notes (1993: p.207), this is not the case, as the actions need only reflect badly on the character, when compared to some "idealised conception of good character", even an anomalous uncharacteristic action can be culpable. Though Moore might have overestimated the choice theory's superiority in these cases, it is still the case that choice theory explains these cases satisfactorily and with an appearance of plausibility.

If only the actual choices of an agent incur culpability, this seems to have serious consequences for any account of recklessness. Supposing, for whatever reason, an agent is completely unaware of a risk, that agent cannot *choose* to take that risk. If, as Moore suggests, culpability requires at the "moment of the action's performance" for an agent to have the "capacity or opportunity" to do otherwise, it would be difficult to inculcate the unaware agent we normally would deem blameworthy. A drunken agent (like Caldwell), for instance, who while burning down a building with the goal of destroying the building, not to endanger any lives, unaware of that particular risk, does not choose to endanger the lives of those in the building. He cannot *choose* not to risk their lives, as he is utterly oblivious to such a risk. As Moore stipulated that the capacity must be present at the "moment of the action's performance", we cannot cite the agent's conduct as culpable for *getting* so drunk, despite making several choices that would lead to that eventuality and eventually to the damage.

One criticism Horder makes of choice theory concerns the nature of choice. He correctly points out that a normal understanding of choice is that of a choice between alternatives. When asked to "pick a card, any card", one chooses from a selection of 52.

When a husband chooses to shoot his wife, this choice is one among several options available to him. However, there are agents who are certainly culpable, who decide to commit crimes that wouldn't fit into this conception of choice. If, when killing his wife, the husband doesn't consider any alternatives, perhaps because he does so impulsively, he hasn't selected from a number of options. Horder gives an example of a man who spontaneously pushes an innocent bystander under a train. Horder suggests that these agents do not choose to perform these actions as "they are done spontaneously, without consideration of courses of action" (1993:p.201). If the choice theory couldn't find such actions culpable, it would be completely untenable.

However, this understanding of choice as selection among alternatives, though typifying the notion, seems both unnecessary and mistaken. If someone is asked what they would like to drink, and asks for a cup of tea, it is completely natural to say that this was their choice. This is so even if they hadn't considered the option of drinking coffee, or whatever else may have been available. It could be responded that I have obfuscated a choice in this example, a tacit but obvious choice, of not having a drink at all. This option, however, also exists in the case of the man pushing a bystander in front of a train. There is a constant backdrop of the equivalent alternative in any spontaneous action; you don't have to choose to do it. Perhaps the argument could be strengthened if we considered that spontaneous actions aren't chosen because they are influenced by some entity alien to oneself; that "a violent urge took over". A choice theorist can easily account for this by understanding the person in a broad scope, such that it includes sudden urges, even though the agent may not identify with them⁷⁵.

As intimated earlier, choice theory would have significant consequences for an account of recklessness. Any objectivist accounts, finding agents culpable for taking risks that they *should* have noticed, while oblivious to those risks, so not choosing to take them, would be unjustifiable. Moore attests that "choice is essential" to culpability, and if a risk is not adverted to by an agent, the agent doesn't actually take a risk (1990: p.57). If these grounds for culpability were accepted, it would provide strong support for the orthodox subjectivist account, as this requires that any risk is foreseen in order

⁷⁵ Moore confirms that this is how he would understand the scope of the agent when considering similar issues (1990: p.39).

for the agent to be reckless. Any lower levels of mens rea could only be justified on pragmatic grounds, not on the basis of deserts.

I would suggest that not only does the choice theory support the orthodox subjectivist account of recklessness, but also that an underlying belief in choice theory, or some of the general platitudes of choice theory, has led to recklessness being cashed out this way. To support this contention, consider the *Morgan* verdict. If the Lords deciding this verdict were influenced by capacity, character or agency theories of culpability⁷⁶, it seems unlikely that they would have concluded that an unreasonable belief in consent should exculpate a rape charge. Under capacity theory, focussing as it does on the agents having a fair opportunity to avoid the relevant harm, it seems clear that reasonable belief would be required; that would be *fair*. Following the tenets of character theory would lead to those actions which manifest bad character – which having sex with someone under an unreasonable belief of consent presumably does – inculcating an agent. Agency theory (as will be discussed at length in the upcoming chapter) would also, in its most plausible versions, find such agents guilty. This is obviously not exhaustive. There are other reasons the Lords may have made the decision they did in *Morgan*, but presumably all based on some conception of what should and should not exculpate an agent.

2. Ashworth, Duff and Arguing against choice theory

If choice theory was seen as the natural grounds for culpability by the Lords, as I have suggested, it would be hardly surprising that an orthodox subjectivist account of recklessness is the dominant account in English law. In the next section, I will attempt to cast doubt on the choice theory.

One of the attractions of choice theory is its prima facie plausibility. Choices are the sorts of thing that we are, and should be, responsible for. It seems, however, that we can

⁷⁶ I have ignored the defiance theory of culpability here, but for the reasons mentioned previously the theory does not seem plausible.

break the theory down further than Moore did. Ashworth takes the theory apart even further to find what warrants a “quantum of punishment”; the minimum a situation requires in order for an agent to be culpable (Ashworth 1988: p.742). His argument is founded on a retributivist theory of punishment, holding that punitive sentences should only be given according to the deserts of the agent, but the minimum he deems required relies upon what makes an agent culpable. In arguing for choice theory, Ashworth provides an argument relating to criminal attempts.

When an agent normally commits a crime, she goes through six steps: she i) conceives of the crime, ii) evaluates the idea, iii) forms the intention, iv) prepares to commit the crime, v) commences the crime and vi) completes her actions (Dressler 1995: §27.01). If the agent only goes through the first three stages, she has committed no crime in English or American law: no *actus reus* has taken place. If the fourth stage – the preparation to commit the crime – takes place, but the agent doesn’t successfully complete the crime, an agent could still be culpable of an *inchoate* offence. Solicitation and conspiracy are inchoate offences, but most important for present purposes are attempts. An attempt can be *complete* (also called *imperfect*) or *incomplete*. A complete attempt occurs when an agent has gone through all the stages of a crime, but has not succeeded in the criminal goal. A would-be assassin can buy a gun, aim it at the president and fire, but she may, due to poor aim or bad conditions, miss her target. Here the attempt is complete. If, however, she doesn’t carry out all the stages, perhaps she is apprehended by a policeman or changes her mind while pointing, the attempt is incomplete.

Ashworth argues that an agent has no *real* control over whether or not an attempt succeeds. The would-be assassin might try to pull the trigger, but there is no guarantee that she won’t have an inopportune seizure at that very moment, or that the gun won’t fail (2011: p.159). There is no way she can be sure that she won’t miss, or a bird would get in the way and take the bullet in the president’s place. The only actual control we have is over the choices that we make, and over these – if we are free – we have complete control..

It seems reasonable that someone should be culpable only for things within their control. If a man walking down the street not paying attention walked into stationary

pedestrian bystander, it would be their fault and as a result they may owe an apology or have the obligation to help the bystander up. If, however, he was pushed by a ruthless jogger, depriving him of control of his footing, he would not be at fault and may not have the same obligations. Given that the only element of an action we are in complete control over is the choice itself, the result of the outcome should be, according to this argument, irrelevant to the culpability attached to the person. Thus, this argument leads to accepting an equivalence of culpability between complete attempts and substantive offences.

Ashworth uses this argument to suggest that after the point at which an agent has committed the 'trying' which may or may not (from their perspective) cause the harm which could potentially result, everything else depends on outcome luck. As the outcome luck is out of the agent's control, Ashworth argues, it should not be relevant to their culpability. The 'fully subjectivist principle'⁷⁷ of criminal liability seeks to eliminate any culpability judgments based upon chance, rather than what the agent actually controls, which is merely the trying, the act of choosing itself. As the element controlled in the complete attempt and the substantial offence – the 'trying' – is the same, the subjectivist accepts the "moral equivalence thesis"; that nothing relevant to the agent's moral evaluation differs in the cases (Duff 1996: p.334). Consequently, punishments for criminal attempts, for the subjectivist, track the choices, regardless of the ensuing results, so the successful assassination should be punished just as much as the assassination prevented by a bird blocking the bullet's path.

Currently, the law in the US and the UK does not work this way. Attempts, even complete attempts, are punished less severely than substantive offences (Ashworth 2010). Though there are some who agree with Ashworth's argument and hold that complete attempts should be punished as severely as substantive offences⁷⁸, this is far from the dominant view. There are other arguments that attempts should be punished equally: a utilitarian argument for equal punishment notes that an agent who has

⁷⁷ As labelled by Duff (1996: p. 148).

⁷⁸ Ferzan and Alexander, who will be discussed in chapter V, are prominent advocates of this sort.

committed a complete attempt is in need of the same sort of rehabilitation (if appropriate) and has demonstrated that they are (mentally) capable of being just as dangerous (Dressler 1995: §27.04[B]). However, such arguments have not proved convincing in actual punitive proceedings.

If this theory of attempts were convincing, it would lend even more credence to choice theory. Duff, however, provides a counter-argument not only to the equal punitive deserts of those committing complete attempts and substantive offences, but also to their culpability as a whole (1996: 334-347). In doing so, he considers ways in which our responses to wrongdoing differ in cases of a complete attempt and a substantive offence. Even an advocate of the fully subjectivist principle must acknowledge the differing responses, so must accept these premises of the argument (though they will offer a different explanation). The differences of response are of three sorts; the response to the act, the response to the agent and the liability that is incurred.

Suppose that, angered by something trivial, a man throws a glass bottle in the vicinity and direction of an innocent bystander, knowing he may hit them or miss them. A reasonable witness observing this will respond to the action, and is likely to have different responses (or at least responses of differing intensities) dependent on the outcome. If the bottle hits the bystander in the head, smashes and leaves them blind in one eye, the event itself is likely to leave the witness shocked and sympathetic towards the victim. This effect is likely to be long-lasting, as events of this sort are not soon forgotten. If the bottle missed, however, such a witness is likely to react differently. They may be relieved, and may even be shocked. They would not be shocked at the harm inflicted though, as no harm, in this case, is actually caused. A witness may also be sympathetic to the victim, depending on how close the victim was to being injured, but this will all be to a lower degree, than if the harm were caused.

The man who threw the bottle is also (unless extraordinarily callous) likely to feel differently about the event. If he hit the bystander, we would hope he would feel regretful, not just for throwing the bottle, but for actually hitting the bystander and causing the harm. If he misses, the shock and regret would be for the action only. He might be shocked that he was capable of risking another's safety and be thankful that he

missed. Repentant agents, in either case, would wish that they had not committed the act.

With regard to the bottle-thrower, a reasonable witness will likely attribute blame. Whether or not the bottle hits, it might be appropriate to be disgusted by the agent, to feel angered by them. These are likely to be increased if the harm does ensue. As Duff notes, if someone actually causes such harm of a serious sort, like the reckless blinding mentioned – particularly one knows the victim – it might be difficult to maintain a friendship with that person. This response towards the man is likely to be much less intense, if present at all, if the bottle misses. Similarly, the throwing agent himself will have a much stronger response towards himself (if repentant) if the bottle actually hits. He will become in his own eyes, the man who caused that harm. Any shock experienced by the agent at his own recklessness will be “deeper and more lasting” when the harm does actually result (1996: p.336).

In terms of liability there will be a striking difference between such cases. The liability in question here is not legal liability, but one of moral obligation. If an agent, through some fault, causes a harm, they would normally be expected to compensate a victim if this is possible. If I recklessly destroy some of your property, I might be liable to replace it. I will probably owe an apology, not just for my action, but for the damage itself. When the potential harm does actually ensue from an agent’s free actions, they do confer upon themselves additional obligations.

The subjectivist concerning attempts (and the advocate of the choice theory of culpability) must explain these differences in a way which doesn’t alter the culpability between the complete attempt and the substantial offence. Duff notes that the subjectivist can even give an explanation for why these feelings are appropriate; we might blame the morally unlucky agent (the one whose action does cause the harm) more, as they have done something extra which they are ‘to blame’ for, but that the agent is still not more blameworthy. One might be ‘blamed’ more, in one sense of blame, when the harm is caused because the agent may have additional obligations as a result of causing the harm, and the practice of blaming in these situations may make it more likely that the agent will fulfil these obligations.

In all these instances, the subjectivist can claim that the level of culpability attributed to the perpetrating agent is the same, in accordance with the moral equivalence thesis, and that we should ensure that when theorising about such events, we ensure that we take proper care to distinguish our feelings of additional *blaming* from the agent's actual culpability.

It has already been mentioned that one's liability is dependent on outcomes. If while out jogging, not paying attention to what's going on around me, I bump into and knock down a pedestrian, I owe them an apology. If necessary I should help them up. These obligations are conferred upon me by my acting carelessly. It might well be the case that it was unlikely I would hit someone – perhaps I was only not paying attention to my surroundings for a few seconds – but if I did, then I certainly have the moral obligation to help. If I didn't hit anyone, then no apology would be owed and I wouldn't have to help the person up. Perhaps I would mentally scold myself for not looking around if I realised that I was being careless.

Given that obligations track outcomes, rather than choice, it can be questioned why this would be the case for obligations and not for culpability in general, as the choice theorist must argue⁷⁹. The obligation to help someone up who one has accidentally knocked down is a moral one, so there are even moral consequences bestowed upon a person based on outcome luck.

The part luck plays in this emergence of liability seems easily overstated by the choice theorist. If the choice made and the outcome are construed as entirely separate and unrelated entities, it may seem very unfair, but this is obviously not the case. While it might be true that all we have *complete control* over is the choices themselves, the outcomes that ensue are not *pure* luck (Duff 1996: p.342). In most cases, the choices we make have a bearing on the resulting outcome. Though luck might be a factor, this does not prevent moral appraisal or blame being appropriate when the outcome an agent directs her choices towards comes about. Duff compares the choice theorist to the

⁷⁹ A choice theorist *could* suggest that liability didn't track outcome, but this position would require that obligations of even apologies weren't needed in cases like the one above, or that the obligation of an apology was present even when there was no pedestrian there to hit, which seems too absurd to take seriously.

skeptic about knowledge – who holds that just because a remote threat of a peculiar scenario could compromise one’s ability to form true beliefs – in that they allow the possibility of the bad situation (an unintended outcome resulting) to compromise an agent’s credit in the expected situation (Duff 1996: p.332). The natural solution for the epistemologist might be to accept that where there are no barn-facades,⁸⁰ one *can* know that one is looking at a barn, just like we might say an agent is culpable for the outcome when it is in accordance with the choices they have made.

Duff holds that culpability in general, like moral liability, is subject to a more holistic evaluation. When an agent jumps into a lake to save a drowning child, she is praiseworthy even for *just* trying to do so. If she succeeds, she is even more praiseworthy. If, as Duff argues it should be, assigning moral blame is understood as a social activity, taking into account effects on other people and one’s standing in the world (1996: p.346), it is only natural that the outcomes *in* the actual world would matter to this.

Though this is by no means a conclusive argument against the subjectivist, or against choice theory, it is clear that the way we (as a society in our appraisals praiseworthiness and blameworthiness, and through our punitive practices) *do* treat outcomes as relevant to culpability. In this respect, choice theory, at minimum does not reflect our attitudes or practices. A choice theorist might claim that it *should*, and I concede that consistent accounts are possible on this basis. However, if an alternative basis for culpability coheres more easily with our intuitions, there would be reason to adopt that theory instead. I will now suggest that agency theory accommodates such intuitions and practices more successfully.

3. Agency theory revisited

Due to its wider interpretation of how culpability is attributed to an agent, incorporating both the intentions of the agent and the outcome of the action, agency theory easily

⁸⁰ This position is taken by Alan Millar (e.g. 2010: p.127) among others.

accommodates intuitions of diminished culpability for attempts. A typical complete attempt, such as the assassination attempt that failed because a passing bird blocked the oncoming bullet, strongly resembles the paradigm case, but the actual result differs and so is judged less culpable.

Though he doesn't argue for this at length, Horder claims that the agency theory is unable to account for excuses in law. I disagree. It is unclear why the account of excuses available to the character theorist cannot also be utilised by the agency theorist. An important constituent of acts of responsible agency is the beliefs or intentions with which one acts. Beliefs that are incongruous with the resulting outcome of one's action should be a significant deviation from the paradigm of agency. If an agent temporarily assists terrorists because he fears for his life⁸¹, his beliefs and intentions will presumably be related to his actions in a different way to the 'willing' accomplice of the terrorists. This difference provides the basis for mitigation or exculpation. In suggesting that agency theory is unable to account for excuses, Horder seems to have a narrow conception of agency. When more factors pertinent to the manifestation of agency in action are taken into account, agency theory seems not vulnerable to his objection and to have a wide-ranging explanatory power.

When considered in this way, it seems that agency theory can be thrown back into the ring. Agency theory will be discussed at length in the following chapter.

4. Building on the foundations

I contend that arguments for the choice theory of culpability *do* motivate accounts of recklessness along the orthodox subjectivist direction. I also contend that this does not accurately reflect how we view culpability. It could be argued that this is how we *should* view culpability – Alexander and Ferzan's account of criminal liability seems to follow such lines – but this would result in a wildly different system of criminal law.

81 See *R v Lynch*, [1975] A.C. 653.

For example, complete attempts would be punished just as severely as substantive offences.

Horder claims that no unifying theory of culpability is possible, instead favouring viewing culpability as a “patterned mixture” of the capacity, character and agency accounts. As I have suggested above, I think both choice theory and agency theory give plausible accounts, but even if we accept Horder’s claim, it can give us significant food for thought with regards to recklessness.

Even if what culpability *really* is, is some mixture of the above concepts, this still permits us to evaluate various accounts of recklessness. The orthodox subjectivist account of recklessness is supported by choice theory, but the objectivist accounts don’t seem to be able to claim any such support. The direction of *Caldwell* recklessness, requiring that a risk be obvious according to a reasonable person standpoint, can’t be justified by any of the above accounts. Consider an example like *Elliott v C*, wherein a fatigued girl of low intelligence was deemed culpable for not noticing an ‘obvious’ risk she would not have noticed no matter how much she thought about it. Such a person is not defiant; the risk was unknown. Due to such an agent’s capacity, she does not have a fair opportunity to avoid the harm. Her acts didn’t manifest any bad character trait (as ignorance or stupidity would not suffice by any character theorist’s standards). Her action doesn’t resemble anything like the paradigm of responsible agency (because her intentions are so far removed from the outcome that resulted)⁸², so would not be culpable under agency theory and she did not choose the harm she caused, so choice theory would similarly exculpate. Being unable to find support from any of these candidates for the grounds of culpability warrants severe suspicion of objectivist theories.

Similarly, several of the ways of dealing with drunken behaviour, such as that of *Caldwell* or *Faulkner*, do not seem to be justified under any of the above conceptions. *Caldwell* recklessness, relying upon a reasonable person standard to decide whether a risk is obvious, cannot be justified for the above reasons. The possibility of regarding

⁸² I will later suggest that agency theory can justify the requirement of a belief’s being reasonable - which may be interpreted as reasonable to an ordinary person – but this is not the justification for such a clause in the *Caldwell* verdict.

self-induced intoxication as its own mens rea level could be argued for under character theory, as we might suppose that self-induced intoxication (to some degree) manifests a bad character, but as Rebecca Williams notes, this would merely treat drunkenness itself as a crime (2013: p.266), which is presumably not a desirable direction.

One concern that we might have is that since 2003, the Sexual Offences Act does have a “Caldwell-esque” notion of culpability. If, as I have suggested in the preceding paragraphs, an objectivist notion has no foundational justifiability, isn’t such a legal provision entirely unfair? In the following chapter I will suggest that though the objectivist principles are groundless, this particular provision is consistent with agency theory and its conception of recklessness.

V. Academic Accounts of Recklessness

Below are discussions of the two accounts of recklessness that were deemed most plausible by culpability considerations in the previous chapter. Key features of the respective accounts are first presented and explanations of what verdicts they provide in the problem cases (self-induced intoxication cases, “the thought never crossed my mind” cases and “I thought she consented” cases) are given. Criticisms that follow from each account are discussed and the relative merits of the accounts are compared. Finally, I suggest that Duff’s account of recklessness is more plausible both as an account that reflects what we deem culpable and as an account which, if accepted, would yield legislation more effective in dissuading potential criminals.

Duff’s recklessness

a) Exposition

As noted in the previous chapter, Duff sees culpability assessments as a target with concentric circles. If Bob, in his normal state of mind⁸³, throws a knife at Jill because he

⁸³ This proviso is intended to avoid defences such as insanity or heat of passion, which may diminish, or eliminate any culpability on Bob’s part.

intends to kill her, his actions, if he succeeds, completely fit the paradigm of agency. Complete attempts fail to resemble the paradigm because the intended outcome was not achieved. Incomplete attempts are further from the 'target', as there are more stages of the action that the agent has failed to carry out. Just as attempts bear less resemblance to the paradigm of responsible agency than do substantive offences, so do instances where the material element of a crime is not intended. If Bob was throwing knives with the intent of hitting a target he had placed on a door, when Jill happened to enter the room, his harming her is further from the paradigm of agency.

Duff recognises that recklessness is typically treated as an extension of the normal paradigm. In the paradigm case, an agent is culpable for the material elements of the action that she intends and for the consequences that she is certain will be brought about by her actions. Recklessness is usually (as in any cases of *Cunningham* recklessness) seen as extending this to material elements one realises *might* be caused by one's actions (Duff 1990: p.141). Though this presumably would be one way of envisaging an extension of the paradigm which could serve as a separate mens rea, it is not the route Duff takes. Instead, he deems practical indifference towards some material element of a crime as the meaningful extension of the paradigm⁸⁴.

Exactly what "practical indifference" entails is difficult to articulate. How does this differ from indifference simpliciter? If there was no difference, Duff's account would seemingly collapse into a character theory. What is important for Duff, is that the indifference is somehow *part* of the action.

In his exposition of Duff, Brady supposes that Duff's distinction – between the practical indifference required for recklessness and the mere thoughtlessness of negligence – involves two categories (1996: p.197). The first category involves actions that are so inseparable from the harm that ensues that performing one entails one's indifference. This indifference is *manifested* by the action. If an agent's actions fail this

⁸⁴ Practical indifference was not an unfamiliar notion in discussions of recklessness. For example, it featured in rulings dating at least as far back as *Derry v Peek* (1889), as well as a great many cases since. See White (1985: p.108, n.42) for a extensive list of such cases. White himself also argued that recklessness was a form of indifference (1961: p.594).

test, the recklessness is “irrebuttable”. In the second category, Brady notes that practical indifference can occur when an agent’s conduct “display a seriously culpable practical indifference to the interests” threatened by her action (Brady 1996: p.198, Duff 1990: p.172).

Practical indifference differs from mere indifference in that it can be “read” by the mere evaluation of an agent’s conduct. Bob, who has been throwing knives at the door would then be judged as reckless if he has acted with indifference to Jill’s safety (or that of anyone else who might appear at the door). If he had taken all possible measures to ensure nobody was in the house, put up signs notifying of his activity or warned everyone explicitly beforehand, he would not have been acting indifferently towards her. If however, he began throwing his knives either without thinking about the possible risks to anyone else, or having contemplated them but dismissed them without good cause, we would rightly deem him reckless. Duff’s account captures both these instances. However, if Bob were (non-culpably) rendered incapable of thinking rationally (by perhaps an unexpected psychological episode or being drugged by some malevolent third party) and he failed to consider risks to anyone else for this reason, he might not be deemed reckless. Similarly, individuals of diminished capacity may not be acting with *indifference* if they fail to consider some risk, as they may simply be incapable of considering risks the same way we might expect those of normal capacity. For this reason, this account can avoid some of the problems which haunted *Caldwell* recklessness (and do so without resorting to ad hoc provisions).

Unlike the *Caldwell* account, which admits of a loophole for agents who have considered a risk but dismissed it unreasonably, Duff’s account could find such agents culpable. If Bob were to reason that no one would come in and put themselves in danger because they *usually* knock, or for some other bad reason, Duff could explain that he acts recklessly because if he had cared enough about the wellbeing of others in the house, he would have taken care to ensure that no one would enter. That he did not think to do so *manifests* a practical indifference.

Some argue that a person cannot be indifferent to something they haven't noticed (G. Williams 1982: p.287, White 1985: p.109, Brady 1996: p.193). This claim is easily rebutted. Consider, to borrow an example from Duff, a bridegroom who on the day of

his wedding, was at the pub with his friends rather than the church where the wedding was to take place (1990: p.163). The groom hadn't intended to miss the wedding, but later explains to the ex-bride that it had "slipped his mind".

Duff suggests that if the groom had cared enough about his fiancé, he would not have forgotten the wedding. His doing so – assuming there were no extreme circumstances – manifests a practical indifference for which he *is* culpable. Any suggestion that he wasn't to blame because he forgot would at best be seen as a bad joke. As Duff notes:

“What I notice or attend to reflects what I care about; and my failure to notice something can display my utter indifference to it.”

(Duff 1990: p.163)

Usually, the law will have nothing to say about an agent's indifference. In most instances, “a detached attitude is not the law's concern” (Duff 1990: p.162). However, when such an attitude manifests in the form of actions that harm legally protected interests, the agent in question is culpable. We can therefore define Duff's recklessness as follows.

Agent X is reckless with regards to:

- i) A circumstance when he manifests an attitude of practical indifference towards a risk that it exists or will exist.
- ii) A result when he manifests an attitude of practical indifference towards a risk that it will occur.

As Alan White notes in his exposition of recklessness as indifference, an account of this sort has no issues with the type of cases like the surgeon who (in accordance with her duty) performs a risky surgery (White 1985: p.101). In such cases, the surgeon does not act with indifference. As the surgeon acts with the motivation of improving the victim's condition, she is not acting with indifference, so she is not reckless.

b) “The thought never crossed my mind” cases

We are now in a position to evaluate Duff’s account with regard to the problematic cases. The case of an agent who is blind-drunk still proves very difficult⁸⁵, so the “the thought never crossed my mind” and “I thought she consented” cases will be dealt with first. Being practically indifferent is not the same as merely being unaware. An agent can be aware of a risk and indifferent to it; if Mr Cunningham was aware of the risks to his neighbour, we would not hesitate in judging him reckless. When an agent is unaware of the risk, we need to take into account the reason *why* the agent was unaware, in order to judge whether they have been reckless. To illustrate how this may be done, we can consider Duff’s examples of *Miller and Denovan* and *Faulkner*.

As previously mentioned⁸⁶, Mr Miller attacks a man with a piece of wood with such force that the man died. Mr Miller claimed that he was so focussed on his activity – that of attempting a burglary – that he didn’t consider the risks to the victim. Duff says that in a case like this, what is pertinent is not an “occurrent feeling”, but the “practical attitude” (1990: p.162). When a person is striking another with such ferocity as to kill them, failing to apply their latent knowledge (knowledge that hitting someone so hard is likely to endanger their life) manifests a practical indifference. There is, Duff argues, no explanation for Mr Miller’s not noticing the risk of his actions, other than being indifferent to the life of the victim. As such, it seems we can use the following question as an indicator:

If the agent had cared about the legally protected interest, would he have acted as he did?

⁸⁵ In his discussion of recklessness in *Intention, Agency and Criminal Liability*, Duff doesn’t discuss whether drunkenness should be allowed to negate the mens rea requirements for recklessness, noting that it is a complex issue (p.161), though he does confirm that he sees the *Caldwell* verdict as mistaken (p.206), suggesting that he doesn’t deem drunkenness as negating mens rea requirements.

⁸⁶ *Denovan and Miller* is discussed in II.4.

In *Miller and Denovan*, this test would give the same verdict as the *Caldwell* account, against what would be seemingly prescribed by the *Cunningham* account. This test, however, doesn't always provide the same results as the *Caldwell* account. This can be demonstrated by a case where the test gives the same results as *Cunningham*, contra *Caldwell*: *R v Faulkner*⁸⁷. Mr Faulkner was a seaman on board a boat who intended to steal some rum from the spirit room. Once in the spirit room he lit a match, so that he might find the rum he had designs upon, which resulted in his inadvertently burning down the ship. The risk of spreading a fire by carrying an uncovered flame on a wooden boat would have been clear to any seamen. To do so in the spirit room, considering the flammable liquids contained therein, should have been an obvious one to Mr Faulkner, but he was so intent on his thievery that he did not notice the risk.

As the risk created by Faulkner was “an obvious risk that property will be destroyed”, by a *Caldwell* account he would have been found guilty of recklessly destroying the ship, but due to his inadvertence to the risk, the *Cunningham* account would have the opposite finding. Duff suggests that looking at his conduct, we can see that Mr Faulkner's actions might not manifest an indifference to the property he destroyed, as the risks he imposed upon the ship were serious risks upon his own life too. Though the risk of fire in a spirit room is obvious, it is not a consequence so immediate to the act of lighting a match that one could not fail to notice it, particularly when preoccupied by something (such as Faulkner's nefarious rum-stealing plans). In the case of Mr Miller, however, the harm was so immediately and naturally related to the action that the only way one could perform it without awareness of the risk is to be indifferent to the well-being of the victim.

The use of this test in cases where an agent fails to become aware of a risk is supported by comments made by Lord Goff, in his comments regarding the *Elliott v C* verdict:

“Where no thought is given to the risk any further inquiry necessary for the purpose of establishing guilt should prima facie be directed to the question why such thought was not given.”

⁸⁷ *R v Faulkner* (1877) 13 Cox C.C. 550.

(*Elliott v C*, [1983] 1 W.L.R. 939)

The solution Duff offers is that recklessness is only established if the explanation why no thought was given was (at least in part) practical indifference. In *Elliott*, the minor of low intelligence who while fatigued had inadvertently set fire to a shed would, by Duff's lights, only be found reckless if her actions manifested practical indifference. Given her psychological state at the time of the crime, it is not clear that her actions display any such indifference.

c) "I thought she consented" cases

The 'I thought she consented' cases proved difficult for *Cunningham* and *Caldwell* advocates to provide satisfactory verdicts, but Duff's writings about sexual offences provide a plausible solution which is justified by his account of recklessness⁸⁸. In order to see what should constitute the fault element in the crime of rape, Duff considers the nature of the crime itself.

"The essence of the crime of rape is that it constitutes a serious attack on a woman's sexual interests and integrity: the fault element in rape should, therefore, consist in a serious disregard or disrespect for her sexual interests and integrity."

(Duff 1990: p.169)

This disregard or disrespect can be manifested whether or not the agent is aware that the woman does not consent. It is clearly displayed when a man has sex with a woman knowing she doesn't consent, or when he proceeds without concerning himself at all whether or not she consents. It also seems that the same disrespect and disregard is manifested by the man who has sex with a woman while believing for no good reason

⁸⁸ Duff wrote most specifically about this in "Recklessness and Rape" (1981), though he also discusses the subject in several other places, including *Intention, Agency and Criminal Liability* (1990), *Criminal Attempts* (1996).

that she consents; if he did care, he would not have been so easily convinced. In such cases, it is clear that the woman does not consent, and that the man does not “notice” or is too busy indulging his own gratification to question the circumstance despite clear signs of reluctance demonstrates his indifference.

The ruling given in *Morgan* and *Cogan*, therefore seems mistaken. Even if Mr Cogan did honestly believe that Mrs Leak consented, he shouldn't have, considering the overwhelming evidence that she did not. His readiness to accept the highly implausible scenario as actual demonstrates that he didn't really care about her consent. Even with the claim that the intoxication contributed to his mistaking the facts, he still acted with practical indifference contrary to the nature of consensual sex, thus is reckless as to her consent.

The only situations in which one may have committed the actus reus for rape – sex with a non-consenting party – and not be culpable in doing so, by Duff's lights, are when one reasonably believes in the consent of the other person. Such a situation would be very rare and bizarre, as in normal situations a lack of consent would be blatant and thus would be acknowledged by anyone forming their beliefs reasonably. A man might reasonably believe that a woman consents if, unbeknownst to him, she has been coerced to go along with it by some third party. Another possible scenario, suggested by Baron, would be one in which a survivor of chronic sexual abuse in childhood believes that a man she is with will abuse her, despite no indication of this by the man⁸⁹. Because of her previous experiences, she believes that if she resists, the ordeal may last longer or be more painful, and that refusing would be pointless or dangerous. The woman then pretends that she wants to, or doesn't mind, even though she is unwilling. As she is a good actress, the man notices nothing wrong in the situation, and proceeds to have sex with her.

Situations like this would be very unusual, but would exculpate. In all other situations, when the actus reus for rape occurs, the charge of rape would stand. This

⁸⁹ This example is modified from an example provided by David Archard, who depicts a man who looks similar to an escaped psychopath who resorts to brutal violence if he doesn't get his way. A woman, believing he is the psychopath, acts as though she consents so as to avoid being brutalised (Archard 1999: p.216, cited in Baron 2001: p.16).

account also provides helpful answers to practical worries about the demandingness of proving the mens rea requirement. A defendant could not be exculpated by creating a small amount of doubt among jury members about whether he was (for bad reasons) unaware of the non-consent. This alleviates the concern that alleged rapists would escape conviction by claiming they thought the woman consented, as they would still be found guilty unless their belief is deemed reasonable. Duff thus determines that only reasonable belief of consent can exculpate in “I thought she consented” cases.

As mentioned previously⁹⁰, the 2003 Sexual Offences Act does require that men charged with rape have good reason to think a woman consented if they are to be exculpated. While I noted that this ‘objectivist’ requirement had no clear foundation, Duff’s account elucidates this. It is because the man who goes through with a sexual act without good reason to believe the woman consents acts in a way that manifests a practical indifference that he is culpable.

d) Blind-drunk cases

As so often is the case, ascertaining whether or not an agent has manifested a practical indifference and thus is reckless requires attention to the circumstances. Consider cases involving self-induced intoxication, where the intoxication blinds one to a substantial risk, or renders it difficult to see the risk as substantial. Taking a hard line, it could be suggested that becoming intoxicated is reckless in itself. As becoming intoxicated alters a person’s inhibitions so that drunken individuals might risk certain legally protected interests, anyone who does commit a crime in such a state *has* manifested their practical indifference in becoming so drunk as to commit the crime⁹¹. As Dressler notes, “the effect of alcohol and drugs on the human body is now sufficiently well known that the law may assume that when an ordinary person chooses to ingest intoxicating substances,

⁹⁰ See IV.4.

⁹¹ If the agent would have committed regardless, then the intoxication need not be taken into consideration as a factor.

he knows that he will suffer temporary impairment of his powers of perception, judgment and control; therefore, he knows that he will jeopardise the safety of others while in that condition” (Dressler 1995: §28.03 [B] [2]). This reasoning concerning drunken crimes can lead to self-induced intoxication being regarded as not only not permissible as a defence, but also enough to *suffice* for criminal recklessness. This rejection of the use of self-induced intoxication as a defence is used in Scots law⁹². Any action that would have been seen as reckless by a sober person could then be judged reckless when committed by a drunken person.

However, this seems to fail to capture something important (particularly in light of the agency theory of culpability), something that Duff’s account does capture. Consider the following example.

Susan returns home from a party where she became very drunk. Upon reaching her house, she sees that the next door neighbour is lying on the floor in his living room⁹³. Thinking that her neighbour has taken ill and possibly in urgent need of medical attention, she quickly breaks a window and bursts in. However, the neighbour was only setting up a mousetrap or looking under a table. If Susan was sober, she would have knocked on the window, called to her neighbour or looked more closely, but because of her intoxication she panicked and acted hastily.

Normally, an agent in Susan’s position would have at least an excuse defence available against any charge of criminal damage⁹⁴, but if intoxication is not allowed to constitute part of a defence, this might not be possible. Though Susan clearly made a mistake about the facts of her environment, she certainly wasn’t practically indifferent; she acted with the aim of helping her neighbour. As she wasn’t practically indifferent to

⁹² In *Brennan v HM Advocate*, the accused’s acute self-induced intoxication was deemed to be sufficient mens rea even for a murder conviction ([1977] J.C.51), which has received significant criticism (i.e. Stark 2011).

⁹³ This particular example adapted from one provided by Duff in *Answering for Crime* (2007: p.271).

⁹⁴ Duff notes that actually such an agent may be acquitted in English law, as belief in a lawful excuse is a defence under the Criminal Damage Act that does not require a belief to be justified (Duff 2007: p.293).

the criminal damage, under Duff's account she was not reckless. Considering examples like this, a rule imputing appropriate mens rea based on intoxication seems incompatible with Duff's recklessness, as well as the agency theory of culpability as a whole.

Cases such as the above instance suggest that self-induced intoxication can be evidence that the agent was less culpable, so that evidence should be permitted as part of a defence. It is not obvious, however, that all offences should permit such defences.

Mistake-of-fact "defences"⁹⁵ which coincide with instances of self-induced intoxication, as those argued in *Morgan* and *Cogan* are very problematic. I have already argued that the intoxication in *Morgan* and *Cogan* does not exculpate, but this might not hold in all mistakes due to intoxication. An alternative mistake-of-fact case is *Jaggard v Dickinson*⁹⁶. In this case, the defendant, Ms Jaggard had intended to stay at the house of a friend, Mr Heyfron. Jaggard had permission from Mr Heyfron to treat his property as she would her own. After a night of drinking, Ms Jaggard took a taxi to what she thought was Heyfron's house. Unbeknownst to her at the time, she had arrived at a nearly identical house on the same road. Ms Jaggard proceeded to break two windows in order to gain entry to the house, believing at the time that she had permission.

The crime of criminal damage to property is deemed a crime of general intent, so following the *Majewski* verdict, mistake-of-fact due to self-induced intoxication would not seem to exculpate. However, the judgment was challenged, as the Criminal Damage Act 1971 specified that "it is immaterial whether a belief is justified or not if it is honestly held". Upon appeal it was decided that the belief didn't need to be justified. As the belief that she had permission to use the property in this manner was honestly held, she could use this as a defence. That the belief was formed because of her intoxication did not change this⁹⁷.

⁹⁵ Technically, a claim of mistake-of-fact is not a "defence", as it is a type of failure-of-proof claim, which is not a true "defence" (Dressler 1995: §24.01 n.4).

⁹⁶ [1981] Q.B. 527

⁹⁷ Ibid. p.528

The essence of the crime of criminal damage is that it constitutes a threat to the property of others. For Duff's account, whether or not Ms Jaggard was reckless depends on whether or not she was practically indifferent to the damage. Yet someone who uses someone else's property under the mistaken belief that it's theirs is not indifferent to the property.

Though we would probably argue that Ms Jaggard was culpable in some respect, and is liable to replace the damaged property, she does not act with indifference. In this case, Ms Jaggard's failure is to *take* care, not a failure to care. She made a mistake and one that she would not have made had she been sober. However, her conduct in damaging the property was not indifferent. With these considerations in mind, for *some* crimes, mistake-of-fact claims should be available for defendants acting while intoxicated. Ms Jaggard seems to be an instance of someone who was civilly liable, so is responsible for paying for the damages caused by her actions, but not criminally liable. Duff's account is easily able to accommodate this interpretation.

As the above examples suggest, it might be a mistake to attempt to regard all crimes similarly with regard to whether or not self-induced intoxication can be used as part of a defence. In some situations, like *Jaggard v Dickinson*, intoxication does seem to provide an explanation for a mistake-of-fact. In those cases acting in accordance with that mistaken belief does not reveal a practical indifference on behalf of the agent. In other cases, such as *Morgan* and *Cogan*, the mistake-of-fact does entail an indifference upon the part of the agent. The *Majewski* ruling makes a similar claim, but makes the distinction based upon crimes of basic or specific intent⁹⁸. As both of these crimes are regarded as ones of basic intent, but only one seems criminally culpable, making distinctions on whether a crime is of basic or specific intent seems unhelpful. Duff's account, however, is able to offer a plausible distinction between these cases. Through his account, Duff illustrates that it is both possible and desirable to distinguish between offences which should permit mistake-of-fact defences, and which should not.

98 This distinction is previously discussed in III.1.

2. Criticisms of Duff's account

Though the methods described above do provide satisfactory resolutions to many of the problematic cases, there are still several criticisms of Duff's account. In this section I will address two particularly pressing concerns.

(a) The definition of recklessness can be criticised as eclectic and wildly dissimilar to both everyday and conventional legal usage (Gardner and Jung 1991: p.561). Its utilisation in explaining certain cases might then seem ad hoc, and it might be wondered whether the attitude Duff describes as recklessness is actually appropriate for purposes of a culpability category.

(b) Norrie argues that Duff's account relies upon peculiar and unfair notions of what constitutes the essence of an offence. If there is no systematic way for this to be uncovered, the account relies upon potentially arbitrary views of what the nature of a given crime is.

a) An ad hoc mens rea categorisation?

One may wonder why practical indifference forms the clear mens rea category that Duff supposes "recklessness" to serve. One could argue that though acting with a practical indifference towards some legally protected interest is culpable, it is surely *more* culpable if one realises one is doing so. If one is more culpable for taking some risk when aware that that risk exists, why shouldn't there be a mens rea category between practical indifference and knowledge?

Brady argues that there is a conceptual distinction between crimes involving an awareness of risk and those with a "mere" practical indifference (1996: p.193). Instead, he favours a *Cunningham*-like account of recklessness. On this view practical indifference without awareness of risk should suffice only for negligence. In supporting

his position, he accuses Duff of ignoring important conceptual considerations because of a supposed equivalence of blameworthiness between situations. For example, when Duff gives the example of *Miller and Denovan*, he argues for Mr Miller's recklessness by claiming that while hitting the victim with the plank of wood unaware of the risk, he acts with the same indifference to the victim's well-being as the agent who is aware. Brady claims that it is a mistake to think that merely because Mr Miller was just as culpable as he would have been if he considered the risks of his conduct that both instances belong in the same conceptual category.

Gardner and Jung also claim that Duff does not motivate the position that his recklessness is the obvious conceptual mens rea category denoting a level of culpability below knowledge. They also suggest that his definition of recklessness coheres neither with the "everyday concept" nor with any "existing legal definitions" (1991: p.561).

An advocate of the choice theory of culpability would be unlikely to be persuaded by Duff's account of recklessness, but even if one endorses the agency theory of culpability, we might question why practical indifference is the category of culpability below knowledge. In the paradigm cases of responsible agency the agent aims at some criminal end and accomplishes this. Surely the person who is aware that this criminal aim may obtain resembles the paradigm more closely than one who does not.

In defence of Duff, we might consult Alan White's writing on recklessness. Though White did not have the commitments to agency or the possibility of recklessness without foresight of risk, he also characterised recklessness by the attitude of practical indifference. White analyses recklessness as an ordinary language concept. If White's everyday concept of recklessness can be reconciled with Duff's (which seems plausible given their shared reliance on practical indifference) and White motivates the place of recklessness as the mens rea level below knowledge, the same argument can be made on Duff's behalf.

White argues that recklessness is an attitude. Actions by an agent with that attitude are also correctly described as "reckless", as is the agent performing such actions. The attitude of recklessness is a specific form of indifference. Not all indifference is reckless, as one can be indifferent towards a piece of music or towards the plight of

some endangered species one has never heard of, though these are certainly not reckless attitudes (White 1961: p.594). Indifference is the attitude of “the man who does not care” (White 1961: p.592).

We can justify these claims by referring to ordinary language. As with other attitudes, one can *feel* reckless, but recklessness cannot be “exercised” or “used”. Recklessness can serve as an explanatory factor in behaviour; a person can drive too fast because of their recklessness. A person can feel reckless even when not acting. These considerations distinguish recklessness from carelessness. It would be peculiar to describe oneself as feeling “careless”⁹⁹. These concepts may be conflated because carelessness is often due to and “evidence of the not caring which is indifference,” the hallmark of recklessness, but recklessness and carelessness are clearly different (White 1985 p.101). An agent accidentally knocking over friend’s cup of tea while she passes the sugar is careless, but obviously not necessarily reckless. And obviously she need not be indifferent; she might be mortified and extremely apologetic at having done so. In doing so, she exhibits a failure of attention, rather than a failure of care.

Considering this point, we may revisit Brady’s criticism, that Duff mistakenly ignores an important conceptual distinction based on an equivalence of blame in some examples (like Mr Miller and the bridegroom). When discussing mens rea levels, it is the fault element that is pertinent. The comparison between Miller, and a similar agent who does think about the risk of harming (or killing) his victim is illuminating because the fault element of these agents is the same. The fault element *is* the culpable attitude manifested in the agent’s conduct. Because this attitude is the fault element, and that attitude is present in both Mr Miller and his counterpart who considers the risk, both are properly assigned in the same conceptual category.

Gardner and Jung’s criticism can be responded to similarly. Though a mesh of mental states may fall into what Duff labels the attitude of “recklessness”, they are all characterised by the same fault element; manifesting a practical indifference. This is the pertinent factor which unites a various agglomeration of situations Duff wishes to call

⁹⁹ They may describe themselves as “carefree”, or “without a care”, but these phrases indicate a lack of worry, rather than a lack of care (White 1985: p.93).

“reckless”. That it does not cohere at all with either the legal or everyday definitions could also be questioned: Alan White came to a similar account of “recklessness” by analysing ordinary language, so this surely isn’t entirely divorced from everyday usage. The role of indifference in relation to recklessness is also well-documented in legal thought.¹⁰⁰

Even if the above argument is accepted, and it is accepted that both the advertent and inadvertent agents that fall under Duff’s umbrella of “recklessness” do form a natural category, it might still be thought that the cases wherein the agent is aware are more culpable. Perhaps this notion of recklessness is a natural concept, but levels of culpability are better captured by replacing recklessness with two categories, with the advertent agent in a more culpable mens rea level. A similar formulation was considered in the *1985 Code*, giving the name “recklessness” to instances where an agent was aware of a risk, and calling “heedless” an agent who gives “not thought to a risk that “would be obvious to any reasonable person”¹⁰¹.

If we consider this alternative to Duff’s method, we may see further wisdom in his approach. There could, instead of the mens rea category of recklessness, be two categories¹⁰²:

- 1) Foreseen risk-taking.
- 2) Practical indifference.

Proof of foreseen risk-taking would, as in the MPC hierarchy of categories, suffice for offences that only required culpable indifference. This would address the concern that

¹⁰⁰ Supra, n.84.

¹⁰¹ *1985 Code*, 8.22. The element of “heedlessness” was removed for the *1989 Code*.

¹⁰² The Israeli criminal code does have an idea like this, but both “rashness” – the “assumption of an unreasonable risk as to the possibility of the consequences hoping that it will be possible to prevent them” = and “indifference” are seen as types of recklessness, which is a mens rea category below “intention”. Both of these notions of recklessness would presumably be covered by Duff’s notion of “practical indifference”, so would result in a hierarchy similar to Duff’s proposals. (Penal Law of Israel, quoted in Simons: 2003: n.5).

the man acting with the awareness of the risks of his illicit conduct is more culpable than the one who is unaware (though still culpably indifferent).

If such a hierarchy were adopted, Duff's concerns about recklessness and rape could be accommodated by making the lower category the required mens rea for rape. This would also allow the law to accommodate Brady's thought that the agent who does foresee the risk is more culpable, and this could be reflected by harsher sentences for those in who take a foreseen risk than for those who commit offences with "mere" practical indifference.

If, however, this new hierarchy were adopted, it would suggest that – without extenuating circumstances – the foreseen risk-taking is always worse (for the same offence, at least) than culpable indifference without foresight of risk. I would like to question this based on two examples. Firstly, consider the man who has sex with a woman, noting the possibility (estimated at $p\%$) that she doesn't consent. It doesn't seem that there is an ordinal difference in culpability between this man and the man who, like the character, Arrogant (referred to in III.3) assumes consent and refuses to accept any evidence to the contrary. This is particularly evident when p is a very low percentage, say 0.001%. It might even appear that Arrogant is more culpable due to his extraordinary unwillingness to accept the situation. Though it is not possible to assign a number to the culpability of the respective agents, it is clear that within a category there are different gradations of culpability; taking a very high risk, all things being equal, is worse than taking a low risk. It would be undesirable, however, if for a given offence, a "lower" category of culpability often seemed more culpable than a "higher" category¹⁰³.

A second example, courtesy of George Fletcher, concerns the Ford car manufacturer's production of the Pinto (Fletcher 1998: p.116). The Pinto was designed in such a way that the gas tank was likely to explode on fairly common, light impact, such as a very slight rear-end collision. Consider (without attention now to what did in fact happen) two possible versions of what happened. In one instance, the car manufacturer does not consider risks of this design, due to "sloppiness and

103 Ferzan and Alexander (2009) and Simons (2003: p.196) do suggest that this occurs in the current categories already, however, this contention is disputed in V.3.

indifference”. In a second version of the case, the company runs thorough tests to evaluate the risks, but decides that the risk is not substantial enough to warrant assuming additional costs¹⁰⁴. This decision is later decided to be reckless, as the risk is deemed by a judge to be very substantial indeed, and the company mistaken in their assessment. Although we might think Ford callous in the second instance, that they have evaluated the risk at all indicates some concern for the public. It might be the case that if the risk was even slightly higher, they would have withdrawn the model. In the first version, however, the risk could have been much higher, but because the company didn’t conduct any evaluation, it would still have gone unnoticed. Fletcher suggests that the first version of this example would make Ford more blameworthy, yet a hierarchy placing foreseen risk-taking as more culpable would suggest otherwise (as would the MPC definitions).

Examples such as these, which would indicate culpability levels contrary to any amended hierarchy (with foreseen risk-taking above practical indifference) provide indirect reasons to adopt Duff’s simpler hierarchy, with recklessness (manifesting an attitude of practical indifference) below purpose and knowledge. Given that some evidence suggests that ordinary people struggle with understanding the current mens rea categories anyway¹⁰⁵, one might wonder how beneficial it would be to split the mens rea hierarchy even further, even if clearer culpability categories were available.

This criticism of Duff’s account is unconvincing, as his notion of recklessness does not, upon further inspection, appear as eclectic as several critics suggest. Dissecting a mens rea hierarchy even further also seems undesirable, due to the difficulty of the project (for both those making the categories and the jurors who would have to make the distinctions). Restricting the hierarchy further, though appearing simpler¹⁰⁶ also

104 Incidentally, this is a further example that would fall into a *Caldwell* loophole, as the risk was considered, yet dismissed as not substantial.

105 This was noted in a recent article by Francis Shen et al. (2011), which cites considerable confusion regarding the difference between recklessness and knowledge (p.1354).

106 Dolinko praises Alexander and Ferzan’s account for this virtue – calling it “refreshingly novel” despite arguing that it inevitably fails (2012: p.98).

seems plagued by problems. As Dressler points out, distinctions like those in the MPC hierarchy are important to “express the moral gradations of culpability that exist” (2000: p.963).

b) Arbitrary view of a crime’s essence

Alan Norrie claims that though Duff’s account is able to provide desirable consequences only if we rely upon very specific ideas about what constitutes the essence of a crime. Moreover, he suggests that what Duff views as constituting the essence of a crime is wildly different to what the ordinary person thinks. Therefore, Norrie suggests, Duff’s view of what suffices for a crime may rely upon arbitrary ideals and prove unfair to non-experts who would be unfamiliar with these notions.

To illustrate his criticism, Norrie takes Duff’s analysis of the essence of rape. As discussed in the previous section, Duff says sex is “*essentially* a consensual activity between partners” (1990: 169). The man who believes unreasonably that a woman is consenting has made a mistake about “something which is (which should be) essential to his intended action, since without her consent” he is engaged in a “perverted, because non-consensual distortion of that act” (still Duff 1990: 169). As such, not being sufficiently careful towards the woman’s integrity is reckless, so the agent is guilty of reckless rape.

Norrie claims that Duff bases his account of rape and its essence on judgements about the crime of rape and value judgements of sex as “a matter of deep emotional sharing rather than objectivized physical satisfaction” (1992: p.51). He argues that though this sentiment might be shared by many of us and is preferable to alternatives, large parts of the sexist society that we are part of do not share such views. Many of those who would be found guilty by Duff’s lights would be of differing views, so would not see themselves as acting criminally. As Duff requires “an evaluation of reasonable sexual conduct” which may differ from the “actual attitudes of unenlightened men”,

Norrie contends that the account “cannot meaningfully be said to be anything to do with their actual, concrete subjectivity” (1992: p.52).

There are several concerns related to this criticism. One such concern is that what constitutes an offence is arbitrary or reliant on niche value judgments. This would clearly count against the theory. Rather than a careful investigation of universal concepts, the analysis of a crime would require a specific, privileged set of values and an interpretation of events also influenced by one’s values. This would be unfair to those without such values and thus undesirable.

One might attempt to respond to this with the legal doctrine that ignorance of the law is no excuse. This, without further qualification, seems inadequate, as it contains nothing to indicate why an agent acting with such ignorance would be culpable. If the laws are completely arbitrary and an agent breaks them without knowing, that information in itself isn’t enough to ground an agent’s culpability. Fortunately, I will argue, Norrie is mistaken in such claims.

Any legal system protects certain interests. All citizens are required to ensure that their behaviour does not harm these interests. In our legal system, the sexual integrity of any citizen is one such interest. Norrie cites misogynistic men as examples of “unenlightened” people holding different values. He claims that requiring “reasonable sexual conduct” from such people “may be politically acceptable but cannot meaningfully be said to be anything to do with their actual, concrete subjectivity” (1992: p.52). Even “unenlightened people”, however, will have some understanding of sexual integrity; they will probably value their own.

If Duff’s account were reliant on some of the claims Norrie indicates, his argument might be convincing. However, the interpretation Duff offers of sex as “deep emotional sharing” is not required for one to respect the sexual integrity of others. One might regard sex as an informal activity between acquaintances or as a means for one’s individual pleasure (like a massage) and still respect the autonomy of the other party/parties. All Duff’s account actually requires in this matter is that an agent respects the choices of others with regards to whether or not they wish to use their bodies in a certain way. If their conduct manifests a practical indifference to the sexual integrity of

others, they are culpable for doing so, and as this is a legally protected interest, they are criminally culpable.

It might be a matter for public communication to relay exactly what interests are protected to help inform such “unenlightened” people exactly what conduct is required. However, such conduct is still required. As Marcia Baron argues,

“...public education may very well be needed to get out the message that this is required. But that means that education is needed, not that because the education isn't offered, we should not require the conduct. The fair warning requirement is a reason to give the warning, not to abandon plans to require the conduct.”

(2001: p.9)

The actual requirements of agents are fairly minimal. In *Morgan* or *Miller* –type cases, their offences would have been prevented if they had acted with respect for the legally protected interests of others. Ensuring that a partner is consenting or that one doesn't hit another with sufficient force to risk his life are very minimal requirements. These can be seen by anyone who does value others' sexual autonomy or well-being; by anyone who is not practically indifferent to them. For any agent to have so little concern that his actions could cause such harm *makes* his causing the harm culpable. It is difficult to conceive how someone interpreting their environment (including the actions of the “partner”) could make a mistake in such a situation unless they exemplify an astounding lack of care (in which case we would deem them culpable) or suffered from some diminished capacity (in which case a diminished capacity defence could be available¹⁰⁷).

Norrie's criticism also relates to the criticism of the reasonable person standard. He concedes that when an agent acknowledges that his conduct was wrong and when the interpretative audience agrees (when society also judges the conduct wrong), there is a consensus and the agent is thus culpable. A reckless driver, realising that their driving is

107 Under Duff's account some form of diminished capacity defence must be available, as an agent of a diminished capacity may not be indifferent, but just *unable* to appropriately react. As this would clearly affect the resemblance of the agent's action to the paradigm of responsible agency, it must also affect the agent's culpability.

wrong, can justly be punished. Without this consensus, however, as when a driver thinks (erroneously) that he is driving safely, the agent is being held to standards he didn't know of, and possibly *could not* meet.

Duff insists that recklessness is a subjective notion, even under his account. This is because an agent's recklessness "consists in his own practical attitude of indifference... an attitude he displays in his conduct" (Duff 1990: p.172). The reckless agent acts callously or indifferently. Norrie suggests that to make the account truly subjective, it is necessary to find some way to determine whether the agent did act with indifference rather than "negligence, stupidity or thoughtlessness" (Norrie 1992: p.54).

To illustrate the criticism more clearly, consider *A*, who has committed some offence. As this is an offence, it is something deemed wrong by the interpretive audience (society, in the form of the law). The agent, *A*, may have adverted to the material element that constitutes the offence, or she may not have. Either way, she may acknowledge afterwards that she acted with practical indifference, or she may not. Norrie accepts that in the cases wherein "it should be possible to gain the accused's *ex post facto* agreement that what she had done did display practical indifference", the agent has acted recklessly (1992: p.55)¹⁰⁸. When no such consensus exists between the agent and interpretive audience, however, Norrie suggests that the disagreement is one of value-judgments, and politically motivated. Thus in such cases, agents would be held culpable for possessing different values. This criticism of the use of the reasonableness, which Norrie later describes as a "political rabbit in the judicial hat", is slightly different to the criticism described earlier¹⁰⁹ as it focuses on the values rather than cognitive ability of an agent. This criticism – as well as the related criticisms of the reasonable person standard – is likely to warrant a response from defendants of all accounts of

¹⁰⁸ It should be noted that despite Norrie's wholesale criticism of Duff's conclusions, he does accept that an agent can be reckless despite inadvertence to a risk.

¹⁰⁹ See III.4.

recklessness¹¹⁰ (as well as for various other aspects of criminal law), so this shall be returned to later.

3. Alexander and Ferzan's recklessness

a) Exposition

Larry Alexander and Kimberly Kessler Ferzan have claimed that the entire legal system has vast flaws and propose a serious remodelling¹¹¹. They make several bold claims about how the law should be adjusted. One of the most controversial claims they make is that there should only be one mens rea category: recklessness. They see this category as very similar to the MPC version of recklessness, though argue that the requirement that the risk be substantial is unnecessary.

That one can be reckless without taking a *substantial* risk is a matter which has some support from previous authors¹¹². In support of this claim, they consider examples where the probability that a risk will obtain is very small, but extremely unjustified. They compare "Driver", who upon noticing that a passenger is having a heart attack speeds to the nearest hospital in order to get his passenger the treatment they need with agents like Daniel, who likes to "set dynamite on city streets just for the thrill of watching the dynamite explode" (2009: p.26). They imagine that the risk of Daniel

110 Any account that holds the falling short of some minimal objective standard of conduct as a keystone of recklessness will do so. The *Cunningham* and *Caldwell* accounts do explicitly. The MPC talks of "the standard of conduct a law-abiding citizen would observe", but this description does not avoid the problem.

111 Most of the claims attributed in this section to Alexander and Ferzan are made in *Crime and Culpability* (2009). Though Stephen Morse is also credited as a contributor, his influence is difficult to ascertain. For simplicity I shall refer to this position as Alexander and Ferzan's.

112 Dressler (2000: p.957) suggests that the "substantiality" should be read with regard to the unjustifiability of the risk, rather than to the probability of the risk. Simons makes a similar point (2003: p.189, n.30).

causing injury or death by this is 1% of the risk caused by Driver, but still suggest that Daniel is reckless, whereas Driver is not, because his conduct is justified.

This is the only change Alexander and Ferzan see as required to the definition to the MPC definition of recklessness. They still require of recklessness that the conduct, considering the circumstances known to the agent, “involves a gross deviation from the standard of conduct that a law-abiding citizen would observe in the actor’s situation” (2009: p.25). As Baron notes, the “law-abiding citizen” requirement seems puzzling, as it seems uninformative and potentially circular (2001: p.26)¹¹³, but Alexander and Ferzan do explicitly endorse it (2009: p.43) This doesn’t seem too problematic, as long as it is interpreted as requiring some appropriate standard of conduct, though this clause might have been edited to clarify the definition.

Any recklessness is constituted by two axes; the degree of risk imposed and the reasons for doing so (2009: p.24). The degree of risk axis denotes the probability the risk will obtain as perceived by the agent, and the harm that risk would occur. The reasons axis is also required, as the agent must be acted unjustifiably in order to be deemed reckless. As they demonstrate with the cases of Driver and Daniel, a significant risk might be reckless if there are no good reasons for acting (exploding things for fun), but not reckless if there are good reasons (trying to get an ill person to hospital).

Crimes currently classed as purposely or knowingly committed are obviously still culpable, but these are “folded” into recklessness (2009: p.31). In the purposeful or knowing case, an agent would risk the interests of others and her reasons would not justify her behaviour, just as in the reckless case. In doing so, they provide examples of purposeful and knowing crimes, and claim that they necessarily exhibit the same properties required by their definition of recklessness.

When considering purposeful crimes they consider assassins who attempt to kill a political figure for financial gain. However likely they are to succeed, they have unleashed a risk against a protected interest and have done so without good reasons. As Alexander and Ferzan have dispensed with the “substantiality” requirement, the risk

113 Moore and Hurd also draw attention to this phrasing (2011: p.333).

could be very small. They consider the case of “Cowardly Jackal” who shoots at his target from a great distance, realising that the chance of his success is only one in a million (2009: p.35). Alexander notes that an agent acts purposely even when the odds are so tiny, as long as they believe their activity increases the risk of harm (2000: p.942). He is still unjustified and the risk (though low) is still a risk, fulfilling both the axes of recklessness.

A similar analysis is available for knowledge. In the case of offenses committed knowingly an agent has a “practical certainty” that the risk imposed will be satisfied. As long as the reasons for imposing the risk are unjustified the offense is still, by Alexander and Ferzan’s definition, reckless. Offenses committed knowingly or purposefully are then just special forms of reckless.

Incorporating knowingly and purposefully committed offenses into recklessness avoids two theoretical problems¹¹⁴. It “allows us to avoid the error of deeming all cases of knowledge to be worse than all cases of recklessness” (2009: p.33). Alexander illustrates this with the example of a person who imposes a practical certainty of harm on another for a “quite weighty but ultimately insufficient reason” (Alexander 2000: p.940), who he suggests is far more culpable than an agent who imposes a very high – but short of practical certainty – risk for frivolous reasons. The former case would be classed as knowingly committed according to the MPC, whereas the latter would be reckless, which Alexander sees as making an erroneous culpability distinction.

The other problem resolved by recognising only one mens rea level is that wilful blindness doesn’t require an ad hoc treatment. Instances of wilful blindness occur when an agent does not have knowledge that they are committing an offense, but only because of deliberate avoidance of evidence that would provide them with such knowledge. This type of case often occurs in the case of agents who take steps to ensure that they do not gain knowledge that they are actually transporting drugs or other illicit materials across national borders. Often, smuggling illicit substances is only punished if done so *knowingly*, so if the agent avoids knowledge, she would escape prosecution. Alexander

114 These are cited in *Crime and Culpability* (2009: pp.33-35) as well as in Alexander’s “Insufficient Concern” (2000:940-942)

notes difficulties in several American cases wherein courts have contrived to find a defendant guilty by finding their “wilful blindness to be tantamount to knowledge” (2000: p.941). Alexander argues that it would be preferable to avoid this unnecessary distortion, which a singular mens rea category of recklessness would. There would be no issue in finding the wilfully blind agent reckless, as she certainly takes an unjustified risk. The level of punishment that is appropriate would be a function of the probability she deems of the risk obtaining and how unjustified the conduct was.

Alexander and Ferzan firmly reject criminal liability for negligence, basing their position on the choice theory of culpability. If there is no culpable choice made then there would be no justification for criminal liability. They demonstrate their conviction in this account by means of an example they understand might seem very troubling, calling it the “strongest counterexample” to their position (2009: p.77). Sam and Ruth are a “self-absorbed yuppie couple” with a young child. They also happen to be throwing a party which both hold very important to their social standing and careers. While drawing a bath for their child, the doorbell rings signalling the arrival of the first guests. At the time, both reason that there is plenty of time to welcome the guests and return upstairs to turn off the bath. They proceed to greet the guests, “both realizing that the child would be in grave danger if they failed to return and turn off the water, but both believing correctly that at the rate the tub is filling, they will have plenty of time to return to the child after they have welcomed the guests.” Once downstairs, however, both Sam and Ruth, distracted by the guests, forget about their child, who drowns. Alexander and Ferzan hold that if negligence was ever culpable, this would be one such instance. They reject this though, arguing that though Sam and Ruth are not “morally attractive” people, they did not believe they were taking a risk, so are not culpable (2009: p.78). The thought had slipped their minds and “once the thought was out of their minds, they had no power to retrieve it.”

The culpable choice, under this account, is one that “unleashes a risk of harm over which he no longer has complete control” (2009: p.19). Agents who still have complete control whether or not they unleash such a risk are deemed non-culpable. Consequently, certain offences which are currently illegal, such as solicitation, conspiracy and incomplete attempts (where an agent takes some steps to commit a crime, but falls short

of actually unleashing a risk) would be deemed non-culpable. It should be noted that minor risks may be unleashed in the process of what would normally be considered incomplete attempts. For example, if carrying a gun with the intention of killing someone, an agent has already unleashed the risk that he could drop the gun or fall in a peculiar way, and with no good reason. Even act of driving is reckless if it is with the intention is to another person's house to kill them (or even fraudulently enter an exam), as this risk – though admittedly low – is completely unjustified (2012: p.286).

The culpable choice need not be a conscious one. In order to account for cases where an agent indulges in risky activity, while having a vague risky feeling but without having considered the ramifications fully, Ferzan draws from her work on “opaque recklessness”. When a risk is fully considered – when the risks have been noticed and acknowledged by the agent – but the agent still takes it, she is “purely reckless” (Ferzan 2001: p.603) or “transparently recklessness” (Alexander and Ferzan 2009: p.51). Opaque recklessness occurs when an agent knew her “conduct was ‘risky’ or ‘dangerous’ but failed to advert to and consciously disregard the specific reason why” (2001: p.599).

Ferzan considers a driver who runs a red light while in a hurry and hits a pedestrian. When running the light, the driver only had the notion that she was taking a risk. In her original paper, Ferzan expresses concern that the MPC definition of recklessness would not include any such driver, as it requires that a risk is “consciously disregarded”, even though such an agent *should* be classed as reckless. Alexander and Ferzan suggest that the opaquely reckless agent is “oftentimes just as culpable as when she is fully aware of the risk” (2009: p.51).

To justify this they draw upon Michael Moore's discussions of consciousness and culpability¹¹⁵, which distinguish conscious awareness from *preconscious* awareness. The preconscious is “the domain of routine actions that have become so habitual that we need not focus on them but can, when necessary, call them to mind” (2009: p.51). An agent who is driving may have delegated many of the actions to her preconscious. She will not have to actively think what the pedals do, what the lights signify or about

115 See Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (1993).

general rules of the road. When opaquely reckless, such an agent has the *conscious* awareness that “this is dangerous”, but she does not probe any further. What makes the conduct dangerous lies within her preconscious. If she was asked what made her conduct dangerous, she would “immediately rattle off reasons” (2009: p.52). As the reasons were available to the agent, and her conscious awareness gave her reason to consider those reasons, the agent is judged to be just as culpable as the purely reckless agent (2009: p.58).

When there is no awareness of the risk, the agent is not signalled to consider the dangers, so has no internal reason to. So the initial feeling of recklessness is necessary for the agent to actually choose to take the risk. If a risk is merely located in the preconscious, the agent is like a negligent agent, with “no power to retrieve” the knowledge required to advert to the risk, thus is non-culpable.

Another pertinent feature of Alexander and Ferzan’s account, in keeping with the choice theory of culpability, of which they are staunch advocates, is that complete attempts are deemed just as culpable as substantial offences. Results have no bearing upon an agent’s culpability. This does fly against common moral evaluation. As Duff, notes¹¹⁶ we ordinarily will blame someone more if they succeed in harming us or our interests. Lacey criticises Alexander and Ferzan’s position in this regard, arguing that despite its “pleasing conceptual neatness”, it is unsatisfactory considering “the centrality of harm to the reactive attitudes which underpin our practices of praising and blaming, including our current practice of criminalization” (Lacey 2011: p.636).

Alexander and Ferzan see themselves not as “biting the bullet” in this position, but challenge their opponents to provide a compelling argument for why results matter (2009: p.173). They provide an example wherein we watch video footage of an agent, who decides to commit a murder, buys a gun, waits for his victim to arrive, then shoots at her. At that moment, the video is paused (2009: p.172). We then, ignorant of the outcome, are asked to evaluate the blameworthiness of the agent. As choice theorists, they hold that his choices and acting on those choices is the sole determinant of his culpability. Any feelings of additional blame we may have towards him if his victim

116 Discussed in IV.2.

should die might be explicable by moral psychologists, but these would be in error, as once he has unleashed the risk, his culpability is set.

b) Blind-drunk cases

With the pertinent features of this account in mind, we can now evaluate how it can accommodate the problem cases. The blind-drunk cases are dealt with very differently by Alexander and Ferzan because a blind-drunk agent who is unaware of the risks they are imposing upon others is not culpable. As long as they have not unjustifiably chosen to impose a risk, they are not reckless. However, in many of these cases Alexander and Ferzan will find fault in earlier conduct of these agents, deeming them reckless, but locating the recklessness at the moment they unleashed the risk of harm.

Alexander and Ferzan explicitly deal with self-induced intoxication amongst their claims that results do not affect culpability (2009: pp.191-2). They consider three would-be drunk-drivers. Joe, John and Jake all get equally drunk of their own volition and decide to drive home. Joe fails to get to his car, passing out in the parking lot. John manages to drive his car in his intoxication and drives dangerously, but arrives home without incident. Jake, however, tries to drive home, and because of reduced risk-awareness, collides with a car, killing those inside.

For Alexander and Ferzan, what is pertinent to the culpability of these agents is the “ancestral culpable act”, namely their choosing to drink without surrendering their keys in the first place (2009: p.191). They name this “genetic recklessness”, as the harmful conduct is the result of the “ancestral culpable act” (2009: p.58). If an agent acts in a certain manner at T_1 , that creates “for insufficient reasons, what the actor perceives as a risk of harmful conduct at T_2 , then the actor acted recklessly at T_1 , *irrespective of what occurs thereafter* (2009: p. 59).” Consequently, under this account Joe, John and Jake are all equally culpable.

To illustrate how the account would determine culpability, we may consider the blind-drunk case of *Caldwell*. The degree which James Caldwell should be found

culpable, under this account, would be dependent on his evaluation of the risks of his conduct. By his own testimony, he did attempt to burn down the hotel owned by his former employer – so he would certainly be culpable for arson – but was, due to his intoxication, unaware that he might endanger lives by doing so. Even accepting that Caldwell had no awareness that his conduct was endangering lives when he started the fire, Alexander and Ferzan’s account may still find Caldwell culpable for this endangerment, but to ascertain his culpability a jury would need to inquire about whether he committed an “ancestral culpable act”. If Caldwell himself realised that he was in a temper when he began drinking, and that he would risk causing harm to legally protected interests, then he would be culpable. Just how culpable Caldwell – and those in a similar position would be – would depend upon “the average riskiness the actors believe such conduct entails” (2009: p. 192). A similar level of culpability would attach to any actor who decided to get drunk, knowing that this could lead to his harming of legally protected interests.

It follows that intoxication *could* potentially be used as a defence¹¹⁷ against a wide range of offences. Any mistake of fact, in which an agent mistakenly – due to her intoxication – thought there was no risk could mitigate her actions, or exculpate her completely if her becoming intoxicated in the first place was non-culpable. Such an agent would not be culpable for becoming inebriated if she failed to consider any reasons why becoming inebriated *could* cause harm, or if she had considered some harms but (justifiably) judged them to be either negligible, outweighed by some benefits (like her enjoyment, which may outweigh certain risks of imposing harms if those risks are low enough) or mitigated by some other of her actions (such as giving a friend her car keys, perhaps).

Alexander and Ferzan also allow for intoxication to mitigate culpability in cases when an agent is aware but provoked, inasmuch as it serves to impair the agent’s rationality (2009: p.162). As being intoxicated may make it more difficult to resist provocation, it acts as a “partial defeater” to culpability. It is supposed, however, that the aggregation of the initial culpability for recklessly drinking (drinking while aware

117As noted in n.87, this would not strictly be a “defence”, but a failure-of-proof claim.

that this will lead to an increased risk of being easily provoked) and the culpability for choosing to act upon provocation (even though this is mitigated to some degree by the difficulty of resisting provocation) will usually add up to the same level of culpability as it would if the intoxication were not permitted to mitigate (2009: p.167).

If the total culpability will usually be the same in these cases regardless of whether intoxication is considered to mitigate, it might be wondered what benefit this has. There are two noteworthy practical upshots of this. First, it becomes possible to find someone reckless for getting drunk when he has a temper he knows may lead him to act violently, even when he fortuitously avoids a violent confrontation. Perhaps we could consider a man with a history of drunken violent conduct, whose drinking in the first place unleashes a risk over which he no longer has full control.

Secondly, this two-fold account of culpability in these cases helps explain why it might be desirable to be lenient towards first time drunken offenders. Rebecca Williams discusses the difficulties posed by the fact that a large amount of alcohol-related crimes are committed by first-time offenders (2013: p.264). If many of these agents were unaware that alcohol would have this effect on them, or estimated their susceptibility to this as much lower than it in fact was, this account would deem them less culpable. Alexander and Ferzan note, that though such an agent “will be less culpable the first time he does so...he should only have one bite at this apple” (2009: p.167).

For any agent who is intoxicated while committing an offence, the question to determine her culpability depends upon any culpable choices she has made. Her choice may occur at the time the harm is caused, but if she is blind-drunk – so inebriated she is unable to appreciate the risks of her conduct – her culpability will be dependent upon whether there is an ancestral culpable act. Such an act would require that she realised at some point that she was taking a risk in drinking or continuing to drink, and yet decided to take the risk. The essence of this account is also applicable to cases of “epileptics or psychotics failing to take their antiseizure or antipsychotic medications” and many other cases of genetic recklessness (2009: p.192).

c) “The thought never crossed my mind” cases

Due to the nature of Alexander and Ferzan’s account, genuine “the thought never crossed my mind” cases are easy to evaluate. If an agent never considered that there was a risk the agent is not culpable. Because of the intricacies of the account, however, this will apply to far fewer cases.

In *Miller and Denovan*, for instance, though Mr Miller may have not thought about the possibility of killing his victim at the time, he presumably would have had some reckless feeling, some underlying feeling that his behaviour was “risky” or “dangerous”. Though he may have acted upon this without fully probing his preconscious to discover the exact risks, Ferzan’s account of opaque recklessness will still deem him culpable. Additionally, Mr Miller would also have to answer for putting himself in the position wherein he may have to attack intervening parties. It seems highly probable that when he and his partner decided to commit a robbery, they were aware that they could pose significant dangers to the wellbeing of others – as well as the property they intended to steal. Consequently, both Miller and Denovan would be culpable for the “average riskiness” they believed their conduct entailed.

When absolutely no thought is given to the risk, however, and no lingering “risky” feelings arise in the agent, that agent is non-culpable. Among such cases, we might consider *Faulkner* or *Elliott v C*. If Faulkner was truly so obsessed with stealing the rum that the risks of lighting a match in the spirit room were not apparent to him, he would be non-culpable for that¹¹⁸. As with the example of Sam and Ruth, the couple who forget their child in the bath, we may judge that Faulkner is not a morally attractive character for acting as he did, but if he did not notice the risk, he had no “internal reason” to advert to it, thus, on this account, is non-culpable.

Similarly, in *Elliott v C*, the defendant, being fatigued and of low intelligence may plausibly have had no sensation of risk when she played with matches near the white

¹¹⁸ In fact, Mr Faulkner would probably be deemed non-culpable even for robbery under Alexander and Ferzan’s account, as, assuming he had not yet stolen the rum or deliberately broken anything in his efforts, he would not have considered himself to have unleashed a risk beyond his control.

spirit. Though she would probably have realised that she wasn't allowed in the shed she had broken into, the harm she would have been able to foresee from her doing so would have been minimal. She was also seeking shelter, which may have excused any minimal risks she would have actually foreseen. Even if not, it is unlikely that her doing so would have constituted a "gross deviation from the standard of care that a law-abiding citizen would observe" in her situation, so Alexander and Ferzan would probably deem legal intervention inappropriate (2009: p.87).

Evaluating recklessness in this way overcomes the dangers that plagued *Caldwell* recklessness, of unfairly criminalising the behaviour of those of low intelligence.

d) "I thought she consented" cases

Cases where a mistake about consent is made may result in the most counter-intuitive verdicts under Alexander and Ferzan's account. In cases like *Morgan* and *Cogan*, all that is required of defendants in order that they be exculpated is a genuine belief in consent. When this is combined with the position that mistakes-of-fact made because of intoxication are not culpable (any more than the original intoxication itself), this seems, at first glance to find non-culpable a wide range of conduct that we might think should warrant severe punitive action.

Perhaps this cursory analysis is too quick to dismiss the tools available to Alexander and Ferzan's account. We might suppose that genetic recklessness could once again come into play. Particularly when the agents are intoxicated, as in *Cogan* and *Morgan*, the agents may have considered before beginning drinking that they could participate in some improper conduct once drunk. However, it would be very peculiar for a man at a bar while ordering his first pint to consider the probability of sexually assaulting someone if he gets drunk. A man who had committed some sexual assault while intoxicated before might think about it, but it seems very odd to locate his recklessness at this point. Additionally, Alexander and Ferzan's suggestion that such an agent should "only have one bite at the apple" would seem wildly inappropriate in the case of not considering the possibility of making drunken mistakes about consent.

Genetic recklessness doesn't seem able to provide a satisfactory solution here. Perhaps the recklessness of such an agent can be found in any moment of doubt that is not properly treated. Alexander and Ferzan provide an example of a man who drives home from work, realising when he arrives at his driveway that his brakes are soft and that it would be reckless to drive with them again in that condition. This man, knowing he is prone to forgetfulness, resolves that he must write a note for himself to read tomorrow. If he then omits to write that note – deciding perhaps to take his shoes off and have a cup of tea first – even if he *does* in fact remember the next morning, he is reckless in doing so. The only exception to this is if the man is not culpable for forgetting to write the note. Alexander and Ferzan suggest that he might be distracted by news of a family crisis, which would put the thought out of his mind, in which case he would not be culpable for failing to write his reminder (2009: p.80).

By this same reasoning, we might conclude that any man is reckless who does not appropriately deal with an awareness of risk. If Mr Cogan had some doubts when Mr Leak first said that his wife wanted to have sex with him, but did not respond to them appropriately, he might then be culpable. It is unlikely that once such a thought was in his mind it could be forgotten for any good reason. “Good reasons” are ones that do not display “insufficient concern for others’ welfare” (2009: p.81). By analysing the prior conduct that led to the offence, some recklessness might be uncovered rendering the agent culpable.

It might be retorted that a man in this position would simply deny any awareness of risk. In such a situation, they would probably be susceptible to the “hot-time in the witness box” Glanville Williams referred to (1988: p.77) and it would be for the jury to decide whether or not the claims were true. Under this notion of culpability, this decision must take place, as the presence of absence of any awareness is the dividing line between the culpable and the non-culpable. If a man genuinely had no idea that the woman wasn't consenting (and this isn't because of some ancestral culpable act), this account finds him innocent.

As Alexander and Ferzan criticise the use of reasonable person standards, citing it as arbitrary, they can make no use of this. As a consequence, no matter how unreasonable the inferences made by an agent are, they are not culpable. If the belief of consent is

genuine – and is held throughout the agent’s conduct – the agent cannot be held criminally accountable.

4. Criticisms of Alexander and Ferzan

Crime and Culpability has attracted a large amount of criticism¹¹⁹. In this section, I will address some of these criticisms, focussing on those directly concerning their account of recklessness and its consequences¹²⁰.

a) What are the benefits of a unified conception of criminal culpability?

When Alexander and Ferzan attempt to justify their reclassification of mens rea categories to only count recklessness they try to explain how cases of knowledge and purpose can be “unpacked” into cases of recklessness (2009: p.31). Obviously, when knowing and purposeful offences are included, the account of “recklessness” fails to track any normal usage of the word; a meticulously planned offence would not be called “reckless”. What is important is whether this amended categorisation is beneficial in assessing culpability.

Clearly, if there was only one mens rea category, this would be more parsimonious, but that in itself cannot warrant the manoeuvre. It might be thought that several mens rea categories, which capture differing degrees of culpability – as is the status quo - better characterise moral intuitions¹²¹. Dolinko (2010: p.98) and Cornford (2010: p.344)

119 This is testified to in the many reviews of the book. Susan Bandes (2010), Andrew Cornford (2010) Michael Corrado (2010), David Dolinko (2010), Nicola Lacey (2011) and Kenneth Simons (2010) all review the book, with most being very critical.

120 Consequently, I will not discuss many of the criticisms made, such as of the retributist/consequentialist tensions in the book (i.e. Simons 2010: p.557) or the omissions of various important arguments (noted by Lacey (2011: p.636), Cornford (2010: p.345).

suggest that the wrongdoing of purposefully or knowingly committed offences might be of a distinctive type and consequently warrant different treatment.

One argument that Alexander and Ferzan make for regarding recklessness as the only mens rea category is that this avoids the mistake of “deeming all cases of knowledge to be more culpable than all cases of recklessness” (2009: p.33). It is unclear from the literature who they see as making this mistake, as no authors are mentioned¹²². This alleged mistake could be understood in two ways. Either it is the mistake of suggesting that *every* offence committed purposely is more culpable than *every* offence committed recklessly. This ‘mistake’ is so *clearly* false that it is difficult to imagine anyone would make this claim: someone who knowingly litters a minimal amount is obviously less culpable than the reckless rapist or the extremely reckless driver.

Alternatively, the mistake they refer to may be that of suggesting that purposefully or knowingly committed offences are always more culpable than reckless offences of the same kind. This is a much more substantial claim, but they offer no arguments for it. The example they provide attempts to demonstrate that they can account for a difference in culpability in accordance with the standard MPC mens rea hierarchy, but involves offences of different sorts – Albert, who defends his life’s work by inflicts severe injury on someone who would otherwise destroy his life’s work, and another agent who drives like a madman. As the example can only support the trivial claim, that some crimes recklessly committed can be more culpable than some knowingly committed, it is not particularly effective, or threatening to the status quo of the traditional mens rea hierarchy.

The current hierarchy does seem to capture important culpability distinctions. We might consider an example courtesy of Kenneth Simons, wherein Larry and Kim both want to kill some innocent person. Both have equally malign reasons for doing so, but while Larry is happy to shoot his victim point blank to ensure his result is attained, Kim

¹²¹ As previously noted, this is suggested by Joshua Dressler (2000: p.963).

¹²² David Dolinko expresses doubt that the mistake suggested is made by the conventional approach (2010: p.98).

wants a challenge so shoots from further away, estimating her chance of success at only 30% (Simons 2010: p.564). In current systems, both would (if they succeed) be guilty of a purposeful homicide. In Alexander and Ferzan's account however, as recklessness is simply "a subjective concept that tracks the defendant's assessment of the risk" (2009: p.31), and Kim's assessment of the risk she imposed was drastically lower, her culpability would also be drastically lower. How can this be accounted for without deviating from the culpability calculus Alexander and Ferzan adhere to?

Perhaps Alexander and Ferzan would argue that the only pertinent fact is the choice that shows insufficient concern. Within their account endangering a legally protected interest is more culpable the more certain the risk is and the more unjustified it is given the actor's reasons. Thus, acting with the goal of harming one such interest and with certainty that one could do so is the most culpable an agent could be for a given offence. Differences in culpability can be distinguished in this way, without any distinctions for judgments about the type of motivation for the conduct. It might be suggested that though we would evaluate Larry and Kim as equally culpable, this is a confusion to which we are susceptible because of the way the actions affect our blame attributions, much like the suggestion that psychological explanations account for (supposedly) mistaken beliefs that results affect culpability (2009: p.187). This might be successful, though it would be a much more satisfying response if some explanation for commonplace misconceptions about major culpability distinctions were given.

Alexander also suggests that the presence of wilful blindness as an anomaly is avoided by their unified conception of recklessness. He provides an example of a drug smuggler who employs 100 "mules", each of whom is given a suitcase, of which only one contains the drugs. Each of the mules would evaluate the risk of their carrying the drugs at 1%, so it would be absurd to suggest that the one carrying the drugs *knew* they were smuggling drugs. Alexander claims that though the risk taken by the smuggling mule is a paradigmatic instance of recklessness, because knowledge is required for a smuggling prosecution in many jurisdictions, courts contrive methods to find call this "knowledge" (2000: p.941).

The wilful blindness doctrine is not as strong as Alexander needs for his argument to succeed. It merely states that a special type of recklessness in a circumstance is *just as*

bad as acting with knowledge. To undermine the MPC's mens rea hierarchy, he would really need an example of a reckless action that was *more* culpable than any instance of acting with knowledge. Alexander might complain that the requirement for knowledge in smuggling is inaccurate if wilful blindness would suffice, but that is not an issue that would compromise a ranking of knowledge above recklessness.

Alexander and Ferzan cite two benefits of their unitary conception of criminal culpability. Neither, without substantial further justification motivates their radical reconception. Despite these concerns, if, as they claim¹²³, this account was more successful in achieving justice, it might still be preferable to the status quo.

b) Problems of opaque recklessness

The notion of opaque recklessness¹²⁴ allows Alexander and Ferzan's account to find culpable agents who have only a vague awareness of the dangers they impose. If all that is needed is a vague awareness of a risk for one to be culpable for all the risks one would be aware of had they consciously thought about it, this allows prosecution of the impulsive reckless driver, as well as the problem case of *Miller and Denovan* discussed by Duff. As long as Mr Miller had known that there was some risk to his behaviour, he could be culpable for the full gamut of risks that he would have realised he was unleashing had he given it his full attention.

Though it is certainly necessary to find such agents culpable, upon thorough examination, this seems to have the undesirable effect of pulling apart the culpability distinctions Alexander and Ferzan so adamantly deny. To illustrate this, consider Ferzan's driver, who while in a rush decides to cross a yellow light knowing that it will turn red before she gets there (Ferzan 2001: p.597). The driver only had a fuzzy notion

¹²³ Alexander and Ferzan claim this at length in *Crime and Culpability* and have continued to do so more recently (2012: p.286).

¹²⁴ Discussed in V.3a)

of the risk. She had not planned to unleash this risk upon the world. We might even suggest that if she *had* properly considered this risk, she would have refrained. It seems this agent who was opaquely reckless is much less culpable than an agent who, after calculating the risks, decides to unleash this risk (or perhaps *wants to* unleash it).

We could also consider Jonathan and Yuri, who have the same conscious “risky feeling” which they ignore. If Jonathan had consulted his preconscious, he would have noticed only a minor risk. Yuri, however, through various research, has placed himself in a superior doxastic position and would be aware of more dangers that would ensue from his conduct¹²⁵. As the culpability of an opaquely reckless agent is evaluated as proportional to the risk he would have noticed if he had consulted his preconscious, Yuri would be deemed much more culpable. This is despite the fact that Jonathan and Yuri went through the very same conscious decision-making process. This seems contrary to Alexander and Ferzan’s views of moral luck, as the “red flag” of the “risky feeling” could in an otherwise identical situation, have been a false alarm.

Alternatively, if an agent dismisses a “risky feeling” without considering it, should she not be culpable for an entire range of dangers that “risky feeling” could have signalled? Presumably the vagueness of such phenomenology could be explained by a number of dangers. If she is culpable for reactions to conscious stimuli only, the comments concerning genetic recklessness would suggest that she should be culpable for imposing the average riskiness she would have estimated that could have been signalled by this risk.

A broader interpretation of the agent might resolve this difficulty. If the conscious *and* the preconscious are considered as a whole in the evaluation of a person’s conduct (as must be the case for the opaquely reckless agent to be culpable) then the agent who would have been aware of more risks would rightly be judged more culpable. However, if it isn’t *just* the conscious process of the agent that is evaluated when assessing culpability, why should the negligent agent – who has preconscious awareness, but no risky feelings – be exculpated?

125 This example would have the same effect under Alexander and Ferzan’s theory if Yuri merely had a collection of false beliefs which would have made him think the conduct more risky than it actually was, but didn’t consult them.

Simons also finds opaque recklessness problematic, particularly citing the difficulty in individuating risks in the preconscious. If an agent is driving a car and has a “dim awareness that she is doing something dangerous”, yet continues, this is enough to suffice for recklessness, but “what level of risk has she consciously created?” (Simons 2010: p.572-3). Simons supposes that the preconscious risk caused by running a red light could be due to the “preconscious belief that she will merely smash into a parked car” or that she might “kill a pedestrian”, and that worryingly, there may actually be no determinate answer to what preconscious belief caused her to feel that she was acting riskily.

Perhaps these worries can be assuaged if we imagine the driver was culpable for exactly and only the risks she would have noticed had she thought about them. This would result in an analysis similar to conditional subjectivism interpretation of *Caldwell* recklessness¹²⁶, though it would require conscious awareness of some risk in the first place. It might be questioned whether or not even an analysis of this sort would be consistent with Alexander and Ferzan’s program. In addition, this would certainly raise the sort of worries that Lord Diplock had of *Cunningham* recklessness, that it requires a jury to make a “meticulous analysis...of the thoughts that passed” into the mind of the defendant¹²⁷. Setting aside the evidentiary burden of proving the original awareness, the difficulty of ascertaining what risks the agent would have perceived upon consulting her preconscious would be astounding. Regardless, if these are the distinctions that serve as the dividing line between culpable and non-culpable, these judgments must somehow be arrived at, and it is not a fault of the theory that this may be difficult.

c) Could genetic recklessness really work?

¹²⁶ This evaluation is discussed in II.6, and was the interpretation of *Caldwell* recklessness favoured by Glanville Williams.

¹²⁷ *Caldwell*, pp.351-2

In order for an agent to be culpable due to his “genetic recklessness”, an agent would have to acknowledge at the time of committing the supposed reckless act, that he was committing a risk. Does it not wildly misconstrue the dangerous drunk to suppose that he considers, upon buying his first pint, that it might lead him to become less resilient to provocation, thus unleash a risk upon the general public? Alexander and Ferzan suggest that “many folks are on notice that when they drink they get into fights, become hot-tempered and so on” (2009: p.166), so their drinking is culpable (regardless of the result). The agents will also be culpable for actually getting into fights, should they make choices to do so while intoxicated, though the culpability for these choices would be mitigated if the alcohol is deemed to have reduced their ability to resist provocation.

Merely because agents do have the latent knowledge that they are likely to start brawls if they are to get drunk, it doesn’t follow that they *will* consider this. If agents do not consider the risks when they drink, their culpability is less than it would be had they considered the risks while drinking. It certainly seems questionable whether this should reduce their culpability. If a man gets into fights a lot when he drinks, surely he *should* reconsider getting drunk. Alexander and Ferzan acknowledge that someone who realises they possess a potentially dangerous character trait may have a duty to correct it (2009: p.85) but their account – and any account requiring *choosing* to endanger the interests of others – cannot accommodate this without somehow *making* the agent aware of this duty. His first drink of the day, when not thinking about potential risks (even opaquely), is merely negligent, so not culpable.

One consequence of this account might involve notifying agents likely to act in a way that would increase their likelihood of imposing risks at opportune moments. This could be in the form of warnings in bars to alert potentially violent drunks that their drinking might itself be reckless (particularly if they have a history of violence or haven’t surrendered their car keys), thereby ensuring their awareness. It would still be extremely difficult to prove genetic recklessness and hold culpable agents accountable¹²⁸, particularly as most cases would not lead to actual instances of harm, but

128 Alexander and Ferzan’s “moderate retributionism” only holds that punishment for wrongdoing is a good, not that it is necessary, particularly if doing so would require vast resources, so the theory would not require overly demanding prosecutions (2009: p.8).

this approach could be successful in providing specific events of awareness that could be pointed to.

VI: The Reasonable Person Standard

In the previous chapter, I suggested that both of the academic accounts presented are able to provide verdicts for the three problem cases and explain how they relate to criminal culpability. I have suggested that Duff's account is more congruous with everyday moral intuitions and is better able to respond to various criticisms that Alexander and Ferzan's account. The major difficulty I found with Duff's account was its reliance on reasonableness considering. Norrie's criticism – that the nature of reasonable person standards requires that “unenlightened” people are judged by an unfair value system – proved particularly problematic. Alexander and Ferzan's account aims to avoid that problem by dispatching entirely of the ordinary person standard. The avoidance of the reasonable person standard might be seen as a major point in favour of their account over Duff's.

In this chapter, I shall first demonstrate that despite their assertions to the contrary, Alexander and Ferzan still rely on a notion of reasonableness (or at very least, some equivalent concept that carries with it the same issues), before arguing that these problems should not and *must not* be allowed to negate criminal culpability. Consequently, taking into account culpability concerns and overall plausibility, Duff's account is superior.

1. Why Alexander and Ferzan still need reasonableness

For Alexander and Ferzan, the essence of culpability is insufficient concern, which entails “choosing to take risks to others' legally protected interests for insufficient reasons” (2009: p.67-8). This is embodied by (and only by) an agent's recklessness, which is a function of:

- 1) the degree of risk the actor believes he is imposing on others' interests

2) his reasons for doing so.

(2009: p.24)

Already, questions of standards arise. There is some standard from which one must deviate (or grossly deviate) in order to satisfy the requirements for recklessness. By what standard is the concern demonstrated by an agent's conduct insufficient? Alexander and Ferzan ardently criticise the use of the reasonable person in the actor's situation (2009: p.81), so some other standard must be intended. They regularly refer to the MPC qualification of a "gross deviation from the standard of care that a *law-abiding citizen* would observe in the actor's situation" (2009: pp.25, 43, 315 my italics). They also refer to gross deviation from "what the ordinary citizen, with ordinary concern for others, would do" (2009: p.314).

How can it be fair to measure someone against the "law-abiding person" standard? The term itself is vacuous if no one abides the law. Must a citizen apprise herself of the conduct of non-criminals in order to meet this standard?

Perhaps Alexander and Ferzan would claim that the unfairness they point to only applies when holding agents accountable for risks they have not noticed. This, however, seems unsatisfying. If their complaints about the reasonable person standard are taken seriously, there is no non-arbitrary method to hold someone accountable in accordance with some objective standard, so this must apply to the degree to which their conduct deviates from some objective series of norms which the agent may or may not be properly acquainted with.

The apparent problem of judging an agent's conduct by some objective standard is parallel in both the negligent agent who *should* have been aware of some risk, and the reckless agent who *should* have realised that his weighing of values was mistaken. Consider the following arguments:

- 1) The unaware agent, A, has belief set B. Belief set B contains no beliefs about the riskiness of F, where F is some fact A is responsible for. Alexander and Ferzan suggest that the only non-arbitrary interpretations of the reasonable person standard involve considering whether A would have noticed the risks of F if he

was 1) an omnipotent epistemic agent (one who knows all the facts that relate to the decision) or 2) an agent with the exact beliefs that A did in fact have (2009: p.82). If the omnipotent agent, Z, is to be considered, one is culpable for *every* risk one did not notice relating to one's conduct, which is clearly far too strong. If the equivalent agent with the same beliefs, A*, is considered, the agent is never culpable¹²⁹.

- 2) Similarly, we can consider the agent, A, who grossly deviates from some objective standard, but believes he is acting in accordance with it. From Alexander and Ferzan's arguments from non-arbitrariness, we could suppose that the only plausible standards we could assess him by are those of 1) an agent who knew all the relevant facts about what standard he was held to, or 2) an agent who held all the beliefs that A actually held. If the first interpretation is used, *every* agent who acts on mistaken beliefs about the standards of society is culpable. If the second interpretation is taken, *no* agents who act in accordance with mistaken standards are culpable.

Alexander and Ferzan accept the first of these arguments, but reject the parallel second argument. The second argument – given that they claim these are the only non-arbitrary ways to counterfactually compare belief sets – would apply to *any* standard an agent's conduct could be measured against, as it makes no mention of reasonableness, only of standards.

Simons suggests that the motivation for permitting the first of these arguments but not the second is the fact-law distinction (2010: p.581). According to this, one is not culpable for mistakes one holds about the facts they believe, but *is* culpable for mistakes they make about the laws that govern them, including what justifications can legitimise certain conduct. Interestingly, agents holding inappropriate values (those mistaken about the objective standard required of their conduct) can *cause* them to have faulty beliefs.

¹²⁹ Referred to in III.4

Simons notes that the yuppie couple, Sam and Ruth, were only unaware of the risks to their child because of their abhorrent values (2010: p. 581). If an agent is culpable for the values they hold when weighing up risks, why should they not be culpable when those values cause them to fail to notice risks?

Alexander and Ferzan never justify this distinction, but merely claim that this seems to be a presupposition of our practices of blaming and praising” (2009: p.153, n.76). Regardless of what justification could be available to them, some notion of reasonableness (or an equivalent notion to fill the same role) is required in relation to values, in order for an agent to determine what reasons can justify behaviour¹³⁰.

2. A defence of the reasonable person standard

An odd feature of Alexander and Ferzan’s argument against the reasonable person standard is the assertion that the only non-arbitrary ways to assess the standard is by counterfactually comparing to doxastically ideal agents or to doxastically identical agents (agents with relevantly perfect beliefs, or the same beliefs as the agent). They suggest that any other interpretation would be “morally arbitrary” (2009: p.82). This seems mistaken.

Simons questions why they did not consider what the reasonable actor would have done in the agent’s shoes (2010: p.573, n.35). Cornford suggests that an alternative position to assess an agent from would be that of the agent who has “complied with their epistemic duties” (2010: p.345). The supposed objections to the use of the reasonable person standard might offer explanations for not considering these ideas.

In a discussion of the reasonable person standard, Sharon Byrd voices the worry that the standard is too high. She compares the actions of defendants to “pinnacles of virtue” (2005: p.571). The fictional people the standard refers to are thought too virtuous, to set too high a threshold to expect all agents to meet. This criticism might seem misplaced,

¹³⁰ Alternatively, reasonable awareness of society’s values might suffice, but this would once again result in punishment for beliefs about facts, which Alexander and Ferzan reject.

but Byrd focuses primarily on the role of the reasonable person standard in provocation defences. As Kamir notes, “courts never, in fact, find that a reasonable person would have killed when provoked”, so a requirement to act as a reasonable person to use a provocation defence (even as a partial excuse) would be inappropriate¹³¹.

The major issue found with the reasonable person standard¹³² seems to be that it is somehow unfair to hold agents to this standard. Because of varying values or mental capacities, some agents may find it more difficult to meet this standard, or may be unable to. However, I shall argue that this misconstrues reasonableness. It is not a lofty aspiration that can only be met by the elite. It is a broad standard that virtually every agent¹³³ within a community is able to meet.

Baron discusses several potential connotations that could result in problematic interpretations of “reasonable”, citing that it is “often treated as synonymous with...‘average’, ‘ordinary’, ‘law-abiding’, and ‘prudent’” (2013: p.6). It might be noted that “ordinary” and “prudent” were used interchangeably with “reasonable” by Lord Diplock¹³⁴. There are many dangers, as well as clear conceptual faults of

131 Note that what is inappropriate is the requirement of the agent to *act* like a reasonable person. As Baron argues: “a complete defense should be available only if a reasonable person in the defendant’s situation *might* well have” acted the same way [my emphasis]. For a partial defence, the “requirement can be that a reasonable person might well have been extremely upset/angered by the provocation...” (2013: p.8). It is outwith my remit here to discuss whether provocation should serve as a partial defence, but it is clear that if it did, the role of reasonableness must be different.

132 There are also serious concerns in the application of the reasonable person standard. Kamir (2005) and Moran (2010) discuss the normalization of the standard, which result in the “reasonable person” being construed as male and white, therefore distorting the standard. Baron addresses these concerns in “The Standard of the Reasonable Person” (2011), but within this paper I shall simply assume that these issues, though certainly problematic and warranting concern, can be resolved.

133 There may be some agents who, because of mental defects, are unable to reach even this minimal standard. This should not, however, count against the use of the standard. As Baron argues, “such abnormalities should never constitute a sound basis for lowering the standards to which we hold the general population” (2001: p.14). Those who cannot attain reasonableness *do* warrant (or even *require*) special treatment to be able to function safely in society, but this does not tell us anything about the standards others should adhere to.

134 *Caldwell*, p.354

identifying “reasonable” as “ordinary”. Holding those of low intelligence or children to “ordinary” standards, as in *Elliott v C* and *R v G* is one such problem. Those particular problems would not have emerged if the standard concerned was what a reasonable person might have noticed in the actor’s situation (rather than what was obvious to an *ordinary* person).

Clearly, a reasonable person need not be ordinary, and reasonable conduct need not be ordinary. Baron notes that though the concepts are different, what conduct is considered “ordinary” or “customary” can *inform* what it is reasonable to expect of an agent. She considers a surgeon charged with negligent homicide (2011: p.28). When discerning whether or not the defendant was negligent, it might be useful to know what procedures are customary, or expected in that situation. Knowledge of the accepted practice can inform what sort of behaviour deviates from this, and whether a surgeon might reasonably have made the mistakes the defendant has.

A conflation with “prudence” can also result in too high a standard being set for “reasonableness”. This can provide the illusion of reasonableness requiring risk-averse behaviour, or frugality. It might be perfectly reasonable for an agent to spend his savings on a vintage hat at a whim (providing he was under no obligation to spend it in some other way), but this would certainly not be prudent. Baron notes that “prudence” also carries with it connotations of “rational self-interestedness”, which could in fact play against reasonableness (2011: p.28).

In her analysis of what the concept of reasonableness entails, Baron notes that what is relevant is often the reactive attitude to some situation (2013: p.18). A reasonable person is not furious over minor inconveniences, does not become profoundly aggrieved by a perceived minor slight and does not blame those who do not deserve it. Importantly, a reasonable person would not act upon such reactive attitudes. This stage in between reaction and action gives an agent the opportunity to act reasonably. A hot tempered person, with the knowledge that he is often disproportionately angered by small matters may decide to take a deep breath and calm himself. Alternatively, he may fuel his anger and cause himself to lash out. When there is no good reason to do so, “stoking one’s anger” seems unreasonable (2013: p.18).

Baron also notes that a “tendency to mistrust others”, being “unwilling to compromise”, or “exempting oneself from requirements to which one holds others” are also clear hallmarks of unreasonableness (2013: pp.19,20,17). Notably not featured on this list are simple failings of rationality. One can be foolish, as in the case of someone who does not dress warmly in the winter, but such an agent is not described as unreasonable (2013: p.24). Neither is the agent who forgets his wallet unreasonable¹³⁵. Herein lies the response to those who argue that a “reasonable person standard” punishes the foolish. Being reasonable does *not* entail good reasoning. As Baron notes:

“Reasonableness is primarily about how one reacts to others and, more broadly, how one views others. It calls for fairness, and for awareness of others as people like you with aims, interests, needs, the right to make claims on others, and bad days. It calls for tolerance and some modicum of cooperation and reciprocity. It does not call for moderation in general, but does call for moderation insofar as the moderation is in order for getting along with others.”

(2013: p.224)

It might still be thought that these qualities are too demanding for some agents. However, these are traits that all agents can cultivate¹³⁶. Furthermore, these are all traits that it is important for an agent to have if they are to have successful social relations. It is also not the case that an agent will have to be perfectly reasonable at all times. Also, merely *acting* unreasonably will not amount to an offence. Baron argues that “reasonableness enters in in a different way: to limit the range, or availability, of defences” so it isn’t even the case that the law requires an agent to be reasonable (2013: p.29).

¹³⁵ Unless special circumstances apply; perhaps his friends – knowing his tendency to forget – had told him several times to write a note to ensure he did not forget, and he stubbornly refused, in which case we might describe himself as unreasonable.

¹³⁶ With the exception of some agents of diminished capacity, who special rules should apply to anyway, see *supra* n.133.

3. Reasonableness in Duff

The most difficult criticism of Duff's account mentioned in the previous chapter was Norrie's objection that it would be unfair to hold "unenlightened" people to a reasonable person standard. However, as the considerations of reasonableness in the previous section suggest, this isn't a particularly lofty challenge, nor is it unattainable for vast proportions of the public.

Because Duff's account holds that acts manifesting practical indifference *are* culpable, and agents' failures to act reasonably can manifest practical indifference, such failures are clearly culpable. Unlike Alexander and Ferzan, Duff is able to find culpability in the absence of a conscious choice, so a conscious choice to act recklessly is not necessary.

Norrie might question what justifies holding agents accountable for failing to act reasonably or form reasonable beliefs. This is justified when the agents have committed a wrong that damages the interests we value highly enough to legally protect. To prevent the interests of society from being compromised, the law can at least demand the fairly minimal criteria required by reasonableness.

Alexander and Ferzan's account of culpability attempts to focus on criminalising insufficient concern. However, it fails to appreciate that harms resulting from insufficient concern may occur as a result of agents failing to make reasonable inferences. The apparent lack of dependence upon standards of reasonableness was the only argument that counted in favour of Alexander and Ferzan in the previous chapter. However, it now seems that reliance on some standard of reasonableness is neither problematic, nor avoided by their account.

Conclusion

The current formal account of recklessness in UK criminal law fails to properly capture culpability distinctions. The abandonment of Caldwell recklessness, though necessary, leaves various actions deemed non-reckless and consequently non-culpable. Though special steps have been taken to criminalise the conduct in some of these cases – as in the 2003 Sexual Offences Act – such remedies treat the symptoms rather than the cause of the erroneous verdicts. When the principles that govern culpability judgements themselves are properly considered, as in the two contemporary accounts of recklessness provided, what is required for culpability for a given offence becomes more clear.

In comparison to the revolutionary rival account of Alexander and Ferzan, Duff's coheres much more readily with everyday moral intuitions. In addition, the concepts of opaque recklessness and genetic recklessness would be extraordinarily difficult to put into practice, whereas Duff's own account simplifies several aspects of current proceedings.

When Duff's account of recklessness as practical indifference is evaluated, satisfactory responses are available to all the problem cases. Perhaps most impressive is its ability to appropriately account for the culpability of the rapist who without good reason believes in consent. The requirements for a defence in such a case fall out of the theory, needing no ad hoc treatment. Similarly, the role is clear for jurisprudence to discern which offences, like rape, essentially entail practical indifference upon the part of an agent. Accordingly, this can aid in formulation of what may or may not count as a defence. Once what will exculpate or mitigate for a given offence is known, this can help in providing jury instructions tailored to a given offence. While the question of "whether an agent's conduct manifested a practical indifference on the part of the defendant" might prove overly complicated to the layman, "did the defendant have good reason to believe x?" is comprehensible to anyone.

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