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# SUBJECTIVE FAULT FOR CRIME:

## *A Reinterpretation**

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This essay develops a liberal account of the mens rea requirement of criminal liability and identifies the fault level required by that account. By "a liberal account" is meant one that interprets the meaning of mens rea in a way that reconciles liability to coercion with the individual's inviolability. The article argues that the wrongdoer's choice to interfere or to risk interfering with another agent's capacity to act on his own ends is the level of fault required to make punishment implicitly self-imposed by the recipient and thus distinguishable from the wrongdoer's violence. Such a choice is one to which a denial of rights of agency may be logically imputed, a denial by which the wrongdoer implicitly authorizes his own coercibility. This version of subjectivism is, I argue, invulnerable against criticisms leveled against other versions. While staking out defensible subjectivist ground, the article criticizes the character, choice, and opportunity theories of mens rea proposed by Fletcher, Moore, and Hart, and elaborates the interpretations of exculpatory conditions flowing from the subjectivist thesis. Finally, it addresses arguments advanced by Ripstein, Duff, and Horder for eliminating the requirement of a conscious choice to do that which amounts to a denial of rights.

Of all political institutions, judicial punishment is the one most problematic for a liberal state, for it seems directly to contradict the inviolability of the individual. Punishment physically restrains and confines persons. Unlike other forms of social censure, it does things to individuals that violate their rights of agency—exactly the things that those it condemns as criminals do. Moreover, it does these things when it is too late for the state to claim a right of preemptive self-defence on behalf of those under its protection and even though private law institutions exist for correcting wrongs after the fact. The reasons typically adduced to justify it (deterrence, incapacitation of the dangerous) appeal to goals external to those of the recipient of punishment, who thus seems to be coerced for the benefit of others—hardly the sort of justification punishment needs. In these circumstances, the criminal law's role is to constrain the state's penal power by principles that, to the

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extent possible, reconcile punishment with the individual's inviolability. Central to this task is the doctrine of *mens rea*—of what constitutes a culpable mind.

In this essay I develop from classical retributivism a liberal account of the mens rea requirement of criminal liability and identify the level of fault required by that account. By "a liberal account" I mean one that interprets the meaning of mens rea in a way that reconciles liability to coercion with the individual's inviolability as a free agent. To anticipate, I argue that the wrongdoer's choice to interfere or to risk interfering with another agent's capacity to act on his own ends is the level of fault required to make punishment implicitly self-imposed by the recipient and thus distinguishable from the externally imposed violence of the wrongdoer. This is so because a choice to interfere or to risk interfering with another's agency is a choice to which a *denial* of rights of agency may be logically imputed, a denial by which the wrongdoer implicitly authorizes his own coercibility. Accordingly, I argue that the fault threshold for criminal liability is the conscious choice to do that by virtue of which a denial of rights becomes logically imputable to the choice.

The latter thesis is a version of subjectivism because it holds that a punishable wrongdoer must have intentionally interfered with another agent's capacity to act on his own ends or knowingly risked such an interference; inadvertent interferences are insufficient. But it is one that, I argue, is impregnable against the criticisms leveled against other versions of subjectivism by those who would punish for blameworthy inadvertence to risk. Specifically, the subjectivism I defend avoids the excessive empiricism of which critics complain, incorporating as it does the standpoint of an ideal thinking Agent whose inferences from the empirical agent's choices are imputed to those choices. Thus the subjective fault principle I defend incorporates a heavy dose of objectivism. Second, the thesis I defend draws a clear distinction between subjective fault for wrongdoing as the threshold condition for the deservedness of any punishment and subjective fault for consequential harm as only one of several degrees of criminal responsibility relevant to a just measure of punishment. Accordingly, the subjectivist thesis for which I argue applies to the threshold but not to results. Third, the subjectivist position I defend is consistent, as we shall see, with the general rule that a mistake of law provides no defence to crime. Fourth, the subjectivism I put forward is one that by its justifying theory, applies to criminal right-infringements but not to public-welfare offences. On the strength of all these features, the subjectivist thesis I defend may be described as moderate.

Along the way toward staking out defensible subjectivist ground, I criticize alternative accounts of mens rea—specifically, the character, choice, and opportunity theories proposed by George Fletcher, Michael Moore, and H.L.A. Hart. After justifying the particular version of subjectivism that I call the classical position on mens rea, I elaborate the interpretations of

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exculpatory conditions (involuntariness, mistake of fact, color of right, insanity) that flow from this position. Finally, I address arguments recently put forward by Arthur Ripstein, R.A. Duff, and Jeremy Horder for eliminating the requirement of a conscious choice to do that which amounts to a denial of rights.

## I. THE TWO ROLES OF MENS REA

An account of the mens rea requirement of criminal liability must begin with a distinction that is often ignored in debates about the point and nature of that requirement. In common law, the various mental orientations toward wrongful deeds or risks (namely, intention, foresight, and willful blindness) characterized by knowledge of the doing or awareness of the risk and that comprise what is called subjective fault have always played a dual role. First, subjective fault has traditionally (though not univocally) been viewed as the threshold level of fault for criminal wrongdoing and so for liability to judicial punishment of any severity.[1] That is, it has traditionally been viewed as the level of fault distinguishing crime from tort. But, second, subjective fault has been treated as the highest degree of responsibility for the harmful result of a criminal wrong calling for the most severe punishment meted out for that kind of result. Thus someone who means to cause death and does so is responsible for the death to a higher degree (and liable to a more severe punishment) than if he had meant to cause bodily harm that he ought to have foreseen would result in death. The sense in which he is more responsible for the death is open to diverse understandings, but this need not concern us now. Instead, I want to focus on the following distinction: subjective fault has been both *the* fault threshold of criminal culpability for wrongdoing (hence for liability to any right-infringing punishment) and *one*—the highest—degree of responsibility for the harmful consequences of criminal wrongs (deserving a certain measure of punishment) once culpability for any consequence has been established. I call this the classical position on mens rea.

Corresponding to the different roles played by mens rea are two different ways in which a penal law might be criticized for failing to stipulate the appropriate level of fault for a crime. A statute might impose criminal liability in the absence of an intention to interfere with another's agency or without an awareness of the risk of doing so, thus collapsing the difference between crime and tort. Or it might (as in constructive murder) punish and stigmatize equally two different grades of responsibility for harm consequent on criminal wrongdoing—intention and foreseeability of the harm to the

1. By "judicial punishment" I mean state coercion justified by criminal desert; sanctions justified by welfare goals I call "noncriminal penalties," which are typically imposed either without fault or subject to a due diligence defence.

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reasonable person. The first failing is a mistake (I argue) about the threshold of criminal liability to punishment, the second a violation of proportionality in the measure of punishment.

In some crimes, the duality of roles played by mens rea is hidden. Take murder, for example. In murder, there is subjective fault with respect to the right-infringement, which is the battery to the victim. This is, according to the classical position, what puts the wrongdoer into the criminal category, making him liable to punishment *simpliciter*. But there is also subjective fault with respect to the consequence of the battery—the death. This is what makes the criminal specifically a murderer liable to the most severe punishment meted out for a homicide. Mens rea is performing two normative tasks here—one authorizing punishment per se, the other authorizing a particular measure of punishment—but because the battery tends to be subsumed in the murder, it appears that the intention to kill is the only operative mens rea.

The tendency to elide the difference between the two roles of mens rea is responsible for much confusion in debates about the point and nature of the mens rea requirement. For example, although one can logically insist on a threshold requirement of subjective fault for criminal wrongdoing without committing oneself to a subjective fault requirement for responsibility for consequential harms once criminal liability for any outcome has been established, critics of the subjectivist position often ascribe both views to the subjectivist, who then becomes an easy target for criticism.[2] After all, who would say that we are responsible only for those harms we have consciously chosen? Who would deny Hart's claim that we are also responsible for those harms consequent on our actions that we could have avoided had we exercised our capacity for reasonable care?[3] Moreover, the straw man the critics have attacked has in some cases been made of real straw. Some subjectivists have themselves mistakenly thought that subjectivism regarding the threshold commits the law to subjectivism with respect to consequences, so that the maxim *actus non facit reum nisi mens sit rea* must have the same subjectivist meaning for both.[4] But this view makes outliers of many result crimes and gives subjectivism a revisionist thrust too far-reaching for it to be credible as an internal elaboration of the criminal law.

Another example of the confusion concerns the case of R. v. Caldwell,[5] a decision of the House of Lords. This case is almost universally taken to have introduced an objective standard of fault (an egregious failure to exercise

2. *See, e.g.*, R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY 150–151 (1990); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 174 (1999).

3. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 145–157 (1968).

4. For example, Glanville Williams saw manslaughter, where death need only be foreseeable, as "an exception to the requirement of full *mens rea* in crime." *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 106 (2nd ed. 1961); *see also* J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1936).

5. [1981] 1 All E.R. 961 (H.L.).

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reasonable care) for criminal liability and thus to have dealt subjectivism a severe blow in the United Kingdom. Yet in *Caldwell*, the penal statute that had to be interpreted made it an offence punishable by up to life imprisonment to destroy or damage any property "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." The accused had set fire to an inhabited hotel to redress a grievance he had against the proprietor but claimed that he had given no thought to whether he might be endangering life. The question for the court was whether "reckless" should be interpreted to mean having a conscious awareness of the prohibited risk or whether it should be enough that the risk would have been obvious to the reasonable person.

Now, this question was not about the appropriate fault threshold for criminal liability, for that threshold had already incontestably been crossed by virtue of the defendant's having intentionally set fire to the victim's property. Rather, what was alone at issue in the application of the term "reckless" to the facts in *Caldwell* was whether a criminal arsonist who ought to have foreseen that he would endanger life but did not foresee this was to be held responsible for the endangerment. This is a question not about whether the defendant is a criminal wrongdoer but about the scope of a criminal wrongdoer's responsibility for consequential risks or harms. Accordingly, the court could have limited its view of recklessness as including egregious negligence to the responsibility issue while indicating that this implied nothing for its view of what is required for culpability for *any* harm or risk. But the court drew no such distinction, and so, while nothing in the judgments really supports the view that objective fault marks the threshold of criminal liability, *Caldwell* is generally taken to have introduced this principle, and that is what the case has come to stand for.

We see the same confusion in the leading academic literature on mens rea. For example, in his book, *Intention, Agency, and Criminal Liability*,[6] R.A. Duff takes as the central target of his criticism and the foil for his own theory of liability the view that a conscious choice to bring about or risk a wrongful outcome is a requirement of punishability for the outcome, even though the classical subjectivist position holds no such view. He characterizes orthodox subjectivism as the view that "I should be guilty of an offence only if I acted intentionally or recklessly as to every element of its *actus reus*; and I act intentionally as to a result only if I aim to bring it about or am (almost) certain that I will bring it about, and recklessly only if I am aware that I may bring it about."[7] If this is orthodox subjectivism, then the offences known as manslaughter, assault causing bodily harm, causing bodily harm by an unlawful act, and aggravated assault are in conflict with it, and so this view would have to be called radically revisionist rather than orthodox. In fact,

6. DUFF, *supra* note 2.
7. *Id.* at 150.

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classical subjectivism subscribes to no such implausible position. It holds that a choice to do that from which a denial of rights may logically be imputed to the agent's choice marks the threshold of criminal liability to punishment, but once the threshold has been crossed, the criminal is punishable for the proscribed harms consequent on his crime that are connected *in some degree* to his agency; and here intention and foresight are only two of several degrees of connection. For classical subjectivism, restricting liability for results to intended or actually foreseen results would be inconsistent with the respect for free agency determining (in a way I explain below) the subjectivist threshold; for it would treat human beings as unreflective, nose-to-the-ground seekers of satisfaction incapable of meeting expectations of foresight premised on a capacity for thought.

Because, moreover, Duff fails to distinguish between subjectivism with regard to culpability for wrong and subjectivism with regard to responsibility for consequential harm, he treats the cases of *Caldwell* and D.P.P. v. Morgan[8] as raising the same issue of criminal liability. In *Morgan*, the defendants sexually assaulted the wife of a friend who had invited them to have intercourse with her, falsely informing them that she had consented to intercourse simulating rape. The defence of the accuseds was that, despite the victim's strong resistance, they honestly believed she had consented; and the question was whether, if believed, that story makes a good defence or whether, to exculpate, their mistake had to be reasonable. Now, this is a case where the threshold requirement of criminal culpability is indeed in issue, since (if we believe their story) the defendants believed they had the victim's consent and that they were thus respecting her free will. So the issue is whether a grossly unreasonable mistake is the threshold of criminal liability or whether a conscious disdain for another's capacity for freedom is. But *Caldwell*, as we have seen, is a different kind of case. There the defendant unquestionably chose to interfere in the victim's exclusive domain of choice, and so there is no doubt about his liability to punishment. In *Caldwell*, what is really at stake in the dispute about the compass of "recklessness" is whether it is appropriate for a penal statute to lump together and punish with the same maxima different grades of responsibility for consequential risks or outcomes: intention, foresight, and objective foreseeability. Should the proportioning of sentence to degrees of responsibility be a prior legislative constraint on sentencing, or should it be left to the sentencing discretion of the judge?

Accordingly, it is important to keep the two roles of mens rea distinct. In this essay I deal only with the level of fault necessary for crossing the threshold from tort to criminal liability—that is, for liability to punishment *simpliciter*. Mens rea as denoting the several grades of criminal responsibility for wrongful harms is best left for another essay.

8. [1976] A.C. 182.

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## II. CHARACTER, CHOICE, AND OPPORTUNITY

Before elaborating an account of mens rea as the level of fault needed to connect wrongdoing with the coercibility of the wrongdoer so as to legitimate judicial punishment as implicitly self-imposed, I want to examine two other theories of mens rea that also see it as constituting criminal desert. Though very different, these theories share two common features.First, they are both theories of moral blameworthiness applied to the sphere of judicial punishment. Hence they both claim that, assuming punishment is otherwise justified by forward-looking ends, cases where it would be unjust to hold someone legally culpable for an unlawful act are parasitic on cases where it would be inappropriate to blame someone for the act. This means that wherever it would be inappropriate to blame, it would also be unjust to hold legally culpable (that is, moral blamelessness entails legal innocence); and where there is no moral excuse, there need not be legal exculpation either (it would not be unjust to punish this person for whatever ends justify punishment generally). Second, they all derive an account of the culpable-mind requirement from a single theory of exculpatory conditions—that is, from a theory that seeks to explain with one idea defences as diverse as "I thought I had permission from the owner to use his cottage" and "Yes, I knew I was using the cottage without the owner's permission, but it was either break in or freeze to death."

### The Character Theory

The character theory of mens rea holds that a blameworthy state of mind is necessary for criminal liability because it allows us to infer a socially undesirable character trait from the wrongful act[9] or it permits an interpretation of the wrongful act as an expression of,[10] or as partly constitutive of,[11] a disposition of character deserving blame. Unlawful acts by themselves permit no such inference, because from a single unlawful act one can tell nothing about the settled features of an agent's character unless he performed the act purposely, knowingly, with reckless indifference, or with thoughtless preoccupation with his own interests. So the presence of mens rea is essential to our being able to presume a connection (whether of evidence or causation) between an unlawful act and a blameworthy disposition or attitude. Obversely, exculpatory conditions such as involuntariness, mistake of fact, necessity, and duress either block a presumption that the defendant's act reflects a character flaw or (in the case of necessity and duress) displace

9. Michael Bayles, *Character, Purpose, and Criminal Responsibility*, 1 L. & PHIL. 5–20 (1982).

10. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 799–802 (1978); NICOLA LACEY, STATE PUNISHMENT 68–78 (1988).

11. John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575 (1998).

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that presumption with evidence of extraordinary pressures so as to make moral blame and censure undeserved.

Blameworthy character is not, of course, a sufficient condition of judicial punishment, since moral disapproval can be expressed in many ways. There must also be a harmful or dangerous act prohibited by law, because the end of judicial punishment, as distinct from that of informal types of social censure, is the prevention of crime. So the possibility of drawing an inference from act to character functions as a side constraint on the state's pursuit of the goals of deterrence, incapacitation, and reform, ensuring that these aims will be furthered only on the backs of people who deserve public condemnation.[12]

Because it is far too difficult a question to tackle, let us grant the character theorist the assumption he needs that we are responsible for our characters and can thus be appropriately blamed for vicious traits, dispositions, habits, and attitudes. And let us also assume that the character theorist can demarcate with some precision the borders of the character for which we are responsible (does it exclude or include attributes formed through early childhood identification with parents; emotions, urges, etc. that *we* banish from our consciousness?), so that judgments of acts as being "in character" or "out of character" can be analytical and disciplined rather than subjective and result-driven. Even so, the character theory of mens rea is vulnerable to two lines of criticism: it fits too loosely the criminal law of which it is supposed to be an interpretation; and it provides an inadequate account of criminal desert.

Let us first consider the question of fit. Others have pointed out how precarious the act (or externalization) requirement of criminal liability becomes under a character theory of culpability, and so I do not belabor that point.[13] Instead I focus here on how loosely the character theory of mens rea and of exculpatory conditions fits the actual contours of the mens rea requirement in law.

Because it wants to link judicial punishment not to the culpable agency of an abstract person but to the blameworthiness of a concrete and full moral character, the character theory requires distinctions among mental attitudes much finer than the criminal law typically recognizes. Criminal law generally attaches no practical significance to the distinction between committing an unlawful act for the purpose of doing so, committing it knowingly but regretfully as a means to (or by-product of) achieving some further end, consciously imposing an unreasonable risk and being indifferent to whether the risk materializes, and consciously imposing an unreasonable risk but hoping it will not materialize. For purposes of punishability, these states of mind are treated as moral equivalents; when accompanying an unlawful

12. But Lacy, because she is dubious about our responsibility for our characters, rejects attribution to character as a retributivist side constraint, viewing it instead as integral to the forward-looking ends of punishment; *see* LACEY, *supra* note 10, at 72.

13. *See* Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 54–56 (1990).

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act, any will suffice to move the wrongdoer across the threshold from civil to criminal liability. Yet they are far from equivalent from the standpoint of blameworthy character. Someone who, without justification or excuse, acts for the purpose of killing another human being has exhibited a more depraved character than someone who kills in anguish as a certain side effect of achieving a different purpose; someone who is indifferent to whether an unreasonable risk will materialize deserves more blame than someone who hopes it will not. A character theory must distinguish between these nuances of fault as a matter of law binding on the judge; it cannot leave them to sentencing discretion because, subtle as they are, the gradations are, for the character theory, intrinsic to penal justice, not a matter of indifference to it. Accordingly, mens rea in law is far too blunt an indicator of blameworthy character to be plausibly considered as ordered to that function.

To the same point is the observation that the character theory cannot account for the law's general practice of treating mens rea as separate from motive and motive as irrelevant to culpability. The reason someone commits an unlawful act is surely relevant to whether an inference can be drawn from the unlawful act to the actor's settled character as well as to what sort of inference can be drawn. Thus the person who, from benevolent motives, force-feeds his hunger-striking friend has revealed a character far less deserving of blame than has someone who, to amuse himself, forces food down the throat of a stranger sitting beside him at a restaurant. The criminal law treats both of these cases as simple assaults and leaves to sentencing discretion the moral differences between them. But the character theory is committed, if not to exculpating the benevolent force-feeder, at least to treating his crime as belonging to a different category (assault from benevolent motives, perhaps) from that of one who assaults from vicious motives.

If mens rea in law is too undifferentiated to be a reliable indicator of character, it is also in some cases too narrowly focused on agency to permit the blaming of the blameworthy. I have in mind here the defences of mental disorder and intoxication. Where mental disorder is not genetic or biologically caused, it comprises a set of character vices (megalomania, paranoia, narcissism, etc.) for which the agent is as much or as little responsible as he is for any other formation of character. Thus, far from a condition blocking an inference from unlawful act to character, mental disorder is itself the connection. The same may be said for voluntary drunkenness. Drinking to the point where one loses control of motor functions or even where one lacks the capacity to intend objects as means to further ends is, one may say, the sign of a man who disrespects his humanity, who is willing to "throw himself away," in Kant's phrase. From the standpoint of the character theory, therefore, the law's practice of permitting mental disorder to exculpate when it negates criminal intent and of allowing intoxication to exculpate from crimes of complex intent must seem exactly the opposite of the way these conditions ought to be regarded. Accordingly, the character

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theory would seem to be committed to eliminating or drastically reducing the scope of the defence of mental disorder and to admitting all evidence of intoxication as *inculpatory*.[14]

Not only does the character theory turn some legally exculpatory conditions into inculpatory ones; it also renders unintelligible the limitation of exculpatory conditions to a finite set of defences signifying that the defendant's *act* does not deserve punishment. If the only significance of the legally recognized excuses is that they preclude an inference from conduct to character, why not consider character evidence extrinsic to the act that might do so as well or that might at least reveal the act in a truer light? Indeed, since it is manifestly unfair to judge a person's settled character by an isolated act, the defendant ought, on the character theory, to be permitted to adduce character evidence not simply to support a denial of commission or in discretionary mitigation of sentence but as exculpatory in itself. Thus, if it could be shown that the criminal act was a momentary aberration from the defendant's enduring moral character, or if it could be shown that the act, while not disownable by the defendant (because no acts are), nonetheless belongs to a generally good man with all-too-human frailties rather than a bad man, he should be entitled to an acquittal or statutory mitigation. Here the fit between the character theory of mens rea and the criminal law could not be much looser. Not only could the character theory convict before a blameworthy (and dangerous) disposition issued in an act; it could also acquit on the basis of a residual character defence someone who intentionally and without justification or excuse committed an unlawful act.[15]

The character theory is also intrinsically deficient as a theory of criminal desert. On this theory, mens rea functions as a connector between a dangerous act and a character deserving of blame and moral censure. But if the blameworthy disposition revealed by an unlawful act committed with mens rea does not specifically deserve judicial punishment as distinct from blame generally, how can we say that a mens rea requirement acts as a desert constraint on the state's pursuit of crime prevention through punishment? Perhaps a character vice deserves blame in the abstract, and judicial punishment is one way of expressing blame (i.e., of censuring), so that by

14. Bayles, *supra* note 9, at 17–19.

15. Jeremy Horder seeks to avoid this result of the character theory by judging the defendant's criminal act against an idealized moral character for whom such an act would be impossible. But this takes the character theory out of the frying pan of act-marginalization into the fire of no-fault criminal liability. Because the ideal moral character is a construct of reason, it is by definition unattainable by flesh-and-blood characters, who might uncharacteristically slip on occasion. To judge the real character as "bad" by an impossible standard of perfection, however, is to impose criminal liability without fault (and to turn every judge into a hypocrite). True, the defendant has broken the law with some form of mens rea; but the character theory (as modified by Horder) must see this as revealing a culpable character only because the real character has fallen short of the ideal one. And since he cannot help but fall short, this is to blame without fault. *See* Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 L. & PHIL. 193, 207–208 (1993).

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deserving blame, a character also deserves any of the specific manifestations it might take. But judicial punishment is not just a particular instance of censuring alongside professional discipline, verbal reprimands, and social snubbing. Because it comprises actions that are ordinarily themselves wrongful (indeed criminally wrongful), judicial punishment forms an altogether different category of responses to wrongdoing needing a distinctive justification—one directed toward legitimating the violence it entails. Thus something more than deservingness of blame and censure is required to deserve *it*.

The same conclusion follows from attending to the difference between political and moral obligation. What is generally taken to distinguish them is precisely the authority of an official to whom a political obligation is owed to coerce obedience to norms that are otherwise binding only in conscience so that he need not rely on angry remonstrations alone. The moral obligation to obey the norm is not yet a political obligation not to resist the might of the sovereign enforcer of the norm. Rather, the political obligation requires a distinctive justification by appeal to some common interest apart from the good of virtue, whether in self-preservation (Hobbes, Locke) or in civil independence (Rousseau, Kant). But if political obligation is categorically different from moral obligation, then the authority to punish that is correlative to political obligation is categorically different from the moral standing to blame, not simply a case of it. So to explain the mens rea requirement as being needed to ensure a character's deservingness of blame, disapproval, or censure is still to leave judicial punishment undeserved. But then the pursuit of crime prevention through that means looks like arbitrary violence indistinguishable from the wrongdoer's.

## The Choice Theory

The choice theory of the culpable-mind requirement is, like the character theory, an account of moral blameworthiness applied to legal punishment. The theory is quite simple and intuitively appealing. It says that, assuming punishment for a type of act is justified for forward-looking reasons, punishment of *this* person for an act of that type is justified only if blame is justified; and blame is justified for an unlawful act only if the agent had a choice between committing it and not committing it—only if he could have chosen otherwise than he did. If the agent had no choice but to do what he did, he is not to blame for it. The culpable-mind requirement of criminal liability embodies this truth of moral theory, for it confines punishment to those who could have done otherwise. In H.L.A Hart's words:

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for abstaining from what [the law] forbids, and a fair opportunity to exercise these capacities. Where

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> these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice."[16]

Here Hart has run together two different pleas that might be meant by "he could not have helped it." That statement might mean that he lacked the *capacity* to choose otherwise, perhaps because he was a newborn infant. Or it might mean that he lacked a *fair opportunity* of exercising his capacity to choose otherwise, perhaps because he was unaware of the circumstances that made his conduct unlawful or because his will was overwhelmed by pressures much stronger than most people ordinarily face. Michael Moore, another proponent of the choice theory, distinguishes these senses by describing the first as a claim that one's choice was made impossible by factors beyond one's control and the second as a claim that one's choice was made very difficult by such factors.[17] Let us first consider incapacity to choose otherwise as a condition negating mens rea.

There is, of course, an ambiguity here as well. To say someone lacked the capacity to do otherwise than he did might mean that at the time he broke the law he lacked the capacity agents have for free choice. This might be because he was asleep or unconscious, or because a gust of wind blew him into another person. Alternatively, to have lacked the capacity to do otherwise might mean that while the defendant was a conscious agent at the time of the breach, he lacked the strength of will to resist the powerful inclination to act as he did. Just as someone might say "I couldn't lift the two-hundred-pound weights," someone might say "I couldn't resist the impulse to steal the watch." This second sense of "I could not do otherwise" cannot be exculpatory, however, because, so understood, the statement adds nothing to "I *did* not do otherwise." Since, counterfactually, I could have had the strength of will to resist the impulse (that is, resistance did not call for superhuman fortitude), the statement that I did not have the strength to resist is tautological for "I failed to resist." So it has no force to excuse the failure.

Let us then explore the first sense of incapacity. And let us grant the choice theorist's assumption against determinists that incapacity in this sense intelligibly distinguishes the blameless from the possibly blameworthy. Assume, in other words, that a conscious, normally functioning human being has a capacity to accept or reject any impulse or motive that its body-psyche offers up as an end of action. By "capacity" is meant here not strength of will but the bare possibility of asserting a will that distinguishes a conscious human being from other forms of life. A sunflower cannot reject the force

16. HART, *supra* note 3, at 152.
17. Moore, *supra* note 13, at 35.

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of phototropism that causes it to turn toward the sun; a bloodhound cannot reject, except for the sake of a stronger impulse, the force of an instinct that causes it to pursue a scent. But a human being can reject, just for the sake of displaying self-mastery, the force of an emotion, drive, or inclination. It can do so because it is a self-consciousness—that is, an *I* distanced from these emotions and drives and so capable of taking a stance toward them. This, no doubt, is a minimalist sense of capacity. Here capacity simply means that there is a rider on the horse, to use Plato's image, not that the rider possesses the strength or know-how to control the horse. So we can say that a capacity to have done otherwise in this sense belongs to any human being who is aware of itself as an *I* or subject. And since this self-awareness is the possibility of choice undetermined by what is not-I, it is the condition of imputing choices to a subject and hence, as the choice theorist rightly maintains, the condition of blaming a subject for his unlawful deeds.

The difficulty for the choice theorist of the culpable mind, however, is that the presence of the capacity to have chosen otherwise says almost nothing about whether the defendant's mind was culpable. That D could have chosen otherwise when he shot V, while a minimum condition for culpability, fails by a wide margin to establish a culpable mind, for in a dark forest D may have reasonably believed V was a bear. Thus the culpable mind is determined not solely by *whether* the defendant had a choice to do otherwise but also (and indeed, primarily, as we shall see) by *what* he chose. This is why, in law, the mind's culpability is a function of its cognition rather than simply of its volitional capacity, of what the defendant knew or believed and thus thought he was doing. Thus, if he chose to shoot a bear but mistakenly shot a man he thought was a bear, he is not guilty of a homicide even though he could have chosen to flee. Even if, because of mental disorder, he delusionally mistook the man for a mouse, he is innocent of criminal wrongdoing even though he could have chosen not to kill the "mouse."

Conversely, if, because of some condition negating self-consciousness (for example, unconsciousness) or determining physical motion irrespective of volition (for example, reflex action, forces of nature), the defendant could not have done otherwise, something more basic than a culpable mind is missing. In these situations, the law says that there is no *act*, because voluntariness is what distinguishes an act from an event. Accordingly, on its incapacity branch, the choice theory explains no more than the voluntariness requirement for a culpable act; it does not explain the requirement of a culpable mind—the requirement that the defendant have chosen something in particular. Hence it fails to explain the defences of mistake of fact and insanity, by virtue of which lawbreakers are acquitted despite having had the capacity that conscious subjects have to choose otherwise.

Perhaps the choice theory fares better when it argues that blameworthiness (and so punishability) depends on the defendant's having had a fair opportunity to exercise his capacity for choice. This path seems more

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promising, because the defendant who shot the man believing it to be a bear, though he had the capacity to choose otherwise, lacked the opportunity most people would have had for exercising this capacity, either because the mistake was reasonable (the forest was dark) or because the defendant was suffering from a mental disorder that distorted his perception of the world. Moreover, the defences of necessity and duress can also be brought within the ambit of this theory, because they are put forward by people who, though they possessed the abstract capacity to have chosen otherwise, found their will overborne by pressures far above the ordinary. In these cases, the lack of strength to resist a drive or to overcome fear does have, potentially at least, exculpatory force, because the plea does more than redescribe the failure to resist; it judges the failure as meeting the standard of moral strength that we are entitled to expect from our fellow human beings. The accused lacked a *fair* opportunity to exercise his capacity to have done otherwise.

Nevertheless, the fair-opportunity branch of the choice theory also fails as a theory of the culpable mind. This is so because, if the capacity test establishes too little of what makes for a culpable mind, the fair-opportunity test embraces too much, sweeping in states of mind that not even the most expansive view of mens rea found in the positive law views as culpable. So far, the outer limit to which courts have stretched the fault threshold of criminality is "gross negligence," understood as a failure to avoid a very high risk of serious harm where the defendant had the capacity to do so but regardless of whether the defendant actually perceived the risk.[18] Any further expansion would breach the border between crime and regulatory offences based on civil negligence and thus brand as criminals those whose fault was venial. Yet the fair-opportunity test of culpability would breach the border.

To see this, consider a classic civil law case of negligence, Donoghue v. Stevenson.[19] As a matter of tort law, of course, it is immaterial whether the defendant had the mental or physical capacity to conform to the standard of care that the reasonable person would have exercised in the situation; all that matters is whether or not he measured up to the standard. Thus civil negligence does not require that the defendant have been morally blameworthy for his having breached a duty of care. Suppose, however, that Stevenson did have the basic capacities needed to meet the required standard of consideration for those likely to drink his ginger beer—to contemplate the risk that some of his bottles would become adulterated and

18. R. v. Adomako, [1994] 3 All ER 79 (H.L.); R. v. Hundal, [1993] 1 SCR 867; Model Penal Code, s. 2.02.

19. [1932] A.C. 562 (H.L.). The plaintiff drank from a bottle of ginger beer purchased from a café owner, in which was found the decomposed remains of a snail. As a result, she suffered stomach pains diagnosed as gastroenteritis. The plaintiff sued the bottler for damages, and the House of Lords acknowledged her cause of action, thus founding the modern tort of negligence as actionable outside the bounds of contract.

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to inspect them prior to sealing them. In that case we would say that he breached a duty of care owed the plaintiff and injured her despite having had a fair opportunity to have done otherwise—to have taken the precaution that would have avoided injury to the plaintiff. This, according to Hart's fair-opportunity test, makes Stevenson blameworthy for his negligence, and so it does. Does it also make him culpable and criminally liable to punishment (assuming there are good goal-oriented reasons to punish)? Not according to the most expansive view of mens rea found in the positive law, because his having had the capacity to foresee the risk and avoid it has not changed the magnitude of the risk, which (we may assume) was not sufficiently excessive to warrant a finding of egregious negligence. Nor does his capacity indicate anything more than venial thoughtlessness. He is not indifferent to the risk, for had it been brought to his attention, he would no doubt have taken the appropriate action to remove it. Nor was the risk of adulteration so obvious that only someone indifferent to the risk could have failed to notice it. If this is nonculpable negligence when he lacks capacity, it is still nonculpable negligence when he has it.

So here we have a case where, though the defendant is morally to blame for his negligence, it would still be unjust to punish him (though not unjust to impose noncriminal penalties that need not be deserved by either culpability or blameworthiness). But this tells us only what we already knew: that the blameworthiness that gives the wronged party the standing to blame is not yet the culpability that gives the state the right to punish.

If the presence of a fair opportunity to exercise one's capacity for choice against wrongdoing does not map onto legal culpability for wrongdoing, we should suspect that the lack of a fair opportunity to avoid wrongdoing is not the legally relevant common theme of the conditions that exculpate. Of course, it is natural to think that even if those morally blameworthy for their unlawful acts are not necessarily criminally culpable for them, at least the morally blameless are necessarily nonculpable. But this is not as obvious as it seems. Anglo-American criminal law distinguishes between *exculpating* conditions that negate an essential element of culpable wrong (culpable act or culpable mind) or that justify what in ordinary circumstances would be a culpable wrong and *excusing* conditions that presuppose a culpable wrong. Duress is (in some cases) an excusing condition. Now, let us grant that T's believable threat to kill D if D does not kill V excuses D from murdering V, because D lacked a fair opportunity to exercise his capacity for choice and is therefore morally blameless (his doing otherwise would have been morally heroic, supererogatory). On the traditional common-law understanding, D's blamelessness does not exculpate him from the wrong; rather, it (at most) gives a reason for excusing D from a culpable wrong, for holding him safe from punishment despite his legal culpability. The fair-opportunity theory, in conflating moral blamelessness and legal innocence, fails to capture this nuance of the law. Moreover,

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if the morally blameless are not necessarily nonculpable legally, then the lack of a fair opportunity to do otherwise cannot explain why mistake of fact and insanity *exculpate*. But this is what we suspected all along. For even prior to any theoretical reflection, it seems intuitively plain that the reason someone who kills a man thinking he is a bear is not culpable for his wrong (liable to judicial punishment) is not that he lacked a fair opportunity to exercise differently his capacity for choice, but that his actual choice (to shoot a bear) is nonculpable.

But (it will be protested) have we not, with this separation between exculpation and excuse, driven a wedge between the defences to a criminal accusation, thereby precluding a coherent theory of defence? Whatever their failings with respect to fit with the positive law, after all, both the choice theory and the character theory have the advantage of providing a unified theory of defences. And is it not the chief virtue of a theory that it unifies into a coherent explanation the phenomena of which it purports to be an account?

Wedge yes, incoherence no. There is no reason to consider it an advantage of a theory that it explains with one idea defences as disparate as "I thought he was a bear" and "I knew he was a man, but it was either him or me." We should rather think that such a theory oversimplifies. But neither is there any reason to think that preserving the common law's distinction between exculpation and excuse is incompatible with a coherent theory of defences; for an account of defences can be unified without being unitary. That is, it may be possible to unify the defences not through a single idea that effaces the difference between exculpation and excuse but through a parent idea that manifests itself differently in each, that shows their kinship and compatibility, and that thus shows how they fit together, different as they are, within a coherent account of the defences. But this, too, is the subject of a different essay.

## III. A LEGAL ACCOUNT OF MENS REA

The character and choice theories of the culpable mind derive legal culpability from moral blameworthiness and legal excuse from moral excuse. They carry implications at odds with well-settled features of the legal tradition and fail to connect blameworthiness to judicial punishment. By contrast, the theory of mens rea that I defend here is a distinctively legal account that explains the fault threshold of criminal liability as the one specifically required to legitimate a judicial infringement of rights.

The account of mens rea that I propose flows from the classical retributivist justification of punishment adumbrated by Kant but formulated with more precision by Hegel.[20] The account is meant to have both explanatory

20. I. KANT, THE METAPHYSICS OF MORALS 140–145 (Mary Gregor trans., 1991); G.W.F. HEGEL, PHILOSOPHY OF RIGHT paras. 90–103 (T.M. Knox trans., 1967).

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and prescriptive force. That is, it claims to fit the common law of criminal fault well enough to have earned the credentials to issue prescriptions for the law to jurists—to label outliers as missteps and to call approved changes organic developments. But the following account of mens rea is also meant to be prescriptive in a stronger sense—in the sense needed to persuade someone with liberal convictions of the normative cogency of the account. The liberal conviction the argument assumes in the interlocutor is, I believe, uncontroversially generic to the various schools of liberalism: that the individual agent possesses an inviolable worth that makes it wrong for others physically to restrain and confine the agent for their particular ends. On the empirical plane, judicial punishment does just this, and so the question becomes: How must penal coercion be constrained so as to reconcile it with the individual's inviolability? The following account of the culpable mind forms part of an answer.

## The Fault Threshold

The classical retributivist legitimation of punishment runs basically as follows. If D knowingly interferes with V's capacity to act from self-chosen ends (whether by threatening one of the essential conditions of V's freedom, by physical force, or by interfering in the proprietary domain over which V's choices rule), his act signifies something more general than an infringement of V's right so to act. Since V is a human agent with a capacity for self-actuation, D's choice to interfere with this capacity signifies for the thinking Agent standing in D's shoes a claim of permission to act that is unlimited by respect for the agency of another human being. However, claims of permission binding others can be objectively validated as rights only by free others whose liberty to act is reciprocally respected. Therefore, D's choice to interfere with another agent's freedom is impliedly a choice to act against the framework of mutual respect that makes rights (as distinct from subjective claims) to act possible. Accordingly, D's choice to interfere with V's agency signifies (to the thinking Agent) a challenge to the very idea of a valid permission to act or of a permission to act that others must respect. However, if (according to the challenge) no one has a valid permission to act, then no one can validly protest (i.e., make a protest that others must heed) if another agent impedes his movements through physical restraint or confinement—no one, including D. Thus the necessary implication of D's choice to interfere with V's agency is the denial of an inviolable sphere of liberty for D. Since D implicitly denied the existence of rights (claims recognizable by a free self) to act, he cannot now turn around and assert his right against interference with his own agency. This constitutes the *aporia* or self-contradictory result of the criminal's implicit claim of permission to an unlimited liberty. Because this claim was mistaken, it would be impermissible for V or anyone acting from self-interest to take advantage of the

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license the criminal has granted to coerce him. However, a state agent could do so for the public purpose of demonstrating the aporia so as to vindicate mutual respect as the sole ground of solid rights. Judicial punishment is justified by this purpose. By availing itself of the criminal's license to coerce him, the state shows the downfall of his claim of right to an unlimited liberty and it thereby publicly vindicates mutually recognized liberty as the framework for real rights. Since doing so also vindicates the criminal's right, the thinking Agent in his shoes would accept retribution as the actualization of valid human worth. Accordingly, the necessary implication of D's willful interference with V is his own moral vulnerability to coercion for the purpose of right-vindication, and this connection between willful wrongdoing and liability to punishment is what we call criminal desert.[21]

We can see that what launches this story is an intentional interference with another human being's capacity for free agency. Choosing to do that from which a denial of rights of agency can be imputed to the choice triggers the circuit from wrongdoing to coercibility. *Why* one chose so as to imply a right-denial—one's motive, whether wicked or benevolent—is irrelevant to whether the circuit goes through, as it is to culpability in the positive law. Moreover, *only* a choice implying a right-denial initiates the circuit. An unwitting interference does not set the logic in motion, for if D mistakenly thinks he has permission from V, then his choice is just to pursue his object (surgery, sex, acquisition, etc.) within the bounds of respect for V's agency; and from this act description no denial of rights can be imputed to his choice, hence no authorization of his own coercion either. Coercion is then external violence incompatible with the inviolability of the person.

Observe, however, that nothing in this argument determines that an intentional interference is required for a right-infringement or a boundary crossing (i.e., a tort). Where D interferes with V's agency under a mistaken belief that he has permission from V, a boundary has nonetheless been crossed, and D will not be able to raise his mistake to defend against a civil action for battery, entry, or conversion.[22] This is so because D's subjective perceptions and beliefs cannot, consistently with mutual respect

21. Of course, this skeletal account of retributivist punishment gives rise to many further questions. Does it entail giving literally like for like? If not, how is the conceptual link between crime and punishment to be translated into a practicable scheme of specific punishments? However, discussion of these questions lies beyond the scope of this essay, which is concerned solely with the appropriate fault threshold for criminality given the liberal premise of individual inviolability.

22. Thus the oft-heard argument that subjectivism ignores victims tells a half-truth. It forgets that subjectivism does not stand alone but comes on top of a theory of tort that sees tort law as vindicating the rights of victims and so as the proper sphere for objective standards of fault and even (in some cases) strict liability. Subjectivism assumes that the parties to a criminal action are the state and the accused; the accused is criminally culpable, not because he infringed this particular victim's right but because, in willfully infringing this particular person's right, he denied the very idea of a right and gave this denial practical force. Accordingly, to exculpate someone on the ground that, through an unreasonable mistake, he did not deny rights is perfectly compatible with a finding that he infringed this victim's right and is therefore liable in tort.

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for agency, be allowed to determine unilaterally the boundary between D's and V's zones of permissible activity. That boundary must be determined impartially—in accordance with a principle securing the greatest extent of equal liberty.

In the criminal action, however, the question is whether D can be physically restrained and confined for his boundary crossing, and now his subjective perceptions become relevant as determining whether he has made a choice from which an assent to coercion may be implied. If, given his perceptions and beliefs about the circumstances or likely consequences of his action, it would be incorrect to describe his choice as one to interfere with V's free agency, then nothing connects his choice to his own coercibility. Thus even to interfere unwittingly where an ordinarily circumspect person would know of the interference (i.e., to make a negligent mistake about permission) is not yet to interfere culpably either in theory or in law.[23] Nor is an unwitting interference culpable where the interference would be glaringly obvious to the ordinarily circumspect person, though the obviousness of the interference would be strong evidence against a plea of inadvertence. Though the ordinarily cautious person would have known of the interference, D did not, and so he made no choice from which a denial of his rights can be logically inferred.

Whereas, however, a choice to do that from which a denial of rights can be imputed to the choice is essential to culpability, *knowledge* of the *interference* is not the only way to make such a choice. A denial of rights to respect for agency can also be inferred from a choice to impose an extraordinary risk of interference—that is, a risk over and above the magnitude that agents reciprocally accept as an inevitable cost of freedom of action in a certain social context. I choose to impose an extraordinary risk, however, only when I am aware of such a risk or only when I suspect that one exists and so actually foresee the likelihood of an interference. If I am unaware of the risk, then no matter how apparent it would be to a reasonable person, I have not chosen to impose it, and so I have chosen nothing implying a denial of rights (though my bare assertion of ignorance need not, of course, be taken at face value). Thus recklessness, understood as proceeding despite advertence to one's imposing an unreasonable risk of interference with others' capacity for freedom, and a willful blindness regarding such a risk are culpable states of mind both in theory and in law; but gross negligence is an outlier for the theory and (we may say) a mistake in law. Moreover, a denial of rights can be imputed to the choice to impose an unreasonable risk whether one would regret the risk's materialization or be indifferent to it or rejoice in it. Thus mental orientations toward acts and outcomes one would want to distinguish in assessing and calibrating moral blame are

23. Though this can be deterred by a noncriminal penalty for a public-welfare offence, for which the penalty need not be deserved and to which other constraints protective of individual autonomy apply; *see* Alan Brudner, *Agency and Welfare in the Penal Law,in* ACTION AND VALUE IN THE CRIMINAL LAW 40–45 (Stephen Shute, John Gardner, & Jeremy Horder eds., 1993).

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juridically equivalent as denials of rights authorizing one's own coercion, and they are so treated by the positive law.

Observe that while this account of the culpable mind provides an argument for subjective mens rea as the fault threshold of criminal liability, it is not crudely subjectivist in the sense decried by many advocates of an objective standard of criminal fault.[24] That is, it is not concerned solely with what is empirically going on in the mind of a monadic agent, and so it does not judge him exclusively by his own knowledge, beliefs, and self-interpretations, ignoring the interpersonal meaning of his act. True, the foregoing account of mens rea focuses on what situational facts the agent knew or believed existed or on what risks he foresaw in order to determine what he chose to do. But it does not judge the agent solely by what he subjectively thought his choice *meant*; rather, it judges him by what is logically imputable to his choice and thus by what the thinking Agent in his shoes meant by his choice. If D knowingly operates on V against V's will, thinking that this shows love and concern for V rather than disrespect, the foregoing account will still treat him as having implicitly denied rights of agency and authorized the interference with his own; so, too, if D reports that he thought he was only ignoring V's will, not denying rights of agency as such, or that he knew V was a human being but did not know he was an agent or even what an agent is. Accordingly, the foregoing account of criminal desert generates a subjectivism that, by virtue of incorporating the public standpoint of a thinking Agent, is immune from the charges of excessive atomism or empiricism brought against other versions.[25]

Observe, further, that the foregoing account of the culpable mind determines that a form of subjective fault is the threshold of criminal liability to judicial coercion in the abstract. It says that a choice from which a *right-denial* may be implied is essential to deserving a *right-infringement*. This means that once the agent has made a choice implicitly authorizing a right-infringement in the abstract, the account's subjectivist requirement is spent. There is no further need that the criminal have intended or foreseen the harmful result of his transgression in order that the severity of punishment properly reflect that result. Of course, the self-imposition requirement at the threshold rules out punishing the criminal for all consequences of his wrong, no matter how unforeseeable; for it would be self-contradictory to say that punishment per se must be implicitly self-imposed but that the

24. DUFF, *supra* note 2, at 159–162; RIPSTEIN, *supra* note 2, at 178.

25. But now the empiricist will protest: Why is it legitimate to fix the empirical agent with the knowledge, choice, and assent of the thinking Agent? Why should the thinking Agent's consent to punishment count as that of the empirical agent, who, after all, must be assumed not to consent? One response is that a public standpoint is required to make law, crime, and punishment conceivable, and a public standpoint is possible only if we conceive the empirical human being as a particularized agency—a self individuated in various ways. But if the empirical individual is a particularized agency, then he or she may be fixed with the universal capacities (logical thought, free will) belonging to agency without external imposition; these capacities are not alien to the empirical agent, however well or ill the agent may realize them.

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measure of punishment can be abandoned entirely to chance. However, the self-imposition requirement does not entail that the criminal can be punished only for those results he intended or actually foresaw; for in choosing to coerce someone in a world of cause-effect chains he knows might extend beyond his purpose, the thinking Agent in the criminal's shoes accepts responsibility (in the appropriate degree) for those outcomes of his right-denying act that are imputable in some degree to his agency; and intention is but the highest of several degrees of imputability (foresight and foreseeability are the others). Hence the relaxed fault requirement applying to results is quite consistent with the self-imposition constraint determining the stringency of the threshold. Indeed, one can go further: a requirement of intention or foresight for results would be *inconsistent* with the respect for free agency determining the subjectivist threshold, for it would imply that human beings have no capacity they may be expected to exercise to think beyond the immediate effect of their acts.

It follows that nothing in the foregoing account of subjective fault as the threshold of criminal *culpability* determines that subjective fault is also required for criminal *responsibility* for harmful results once the threshold for liability to any punishment has been crossed. Because the classical retributivist account of the culpable mind determines only that subjective fault for wrong *simpliciter* abstracted from harm is required for punishability *simpliciter* abstracted from *quantum*, that account stands for what may be called a moderate subjectivism. Such a position is invulnerable against charges of excessive revisionism that have been brought against extreme versions of subjectivism that extend to results.

Finally, the classical retributivist account of mens rea reveals subjective fault as belonging to the sphere of crimes involving interferences with rights of agency, for it is the denial of these rights implied in intentional interferences that connects wrongdoing with the coercibility of the wrongdoer. Because the account has no application to breaches of statutes aiming at the public welfare, it leaves the fault requirement of these offences to be determined by a generic autonomy constraint on the state's pursuit of welfare, which constraint is satisfied by a due diligence defence coupled with a rule against imprisonment for negligence.[26] On the other hand, the retributivist justification of physical restraint applies by extension to *intentional* breaches of laws (against perjury, bribing officials, etc.) supporting the enforcement of rights and even to intentional breaches of public-welfare laws. This is so because the reality of rights may be said to depend on the rule of law. A knowing breach of a statute involves a choice to which a denial of law's authority may be imputed and hence also a rejection of the condition for the possibility of effective rights. Accordingly, for every public-welfare

26. *See* Brudner, *supra* note 23. In confining a subjective fault requirement to the sphere of right-violations, the subjectivist position I defend departs from that of Jerome Hall, who would have banished negligence from the penal law generally; *see* Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

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offence involving a risk of harm to others or to a public good (a qualification required by proportionality, for otherwise an intentional breach of a no-jaywalking ordinance could incur a prison sentence), it would be permissible for a liberal state to enact a separate offence for committing the offence knowingly (to which ignorance of law would thus be a defence) punishable by imprisonment.

## Exculpatory Conditions

The retributivist account of the culpable mind is also an account of the conditions that exculpate because and to the extent that their presence means that the defendant did not make a culpable choice: mistake of fact, color of right, and legal insanity. These conditions exculpate, I argue, to the extent that they preclude an implication of a right denial from the defendant's choice.

Of course, if, because his bodily movements were unwilled, the defendant made no choice at all, then he could not have made a choice to which a right denial is imputable. Thus involuntariness exculpates, not because the defendant could not have done otherwise than he did (a condition relevant only to moral blame), but because it negates a basic precondition—choice—for a right-denying choice. This explanation accords better with the positive law's own understanding of involuntariness than does the choice theory's account; for instead of developing involuntariness into a general theory of exculpation, it captures the law's sense that involuntariness negates only a basic precondition of culpability.

Mistake of fact exculpates, not because the defendant lacked a fair opportunity to exercise his capacity for choice, nor because it blocks an inference from act to character, but because (and only to the extent that) on the facts as perceived by the defendant, he made no choice that for the thinking Agent in his shoes would have been a choice to deny rights of free agency. Thus if D chose to shoot a bear and instead shot a man thinking it was a bear, he chose nonculpably unless he chose to risk shooting a man. But if he chose to shoot Peter and instead shot Paul thinking he was Peter, he in any case chose to kill a human being, which for the thinking Agent in his shoes is a denial of rights, and so his mistake is nonexculpatory even without the fiction of a "transferred intent." If D shoots V under a mistaken belief that V is about to shoot him, then, however unreasonable the mistake, D does not make a choice from which a right-denial may be inferred; for, on the contrary, the thinking Agent with D's perceptions and beliefs is asserting his right against a transgressor, and so D's choice, while not actually justified, is nevertheless nonculpable (though D may be subject to noncriminal penalties for a negligent homicide).[27] But if D shoots V, who is not threatening

27. R. v. Williams, [1987] 3 All ER 411, 415 (C.A.).

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him or anyone else but who D mistakenly believes has forfeited her right because her evil ways have brought dishonor to the family, he has made a choice from which a right-denial may be inferred; for the thinking Agent in his shoes knows that V cannot forfeit her right by giving offence to a particular set of moral beliefs (this being contradictory to the idea of having a right) and that D has chosen to act as if V's right were held at his pleasure.

In the latter case, no doubt, D has made a mistake of law rather than of fact. However, the reason his mistake fails to exculpate is not that it belongs to one category of mistake rather than another but that, even taking into account D's beliefs, he chose to do that which for the thinking Agent is a choice to deny rights. Indeed, as it applies to right-infringements, the rule that mistake or ignorance of law does not exculpate simply reflects the idea that the thinking Agent knows the self-contradictoriness of right-claims to act unlimited by respect for others' agency and that the knowledge of the thinking Agent is imputable to the defendant. That is why Bailey was culpable for shooting Truscott on the high seas even if he could not be aware of a new statute extending the king's writ to British ships in mid-ocean.[28]

However, this means that if, in the particular situation, the thinking Agent would not necessarily know the illegality of D's deed, then D's mistake of law can exculpate if it means that he chose to act within the bounds of his permission and so respectfully of V. For example, if D takes V's property under a mistake of positive law that the thing is his own, he has chosen to act within his permission (under "color of right"), and so his mistake of law exculpates both in theory and in law. But then, similarly, if D makes sexual contact with V mistakenly taking an equivocal communication for consent, he chooses nonculpably (assuming no recklessness or willful blindness) even if, for reasons of social policy, consent is (unknown to D) defined by statute as an unequivocal communication of "yes" rather than a privately held attitude toward the contact.[29] This is the case, too, if fifteen-year-old D has sexual contact with a thirteen-year-old willing partner believing the statutory age of consent to be thirteen when it is in fact fourteen. What matters is whether, given his beliefs, D made a choice from which a right-denial may be implied, not whether his mistake is one of fact or law; hence it should make no difference whether D mistakenly thought his partner was fourteen or mistakenly thought the legal age of consent was thirteen, for in either case he chose lawful sex. While D may be subjected to noncriminal penalties for a negligent mistake, he is not liable to punishment as a criminal, for he has made no choice from which a right-denial may be inferred.

The defence of insanity as circumscribed by the rules in the *M'Naghten* case[30] perfectly reflects the classical retributivist view of what constitutes culpability and exculpation. First, insanity is not treated as necessarily

28. R. v. Bailey (1800), Russell and Ryan 1, 168 E.R. 651.

29. I deal below with the objection that the thinking Agent would define consent only as publicly given.

30. [1843–60] All E.R. Rep. 229.

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depriving human beings of the capacity for free choice, because this capacity—for nondetermination by causal laws—is too thin to be affected by cognitive and emotional disorders short of advanced dementia and automatism. So the mentally disordered are not regarded as infants to whom judgments of guilt or innocence, responsibility or nonresponsibility, do not apply; they are not, for example, exempted from the criminal process upon a psychiatric diagnosis of clinical insanity, as infants are exempted just because of their age. Nor are they (except in some American jurisdictions) exculpated for reasons that would not be exculpatory for other conscious agents with a capacity for choice, for example, because of "irresistible impulse." The capacity for free choice is just the capacity to resist.[31] Rather, they are treated as agents who can be culpable for their choices and who are exculpated only if their disorder engenders cognitive mistakes that would be exculpatory absent their disorder. So if D kills V delusionally thinking V is a snake, he has made no choice from which a right-denial can be implied, and so the mistake is exculpatory; so, too, if D kills V thinking that he (D) is a public executioner carrying out the verdict of a court. But if D kills V under the delusion that he is guaranteed protection against penal consequences by a cosmic shield or that he is a god to whom the law does not apply, his choice is culpable regardless of his delusion, for a right-denial is imputable to it.

Just as mistakes of law may exculpate when, exceptionally, the thinking Agent would not necessarily know the law (for example, pertaining to property) determining when a boundary has been crossed, so may they when the thinking Agent with the defendant's beliefs would consider that a right-infringement is tragically justified, as in the case of a public necessity. So if the defendant delusionally believes in the existence of exigent circumstances that the thinking Agent would consider justify a wrong, he has not chosen culpably even though he has mistaken a wrong action for a right one—that is, has made a mistake of law. And this is so both in theory and in law; for the *M'Naghten* rules exculpate not only those unable because of mental disease to understand the nature and effect of their acts but also those incapable of knowing that what they are doing is something they ought not to do.

Some regard the latter reason for not punishing the insane as relevant to something more basic than the existence of a culpable choice, since no other adults are exculpated because they could not know right from wrong; knowledge of right and wrong is rather imputed to them. An incapacity to know right from wrong seems to make a culpable choice impossible rather than simply absent, as it does for the infant. That is, it negates a precondition of imputing culpable choices to the defendant, for an agent

31. R. v. Borg, [1969] C.C.C. (4th) 262. However, the fact that capacity is present leaves open the question whether an extraordinary difficulty in controlling impulses because of mental disease might afford a partial defence of diminished responsibility mitigating crimes carrying a mandatory sentence.

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cannot impliedly *deny* the validity of rights if he does not impliedly know the *purported* basis of rights in human agency. Now, it may be that some mental disorders (dementia, for example) infantilize the sufferer to the point that he is no longer aware of his agency. Such a person will also be unable to understand the nature and point of the trial process and so will be unable to give a hypothetical legitimating assent to any judgment rendered against him. For this reason he will be exempted from trial. But it cannot be said a priori of all mentally disordered individuals that their disease is incapacitating to the extreme of robbing them of their humanity. Moreover, if this were the type of defendant envisaged by the insanity defence, would it make sense for a judge or jury to decide the question of capacity to know right from wrong after a trial instead of a team of psychiatrists after a series of examinations? The fact that the clinically insane defendant is tried under specific criteria for *legal* insanity reflects the fact that, unlike the infant, his capacity for guilt or innocence is assumed, and the inquiry is into whether his choice was actually culpable or not. Sometimes his choice will be nonculpable because he labored under a delusion that he was performing an act quite different from the one he was actually performing. But sometimes it will be nonculpable because, looking at the world from the defendant's deluded perspective, the thinking Agent would conclude that in this case a wrong is justified by public necessity and so would choose a justified act. Thus no denial of right can be imputed to the defendant's choice.

To be sure, the defendant, in erroneously believing his act was justified in the real world, has made a mistake of law; but we have seen (in the "color of right" doctrine) that if a mistake of law blocks the inference from the defendant's choice to a denial of rights, it is no less exculpatory than a mistake of fact. Accordingly, that an insane defendant may be exculpated for an incapacity to know that his act was prohibited is not a reason to think that the defence of insanity belongs with infancy rather than with mistake.

The difficult case, however, is one where the deluded defendant thinks himself justified in a wrong by a standard transcendent of the legal order. Of this kind is the case of Hadfield, who shot at the king in order to fulfill a divine commandment to sacrifice himself to avert the world's destruction.[32] This type of case presents difficulties because, though the defendant was hallucinating when he committed a crime, the thinking Agent with his perceptions chose to subordinate the public authority of law to a private belief in a higher law, which is to deny the reality of rights. Indeed, since crime on the classical retributivist theory is just the claim to a permission to act unlimited by respect for others' agency—that is, a claim of right to do wrong, the religiously inspired accused's plea in defence looks more like an admission of culpability. Nevertheless, there may be a way of distinguishing the psychotic who knowingly commits a wrong in obedience to a divine voice he "hears" from the fanatic who subordinates public rights of agency to a

32. *Hadfield's Trial* (1800), 27 St.Tr. 1281.

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private religious inspiration. If the defendant's disorder is of a kind (a matter of expert evidence) that deprives him of the ability to distinguish between a private inspiration or dictate of conscience and a public command from the sovereign of sovereigns, then he is in the same position as the man who kills convinced that he is the king's public executioner. His choice is then nonculpable, for no claim of permission to a liberty unfettered by law is imputable to it.

## IV. A RESPONSE TO OBJECTIONS

In this section I discuss whether the version of subjectivism outlined in the preceding pages is vulnerable to the strongest objections that have been directed against a subjective fault threshold for criminal liability. I will not deal with the objection, associated with H.L.A. Hart, that one can be morally responsible for outcomes one does not choose, for the response to this objection is the same as the one given to the character theory of mens rea: to be morally responsible for an unlawful outcome is not yet to deserve the infringement of one's right to agency that judicial punishment distinctively entails.

### Subjectivism and Mistake of Law

One persistent objection against subjectivism was raised by Oliver Wendell Holmes and George Fletcher and has lately been reformulated by Arthur Ripstein.[33] It is that a consistent subjectivism is committed to abolishing the well-settled distinction between mistakes of fact and mistakes of law and to treating even negligent mistakes of law as exculpatory. This is so, argue the critics, because the subjectivist requires for criminal liability a conscious choice to do wrong or to break the law, so that if the defendant is, even through his own moral blindness or negligence, unaware of the legal prohibition, he must be acquitted. But this position obviously undermines the authority of the legal standard and runs contrary to the positive law of all Western legal systems. Hence subjectivism must be discarded as offensive to "basic sensibilities of justice."[34]

The classical subjectivist position I delineated above is immune to this criticism. For while it softens the dichotomy between mistakes of fact and mistakes of law, it does so only to the extent that the positive law itself acknowledges, in the doctrine of color of right, an exception to the rule that a mistake of law does not exculpate. Moreover, far from abolishing the rule, classical subjectivism provides theoretical support for it insofar as

33. O.W. HOLMES, THE COMMON LAW 41–43 (M. Howe ed., 1963); George Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971); RIPSTEIN, *supra* note 2, at 179–214.

34. Fletcher, *supra* note 33, at 422.

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the rule applies to the sphere of crimes and leaves it standing in the sphere of public-welfare offences. In the sphere of crimes, the subjectivism I am proposing does not require for criminal liability that the empirical agent consciously choose to do wrong; to the contrary, it treats the thinking Agent's knowledge of the rightful limit of action in the free will and ownership of others as imputable to him. What is required, rather, is that the empirical agent choose to do that from which a self-contradictory right-claim to an unlimited liberty is logically imputable to his choice. This is enough to break the objectivist's lances; for on the subjectivist position offered here, the defendant's ignorance of his wrong will not exculpate him if the thinking Agent in his shoes would be choosing a wrong; and it will positively *inculpate* him if his ignorance is shown in an explicit challenge to the normativity of rights such as might be expressed in the claim, "I am above the law" or "right is the interest of the stronger."

It is true, however, that where knowledge of the law cannot be imputed to the empirical agent as a matter of reason, a mistake of law can exculpate if it precludes an imputation of a right denial from his actual choice. So if he takes or damages another's property believing it to be his own, he is exculpated from theft or mischief; or if he defends with reasonable force what he mistakenly believes is his property against someone legally entitled to possess it, he is exculpated. But these exceptions to the rule that mistakes of law do not exculpate are those recognized by the positive law itself.[35]

Further, the subjectivist position I described above leaves the rule regarding mistakes of law untouched in the welfare context. This is so because the retributivist argument for subjectivism applies only to right-infringements or to what are called "true crimes"; it does not apply to welfare offences punishable by noncriminal penalties, for the logical circuit between an intentional doing of what the law forbids and coercibility is not initiated (though it is by an intentional breach of the law) where the law furthers a public goal rather than protecting a right of agency. I have argued elsewhere that negligence is the appropriate fault threshold for noncriminal penalties, so that negligent mistakes, whether of fact or of law, will not excuse (a defence of mistake of law would be available only against a separate offence of knowingly breaching a statutory offence).[36]

Arthur Ripstein has mounted a critique specifically directed against the classical version of subjectivism I have sought to revive. He observes that classical subjectivism maintains a distinction between mistakes of law as nonexculpatory and mistakes of fact as exculpatory by imputing to empirical agents the thinking Agent's knowledge of the wrongfulness of acts interfering with other agents' capacity to act from self-chosen ends. That knowledge comes from grasping the self-contradictoriness of a claim of right based on

35. Criminal Code, R.S.C. 1985 c. C-46, ss. 39(1), 322(1), 429(2).
36. Brudner, *supra* note 23.

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agency to a liberty disrespectful of agency. This idea, Ripstein argues, raises three problems. First:

> [A]ny concept of respect for the agency of others thin enough to be presupposed by all action will be incompatible with every action. On the face of it, the criminal who decides on reflection that his commitment to his gang is more important than any commitment not to take the lives of strangers has done something awful, but has not contradicted himself. If we presume (as the argument requires) that the criminal's commitment to respecting agency as such flows from the fact that he acts for reasons he recognizes, then whatever he decides to do, he will end up honouring it. (Or if he does not, his act will show that it is after all possible to act without that commitment.) In order to show that some implicit commitment has been violated, the commitment must both be implicit in every act, and yet violated in criminal acts. The question for the subjectivist is not whether or not the agent could be made aware of the law, but whether he was aware of it at the time of the offense.[37]

This objection confuses throughout the thinking and the empirical agent. The agent whose commitment can alone be self-contradictory is the thinking Agent shorn of all commitments but the one to liberty. That Agent's commitment to liberty is self-contradictory when it lays claim to a liberty disrespectful of the liberty of other agents. The criminal who prefers his gang loyalty to respect for others' freedom is an empirical agent, and it is obviously true that no single empirical commitment of his can be self-contradictory. But in giving effect to his preference in a wrongful act, the criminal implicitly (i.e., for the thinking Agent) acts from an a priori commitment (to a right-claim based on agency to a liberty nonrespectful of agency) that is self-contradictorily destructive of rights. And this right-denial can be imputed to the criminal insofar as he is an agent.

Further, the fatal presumption that Ripstein attributes to the subjectivist is one that the subjectivist will certainly disclaim. The subjectivist's argument need not presume that "the criminal's commitment to respecting agency as such flows from the fact that he acts from reasons he recognizes," nor does it in fact presume any such thing. Rather, his argument presumes that the thinking Agent's commitment to respecting agency as such flows from his laying claim to a liberty to act, period. From this it hardly follows that the empirical agent will always end up honoring his commitment to respect agency whatever he does; for, first, he may have no such commitment, and second, he may act for empirical ends in a way that contradicts his a priori right-claim to action. Thus the subjectivist meets the condition of success that Ripstein identifies: "in order to show that some implicit commitment has been violated, the commitment must be both implicit in every act and yet violated in criminal acts." The meaning of the last sentence in the long passage reproduced above is obscure. The question for the subjectivist is not

37. RIPSTEIN, *supra* note 2, at 186.

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whether the agent was aware of the law at the time of the offence, because the thinking Agent's knowledge of the law proscribing wrongs is imputable to him.

The second problem allegedly faced by the classical subjectivist, according to Ripstein:

> is that even if we grant that all agents are implicitly aware of the conditions of their agency, and that that implicit awareness implicitly commits them to a recognition of the wrongfulness of certain acts, that awareness needs to be made explicit. Given the subjectivist's readiness to excuse mere inadvertence about matters of fact, why not also excuse inadvertence about one's implicit commitments?[38]

This argument, too, rests on a misunderstanding. The subjectivist's readiness to "excuse" inadvertence about matters of fact does not flow from the mere fact that the wrongful act was inadvertent. It flows from the proposition that a right-denial cannot be imputed to an empirical agent's choice if, on the facts as perceived by the agent, he did not choose to interfere with another agent's capacity for self-actuation. This reason for allowing mistakes of fact to exculpate has no general application to mistakes of law nor any application at all to "inadvertence about one's implicit commitments." If the agent did choose to interfere with another's agency, then a right-denial can be imputed to his choice (because he is an agent) whether or not he was empirically aware that such an interference is wrong. Indeed, since he is an agent who (unlike the infant) *can* discern right from wrong, his mistaking an intentional interference for a permitted act is just the right-denial that constitutes culpability. So why would the subjectivist treat such a mistake as grounds for exculpation?

The third difficulty for classical subjectivism, Ripstein says, "goes deepest":[39]

> In order to make unreasonable mistakes of fact exculpate, but unreasonable mistakes of law inculpate, the subjectivist must provide a conception of agency that does two seemingly incompatible things. It must both incorporate some account of reciprocity into the very concept of agency, yet at the same time remain monadic. It must incorporate reciprocity because if it does not, the conditions of agency will fail to implicate the protected interests of others. If it fails to incorporate the interests of others, it will lack the grounds to distinguish mistakes of fact from mistakes of law, because the very possibility of acting will not implicitly include knowing the rights of others. At the same time, the account of agency must not be too reciprocal, for otherwise it will incorporate reasonablenes tests, that is, tests that seek to be fair to both parties in situations of risk. For the argument from agency to lead to subjectivist

38. *Id.* at 186.
39. *Id.* at 187.

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> conclusions, agents must know the rights of others and those rights must not include the right to have others only violate their apparent interests on reasonable grounds. No amount of analysis of the concept of intention could establish such a thing.[40]

What Ripstein is saying here is that the idea of mutual recognition of agency (or reciprocity, in his language) that delimits valid permissions to act must also draw the boundary of the self in reference to which a boundary crossing is determined. This means that the self's boundaries must fall out of a determination of what is a reasonable impingement or imposition of risk as between two parties in interaction, so that a boundary is crossed not by any imposition but only by an unreasonable one. The classical subjectivist, Ripstein argues, is ambivalent about the role of reciprocity in drawing boundaries to permissible action. On the one hand, he must be committed to the view that, conceptually, valid claims to individual liberty fall out of mutual respect for liberty, for otherwise the thinking Agent could not know the wrongfulness of acts disrespectful of another's liberty; but on the other hand, he is committed to atomism in drawing the self's boundary outside of interaction with others and thus independent of a standard of reasonable impositions. This is why the classical subjectivist can speak of an unreasonable belief in consent (i.e., a belief held despite outward behavior that a reasonable person would interpret as nonconsent) as a mistake of fact about what is going on in the private mind of the victim; for him, the victim's monadic will determines when her consent to bodily contact has been given, and what she inwardly wills is a fact about which one can be mistaken against all outward evidence. The monadic perspective also explains why the classical subjectivist can treat unreasonable mistakes about consent as exculpatory: if the complainant's monadic will determines when her consent to bodily contact has been given, it must be open to the defendant to say (subject, of course, to an evidentiary burden) that he was honestly mistaken about her inner will, even if his belief was held in the face of clear manifestations of resistance or without any effort to ascertain her will; and if in fact the defendant did not choose to touch (or to risk touching) the complainant against her will, then no right-denial is imputable to him.

Ripstein's own view, however, is that whether a person consents to bodily contact is determined in the same way that consent to a contract is determined—interpersonally. So if a reasonable person would interpret the complainant's words or actions as consent, then she has consented in law, no matter what lay in her inner will—a reasonable belief in consent cannot be mistaken. Conversely, if a reasonable person would interpret her manifestations as nonconsent, then she has not consented, and there is no room for an inquiry into her private thoughts. Therefore someone who claims a mistaken belief in consent despite clear manifestations of nonconsent or

40. *Id.* at 187–188.

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despite a failure to make reasonable inquiries (i.e., someone who has made an unreasonable mistake about consent) has made a mistake about what consent is; he thinks consent is a matter of one's inner will rather than one's public manifestations. This, however, is a mistake of law. And since he is making a mistake about what consent in law is, to exculpate him for this mistake is to subvert the authority of law and to allow the defendant to dictate when the complainant consents. The subjectivist, concludes Ripstein, in allowing an unreasonable mistake about consent to exculpate, gives exculpatory force to a mistake of law.[41]

Now it is partly true that the classical subjectivist is monadic when it comes to drawing the boundaries of the self. I say "partly" because the subjectivist is monadic in drawing some boundaries but not others, though this discrimination reflects (I shall argue) attention to nuance rather than ambivalence. The self's body, the subjectivist believes, is a boundary that is set prior to and outside of interaction. As a consequence, there is no latitude for legally permissible but unwanted incursions on the body based on reasonable apprehensions of consent. The subjectivist, however, is not monadic when it comes to drawing boundaries against unwanted disturbances to the enjoyment of one's property or against injuries resulting from the risks attendant on action in the world. Here boundaries are determined by standards of reasonableness.

Why the difference? One could say that personal autonomy requires that the agent determine alone when her consent to bodily contact is given rather than handing this decision over to a meeting between agents. But there is a more conceptual reason. To use one's property and to act in the world are necessarily to create noises, smells, and risks, so that for my right to liberty to coexist with yours, there must be space for reasonable mutual impingements. But my self-possession can coexist with your self-possession without allowing scope for unwanted bodily incursions based on reasonable apprehensions of consent, because self-possession requires no external action. My body is openly mine without my having to take action to occupy it publicly. But because a person's body is hers absolutely, consent to bodily contact is determined from the subjective perspective of the person whose body it is. If in her mind she was not consenting, then she was not consenting, regardless of how the reasonable person would interpret her behavior.

However, the corollary to this is that the defendant must be permitted to say that he was mistaken about what was going on in her mind, whatever her outward behavior (though the unreasonableness of the belief will be strong evidence against its sincerity) and despite his failure to make inquiries. And if this was an honest mistake without advertence or willful blindness to the risk of nonconsent, then his choice was not to touch her or to risk touching her without her consent, and so no right-denial is imputable to his choice.

41. *Id.* at 209–214.

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Of course, he may be subjected to a noncriminal penalty aimed at educating him and others to sexual communication undistorted by stereotypes; but he may not be punished for a criminal assault.

So the dispute between Ripstein and the classical subjectivist comes down to this: Who is right about the boundary of the self's body? Is that boundary drawn relationally or nonrelationally? Is there scope for legally permissible unwanted incursions on the body as there is scope for legally permissible impositions of risk in acting? Is there room for a defence of mistake of fact as to whether someone has consented to bodily contact, or are all mistaken beliefs in consent mistakes of law?

To say, as Ripstein does, that consent to bodily contact is determined relationally is to say that my control over my body is not absolute vis-à-vis other persons but is limited by their qualified liberty to use my body against my subjective will. This implication is surely at odds with the liberal premise of individual inviolability. Further, the common law denies that consent is relational even with regard to possession (not enjoyment) of an ordinary item of property. If I take your Lexus from your driveway under the reasonable but mistaken belief that you gifted it to me (you said, handing me the keys, "take the car in my driveway—it's yours," thinking it was the Lada), I do not get to keep the car. If I enter your land uninvited, you can eject me even if I reasonably believe (because of a clerical error on the deed) I had just bought it. In other words, civil liability for an interference with proprietary sovereignty (not for harm) is strict.[42] Perhaps Ripstein thinks this settled law is mistaken. But if not, then his relational view of consent to bodily contact requires us to believe that tort law affords greater protection to land and chattels than it does to the body.

Further, I shall pose two cases where I believe the intuition against the relational view of consent to bodily contact and in favor of the monadic view is overpowering. Suppose D is about to force himself on V, who has recently broken off a relationship with D. V thinks to herself that if D knows he is raping her, he might very well kill her to remove the only witness to his crime. So she resolves out of fear for her life to feign reconciliation and consent, and she thinks that her self-preservation depends on her being as convincing as possible. Suppose her pretense would be convincing to any former lover and that she succeeds in masking her fear. I do not believe that anyone would comfortably say that V has consented to intercourse in this case, but that is what Ripstein's relational view of consent requires us to say.

Second, suppose (counterfactually) that in *Morgan* the husband's story to his friends was true, that his wife had indeed invited intercourse with his friends simulating rape and that she was a willing participant in the game throughout. The relational view of consent requires us to say that no consent is given here and that the defendants' "mistaken" belief in consent

42. Restatement (Second) of Torts, s. 217: "It is not necessary that the actor should know or have reason to know that [his] intermeddling is a violation of the possessory rights of another."

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is a nonexculpatory mistake of law. By contrast, the monadic view yields the sensible result in both cases (no consent in the first, consent in the second). But if consent to bodily contact is indeed determined outside of relation with another, then an unreasonable but honest belief in consent is an exculpatory mistake of fact, not a mistake of law.[43]

## Subjectivism and Practical Indifference

R.A. Duff has fashioned an intricate argument countering the position that criminal liability ought to require a conscious choice to do that which is proscribed as wrong or a conscious choice to risk what is so proscribed.[44] The argument is meant to establish that inadvertent recklessness—a failure to notice and avoid an obvious and unreasonable risk one had the capacity to notice—can sometimes supply the blameworthiness needed to justify punishment. Duff's strategy is first to determine what makes an agent blameworthy in what he calls the paradigm cases of responsible agency and then to see whether penumbral cases of responsible agency, namely, advertent recklessness (acting in the face of a foreseen risk of a wrongful outcome) and inadvertent recklessness can be brought within the same reasoning. The paradigm cases are "intended agency," where the agent aims to bring about a wrongful outcome, and "intentional agency," where he pursues an object by means that will certainly bring about a wrongful outcome but where that outcome is not itself the aim of his action. Duff's argument proceeds as follows.

If the agent's choice of a proscribed outcome underlies criminal responsibility for outcomes in the two paradigm cases, then advertent recklessness is the only kind of recklessness we can punish, since only the advertently reckless person chooses to risk a wrongful outcome. But choice, while it underlies the paradigm of intended agency, does not necessarily define intentional agency, where the agent produces an outcome he knew would certainly come about as a result of doing what he intends. The reason for blameworthy responsibility in the case of intentional agency, Duff argues, is the attitude of indifference toward the victim's important interests that it shows. The agent is willing to sacrifice the victim's important human interests for his own particular ends. But if that is why we punish agents for unlawful outcomes produced through intentional agency, then we can also punish agents for unlawful outcomes they produce through inadvertent

43. Does the monadic view of consent to bodily contact collapse the distinction between choice and wish? No, because there is room for the distinction even within the agent's private perspective. Thus, in the case of the rape victim fearful that her assailant will murder her if he knows he is raping her, we can intelligibly say she is choosing to feign acceptance while wishing she could manifest her rejection. To map the distinction between choice and wish onto that between the external and inward dimensions of the self is to settle a normative question by definitional fiat.

44. DUFF, *supra* note 2, at 139–142.

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recklessness, because (and to the extent that) they also manifest a callous indifference to the victim's important human interests. And since we are punishing agents who manifest this attitude of indifference, we are still subjectivists about mens rea, argues Duff, albeit not subjectivists in the classical sense of requiring a conscious choice to run a prohibited risk. Choosing to run an unreasonable risk of a wrongful outcome is only one way of manifesting indifference toward whether it materializes; one may also display this attitude through inadvertent recklessness. Thus criminal liability based on inadvertent recklessness can be defended on subjectivist grounds provided that we broaden the notion of the subjective to include an attitude of practical indifference to the important human interests of others.[45]

Duff emphasizes that the attitude of practical indifference is not an empirical psychological state for which the outward act is evidence. Rather, it is a practical attitude constituted by conduct that fails to consider a human being's important interests when the danger to those interests is obvious. We should say that the attitude is reflected or manifested in the conduct rather than evidenced by it. However, not all failures to notice or avoid obvious risks constitute practical indifference. Some are not culpable at all because the agent lacked the capacity to appreciate the risk; and some are blameworthy but not criminally culpable because the agent failed to notice the risk for reasons other than indifference—for example, from an undervaluation of the victim's interests in comparison with his own. This Duff calls gross negligence.

Duff comes to practical indifference as the unifying theme of culpable agency by a curious logic. Choice, he says, characterizes intended agency, but there is an ambiguity about what constitutes culpability in intentional agency: it could be that the agent chooses to bring about the outcome he is certain will occur, or it could be that he is willing to ignore another's important human interests for the sake of his ends. Duff opts for the second of these possibilities for no other reason than that an attitude of practical indifference toward others seems highly blameworthy and condemnable. He then reinterprets all the other cases of responsible agency, including intended agency, as instances of practical indifference and then brings inadvertent recklessness into the tent.

However, there is no connection between the blameworthiness of practical indifference and judicial punishment involving an infringement of rights. Nothing tells us that practical indifference deserves judicial punishment as distinct from other kinds of social responses to blameworthy conduct. So Duff's reason for opting for practical indifference rather than choice as the key to culpable agency in the case of intentional agency is not a good one. There is, however, a good reason for opting for choice. Choice of a proscribed outcome is culpable in the case of intended agency because it is the only attitude toward the outcome to which a denial of rights

45. *Id.* at 157, 163.

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is imputable, and this imputation is what makes the coercion of the agent self-willed. Intentional agency is also a culpable agency because, though the agent does not aim at the proscribed outcome, he knows it will certainly occur, and so he chooses it, thus implicitly denying the validity of rights, including his own. Advertent recklessness and willful blindness are also culpable as implicit right-denials authorizing punishment, because the agent chooses a wrongful risk. And that is where the logic stops. The inadvertently reckless agent does not choose the unreasonable risk, and so no right-denial is implicit in his choice, however obnoxiously narcissistic his character may be in being oblivious to the important interests of others.

Because Duff makes the moral blameworthiness of practical indifference the key to criminal liability, he has no way of stopping his logic from extending past practical indifference to gross negligence and even to negligence, assuming the agent has a capacity to appreciate the risk. He distinguishes practical indifference from gross negligence on the basis that the practically indifferent agent does not care about others' important human interests, whereas the grossly negligent agent, in his preoccupation with his own ends, simply undervalues those interests while overvaluing his own.[46] Yet these attitudes are surely gradations along a continuum of blameworthiness rather than qualitatively different kinds. They differ, as Duff admits, only in degree, whereas one needs a categorical distinction between culpability and other forms of moral blameworthiness to be able to attach criminal liability to one but not the others. Ordinary negligence, where the agent has the capacity to appreciate and avoid the risk, is likewise on the continuum, and so the distinction between crime and tort or between crime and regulatory offence disappears.[47] Indeed, it would seem that any plausible rationale (whether moral blameworthiness, deterrence, or reform) for punishing practical indifference will also justify punishing gross negligence and negligence as culpable forms of fault. What is needed, therefore, is a justification for punishing criminal negligence that will not extend to ordinary negligence. But the only such justification of which I am aware is that in criminal negligence, the actor chooses to impose (what he knows or suspects is) an unreasonable

46. *Id.* at 164–165.

47. Larry Alexander's idea of "insufficient concern" as the unifying idea of culpability is also vulnerable to this slide into negligence. Alexander wants to unify culpability under advertent recklessness, but since the "basic moral vice" underlying culpability is the insufficient concern for others' interests shown by imposing unjustified risks, it is unclear why this lack of regard is not also shown by unreasonable mistakes (caused, say, by partiality to oneself) concerning when one's interests sufficiently outweigh those of others to justify imposing risks on them. Alexander believes that negligence is morally nonculpable even if the agent has the mental capacity to notice and appreciate the unjustified risk, because one has no control over one's absentmindedness unless one foresees it. But why should this be true absolutely, given that someone might fail to appreciate an unjustifiable risk not from absentmindedness but from a narcissistic tendency to overvalue his interests and undervalue others'? Even if forgetting or failing to notice is never blameworthy (a doubtful proposition in itself, since they might be caused by self-absorption), negligence need not always take these forms. It may consist in misvaluing because of insufficient concern the interests at stake. *See* Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931 (2000).

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risk of interference with another's agency, hence implicitly denies rights of agency, including his own.

Aware of the icy slope on which he has trodden, Duff tries to rescue practical indifference by distinguishing it from other forms of inadvertent impositions of wrongful risk. The practically indifferent agent, he says, is unaware of a specific risk, for example, of death, whereas the negligent agent is merely unaware of a general risk to safety or health.[48] This distinction, however, is difficult to fathom. Specific and general risk can distinguish different forms of advertence (I foresaw the danger to his welfare but I did not foresee death, whereas you foresaw death), but how can they distinguish different forms of inadvertence? To be inadvertent with respect to a specific risk is either to be inadvertent with respect to risk generally or to be advertent to risk generally but not to the specific risk. The latter possibility is ruled out because the practically indifferent agent who is inadvertently reckless is not advertent to general risk either, for otherwise he would be indistinguishable from the advertently reckless agent; and the former possibility does not distinguish the practically indifferent agent from the negligent one. So for Duff's distinction (between practical indifference and ordinary negligence) to make sense, it would have to be possible for the practically indifferent agent to be at once inadvertent to risk generally and specifically inadvertent to a particular risk. But this is not possible (try not to think about artichokes).

Jeremy Horder has sought to repair this flaw in Duff's reasoning by showing how practical indifference of a certain kind can be brought within the classical subjectivist criterion of criminal culpability.[49] Horder distinguishes between weak and strong practical indifference. The weakly indifferent agent does not deny that another agent's agency interests should be taken into account in one's practical reasoning as to what course of action to take. He simply tends in his haste to overvalue his personal interests and to be thoughtless regarding the other's agency interests. If the risk to the other's agency interests were brought to his attention, his practical reasoning would change. By contrast, the strongly indifferent person denies the weight of the other's agency interests altogether; even if the risk to those interests were brought to his attention, he would still prefer his own particular ends. Accordingly, Horder argues, in denying weight to the other's agency interests, the strongly indifferent person implicitly denies the validity of rights and so invites punishment in the sense demanded by classical subjectivism even though his recklessness is inadvertent.[50]

Horder's effort is valiant, but unfortunately it falls short. This is so because strong indifference is now ascertained by means of a counterfactual situation. The agent's act itself tells us nothing about whether the agent is strongly or weakly indifferent to the victim's agency interests. Of course, if

48. DUFF, *supra* note 2, at 165.
49. Jeremy Horder, *Gross Negligence and Criminal Culpability*, 47 U. TORONTO L.J. 495 (1997).
50. *Id.* at 502–509.

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an agent is advertently reckless, we can say that he did in fact choose an unreasonable risk of a wrongful outcome and was thus strongly indifferent toward another's agency interests. But if he does not advert to the risk, we can determine strong indifference only by imagining a hypothetical scenario; if he had known of the high risk to the victim's important human interests, would he have chosen the risk?

However, this is now a question about the defendant's underlying character, not about his culpability for this act in particular. In this act, he did not choose the risk. And if punishment is to be directed against a character who is strongly indifferent toward others' important interests, why require a wrongful act at all? Suppose that in acting, the agent did not bother to consider the likely impact of his action on the agency interests of others, but that his action was not unreasonably risky. Yet someone was hurt. Why not ask: If his act had been unreasonably risky and if he had adverted to the risk, would he have chosen the risk? If so, he is strongly indifferent and criminally culpable, on Horder's theory, for a nonnegligent injury. The *actus reus* requirement of culpability drops out because the agent's act cannot be interpreted as a sign of strong as opposed to weak indifference, and so it becomes a contingent piece of evidence that can be buttressed or countered by evidence of what the agent would have done in the counterfactual situation. Duff avoids this problem by emphasizing that the inadvertently reckless act is not evidence of a practically indifferent attitude lying behind the act but practical indifference itself. But this is precisely what one cannot say about strong indifference in particular. The only *act* that manifests strong indifference is an advertently reckless one.

## V. CONCLUSION

Judicial punishment is not simply an instance of expressing moral blame. Alone among other forms of censuring, judicial punishment violates rights of agency; and there is no connection between moral blameworthiness and liability to a right violation in virtue of which we could say that the former deserves the latter. What is required for criminal desert is a specifically legal sense of culpability that connects wrongdoing with the coercibility of the wrongdoer. Culpability of that sort is given only by a choice to which a denial of rights of agency is logically imputable. But the only choices to which a denial of rights of agency is imputable are choices to interfere or to risk interfering with another agent's capacity to act on his or her own ends and choices to break the law. Accordingly, the defendant's choice to interfere or to risk interfering with another person's agency or to break the law is the level of fault without which restraint and confinement of the person is external violence indistinguishable from the criminal's rather than just punishment self-willed by the criminal and so consonant with his inviolability.

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Once the culpable mind is understood in this way, exculpatory (not justificatory or excusing) conditions such as mistake of fact, color of right, and legal insanity can be explained as conditions that block an inference from the defendant's choice to a denial of rights. Involuntariness, because it negates choice, a fortiori precludes a right-denying choice. Accordingly, exculpatory defences ought to be structured so as to allow any honest misperception that blocks the requisite inference to exculpate regardless of its unreasonableness. Negligent mistakes can be penalized as lesser included public-welfare offences with monetary disincentives. This is a subjectivist position on criminal fault that avoids the difficulties chargeable to other versions. It does not judge the defendant solely by his own understanding of his deed's import; it does not apply to public-welfare offences; it does not entail a subjective fault requirement for criminal responsibility for the results of wrongdoing; nor does it require more inroads into the rule that mistake of law does not exculpate than the positive law already implicitly recognizes in the color-of-right defence to property crimes.

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