INTENTION, AGENCY AND CRIMINAL LIABILITY:

Philosophy of Action and the Criminal Law

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7.1 *Extending the Paradigms*

Intended and intentional agency form the paradigms of responsible agency – and thus also of criminal liability; agents are most clearly responsible, and culpable, for their intended or intentional actions. But agents are also held responsible and liable for actions which do not fit these paradigms; and we must now see how these paradigms can be extended to cover other species of culpably responsible agency.

The paradigms involve a union between the 'subjective' and the 'objective' aspects of the agent's action: between what he intends or expects to bring about and what actually happens. Ian intends to kill Pat, or expects her death as a certain side-effect of his action; and he actually causes her death as he intends or expects. I shall discuss two extensions of responsible agency here, each of which involves a divergence between 'subjective' and 'objective'. Each extension must be understood, and justified, by reference to the paradigm from which it begins; we hold an agent to be responsible and liable because his action exhibits a sufficient resemblance to one of the two paradigms.

One extension concerns cases in which what actually happens *falls short* of what was intended or expected: Pat tries to kill Ian or is sure that her action will cause his death, but he does not die. These are cases of responsible, and culpable, agency: Pat acts with intent or intentionally as to Ian's death, and may be convicted of attempted murder. But they fall short of the paradigms of *completed* intended or intentional agency. We shall ask, in chapter 8, how this category of incomplete crimes should be defined (whether they should require intended, or only intentional, agency as to the relevant result), and why the law should distinguish failed attempts from completed crimes.

The other extension concerns cases in which what happens *exceeds* what was intended or expected. Ian intends only to do serious injury to Pat, but

in fact kills her; under English law he is then guilty of murder on grounds of 'implied malice'. Or he foresees her death only as a *possible* side-effect of his action (or does not foresee it at all), but in fact kills her: though he expects at most to create a *risk* of death, he may be liable for the *actual* death which he causes, but as causing it recklessly (or negligently), not intentionally; the fact that he has not killed her intentionally qualifies, but does not negate, his responsibility for her death. This chapter will focus on this extension to the paradigms of criminal agency, and on three of the problem cases from chapter 1 – *Caldwell*, *Morgan* and *Hyam*: central to these cases is the problem of how recklessness should be understood in the criminal law.

Each of these extensions to the paradigms of responsible agency raises the controversial issue of how far criminal liability should depend on the 'subjective' character of the agent's conduct, and how far on its 'objective' aspects.

That issue would be easier to grasp if we could begin with a clear distinction between the 'subjective' and the 'objective' – and thus between 'subjectivists' who argue that criminal liability should be determined by the subjective aspects of the defendant's conduct, and 'objectivists' who insist that liability should depend, at least in part, on its objective aspects. But matters are not that simple: for the dispute between self-styled subjectivists and their opponents is in part an argument about what the 'subjective' includes. We can, despite some judicial dicta to the contrary,[1] usefully talk of 'subjective' as against 'objective' grounds of liability: but part of our task in this chapter is to work out just what that distinction amounts to.

By way of preliminary clarification, however, we can say that the 'subjective' character of an agent's conduct is determined by her own 'state of mind' in relation to that conduct – most obviously (but not only) by her intentions and beliefs: what she 'subjectively' does is what she intends to do or believes that she is doing. There are two dimensions to the 'objective' character of her conduct. One concerns the actual results of her actions. Pat intends to shoot a stag, but her shot misses the stag and hits Ian: subjectively, she 'shoots the stag'; objectively, she 'shoots Ian'. I take what I believe to be my umbrella, but in fact it belongs to Ian: subjectively, I 'take my own umbrella'; objectively, I 'take Ian's umbrella'. The other dimension of the 'objective' concerns the standards of 'reasonableness' (as set by 'the reasonable man') by reference to which we might describe or judge an agent's conduct. Pat fails to notice an 'obvious' risk of harm (a risk which would be obvious to any 'reasonable man') which her action creates:

1 *Caldwell*, pp. 352–4 (Lord Diplock); *Lawrence*, p. 520 (Lord Hailsham): see G. Williams, 'Recklessness redefined', pp. 253–6.

subjectively, she 'acts safely'; objectively, she 'creates an obvious risk'. Or she takes a risk of causing harm which she thinks it reasonable to take, but which 'reasonable' people think it unreasonable to take: subjectively, she 'takes a reasonable risk'; objectively, she 'takes an unreasonable risk'. Criminal liability is 'subjective' in so far as it depends on the 'subjective' character of the defendant's conduct; on, for instance, what she intended to do or believed that she was doing: it is 'objective' in so far as it depends either on what actually happened (as distinct from what she intended or believed), or on independent standards of 'reasonableness'.[2]

Our concern in this chapter is with recklessness as a species of criminal liability and in particular with the question of whether it should be defined 'subjectively' or 'objectively'. Now recklessness is typically portrayed as marking an extension from the paradigm of *intentional* agency: I act intentionally as to side-effects which I am certain my action will cause, and recklessly as to those which I realize it might cause. Some types of recklessness must in fact, we shall see, be related to the paradigm of intended agency: but controversy over the legal meaning of recklessness also reflects a conflict between two possible accounts of why intentional agency provides a paradigm of culpably responsible agency, and thus of how an action must resemble that paradigm if its agent is properly to be condemned as reckless.

One account emphasizes the concept of *choice*. An agent is fully responsible for effects which she brings about intentionally because she *chooses* to bring them about: which is to say, not that they must figure explicitly in some process of deliberation which precedes her action, but that she knows that it is up to her whether they occur or not; in doing what she knows will bring them about, she chooses to bring them about, and makes herself fully responsible for them.[3]

The other account talks of *attitudes* rather than of choice. To do what I know will cause some harm is to show that I am fully 'willing' to bring that harm about (see Law Commission, *Imputed Criminal Intent*, para. 17): I do not direct my will towards it, but it is a price which I am quite ready to pay in order to achieve my ends. My action might also be condemned as displaying my disregard for, or indifference to, the harm which it causes: if I unjustifiably do what I know will injure another, I do

2 See R. Cross, 'Centenary reflections on Prince's case'; G. Fletcher, *Rethinking Criminal Law*, chs 3, 6.8. G.H. Gordon, 'Subjective and objective *mens rea*'; J.E. Stannard, 'Subjectivism, objectivism, and the draft criminal code'.

3 See H.L.A. Hart, 'Intention and punishment', pp. 120–1; A.J. Ashworth, 'Sharpening the subjective element in criminal liability'.

not manifest the hostile intent which a direct attack on her would exhibit; but I manifest my utter indifference to her interests in being thus willing to injure her.

The first of these accounts, we shall see, underpins the view that recklessness should be defined as conscious risk-taking; the second underpins the contrary claim that an agent can sometimes be properly held to be reckless as to a risk of which she is unaware. But before we discuss these views, we should look briefly at the recent history of recklessness in English criminal law.[4]

7.2 *Recklessness in the Criminal Law*

Recklessness is a necessary and sufficient condition of liability for a wide range of offences: necessary since, though there are some offences of negligence or strict liability, most require at least recklessness by way of *mens rea*; and sufficient since, although some offences require intention, many require no more than recklessness by way of *mens rea* (see *1989 Code*, cl. 20(1)). Assault, criminal damage and wounding can all be committed either intentionally or recklessly, any difference in culpability between reckless and intentional agency being marked only at the sentencing stage; and a man can be guilty of rape if he knows that the woman does not consent *or* is reckless as to whether she consents. In English law, murder requires an intention to kill or cause serious injury, while a merely reckless killing counts only as manslaughter: but Scots law counts a 'wicked recklessness' as to the life of another as sufficient *mens rea* for murder (*Gordon*, ch. 23.17–19); and the English doctrine of 'implied malice' involves, we shall see, a similar notion of recklessness.

We must therefore ask whether we can define recklessness in a way that will show both why it should often be as sufficient a basis for criminal liability as intention, and why these two kinds of *mens rea* should sometimes be distinguished.

By the end of the 1970s, English courts seemed to have accepted a 'subjective' definition of recklessness as *conscious and unjustified* risk-taking. The 1989 Code reflects this view:

> a person acts ... 'recklessly' with respect to –
>
> (i) a circumstance when he is aware of a risk that it exists or will exist;
>
> (ii) a result when he is aware of a risk that it will occur;
>
> and it is, in the circumstances known to him, unreasonable to take the risk. (cl. 18(c))

Four points should be noted about this definition.

First, recklessness involves awareness of risk. This 'subjective' core to the definition is what distinguishes recklessness from both intention and negligence. To act intentionally as to an effect I must either intend to cause it or be morally certain that I shall cause it: recklessness, however, involves risk-taking rather than certainty; a reckless agent realizes only that his action *might* cause the relevant effect. Negligence, by contrast, is also a matter of risk-taking, but of inadvertent risk-taking: a negligent agent may not notice the risk which she creates, but a reckless agent must be aware of the risk. If Mr Caldwell did not at the time notice the (obvious) risk of death which his action created, he did not recklessly endanger life. If the *Morgan* defendants firmly (albeit unreasonably) believed that Mrs Morgan was consenting to sexual intercourse with them, they were not reckless as to whether she consented: for they were not then aware of a risk that she did not consent.

Second, recklessness involves risk-taking which is 'unreasonable' by an 'objective' standard. Not every risk-creating act is reckless: driving a car always creates a risk of causing harm, but the mere act of driving does not make me reckless. To call an agent reckless is to *condemn* her for taking an unreasonable (unjustified) risk. Now we must judge the reasonableness of the risk which she was aware of taking; this is the 'subjective' core of recklessness. Whether she acted reasonably in taking that risk, however, depends not on whether *she* thought it it reasonable to take it, but on a standard of reasonableness which is independent of her beliefs: she was reckless if she took a risk which, whatever she thought, it was in the eyes of reasonable people unreasonable for her to take. Suppose Mr Caldwell was aware of a risk that his action would cause death, but thought it reasonable to take such a risk: it would then be for the jury to decide whether it *was* reasonable to take that risk, and to convict him if it was not.

Third, whether a risk is reasonable or unreasonable depends, not just on the degree of the risk, but on its relative disvalue (which depends on the seriousness of the harm threatened and the probability of its occurring) as compared with the positive value of the action which creates it. It might be reckless to create even a small risk of minor injury, if my action is not justified by some greater or more certain good which it brings; or it might be reasonable (and thus not reckless) to create a major risk of serious injury – a very dangerous operation might give the patient his best chance of survival.

Fourth, the reckless agent need not be 'indifferent' to the risk which she

4 See *S&H*, pp. 61–9; *TCL*, ch. 5; *C&K*, pp. 140–60; *Gordon*, pp. 230–59; A.R. White, *Grounds of Liability*, ch. 7; D.J. Birch, 'The foresight saga: the biggest mistake of all?'; D.J. Galligan, 'Responsibility for recklessness'.

takes. She may care about it, in that she regrets taking it and hopes that the harm will not actually ensue: but she is reckless if it is unreasonable for her to take that risk. Recklessness in the criminal law (whatever its extra-legal meaning) is a matter of choice and action, not of attitude or feeling; it involves choosing to take a risk which it is, objectively, unreasonable to take.

The general acceptance of this definition of recklessness in the 1970s marked, some claimed, the 'triumph' of subjectivism.[5] But that triumph was short-lived.

The first cracks in this subjectivist orthodoxy appeared in 1980. In *Murphy*, the Court of Appeal held that whether a person was driving 'recklessly' depends, not on whether he 'contemplated' the risk which his driving created, but on his 'attitude' to his obligation to drive with due care and attention: he drives recklessly if he 'deliberately disregards' that obligation or 'is indifferent whether he does so or not', and thus 'creates a risk of an accident which a driver driving with due care and attention would not create'. He must 'know' that he is driving dangerously, but only in the sense that he has a knowledge of 'risks in general' which is 'stored in the brain and available if called on', and which would enable him to realise that he was driving dangerously *if* he 'called on' it (p. 440); he need not be consciously aware that he is driving dangerously.[6] This is at odds with orthodox subjectivism, which insists that recklessness requires an actual, not merely a potential, awareness of risk: it is not enough, for orthodox subjectivists, that an agent *would* notice a risk *if* she brought her knowledge of 'risks in general' to bear on her present conduct; she must actually be aware of that risk.

In *Sheppard*, the House of Lords held that one who is to be guilty of the wilful neglect of his child must not only fail to provide care which a prudent parent would see that the child needed; he must also be at least 'reckless' as to the risk to his child which that failure creates.[7] But such recklessness need not involve an actual awareness of that risk: what must be proved, Lord Diplock thought, is

> either that the parent was aware at that time that the child's health might be at risk if it was not provided with medical aid or that the parent's unawareness of this fact was due to his not caring whether his child's health was at risk or not. (p. 408)

And Lord Edmund-Davies argued that

> a parent reckless about the state of his child's health, not caring whether or not he is at risk, cannot be heard to say that he never gave the matter a thought and was therefore not wilful in not calling a doctor. In such circumstances recklessness constitutes *mens rea* no less than positive awareness of the risk involved in failure to act. (p. 412)

This explicit contrast between 'recklessness' and 'positive awareness of risk' is clearly at odds with the orthodox subjectivist view that recklessness must involve just such a positive awareness of risk.

Murphy and *Sheppard* took recklessness to involve *either* conscious risk-taking *or* a kind of 'indifference' which need not involve actual awareness of the risk that I create (and which may explain why I fail to notice that risk). But in *Caldwell* and *Lawrence* the House of Lords apparently held that recklessness need not even involve indifference.

Caldwell was described in chapter 1: an agent is 'reckless' as to some harm if

> (1) he does an act which in fact creates an obvious risk [of causing that harm] and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it. (p. 354, Lord Diplock)

Lawrence was a case of causing death by reckless driving. Mr Lawrence was driving his motorcycle along a busy urban street (subject to a 30 mph speed limit) and knocked over and killed a pedestrian. The main factual issue concerned his speed: was he driving, as the prosecution claimed, at 60–80 mph or, as the defence claimed, at 30–40 mph? But neither that issue, nor the grounds on which his appeal was allowed, concern us here: what is relevant is the Law Lords' ruling that, to prove that he was driving recklessly, the prosecution must prove

> first, that [he] was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and, second, that in driving in that manner [he] did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it. (pp. 526–7, Lord Diplock)

A risk is 'obvious' if it would be obvious to the 'ordinary prudent' individual or motorist.

Caldwell and *Lawrence* seem to define recklessness as a matter not of the 'subjective' character of the agent's conduct (does he realize or is he

5 See J.C. Smith, 'Some problems of the reform of the law of offences against the person', p. 19; and *TCL*, p. 101.

6 See J.C. Smith, 'Comment on *Murphy*'; R.A. Duff, '*Caldwell* and *Lawrence*: the retreat from subjectivism', pp. 78–81.

7 See J.C. Smith, 'Comment on *Sheppard*'; G. Williams, '"Wilful neglect" in the Children and Young Persons Act'; R.A. Duff, '*Caldwell* and *Lawrence*: the retreat from subjectivism', pp. 81–4.

'indifferent' to the risk which he creates), but purely of its 'objective' character as conduct which in fact creates an obvious risk of harm. The 1985 Code defined a new concept of 'heedlessness' to capture this kind of fault; an agent acts 'heedlessly' as to an element of an offence when

> (i) he gives no thought to whether there is a risk that it exists or will exist or occur although the risk would be obvious to any reasonable person; and
>
> (ii) it is in the circumstances unreasonable to take the risk. (cl. 22(a))

But that Code still defined heedlessness as a lesser species of fault than recklessness (defined as conscious risk-taking), while the 1989 Code, asserting the 'subjectivist tradition' of English law, refuses even this compromise with *Caldwell* and *Lawrence*: liability for 'an offence of any seriousness' should require at least recklessness, defined as conscious risk-taking (para. 8.20).

Two qualifications have, however, been suggested to the apparent 'objectivism' of *Caldwell* and *Lawrence*: one has not been accepted by the courts, but the other probably does represent the current law.

First, it has been suggested that *Caldwell* defines recklessness in 'conditionally subjective' terms: an agent is reckless only if she creates a risk which would be 'obvious' *to her*, if she gave any thought to the matter.[8] In *Elliott v C* a fourteen-year-old girl of limited intelligence destroyed a shed by lighting a fire in it. Her action created an obvious risk of damage to property: but the defence argued that even if she gave 'no thought to the possibility of there being any such risk', she should be convicted of criminal damage only if she would herself have realized that risk had she given thought to the matter; for in *Caldwell* Lord Diplock had said that an ascription of recklessness 'presupposes that, if thought were given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequence' (p. 351). But the Court of Appeal reluctantly held that the final definition of recklessness in *Caldwell* (see p. 145 above) left no room for any such conditionally subjective interpretation: one who creates a risk which would be obvious to an 'ordinary prudent individual' is reckless even if she would not herself have noticed that risk had she given thought to the matter.

8 See G. Williams, 'Recklessness redefined', 'Divergent interpretations of recklessness'; G. Syrota, 'A radical change in the law of recklessness?'; R.A. Duff, 'Professor Williams and conditional subjectivism'.

Since the House of Lords refused the defendant leave to appeal in *Elliott v C*, we must suppose that this is how the law now stands.[9]

Second, *Caldwell* counts as reckless both one who gives no thought to the obvious risk which she in fact creates, and one who recognizes that she is creating such a risk: but not, apparently, one who gives thought to the matter and decides that there is no risk – even if her belief that there is no risk is quite unreasonable. For she does not fall within either of the two categories specified in clause (2) of Lord Diplock's definition; had he meant to count her as reckless, he would have needed only clause (1) of the definition, since *anyone* who created an obvious risk would then be reckless; and *Caldwell* did not overrule *Morgan*, which held that even an unreasonable belief in the absence of risk rebuts a charge of recklessness.[10]

This escape clause will, however, acquit only those who do 'give thought' to whether there is a risk (not those who simply assume that there is no risk without having given any thought to the matter); and only those who believe that there is *no* risk of harm, or a risk which is so slight as to be properly called 'negligible' (*Caldwell*, p. 354). Mr Shimmen, an expert in the Korean art of self-defence, was showing off to his friends, and made as if to kick a shop window. He intended to demonstrate his skill by just missing the window, though to play safe he 'aimed off rather more than he normally would in this sort of display', and believed he had 'eliminated as much risk as possible by missing by two inches instead of two millimetres' (*Shimmen*, p. 12). He broke the window and was charged with criminal damage. He argued, however, that he had given thought to the possibility of damaging the window, and had decided that, given his skill and precautions, there was no real risk: even if his confidence in his skill was unreasonable (even there was in fact still an 'obvious' risk), he was thus not reckless by the *Caldwell* definition.

The court's rejection of this defence was based on the claim that Mr Shimmen had (before taking his precautions) 'recognized that there was some risk' of causing harm: unlike a person who believes from the start that his action will create no risk of harm, he therefore fell within the *Caldwell* definition of recklessness. But this argument is untenable. For the

9 See *S&H*, pp. 63–4, and *Stephen Malcolm R.* But compare *Hardie*: one who had taken drugs which made him *unable* to appreciate the risk which he created was not reckless as to that risk, unless he was reckless in taking the drugs.

10 See G. Williams, 'Recklessness redefined', pp. 278–81, 'The unresolved problem of recklessness', pp. 87–91; *S&H*, pp. 64–6; E.J. Griew, 'Reckless damage and reckless driving: living with *Caldwell* and *Lawrence*'; D.J. Birch, 'The foresight saga: the biggest mistake of all?'.

Caldwell definition requires that the agent should have 'none the less gone on to do' the act which he recognized involved a risk of causing damage: but the act that Mr Shimmen saw to be risky (kicking so as to miss the window by two millimetres) was not the act which he then did (kicking so as to miss by two inches). What matters must be the agent's belief about the riskiness of the action which he actually does: if he believes that that action involves no (or only a negligible) risk, he escapes the *Caldwell* definition of recklessness.

Mr Shimmen's defence was none the less inadequate. Had he been sure that there was *no* risk of damaging the window, he would not have been reckless by the *Caldwell* definition: but he believed only that he had 'eliminated as much risk as possible', i.e. that there was still *some* risk of damaging it, though one which he thought acceptable. He could thus avoid conviction only if that risk was a 'negligible' one, which it was reasonable to take in that situation: but it is, surely, *not* reasonable to take even a slight risk of damaging another's property merely in order to show off to one's friends. Mr Shimmen was reckless even by the orthodox subjectivist's definition: for he knowingly took a risk which it was 'objectively' unreasonable for him to take (see G. Williams, 'The unresolved problem of recklessness', pp. 76–7).

The notion of 'indifference', which had figured in *Murphy* and in *Sheppard*, did not figure in the formal definitions of recklessness in *Caldwell* and *Lawrence*. But it had figured in *Morgan*: Lord Hailsham talked of an 'intention of having intercourse willy-nilly, not caring whether the victim consents or no' (p. 215); and Lord Edmund-Davies of the man who acted 'recklessly, without caring whether or not she was a consenting party' (p. 225). Even in *Caldwell*, Lord Diplock said that 'recklessness' in the Criminal Damage Act must retain its extra-legal meaning of 'careless, regardless, or heedless of the possible harmful consequences of one's acts' (p. 351), and spoke of the person who 'did not even trouble to give his mind to the question whether there was any risk' (p. 352). This suggests that recklessness involves more than just not giving thought to whether there is a risk. A girl of limited intelligence, who would not recognize a risk she was creating even if she thought about the matter, may have 'not given any thought' to the matter: but we surely should not call her 'reckless' in the ordinary meaning of the term, or say that she 'did not even trouble to give [her] mind to the question whether there was any risk' (see Lord Goff, in *Elliott v C*, p. 949).

Post-*Caldwell* courts have still described recklessness in sexual cases as involving indifference. In *Pigg*, a case of attempted rape, the Court of Appeal said (supposedly following *Caldwell* and *Lawrence*) that a man was reckless of a woman's consent

> if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not. (p. 772)

This implies (against *Caldwell*) that a man who gives no thought to the possibility that a woman is not consenting is reckless only if he gives no thought *because* he is 'indifferent'; and in *Kimber*, recklessness as to a woman's consent was also defined in terms of an 'attitude . . . of indifference to her feelings and wishes': '[t]his state of mind is aptly described in the colloquial expression "couldn't care less". In law this is recklessness' (p. 230). This account of recklessness was followed in other sexual cases, when the Court of Appeal held that *Caldwell* and *Lawrence* were not binding in this context (see *Bashir*; *Satnam and Kewal*; *Thomas*; and *S&H*, pp. 66–7).

English law thus offers three accounts of criminal recklessness: that it must involve conscious risk-taking; that it is a matter of 'indifference' (an agent can be reckless as to a risk of which she is unaware if she is indifferent to it); and that anyone who creates an obvious (and serious) risk of harm is reckless unless she has given thought to the matter and decided that there is no risk. I shall offer a version of the second account, which defines recklessness in terms of 'practical indifference': but we should first look more closely at the orthodox 'subjectivist' view which insists that recklessness must involve an actual awareness of risk.

7.3 *'Subjectivism' and 'Objectivism'*

Those who insist that recklessness should involve conscious risk-taking see themselves as defending a properly 'subjectivist' account against the 'objectivism' of *Caldwell* and *Lawrence*. Now despite Lord Diplock's claim that the state of mind of one who gives no thought to an obvious risk which his action creates is 'neither more nor less "subjective"' than that of a conscious risk-taker (*Caldwell*, p. 354), *Caldwell* and *Lawrence* do offer an unduly 'objectivist' definition of recklessness: but we should not simply assume that a 'subjectivist' account must define recklessness in terms of conscious risk-taking. For we must ask more carefully just what the 'subjective' dimension of an agent's conduct, on which the subjectivist insists her criminal liability should depend, includes; and I shall argue that 'orthodox subjectivism', which insists that recklessness must involve conscious risk-taking, gives an inadequate account of the 'subjective'. We can

provide a properly 'subjectivist' account of recklessness which will (without falling into the objectivism of *Caldwell* and *Lawrence*) count as reckless some agents who are unaware of the risks which their actions create.

We should, however, first examine the principles and foundations of 'orthodox subjectivism'.

'Orthodox subjectivism' offers a particular reading of the maxim '*actus non facit reum nisi mens sit rea*'. Criminal liability should, as a matter of justice, depend not merely on the 'objective' elements which constitute the *actus reus* of an offence (the actual character, circumstances and consequences of the defendant's external conduct), but on the 'subjective' elements which constitute its *mens rea*: for it is the subjective or mental element which makes an agent culpable. But if liability is to depend on subjective culpability, it must then require *mens rea* as to every element of the *actus reus*; and *mens rea* must consist in intention or recklessness, defined 'subjectively' in terms of the agent's own purposes and beliefs.

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 might bring it about. The 'subjective' thus consists in the agent's own purposes and beliefs: what I 'subjectively' do is what I intend to do or believe that I am doing. Liability is properly 'subjective' when it depends on these subjective aspects of a defendant's conduct, since it is these that show her to be culpable or at fault; and it is improperly 'objective' if it depends either on what actually happens, or on what a 'reasonable man' would intend or believe, rather than on the defendant's own intentions or beliefs.

Thus the doctrine of 'implied malice', for instance, which could convict of murder one who neither intended to kill nor realized that she might cause death, is objectionable; so too is s. 6 of the Sexual Offences Act 1956, under which a man aged twenty-five is guilty of an offence if he has sexual intercourse with a girl of fifteen, even if he neither knows nor suspects that she is under sixteen: for in each case there is a central element of the *actus reus* as to which neither intention nor recklessness (defined subjectively) is required. *DPP v Smith* was also objectionable, in so far as it took an agent to 'intend' all the 'natural and probable consequences' of her action (those that a 'reasonable person' would foresee): for this is to define intention objectively rather than subjectively; an agent should rather be taken to intend only what she herself aims at or foresees.[11] *Caldwell* is also wrong

11 See R. Cross, 'The need for a redefinition of murder'; Law Commission, *Imputed Criminal Intent*.

to count as reckless anyone who takes an 'objectively' obvious risk (one which would be obvious to a reasonable person): a person should be held reckless only as to risks which he realizes that he is taking. *Morgan* was rightly decided, however: since the *actus reus* of rape includes the woman's lack of consent, the *mens rea* of rape must therefore involve either intention or recklessness as to her lack of consent; and a man who firmly (albeit unreasonably) believes that she consents is not reckless as to her lack of consent, since he does not realize that there is even a risk that she does not consent.

More generally, the notions of 'reasonable belief', and of what a 'reasonable man' would foresee, should play only an *evidential* role. That a reasonable man would have foreseen an effect, or noticed some risk, is evidence that this defendant foresaw that effect or noticed that risk. But what matters for liability is whether she did actually foresee it or notice it; and inferences from what a reasonable person would have foreseen or noticed to what she herself foresaw or noticed can be rebutted by evidence that she in fact failed to foresee or to notice what was in that sense obvious. That there was no good reason to believe that a woman consented to intercourse (that any belief in her consent would have been unreasonable) is, likewise, evidence that this defendant did not believe that she consented: but his liability must depend on what he actually believed; and if he firmly believed that she consented, he must be acquitted of rape. So too with self-defence: if I believe, however unreasonably, that I am being attacked and must use force to defend myself against my supposed attacker, I am not guilty of assault or wounding; for I believe in the existence of facts which would justify my action, and I must be judged on the facts as I believe them to be.[12]

('Objectivists', however, use the 'reasonable man' and 'reasonable belief' as *criteria* of liability, not merely as evidence for what the defendant himself actually realized or believed: he is taken to have acted intentionally or recklessly as to results which the 'reasonable man' would have foreseen, whether or not he himself foresaw them; he is guilty of rape if he persists with intercourse in the mistaken and unreasonable belief that the woman consents; he is guilty of wounding if he wounds another in the mistaken and unreasonable belief that she is attacking him.)

12 See R. Cross, 'Centenary reflections on Prince's case'; J.C. Smith, 'The guilty mind in the criminal law'; *Williams (Gladstone)*; Criminal Justice Act 1967, s. 8; Sexual Offences (Amendment) Act 1976, s. 1(2). See more generally *S&H*, pp. 207–9; *TCL*, pp. 128–40; *C&K*, pp. 208–24; *E&W*, pp. 98–128; *Gordon*, ch. 9; L. Bienen, 'Mistakes'; G. Fletcher, *Rethinking Criminal Law*, ch. 9.

These comments about reasonable men and reasonable beliefs apply, however, only to matters of *fact*; on matters of *value*, even a strict subjectivist appeals to 'objective' standards of what is reasonable. Recklessness involves taking an unreasonable risk; and whether a risk is reasonable depends, not on the agent's subjective judgement, but on whether it is 'objectively' reasonable by the standards of reasonable people. A plea of self-defence can succeed only if the defendant used a reasonable degree of force; and the reasonableness of the force she used depends, not on her judgement, but on whether it was in this sense 'objectively' reasonable to use such force (see *TCL*, pp. 506–7).

We should judge a defendant on the *facts* as she believed them to be; we should convict her of an offence only if the action which she believed herself to be doing, in the circumstances which she believed to obtain, with the consequences which she realized it would or might have, constituted the *actus reus* of that offence. The *values* in whose light we judge her (subjectively defined) conduct, however, should be the 'objective' values which the law embodies; she is properly guilty of an offence if what she knowingly does contravenes those values. We should not, for instance, acquit someone of wounding just because *he* thought himself justified in attacking his victim (perhaps he thought it reasonable to attack someone who took the parking place which he wanted): for the criminal law should enforce those basic standards of conduct which everyone ought to obey; and to attack another person for that kind of reason is to exhibit just the kind of fault which the law rightly condemns and punishes. It would likewise be absurd to acquit someone of recklessness just because *she* thought it reasonable to take the risk which she took: for to think it reasonable to take what is, 'objectively', an unreasonable risk is to exhibit just the kind of fault for which one is rightly condemned as being 'reckless'.

I have sketched here the purest form of 'orthodox subjectivism', which insists that criminal liability should *always* require intention or recklessness (as it defines them) as to *every* element of the *actus reus*. Now advocates of this principle do not typically insist that it should always be followed: the law must sometimes, they might allow, make a compromise between the principled demands of justice and the pragmatic demands of efficient harm-prevention, and make liability for some offences, to some degree, 'objective'. I shall not discuss such compromises here, however. My concern here is rather with the central principle of orthodox subjectivism: that a defendant should, in principle, be convicted of a criminal offence only if he intended to commit, or realized that he would or might commit, every element of the *actus reus* of the offence with which he is charged.

What underpins this principle is the central role which orthodox subjectivists give to *choice* as a determinant both of the subjective character of an agent's conduct and, accordingly, of the scope of her responsibility:[13] this explains both why liability should normally require intention or recklessness (defined as conscious risk-taking), and why recklessness should be a lesser kind of fault than intention.

I am responsible for what I choose to do. That is why intended and intentional agency are paradigms of responsible agency: both one who intends to bring a result about and one who does what she is sure will bring it about can be said to choose to bring it about (see p. 108 above). Now we can extend the paradigm of intended agency to capture those who choose and try, but fail, to cause harm; and the paradigm of intentional agency to capture those who choose to take a risk of causing harm. But we must not extend responsibility beyond the realm of choice: recklessness, as a basis for criminal liability, should be understood as a matter of choosing to take a risk.

But choice requires belief: I choose to do only what I believe I am doing. If I do not realize that my action will, or might, have a particular result I do not choose to bring, or to risk bringing, that result about. That result or risk might be obvious to any reasonable person, and if I fail to notice what is thus obvious I may be stupid or negligent: but I do not choose to do what I do not know that I am doing. If Mr Caldwell did not notice that his action would endanger life, he did not choose to endanger life; if the *Morgan* defendants were certain that Mrs Morgan was consenting, they did not choose to take the risk that she did not consent – what they chose was 'to have intercourse with her consent'.

So if criminal liability should depend on choice, *mens rea* should require intention or recklessness (defined as conscious risk-taking): an agent should be liable only for harms which she aims to cause, or is sure that she will cause, or consciously takes a risk of causing. And *mens rea*, as thus defined, should be required as to every element of the *actus reus*. One who intends and expects only to cause serious injury should not be guilty of murder if her victim in fact dies: for if she does not realize that she will or might cause death, she does not choose to kill or endanger life. A man who has intercourse with a girl whom he firmly believes to be over sixteen should similarly not be guilty of an offence if she is actually under sixteen:

13 See especially A.J. Ashworth, 'Belief, intent and criminal liability', 'Sharpening the subjective element in criminal liability'; also J.C. Smith, 'The element of chance in criminal liability', 'Some problems of the reform of the law of offences against the person'.

for if he does not realize that she is or might be under sixteen, he does not choose to have (or to risk having) intercourse with a girl who is under sixteen.

Recklessness is an appropriate species of *mens rea* because it is appropriately related to the paradigm of intention: both one who acts intentionally and one who acts recklessly as to a specified harm make themselves responsible for that harm by choosing to bring it about or to risk bringing it about (indeed, reckless conduct is itself a kind of intentional conduct; it involves intentionally taking a risk). But recklessness is a lesser species of fault than intention, since the reckless agent chooses only to take a risk of causing harm, whereas an intentional agent chooses actually to cause harm; this difference in the subjective character of their choices makes the reckless agent less culpable. Negligence, however, if it is culpable at all, must be categorially less culpable than recklessness: for a negligent agent, who is unaware of the risk which she creates, does not choose either to cause harm or to risk causing it; we cannot extend the paradigm of intentional action to capture her, as we can extend it to capture the reckless agent.

But why should liability depend on choice? Because choice, it is thought, is the defining mark of agency; it marks the point at which we engage in the world as free and responsible agents, and thus bring ourselves within the proper reach of the criminal law.

For, first, the criminal law should be concerned with *action*, not with mere thought; it should forbid and punish only wrongful actions, not thoughts or feelings – not even intentions, so long as they remain only bare intentions (see p. 38 above). But action involves choice: whatever precedes choice, by way of thought or deliberation, is not yet action; I act, and thus commit an offence, only when I *choose* to put my intentions into effect.

Second, we are responsible (and should be criminally liable) only for our voluntary actions. But actions are voluntary only in so far as they are chosen: it is through my choices that I exercise my will, and thus define myself as an agent. What I choose to do I do freely, in that my choice determines whether I do it or not: it is also what is properly *mine* as an agent, in that it expresses my own will; I make myself responsible for it by choosing to do it. But what I do without choosing to do it cannot be attributed to me as a free and responsible agent, since it does not express my own will; indeed, if I do not choose to do it, I do it *unintentionally*. Mr Caldwell would claim that he endangered life unintentionally, and the *Morgan* defendants that they 'had intercourse without Mrs Morgan's consent' unintentionally; but we cannot justly hold agents criminally liable for what they do unintentionally, without choosing to do it.

We should note that such a conception of responsible agency makes the agent's 'attitudes' or 'feelings' (of indifference, for instance) irrelevant to her criminal liability. What concerns the criminal law is what she chooses to do, not what she feels: for her attitudes and feelings, while they may motivate or accompany choice and action, do not manifest her voluntary will. Feelings are indeed often seen, from this perspective, as essentially passive, non-rational mental states over which we have little or no voluntary control: I cannot help what I feel; what I can help, and am responsible for, are my choices.[14] Someone who sets fire to a hotel might feel indifferent to (feel no concern for) the safety of those in the hotel; or he might care about their safety, in that he feels bad about endangering them and hopes that no one will be hurt. What matters to the criminal law, however, is whether he chooses to endanger them: if he does so, no feelings of concern for their safety can save him from being guilty of reckless endangerment; if he does not choose to endanger them, the fact that he feels indifferent to them cannot make him guilty of an offence.[15]

One obvious objection to this account is that it has no room for negligence as a species of fault, since the negligent agent does not choose to cause, or to risk causing, harm. But negligence surely *is* a species of fault, albeit less serious than recklessness: we properly *blame* people for their negligence.

Now some 'subjectivists' do, in fact, argue that negligence is not a species of *mens rea*; and that offences of negligence are therefore offences of 'objective' liability. For *mens rea* must be a 'positive state of mind' related to the *actus reus* of the relevant offence: but negligence, which may be defined 'a very serious deviation from the standard of care to be expected of a reasonable person' (*1985 Code*, cl. 22(b)), does not involve any 'positive state of mind'; it rather involves the *absence* of a mental state of advertence or care. To hold someone criminally liable for her negligence is therefore to hold her objectively liable for her merely unintentional failure to attain the appropriate standard of care: this may be justifiable as a useful way of preventing certain kinds of dangerous conduct, but it amounts to imposing liability in the absence of true (voluntary) culpability.[16]

14 For criticisms of the Kantian background to this view, see L. Blum, *Friendship, Altruism and Morality*; M. Midgley, 'The objection to systematic humbug'; B. Williams, 'Morality and the emotions'.

15 See the debate between A.R. White, P.J. Fitzgerald and G. Williams – all three articles called 'Carelessness, indifference, and recklessness'.

16 See *TCL*, pp. 88–94; G. Williams, 'Recklessness redefined', pp. 271–2; *C&K*, pp. 157–70; J. Hall, 'Negligent behaviour should be excluded from penal liability'. For the contrary argument, see H.L.A. Hart, 'Negligence, *mens rea*, and criminal responsibility'.

This argument reveals the malign influence of the kind of Dualism which I criticized in chapter 6; it portrays *mens rea* as an occurrent mental state distinct from, though accompanying, the agent's external conduct. Now we certainly cannot ascribe any such mental state to the negligent agent: but this does not show that we cannot rightly blame her for her negligence, or identify the element of 'subjective' fault which makes her culpable.

If negligence is only a 'a deviation from the standard of care to be expected of a reasonable person', it is indeed purely 'objective': but we can add a 'subjective' element to the definition by talking of an 'avoidable deviation'; by holding an agent to be negligent only if she *could* have attained that standard of care. If she could not have attained that standard, to convict her would be to hold her strictly (and unjustly) liable for what she could not help. But if she could have attained that standard; if she failed to take reasonable care, not because she lacked the capacity to do so, but because she failed to exercise capacities for thought and attention which she could (and should) have exercised: then to convict her of negligence is to hold her properly liable for what she could and should have helped.

A driver may be justly convicted of driving 'without due care and attention' (Road Traffic Act 1988, s. 3) if she could have driven with due care but failed to do so – or if she is an incompetent driver who could and should have realized that she was too incompetent to drive. Her liability is 'objective' in that her conduct is judged, like that of the reckless agent, by the 'objective' standard of the reasonable person. But it is also appropriately 'subjective', in that her guilt depends on whether she could have taken the care which she failed to take; the 'subjective' element in negligence is the agent's failure to exercise her own capacities for care and attention. That failure might be unintentional: but she is culpable if she could and should have taken care; and if, as the orthodox subjectivist assumes, one who chooses to take a risk acts freely, in that he could have chosen not to take that risk, it can equally be true that one who fails to take care does so freely, in that she could have taken care.

Negligence can thus be defined as a genuine species of culpable fault. But the orthodox subjectivist could explain it, and show it to be a categorially less serious fault than recklessness, in terms of the model of choice sketched above: for, she could say, negligence involves fault only in so far as the negligent agent could take care by *choosing* to do so. She is condemned for failing to make a choice (to take care) which she could and should have made: but failing to make a choice which I ought to make is, surely, less culpable than making a choice (to cause, or risk causing, harm) which I should not make, since it is by the choices we actually make that we primarily define our responsible agency. The negligent agent is less closely

related, as an agent, to the harm or danger which she causes than is one who actually chooses to cause harm or danger: since the harm or danger does not flow from her active will, it is less fully hers – less fully something which she *does*. The essence of the orthodox subjectivist picture can thus be preserved: the more serious forms of criminal liability should still depend on choice (the choice to cause or to risk causing harm); that is, on intention or recklessness defined as conscious risk-taking.

Orthodox subjectivists must, however, face two more general kinds of objection. One (to be discussed in chapter 8) argues that criminal liability should sometimes depend on what is truly 'objective' rather than 'subjective'. The other (to be discussed in this chapter) argues that criminal liability can be properly 'subjective' without (always) requiring that actual awareness of results or risks on which orthodox subjectivists insist; that orthodox subjectivism offers too narrow an account of the 'subjective'. I shall argue in the next section that an agent should sometimes be held to be reckless as to a risk which she does not notice; and in the following section that in some contexts a mistaken belief in the absence of risk should preclude the ascription of recklessness only if that belief is 'reasonable'. These arguments will depend on portraying recklessness as essentially a matter, not of choosing to create a risk, but of a kind of 'practical indifference' which can be manifested both in choosing to take an unreasonable risk, and in failing to notice an obvious risk or in acting on an unreasonable belief that there is no risk. Such an account of recklessness is still properly 'subjectivist' rather than improperly 'objectivist': but it rejects the orthodox subjectivist principle that agents must always be judged on the facts as they believe them to be.[17]

7.4 *'The Thought Never Crossed My Mind'*

Miller and Denovan (a Scottish case) concerned two young men who committed a violent robbery, in the course of which Mr Miller struck their victim so hard on the head with a piece of wood that he killed him. He was convicted of murder, since

> If in perpetrating this crime of robbery a person uses serious and reckless violence which may cause death without considering what the result may be, he is guilty of murder if the violence results in death although he had no intention to kill.

17 For another criticism of the orthodox subjectivist account, as making the concept of recklessness too broad, see R.A. Duff, 'Recklessness', pp. 285–9; and pp. 95–7 above, p. 168 below.

Perhaps Mr Miller did not realize that his blow might kill: but if it was so violent that 'death was within the range of [its] natural and probable consequences', and if it 'displayed such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences', then 'it is murder' (*Gordon*, p. 742).

What concerns me here is the claim that an assailant who strikes such a violent blow is reckless of his victim's life, even if he is at the time so intent on his robbery (and so unconcerned about his victim's fate) that he does not notice the obvious risk to life which his action creates. Orthodox subjectivism tells us that such a person is not reckless as to the risk of death which his action creates: for however vicious his attack, he does not choose to endanger life; and to say that he is reckless because death is a 'natural and probable consequence' of his act is to apply an improperly objectivist, rather than a properly subjectivist, criterion of liability. I shall argue, however, that one who mounts such a violent attack shows himself to be, in the very character of his action, reckless of his victim's life, whether or not he realizes at the time that he might kill her.

We might express the claim that Mr Miller was reckless as to the risk of death which his action obviously created by saying that that action exhibited a callous indifference to his victim's life – thus appealing to the line of thought which defines recklessness in terms of 'indifference'. Orthodox subjectivists might reply, however, that talk of 'indifference' does not remove the need to prove awareness of risk: for I can be 'indifferent' to a risk only if I actually realize that it exists.[18]

The truth which underpins this argument is that I can be properly held liable for an effect only if it can be properly attributed to me as its responsible agent; and that any such attribution depends, not merely on the fact that I actually brought that effect about, but on proof of some 'fault' element which connects me to that effect as a responsible agent (see p. 102 above). The crucial question, however, concerns the proper criteria for such attributions: how must I be related to an effect of my action if I am to be justifiably held responsible for bringing it about? The orthodox subjectivist insists that an actual awareness that that effect is at least possible is a necessary condition for any such attribution: I am properly held responsible for an effect only if I choose to bring it about or to risk bringing it about; and choice requires awareness. It is this claim that we must now examine more critically.

The claim that I can be indifferent to a risk which I create only if I am aware of it might reflect the kind of dualism which portrays *mens rea* as an occurrent mental state accompanying the *actus reus* (see p. 29 above). For to say that I am indifferent to a risk would then be to say that I have an occurrent feeling of indifference to the risk at the time when I create it; and such a feeling could be one of indifference to *that* risk only if it involves an awareness of that risk. But if indifference is simply some such occurrent feeling, it surely should not be relevant to criminal liability; an agent's liability should depend on what she does, not on what she feels.

18 See G. Williams, 'The unresolved problem of recklessness', p. 83.

This dualist view, however, gives an inadequate account not only of 'indifference', but also of that mental state which the orthodox subjectivist takes to be crucial – that of realizing that my action creates a risk of harm; and by seeing what is wrong with this account of awareness of risk, we can also undermine some of the objections to defining recklessness in terms of indifference.

This dualist account is revealed in Lord Diplock's comment that, in order to determine whether a defendant was aware of a risk created by his action, we would need to engage in 'a meticulous analysis ... of the thoughts that passed through the mind of the accused at or before the time he did the act that caused the damage' (*Caldwell*, pp. 351–2). An agent's awareness of a risk involves, on this view, the occurrence in his mind of the thought of that risk (a thought like 'this might kill someone') at the relevant time: but this is not what awareness or knowledge involves (see pp. 127–34 above).

The occurrence of some thought such as 'this might kill someone' is neither a necessary nor a sufficient condition of realizing that I am creating a risk of death. It is not sufficient, since it could be just an idle thought, not one that manifests knowledge or awareness. It is not necessary, since my awareness of the likely effects of my actions is a matter, not of what happens in the hidden reaches of my mind, but of the manifest pattern of my actions and reactions.

To clarify this point, we should distinguish *latent* from *actual* knowledge: knowledge which is 'stored in the brain and available if called on' from 'knowledge which is actually present because it has been called on' (*Murphy*, p. 440). A driver, for instance, has a large store of latent knowledge about driving in general (how to drive, the risks which driving can involve, etc.) and about her particular car and the familiar contexts in which she drives it (where the controls are, the relevant features of the roads along which she often drives, etc.). To call this knowledge *latent* is to say that she knows such things even when she is not using that knowledge to guide her thought or actions – when she is not driving or thinking about driving. Her knowledge becomes *actual* when she uses it to guide her thoughts or actions; when, for instance, she slows down at a sharp bend or tells someone how to change gear.

Now latent knowledge clearly does not involve an occurrent mental state: but orthodox subjectivists, who distinguish recklessness from negligence by reference to the agent's awareness of risk, must be concerned with actual, not merely latent, knowledge, since even a negligent driver normally has the kind of latent knowledge of 'risks in general', which would make her actually aware of the risk she is taking if she 'called on' it. So what does such actual knowledge involve: what is the difference between a driver who is aware that his manner of driving is creating a serious risk of harm, and one who is not actually aware of the risk she is creating because she fails to apply her latent knowledge (she does not notice her speed, or 'forgets' how sharp the next bend is, or simply fails to draw the obvious inference from her speed and the sharpness of the bend)?

On the dualist view sketched above, the difference between these two drivers consists in what occurs or does not occur in their minds: the former's awareness of risk involves the occurrence of a thought such as 'I might harm someone'; the latter's unawareness consists in the fact that no such thought passes through her mind. But, while we do indeed sometimes make our knowledge of what we are doing explicit to ourselves in such silent mental reports, it is absurd to suggest that such knowledge can be actual only if it is made thus explicit. When I drive my car, my driving is guided by my (actual) knowledge of my car and of the context in which I am driving: but my driving is not accompanied by a constant silent monologue in which I tell myself what to do next, what the road conditions are, whether I am driving safely or not, and all the other facts of which I am certainly aware while I am driving. Nor will it help to say that such mental reports must then be 'subconscious': for why should we suppose that any such subconscious thoughts 'must' occur, unless we are already so gripped by the dualist model that we can imagine no alternative?

But what alternative is there? The alternative is to abandon the dualist attempt to explain knowledge or awareness as occurrent mental states. My (actual) knowledge of what I am doing, of its context and likely effects, is *shown* (as my intentions are shown) in my actions and reactions: in the way in which my actions are patterned towards my ends; in what I say or would say if asked about what I am doing (I could answer such questions without having to pause and *discover* what I am doing); in my lack of surprise at what actually happens. So too, my lack of awareness is shown in the way in which my actions misfire (I take the wrong turning, or collide with a parked car), and in my surprise or shock when I see what has happened. The occurrence or the non-occurrence of certain explicit thoughts is irrelevant to whether I am actually aware of what I am doing: my actions can manifest my awareness even if no explicit thoughts about the relevant facts pass through my mind at the time; and the occurrence of such thoughts is a manifestation of knowledge only if they are appropriately related to my actions and reactions.

To determine whether Mr Caldwell was aware that his action would endanger life, we thus need not engage in 'a meticulous analysis' of 'the thoughts that passed through' his mind. It might still, however, be in practice impossible to determine whether he was aware of that risk. If his actions had manifested an *intention* to endanger life, we could be sure that he realized that they might endanger life: but no such intention was revealed. If we could be sure that he intended *not* to endanger life, we could discern an unawareness of the risk to life in his failure to take any precautions against endangering life: but we cannot be sure of that. His actions, as far as we know them, were consistent both with foreseeing some risk to life as a side-effect of his action, and with not noticing that risk. We can, of course, specify the kind of reaction which *would have* manifested either his awareness or his unawareness of the risk: for instance, had someone said to him 'Don't you realize that you might kill someone?', would his (sincere) response have been something like 'Of course I do', or something like 'Good heavens, I didn't notice that'? But we do not, in fact, now know enough about what he did and said to make a firm conclusion possible.

Nor can we safely infer that he realized that risk from the fact that it would have been obvious to any 'ordinary prudent individual': for an agent can fail to notice risks which would have been obvious, not just to the ordinary prudent individual, but to himself had he attended to that aspect of his action. If the risk was obvious, the onus is on him to explain how he could have failed to notice it: but Mr Caldwell could plausibly say that he was so intent on taking his revenge that he simply did not notice that he was endangering life. (He actually claimed that he did not notice the risk because he was drunk; but we cannot discuss the complex issue of whether drunkenness should be allowed to negate this species of *mens rea* here.)[19]

It may thus be hard for juries to decide whether a defendant was aware of a risk which her action created: but the deeper question, to which we must now return, is whether a finding of recklessness must always depend on proof of such awareness.

To argue that (some) orthodox subjectivists assume an inadequate, dualist view of awareness is not yet to show that recklessness need not involve awareness of risk. It should, however, weaken resistance to defining recklessness in terms of indifference, in so far as that resistance reflects a

19 See *TCL*, pp. 102–6, ch. 21; *S&H*, ch. 9.5; *C&K*, pp. 298–312.

comparable dualist view of indifference as an occurrent mental state. For once we see that the species of *mens rea* which consists in awareness of risk does not consist in an occurrent mental state accompanying the action (that it is rather shown in the pattern of the agent's actions and reactions), we shall be better able to recognize that an agent's indifference to a risk which she creates is a matter not of her occurrent feelings, but of the meaning of her actions; that such indifference can be a proper basis for criminal liability; and that it can be displayed by one who is unaware of the risk which she creates.

If Mr Miller realized that his attack might kill he was, clearly, reckless of his victim's life: for his attack then displayed, as we might naturally say, an utterly callous indifference to his victim's life. To say this, however, is to talk not about an occurrent *feeling* which he did or did not have at the time, but about the meaning of his *action*: for that meaning consisted not only in the intention (to injure his victim) which structured it, but also in the 'practical attitude' (of indifference to his victim's life) which it displayed; and that attitude constituted recklessness.

The indifference which constitutes recklessness is a matter, not of feeling as distinct from action, but of the practical attitude which the action itself displays. Attitudes can, of course, be detached from action. My indifference to Pat's interests might consist simply in the fact that I am emotionally untouched by her fate – I am neither saddened by her suffering nor pleased when she does well; and such a detached attitude is not the law's concern. But when I *act* in a way that harms her legally protected interests, the law is interested in the character of my action: it may hold me criminally liable if my action exhibits criminal fault; and one relevant kind of fault is, I suggest, that practical indifference to her interests which I display in doing what I know will or might injure them. An agent's intentions should concern the law only when she puts them into action. Likewise, her attitudes should concern the law only when they structure her actions: but when they are thus practical, they constitute a relevant kind of criminal fault.

But suppose that Mr Miller did not realize, at the time, that his blow might cause death; that while he had, of course, the latent knowledge of 'risks in general' which would have enabled him to recognize that risk to his victim's life, he failed to apply that knowledge: should this rebut the charge that his action revealed a callous indifference to his victim's life? Surely not: we should rather say that there is in this context no significant moral difference between one who does and one who does not notice that his action endangers life; that the latter's very failure to notice that risk displays just the kind of practical indifference which is displayed in the former's conscious risk-taking. For if we ask *how* he could have failed to

notice that risk, the answer must surely be that he did not notice it because he was indifferent to, or cared nothing for, his victim's life: which is not to infer some distinct mental state of 'indifference' from his failure to notice the risk, but rather to claim that one who mounts such a violent attack without noticing that it might kill shows his indifference in that very action – just as does one who realizes that he might kill his victim.

Consider another example. A bridegroom has missed his wedding; he explains to his (ex-)bride that he was in the pub with his friends at the time, and that the wedding just slipped his mind. On the orthodox subjectivist account that explanation should reduce the moral charge against him to one of mere negligence or forgetfulness; his fault is categorially less serious than it would have been had he realized that he was missing his wedding. But his bride would surely (and rightly) be unimpressed by this story: for to forget his wedding (when there was no sudden emergency which might have made even a 'reasonable man' forget his wedding) itself manifests an utter lack of concern for his bride and their marriage. Had he cared at all for her, he *could* not have forgotten their wedding. The fact that he forgot it shows that he did not care; and that lack of concern, as manifested in his conduct, is the fault for which she rightly condemns him.

This shows how I can be indifferent to what I do not notice. What I notice or attend to reflects what I care about; and my very failure to notice something can display my utter indifference to it. Orthodox subjectivist objections to defining recklessness as indifference may reflect the dualist conception of indifference as an occurrent mental state which is quite distinct from conduct, and therefore irrelevant to criminal liability. But once we reject this dualist distinction between attitude and action, and recognize that an agent's actions can manifest her attitudes as well as her intentions, we can explain criminal recklessness in terms of the practical indifference which the agent's actions display; and we can also see that such practical indifference can be displayed both in conscious risk-taking, and in her very failure to notice a risk.

This still treats recklessness as a properly 'subjective' notion: Mr Miller's practical indifference to his victim consisted in his own attitude to his victim's interests; and attitudes are as 'subjective' as intentions or knowledge. To call him reckless is, of course, also to appeal to an 'objective' standard: it is to say that he showed an 'unreasonable' lack of concern for his victim. But this matches the orthodox subjectivist's appeal to an objective standard of reasonable risk-taking: we judge the subjective character of his conduct in the light of an objective standard of reasonableness.

An orthodox subjectivist might now argue, however, that if he did not notice that his blow might kill, he did not *choose*, or *intend*, to endanger his victim's life; but his criminal liability should depend on what he chose

or intended to do. But the claim that he was reckless of his victim's life *does* depend on what he chose or intended: on the fact that he chose to attack and seriously injure his victim. Nor should we anyway accept the orthodox subjectivist's argument that I should be held responsible and criminally liable *only* for what I choose or intend to do. For even if the risk of death was no part of what Mr Miller intended or chose (but see pp. 177–8 below), he would have noticed that risk if he had cared at all for his victim's life, and could have avoided that risk by not attacking him thus. The indifference to his victim's life which was shown in his failure to notice that risk was partly definitive of the subjective character of his action: we can legitimately hold him responsible for that risk as its culpable agent, and ascribe the action of endangering life to *him*, as something which he truly, and culpably, *did*.

To argue that Mr Miller was reckless of his victim's life even if (indeed partly because) he did not notice the risk of death which his action created is not, however, to justify the *Caldwell* definition of recklessness: for not every failure to notice an obvious risk which my action creates displays the kind of practical indifference which constitutes recklessness.

This is clearly true of the strict reading of *Caldwell* applied in *Elliott v C* (p. 146 above). Someone who, given his age or intellectual capacity, would not notice the risk which he creates even if he gave thought to the matter, should not be called reckless as to that risk, even if it would be obvious to an 'ordinary prudent individual': for his action does not manifest a 'mindless indifference' to that risk (*Elliott v C*, p. 949, Lord Goff). The strict *Caldwell* definition is indeed unacceptably 'objective': it counts as reckless *anyone* who falls short of the 'ordinary prudent individual's' standard of care, even though his failure to attain that standard might be a matter of stupidity rather than of the kind of practical indifference which recklessness should require.

Nor can we salvage *Caldwell* by interpreting it in 'conditionally subjective' terms (see p. 146 above): would the risk have been obvious to the defendant herself had she given thought to the matter? This would give the definition a 'subjective' dimension which involves a recognizable kind of fault, counting as reckless only those who fail to attain a standard of care which they could and should attain: but it still gives too wide a meaning to recklessness, since it would count as reckless some who should rather be called stupid, or negligent, or thoughtless. Mr *Faulkner* entered the spirit room of his ship to steal some rum; lighting a match to see what he was doing, he accidentally started a fire which destroyed the ship. Given the inflammable nature of the liquor, the risk of fire would have been obvious both to an ordinary prudent individual and to Mr Faulkner himself, had he given any thought to the matter. But if he was so intent on his theft that he did not notice that risk, he did not create that risk recklessly: he was grossly negligent, but his failure to notice the risk did not itself manifest a culpably reckless indifference to the harm which he risked causing (the fact that the fire endangered his own life is relevant; it helps us to suppose that he was not indifferent to the risk which he created).

An orthodox subjectivist might now object that, if we abandon the claim that recklessness is distinguished from negligence by the fact that a reckless agent is aware of the risk which her action creates, we cannot clearly distinguish between them. Recklessness now becomes simply a matter of gross negligence: but this blurs what should be a sharp distinction between recklessness, as a kind of fault which will usually suffice for liability, and negligence as a categorially less serious kind of fault.[20]

The distinction between the kind of practical indifference that, I have argued, constitutes recklessness, and the kind of carelessness that rather constitutes negligence, is indeed partly one of degree; both involve a species of thoughtlessness or lack of care. But we can still draw an appropriate, categorial distinction between them. What makes a reckless agent more culpable, more fully responsible for the risk she creates, is that she displays a gross indifference to that particular risk or to the particular interests which she threatens: negligence, however, involves a less specific kind of carelessness or inattention which does not relate the agent so closely, as an agent, to the risk which she creates. To show that I recklessly endangered someone's life it must be shown that my action manifested a culpable indifference to her life: but negligently endangering her life need involve only a lack of attention to what I am doing – not a specific indifference to that particular risk.

The truth in orthodox subjectivism is that an agent most clearly displays her reckless indifference to a risk in consciously creating it, and that her unawareness of a risk often precludes the ascription of such reckless indifference: its error lies in the claim that *only* one who consciously creates a risk can be said to be reckless of that risk – that unawareness of risk must *always* preclude the ascription of recklessness. The truth in *Caldwell* and *Lawrence*, on the other hand, is that the indifference which constitutes recklessness can sometimes be shown in an agent's very failure to notice a risk which her action creates, as well as in her conscious risk-taking. Their error lies in their suggestion that *any* failure to notice an obvious (and serious) risk created by one's action displays a reckless indifference to that risk: for what matters is not just *that*, but *why*, the

20 See *TCL*, pp. 96–102; *S&H*, pp. 68–9; G. Williams, 'The unresolved problem of recklessness', p. 87.

agent fails to notice an obvious risk; she is reckless only if she fails to notice it *because* she does not care about it. This is the criterion which *Sheppard* specified; it can perhaps be read into the references made to 'indifference' in cases like *Pigg* and *Kimber* (pp. 144–5, 149 above); and it shows that Mr Miller was reckless of his victim's life.

In order to conclude that a defendant failed to notice an obvious risk because he did not care about it, the jury need not *infer* some hidden mental state or feeling (or some general character-trait) of indifference from his external conduct: it is rather a matter of the meaning of his particular action – the practical attitude which that action displayed. A jury could usefully ask this question: 'how else could a person who acted thus have failed to notice that risk if not because he did not care about it?' (compare *Hancock and Shankland*, p. 469); and the answer to that question is given by 'what he did, what he said, and all the circumstances of the case' (*Moloney*, p. 918).

Sometimes the moral character of the agent's *intended* action, and its relationship to the risk, will be crucial; this is one relevant difference between Mr Miller and Mr Caldwell. For Mr Miller intended a violent attack, which would at least cause serious injury, on his victim: but to mount such an attack is itself to be reckless of one's victim's life even if one does not notice the risk of death, since that risk is so 'inseparable' from (*Hyam*, p. 74; see pp. 89–91 above) such an attack that the assailant's failure to notice it cannot but manifest an utter indifference to his victim's life. But Mr Caldwell intended only to damage property, not to cause injury: his intended action was not so closely related to the risk of death which it in fact created; it did not by itself show him to be reckless as to that risk.

In other cases, the jury must consider how obvious (and serious) the risk was, and 'any explanation [the defendant] gives as to his state of mind' (*Lawrence*, p. 527, Lord Diplock) which could show that his failure to notice the risk was not itself reckless. A distracted parent may not notice his child's sudden or unobvious need of medical treatment, without thereby showing himself to be reckless of the child's health: but if the child's need was sufficiently obvious and lasting, we may discern in the parent's failure to notice that need his indifference to the child's health (he did not notice because he did not care). A driver who suffers a sudden shock, or a momentary lapse of attention, might fail to notice an obvious and serious risk, which her driving is creating, without being reckless (see E. Griew, 'Reckless damage and reckless driving: living with *Caldwell* and *Lawrence*'): but if she knows, for example, that she is driving at high speed along a busy urban road, we may properly discern in her failure to notice the obvious and serious risks she is creating her culpable indifference to the safety of those whom she endangers.

The practical implications of this test of recklessness can only emerge from a detailed study of examples. But it clearly does not justify convicting Mr Caldwell of recklessly endangering life: for we can be confident neither that he noticed the risk to life which his action created nor that his failure to notice it displayed a reckless indifference to it (unless we must count as reckless any such failure which is due to voluntary intoxication: see n. 19). Mr Lawrence, on the other hand, was driving recklessly if he knowingly drove at 60 mph along a busy urban street: for only someone who was utterly indifferent to the safety of others could knowingly drive like that.

We must turn now to the other kind of case in which an agent may be judged reckless as to a risk of which he was unaware; that in which he unreasonably believed that there was no risk.

7.5 *'I Thought She Was Consenting'*

A man charged with rape admits that he used force to overcome the woman's (apparent) resistance, but claims that he firmly believed her to be a willing participant in the intercourse: for her husband had told him that she wanted to have sexual intercourse with him, and that since she enjoyed the pretence of rape, she would play-act the part of an unwilling victim. His belief in her consent was, he now sees, quite unreasonable; he was too quick to believe the husband's story and should have checked its truth: but that firm belief in her consent must, he claims, preclude his conviction for rape.[21]

On an orthodox subjectivist view, and under present English law, he must be acquitted if his story is credible, since he did not know that she did not consent and was not 'reckless' as to whether she consented: for he did not realize at the time that she might not be consenting; and since he had given thought to the matter and decided that there was no risk that she was not consenting, he escapes the *Caldwell* definition of recklessness. But should he be acquitted?

Consider first a man who, while believing that the woman probably consents, realizes that she may not. He is guilty of rape, both on the orthodox subjectivist view and under present English law. But suppose he

21 See *Morgan*; *Cogan*; E.M. Curley, 'Excusing rape'; J. Temkin, 'The limits of reckless rape'; C. Wells, 'Swatting the subjectivist bug'; R.A. Duff, 'Recklessness and rape'.

claims that he persisted with intercourse only because he believed that she probably consented and would have desisted had he realized even that she probably did not consent: why should he not argue that he did not intend 'to have intercourse willy-nilly not caring whether the victim consents or no' (*Morgan*, p. 937, Lord Hailsham), but 'to have intercourse with her consent'? He was, he admits, 'consciously negligent' as to her consent (see *Gordon* ch. 7.48): but he did not exhibit the complete disregard for her consent which characterizes the paradigm rapist; he should therefore be convicted of a lesser offence than rape.

There is sometimes a significant difference between one who does what he realizes will probably cause some harm, and one who does what he realizes might, but probably will not, cause such harm. If I throw debris off a roof which I am repairing, realizing that it is possible (but unlikely) that someone will be passing below and will be hit and injured, I consciously take what is an unreasonable risk of causing injury. But even if I do injure someone, it seems harsh to convict me of the same offence (of wounding) as one who realizes that he will probably cause injury: for although his action is close enough to the paradigm of intentional agency to convict him of the same offence as one who does what he is sure will cause injury, my action is surely more like a negligent than an intentional injuring. I am admittedly 'consciously negligent': but I do not display the utter disregard for the safety of others which would justify a conviction for wounding (see pp. 96–7 above).

In this case, however, I am consciously negligent as to a purely *contingent* circumstance of an otherwise innocent action. My intended action is an innocent act of rubbish-disposal; although it occurs on this occasion in circumstances which make it dangerous, the danger to other people is not *intrinsic* to my intention (as it would be if, for instance, I threw down debris in order to frighten my neighbour who might be there). The man who seeks to mitigate his offence, by saying that he thought that the woman probably consented, seeks to portray his action in the same way. He was, he claims, consciously negligent as to a contingent circumstance of the (in itself innocent) action of intercourse which he intended; he thus portrays the woman's consent as a prerequisite of the propriety of his action – not as something which was essential to its very character.

But to see the matter in this way is to see sexual intercourse as a matter simply of male gratification: the woman's body is a means to that gratification, and he should have her permission to use her body thus (just as he should have her permission to use her property); but her consent has no essential connection to his intended action. If we accept this view, we must indeed agree that he is not a true rapist: he is like someone who borrows another's property in the belief that she has probably given him permission; and such 'borrowing' is indeed significantly different from a taking to which I know the owner does not (or probably does not) consent. But we should reject this view, insisting instead that sexual intercourse is *essentially* a consensual activity between partners, which must be structured by their mutual consent. Intercourse to which the woman does not consent is not just ordinary intercourse which lacks one of its appropriate preconditions; it is a radically different *kind* of activity from properly consensual intercourse (it is not, we might say, *inter*course strictly speaking). But if the woman's consent should be intrinsic to the man's intended action, rather than a merely contingent circumstance, to persist with intercourse in the realization that she might not consent to it is to display a disregard or disrespect for her rights and interests which does not differ significantly from that displayed by one who persists in the realization that she probably does not consent.

The essence of the crime of rape is that it constitutes a serious attack on a woman's sexual interests and integrity: the fault element in rape should, therefore, consist in a serious disregard or disrespect for her sexual interests and integrity. Such a disregard is shown not only by one who persists with intercourse in the realization that the woman probably does not consent, but also by one who persists in the realization that she might not consent: his willingness to take such a risk over something which should be integral to his intended action displays that utter practical indifference to (or contempt for) the woman's interests which characterizes a rapist.

What then of a man who is sure, because her husband told him so, that the woman consents – when in fact she does not? The claim that he is not a rapist suggests that we should see his intended action as one of ordinary and legitimate consensual intercourse; his only fault is that he is negligent as to an (admittedly important) circumstance of that action. His willingness to believe that she consents, on such inadequate grounds, and his lack of due attention to the evidence of her lack of consent, exhibit the kind of thoughtless stupidity which constitutes negligence (he should thus perhaps he convicted of a new, lesser offence of negligence): but they do not display that wilful disregard for her consent which the true rapist displays.

Two considerations, however, suggest that we should not accept this portrayal of his action.

First, he is mistaken about something which is (which should be) essential to his intended action, since without her consent, what purports to be a normal act of consensual intercourse is instead a perverted, because non-consensual, distortion of that act. If what he intended was legitimate sexual intercourse, he would therefore have been as concerned about the woman's consent as he was about his own gratification: but he clearly was not.

Second, he is mistaken about something which is entirely obvious. The *actus reus* of rape is proved only if the woman's lack of consent is 'objectively demonstrated' (*Morgan*, p. 191): by her express dissent or resistance, or by circumstances (that she was tied up, terrified, unconscious, etc.) which clearly made it impossible or unreasonably difficult for her to resist. So he does not just fail to notice some unexpressed reluctance on her part (which might show him to be merely insensitive): for such unexpressed reluctance cannot in law amount to lack of consent. He persists with intercourse in the face of obvious evidence of her lack of consent, which he must either fail to notice or radically misinterpret.

But how could he fail to notice, or misinterpret so radically, the clear evidence of her lack of consent? The answer must surely be that his failure to realize even that she might not consent itself manifests the kind of disregard for her rights and interests which constitutes the fault element in rape. For he is ready to discount the clear evidence of her lack of consent on the basis simply of what her husband said: perhaps because he is so intent on intercourse that he 'doesn't stop to think', or gives little thought to what he sees as an unimportant circumstance of his action; or because he has some general view about how willing women are to be forcibly seduced. But any such explanation shows precisely that he lacks even that minimal concern for her consent which the law should demand; that his action is structured by a disregard for (an indifference to) *her* integrity, and *her* right to make up and express her own mind about her sexual partners, which does not differ significantly from that displayed by one who persists with intercourse realizing that the woman might not consent. The actions of both display a practical attitude which can rightly be described as one of 'recklessness' as to her consent.

This argument shows that *any* man who commits the *actus reus* of rape (any man who persists with intercourse with a woman whose lack of consent is 'objectively demonstrated') should be convicted of rape unless he acted on a firm *and reasonable* belief that she consented; an unreasonable belief in her consent cannot rebut the charge that he was reckless as to her consent. To see the justice of this claim, we must recognize that what makes a belief in consent 'reasonable' or 'unreasonable' is not just its factual plausibility as an *observer's* belief, but its moral propriety as an *agent's* belief.

In asking whether a man acted in the 'reasonable' belief that the woman consented we must ask, not whether there were good grounds for a detached observer to suppose that she consented, but whether it was reasonable for one who intended to have intercourse with her to form and act on a belief in her consent; and such a belief should count as 'unreasonable' if, in forming and acting on it, he displayed the kind of indifference

to her rights and interests which itself constitutes recklessness as to her consent. To ignore or misinterpret the obvious manifestations of her dissent, simply because of what another person told him about her sexual proclivities, or because of some assumption about what 'women' (or women of a certain kind) want, is not just to form a belief which in fact might well be false: thus to discount her own expression of her will is to display a contemptuous disregard for her integrity as a sexual agent – to treat her as a sexual object, rather than as an autonomous subject; and such an attitude, when it informs the commission of the *actus reus* of rape, should count as recklessness as to her consent.

A defendant who is to be acquitted on the basis of his mistaken belief in the woman's consent should thus have to argue not only that he actually held that belief, but that it was a reasonable belief for him to hold and act on; that in holding and acting on it he showed a proper respect for the woman's rights. He would have shown a proper respect, I think, only if his belief was founded on her own explicit or implicit expression of consent – either in that particular context or as part of her continuing relationship with him; and there will no doubt be few cases in which proof of the *actus reus* of rape will not also in fact amount to proof that the defendant could not have acted on a reasonable belief that the woman consented. There could be such cases; cases in which, perhaps, a woman who is subjected to threats or deception by a third party gives her merely apparent consent to intercourse with a man who is unaware of those threats or deception. But my argument here is only that in the case of rape, as in that of an assailant who does not notice the risk to his victim's life, the defendant's liability should depend not just on what he realized or knew, but on the practical attitude to his victim which his action displayed; and that recklessness as to the woman's consent is shown not only by a man who persists with intercourse realizing that she might not be consenting, but also by one who persists in the firm but unreasonable belief that she consents, since each displays a similar indifference to her consent.

The orthodox Subjectivist is therefore wrong to demand that we should always judge defendants on the facts as they believed them to be, and acquit anyone who firmly believed in the existence of facts which would have made his action non-criminal. That demand reflects a proper concern not to count as reckless one who is merely stupid or negligent. But it also assumes that an unreasonable belief can *never* manifest anything worse than stupidity or negligence; whereas a man who forces intercourse on a non-consenting woman in the unreasonable belief that she consents manifests not just stupidity or negligence, but a reckless indifference to her consent which justifies convicting him of rape.

This view is incompatible with the 'choice' model of liability; a man who

acts on an unreasonable belief that the woman consents does not *choose* to take a risk that she does not consent. But it still makes criminal liability properly 'subjective': for his recklessness consists in his own practical attitude of indifference to the woman's interests – an attitude which he displays in his conduct, and in his willingness to believe on quite inadequate grounds that she consents. The judgement that he is reckless depends, of course, on an 'objective' judgement of the reasonableness of his beliefs and conduct: but the orthodox subjectivist likewise passes an 'objective' judgement on the reasonableness of the risks which an agent consciously takes.

The last two sections have argued that we should sometimes judge an agent to be criminally reckless as to a risk of which he is not at the time of his action aware (because he either fails to notice it or unreasonably believes it not to exist). The orthodox subjectivist's insistence that recklessness must involve conscious risk-taking rests on the claim that the 'subjective' character of an agent's actions is determined wholly by his own beliefs about what he is doing; and that he can thus properly be held responsible only for what he chooses to do. But the 'subjective' includes the practical attitudes which his actions display, as well as the choices which he makes; and that practical indifference to the rights of others which can be shown in a failure to notice the risk which I create, or in the unreasonable belief that there is no risk, as well as in conscious risk-taking, is itself an appropriately 'subjective' species of criminal fault, which should indeed be seen as the essence of criminal recklessness.

The orthodox subjectivist's insistence on conscious risk-taking might reflect an untenable dualism, which draws a sharp distinction between '*actus*' and '*mens*', and takes *mens rea* to consist essentially in some occurrent mental state which is explicitly related to every element of the *actus reus*. We should instead recognize that *mens rea* (whether it involves intention, or knowledge, or practical attitudes) is rather a matter of the meanings or patterns which are displayed in the agent's actions themselves: it is the intentions and attitudes by which those very actions are structured which properly constitute the agent's ('subjective') criminal fault.

I have not tried to determine the precise range of cases in which a failure to notice an obvious risk, or an unreasonable belief in the absence of risk, should be taken to constitute recklessness: but an appropriate general test of recklessness would be – did the agent's conduct (including any conscious risk-taking, any failure to notice an obvious risk created by her action, and any unreasonable belief on which she acted) display a seriously culpable practical indifference to the interests which her action in fact threatened? The results of this test of 'practical indifference' may not often differ from those justified by a definition of recklessness as conscious

risk-taking; an agent's unawareness of risk will often preclude the judgement that she was reckless. But the test of practical indifference will convict some agents whom an orthodox subjectivist would have to acquit; and that test anyway expresses a more adequate understanding of the essence of recklessness as a central kind of criminal fault.

I have dealt in this chapter with two of the four problem cases from chapter 1. *Caldwell* was wrongly decide: not (as orthodox subjectivists argue) because it did not make conscious risk-taking a necessary condition of recklessness, but because it should have held that an agent who fails to notice or give thought to an obvious risk created by his conduct is reckless only if that failure manifested a culpable practical indifference to that risk. *Morgan* was also wrongly decided: a man who commits the *actus reus* of rape in the unreasonable belief that the woman consents is 'reckless' as to her consent, and should therefore be convicted of rape.

We are now also in a position to gain a better understanding of *Hyam* and of the doctrine of implied malice in murder.

7.6 *Implied Malice and Murder*

Recklessness is sufficient *mens rea* for many crimes in English law, but not for murder. One who knowingly endangers life, and actually causes death, may be guilty of manslaughter, but not yet of murder: for murder requires an intention to kill or cause grievous bodily harm. Now the 'intention' to kill is unproblematic: both one who intends to kill and one who kills intentionally are guilty of murder. I want to focus here, however, on the 'intention' to cause grievous bodily harm, and on the doctrine of 'implied malice' which makes that intention sufficient for murder. Mrs Hyam neither intended to kill, nor foresaw death as so certain or probable a side-effect of setting fire to Mrs Booth's house that she could be said to have killed her victims intentionally: but could she be rightly convicted of murder by some version of the doctrine of 'implied malice'?[22]

Scots law contains a related doctrine: one whose violent attack kills his victim is guilty of murder, even if he did not realise that it might cause death, if 'death was within the range of the natural and probable consequences of the blow', and if his attack 'displayed such wicked reckless-

22 See *C&K*, pp. 502–13; *Gordon*, pp. 732–48; Lord Goff, 'The mental element in the crime of murder'; A.J. Kenny, 'Intention and *mens rea* in murder'; R.A. Duff, 'Implied and constructive malice in murder'; A.J. Ashworth, 'Reforming the law of murder'.

ness as to imply a disposition depraved enough to be regardless of the consequences' (*Miller and Denovan*; *Gordon*, p. 742). Similarly, the American Law Institute's Model Penal Code prescribes that criminal homicide should constitute murder if it 'is committed recklessly under circumstances manifesting extreme indifference to the value of human life' (s. 210.2(1)(b)). These Scots and American doctrines suggest that we might explain the English doctrine of implied malice by saying that one who intends to cause grievous bodily harm displays a 'wicked recklessness', or an 'extreme indifference' to her victim's life, which should convict her of murder if her victim dies. Such an explanation will need to show, however, why such a 'wicked recklessness' should suffice for murder, while other kinds of recklessness do not: why should one who intends to do grievous bodily harm be convicted of murder, whereas a reckless driver who consciously creates a serious risk of death is guilty only of manslaughter if he causes death?

The doctrine raises two further questions. First, should 'implied malice' require a direct intention to cause grievous bodily harm; or should it be enough that the agent foresees grievous bodily harm as a (virtually) certain side-effect of her action? Second, what should 'grievous bodily harm' mean? Should we define it simply as 'really serious injury' (*Hyam*, p. 69, Lord Hailsham), without requiring that the injury be one that obviously endangers life;[23] or should we say that death must at least have been 'within the range of the natural and probable consequences' of the assault (*Gordon*, p. 742), even if the assailant did not himself realize that he might kill; or should we say that the assailant must foresee 'as a likely consequence of his act that human life would be endangered' (*Hyam*, p. 68, Lord Diplock), or that he must intend to cause 'some injury which is likely to cause death' (*Hyam*, p. 98, Lord Kilbrandon)?

This last view is also expressed in the 1989 Code; a person is guilty of murder only if

> he causes the death of another –
>
> (a) intending to cause death; or
>
> (b) intending to cause serious personal harm and being aware that he may cause death. (cl. 54(1))

In requiring foresight of at least the possibility of death, the Code reflects the orthodox subjectivist insistence on awareness of risk as a necessary

23 Compare the Model Penal Code's definition of 'serious bodily injury' as 'bodily injury which creates a substantial risk of death or which causes serious, permanent, disfigurement or protracted loss or impairment of the function of any bodily member or organ' (s. 210.0).

condition of criminal liability. But it still attaches a special significance to the intention to cause serious injury, since the mere awareness 'that he may cause death' does not constitute the *mens rea* of murder; it thus still relies on some form of the doctrine of implied malice.

We can approach the traditional doctrine of implied malice by considering Lord Hailsham's claim that Mrs Hyam was guilty of murder because she intended, if not to cause death or grievous bodily harm, at least to expose 'a third party to a serious risk of death or grievous bodily harm' (*Hyam*, p. 77).

This criterion should convict of murder the bomber who intends to cause terror by creating a risk of death, if her bomb in fact causes death; but not a reckless driver, even if he realizes that his manner of driving exposes others to a serious risk of death: causing death by reckless driving must, it is assumed, be manslaughter, not murder (see p. 18 above). The relevant distinction between the bomber and the reckless driver must be that between *intended* and *intentional* agency: each may knowingly create, and thus *intentionally* expose others to, an equal risk of death; what differentiates them is that the bomber, but not the driver, *intends* to create that risk. Now Lord Hailsham's definition of 'intention' precludes that distinction: since it is a 'moral certainty' that the reckless driver will create that risk, the risk is therefore an 'inseparable consequence' of his driving as he intends; which is to say that he 'intends' to expose others to that risk (see *Hyam*, p. 74). Lord Hailsham dealt with this problem by saying that a murderer's act must be 'aimed at' someone (*Hyam*, p. 79): but we can say more simply that an agent intends to expose others to a risk of death only if she acts as she does *in order to* create that risk; and while some effects might be so 'inseparable' from my intended end that I must be taken to intend them as well, the mere fact that they are morally certain does not make them 'inseparable' (see pp. 89–91 above).

But since both intended and intentional killings count as murder, why should not both intended and intentional risk-creation make the agent guilty of the same offence? The answer must be that there is in this context some crucial difference between intended and intentional agency: that while an agent is as culpably responsible for harm which she causes intentionally as for harm which she intends to cause, the extent of her culpable responsibility for harm which *exceeds* what she intends or expects depends on the character of her *intended* action; one who intends to expose others to a risk of death relates herself more closely as a responsible agent to the deaths which she actually causes than does one who expects, but does not intend, to create such a risk.

To see what force this distinction might have, we should compare examples which are otherwise identical: not a bomber with a reckless

driver, but two drivers who each expose another person to a serious risk of death. Each drives at high speed towards a pedestrian on the road, realizing that she might hit and kill him, but hoping that he will get out of the way (for neither intends actually to kill him). One of them, however, drives like that in order to frighten him by endangering his life, while the other is simply in a hurry to reach her destination. One, that is, intends to expose the pedestrian to a serious risk of death: but the other, although she exposes him to that risk *intentionally*, does not act *with the intention* of exposing him to it. Each, in fact, kills the pedestrian; and on Lord Hailsham's account the former is then guilty of murder, while the latter is guilty only of manslaughter, or of causing death by reckless driving. But why should we thus distinguish them, when each knowingly made it to a similar degree likely that she would cause death (when each 'chose' to create a similar risk of causing death)?

An answer to this question must clearly rely on the kind of non-consequentialist conception of responsible agency which I sketched in chapter 5. The driver who intends to subject her victim to a serious risk of death is engaged, as the other is not, in a serious *attack* on another's physical security: her action is structured, as the other's is not, by the goal of threatening his life; she directs herself, as the other does not, towards putting his life at risk. Her action is thus closer to the (non-consequentialist) paradigm of murder: though she does not intend to kill, the threat to another's life is integral to the purposive structure of her action. She exhibits a recklessness as to her victim's life which is categorially more serious than that exhibited by the driver who simply foresees a risk to life as a side-effect of her action: a more active and directed recklessness which relates her more closely, as a responsible agent, to the death which actually ensues; a 'wicked recklessness' whose wickedness consists in the fact that she does not merely 'consent' to, but actively seeks to create, the risk of death, and which should make her guilty of murder if she actually causes the death which she threatens to cause.

Nielson aptly illustrates this argument. Mr Nielson killed three people in the course of armed robberies, and kidnapped and killed a young woman; he admitted causing their deaths, but insisted that they were 'accidental'. He took a loaded gun on his robberies to frighten his victims, and once fired a warning shot into the ceiling: but in each case the fatal shot occurred accidentally, during a struggle started by the victim. He tied his kidnap victim up on a narrow ledge in a drainage shaft, with a wire noose around her neck: but her death was an 'unfortunate accident' – she slipped and fell off the ledge. 'I do not', he said, 'hold myself responsible for her death. It was not my doing'. The court thought that he was guilty of murder only if his story was false – only if he intended at least to do

grievous bodily harm to his victims: but I suggest that he was, by his own admissions, a murderer. He attacked his victims, with the intention of subjecting them to a serious risk of death (he tied up his kidnap victim like that, presumably, to ensure that any attempt at escape would be fatal); he thus displayed a 'wicked recklessness' of their lives which made him fully responsible not only for the risk of death which he intended to create, but also for the unintended deaths which he actually caused. Those deaths *were* 'his doing', not just in that he actually caused them, but in that he made himself responsible for them by threatening them; they were not 'unfortunate accidents' from which he could distance himself as a responsible agent.

One who intends 'to expose a potential victim' to a 'serious risk of death' should be convicted of his murder if she in fact kills him. The same is not, I think, true of someone who intends only to expose another to a serious risk of serious injury rather than of death: for that intention does not relate her so closely as a responsible agent to the death which she actually causes. But what of one who intends actually to cause (not merely to threaten) serious physical injury: can we say that he too displays a 'wicked recklessness' of his victim's life which makes him a murderer if he actually kills her?

We surely should say this if he actually realizes that his attack might kill his victim: for that foreseen risk of death is then not a mere side-effect of his intended action; it is an integral aspect of his intended attack. Though he might not attack her thus *in order to* endanger her life, that risk to her life is so 'inseparable' from the injury which he intends to inflict that he must be said to intend 'to inflict a life-threatening injury': but he then intends to expose her to a serious risk of death, and is her murderer if he kills her. (See pp. 89–92 above. Note that the 'inseparability' of the risk to life from his intended attack lies partly in the *impossibility* of attacking her thus without endangering her life, and partly in the *moral* connection between the injury which he intends and the death which he threatens to cause: the injury lies towards the end of a continuum of 'attacks on another's physical well-being' which culminates in killing as the most serious such attack.)

The same is true of an assailant who does not at the time notice that he might kill, if death is 'within the range of the natural and probable consequences' of his attack (*Gordon*, p. 742). If his attack is so violent that it creates an obvious risk of death, his very failure to notice that risk then displays just the same kind of recklessness of his victim's life as is displayed by one who knowingly endangers his victim's life. He might say, 'True I intended to inflict really serious injury on my victim, but it is most unfortunate that he died. I did not really intend to endanger his life'

(*Hyam*, p. 69, Lord Hailsham). But we should not allow him thus to portray his victim's death as an 'unfortunate' accident for which he was not wholly responsible, when the risk of death was 'inseparable' from his intended attack. Even if he did not strictly intend to threaten his victim's life, that threat should not be seen simply as an *unintended* side-effect of his action: we should rather say that he wilfully endangered (even that he *chose* to endanger) his victim's life by mounting such a violent attack; and that he thus made himself fully responsible for his victim's death.

But what of an assailant who intends only to cause some physical injury which, although serious, is neither obviously life-threatening nor realized by him to be life-threatening? The strictest doctrine of implied malice would also convict him of murder, and we might justify this by insisting that *any* serious injury *necessarily* threatens life. Even if its seriousness is not *defined* in terms of the risk of death, it necessarily creates *a* risk of death: in intending to cause serious injury an assailant thus necessarily endangers his victim's life, and is fully responsible for the harm which he in fact causes her even if that harm exceeds (as death exceeds serious injury) what he intended or expected. But, on the other hand, we might argue that although he does attack his victim's physical safety, and thus displays a kind of recklessness which should convict him of manslaughter if he kills her (a recklessness which does not, however, consist simply in conscious risk-taking), the risk of death is neither so great nor so integral to his attack that we should hold him fully responsible as a *murderer* for the death which he actually causes.

I am not sure which view we should take on this issue – though I incline towards the view that the doctrine of implied malice ought to count as murderers only those who intend to cause some obviously and seriously life-threatening injury: but what I want to emphasize here is the way in which the justification of any version of that doctrine depends on the notion of direct rather than oblique intention, and on a notion of recklessness significantly different from that advocated by orthodox subjectivists.

To ask whether we should extend the category of murder beyond the paradigm cases of intended and intentional killing is to ask whether there are any other cases in which the killer's action relates her so closely, as its agent, to the death which she causes, that we should hold her as fully and culpably responsible for that death as we would if she had killed intentionally. I have suggested that there are such cases – those in which the killer attacks her victim with the explicit or implicit intention of exposing him to a serious risk of death: for even if that intention is not, strictly, 'morally indistinguishable' from an intention to kill, it encompasses the victim's death as a real, and intended, possibility; its relation to an intention to kill is close enough to make it 'just that [it] should bear the same consequences to the perpetrator as [it has] the same consequences for the victim if death ensues' (*Hyam*, p. 78, Lord Hailsham). But this is true only of a *direct* intention, as manifested in a violent attack on the victim, to subject her to a serious risk of death. We cannot say the same of an agent who simply foresees a risk to life, or a serious bodily injury, as a side-effect of his action: for his action is not structured by the intention to harm another. It is through her direct intentions that an agent relates herself most directly, most closely, to the world; they can make her fully responsible for the harm which she actually causes even when that harm exceeds what she intends or expects: but we cannot say the same of her oblique intentions.

One who attacks another person, intending to threaten his life, thus displays a 'wicked recklessness' of her victim's life which is categorially more serious than that shown by one who foresees a risk to life as a side-effect of his action. But 'consciously creating a risk to life' (the orthodox subjectivist's definition of recklessness as to death) is neither necessary nor sufficient to constitute this kind of recklessness: it is not necessary, since such recklessness can be displayed by one who does not notice the risk to his victim's life; it is not sufficient, since such recklessness is displayed only by one who *intends* to harm his victim.

What then of Mrs Hyam? She did not *intend* to kill or injure; nor did she intentionally cause death or injury (for she could reasonably hope that no one would be physically harmed): thus, under the law as declared in *Moloney*, she was not a murderer. But she did intend to expose those within the house to a serious risk of death, in order to frighten Mrs Booth; and in thus deliberately threatening her victim's lives she also, we should now say, took the risk of making herself a murderer if she killed them. Her intention encompassed their deaths as a real, and intended, possibility; and she thus made herself fully responsible for those deaths when that possibility was actualized.

But this argument raises a further problem, which leads into the next main topic for discussion. Suppose that no one had been killed in the fire: should she in that case (as *Cawthorne* implies) have been convicted of attempted murder? Many would say that, although she was rightly convicted of murder when she in fact caused death, she should not have been convicted of attempted murder had she not caused death. To say that, however, is to say that her criminal liability depended to a significant extent on what actually happened: if someone died she was guilty of murder, but if no one died she was guilty of nothing more than assault, or wounding, or perhaps threatening to kill. This must raise the hackles of any 'subjectivist', since it seems to make her criminal liability depend on what is 'objective' (on what actually happens), rather than on the 'subjective' character of her actions; and it is to this kind of conflict between 'subjective' and 'objective' criteria of liability that we must now turn.