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OPAQUE RECKLESSNESS

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INTRODUCTION

Imagine this scenario: you are driving to work and running very late. Up ahead, you see a yellow light that you know will be red by the time you reach the intersection. Because you are in such a hurry to get to work, you decide to run the red light. Lo and behold! A pedestrian walks in front of your car; you are unable to brake in time; and you kill the pedestrian.

For causing this death, you are guilty of criminal homicide.[1] However, the degree of your offense, *i.e.*, whether it is murder, manslaughter, or negligent homicide, depends on your mental state with regard to causing the death.[2] What was your *mens rea*? Well, clearly it was not purpose or knowledge. It was not your conscious object to kill the pedestrian, nor did you believe that it was practically certain that you would kill the pedestrian.[3]

Were you reckless? Under the Model Penal Code, to be reckless, an actor must consciously disregard a substantial and unjusti-

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[1] *See* MODEL PENAL CODE (Official Draft and Revised Comments 1985) [hereinafter MPC] § 210.1 (defining criminal homicide). As set forth, the hypothetical establishes that this death was more than accidental, and no justifications or excuses obtain.

[2] *See* MPC § 210.2 (defining murder as a purposeful or knowing homicide or one evidencing recklessness with extreme indifference to human life); MPC § 210.3 (defining manslaughter as reckless homicides and those committed under extreme mental or emotional disturbance); MPC § 210.4 (defining negligent homicide as negligently caused killings).

[3] *See* MPC §§ 2.02(2)(a)-(b) (defining "purpose" and "knowledge").

fiable risk.[4] Thus, for you to have been reckless here, you must have consciously disregarded the substantial and unjustifiable risk that you could kill someone as a result of your actions. But you did not engage in this mental calculation. While you knew that there was some inherent danger in running the red light,[5] you certainly never thought, "well, I might kill someone but I am going to run that light anyway."[6]

And indeed, there are those risk-takers who do consciously disregard the possibility of killing someone and therefore are reckless as defined by the Model Penal Code. Some people do engage in risky behavior, fully acknowledging the possibility that their actions could cause substantial and unjustifiable harm to others.[7] I will refer to a person whose mental state satisfies the Model Penal Code's definition of recklessness as being "purely reckless."

Since your mental state does not fall within the Model Penal Code's definitions of purpose, knowledge, or recklessness, the Model Penal Code then leaves us with negligence. Were you simply negligent? Were you merely unreasonably unaware of the substantial and unjustifiable risk that you were presenting?[8] No, you were more than negligent. Compared to a negligent actor, who, for example, changes the radio station and is thus unrea-

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[4] *See* MPC § 2.02(2)(c) ("a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). *But see* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 365 (1981) (noting that the actor may only need to be aware of the substantiality, not the unjustifiability, of the risk); *cf.* Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 934-35 (2000) (arguing that the unjustifiability, not the substantiality, of the risk does all the work in recklessness).

[5] Did you see the pedestrian? Let us assume that the layout of the intersection prevented you from seeing the pedestrian before he stepped into the intersection, but you were aware of the blind spot itself. If need be, assume that you decided to make a right turn without stopping at the red light.

[6] *Cf.* Dan W. Morkel, Comment, *On the Distinction Between Recklessness and Conscious Negligence*, 30 AM. J. OF COMPAR. LAW 325, 331 (1982):

> The man who stops at a stop sign, sees the oncoming traffic, but decides that with his modern powerful car he will make it, does not necessarily intend a collision to occur. It is, at any rate, clear that he did not take time to contemplate in detail the possibilities of his conduct. His decision may have been taken almost at impulse.

[7] Russian roulette is a classic example of this type of recklessness. There, the substantiality of the risk is clearly defined—there is a one in six chance of death. Thus, the actor who chooses to pull the trigger knows and disregards that substantial and unjustifiable risk.

[8] *See* MPC § 2.02(2)(d) (defining "negligence").

sonably unaware that he is even running the light, much less posing the risk of killing pedestrians, you are certainly more culpable. You were fully cognizant of the fact that you were running the red light and that your action presented some inherent danger.

So what do we do with you when your sense of the risk was opaque? You knew that your conduct was "risky" or "dangerous," but failed to advert to and consciously disregard the specific reason why your conduct was dangerous and risky (because death might result). I will refer to your mental state as "opaque recklessness."[9]

Why is this puzzle so important? Currently, the Model Penal Code uses recklessness as the minimum level of culpability for most crimes.[10] Yet opaquely reckless actors do not fall within the

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[9] While I use the red light as a proxy for the dangerousness that the driver disregards, my analysis in no way depends on the actor's violation of any statute. An actor is opaquely reckless whenever he engages in an activity consciously recognizing that that activity is dangerous, but fails to consciously disregard the exact harm that might materialize. But a statutory violation is not itself sufficient. That is, the actor may violate a statute, particularly a traffic law, without being reckless (or even negligent) vis-à-vis any risk of harm. *Accord* State v. Cox, 500 N.W.2d 23, 26 (Iowa 1993) (reversing conviction for vehicular homicide where the defendant ran a stop sign but there was no showing of recklessness); State v. Collins, 616 N.E.2d 224, 226 (Ohio 1993) (stating that a traffic violation cannot serve as underlying misdemeanor for misdemeanor-manslaughter); Commonwealth v. Clauser, 239 A.2d 870, 872 (Pa. Super. Ct. 1968) (holding a traffic violation cannot serve as a basis for involuntary manslaughter absent a showing of "culpable behavior" or "reckless disregard for the safety of others"). Of course, the actor's knowledge that he is violating a statute may make it more likely that he is opaquely reckless.

[10] *See* MPC § 2.02(3); *see also* Treiman, *supra* note 4, at 285 ("Recklessness is the most complex, most utilized, and probably the most critical of the four kinds of culpability. Recklessness is the most critical because for many crimes it defines the minimum level of culpability, thus making the difference between acquittal and conviction.") (footnotes omitted); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 959 (1998) ("Recklessness is the most common level at which criminal liability attaches, and is considered the 'default' requisite mental state in many jurisdictions when a statute is silent regarding the requisite mental state."); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 701 (1983) ("[R]ecklessness is generally accepted as the theoretical norm.").

Moreover, theorists advocate expanding the reach of recklessness. *See* Larry Alexander and Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997) (advocating expanding the *mens rea* required for solicitation to recklessness, but eliminating incomplete attempts and conspiracy); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997) (arguing as a matter of principle that recklessness should suffice for complicity for reckless crimes).

ambit of the Model Penal Code, and, thus, their behavior falls outside the boundaries of most crimes.

Indeed, consider the death of Morgan Pena, a 2-½ year-old killed by a driver using a cell phone. The driver, distracted by dialing the phone, ran a stop sign and collided with the Pena's car, killing Morgan. The driver received two citations, for careless driving and for failure to observe a stop sign, and was fined $50. The driver was not charged with homicide by vehicle because the police determined that the driver was not reckless, only careless, a result that appears to be correct according to the Model Penal Code's definition of recklessness.[11]

But perhaps the question should have been whether the driver was opaquely reckless–did he recognize that driving while dialing a cell phone was a dangerous thing to do? Should the driver escape responsibility for the death because he never thought, "if I use this cell phone, I may become distracted, run a stop sign, and kill a small child?"

Hence, people who knowingly engage in risky behavior but fail to think through why their actions are "risky" or "bad" or "dangerous," may not be subject to any criminal responsibility. Yet, by their choices to engage in dangerous actions, these people have shown themselves to be culpable, and thus deserving of punishment, as well as deterrable, since they know the dangerousness of their acts and therefore can decide whether to commit those acts. Consequently, if we believe that opaque recklessness should suffice for criminal responsibility, either we need to expand the definition of recklessness to include opaque recklessness or we must create a new mental state.

Moreover, the flip side also presents a problem. That is, the law, in its current state, presents the danger that opaquely reckless people are being treated as purely reckless, and hence, our criminal justice system may be treating them as more culpable than they actually are.[12] For example, South Dakota's Supreme Court

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[11] *See* Lisa Kozleski, *A Year After Morgan Lee Died, Wireless Phones Still a Hot Issue; Death of 2-Year-Old Bucks County Girl Drew Attention to Careless Driving Because of Devices*, ALLENTOWN MORNING CALL, Nov. 3, 2000, at A8; John P. Ferry, *Cell-Phone User Won't Face Criminal Charges in Death; Quakertown Driver 'Careless,' but Not Reckless, Investigators Conclude*, ALLENTOWN MORNING CALL, Nov. 12, 1999, at B8.

[12] It may be true that in a jurisdiction that has enacted both negligent and reckless homicide statutes, regardless of which crime the defendant is convicted, the defendant's sentence could very well be the same. Nevertheless, we should not discount the true co-

suggested that merely being aware of the dangerous nature of one's conduct will suffice for manslaughter; the defendant need not foresee death as a result.[13] But doesn't it matter why the opaquely reckless actor thinks his conduct is dangerous? What if he never foresees the prospect that someone might die? Should the disregard of "dangerousness" suffice for responsibility for manslaughter?

Finally, for theorists who believe that results do not matter for blameworthiness and punishability,[14] responsibility rests upon the actor's choice. While many theorists advance this argument in the context of attempts and completed crimes, few focus on the result that this argument would have for reckless actors. That is, such a theory commits one to holding that the reckless driver who does not kill someone should be held as responsible as the reckless driver whose conduct results in death. But what do we hold the opaquely reckless actor to have risked? With opaque recklessness, what the actor chose to risk, and therefore what he should be held accountable for, is, well, opaque.

In this Article, I contend that opaque recklessness presents both descriptive and normative challenges to the Model Penal Code's definition of recklessness. Before meeting these challenges head-on, however, in Part I, I discuss whether opaque recklessness can be resolved without rethinking recklessness by

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nundrum presented by opaque recklessness and sacrifice doctrinal consistency at the altar of equal results.

[13] State v. Olsen, 462 N.W.2d 474 (S.D. 1990) (affirming dismissal of indictment where driver of tractor failed to yield right-of-way, causing a car-accident and the immediate death of the other driver, and there was no evidence indicating the defendant had acted in reckless disregard for the safety of the other driver, but noting that to establish recklessness, "[w]hile the State need not introduce evidence that Olsen could foresee a death resulting from his conduct, the State must introduce evidence that would allow a trier of fact to conclude that Olsen was aware of the dangerous nature of his conduct").

[14] I am among the theorists who believe this. *See* Kimberly D. Kessler, Comment, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2184 (1994). But I am far from alone in this position. *See also, e.g.*, HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 423-24 (1979); Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. L. ISSUES 1 (1994); Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFFAIRS 262-76 (1974); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); James J. Gobert, *The Fortuity of Consequence*, 4 CRIM. L.F. 1 (1993); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Richard Parker, *Blame, Punishment, and the Role of Result*, 21 AM. PHIL. Q. 269-70 (1984); Stephen J. Schulhofer, *Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974); Michael Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374 (1987).

collapsing opaque recklessness within the current framework of the criminal law. After concluding that opaque recklessness cannot be so resolved, in Part II, I explore the work of R.A. Duff and Kenneth Simons—both of whom have advanced a broader definition of recklessness,[15] a definition that encompasses the concept of practical or culpable indifference—to determine whether opaque recklessness falls within the scope of their analyses. After reaching the conclusion that an indifference theory is inherently problematic and therefore is an unsatisfying solution to the problem, in Part III, I argue that we should rethink what we mean by "consciously disregarding" in the Model Penal Code's definition of recklessness. That is, I suggest that while the opaquely reckless actor is aware that he is taking a "dangerous" risk on a conscious level, on a preconscious level, the actor may be aware of the meaning of that "dangerousness," *e.g.*, that death may result. I then discuss the normative implications of this conclusion and aver that an opaque choice, where part of the description of the risk exists on a preconscious level, is still sufficiently the product of the actor's practical reasoning so as to justify holding the actor accountable for it. After concluding Part III by exploring the relationship between the preconscious and responsibility, in Part IV, I turn to the doctrinal implications for opaque recklessness.

I. CAN OPAQUE RECKLESSNESS BE RESOLVED WITHIN THE CURRENT FRAMEWORK OF THE CRIMINAL LAW?

The natural response to opaque recklessness is to deny the problem. Since the criminal law has at its disposal many methods of snaring culpable actors within its grasp, perhaps we already have the tools to solve the opaque recklessness dilemma. We might decide that if the actor chooses to risk "harm" and the harm turns out to be "death," we should simply substitute "harm" for "death" with regard to the defendant's *mens rea*, thus holding the opaquely reckless actor responsible for choosing to risk the death that does occur. Alternatively, we should consider whether this is simply a matter of "time framing," and if we

[15] This characterization of Simons' argument is a bit simplistic as will be discussed *infra* section II.B.1. Simons does not advocate broadening the concept of recklessness as Duff does, but rather, advances an entirely new mental state hierarchy, with culpable indifference as its own mental state. Nevertheless, the question remains whether culpable indifference, however characterized, untangles opaque recklessness.

look back in time, we will find a (transparent) culpable choice on which we can place responsibility. We might even say that the choice not to analyze the risk is equivalent to a willful blindness of sorts. After all, we do place responsibility on an actor who does not "know" a material fact exists as required by a statute, where we believe that the actor made a culpable choice not to know of the existence of the fact. In this section, I will discuss these alternatives and demonstrate that neither substitution nor a time framing/willful blindness analysis can cast light through the opacity.

A. SUBSTITUTION

Let's first look at substitution. Can we substitute the harm the opaquely reckless actor does foresee—*i.e.*, an amorphous danger or risk—for the actual harm that materializes—*e.g.*, death, injury, property damage? In the case of the opaquely reckless actor who runs a red light and hits a pedestrian, can we not say that the opaquely reckless actor chose to risk "harm"; the harm turned out to be "death"; and therefore, the opaquely reckless actor chose to risk "death?"

The criminal law certainly has taken such an approach at times. For example, an Ohio court held that a defendant who left his wife violated a statute making it a crime for a husband to abandon his pregnant wife.[16] There, the defendant intended to leave his wife, his wife, unbeknownst to him, was pregnant, and therefore the court held him responsible for leaving his pregnant wife. Or, take the natural and probable consequences doctrine in accomplice liability. If the defendant intends to aid one crime, and the principal commits another crime that naturally and probably flows from the commission of the crime the de-

[16] White v. State, 185 N.E. 64 (Ohio Ct. App. 1933). *White* is, of course, an example of the moral-wrong doctrine in mistake-of-fact. This doctrine allows a defendant to be punished for a crime, without knowledge of a material fact, if the defendant's conduct, even without such knowledge, is morally wrong. Hence, White was morally wrong in leaving his wife; thus, even though he did not know she was pregnant, he can be held accountable under a statute making it criminal to leave one's pregnant wife. Clearly, such a forfeiture rule is troubling, as it usurps the legislature's role, making a defendant's choice to engage in a moral (but not legal) wrong criminal while ignoring the defendant's lack of *mens rea* as to the very aspect of the crime that makes the conduct criminal. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.0[B][3] (2d ed. 1995).

fendant aided, the defendant is likewise held responsible for the additional crime.[17]

Despite vestiges of this approach in the common law,[18] we cannot rely on such a solution, as it misunderstands mental states and demonstrates a willingness to punish people disproportionate to their culpability. Let us begin by noting that mental states—beliefs, desires, intentions—all have intentional objects. We do not just believe, desire, or intend. Rather, we believe X; we desire Y; and we intend Z. Now, in the world outside our minds, there may be many descriptions for X, Y, and Z. For example, an item, "X," may be (1) a red shirt; (2) an item yielding $2 of profit for Clothing Corporation; and (3) a product made by child slave labor in a foreign country. All of these descriptions may refer to item X.

Yet, in our minds, when we believe, desire, or intend something, we do not believe, desire, or intend all of the possible descriptions of that intentional object. Thus, when Julia goes to the mall and she decides to buy item X, she may simply intend to buy a red shirt. Likely, she has no belief, desire, or intention to affect Clothing Corporation's profits. She could also firmly believe (albeit incorrectly) that item X was manufactured in the United States by employees paid handsomely for their efforts. Therefore, we cannot attribute the other descriptions of item X to Julia's intended purchase. We cannot substitute one description of an intentional object for another, even if the two descriptions are equivalent in the real world.[19]

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[17] *See, e.g.*, People v. Luparello, 231 Cal. Rptr. 832 (Cal. Ct. App. 1987) (defendant intends to aid assault; principal departs from common design and kills victim; court holds that because the defendant intended to aid the assault, the defendant is responsible for the first degree murder that was committed). Several states have adopted this rule by statute. *See* Kadish, *supra* note 10, at n.11.

[18] For examples of other areas where the criminal law applies substitution-forfeiture principles, see Michael S. Moore, *Intentions and Mens Rea, in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 245, 264 (Ruth Gavison ed., 1987) (suggesting other areas such as felony-murder, grievous bodily harm murder, and mayhem).

[19] *See* Rebecca Dresser, *Culpability and Other Minds*, 2 CAL. INTERDISCIPLINARY L.J. 41, 81 (1993) (arguing that "[i]ntentional states have an important logical property called 'referential opacity' or 'non-transparency'" and "[u]nlike other informational statements, the truth or meaning of intentional statements can change if a word or phrase is replaced by another that objectively refers to the same thing."). *See generally* WILLIAM VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 139-159 (2d ed. rev. 1980) (discussing referential opacity).

This puzzle plagued criminal law theorists for years in the area of impossibility and criminal attempts. Indeed, the following was considered the law:

Just as we cannot say that Julia intended to buy a shirt made by child slave labor, and therefore, we cannot fault her for her purchase, we also cannot say that the opaquely reckless actor who chose to risk *harm* also chose to risk *death*. And "[t]o deny significance to differing descriptions of the intention's object is to alter radically our understanding of what intention is."[20]

Indeed, it is not just that substitution fails to take into account how mental states work, but also that this failure is fundamentally unfair. We are holding someone responsible for a harm that is incommensurate with her culpability. "One who intends to inflict grievous bodily harm has a level of culpability commensurate to that wrong, not a level commensurate to the wrong actually done but not intended. Forfeiture rules betray a

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> Intent . . . must be distinguished from motive, desire and expectation. If *C* by reason of his hatred of *A* plans to kill him, but mistaking *B* for *A* shoots *B*, his motive, desire and expectation are to kill *A* but his intent is to kill *B*. If a married man forcibly has intercourse with a woman whom he believes to be his wife's twin sister, but who in fact is his wife, he is not guilty of rape because his intent was to have intercourse with the woman he attacked, who is his wife. If *A* takes an umbrella which he believes to belong to *B*, but which is in fact his own, he does not have the intent to steal, his intent being to take the umbrella he grasps in his hand, which is his own umbrella. . . .

Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 466-67 (1954) (footnotes omitted). Keedy fails to recognize that intentions, just like motives, desires, and expectations, have intentional objects and that intentional objects may not be substituted. Thus, when *A* intends to steal *B's* umbrella but the umbrella is really his own, *A* has the intention of stealing *B's* umbrella, and therefore, has attempted to do so. *A* is not guilty of the completed crime of theft, as the umbrella actually is his own. *See* MPC § 5.01(1)(a) (defendant commits an attempt when he purposefully engages in conduct which would be a crime if the attendant circumstances were as he believed them to be).

See also Graham Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005, 1009 (1967) in which Hughes criticizes People v. Jaffe, 78 N.E. 169 (1906), which plays fast and loose with the concept of intention, where a defendant received property he believed to be stolen, but which in fact was not. The *Jaffe* court reasons, "the act, which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated." 78 N.E. at 500. Hughes correctly notes that this statement "is very questionable and turns upon a choice of what is relevant in establishing what intention is. It clearly seems no defiance of ordinary language to say that Jaffe intended to receive stolen goods, for, in speaking of a person's intention, we frequently incorporate his mistaken view of the situation, since belief and intent cannot be neatly separated." Hughes, at 1009.

[20] Michael S. Moore, *Foreseeing Harm Opaquely, reprinted in* ACTION AND VALUE IN CRIMINAL LAW 125, 137 (Stephen Shute et al. eds., 1993) (arguing against the foreseeability test for proximate causation because there is no principled or rationally defensible way to privilege one description of the harm that occurs over another and thus the foreseeability test is vacuous).

'throw away the key' mentality that cannot be justified."[21] Here, where we are struggling to determine how culpable the opaquely reckless actor is and what to hold her accountable for, to simply say that by engaging in dangerous conduct she is liable for all results that follow, would be to abandon our problem, not to resolve it.[22]

B. TIME FRAMING

Another approach to the opaque recklessness problem would be to insist that this is just a matter of time framing. If we grant that the opaquely reckless actor did not consciously disregard a substantial and unjustifiable risk at the time he chose to run through the red light, can we find that his failure to analyze the harm is itself culpable? In other words, can we turn this conundrum simply into a question of time framing and look back to see if the actor made a prior culpable choice not to analyze the risk of harm that he was presenting?[23]

This approach would be similar to that taken by the court in *People v. Decina*, where the defendant was an epileptic who, while driving a car, had a seizure and hit four pedestrians.[24] The defendant contended that because of the seizure he did not have control over his body and therefore he had not performed a voluntary act when he hit the pedestrians.[25] The court concluded, however, that by going back in time, it could find a voluntary act

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[21] Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 329 (1996); *see also* Kadish, *supra* note 10, at 376 ("Like these related doctrines, the common purpose doctrine is essentially arbitrary in serving to convict persons of crimes for which they lack the stipulated degree of culpability; the fact that the defendant has the culpability for some crime does not itself establish his culpability for another more serious crime.").

[22] For examples of where courts have correctly refused to employ forfeiture rules, see Regina v. Pembliton, 2 Cox Crim. Cas. 607 (1874) (finding, in a malicious damage to property case, that where the defendant sought to hit another person with a stone, but caused property damage instead, the intent to harm another person could not be substituted for the intent to damage property); Regina v. Faulkner, 13 Cox Crim. Cas. 550 (1877) (defendant accused of arson where he intended to steal from ship, but accidentally set the ship on fire; intent to steal was not substituted for intent to set fire to the ship).

[23] Steven Sverdlik dubs this the "Aristotelian Strategy." Steven Sverdlik, *Pure Negligence*, 30 AMER. PHIL. Q. 137, 140 (1993) ("[F]or the Aristotelian blame for a norm violation always entails that the agent either intended to do wrong, or chose to take the risk of doing wrong, at the time of wrongdoing, or at some earlier time. In brief: blame requires choice.").

[24] 138 N.E.2d 799 (N.Y. 1956).

[25] *Id.* at 803.

and the requisite mens rea: Decina knew he had epilepsy and still decided to drive the car.[26]

Can we approach opaque recklessness as the court did in *Decina*? Can we go back in time and find a prior culpable choice by the opaquely reckless actor not to think about the risk that he was presenting?[27] Maybe. Perhaps in some cases we can find such a culpable choice, but this may not always be true. Moreover, chances are that that choice was at least as opaque as the one before it. To illustrate, we shall return to your incident with the pedestrian and the thought processes of a typical red-light runner:

If the red-light runner foresees the risk of killing a pedestrian, he is purely reckless.[28] Indeed, if at any point, a passenger in the car screams, "Stop! You might kill a pedestrian!", then once the red-light runner decides to proceed, he is being purely reckless.

On the other hand, it simply is not possible for the red-light runner to foresee "harm" and think, "well, I cannot think anymore about the harm that I am presenting or I will have actually consciously disregarded it" without having thus thought more about the harm. As soon as the red-light runner recognizes the risk, he cannot backtrack—how can the red-light runner consciously choose not to be conscious of the risk?[29]

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[26] *Id.*; *cf.* Mark Kelman, *Interpretive Construction in the Criminal Law*, 33 STAN. L. REV. 591, 603-605 (1981) (arguing that the act requirement is vacuous because it can be manipulated to any given result, depending upon how narrowly or how broadly one defines the time period). *But see* MICHAEL MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 35-36 (1993) ("There is no 'time-framing' choice here. If there is *any* point in time where the act and *mens rea* requirements are simultaneously satisfied, and from which the requisite causal relations exist to some legally prohibited state of affairs, then the defendant is prima facie liable.").

[27] *Cf.* Michael Zimmerman, *Negligence and Moral Responsibility*, 20 NOUS 199, 199-211 (1986) [hereinafter Zimmerman, *Negligence*] (arguing that an actor who behaves negligently may be held morally responsible for that negligence if at a prior time, the actor adverted to the possibility of causing harm by his actions and failed to take precautionary measures to prevent such foreseen harm); *see also* Michael J. Zimmerman, *Moral Responsibility and Ignorance*, 107 ETHICS 410, 420-21 (1997) [hereinafter Zimmerman, *Moral Responsibility*] (presenting the case of Perry who pulls Doris from a car accident only to paralyze her; contemplating whether Perry would be culpable had he previously signed up for, but decided to skip, a first aid course; and noting that whether Perry is thus accountable for paralyzing Doris depends on his contemplation of such a risk at the time he decided to skip the class).

[28] This is, of course, assuming that the red-light runner lacks justification and/or the risk is substantial.

[29] Imagine the parent who hears a loud crash coming from her child's room and hollers, "I don't even want to know what is going on in there!" Isn't that exactly what the parent is doing, thinking about what is going on in there?

Further, even if the red-light runner could choose not to analyze further the harm that he is presenting, his notion of the harm that he is posing by not analyzing the harm in running through the red-light may be just as opaque: he may not recognize the harm in not analyzing the harm . . . in not analyzing the harm . . . in not analyzing the harm that he is presenting by running through the red light. Hence, he may never consciously disregard the risk that he might kill a pedestrian.[30]

By the same analysis, analogizing opaque recklessness to willful blindness will not work either. The common law's approach has been that an actor who purposefully chooses not to "know" that a material element exists so as to avoid the *mens rea* of knowledge required by a statute, has, by legal fiction, been deemed to have the requisite knowledge. That is, because the defendant has not behaved like an ethically well-disposed actor,

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[30] *See also* Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84, 102 (1990) (arguing that finding a prior culpable choice may present problems: the choice may be remote in the causal chain and the culpability in making the prior culpable choice may not correspond to the requisite degree of culpability for the harm that actually occurs).

Indeed, Zimmerman reaches just this conclusion when he discusses whether moral responsibility for negligence may be grounded in a prior culpable choice not to safeguard against foreseen future harms. He imagines Bert, the bricklayer, who tosses defective bricks over his shoulder—a long-formed habit. Bert typically works under conditions where such a habit is safe, but unfortunately, he fills in for a sick worker and unthinkingly tosses a brick off a new high rise, killing a pedestrian below. Even after concluding that Bert may be morally accountable if he adverted to the possibility of injuring someone at the time he formed the habit, Zimmerman must confront the problem that the harm disregarded was not the harm that materialized:

> [W]hile Bert foresaw the possibility that he would injure someone if he continued to indulge unthinkingly in his habit of tossing defective bricks over his shoulder, it may not have occurred to him that he would *kill* someone, and presumably it did *not* occur to him the particular person (call him Pete) that he did kill—someone (we may assume) with whom he was not acquainted. My account then commits me to saying that Bert is *not* morally responsible for killing Pete.

Zimmerman, *Negligence*, *supra* note 27, at 211.

Thus, looking at Zimmerman's analysis, if Bert makes a prior culpable choice to risk "injury" but the result is death, Bert may only be fairly held accountable for the extent of harm that he foresaw (injury) but not for the actual harm (death). Bert may have been opaquely reckless if he broadly foresaw "injury" without any specifics, (*e.g.*, death, grievous bodily injury, or minor injury). That Bert did not foresee injuring *Pete* is of little consequence as the law forbids negligence/recklessness vis-à-vis *a person* and Bert did foresee injury to *a person*. *See* DRESSLER, *supra* note 16, at 109 (arguing that we do not need the transferred intent doctrine because when D intends to kill A but kills V instead, D nevertheless intended to kill *a human being* which is what the statute prohibits).

but rather has tried to circumvent the law, this circumvention will itself be sufficient for responsibility.[31]

Under such an approach, one might question whether the opaquely reckless actor is trying to avoid being reckless by not thinking through the risk presented. Yet, as seen above, (1) query whether such mental gymnastics are even possible and (2) even if one could will oneself not to think through the risk presented, this endeavor may include just as opaque a choice. In contrast, the willfully blind actor knows exactly what he is purposefully avoiding knowledge of.

Note, however, that despite the potential for disparate culpabilities between the harm foreseen and the harm that results, the Model Penal Code does adopt this approach in one area, that of voluntary intoxication.[32] The Code states that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."[33] The drafters of the Model Penal Code, in determining whether voluntary intoxication could negate the mental state of recklessness, rejected a case-by-case analysis of whether the defendant foresaw the specific danger at the time he got drunk in favor of a blanket rule that when an actor voluntarily consumes alcohol he is presumed to be reckless as to any harm that occurs because everyone knows the risks inherent in excessive drinking.[34] But, as noted by David Treiman, "[t]hough the person who voluntarily becomes intoxicated may consciously disregard the risk of some nonspecific harm, to hold such a person liable for recklessness when he was only negligent greatly expands liability."[35] While the drafters of the Model Penal Code were willing to equate the potentially disproportionate culpabilities of an actor's choice to get drunk with recklessness regarding the harm that materializes, their drafting choice was based upon the leap of faith that actors are sufficiently culpable for reckless crimes when actors choose to

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[31] *See, e.g.*, United States v. Jewell, 532 F.2d 697, 704 (9th Cir. 1976) ("[Willful blindness] differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid sanctions of the statute while violating its substance."); *cf.* MPC § 2.02(7) (equating knowledge (practical certainty) with awareness of a high probability, thus ignoring the culpability aspect focused on by the common law).

[32] MPC § 2.08(2).

[33] *Id.*

[34] *See* MPC § 2.08 cmt. 1.

[35] Treiman, *supra* note 4, at 261.

get drunk.[36] While such a forfeiture rule is troubling in the voluntary intoxication context,[37] it is beyond the pale to apply such a rule in other areas.

We have determined that we can use neither substitution nor time framing. Substitution fails to solve the opaque recklessness problem because rather than casting light on the mental state of opaque recklessness, it grossly misconstrues how mental states work. Moreover, following this approach will not result in us determining how culpable opaque recklessness is, but rather, in our abandoning the culpability question at its inception. Time framing likewise fails to solve our problem for two reasons. First, we may reasonably doubt that one can will oneself not to be conscious of a risk. Second, even if such an act of will is possible, the choice to be opaquely reckless may be an equally opaque choice.

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[36] *Accord* Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 435-36 (1998):

> As a matter of drafting history, the Code's treatment of voluntary intoxication in crimes of recklessness seems to have been a compromise which was papered over with the thinnest of rationales. . . . The compromise was rationalized with the proposition that reckless conduct should not be negated by voluntary intoxication, because becoming intoxicated voluntarily is itself reckless behavior. As a moment's reflection will reveal, this equivalence is sometimes present, sometimes not. The fact is that the Code's treatment of voluntary intoxication in cases of recklessness cannot be squared with the Code's general culpability provision, which conceives of culpability as a conscious mental state regarding the harm done.

Notably, Huigens does not dispute the MPC's position on voluntary intoxication, finding it consistent with virtue ethics, the rationale for punishment that he endorses.

[37] *Accord* Larry Alexander, *The Supreme Court, Dr. Jeckyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 214 (1996):

> The Model Penal Code approach to intoxication can be viewed as one in which voluntary intoxication is treated like a culpable but nonpunishable act that enters the actor in a punishment lottery. If he is lucky and does not commit the actus reus of some crime, nothing happens. If, however, he is unlucky and commits the actus reus of some crime, he is punished for whatever crime he happens to commit at the level he would have been punished had he committed the crime recklessly, including reckless homicide.

Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 16-17 (1985):

> [T]he imputation of recklessness is objectionable because even if the actor was reckless, or even purposeful, as to getting intoxicated, it does not follow that he is reckless as to causing the death of the pedestrian. The notion that a person risks all manner of resulting harm when he voluntarily becomes intoxicated is common, but obviously incorrect.

(footnotes omitted). Some courts have likewise been critical of the assimilation. *See, e.g.*, People v. Whitfield, 868 P.2d 272, 280 (Cal. 1994) (constructing a hypothetical situation in which the defendant would not foresee his dangerous future conduct when he chose to become intoxicated).

II. OTHER MENTAL STATE THEORIES[38]

We have already established that opaque recklessness cannot be collapsed into the criminal law's current framework. We cannot avoid this problem as we cannot substitute the vague sense of harm foreseen for the actual harm that materializes nor can we go back in time to an earlier culpable choice not to analyze the risk presented.

Now, we should take a look at practical, or culpable, indifference, a mental state proposed by R.A. Duff and Kenneth Simons independently. After presenting Duff's theory of practical indifference, an "attitude in action" that he contends should suffice for recklessness, I discuss why Duff's shaky metaphysical assumptions provide insufficient grounding for opaque recklessness. Moreover, I contend that even if one were inclined to accept Duff's metaphysics, his theory is plagued with ambiguity. After Duff, I turn to Simons' theory of culpable indifference, where I conclude that Simons' theory is likewise unable to resolve the opaque recklessness problem. Simons' theory, endorsing punishment for desire-states, punishes an actor based upon his character, not because of the actor's choices over which he has any control, and thus does not present a viable means for resolving the issue of opaque recklessness.

A. DUFF'S PRACTICAL INDIFFERENCE

1. Duff's Theory

Duff believes that recklessness should encompass "practical indifference," an attitude encompassed in action that reflects that the actor cares too little about the risk that he is creating.[39] Preliminarily, Duff sets forth his view of mental states, rejecting what he takes to be the "dualist" view that "portrays *mens rea* as an occurrent mental state accompanying the *actus reus*."[40] Duff cri-

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[38] I am intentionally avoiding any attempt to collapse opaque recklessness into the concept of gross negligence. "Gross negligence" means, in different contexts, either 1) pure recklessness or 2) negligence with a sharp departure from the ordinary standard of care (*e.g.*, really negligent conduct). Neither definition is of any use here, and any attempt to include opaque recklessness within the rubric of "gross negligence" would lead to even greater confusion in an already fuzzy concept.

[39] R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 162-63 (1990).

[40] *Id.* at 158-59. According to Duff,

tiques not just the metaphysical dualism of Descartes' time, but also contemporary epistemological dualists.[41] He objects to metaphysical dualism, not on the classic objection—that it cannot explain the interaction of mind and body[42]—but rather on its reliance on the argument from analogy.[43] That is, Duff argues that since each individual only has his own experience—"when I say ouch, it is because I am in pain"—there is insufficient data for us to generalize to others that when they say "ouch," they are in pain. Duff uses the example of a fight between him and a redheaded man, arguing that one experience with this man does not allow him to generalize that all redheaded men are violent.[44] Indeed, Duff argues that even many fights with this one man, as we have many experiences with our own minds, is

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> [a]n 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 . . . .
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> 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.

Id. at 159.

[41] *Id.* at 116-35.

[42] The most famous rejection of dualism is Ryle's. GILBERT RYLE, THE CONCEPT OF MIND (1949). The classic attack on dualism is humorously played out by Daniel Dennett:

> The standard objection to dualism was all too familiar to Descartes himself in the seventeenth century, and it is fair to say that neither he nor any subsequent dualist has ever overcome it convincingly. If mind and body are distinct things or substances, they nevertheless must interact: the bodily sense organs, via the brain, must *inform* the mind.
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> ...
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> This confrontation between quite standard physics and dualism has been endlessly discussed since Descartes' own day, and is widely recognized as the inescapable and fatal flaw of dualism.
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> ...
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> Dualism's embarrassment here is really simpler than the citation of presumed laws of physics suggests. It is the same incoherence that children notice – but tolerate happily in fantasy – in such fare as Casper the Friendly Ghost. How can Casper *both* glide through walls and grab a falling towel? How can mind stuff *both* elude all physical measurement and control the body?

DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 34-36 (1991).

[43] DUFF, *supra* note 39, at 120-23.

[44] *Id.* at 120-21.

insufficient information with which to generalize.[45] Moreover, he claims that we cannot simply rely on what someone tells us because that is simply the behavior of uttering noises by a thing we take to be a human.[46] The inability to generalize from oneself to others is the objection that Duff believes is fatal not only to metaphysical dualists, but also to materialists whom he dubs "epistemological dualists." He reasons that even if we tried to correlate brain states to mental states, we would still need to rely on others telling us that they have a particular mental state to match it to the brain state.[47]

With this objection to dualism in place, Duff argues that intention is a part of action. We do not simply look at someone's bodily movements—we look at his "actions." Action, in Duff's view, is not just a colorless bodily movement,[48] but rather a bodily movement with meaning.[49] Intentions, he argues, are then a part of actions.[50] Forward-looking intentions, moreover, are simply about committing oneself to action.[51] To Duff, intentions do not exist independently of an action to which they are bound.[52] Thus, Duff rejects the view that *mens rea* must involve a running monologue in the actor's mind, constantly stating to the actor what he is doing, and argues instead that we should look at the "attitude" of the actor's actions.[53]

In arguing that we should look at the attitude that the actor's action displays, Duff is quick to clarify that he does not mean that we should look at the actor's feelings about his action anymore than we should look at the actor's thoughts about his action.[54]

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[45] *Id.* at 121.

[46] If someone speaks to me I directly observe only certain movements and sounds. To know that a *person* is *telling* me something (that these are not just meaningless sounds emanating from a mindless body), I must know that this is a person who intends to communicate to me—that these sounds are caused by a particular mental state; and I can know this only by making an analogical reference from the sounds which I hear emerging from this body to the existence and the intentions of a mind which cause them—to their status as meaning and speech.

Id. at 122.

[47] *Id.* at 121-22.

[48] This view of action differentiates Duff from both materialists and behaviorists.

[49] *Id.* at 130-31.

[50] *Id.* at 130 ("the intention is identical with, not something separate from, his observable action").

[51] *Id.* at 133-34 ("a bare intention is a bond by which I tie myself to further action").

[52] *Id.* at 134.

[53] *Id.* at 160-61.

[54] *Id.* at 162.

Rather, Duff contends that we can glean the actor's attitude from the character of the action: "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 . . .."[55] And the meaning of an actor's action can be practical indifference.

Turning to the theory of practical indifference, Duff gives two examples to show that indifference can be part of action and need not involve a separate mental state. The first is the defendant who engages in conduct with the intent to cause grievous bodily harm, *e.g.*, a defendant who intends to maliciously wound another.[56] Duff claims that the defendant must notice the risk of death, and if he does not notice it, then he is certainly indifferent to it.[57] Duff's second example is that of the bridegroom who is at the local tavern with his friends when he should be at the church.[58] Duff argues that the bridegroom's absence from the church is practically indifferent.[59] These examples, Duff believes, "show[] 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."[60] Thus, "we can explain criminal recklessness in terms of 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 [one's] very failure to notice a risk."[61]

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[55] *Id.*

[56] *Id.* at 163.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* One can, however, endorse indifference as the correct definition of recklessness, yet reject Duff's conception of it. Alan White, for example, argues that indifference necessarily involves awareness of the risk:

> Recklessness or indifference, like fearlessness, tactlessness, boredom, or confidence, is a state of mind which denotes a positive lack of its opposite, whether this opposite be regard, care, fear, tact, interest, or doubt. Because this lack can vary from the slightest to the fullest, such states of mind can be characterized by degrees from 'quite', 'pretty', 'somewhat' to 'completely', 'absolutely' or 'perfectly'. But what these states lack to various degrees is something which themselves all imply awareness. Thus, one cannot regard, care for, fear, be tactful of, interest in, or doubt, that whose presence one is ignorant. Hence, one cannot be said to lack, in small measure or completely and absolutely, a regard, care or tact for, a fear or doubt of, an interest in, that of which one is unaware. One cannot be perfectly, any more than one can be partly, indifferent to a lady's charms, absolutely or partly unafraid of thunder, bored by science fiction, or confident of one's choice, unless one knows of these.

2. *Theoretical Challenges to Duff's View*[62]

Under Duff's view, the opaquely reckless actor who engages in dangerous action exhibits her indifference to the welfare of others and is therefore reckless. Thus, if one accepts the theory of practical indifference then the opaque recklessness problem is solved. But can/should we accept Duff's theory?

What is most troubling about Duff's account is his complete abandonment of the "dualist" view in favor of the concept of attitudes that accompany action.[63] We certainly have beliefs, desires, and intentions. Indeed, Michael Bratman, in a groundbreaking book, has set forth a comprehensive theory of our use of intentions and how we employ them in reasoning and planning.[64] Duff, on the other hand, presents an odd view

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ALAN R. WHITE, MISLEADING CASES 39 (1991) (footnotes omitted).

[62] A couple of points should be noted about Duff's hypotheticals before addressing the indifference standard head-on. First, the grievous bodily harm example pulls at our intuitions for one reason: we doubt that the actor can honestly intend to cause grievously bodily harm without being aware of the risk of death.

Duff's second hypothetical likewise pulls at our intuitions because we do not believe that the bridegroom simply forgot his wedding. In fact, how could he be out drinking with his friends? Didn't he write down the date? Don't his friends know about the wedding? How did he wind up at the tavern? And if he chose not to write down the date, chose not to tell his friends, or chose to go to the bar before his wedding began, aren't we seeing a culpable choice somewhere in the mix? See discussion *supra* section I.B., regarding time framing; *see also* Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1630 (1980) (arguing that one possible reason a woman might hold her lover "responsible" for standing her up is because the lover performed earlier actions rendering it less likely that he would keep the appointment).

Now, the bride will certainly hold her groom accountable for his absence. But is that accountability based on the prerequisites to criminal liability? Of course not. Rather, in life, we properly fault people for their character defects. Indeed, we would dislike this groom even if he had shown up at the church, if we knew, for example, that he did not truly love the bride and was only marrying her for her money. Many people may not be as virtuous as we would like but that does not justify our punishing them.

[63] Michael Corrado rejects Duff's attack of dualism, arguing that Duff's discussion is "rife with confusion" and "irrelevant to the law." Michael Corrado, *How to Do Things on Purpose: R.A. Duff's Intention, Agency, and Criminal Liability*, 11 LAW & PHIL. 265, 276 & n.27 (1992). As Duff's view of "attitude in action" is central to Duff's claims about practical indifference, an aspect of Duff's book that Corrado does not address, I will further explore Duff's alternative metaphysical view.

[64] MICHAEL E. BRATMAN, INTENTIONS, PLANS, AND PRACTICAL REASON (reprinted 1999).

As Bratman explains:

> I think we gain more insight into the kinds of agents we are by putting aside such attempts at reduction [of intentions into a belief-desire model] and taking seriously the idea

that intentions do not exist independently of actions, but rather are inextricably linked to actions. According to Duff, my intention today to send my children to public schools (I have no children currently) *binds* me to the future action of sending them to public schools. Bratman presents the more sophisticated view that my current intention helps me to navigate my life from now until the time I have school-age children, but recognizes that under the circumstances, many things may happen between now and then that may cause me to reconsider my intention. According to Bratman, intentions are mental states that co-exist and work with beliefs and desires.[65]

But Duff's odd view of forward-looking intentions as tied to actions is just the tip of the iceberg. In his attempt to tie current intentions to actions, he fails to distinguish between basic and complex actions. Take two different meanings of "accidentally."[66] First, X kills a donkey accidentally, meaning his bodily movement caused the donkey to be killed, as would happen if X's finger slipped on the trigger. Note here the basic action (pulling the trigger) was not intentional, nor was the causally complex action (killing the donkey) intentional. Now assume X shoots at a tree next to the donkey but accidentally hits the donkey. Here, the basic action is intentional, but the causally complex action is not. How is "intention" or "attitude" a part of action? And to which "action" does Duff refer? Does the actor reveal practical indifference in Example One where no intention exists? In Example Two where the only intention is the basic action but there is no intention to kill the donkey (the causally complex action)? Is there an attitude in action only in a third example where X shoots at the donkey to kill it?

Most importantly perhaps, one can accept Duff's attacks on dualism without abandoning Intentionality. This is, in fact, the move made by Daniel Dennett. Dennett recognizes the faults of

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that intentions are distinctive states of mind, on par with desires and beliefs. Intentions are conduct-controlling pro-attitudes, ones which we are disposed to retain without reconsideration, and which play a significant role as inputs into reasoning to yet further intentions.

Id. at 20.

[65] *See also* John Gardner and Heike Jung, *Making Sense of Mens Rea: Antony Duff's Account*, 11 OXFORD J. LEGAL STUD. 559, 567 (1991) (asking why Duff thought it worthwhile to raise the concept of bare intentions because they are unrelated to Duff's *mens rea* questions and are "infinitely more difficult").

[66] The donkey example is from J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1, 11 n.4 (1957), and is discussed in Moore, *supra* note 62, at 1579.

dualism,[67] but also joins Duff's affront to materialism.[68] Dennett, however, offers an alternative: consciousness. And it is consciousness, according to Dennett, that can:

- be the medium in which the purple cow is rendered;
- be the thinking thing, the *I* in "I think, therefore I am";
- appreciate wine, hate racism, love someone, be a source of *mattering*; and
- act with moral responsibility.[69]

Such an approach allows us to reject dualism yet embrace what the folk psychology of the law has long accepted—that people do have intentions, beliefs, and desires that exist apart from action. Thus, to accept Duff's view is to be committed to an odd set of metaphysics.[70]

3. The Ambiguity of Attitudes

But even if we could accept Duff's metaphysics, his theory is still empty. How are we to know the meaning of another's ac-

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[67] *See supra* note 42.

[68] Dennett tells the reader to imagine a purple cow, and then asks a series of questions about the imagined cow (whether it was facing left or right, whether it was chewing cud, whether its udder was visible, and what shade of purple was imagined). Dennett then discusses the relation of this imagined cow to the theory of materialism:

> There are events in your brain that are tightly associated with your particular imaginings, so it is not out of the question that in the near future a neuroscientist, examining the processes that occurred in your brain in response to my instructions, would be able to decipher them to the extent of being able to confirm or disconfirm your answers to [my questions]:
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> "Was the cow facing left? We think so. The cow-head neuronal excitation pattern was consistent with upper-left visual quadrant presentation, and we observed one-herz oscillatory motion-detection signals that suggest cud-chewing, but could detect no activity in the udder-complex representation groups, and, after calibration of evoked potentials with the subject's color-detection profiles, we hypothesize that the subject is lying about the color: the imagined cow was almost certainly brown."
>
> ...
>
> [S]ince you did imagine a cow (you are not lying – the scientists even confirm that), an imagined cow came into existence at that time; something, somewhere must have had those properties at that time. The imagined cow must be rendered not in the medium of brain stuff, but in the medium of ... mind stuff. What else could it be?

Id. at 26.

[69] *Id.* at 34.

[70] *Accord* Gardner and Jung, *supra* note 65, at 586 ("[In Duff's book,] [t]here is the substantial critical discussion of 'dualist' and 'behaviorist' philosophies of mind—which seem, on Duff's account, to include between them most of the philosophies of mind which have ever been seriously entertained, and leave Duff with an all but unintelligible position of his own.").

tions? To what extent is there an attitude of indifference encapsulated in an action? What is the relationship between the role of desires and beliefs and Duff's conception of an "attitude" within action? Consider my purchase of an ice cream cone. I desire food. I believe that an ice cream cone will satisfy my desire. I also believe that I like ice cream. Fighting my desire for food is my desire to lose weight. Nevertheless, the hunger wins and I resolve my competing desires with the intention that I go buy an ice cream cone.

Now, looking at my buying of the ice cream cone through Duff's eyes, what do we have? What attitude is revealed by my purchase? My desire for food? My love of ice cream? My desire to gain weight or my indifference thereto? Certainly, there are a myriad of beliefs and desires that one might attribute to my purchase, but my purchase, in and of itself, does not imply one attitude over another. In fact, some attitudes that might be attributed to my purchase, *e.g.*, I must desire to gain weight if I am opting for the hot fudge sundae, might be false (a competing desire won the mental battle or akrasia stepped in). Indeed, one cannot even infer that I am *indifferent* to gaining weight—perhaps I have made a deal with myself to skip dinner in exchange for this treat.

Thus, practical indifference cannot solve the opaque recklessness problem. The theory, as Duff presents it, rests on shaky metaphysics. Moreover, there is no way to choose what "attitude" an action reveals.[71] Rather, the meaning of the action is derived from the beliefs, desires, and intentions that accompany it. For someone who believes in the independent significance of desire-states, we turn to Kenneth Simons.

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[71] For further illustration, consider Duff's hypotheticals. As to the malicious wounder, she may in fact be indifferent to whether her victim dies. But take Stephen King's novel, *Misery*, where an author's "biggest fan" holds him hostage and eventually maliciously wounds him to keep him under her control. STEPHEN KING, MISERY (1990). It is not the case that this fan is indifferent to the author's death. Rather, she very much wants him to live.

Or take a look at the bridegroom. True, few people would want to be his bride. But think about Robin Williams' absent-minded professor character in the movie *Flubber*. FLUBBER (Disney 1997). Williams is so absent-minded that he has missed his wedding several times. He programs his robot to remind him of his wedding day, but alas, the robot "girl" is in love with Williams and intentionally fails to inform Williams of the date. So, when Williams, rather than being at the church, is at his lab creating "Flubber," it is not because he does not love his fiancé, or because his work means more to him than she does, it is simply because he forgot.

B. SIMONS' CULPABLE INDIFFERENCE

1. Simons' Proposed Mental State Hierarchy

Simons does not believe that culpable indifference is an "attitude" derived from action, nor does he argue that culpable indifference should be included within the definition of recklessness. Rather, Simons contends that the conventional hierarchy of purpose, knowledge, recklessness, and negligence, as adopted by the Model Penal Code, is "seriously inadequate."[72] Simons argues that the problem with the Model Penal Code's approach to mens rea is that it only acknowledges cognitive-based mental states and ignores conative-based (desire-based) mental states.[73]

Simons advances "culpable indifference," a mental state within the conative hierarchy, as the appropriate standard for threshold criminal liability. "An actor who is culpably indifferent to a harmful result neither desires the result nor desires to avoid it. Rather, she cares much less than she should about bringing it about."[74] In proposing culpable indifference, Simons imagines an actor very similar to my red-light runner: "Betty, while running a red light, does not notice a pedestrian about to cross the street. She . . . strikes and injures [the] pedestrian."[75] Simons reasons that, "Betty is culpably indifferent because her action of running a red light displays an attitude of indifference to the safety of others."[76] Thus, to Simons, the gap filler between pure recklessness and negligence lies in the complete disrespect for human life that the defendant exhibits.

Simons additionally contends that conative and cognitive levels of culpability cannot be ranked—that is, one can be more or less culpable on either scale but the scales cannot be combined.[77] Thus, Simons would not present "culpable indifference," a conative-based culpable mental state, to solve my opaque recklessness conundrum. I think that it is fair to say, however, that Simons would contend that in cases where the defendant has only an

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[72] Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 1994 J. CONTEMP. LEGAL ISSUES 365, 371.

[73] *Id.* Simons also argues for a third hierarchy based on conduct in addition to the cognitive and conative hierarchies he proposes. *Id.* at 377.

[74] *Id.*

[75] *Id.* at 365.

[76] *Id.* at 378.

[77] Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 478 (1992).

amorphous concept of the risk, but taking the risk displays an indifference to human life, the defendant is culpably indifferent but not cognitively reckless.[78] Thus, Simons would employ culpable indifference to solve my puzzle.

2. *Why Culpable Indifference Fails*

But I cannot rely on culpable indifference. First, I disagree with Simons' contention that the conventional hierarchy is fundamentally flawed. While he argues that purpose is a conative mental state, and knowledge and recklessness are cognitive mental states, I do not see any reason to split the baby this way.[79] Our criminal system is about prohibiting actors from causing certain harms.[80] With regard to any prohibited harm, when one is acting, there is really only one of two general categories of mental states that one can have toward that harm: the harm can be the actor's goal, *e.g.*, his purpose in so acting, or the harm can be a side-effect of the actor's actions. When the harm is a side-effect, the actor can believe that it is practically certain to materialize (knowledge)

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[78] Indeed, it appears that, for Simons, part of the draw of culpable indifference is that he finds cognitive recklessness to present the very problem discussed here:

> In order to be consciously reckless, must he believe that the risk is nontrivial? Substantial? In absolute terms, or relative to the potential justifications for his conduct? Must he be consciously aware, while he is driving, that a pedestrian is in the vicinity? Is it enough that he apprehend the general risks of running a red light—including the risk that that action might endanger pedestrians? Even if that suffices, must his general apprehension be conscious? Must it coincide with his action of running the red light? Even if he need only apprehend the general risks, is it enough that he understands the risks of unsafe driving to other persons, or must he more specifically understand that those risks include risks to possible pedestrians?

Simons, *supra* note 72, at 382; *see also id.* at 384 (elaborating further on the problems with recklessness that are discussed herein).

[79] *Cf.* Alexander, *supra* note 4, at 937 (arguing Simons is incorrect because recklessness as currently formulated encompasses belief and desire elements). In *Insufficient Concern*, Alexander contends that purpose and knowledge can be collapsed into recklessness. He argues that there is only a "single moral injunction":

> [C]hoose only those acts for which the risk to others' interests – as you estimate those risks—are sufficiently low to be outweighed by the interests, to yourself and others, that you are attempting to advance (discounted by the probability of advancing those interests).

Id. at 939. Opaque recklessness is as problematic for Alexander's conception of recklessness as it is for the Model Penal Code's definition. If the actor is not thinking through the risk he is presenting, he is not balancing his interests against the risk to others.

[80] This is a somewhat simplistic statement of our criminal justice system, lacking an explanation of culpability and wrongdoing. Nevertheless, I believe that the simplicity of the explanation above does not undermine my analysis of the workings of mental states.

or that it poses a risk of materializing (recklessness).[81][82] Thus, Simons' argument for a conative hierarchy cannot be based on the actor's choice to cause or to risk harm. Simons instead wants to punish those actors who just do not care enough.[83]

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[81] A few further points: Sometimes, an actor may purposefully create a risk of harm, thus being reckless. In such a case, a harm that materializes is not a side-effect, but rather is the result of an intentional endangerment. Additionally, of course, an actor could be completely unaware of the harm, in which case the actor would be negligent if his lack of awareness was unreasonable.

[82] Simons views willful blindness as a form of culpable indifference, arguing that the willfully blind satisfy a counterfactual inquiry: we are punishing them because these actors would have acted the same had they known of the existence of the material element. Simons, *supra* note 72, at 381-82. Recently, Alan Michaels has adopted a similar view, advocating the new (or missing) mental state of acceptance to fill the gap between knowledge and recklessness in cases of depraved heart murder and willful blindness. *See generally* Michaels, *supra* note 10. Michaels notes problems with both the Model Penal Code's conception of willful blindness as knowledge of a high probability (without a belief to the contrary) and the common law's purposeful avoidance doctrine. *Id.* at 976-96. Instead, he endorses a counterfactual question of whether a reckless defendant would have continued in the face of certain harm. *Id.* at 961. I discuss my objections to any form of counterfactual inquiry *infra* notes 87-90 and accompanying text.

While Michaels notes theoretical and practical problems with the common law's test, its focus on the culpability of the actor for choosing not to know, is, I believe, the appropriate view of willful blindness. It is the criminal law's way to prevent an actor from avoiding liability by capitalizing upon the difference between knowledge and recklessness. The only difference between knowledge and recklessness is the degree of certainty that the agent has. Sometimes, an actor views it as in his best interest not to confirm his suspicions—to remain uncertain—so as to be able to claim that he did not "know" something. Willful blindness prevents an actor from doing so. It allows us to punish him as if he were practically certain where he makes the choice not to be.

For further discussion of willful blindness, see *id.*; Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351 (1992); David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999).

[83] I am not opposed to the term "indifference" to the extent that it embodies a conscious decision to disregard the interests of others. Whether we employ the term, *recklessness*, *indifference*, or Larry Alexander's *insufficient concern*, all three seem to encompass the disrespect for others that makes reckless conduct culpable. To me, culpable indifference is exhibited by the choice to engage in reckless conduct, the willingness to risk the bad side-effect of one's action. It is the outcome of the actor's practical reasoning that is problematic. Moreover, to the extent that a conscious choice is involved, all recklessness is indifference to me, and some reckless choices, because of the degree of their unjustifiability, exhibit extreme indifference. I understand Simons' position to be different as indifference to him is merely a desire-state. I also take his complaint with indifference to involve the amount of weight that others' interests are or are not given in the actor's practical reasoning. I am opposed to Simons' conception of indifference insofar as it allows for punishment in the absence of conscious choice, as I discuss in the text, but I am likewise unconvinced that he is placing responsibility on the correct aspect of the actor's practical reasoning, as I discuss *infra* note 96.

Second, and perhaps most troubling about culpable indifference, is that it snares merely negligent actors in its net.[84] Indeed, unlike the red-light runner I hypothesize, Simons' Betty does not necessarily advert to any risk of harm: she merely adverts to running the red light. Simons believes actors who are negligent but nevertheless would have engaged in conduct had they adverted to the risks involved are culpably indifferent.[85] However, these actors have merely failed to advert to the risks. They have not chosen to create such risks.[86]

And we should not punish someone based on the prediction that he would have chosen to do wrong had he been presented with the choice. Any counterfactual inquiry fails for two reasons.[87] First, it is indeterminate. Indeed, imagine Jane who is

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[84] Simons, *supra* note 72, at 377 ("[Culpable indifference] is often described as a form of recklessness (though it could also be characterized as a form of negligence)."). The force of this argument presupposes that the Model Penal Code is correct in distinguishing between recklessness and negligence with regard to the threshold for criminal responsibility. I am deeply troubled by responsibility for negligence, as negligence does not involve a culpable choice.

[85] *Id.* at 380-81; *see also* Alexander, *supra* note 4, at 937-38 (also reading Simons as seeming to be willing to punish the negligent). Jeremy Horder explicitly endorses punishment for those who under a counterfactual inquiry would have acted culpably:

> [I]n a case of inadvertent wrongdoing, one is found to have been strongly indifferent, [when] one is found to have been quite prepared to go ahead and commit the wrongdoing even if one had seen the possibility of it. In such circumstances, what reason could there be for attributing any normative significance whatsoever to the mere fact of one's (chance) inadvertence?

Jeremy Horder, *Gross Negligence and Criminal Culpability*, 47 U. TORONTO L.J. 475, 508 (1997). Michaels' conception of acceptance likewise endorses a counterfactual inquiry. Michaels, *supra* note 10, at 961.

[86] As Duff discusses at one point:

> 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 responsible agents, and thus bring ourselves within the proper reach of the criminal law. . . .
>
> 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, nonrational 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.

DUFF, *supra* note 39, at 154-55.

[87] Alan Michaels defends counterfactual inquiries, arguing that they are already employed in instances of recklessness and entrapment. Michaels, *supra* note 10, at 1020-24. As for recklessness, Michaels claims that by judging the defendant against what a law-abiding person would do, we have adopted a counterfactual inquiry. *Id.* at 1020-21. This is unconvincing. With recklessness, we are judging the defendant against a standard, not punishing him based on the prediction of his actions under

driving her car, and fails to notice John in the crosswalk because she is too self-absorbed. Now, Simons would say that if Jane would have continued on anyway, had she in fact seen John, she should be punished as culpably indifferent, rather than simply negligent. But let us assume a little history between Jane and John. Jane, in fact, hates John. Indeed, Jane was driving to John's house, where she planned to take out her shotgun and murder John. Now, if we are playing the "what if" game, why stop at culpable indifference? Isn't it in fact more likely that Jane would aim at John and purposefully (not culpably indifferently) run him over?

Second, the counterfactual analysis conflicts with our concept of free will. We cannot punish people based on predictions as to what they would have done; we punish people based on the culpable choices that they have made.[88] Many actors in a given set of circumstances might resort to crime, but we will not punish them until they have actually made that choice and acted on it. Responsibility should not rest on the prediction of future choices.[89] And, thus, sometimes unfortunately, we must endure the fact that bad people do not choose to commit bad acts and we are stuck with accepting that punishment is not appropriate.[90]

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different circumstances. Regarding entrapment, Michaels avers that predisposition is determined by a counterfactual inquiry into whether the defendant would have committed the crime if the government had not become involved. *Id.* at 1021-24. This, however, is a causation question. The defendant has committed the crime—we are not predicting greater culpability. Rather, we are questioning whether the government's intervention caused a crime that otherwise would not have occurred. Our reliance on counterfactuals in determining causation questions does not justify relying on counterfactuals to punish defendants based on their hypothetical actions had they possessed beliefs they did not actually possess. Moreover, our use of counterfactuals in resolving causation questions is itself problematic. *See* Kessler, *supra* note 14, at 2197-99; LEO KATZ, BAD ACTS AND GUILTY MINDS 233-36 (1987).

[88] Samuel Pillsbury also endorses indifference; however, his rationale is quite different from Simons.' Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105 (1996). Drawing on cognitive science literature, Pillsbury contends that failure to perceive relevant facts may itself be a culpable choice. I contrast Pillsbury's view with my own *infra* section III.C.

[89] *See* Alexander and Kessler, *supra* note 10 (advocating the elimination of incomplete attempts as they are premised upon the prediction of future wrongdoing and not the commission of a culpable act).

[90] For a further discussion of this bitter pill that we must swallow, see Alexander, *supra* note 4, at 950-52.

There are certainly those who worry that not punishing for indifference breeds indifference. Indifferent actors seem to be rewarded for training themselves to be negligent. This objection can actually be divided into two different concerns. The first is that the

Finally, query whether Simons can overcome two problems with his theory that he identifies. The first problem is vagueness.[91] How do we tell if someone is "culpably indifferent?" For example, imagine that David is an emergency room doctor who believes that it is critical for him to be at work on time. Let us now imagine two individuals, Victor and Peter. Victor is a pedestrian who will be hit and killed by David if he runs the light. Peter is a pedestrian who has been hit by a reckless driver. Peter's life, let us assume, will be saved if and only if David gets to work on time. Of course, David does not know about Peter (or Victor) at the time he chooses to run the light. He just believes that he can save lives if he gets to work on time. Is David culpably indifferent? Does he care less about death than he should? Does he care less about injured pedestrians than he should? Does he care less about Victor than he should?[92] Indeed, isn't it a far simpler ques-

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law, as formulated, may encourage indifference. We may be telling people that it is better for them to be indifferent than for them to parse through the risks they are presenting. What should be noted about this concern is its consequentalist nature. Rather than being concerned with punishing culpable action, this objection fears that we are promoting unwelcome behavior. Our project, however, should first be to determine who the culpable actors are. If indifferent actors with bad characters do not warrant punishment, we simply cannot punish them. The criminal law serves to prohibit bad conduct; it is not a device to make citizens more virtuous. *Accord* United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) ("[T]he proper use of the criminal law in a society such as ours is to prevent harmful conduct for the protection of the law abiding, rather than to purify thoughts and perfect character.").

The second approach to take towards indifference is to say that it is culpable, but how can we do that? Indifference is a character trait, an emotion or lack thereof, that the actor may or may not have any control over. To argue that all indifferent actors deserve to be punished because they care too little about their fellow man is to punish them for a trait of character, and commits us very often to punishing the negligent. The hallmark of criminal responsibility is culpable choice and these actors have not chosen to risk or to cause harm. *But see* Pillsbury, *supra* note 88 (discussing Pillsbury's view of culpable choice).

Now, the rejoinder to this argument may be that people do have control over their characters and how they are formed. But here, note that the argument does not place responsibility on the actor at the time of the indifferent risking of the harm but for the "culpable choice" of choosing to become an indifferent person. Nevertheless, we still have the problem that remains from before: those who may embark on a path of "learned indifference" may not advert to the specific risks that they will eventually run. Indeed, imagine the difficulty in pinpointing such a culpable choice where character is formed over time. *Cf.* Sverdlik, *supra* note 23, at 141 (doubting the ability to pinpoint a prior culpable choice in most instances of negligence).

[91] Simons, *supra* note 72, at 390-91.

[92] Not to split semantic hairs, but the concept of indifference implies awareness. *See* WHITE, *supra* note 61, at 39. Thus, David cannot be indifferent toward Victor, whom he does not foresee. Rather, we must think of David as indifferent to human

tion to look at David's choice, not his attitude about that choice, to determine if he is a culpable actor?

Of course, this hypothetical just touches on the inherent vagueness of the culpable indifference standard. How can we punish based not on the actor's choices to do wrong but on his feelings about the wrong that he is causing? Don't feelings cut both ways? Can't we wish that we did not have to kill, yet kill purposefully?[93]

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beings at large, or pedestrians (at the very least). Under the Model Penal Code's formulation, we can easily say that David's risk is unjustifiable, as he is not responding to an emergency call or traveling in an ambulance. Rather, David's choice to run the light is based on his speculation that a patient—like Victor—is awaiting him. The indifference standard, however, points the other way: it is hard to say that David is indifferent to injured pedestrians. But if David, who runs a light because he thinks his work is more important than following traffic laws, is not the kind of insensitive actor whom indifference should capture, who is?

[93] Certainly David's is an easy case if David runs the light because he is on the way to a Knicks game—here attitude and choice converge. But sometimes, they do not. What if David is an excessive worrier and regretfully runs a red light because he is late to pick up his son, imagining that he will do permanent psychological damage to his son if he is not at the school on time? His attitude may not be indifferent, but his choice is nevertheless wrong.

Indeed, Judge Bellacosa's dissenting opinion in *People v. Roe* displays just how improvident it is to inquire into the feelings of a defendant. 542 N.E.2d 610, 616-20 (N.Y. 1989). There, the defendant played "Polish roulette" with a friend, killed him, and then mourned his friend's death, clearly regretting his action. Judge Bellacosa argues that a murder conviction for recklessness demonstrating extreme indifference to human life is the wrong result, given the defendant's love of his friend. Here, feelings certainly depart from choice. If we care about the defendant's choice to risk the death of his friend, the murder conviction holds. The defendant pointed a gun at his friend and fired. This willingness to risk the death of another warrants the murder conviction, no matter how unhappy the defendant may be with the result of his conduct.

Curiously, Alan Michaels appears to agree with Bellacosa's approach to extreme indifference, arguing that the key question is whether the defendant would have fired the gun had he known that the death of his friend would result. Michaels, *supra* note 10, at 1016. But why should we care what the defendant would have done? The defendant, aware of the risk of death to his friend, fired the gun. The fun was in the risk creation. That he later regrets it (and we can assume he had hoped not to kill his friend) in no way undermines the extremely culpable choice that was made. Moreover, to the extent that Michaels relies on *Commonwealth v. Malone*, 47 A.2d 445 (Pa. 1946), to pull at our intuitions that Russian roulette does not always exhibit a depraved heart, the court's use of "fuzzy math" turns a negligence case into one of recklessness—(if the court had credited Malone's testimony that after he inserted the bullets he did not spin the chamber, it would not have estimated the substantiality of the risk as it did). It is Malone's negligence, in his failure to appreciate the substantiality of the risk, that tells us he did not act with depraved indifference, not his later regret.

The second problem identified by Simons is the "significance in action" problem.[94] That is, feelings about causing harm are passive, so how does one tie culpable indifference to an act? Simons argues that perhaps this desire (or lack thereof) must be a factor in the actor's practical reasoning in performing the action.[95] Such an approach, however, collapses culpable indifference into our current conception of recklessness. The actor is then making a choice that involves disregarding the interests of others.[96] Alternatively, Simons asserts that the rela-

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Russian roulette is the paradigmatic case of indifference. However, this indifference is demonstrated by the actor's choice to take a horrible risk, not by the actor's feelings about that result. Russian roulette players want their friends to live, if only to play another round.

[94] Simons, *supra* note 72, at 391-94.

[95] *Id.* at 392.

[96] Michael Bratman has evaluated the role of expected (if unwanted) side-effects in an actor's practical reasoning. BRATMAN, *supra* note 64, at 139-64. As he explains, "a rational agent intends all and only those elements of a chosen scenario that are either the intended end of that scenario or are cited as means to that end." *Id.* at 156. But despite the fact that the side-effect is unintended, it is still chosen: "[w]e may assume that [the actor] will in fact consider this bad upshot in his deliberation and so will choose a scenario containing that upshot. But he still need not intend that upshot." *Id.* at 161. Thus, bad side-effects are part of our practical reasoning and part of our choice. Thus, if we tie indifference to a failure in the actor's practical reasoning, we are tying indifference to the actor's reckless choice.

To the extent that Simons is contending that the actor is being blamed for devaluing the interests of others in his practical reasoning, another problem arises. Assume David runs the red light to get to the Knicks game, and he recognizes that there is a substantial risk of harm of to others. But his desire to go the game is so great, that he decides to run the light anyway. I would contend that David is reckless because, although he appreciates the substantiality and unjustifiability of the risk, he chooses to disregard it. But in deciding to disregard the risk of harm to others, David's practical reasoning might go a variety of ways: David might value his desire to go the Knicks game at 100 and the potential harm to others at 10 (in terms of his desire to avoid it). Or he might value the Knicks game at 10, but the harm to others at 9. I would contend that it is the choice, to pick the game over others' interests, whatever the independent values of these variables, that makes David's conduct culpable. Simons may be placing blame earlier in the calculation—to the amount of weight given to the interests of others. David is indifferent because he is not giving the appropriate weight to the interests of others. But let us assume that David decides not to run the light, still valuing others' interest at 9, but not a basketball fan, weighing the interest of the game at 1. Here, David does not run the light, but his value system is still off. Does Simons wish to punish David for stopping at the light because he gave the interests of others too little weight? Alternatively, is David indifferent if he reasonably assesses the value of others' lives at 100 but grossly overvalues the Knicks game at 1000 and thus runs the light? If so, the indifference is being manifested in choice, not in the value judgments informing that choice.

tionship need only be causal.[97] Michael Moore has noted the limitations of such a relationship between desires and actions. For example, when a man forgets his appointment with his girlfriend:

> . . . this failure to arrive at the appointed time shows that he does not care, not that he adopted this behavior as a means to show the woman that he no longer cares. His emotion, or lack of it, explains his behavior, but does not mean that he chose, even unconsciously, that specific behavior as the means of achieving some particular desire.[98]

A causal account, moreover, is inherently problematic, as it opens the floodgates to problems of determinism. Everything is caused—are we responsible for everything then? Or nothing?

Hence, we should not collapse opaque recklessness into the character defect of not caring sufficiently about the risk created.[99] Not only does such a theory allow punishment for one's character but it also opens up a Pandora's Box of its own. But since we cannot rely on the character fault of indifference, we must now reconsider the definition of recklessness set forth by the Model Penal Code.

III. FROM OPACITY TO TRANSLUCENCY: PRECONSCIOUS AWARENESS

As we have discussed above, the opaquely reckless actor adverts to some sense of risk but fails to formulate a mental state with a detailed description of the risk he is presenting. He knows that running a red light is "dangerous" but fails to think through why it is dangerous. Nevertheless, does the meaning of "dangerous" exist in the back of the defendant's mind? Should we, therefore, rethink whether an actor must "consciously disregard" the substantial and unjustifiable risk?

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[97] Simons, *supra* note 72, at 392.

[98] Moore, *supra* note 62, at 1631.

[99] For the argument against legal perfectionism, see Heidi M. Hurd, *Moral Rights and Legal Rules: A Natural Law Theory*, 6 LEGAL THEORY 423, 434-40 (2000) (arguing that "a theory of legislation that calls upon us to will our reasons for action calls upon us to do the impossible" and that "[t]o mandate [a specific form of virtue] to the exclusion of others, and then to punish persons who substitute other forms for the one that is mandated, would violate the principle that punishment should track moral desert, for it would impose sanctions on those who, in fact, do their (aretaic) duty"). *But cf.* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995) (arguing for virtue ethics as a rationale for punishment).

A. THE PRECONSCIOUS

Let us first take a brief, but necessary, detour and look at the act requirement.[100] The act requirement mandates that the actor engage in his conduct voluntarily, meaning, *inter alia*, that he must be conscious as opposed to sleeping, in shock, hypnotized, and the like.[101] We require that the act be voluntary because we feel that to hold an actor properly accountable for his conduct, the conduct must truly be "his."[102] We want the actor to have engaged in reflective self-awareness and have reasoned through his decision to act. Consequently, to be attributable to the actor, the conduct must be a voluntary, willed bodily movement.[103]

Now, when we choose to engage in an action, are we choosing every discrete part of that action? In other words, when we choose to act, what is the content of our intentions? For example, while I am typing this paper, I think of typing the words. I do not focus on every finger movement—from pressing down on one key to moving my hands to reach another key—nor do I think about each letter that I am typing. Now, some of this behavior is learned. When I began typing, I did focus on each letter and in fact had to memorize its place on the keyboard. Now, if I choose to, I can focus on each individual letter that I am typing. Yet, I find that I can type far faster if I just focus on the words, and not on the individual letters. So when I will myself to type this paper, what is the content of my intention—is it to type the word, to type the letter, to move my finger . . .?

In *Act and Crime*, Michael Moore addresses this question. He asks:

> If we form an intention to throw a curve ball, and that causes us to throw one, are the discrete movements of our fingers across the lacing on the ball something we also intend? Or are those movements simply events that are caused by our intent to throw a curve ball and that themselves cause the ball to move in a curved flight, but that are not themselves intended?

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[100] For the rationale behind the act requirement, see generally DRESSLER, *supra* note 16, § 9.01[B], at 70-71; MOORE, *supra* note 26, at 46-59.

[101] *See* MPC § 2.01 (requiring voluntary act); DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 90-93 (1987) (discussing involuntary conduct); *see also* People v. Newton, 8 Cal. App. 3d 359, 376 (Cal. Dist. Ct. App. 1970) (holding unconsciousness, even if the defendant physically acts, "a complete defense to a charge of criminal homicide").

[102] *See* DRESSLER, *supra* note 16, § 9.02[C][2], at 72-74.

[103] *See id.*

. . . .

> More specifically, how do we draw the line between what a person intends, and what some functionally defined homunculus within him 'intends' to 'do' in order to achieve what the whole person desires?[104]

In addressing his question, Moore begins by defining "consciousness." He states that by consciousness, he means "the kind of awareness we have as an experience."[105] Moore distinguishes both (1) the "preconscious" when routine actions have become so habitual that we need not focus on them, but we can call them to mind,[106] and (2) the "unconscious" in the Freudian sense.[107] Moore suggests that we learn many behaviors that we do not monitor consciously.[108] Yet Moore concludes that although actions may have become so routine that they remain in our preconscious—and in fact, may be hard to focus on in our conscious awareness—the objects of our intentions are discrete bodily movements.[109] As Moore contends, even when we think about complex actions, we are "dimly aware" of the more discrete bodily movements that we are undertaking.[110] Moore adds that "even when this dim awareness of the movement is absent, it is nonetheless accessible to consciousness. It is preconscious in the sense of easily called to mind if attention is focused on it, and so remains part of a person's mental states."[111]

This account clearly seems to be correct. With many complex movements, we do not focus on each discrete bodily movement, just on our over-arching goals. Yet we may choose

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[104] MOORE, *supra* note 26, at 150-51.

[105] *Id.* at 151. For further discussion of consciousness, consider:

> In sum, consciousness entails present experience, which is such as necessarily to involve a measure of putative intuitional contact with the physical world, whether of positive or null or merely counterfactual-conditional variety. For some reason as yet undivined, tuning out intuitionally on the physical world is tantamount to tuning out on Reality; that is, on the voice of Reason—which keeps track of Truth. . . . It seems the function of consciousness must be to link us attentively to the physical world that contains us.

BRIAN O'SHAUGHNESSY, CONSCIOUSNESS AND THE WORLD 84 (2000).

[106] Daniel Dennett uses the term "subconscious," rather than "preconscious." *See* D.C. DENNETT, CONTENT AND CONSCIOUSNESS 128 (1969). I see no reason to choose between these terms as it is clear both Dennett and Moore are describing the same thing.

[107] MOORE, *supra* note 26, at 152.

[108] *Id.* at 151-52.

[109] *Id.* at 154.

[110] *Id.*

[111] *Id.*

to focus on each individual movement. It is simply the fact that these behaviors have become so routine, so easy for us, that we need not pay attention to them. Thus, when someone is driving, many of his actions are part of his preconscious. The driver no longer has to focus on how to stay in his lane, how to turn the wheel, etc. The intention to cause these various bodily movements exists at the preconscious level.

But, turning to the question of *mens rea*, the driver is also *purposefully* engaging in the conduct of driving. Are all the intentions involved in *purposefully* driving monitored at the conscious level, or does the preconscious have a role here too? Now, in keeping with the fact that the driver's discrete intentions regarding individual bodily movements exist in his preconscious, aren't the rules of the road, the sense of risk, the heuristics of when to slow down, likewise monitored at the preconscious level? The driver need not think "red means stop." Or if he is in the right lane and he sees a biker up ahead, he may immediately try to get into the left lane. The thought—"the biker might fall" or "the biker's presence will slow me down"—need not enter the driver's head. Rather, the driver sees the biker and he concludes: change lanes. This lane change is purposeful, even if all of the deliberations leading up to the act occur on a preconscious level. Thus, in the same way that Moore concludes that the object of our volitional intentions are discrete bodily acts but all that we may be consciously aware of is to "throw the curve ball," likewise, we may have discrete beliefs, desires, and intentions, yet all we consciously think is "get out of the way of the bike."

B. THE PRECONSCIOUS AND OPAQUE RECKLESSNESS

Now let us turn to the opaquely reckless actor. The opaquely reckless actor is conscious of the fact that she is dismissing a dangerous risk; she just has not stopped to think about why it is dangerous. But does the knowledge of why it is dangerous exist in her preconscious mind?

Let us consider the opaquely reckless actor from the *ex ante* perspective. Imagine we could stop the driver just as she hits the gas to run the light but before she hits the pedestrian. If asked what she has consciously chosen to do, she will reply: to engage in risky or dangerous activity. If further inquiry is made, the driver can immediately prattle off the reasons why running the light is dangerous. She might say that it is dangerous because she might cause an accident or hit a pedestrian. The ac-

tor does not focus on each and every consequence of her actions; nevertheless, the reasons why her actions are risky are immediately accessible to her.[112]

Contrast, however, the negligent driver, who diverts her attention from the road to change the radio station, never thinking that she will fail to look up in time to avoid running a red light (and thus killing a pedestrian).[113] If the negligent driver does not advert to any risk (which, clearly she should have, as that is what makes her negligent), *ex ante*, nothing exists in her mind about any risk that she is running. Sure, she may have background knowledge about why it is a bad thing to run red lights, but asking her why it is dangerous to run the red light *ex ante* is no different than asking you, the reader, as you sit in your desk chair, why one should not be running red lights.

Moreover, an actor with a preconscious appreciation of the risk reacts differently than a negligent actor does. The opaquely reckless actor may be upset that the harm she risked actually materialized—in the same way that a purely reckless actor might react. The negligent actor, on the other hand, is likely to be surprised by the materialization of the harm.[114]

Now that we have descriptively captured opaque recklessness—the actor consciously chooses to engage in risky behavior and preconsciously recognizes why the behavior is risky, another question follows. Should we hold the opaquely reckless actor responsible for the preconscious aspects of her decision-making? The answer to this question depends on whether the preconscious description informs her practical reasoning. If the preconscious aspect is part of her *choice*, she may fairly be held

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[112] What if the actor thinks her conduct is risky, but not because it risks the harm that ultimately materializes? In such an instance, the actor is only negligent vis-à-vis this harm. I discuss this limitation to opaque recklessness *infra* notes 119-20 and accompanying text.

[113] On any given occasion, changing the radio station might demonstrate opaque recklessness. However, if the actor truly fails to recognize that she is creating a risk of harm or if she recognizes that changing the radio station takes her eyes off the road but believes that she is paying sufficient attention to notice any traffic signals, she is only negligent.

[114] Certainly, we have all had the experience where we have acted negligently, perhaps fortunately adverting to the harm before it materializes. For instance, one might be driving and have failed to see a jaywalking pedestrian. The shock and horror, as one discovers the fact that she put the pedestrian at risk, is quite a different experience than one's reaction to the materialization of those harms knowingly risked.

accountable for it. Moreover, if we do think that the opaquely reckless actor can be held accountable for the description of the risk that exists in her preconscious, then we should reconsider whether there is any difference in culpability between purely reckless and opaquely reckless actors.

To examine the opaquely reckless actor's practical reasoning, let us first turn to Julia, who goes shopping to buy clothing and returns with a red shirt. As discussed above,[115] when we say that Julia intends to buy the red shirt, we may not substitute another description of the red shirt in stating Julia's intention. That is, just because Julia intends to buy a red shirt does not mean that Julia intends to buy a product made by child slave labor, even if, in fact, the red shirt is a product of child slave labor.

But perhaps I cheated a bit before. The different descriptions of Julia's purchase—the various "references"—were all of equal specificity. But, may we say that if Julia intends "to buy a red shirt" that Julia intends "to buy clothing?" Can we move from the specific to the general? We can—because we are substituting "senses" not "references." That is, when Julia thinks of shirt, *she* thinks of clothing. "Shirt" has the same "sense" (meaning) as "clothing." Thus, if Julia's mother has forbidden her to buy any more clothing, Julia is justly held accountable for buying a shirt because the two descriptions refer to the same object to Julia.

Why may we substitute the two senses? To fully grasp this, consider the following from Michael Luntley:

> The fundamental insight [that drives the whole conception of sense and reference] is that if you could factor out grasp of the sense of a singular term from grasp of the sense of whole sentences, you would have no account of the rational power of the sense of the singular term. Thinking of an object is normative. To think of an object is to have your cognitive attitude to it subject to normative rational evaluation. The normativity of thought consists in the way a thought is systematically connected to others.[116]

Luntley's illustration is helpful here. He supposes that in the middle of a crowded, rowdy meeting, he says, "That heckler should be ejected." Luntley then suggests:

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[115] *See supra* section I.A.

[116] MICHAEL LUNTLEY, CONTEMPORARY PHILOSOPHY OF THOUGHT: TRUTH, WORLD, CONTENT 238 (1999).

> Suppose now that my purported reference and thought about the individual is not responsive to an enquiry from you as to whom I mean. Suppose you ask if I mean the man with the red hair, or the man behind the tall security guard, or the man who ..., etc., and in response to all these questions I simply shrug and insist that I simply mean that that heckler should be ejected. So you then ask if I mean that one there, and you point; or you ask if I mean the one next to that one there, and you point to a different place. Suppose I still refuse to see any of this as relevant to the thought I expressed[....] You have offered a series of thoughts to which you took the truth of my original claim to be sensitive, and I refuse point-blank to acknowledge any such sensitivity. In the face of my attempt to hold my original claim insensitive to such further thoughts, it is tempting to wonder whether I could have really meant anything at all by my original claim.
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> ...
>
> The suppositions that I have considered are all ways of revealing the way in which thought about an object must be sensitive to a cluster of thoughts that, as it were, provide the triangulation that fixes thought on a particular. You cannot, for example, demonstratively think about an object without having some idea of how it stands above, behind and to the side of other things, for if you did not have some idea about that, you would have no idea of its space-occupancy at all.[117]

Applying Luntley's reasoning to Julia, when she intends "to buy a red shirt," she does not simply intend to buy a shirt. Rather, the shirt has meaning to her. It is the one on the rack, with the sale tag, with the square collar, etc. And thus the choice to buy the shirt entails all of these descriptions, all the different senses or meanings that she gives to the intentional object. All of these meanings, not just one, inform Julia's choice.

Luntley shows us that when the red-light runner consciously engages in activity he considers to be "dangerous," the thought—"this is dangerous"—must mean something to the driver. To be rational, the driver, when asked, "Why is this dangerous?", must have an answer—"This action is dangerous because it risks lives, injury, and property damage." Given that the actor must have a sense of what he means when he thinks that an activity is dangerous, it must figure into his practical reasoning about whether to engage in the activity. He may have habitualized the concept of dangerousness, as including risking harm to other people's lives or property, and therefore, these specific risks need not consciously enter his decision-making.

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[117] *Id.* at 236.

Nevertheless, it is still appropriate to view this underlying conception of dangerousness as part of the actor's decision-making because "dangerous" must mean something to the actor. It does not exist in the actor's mind independent of its meaning.

In fact, consider the simplicity of this claim in a different context. Some theorists have advocated that we do not need the doctrine of transferred intent.[118] They assert that while the defendant intended to kill *A*, but actually killed *B*, one need not *transfer* the defendant's intent because the defendant's intention was to kill a person, which is what the statute forbids. Now, if the defendant claimed, "well, I only thought that I intended to kill *A*; I never intended to kill *A*," such a claim would seem ludicrous. Of course, the defendant, in choosing to kill *A*, also chose to kill a person (and if he did not think so, there are rationality problems here that would interfere with transferring the intent). The reason why we may hold the defendant accountable is because the defendant's sense of *A* is that *A* is a person. Thus, as Luntley tells us, thinking about an object is normative. We must have a sense of what the object is, and that sense is more than just the one description. So the defendant when he chooses to kill *A*, chooses to kill a person, and may be held accountable for it.

Consequently, when an actor chooses to engage in "dangerous activity," the actor chooses to do what "dangerous activity" means to her. Because this definition of dangerous activity is part of the actor's decision-making, it is fair and appropriate to hold her accountable for this definition, just as if she had explicitly referenced the meaning of the dangerous activity in her conscious decision-making.

One caveat: the determinative factor here is that the actor's understanding of "dangerous" includes the appropriate appreciation of the underlying risk. A defendant is merely negligent if he (1) did not realize his action was dangerous but should have; (2) realized it was dangerous, but thought the risk of harm was not substantial; (3) realized it was dangerous but defined dangerous in a way that did not include the harm that occurred.[119] This actor, while engaging in "dangerous" activities, is

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[118] *See, e.g.*, DRESSLER, *supra* note 16, at 109; Moore, *supra* note 18, at 267-68.

[119] When dangerousness means only injury or property damage to the actor, we cannot say he was reckless as to the risk of death. "We should say that two propositions are the same when the senses (meanings) of the words expressing them are be-

not reckless vis-à-vis the requisite harm; rather, he is merely negligent. However, where the actor's sense of the risk does include, even on a preconscious level, the harm sought to be prevented, there is no reason to treat him any differently than the purely reckless actor.[120]

C. THE PRECONSCIOUS AND RESPONSIBILITY

Thus far, we endeavored to describe opaque recklessness, finding that it is part conscious, part preconscious, decision-making. We have also explored whether this kind of decision-making is sufficient for responsibility. To this point, however, all of our examples have focused on conduct that is monitored at the conscious level. I consciously choose to type; the driver consciously chooses to drive; the opaquely reckless actor consciously chooses to engage in dangerous behavior. But what of the actor who makes the decision entirely at the preconscious level?

Here, the question is whether we should hold someone responsible for risks to which he never consciously adverts, but simply dismisses while on automatic pilot. For instance, when driving, an actor makes many preconscious choices, without noticing a pedestrian, another car, or a cyclist. Yet the actor may engage in conduct that imposes substantial and unjustifiable risks on these people. Should this risk-taking, created without ever being a part of the actor's consciousness, be considered negligence or recklessness?[121]

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lieved to be the same by the holder of the mental states in question." Moore, *supra* note 18, at 259. Thus, typically, it is fair to say that if *A* intends to remain "an unmarried man," he also intends to remain "a bachelor." *Id.* at 250. But, if the actor does not hold the two words to mean the same thing, the senses may not be substituted. For example, the Pope may intend to remain an unmarried man, yet not consider himself a bachelor. (This example is from Gilbert Harman, *Doubts about Conceptual Analysis, in* PHILOSOPHY OF MIND 45 (M. Michael & J. O'Leary-Hawthorne eds., 1994)).

[120] I would also not draw a distinction between pure recklessness and opaque recklessness in the context of depraved heart murders. In those situations where the opaquely reckless actor has acted with extreme indifference to human life, there is no reason not to hold her responsible for murder. In some circumstances, the fact that the description of the harm was opaque may suggest that the actor was not extremely indifferent. But the maniacal driver who thinks his actions are fun because they are extremely dangerous should not escape full responsibility because it was only at the preconscious level that he appreciated the risk of death he was creating.

[121] Larry Alexander has previously considered this issue:

> Michael Moore, in private conversation, pressed me on what kind of consciousness or awareness of risk I require for recklessness. In particular, can a defendant be reckless if

In this area, the discussion of sense, on which we hung our hat for resolving opaque recklessness, is of little utility because the question is not whether given one conscious "sense," another preconscious "sense" may be substituted. Rather, the question is whether choices made by the preconscious actor are a type of choice for which we may hold the actor responsible. This turns on the importance of consciousness. As noted before, we do not hold actors accountable for actions taken while sleepwalking and the like. Why is consciousness so fundamental?

Consider Michael Moore's solution to the question of whether one is responsible for unconscious action. For example, should someone be executed for dreaming about killing the emperor?[122] Moore concludes that responsibility for unconscious "actions" violates the moral principle that "'ought' implies 'can'":

> Whatever else the principle of responsibility might include, it should include the power or ability to appraise the moral worth of one's proposed actions. A person has such ability only if he has moral and factual knowledge of what he is doing and is able to integrate the two to perceive the moral quality of his action. One who lacks this ability cannot fairly be blamed because, although he is acting intentionally, he does not know that what he is doing is wrong.[123]

Thus, for us to believe that the actor is responsible, she must be able to reason through her actions and choose to do wrong. Where there is no choice; there is no responsibility.

But preconscious decision-making is different than punishing for the unconscious. The problem in punishing the unconscious lies in the failure of the actor to have any control over whether she does wrong. But the preconscious is another mat-

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he "believes" that a risk exists, in the sense that he is disposed to act responsively to it, but is not fully conscious of that risk? We have often had the experience of driving successfully down a road for several minutes without being able to recall anything about our driving. We obviously adverted to the risks along the way and responded to them, but we were not fully conscious of them at the time and later cannot recall them. Aspects of riding a bicycle and other habitual activities frequently fall below the level of full consciousness. I am inclined to deem such low-level consciousness of risk to be sufficient for recklessness culpability, although I would want to consider the issue more fully than I have. My principal reservation about deeming low-level consciousness of risk sufficient for recklessness is that the actor may not have an adequate sense of the risk's magnitude, as opposed to its presence, to regard him as culpably indifferent.

Alexander, *supra* note 4, at n.62.

[122] Moore, *supra* note 62, at 1619 (discussing this example of Freud's).

[123] *Id.* at 1624 (footnotes omitted).

ter. There, the actor is, at some level, aware of the risk presented, or is she? Such a question depends on two different meanings of the word, "aware," as Daniel Dennett has pointed out.[124] Dennett reveals that when we use the term, "aware," we may mean two different things.[125] The first sense we have of the term is introspective; the second is behavioral.[126] A man swerves to avoid a tree, and he can report to us that he was aware that a tree was in his way and therefore he moved.[127] Likewise, a bee may swerve to avoid a tree, obviously aware that an obstacle is in its way, but as Dennett questions, "[w]as the bee aware of the tree *as* a tree, or just as an obstacle?"[128] The man is aware of the tree both as an introspective reason for avoiding the tree and as a behavioral reason to avoid an obstacle.[129] The bee, on the other hand, does not introspect and decide to avoid the tree, but behaviorally, the bee is aware of some obstacle (the tree).[130] Applying this analysis to our driver on auto pilot, he is not aware in the introspective sense of the curves of the road, but is aware in the behavioral sense of these curves, thus his ability to navigate them.[131]

Which level of awareness should suffice for responsibility? Well, Moore dismissed responsibility for the unconscious because it violates "'ought' implies 'can.'" Does the preconscious fall victim to the same problem? It does. As Dennett notes, animals can only be aware on the behavioral level, not on the introspective level, because they lack the propositional attitudes that people have.[132] That is, the introspective sense of awareness can be defined as:

> A is [introspectively aware] that *p* if and only if *p* is the content of the input state of A's speech center at time *t*.[133]

Whereas, behavioral awareness is defined as:

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[124] DENNETT, *supra* note 106, at 116-18.

[125] *Id.* at 114-31.

[126] *Id.* at 116.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 117-18.

[132] *Id.* at 120 ("People are [behaviorally aware] of things, but *also* are [introspectively aware] of things, a possibility ruled out in the case of dumb animals.").

[133] *Id.* at 118.

> A is [behaviorally aware] that p at time t if and only if p is the content of an internal event in A at time t that is effective in directing current behavior.[134]

Thus, when we act from the preconscious, we are only behaviorally aware of obstacles. To be introspectively aware, we must trigger our speech center and recognize these obstacles as what they are: curves in the road, pedestrians, or other drivers. Without triggering our speech centers, we are not reasoning through our actions and are not appraising their moral worth. To hold us responsible in such cases would be to violate "'ought' implies 'can.'"[135]

But we have another reason why the preconscious actor might be responsible. She chooses to delegate her decision-making to her preconscious. If one chooses to leave one's child in the care of an unconscious (asleep, comatose?) babysitter, one is responsible for that choice. Should one be responsible for leaving one's actions in the care of one's auto pilot? Indeed, consider *State v. Baker*,[136] where the court held that the delegation of control over the car's speed to the cruise control sufficed to count as a voluntary act.[137] Why should an actor be less responsible for those risks that she creates while on auto pilot, given her voluntary choice to be on auto pilot (or at least her ability to prevent being on auto pilot while driving)?

But this gets us back to the classic conundrum discussed earlier. That is, when looking for a prior culpable choice, we must find (1) that such a prior culpable choice was made and (2) that at the time that choice was made, the actor acted with the degree of culpability necessary for responsibility for the harm that later occurred. Does the driver choose to daydream? If she does, does she advert to the fact that in so doing, she might later fail to recognize a substantial and unjustifiable risk?

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[134] *Id.*

[135] The preconscious and negligence are very similar in this regard. The preconscious actor, if she turns her attention to it, can avoid harm. Likewise, the negligent actor, but for some unreasonable calculation or lack of foresight, can also avoid harm. In both cases, however, the conscious mind fails to tell the actor that there is anything wrong with the actor's current behavior. Thus, neither is culpable.

[136] 571 P.2d 65 (Kansas Ct. App. 1977).

[137] To be sure, the decision in Baker is problematic, as the court unconvincingly distinguishes the case at bar from brake and accelerator failures by the defendant's delegation to an inessential device. *See* Douglas Husak & Brian P. McLaughlin, *Time-Frames, Voluntary Acts, and Strict Liability*, 12 LAW & PHIL. 95, 104 (1993). The analogy is useful nevertheless.

Probably not. Thus, while the driver whose cruise control sticks may be held responsible for the strict liability crime of speeding, we could not punish her for recklessness, absent a choice beyond the choice to use the cruise control.

Finally, consider Samuel Pillsbury's twist on our view of choice, perception, and awareness.[138] Pillsbury, an indifference proponent, disagrees with the standard conception of choice and argues that our reliance on awareness is misplaced because it rests on the assumption that perception is passive. He contends that, "[r]ecognizing that perception represents a learned activity brings it closer to our conception of choice."[139] Thus, since we choose how much attention to devote to any given subject, we may properly be faulted for our perception deficits when we lack a good reason for our failure to recognize obvious risks.[140] Consequently, when we "choose" not to pay attention because we are "indifferent" rather than because we have a good reason for our attention failure, Pillsbury argues this indifference, even without advertence to the risk, should be sufficient for both manslaughter and depraved heart murder.[141]

Why may we be faulted for our failures of perception? Pillsbury argues that responsibility is appropriate regardless of whether (1) the decision about whether to pay attention is made at the time of the act, (2) our "perception priorities" were determined in the past, or (3) our "perception priorities" are unchosen products of our environment and the like.[142] Considering these possibilities in turn, each has its own failings. First, examine Pillsbury's argument that the actor is responsible for not paying attention because "he chooses" not to pay attention. Well, who is the "he" here? Is it the actor's conscious decision or is it a preconscious decision?[143] If we make many choices on

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[138] *See generally* Pillsbury, *supra* note 88.

[139] *Id.* at 143.

[140] *Id.* at 152 ("Culpability should depend on [the actor's] reasons for perceptive failure, not on the failure itself.").

[141] *Id.* at 206-13.

[142] *Id.* at 144-53.

[143] Compare Michael Moore's discussion about the psychology of perception:

> Recent work in the field has shown how much intelligent information preprocessing one does before the information is sent up the optic nerve to the brain. Such information processing gives the appearance of being inferences drawn from beliefs that are formed from the stimuli one receives. However, this does not mean that one actually *knows* these inferences. One's personal self does not know these things because the extended memory,

the preconscious level, or as Michael Moore explored—the unconscious level—the question still remains whether these choices are the kinds of choices upon which to rest moral responsibility. When we "choose" not to pay attention, are we doing the choosing in a morally significant way?

Even if this choice were properly attributable to the actor, it falls victim to the same problem as Pillsbury's second argument. If we make self-conscious choices about our "perception priorities," we still must find the requisite degree of culpability. When an actor learns to be selfish, to what extent does he appreciate that he might cause future harm? Perhaps we could accept Pillsbury's claim if it were limited to distinguishing between types of negligent actors—selfish inadvertence may be worse than clumsy inadvertence. But Pillsbury is willing to replace recklessness with negligence plus indifference. Under Pillsbury's regime, an actor who embarks on a path of selfishness, never recognizing that this selfishness might result in death to others, may find herself guilty of manslaughter.

Finally, Pillsbury anticipates our next complaint—that indifference, or the roots thereof, may be an unchosen character trait. Untroubled by the steepness of this slippery slope, Pillsbury accepts that "perception priorities may be neither consciously nor freely chosen."[144] He views this determinism as no different than punishing people for their motivations, for which he believes we are responsible. I, however, would dispute this view of responsibility.[145] So long as we are rational and not compelled, we have the ability to evaluate our choices and decide whether to violate the law's commands. That I am lazy or poor or greedy may make my choice somewhat harder than it is for others, but this choice is still completely within my control. But to blame people for why they have not seen risks—their perception priorities—when these priorities may themselves be unchosen, conflicts with any conception of free will worth having.

Pillsbury, I believe, would argue that I have placed far too great an emphasis on the conscious/preconscious distinction.

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the device by which one integrates new beliefs or other mental states into one's personal self, is not operative.

Moore, *supra* note 62, at 1608.

[144] Pillsbury, *supra* note 88, at 151.

[145] *Id.* at 150-51.

Drawing on Dennett and others, he shows us that "[t]he line between aware and unaware mental activity appears very much a matter of degree."[146] But this difference in degree is where responsibility rests. We are not responsible for our heartbeats, even if our body and mind control them, nor are we responsible for our dreams, despite our unconscious control over them. What we are responsible for are those actions that we can do something about—where we can decide whether to act. And to have this sort of control, we must be aware, in the introspective sense, of what we are doing.

We have now considered whether preconscious decision-making is itself sufficient for responsibility. We have concluded that consciousness plays a critical role, realizing that placing responsibility on the preconscious violates "'ought' implies 'can.'" We have also explored alternative means for holding the preconscious actor responsible—looking to prior culpable choices and to failures in perception priorities. We have concluded that any prior choice likely lacks the requisite degree of culpability and that the "choice" of perception priorities is elusive. However, nothing in this Section undermines the fact that the opaquely reckless actor should be considered reckless whenever the actor recognizes on a conscious level that her behavior is risky and is aware on a preconscious level *why* her conduct is risky. We now turn to the doctrinal implications of our conclusions about opaque recklessness.

IV. DOCTRINAL IMPLICATIONS

A. MODIFYING THE MODEL PENAL CODE

We have determined that opaque recklessness suffices for criminal responsibility where the opaquely reckless actor (1) consciously adverts to the dangerous nature of her conduct and (2) preconsciously understands that her conduct is dangerous because it presents a substantial and unjustifiable risk that either a material element exists or will result from her conduct. Under these circumstances, there is no principled reason to distinguish opaquely reckless actors from the purely reckless.

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[146] *Id.* at 147.

Hence, we need to change the definition of recklessness in the Model Penal Code to encompass opaque recklessness.[147]

First, note that the Code itself acknowledges that preconscious acts are not the same as conscious acts. In defining voluntary acts, the Code makes a distinction between those acts that are "conscious" and those acts that are "habitual," although both suffice for voluntariness.[148] Given the Code's acknowledgement that the preconscious is not the same thing as the conscious, the use of the word "conscious" in the definition of recklessness excludes opaquely reckless actors.

If we wish to abandon consciousness as a prerequisite, how should we structure recklessness? There are three requirements that the definition must meet. First, the definition must be sufficiently broad to capture opaque recklessness. Second, it must maintain the distinction between reckless conduct and negligent conduct. Currently, a reckless actor "consciously disregards" a risk, while a negligent actor "should be aware of a risk."[149] Any definition must maintain recklessness' subjectivity. Third, the definition cannot encompass decision-making that is entirely unconscious or preconscious, else we violate the principle that "'ought' implies 'can.'"

With these requirements in mind, let us consider three possible options. One possible approach would be to simply delete "consciously." Then, the definition of recklessness would read:

> A person acts recklessly with respect to a material element of an offense when she disregards a substantial and unjustifiable risk that a material element exists or will result from her conduct, yet nevertheless engages in such conduct.

Does this definition meet the three requirements? Applying the second requirement first, the use of the word "disregard"

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[147] It should be noted preliminarily that the Model Penal Code's definition is currently not a model of clarity. For example, query whether the actor must consciously disregard both the risk's unjustifiability and its substantiality. *See* Treiman, *supra* note 4, at 365; Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955 (2000) (arguing that "'substantial' should not be read as an adjective modifying 'risk,' but rather as an adverb modifying 'unjustified risk'"). Whatever the answer to this question, we have discovered that the actor need not "consciously disregard" it.

[148] *See* MPC § 2.01(2)(d); *see also* Bruce Ledewitz, *Mr. Carroll's Mental State or What is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 80-81 (2001) ("the inclusion of habitual acts as voluntary suggests that voluntary acts need not manifest self-awareness").

[149] *See* MPC §§ 2.02(2)(c)-(d)

seems necessarily to imply awareness. How can one disregard that which one does not know?[150] Hence, using the word, "disregard" still requires the requisite subjective mens rea. Does it cover opaque recklessness without encompassing unconscious/preconscious decision-making? It does seem to cover opaque recklessness. The opaquely reckless actor does disregard a substantial and unjustifiable risk, but note that she does it at just the level that should not alone suffice for responsibility—in her preconscious. Thus, this definition does not distinguish between opaque recklessness and preconscious/unconscious decision-making.

What if we try to parallel the definition of recklessness with that of negligence and use "awareness?" The definition of recklessness would then read:

> A person acts recklessly with respect to a material element of an offense when she is aware that there is a substantial and unjustifiable risk that a material element exists or will result from her conduct, yet nevertheless engages in such conduct.

Here, we immediately run into the confusion that Dennett has identified. What conception of awareness do we mean? If we mean introspective awareness, this definition only encompasses the purely reckless and not the opaquely reckless. If we mean behavioral awareness, once again we cannot distinguish between opaque recklessness and preconscious/unconscious decision-making. Accordingly, this definition fails the third requirement.

Finally, why not create a new mental state?[151] In the same way that the Model Penal Code allows willful blindness with an explicit definition of what that encompasses (to be equated with knowledge), we can carve out opaque recklessness, give an explicit definition, and equate that with recklessness. Thus, we might add the following to the Code:

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[150] *See also* WHITE, *supra* note 61, at 31-46 (arguing that indifference and recklessness require awareness).

[151] One argument against carving out opaque recklessness is simply the concern that we theorists keep creating new mental states, thus turning the Model Penal Code's simplicity into a patchwork of mental states as confused as the common law. I am certainly amenable to drafting the definition of recklessness in order to encompass opaque recklessness. However, as I am unaware of any way to capture highly culpable opaquely reckless actors in the definition of recklessness without also ensnaring preconscious actors in the net, I advocate the addition of this mental state.

> Where the evidence does not establish that the actor consciously disregarded the risk, but the actor (1) consciously recognized that her conduct was dangerous; (2) at some level appreciated that the reason why her conduct was dangerous was because it presented a substantial and unjustifiable risk that a material element existed or would result from her conduct;[152] and (3) she nevertheless chose to engage in the conduct, the actor is reckless. The actor is not reckless where she (1) did not realize her action was dangerous but should have; (2) realized it was dangerous, but thought the risk of harm was not substantial or unjustifiable; or (3) realized it was dangerous but defined dangerous in a way that did not include the harm that occurred.

This definition preserves the subjectivity of recklessness, covers opaque recklessness, and does not include decision-making at the preconscious/unconscious level. This definition should be included within the Model Penal Code so that opaquely reckless actors do not escape responsibility for those risks they take, however opaque their choices.

B. PRACTICAL CONCERNS

The question that naturally follows is whether such a test is workable. What jury could possibly understand the instruction above? Although the "cute" response would be to question whether juries ever understand instructions, let me take a more serious approach. First, opaque recklessness aids prosecutors making charging decisions. While prosecutors may often bring charges of recklessness based on circumstantial evidence of the risk involved, opaque recklessness allows them to charge culpable defendants in those cases where the actors claim not to have focused on the risk. For example, if a defendant runs a stop sign while talking on his cellular phone and kills a small child, perhaps the prosecutor should think twice about whether this is simply negligence.[153] After all, if the defendant recognized he should not be talking on a cell phone, the next question is why. Because he might become distracted? And why is that wrong? Because he might cause an accident that results in death. While I do not mean to imply that all accidents are actually instances of opaque recklessness, there are those cases where an actor should be held accountable—where the actor is aware that he is

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[152] *But see supra* notes 4 and 147 (discussing opposing views of whether both substantiality and unjustifiability are and should be required).

[153] *See supra* note 11 and accompanying text.

presenting some risk and preconsciously recognizes the specific risk presented.

But my definition is more than just an aid for prosecutors. While this definition seems difficult in the abstract, this criticism may be made of all the *mens rea* definitions contained in the Model Penal Code. We must remember that these rules are applied in specific cases to particular facts. So let us return to the defendant on the cell phone. He is charged with manslaughter because he was reckless vis-à-vis death. He counters, arguing that he never foresaw that talking on a cell phone would cause him to kill a child. On cross, the prosecutor manages to elicit admissions that the defendant recognized that talking on a cell phone might distract him, that he might miss traffic signals, and the like.

The jury then applies the test: First, the evidence does not establish that the defendant consciously disregarded the risk of death, but there is evidence that (1) he consciously recognized that his conduct was dangerous (he knew talking on a cell phone distracted him); (2) on some level he appreciated why his conduct was dangerous: it presented the substantial and unjustifiable risk that he might kill someone (if the jury finds that the defendant recognized that distractions lead to accidents, accidents lead to death); and (3) he nevertheless chose to engage in the conduct. Now, the negligence caveat: (1) Did the driver fail to realize that he might kill someone even if he should have? (2) Did he fail to appreciate the substantiality (meaning the probability that death might result) or the unjustifiability of the risk he was presenting? (3) Did he recognize that his conduct was dangerous but fail to recognize it was dangerous because it might lead to an accident causing death? The defendant will argue that he did not realize, even preconsciously, that death would result; the prosecutor will contend the defendant was opaquely reckless; and the jury will decide.

Obviously, such an instruction will only be given in those cases where it is necessary, just as a willful blindness instruction is only given in specific kinds of cases. But such an instruction is necessary if we want to guarantee that those opaquely reckless actors who preconsciously appreciate the risks involved are held accountable for their actions and do not slip between the cracks in the Model Penal Code.

C. THOUGHTS ON FURTHER IMPLICATIONS

The conundrum I set forth to address here is opaque recklessness. That is, I challenged the Model Penal Code on a descriptive level, advancing the theory that risks are often not "consciously" disregarded. I then addressed the normative implications of my theory, contending that while preconscious decision-making is not sufficient for liability, opaque recklessness, which involves conscious and preconscious thought, is as culpable as, and should be punished equally to, pure recklessness.

The lessons learned in solving opaque recklessness may present both new problems and new solutions for other areas of the law. I will address these areas briefly. My task, however, is one of identifying areas, not of resolving all the implications of this piece.

1. Actus Reus: Habit

In my discussion of the preconscious, I averred that a preconscious choice should not be sufficient for responsibility. But what implications does my view have on habit? If habit is an act monitored at the preconscious level and the preconscious is not sufficiently part of decision-making for responsibility, should habit be considered an "involuntary" act?

At the outset, note that most habitual conduct has a conscious aspect to it. While I may type the letter "t" out of habit, I am very conscious of each and every word that I am typing. Thus, to the extent that habit coincides with a conscious mental state, punishment certainly seems appropriate. Moreover, causally complex crimes are committed at the conscious, not the preconscious level. We do not habitually pull the trigger, break and enter, force intercourse, or sell narcotics.[154] Indeed, while the separation of *actus reus* and *mens rea* promotes a dualist view of personhood, the bottom line is that both elements entail the same sense of consciousness. Since the Model Penal Code requires consciousness for purpose, knowledge, and recklessness,[155] habitual conduct will be accompanied by a conscious *mens rea.*

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[154] Zimmerman contemplates that habitual criminal behavior is possible and concludes that in such cases, advertence is unnecessary. This assertion, however, is a mere aside to his attack on finding negligent people to be morally responsible for the harms they have caused. *See* Zimmerman, *Moral Responsibility, supra* note 27, at 422.

[155] *See* MPC §§ 2.02(2)(a)-(c).

Thus, the problematic instances are those involving negligence and strict liability. In these cases, the actor is neither consciously choosing to act, nor is she consciously choosing any result. We punish littering, running stop signs, and speeding, without the purpose to do so. Since punishment for these crimes is typically justified on consequentalist grounds at the outset, these grounds will likely supply sufficient support for punishing habit. Alternatively, query whether the actor's acquisition of the habit suffices to serve as the voluntary act. However, for those of us that adopt a choice-based view of responsibility, whether we focus on the *mens rea* or the *actus reus*, the lack of consciousness involved in these cases is very problematic.[156]

2. *Mens Rea: Purpose*

But some will think I have acted too hastily in limiting the implications of my view to negligence and strict liability. What if the defendant claims to have intended to pull the trigger but not to have truly focused on the death that would result? Can the defendant claim this result was not his "conscious object?"[157]

Frequently, we probably do not confront this question head-on because it just sounds ridiculous. What jury will believe a defendant's claim that he intended to fire the gun at X but did not intend X's death? Additionally, in dealing with purposeful action, we automatically engage in the substitution of senses, without even acknowledging that is what we are doing. As mentioned above, those theorists who argue that we need not transfer intent because the defendant always intends to kill a person—which is all that the statute requires—are trading on the different senses of the defendant's conscious object.[158] That is, we say the defendant intended to kill Z; the defendant believed Z to be a human being; and therefore the defendant intended to kill a human being. Finally, query whether the common law's presumption that one intends the natural and probable consequences of his acts, however abused currently to

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[156] I do not mean to say that speeding is not worthy of punishment. However, we typically speed purposefully or knowingly—we are often very aware of how fast we are going. But we are also given tickets on those rare occasions when we simply fail to notice how fast we are going. I believe these tickets to be only consequentially justified.

[157] *See* MPC § 2.02(2)(a) (defining "purpose").

[158] *See* discussion *supra* note 118 and accompanying text.

encompass negligence, once was a crude articulation of the substituting of one sense for another.[159] Hence, it seems that we have a handle on purpose and the preconscious.

Nevertheless, in a recent article, Bruce Ledewitz has struggled with just this dilemma.[160] He tries to answer the age-old question: what was Mr. Caroll's mental state?[161] *Commonwealth v. Carroll* is a classic first-degree murder case.[162] The defendant, Mr. Carroll, got into a fight with his wife, grabbed a gun from the windowsill at the head of their bed, and fired two shots into the back of his wife's head.[163] Carroll argued on appeal that he had not premeditated the murder or even intended to kill her.[164] To support his claim, Carroll presented psychiatric testimony about his wife's abusive personality (and behavior towards their children) and about the "reflexive" nature of his actions.[165] While the majority affirmed Carroll's conviction,[166] Ledewitz takes Carroll's claim seriously and asks:

> While consciousness might be considered a different mental state from intention, consciousness also does not seem to be satisfied by Carroll. At the time of the shooting, Carroll did not have a conscious object; nor was he aware that death would result; and he was not consciously disregarding the risk—that is, if the words conscious and aware are meant to describe an internal mental state of some kind. . . . But Carroll was not aware at the moment that he was shooting his wife, or that he was shooting at all.[167]

For his part, Ledewitz takes an extreme approach to resolving this question. Ledewitz, drawing on Wittengenstein, argues that intentions are evanescent: we do not "intend" as an experience; we can lie to ourselves and others about what intentions

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[159] *Cf.* Ledewitz, *supra* note 148, at 102-104 (advocating abandoning intention in favor of this presumption, among others).

[160] *See id.*

[161] *See id.*

[162] 194 A.2d 911 (Pa. 1963).

[163] *Id.* at 913-14.

[164] *Id.* at 916-17.

[165] *Id.*

[166] *Id.* at 918.

[167] Ledewitz, *supra* note 148, at 90. Ken Simons asks a similar question regarding the *mens rea* of Bernhard Goetz: "In the suddenness of the encounter, his mind may have been a blur. Did he therefore lack the 'conscious' object of killing [the victims]?"). Kenneth W. Simons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM. L. REV. 1179, 1194 (1989) (reviewing GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988)).

are; and we can intend without self-reporting.[168] He concludes that "[i]n light of the evanescence of intention, its use in criminal law seems unwarranted in general and certainly unwarranted as the critical test of liability and punishment."[169] He advocates instead the reliance on presumptions.[170]

Is such a drastic conclusion warranted? We can agree with Ledewitz that we often have "a jumble of thoughts, suppressed thoughts, fears and wishes," without abandoning our view of mental states.[171] Philosophy of mind and cognitive science certainly have a great deal to teach us about how humans think, and materialists certainly pose challenges to the law's folk psychology.[172] Nevertheless, the easy cases abound. We frequently know when we act intentionally. Many a murderer contemplates her killing, selects her weapon, and specifically recounts the act.[173]

On the other hand, *Carroll* is a hard case. The problem with *Carroll* is trying to understand in the first instance what was going on in the defendant's mind. Was it totally blank? The question of when behavior is reflexive is a difficult one. Take

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[168] Ledewitz, *supra* note 148, at 94-97.

[169] *Id.* at 97.

[170] *Id.* at 101-07 ("There was such a general presumption at common law—that someone was presumed to intend the natural and probable consequences of his actions. If broadly utilized, this presumption could operate precisely to avoid fruitless inquiry into mental processes that we really do not understand and probably do not care about.") (footnotes omitted). Interestingly, Ledewitz's argument rings of Duff: "intention is already present in the natural and probable consequences of actions" *id.*, but Ledewitz, unlike Duff, does not advance his own metaphysical theory—he simply abandons the search for intentions.

[171] *Id.* at 101.

[172] *See* Andrew E. Lelling, Comment, *Eliminative Materialism, Neuroscience and the Criminal Law*, 141 U. PA. L. REV. 1471 (1993).

[173] Moreover, to the extent that Ledewitz is motivated by the scenario he sets forth at the beginning of his paper—one in which two men spray bullets in a police station, but the judge dismisses the attempted murder count because the prosecution could not show intent to kill, Ledewitz, *supra* note 148, at 71-72—we need not abandon intentions to solve this problem. Certainly these men were aware of the officers inside when they acted, irrespective of whether they acted because "they hated all police officers" or they were just "mad at things in general." *Id.* at 73. In such a case, these men were reckless. Ledewitz's intuition that they should be treated as if they had attempted murder is correct because as here, where the defendants' behavior manifests an extreme indifference to human life, the defendants should be punished the same as if they had succeeded—as murderers. We do not need to determine whether they intended to kill, or abandon intent because it fails us in this instance. We simply need to abandon our attachment to results.

People v. Newton.[174] There we see very purposeful action. The defendant, after being shot in the stomach by a police officer, shoots another officer and then takes himself to the hospital.[175] There, perhaps because the injury was physical, the appellate court was willing to credit science and deal with the repercussions of viewing this very purposeful behavior as reflexive.[176] Carroll, a case from the 1960s, was not willing to venture into the psychological realm, where an abusive wife might create a reflexive defensive action by her husband. Indeed, the court's hostility toward psychiatry is pronounced.[177]

So, maybe Carroll did act out of reflex, and I am not troubled by the consequences of this view.[178] If he acted out of reflex, he is no different than Huey Newton or sleepwalkers and other automatons. Whether these actors have not "acted" or are simply excused is a matter of line drawing, and the subject for others' work. But whatever Mr. Carroll's mental state, it presents the rare case where action is causally complex, purposeful, and reflexive,[179] and it should not scare us into abandoning mental states altogether.

3. Mens Rea: Knowledge

Having discussed the ramifications of my view on both habit and purpose, let me close by considering the implications for knowledge. More than any other mental state, knowledge requires awareness at the conscious level. The reason is simple. Knowledge without awareness is negligence. We "know" that we should not run red lights, should watch for pedestrians, and should leave signs out when we mop the floor, but if we fail to attend to these tidbits at the moment we act, we are negligent. We have failed to draw on our background knowledge. Thus, the preconscious, it seems, has little relation to knowledge.

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[174] 8 Cal. App. 3d 359 (Cal. Dist. Ct. App. 1970)

[175] *Id.* at 370-73.

[176] *Id.* at 376.

[177] 194 A.2d at 917-18.

[178] Ledewitz does not seem to consider the idea that the court got the answer wrong: "Carroll shot his wife without previously thinking about it, in a kind of blank mental state. For the court, these 'facts' satisfied the standard of intent to kill." Ledewitz, *supra* note 148, at 104.

[179] This question truly highlights the thin line between *actus reus* and *mens rea*. Consciousness is part of one's act and part of one's mental state.

While this conclusion is correct, it may not seem so at first. For example, what of the federal drug laws that require only knowledge that the substance is a drug, and thus allow conviction on the defendant's false belief that the drug is marijuana, when it is actually cocaine?[180] Certainly, this approach has the tenor of an opaque recklessness problem.

To explore this issue, let us assume that Mary possesses cocaine, but believes it to be marijuana. Federal law will only require that Mary know that she possesses a drug, but the prosecutor need not prove that Mary knew the type of drug. While this conclusion may seem obvious at first because the statute itself only requires that the defendant know that she possesses a controlled substance,[181] fairness concerns are raised by the fact that the type of drug is a factor in the length of the sentence.[182]

We do say that if Mary believes she is carrying marijuana that she also believes that she is carrying a drug, thus substituting one sense of the object (marijuana) for another (a drug). But the fairness concern at the heart of the matter is not that Mary is opaquely reckless about what she is carrying. Rather, Mary is operating under a mistake of fact. Thus, given the potentially disparate penalties involved, we must assess whether Mary is to be punished for what she did or what she believed she was doing. However one wants to answer this question, the preconscious is not implicated.

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[180] *See, e.g.*, United States v. Kairouz, 751 F.2d 467, 468 (1st Cir. 1985) ("What is of essence to establish this element of the offense is that the substance be controlled..., *not which* one of the proscribed substances it happens to be."); United States v. Lopez-Martinez, 725 F.2d 471, 474-75 (9th Cir. 1984) (stating that the defendant must believe that she possessed a controlled substance but need not know "the exact nature" of the substance"); United States v. Morales, 577 F.2d 769, 776 (2d Cir. 1978) ("[T]he law is settled that a defendant need not know the exact nature of a drug in his possession to violate § 841(a)(1), it is sufficient that he be aware that he possesses some controlled substance.").

[181] 21 U.S.C. § 841(a)(1) makes it a crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

[182] *See* Richard Singer, *The Model Penal Code and ~~Three~~ Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 151 (2000) (arguing that this approach "led to appalling results . . .. [A defendant] who, according to government concession, believed that he was possessing heroin, and not cocaine, would have been given the much lengthier sentence for cocaine possession because his mistake as to the type of drug was irrelevant, since the type of drug was not part of the crime.").

What if Mary only knows that she is carrying a drug, but does not know which one? If the statute only requires knowledge that one possesses a controlled substance, Mary's belief is not opaque. If, however, the statute requires a belief that one is carrying cocaine, and Mary only knows that she is carrying a drug, we are back to a willful blindness question. Given Mary's belief that she is carrying a drug (or even just something nefarious), if she does not have a belief, but only a guess, as to the item's identity, she is reckless. Whether that recklessness should suffice for knowledge brings us to the problem of willful blindness. But the preconscious is not figuring into this dilemma.[183] It is not the case that Mary knows the content at a preconscious level; rather, she suspects the content at a conscious or preconscious level. We will not resolve the problem by inquiring into the depths of her mind, but by making a determination as to how the concept of willful blindness is best captured.

V. CONCLUSION

Opaque recklessness, where the actor knowingly engages in risky behavior but fails to think through the specific harms she is risking, presents a problem for the current criminal law. Descriptively, the Model Penal Code fails to capture this concept. Normatively, the Model Penal Code should.

Our current framework lacks the tools to solve this problem, and conceptions of indifference lead us astray. Thus, we must create a new mental state in the Model Penal Code, one that captures the actor's conscious decision to engage in dangerous behavior as well as the actor's preconscious appreciation of the exact risk imposed. This new mental state is morally equivalent to the Model Penal Code's conception of recklessness, because when the actor decides to engage in dangerous conduct she not only understands on a preconscious level the potential harms involved, but her decision to engage in the risk necessarily includes this preconscious appreciation.

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[183] *See also supra* section I.B (distinguishing opaque recklessness from willful blindness).