Making Sense of Mens Rea:
Antony Duff’s Account

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1. The Prospects for a Theory of Criminal Culpability

Few legal principles have attracted such extensive academic and judicial attention in recent years as the principles of mens rea in the Anglo-American criminal law.1 Should the legal concept of intention be read as embracing confident foresight of results? Should the legal concept of recklessness be interpreted as extending to unforeseen risks? Should the mens rea for murder be expanded beyond intention, as that concept is properly understood? Should it be possible to commit a criminal attempt recklessly? These questions, and other related ones, have been endlessly and vigorously debated in the law journals and textbooks, and the higher courts have kept us busy with their ever-changing answers. Where mens rea is in issue, indeed, many lawyers have been uncharacteristically eager to swap their judicial or juristic hats for philosophical ones. They have raised questions about the status, accessibility and moral significance of the human mind. They have invoked fictitious examples and counterexamples. Some have even given philosophical-sounding names to their own or each other’s positions, classifying criminal lawyers as ‘subjectivists’ and ‘objectivists’.

Unfortunately, much of the actual product of these flirtations is too superficial or too fragmentary to count as theory. Many of the pivotal examples and counterexamples are poorly constructed, being laden with irrelevant information, or indeterminate just where it matters. And the conclusions of arguments by example are often misrepresented, being stated, for instance, without an essential ceteris paribus clause. The dispute between ‘subjectivists’ and ‘objectivists’, meanwhile, is largely about a single issue—the propriety of imposing criminal liability for negligence—and we are invariably left to work out for ourselves how the different views on that issue might integrate with, say, various possible justifications of the special significance of intention in the criminal law, or with competing critiques of the distinction between the mens rea for attempts and the mens rea for completed crimes, or with diverse models of the so-called

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1 For an excellent survey of the main issues, with extracts from the literature, see C. M. V. Clarkson and H. M. Keating, Criminal Law: Text and Materials (2nd ed, London 1990), 147 ff.
'general defences' available in the criminal law. A truly theoretical perspective on mens rea would, of course, have something to say about these issues as well, but 'subjectivism' and 'objectivism' apparently do not, even if their advocacy often does come hand-in-hand with certain general attitudes to the relative importance of mens rea elements in criminal law.

In recent years, though, one legally inclined philosopher has been trying to work out the kind of genuinely theoretical perspective on mens rea which, in the English-speaking world at least, philosophically inclined lawyers have been so slow to offer. In a series of important articles, moral philosopher Antony Duff has dealt with the definition and moral significance of 'intention', with the moral distinctions which the law endeavours to replicate in employing the language of 'recklessness', with the role of various mental incapacities in defining the boundaries of mens rea, with the nature of mental states in general and their role in action, and with the application of his proposals to various specific criminal offences. He has never lost sight of the specifically legal problems, and seems to have mastered the distinctively lawyerly skills involved in interpreting cases and statutes. But he has always paid thorough attention to the general coherence of his position, to its moral basis, to the precision of his examples, to the very close relationships among the various issues he addresses, and to the many contradictions and incongruities embedded in prevailing legal and legal-academic opinion.

Many of Duff’s arguments have now been organized into a concise but wide-ranging book, Intention, Agency and Criminal Liability, in which the close theoretical connections between the various parts of his endeavour become even more apparent. Although Duff’s book is advertised as a 'philosophical introduction', one is immediately reminded of H. L. A. Hart’s 1968 volume Punishment and Responsibility, which provided an influential synthetic perspective on the same set of issues at much the same level of abstraction. Many writers, of course, have in the meantime pursued the problems about criminal punishment which Hart identified in that book, and in that respect Punishment and Responsibility has several worthy successors already. It is fair to say, however, that Duff’s new
book represents the first really sustained attempt, in the English language at
least, to follow in Hart's footsteps so far as the problems of criminal culpability
are concerned, albeit armed with a very different, and sometimes more plausible,
set of moral principles. But whereas Hart's book merely reproduced a range of
his seminal articles, Duff has set his own arguments out afresh, allowing him to
make the various connections among his ideas yet more explicit. Even those who
have read and absorbed all of Duff's past contributions on the subject will find
much of great value in the book, including some important new claims.

Perhaps in an effort to enter into the spirit of writing a 'philosophical
introduction', and perhaps also to catch the interest of lawyers right from the
outset, Duff starts by outlining a few leading cases from English and Scottish
criminal law, and isolating, with a clarity which few legal textbooks can match,
the mens rea problems which they raise. These cases, and many others, crop up at
various points in the argument, but not merely as illustrations of fact-scenarios.
Rather, the book takes the various judicial arguments very seriously, and tries to
give credit, where due, to the ingenuity of the legal mind. For this reason,
philosophy students would certainly find Intention, Agency and Criminal Liabi-
liity very useful as an introduction to (not to say exposé of) the use of first
principles reasoning in the law. Law students, on the other hand, might well find
it rather heavy going as an introduction to the relevant philosophical themes. Not
because the book is badly written—far from it—but because its text is dense and
intricate. These issues, the book demonstrates, are vastly more complex than
most lawyers are wont to suppose.

There is, however, a serious tension running through the book, which arises
from the rather relaxed mingling of arguments from legal sources and arguments
from first principles. Duff tries to further two projects. First, there is the
clarification of certain recognized mens rea terms. Second, there is the implicit
defence of certain distinctions as important moral distinctions which ought to be
recognized in law. More than once one has the impression that the established
mens rea terms are not in fact the ideal terms by which to mark the moral
distinctions which Duff wants to see entrenched. This is particularly striking in
the case of recklessness. The cluster of concepts which Duff analyses under this
heading might indeed make up an appropriate mens rea category for a viable
system of criminal law. His approach might very well help us to identify salient
moral distinctions for the purposes of grading and sorting some criminal
offences. But, as we will see, Duff's 'recklessness' bears only a limited resembl-
ance to the concept of recklessness which we deploy in evaluative thinking
outside the law. The cluster of concepts which Duff bundles together as
'recklessness' and the everyday concept of recklessness both deviate from the
existing legal definitions of 'recklessness', but they deviate in different direc-
tions. The problem is that the term 'reckless' is going to be a misleading one for
the law to employ if it is to be reconstructed as embodying Duff's distinctions. So

7 Although Anthony Kenny's all too brief treatment of mens rea, Freewill and Responsibility (London 1978)
should not be overlooked.
much the worse for the law's choice of words, one might well say. But then, how
do we reconcile Duff's primary project of clarifying existing *mens rea* terms with
his background project of advocating the legal recognition of certain morally
significant distinctions? How, in other words, do we reconcile the positivist
thrust of the book as a clarification of established criminal law discourse with its
critical thrust as an advocacy of new standards for the criminal law? Since Duff
never really distinguishes the two projects, the question remains tantalizingly
unanswered to the last.

One begins to suspect that Duff's explicit clarificatory project is actually
something of a front for a more radical reorganization—a regimentation, one
might even say—of the categories which bear upon legal fault. This diagnosis is
borne out by Duff's failure to stress the enormous diversity of legal contexts in
which the established vocabulary of *mens rea* is expected to operate, and indeed
the enormous diversity of the vocabulary itself. He discusses *mens rea* terms
cognate with intention and recklessness. But why not other important *mens rea*
terms, like 'wilfully', 'knowingly', 'maliciously', 'dishonestly' and 'without due
care and attention', to say nothing of the various *actus reus* terms which imply
*mens rea*, such as 'possessing' and 'permitting'? It cannot be taken for granted
that the correct boundaries between criminal fault and its absence are to be
drawn according to the same principles, whatever class of criminal offence is at
stake. Why should the *mens rea* for offences involving wounding, bad driving,
killing, polluting, drug-dealing and damaging property all be dictated by one
simple hierarchy of fault elements? Duff implicitly answers the question by
locating the boundaries of 'intention' and 'recklessness' so that they match what
he takes to be absolutely pivotal distinctions of moral culpability. But his
arguments support, at most, the much weaker thesis that these constitute one
valid set of culpability distinctions among others. By portraying them as
absolutely pivotal for the criminal law as a whole, Duff's book effuses the kind of
passion for uniformity—the desire to carve a vast and invariant 'general part' out
of a properly heterogeneous criminal law—which also permeates the work of
many 'subjectivist' legal scholars and the recent rather dismal proposals for
criminal law codification in England.8 The fact that Duff's search for uniform
principles is accompanied by subtler arguments, closer interrelations, and more
plausible moral claims than 'subjectivist' legal scholars and Law Commissioners
can muster does not, unfortunately, make the search itself any more promising.

This is not to claim, of course, that criminal law lacks all vestiges of a 'general
part'. There are, to be sure, general threshold conditions of criminal liability
which ought to be explored and defended as such, including the 'voluntary
conduct' element, the requirement of sanity, the exclusion of young children,
and so forth. Nor are we saying that *mens rea* must be too piecemeal to be

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8 For a classic 'subjectivist' inflation of the general part, see Jerome Hall, 'Negligent Behavior should be
Excluded from Penal Liability', *Columbia Law Review* 63 (1963), 632. The codification proposals are to be found in
The Law Commission, *A Criminal Code for England and Wales* (2 volumes, London 1989), and are powerfully
susceptible of thorough and comprehensive theoretical analysis, so that Duff's
whole enterprise is undermined *ab initio*. Clearly there are and should be various
strong connections between different families of offences and different fault
elements, and the connections would all doubtless repay philosophical explo-
ation. It may well be, indeed, that the value of such exploration for a better
apprehension and application of the criminal law has been underestimated in the
Anglo-American legal tradition. Still, the requirements for a successful com-
prehensive theory of *mens rea* are demanding to say the least. Such a theory must
ultimately deal with a very great variety of offences arising in a very wide range of
contexts. One cannot hope to make the whole thing tidy and linear, even if the
inevitable quirks of legislation, which tend to undermine all systematic efforts,
are put on one side. On this view, then, Duff's contribution can be no more than
part of a much more elaborate story.

Read in this light, however, as an analysis and advocacy of one possible cluster
of criminal culpability distinctions within a more complex network, *Intention,
Agency and Criminal Liability* is certainly a powerful and provocative piece of
work. It confirms, if confirmation be needed, that Duff's contributions belong in
a different league from almost all other English-language writings on the subject
published during the last twenty years or so. Duff's greatest achievement,
brought out well in the new book, is to have focused attention sharply on certain
profound moral controversies which must inform any serious discussion of *mens
rea*, controversies which are all but ignored by contemporary Anglo-American
and Scottish criminal lawyers. The book thus compels its reader to rethink
preconceptions and to retune preoccupations. In the process, of course, the
reader cannot avoid encountering some lacunae, some apparent inconsistencies,
and some intrinsic and extrinsic difficulties with Duff's own solutions to *mens rea*
problems. We traverse some of these in the pages which follow, but we are
conscious that in the process we cannot do full justice to the range and subtlety of
Duff's arguments. To appreciate its importance as a contribution to legal
criticism, a careful reading of the book itself is indispensable.

**2. Duff's Real Intentions: Relevant and Irrelevant Distinctions**

We have suggested that Duff deals with only two varieties of *mens rea*, namely
intention and recklessness. But in fact he makes a tripartite classification. For
Duff, as for some other philosophers and many lawyers, intentions come in two
different forms—direct intentions and oblique intentions. Actually, Duff

* Some examples, at random: Gerald Dworkin, 'Intention, foreseeability and responsibility' in Ferdinand
Schoeman (ed), *Responsibility, Character and the Emotions* (Cambridge 1987), 338; Glanville Williams, 'Oblique
distinction approximates to the one drawn in the German criminal law discussion between 'Absicht' and 'Vorsatz':
Diethard Zielinski, in *Alternativkommentar zum Strafgesetzbuch* (Frankfurt 1990), §§ 15, 16, n 67 f.
eschews this terminology of ‘direct’ and ‘oblique’, which seems to have unwelcome Benthamite associations for him. Instead, he speaks of a contrast between ‘intended action’ and ‘intentional action’ (99). This way of marking the distinction is highly confusing. It makes far too much turn on the unreliable twists and turns of idiomatic usage. We do not in fact use the word ‘intended’ to refer only to direct intentions, nor the word ‘intentional’ to refer only to oblique intentions. It would have been far better for Duff to have stuck to the familiar direct/oblique classification, even if that would have meant sacrificing the support, such as it is, of ‘ordinary language’ distinctions. Better still, perhaps, would have been for Duff to deny oblique intentions the status of intentions altogether. If they are indeed called ‘intentions’ in ordinary conversation, or described in cognate terms, this is in all probability itself a result of philosophical confusions introduced into our language as a result of crude Benthamite thinking, with which Duff evidently has no wish to be associated. Here we see the peculiar predicament of those who espouse ‘ordinary language’ distinctions (as opposed to conceptual distinctions) as the foundation of philosophical investigation. All too often, their tools have already been damaged by the influential oversimplifiers who came before them.

But we should begin, as Duff himself does, with the nature of direct intention, his so-called ‘core notion’ of ‘intended action’ (43). Duff’s ultimate ruling is that an agent acts with the intention of bringing about a given result in this core sense if and only if she acts as she does because she believes that her action might bring that result about (67). As Duff points out, this means that any directly intended result of an agent’s action will have featured somehow in her reasons for acting as she did (51). This is the force of the ‘because’ in the final formulation (59). But the real beauty of the proposal as a piece of conceptual analysis is that it identifies an agent’s direct intentions in action solely by reference to her auxiliary reasons for acting as she did. To understand the nature of an auxiliary reason, think of a simple example. I telephone a friend, say, and invite him round to dinner. Why do I do this? I want him to come round to dinner, of course. That is, in the most obvious sense, my reason for telephoning. But by itself it is an incomplete explanation of my action. It is only the major premiss of my reasoning. To give a full explanation, the minor premiss also has to be brought out. Not only do I want my friend to come round for dinner, but I also believe that, if I telephone him and invite him, he may indeed come round to dinner. This is the crucial piece of information which brings me from my inchoate motivation to the particular action I take. This minor informational premiss can be thought of as my auxiliary reason for telephoning my friend, while the major motivational premiss with which it combines to yield the action of telephoning can be thought of as my operative reason.10

Many accounts of direct intention get into deep water because they focus on an agent’s operative reasons, the major motivational premisses of her practical

10 On the distinction between operative and auxiliary reasons, see Joseph Raz, Practical Reason and Norms (2nd ed, Princeton 1990), 33–5. We hasten to add that Duff himself does not use the operative/auxiliary terminology.
thinking. They propose, for example, that an agent acts with the direct intention of bringing about a certain result if and only if she acts because she desires that result, or, on a different view, if and only if she acts because she holds that result to be worthwhile. These proposals are unnecessarily contentious because they take a stance on the nature of motivations, implicating partisan conceptions of rationality, noncognitivist and cognitivist respectively. Some writers have tried to avoid cognitivist or noncognitivist implications by coining new terms—such as Donald Davidson’s ‘pro-attitude’—which are supposed to cover the full range of candidates for the status of operative reason, ranging from desires to evaluations. But Duff’s solution is far more elegant. It builds on the insight that an operative reason and its associated auxiliary reason always refer to the same envisaged result or results of the action which they conspire to guide. In our simple case, for instance, my friend’s coming to dinner is mentioned both in the motivational premiss and the informational premiss. One can identify the same envisaged result, therefore, just as easily from the auxiliary reason as from the operative reason. And this result will always be, Duff says, among the directly intended results of the action.

If this is right, and we think it is, then there is no need to refer to an agent’s desires, or any other kind of operative reason she may have, in order to identify her intentions in action. And yet Duff devotes several pages to an elaborate defence of the view that what is directly intended is also desired (52 ff). Why does he take this dangerous path, since the resulting ‘desire condition’ turns out to be quite redundant even if valid? One reason is that the development of the desire condition forms part of Duff’s heuristic strategy. He thinks it is a good idea to identify all of the conditions before deciding that one or other of them is redundant, since it discourages oversight and oversimplification and helps to explain the role of the nonredundant conditions. Another consideration is that a discussion of the ‘desire’ issue seems to be significant if Duff is to cut through the countless misleading examples that arise in the cases and textbooks. Lawyers are wont to draw excessively sharp contrasts, and examples which are supposed to show that what is intended is not necessarily desired are sometimes taken to demonstrate that intention cannot be defined except in terms of foresight of consequences, if at all. As Duff shows, many such examples operate to obscure the possibility that desire could be a component of direct intention even though it is not a component of oblique intention. Take an illustration devised by Lord Bridge. A fugitive joins a Manchester-bound flight out of London in order to escape the police, although he has no particular desire to go to Manchester, and is merely taking the first available flight irrespective of its destination. Perhaps there is a sense in which this fugitive can be said to have intentionally gone to Manchester, as Lord Bridge claims. But this will not be a matter of direct intention. If the fugitive is genuinely joining a flight irrespective of its destination, then its destination plays no role in his practical reasoning. Any plausible

12 Speaking in Moloney [1985] AC 905 at 926.
account of direct intention has to be reason-centred. So, as Duff points out, this example cannot serve to show that there can be direct intention without desire (80–81).

But when Duff argues that everything which is directly intended is also desired, he admits that he is talking about ‘desire’ in a broad sense. In this broad sense there are ‘extrinsic desires’ as well as ‘intrinsic desires’: we desire not only that which we desire for its own sake, but also that which we believe would assist us as a means to securing something else we desire (54). Moreover, as Duff slips in later, the word ‘desire’ in the broad sense also has to include that which one believes one has a duty to do, or otherwise ought to do, whether as a means or as an end (66). If these extensions of the word ‘desire’ are not accepted, then there are plainly situations in which one may directly intend what one does not desire: as, for example, when one acts against one’s ordinary inclinations for the sake of duty. If these extensions are accepted, on the other hand, then every directly intended result is indeed desired. But that conclusion emerges, it should now be clear, just because every operative reason has been turned into a ‘desire’ by definitional fiat. So the ‘desire’ condition is not only redundant. It is also fixed so that it will be valid by definition if a reason-centred account of direct intention in action is accepted at all. Duff ends up by pointing this out (67). But in the meantime, there is a serious risk that his all-embracing use of the word ‘desire’ encourages more myths than it dispels. Even Davidson’s ungainly ‘pro-attitude’ neologism seems revealing by comparison. On balance, it might have been better if Duff could have proceeded to his compelling ultimate ruling about the role of auxiliary reasons in direct intention without talking about the nature and role of operative reasons at all. He might have been well-advised to adopt a different heuristic strategy, and to engage the misleading judicial examples with a different set of conceptual weapons.

There is, however, a further consideration which induces Duff to discuss the nature and role of operative reasons. He wants to show how bare or future intentions fit into the picture alongside the phenomenon of intention in action. Recall that an agent acts with the direct intention of bringing about some result, according to Duff’s ultimate ruling, if and only if she acts as she does because she believes that her action might bring that result about (67). But an agent obviously does not intend to bring some result about in the future whenever he believes that his future actions might bring it about. That would be a rather vague prediction, not an intention. So bare intentions, not yet acted upon, cannot be analysed by reference to auxiliary reasons alone. Something else is required. Here the operative reason must come in, thinks Duff. But now he suddenly and all too belatedly reconsiders his use of ‘desire’ to denote all operative reasons, and speaks of ‘judgments’ instead, following one of Donald Davidson’s later suggestions. An operative reason is now (subject to some rather troubling caveats designed to accommodate weakness of will) a ‘judgment of desirability’.

13 Drawn from Davidson’s ‘Intending’ in Essays on Actions and Events, above n 11, at 98–9.
rather than a desire (71). My bare intention to bring about some result in the 
future is apparently made up of an overall judgment of desirability regarding that 
result, coupled with the familiar auxiliary belief that I might bring that result 
about.

It is worth asking why Duff thought it necessary to raise the issue of bare 
intentions at all in this context. In the course of the book, he mentions only one 
legal case in which a bare intention was in issue, and that is not even a criminal 
case.14 Bare intentions play no part in the principles of mens rea. After all, 
cognitionis poenam nemo patitur: nobody falls to be punished for thoughts alone. 
Perhaps here Duff allows his wide philosophical interests to carry him away from 
his main subject-matter, the criminal law. Or perhaps, on the contrary, Duff 
thinks that bare intentions are the simpler cousins of intentions in action, so that 
discussing them can focus attention on the problems about intention in action 
which arise in the criminal law. Unfortunately, the opposite is true. Intention in 
action is the simple phenomenon, and bare intention is its infinitely more 
complicated cousin. Bare intentions are personal normative tools, using which 
we change the structure of our future reasons for action. They are new second-
order reasons which we evolve for ourselves, which operate to exclude certain 
existing operative and auxiliary reasons from our future practical thinking unless 
and until the emergence of further reasons necessitates their reconsideration.15 
Bare intentions work to isolate interim conclusions in extended practical think-
ing. All Duffs's Davidsonian talk of 'overall judgments of desirability' amounts to 
a vague gesture towards the idea that bare intentions have exclusionary force. 
But it makes no sense to think of intention in action as having exclusionary force. 
By the time one acts with a certain intention, it is too late to do any excluding of 
considerations. The deed is done. So discussing the special case of bare 
intentions in a discussion of criminal mens rea cannot but introduce distracting 
side-issues, as Duff discovers to his cost. Had he not discussed bare intention, for 
instance, he would have had no cause to mention weakness of will (72), and that 
would have helped us all to keep our minds on the immediate issues of mens rea.

Although bare or future intention plays no role in the principles of mens rea, 
another special case of intention is frequently mentioned in criminal law 
contexts. This is the case of conditional intention. When criminal lawyers speak 
of conditional intention, they are invariably talking about situations in which the 
fulfilment of some direct intention depends on the satisfaction of some enabling 

14 It is the interesting case of Cunliffe v Goodman [1950] 2 KB 237, concerning liability for building repairs, 
discussed by Duff at 17.

15 This is adapted from the excellent account of bare intentions set out by Michael Bratman in his Intentions, 
Joseph Raz discusses decisions as examples of exclusionary reasons, but explicitly declines to extend his analysis of 
decisions to those bare intentions which are not the product of decisions. However, decisions, on Raz's account, are 
not merely exclusionary reasons. They are also ordinary first-order reasons to do as one has decided. Raz would 
now call them 'protected reasons', which have both an exclusionary and a first-order component: Raz, The 
Authority of Law (Oxford 1979), 18. It seems clear enough that bare intentions are not protected reasons, and so Raz 
is right, to this extent, to distinguish them from decisions. The difference between Bratman and Raz, however, 
seems to be that the latter holds bare intentions to be if anything simple first-order reasons, while the former holds 
them to be simple exclusionary reasons. Bratman's view seems more plausible to us.
condition which is beyond the control of the agent. The thief intends to steal if there is anything worth stealing, or the rapist intends to strike if any unaccompanied woman comes along. Such cases are to be distinguished from cases in which the condition is a reason-giving condition, as where a departing holidaymaker says: I will come home sooner if the hotel is bad. The badness of the hotel will not enable the early return; rather it will supply the reason for the early return. Reason-giving conditions attach to future or bare intentions only, because they identify what one now intends to do in the future should some contingency arise in the future. Enabling conditions, on the other hand, can attach to intentions in action as well. One can act right now with the intention of stealing-if-there-is-anything-worth-stealing. One need not wait for any contingency to arise before one's intention to do so is activated. It is because enabling conditions can be attached to intentions in action that they are the conditions which interest criminal lawyers, and which criminal lawyers refer to as conditional intentions.

Strictly speaking, however, intentions with enabling conditions attached to them are not conditional intentions at all. They are just ordinary direct intentions. Duff's ultimate test of direct intention brings this out clearly. An agent directly intends to bring about some result by her action, remember, if and only if she acts as she does because she believes that her action might bring that result about (67). The word 'might' is important here. In contexts where a thief intends to steal-if-there-is-anything-worth-stealing, he also intends to steal simpliciter. The fact that he has doubts about his chances of finding anything is perfectly compatible with his believing that, if he acts in a certain way, he might find something, and is perfectly compatible with his acting in that way because of that belief. So he intends to steal by Duff's test. This is the right result. Direct intentions do not require confident belief that one will succeed; one can be aware of the many vicissitudes which may defeat one's direct intentions without making them even slightly conditional. This means that the criminal law does not after all raise issues of conditional intention. The only true conditional intentions are those which have reason-giving conditions attached to them, which identify what an agent now intends to do in the future should certain contingencies arise in the future; and these, being bare or future intentions, have no role, to speak of, in the criminal law.

Since Duff's ultimate test of direct intention brings this out so clearly, it is surprising that Duff does not draw attention to it, and indeed explicitly aligns himself with the opposite view. He mentions conditional intention only once. Similarly with German criminal lawyers. See Karl Lackner, Strafgesetzbuch (18th ed, München 1989), §22 n 1. The problem about 'conditional intention' under discussion here should not be confused with the problem discussed in Germany under the heading 'bedingter Vorsatz' (or 'dolus eventualis'), which is a close relative of what Anglo-American lawyers call 'recklessness'. The two problems are apt to be confused because of one common feature, viz the presence of uncertainty.

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17 Davidson, 'Intending' in his Essays on Actions and Events, above n 11, at 94-5; Bratman, 'Davidson's Theory of Intention' in Bruce Vermazen and Merrill Hintikka (eds), Essays on Davidson: Actions and Events (Oxford 1985), 18-21. One cannot however intend what one knows to exceed one's personal skills and/or abilities. This proviso explains why, to use one of the examples which Duff mis-explains, a beginner cannot intend to throw a treble twenty in darts.
His example is an interesting one, because its appearance belies its substance. A landlord intends to demolish a building only if a licence to do so is granted by the local council. The condition attached to this intention—'if a licence to do so is granted'—looks like an enabling condition, but it is in fact a reason-giving condition. If granted, the licence will alter the structure of the landlord's reasons by giving him an exclusionary permission to do something. It is not that one will be able to act in a certain way if the licence is granted; it is that one will be authorized so to act. This condition therefore yields a genuinely conditional intention. It identifies what one now intends to do in the future should a certain contingency arise in the future. But Duff does not comment either on the reason-giving nature of the condition here nor on the fact that such reason-giving conditions can apply to bare or future intentions only. Instead he mistakes the rationale for calling the intention 'conditional' in the licence case. He suggests that the licence case shows that my intention to bring some result about can be no more than conditional where 'I realize that its occurrence depends upon too many factors beyond my control' (56). This phrase aptly describes the situation when an enabling condition applies. So Duff thinks, erroneously, that the licence is an enabling condition, and that direct intentions with enabling conditions are conditional intentions. This raises questions about his use of the word 'might' in his ultimate test for direct intention. What can this word be doing here except drawing attention to the fact that, contrary to the explicit words on page 56, I can indeed intend something directly and unconditionally even though I realize that my intention is all too likely to be frustrated by ever so many factors beyond my control? It also implies, wrongly, that truly conditional intentions will have a major role to play in a theory of mens rea. And if Duff thinks this, however mistaken he may be, one wonders why he does not devote the kind of sustained attention to the topic which, on this view, it would deserve. One wonders why bare or future intentions get a few pages to themselves, while these so-called conditional intentions get only a few lines.

3. Direct and Oblique Intention: an Illusion of Symmetry

What is so important about direct intention, then, understood according to the reason-centred account? For Duff, the answer has to do with the structure of morality. He believes that the 'central or fundamental kind of wrong-doing is to direct my actions towards evil, to intend and try to do what is evil' (113). Our direct intentions expose the evil in the core of our practical thinking, and thus in the core of our existence qua practical beings. The bad reasons constitute the bad agent, as it were. A competing view, according to Duff, suggests that the central type of wrong-doing is simply the promotion of evil results (110). On this view, there is nothing particularly special about direct intentions. Looking at it from

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18 Cedhffe v Goodman again. See n 14 and accompanying text.
19 On exclusionary permissions, see Raz, Practical Reasons and Norms, above n 10, 89-97.
the agent’s point of view, confidently foreseen evil results are no less likely to
occur, and may even be more likely to occur, than directly intended results. It is
in the confidently foreseen evil results of his actions, then, that the agent is most
fundamentally implicated as a promoter of evil. This competing view—described
by Duff as ‘consequentialist’—identifies what philosophers and lawyers are wont
to call oblique intentions, rather than direct intentions, as the central plank of
culpability.

A result is within the scope of an agent’s oblique intentions, on Bentham’s
original definition, if and only if at the time of her action she foresees it as a
probable result of that action. One debate in the legal literature has been about
the probability question here. Just how probable does a result have to be to be
within the scope of one’s oblique intentions? Some have argued that it
needs to be foreseen as virtually certain, or even absolutely certain. Duff works
on the assumption that the central case of oblique intention involves foresight of
a result as certain. But he declines to take a firm stance on marginal cases,
because he is primarily concerned to sort out a different issue. The traditional
Benthamite definition of oblique intention makes no mention of the agent’s
reasons, which are the key to identifying her direct intentions. So it might seem
that oblique intention has no real connection with direct intention, and so is not
perspicuously classed as a form of intention at all. But Duff is keen to establish a
real connection between oblique intention and direct intention, and to confirm
that oblique intention should indeed be described in the language of intention.
While denying that oblique intention is the central plank of culpability, Duff
thinks that it represents the crucial secondary classification (113). And he seems
to take this line largely because he believes that there is an important bond, even
a kind of symmetry, between direct intention and oblique intention.

Duff stipulates that questions of culpability are parasitic on questions of what
he calls ‘responsibility’. An agent who is responsible for bringing about some
result, in Duff’s sense, is one who can properly be required to justify or explain
his action of bringing that result about (78). The agent is actually culpable,
needless to say, only if the justification or explanation is inadequate. One can
properly be required to justify or explain one’s action of bringing a result about,
thinks Duff, only when that result is ‘relevant’ to the action, in the stipulated
sense that it provided a reason for or against doing that action at the time when
the action was done. A directly intended result ‘is relevant as forming a reason for
which the agent acts’ (78). This is supposed to be a pithy restatement of the
ruling on direct intention already discussed. But there are also results, for which
the agent is responsible in Duff’s sense, the likelihood of which provided a reason
against his doing as he did. So long as these results were foreseen by him with the
requisite degree of certainty, whatever that may be, they fall within the scope of
his oblique intentions. A given result is within the scope of an agent’s oblique
intentions, to put it another way, if she acts despite the fact that she believes (with

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the requisite degree of certainty) that she might bring that result about by so acting (79). Compare direct intention: a certain result is within the scope of an agent's direct intentions if she acts because she believes that she might bring that result about by so acting (67). But if one acts neither because of nor despite one's belief that one might bring about certain results, then those results are neither directly nor obliquely intended. Confidently foreseen results which did not provide a reason for or against an agent's doing as he did are not within the scope of his direct intentions or his oblique intentions, because, for Duff, intention is a responsibility category, and responsibility, in Duff's sense, extends only to those results which were relevant to the agent's action as providing a reason for or against that action. So oblique intention enjoys a connection with our reasons which is only slightly more peripheral than the connection between direct intentions and reasons. The two categories are variations on the same theme. It can hardly be misleading, then, to think of them both as species of the same genus, namely the 'intention' genus.

Unfortunately, there is a sleight of hand in this argument. 'The reasons for which one acts' and 'the reasons despite which one acts' are not the symmetrical categories which they seem to be at first sight. In the former expression, the word 'reason' has its explanatory sense ('Her reason for shooting him was . . .'), but in the latter expression, it has to be read in its prescriptive sense ('The strongest reason for coming to Blackpool is . . .'). Explanatory reasons certainly have some properties in common with prescriptive reasons—both, for example, may be either operative or auxiliary—but they are not identical. All actions are undertaken for explanatory reasons, but in cases of irrational action the explanatory reasons do not match the applicable prescriptive reasons. The word 'because' in Duff's test for direct intention correctly reveals that the reasons which identify our direct intentions are explanatory reasons. The word 'despite' in the test for oblique intention, on the other hand, cannot be used in connection with explanatory reasons. One cannot act despite one's reasons for so acting, the reasons which explain one's action. One can only act despite reasons which actually applied, reasons which prescribed or militated in favour of a different action in these circumstances. One concomitant is that direct intention and oblique intention, as Duff defines them, are overlapping categories. One may act for explanatory reasons, taking them to reflect prescriptive reasons for so acting, even though they actually reflected prescriptive reasons against so acting. One acted for evil reasons. The existence of this overlap helps to bring out the fudge in Duff's argument. Evidently direct intention and oblique intention cannot be the neatly matching categories which Duff makes them out to be if a particular result can fall within the scope of both at the same time. The supposed symmetry between 'the reasons for which one acts' and 'the reasons despite which one acts', and thus between direct intention and oblique intention, is illusory.

This category mistake about reasons threatens the coherence of Duff's general approach to culpability. For he is anxious to show how the various distinctions

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21 See, once again, Raz, Practical Reason and Norms, above n 10, 15-20.
he draws among types of culpability are also distinctions among morally
significant 'practical attitudes' (162). It is reasonably easy to see how direct
intention might be understood as comprising a 'practical attitude', even if this is
not the most obvious way to characterize it. It is much more difficult to see where
the distinctive practical attitude is in oblique intention. But Duff contends that
there is, on his account of oblique intention, just such an attitude. With an
oblique intention to injure somebody, 'I do not manifest the hostile intent which
a direct attack on her would exhibit; but I manifest my utter indifference to her
interests in being thus willing to injure her' (141–2). The idea of indifference
creeps in here because one who obliquely intends some result acts, on Duff's
definition, despite the fact that she believes she will bring about that result, and
the word 'despite' immediately brings cases of indifference to mind. But in
reality there are plenty of cases in which people act despite their confident
foresight that they will injure someone in the process, but without any attitude
which could conceivably be thought of as 'indifference' to that person's interests.
Parents who are overprotective of their children are usually in this position.
They know full well that this will have negative effects on their children's future
well-being. But their attitude to their children's future well-being is far from
being one of indifference, in any intelligible sense of that term. If they are to be
classed as 'practically indifferent' on Duff's analysis, then 'practical indifference'
is not the name of a distinctive 'attitude'. It is, rather, a misleading name for the
whole gamut of advertence-based omissive deficiencies of practical wisdom,
failures to give any or enough weight to known salient considerations in one's
practical thinking.

It should be pointed out that Duff's account of oblique intention is subject to a
caveat which excludes some of the more obvious cases in which one's action in
spite of countervailing considerations does not seem to manifest an attitude of
indifference. One does not, he says, obliquely intend any result which is contrary
to one's direct intentions (98). This caveat is applicable, as Duff points out, only
to the extent that one can obliquely intend results which one foresees with less
than full certainty. If one foresees results with full certainty, they cannot be
contrary to one's direct intentions: one cannot act as one does because one
believes that they might not occur, since ex hypothesi one does not so believe. But
if our oblique intentions ever extend to results we foresee as, say, extremely
probable—and Duff explicitly declines to rule this out—then the caveat is
important. If correct, it means that a doctor who undertakes a highly dangerous
operation in the belief that it just might save a patient's life does not kill the
patient intentionally, even in the oblique sense, if the operation fails and the
patient dies. This result was contrary to the doctor's direct intentions. However
attractive this conclusion may be, the caveat is not supported by any argument in
Duff's text. It could be argued that the doctor's situation is better dealt with at
the justification stage rather than the mens rea stage.22 And even if Duff's

22 Compare Thomas Wiegend, 'Zwischen Vorunt und Fahrlässigkeit', Zeitschrift für die gesamte Strafrechtswis-
senschaft 93 (1981), 657 at 667 f.
approach is correct, it cannot rescue the 'practical indifference' proposal as far as oblique intention is concerned. There are plenty of cases, like that of the overprotective parents, in which the negative result is foreseen as certain rather than highly probable. In such cases, it is thoroughly misleading to rule that there must be an 'attitude' of indifference. There is no single 'attitude' which is common to all those cases in which one foresees with confidence a side-effect of one's action which one had reason to avoid. It is far from clear why anyone who holds culpability to be structured according to the 'practical attitudes' of an agent—whatever the merits of that position for moral or legal purposes—should think of so-called oblique intention as a distinct culpability category at all. It cannot be associated with any particular attitude, practical or otherwise. And it is doubly difficult to see why it should be thought of as a culpability category which has to be designated in the language of 'intention', least of all by a writer who is so deeply suspicious of the Benthamite strands in our contemporary moral outlook.

4. From Intention to Recklessness

When should criminal liability turn on direct intention, and when should confident foresight of results, or so-called oblique intention, be enough? In his answer to this question, the positivist dimension of Duff's enterprise seems to come to the fore. He distinguishes, as judges and commentators sometimes do, between crimes of 'basic' mens rea and crimes of 'ulterior' mens rea. In crimes of basic mens rea, the mens rea extends only as far as the actus reus, whereas in crimes of ulterior mens rea, part of the mens rea is associated with results which lie beyond the actus reus, and which therefore need not actually occur for the full crime to be committed (40). Duff asserts that the distinction between direct intention and confident foresight can generally be ignored for the purposes of basic mens rea, but he thinks that ulterior mens rea should generally be cast in terms of direct intention only. He never really argues for this distinction. He simply reasserts it in various ways, alluding to the 'structure and meaning' of actions (113–14, 175, 201–2). The main idea underlying the claim seems to be that bad direct intentions make actions intrinsically bad even when the intentions themselves are frustrated, while action with confident foresight of bad side-effects is bad action primarily in the sense that it is an instrument of badness, so that the badness is properly realized only to the extent that the side-effects actually occur. Even if we leave aside the apparent conflict between this view and Duff's claim that 'oblique intention' itself manifests an intrinsically bad practical attitude, namely the attitude of practical indifference, the view seems much too hard and fast. It seems much more likely that it is sometimes intrinsically wrong to act with confident foresight that one will bring about bad side-effects, as when one incidentally breaches a duty in the course of pursuing some personal project, and sometimes only instrumentally wrong to intend bad results directly, as when one intentionally makes a pointless sacrifice. Surely it all depends on the nature
of the results in question and the detailed structure of the applicable reasons? But even if there are good grounds for thinking that what matters in deciding whether to require direct intention rather than confident foresight as the \textit{mens rea} of some offence is whether the \textit{mens rea} in question is ulterior or basic, we obviously cannot profit much from knowing that unless we also know what criteria legislatures and judges should use in deciding whether to make a particular \textit{mens rea} ulterior rather than basic in the relevant sense. Why exactly should theft be drafted as a crime of ulterior intent, while rape is not? It is far from obvious that this question is any easier to answer than the one we asked at the beginning of this paragraph. Duff leaves it open. But it is actually a question which he must answer if his argument is to be illuminating. He cannot be allowed to take temporary and \textit{ad hoc} refuge in convention, simply relying on the established definitions of existing criminal offences to do the classificatory work for him, as if the invisible hand of the lawmaker would automatically secure the right arrangements here.

The conventionalist turn is also apparent when we reach the discussion of ‘recklessness’. Why should criminal offences ever be drafted using this particular word? And why should any particular criminal offence be so drafted? Duff does not explain. Nor does he stop to point out that ‘recklessness’ belongs to an entirely different cluster of concepts from ‘intention’. Recklessness is a vice or personal fault, like dishonesty, cowardice and self-indulgence. Intention, meanwhile, is obviously not a vice. Virtue requires intention every bit as much as vice does. Duff makes a category mistake here. He describes intention and recklessness alike as ‘species of fault’ (154).\footnote{Sensitive to this distinction, German criminal law has attempted to separate the intention element from questions of fault or culpability, here understood as the last and most individualized calibration on the yardstick of criminal liability. This position, which has prevailed since the decision of the Federal Appeal Court BGHSt 2, 194, and has been integrated into the Code since 1975, flows from an understanding of the \textit{actus reus} as being structured by the underlying intention: see Zielinski in \textit{Alternativkommentar zum Strafgesetzbuch}, above n9, §§ 15, 16, n 6 f.}

\footnote{Vices are also identified in part by reference to the emotions of those who exhibit them. It seems likely that the legal culpability standards should remain emotion-independent for much the same reasons as they should remain motive-independent. But compare Jeremy Horder, 'Cognition, Emotion and Criminal Culpability', (1990) 106 LQR 469.} Had Duff paused to reflect on the categorical difference between intention and recklessness, he would have been able to identify a significant prima-facie reason for doubting the suitability of ‘recklessness’ as a general \textit{mens rea} term. Vices are identified in part by reference to the \textit{ends} or \textit{motives} of those whose actions exhibit them.\footnote{Had Duff paused to reflect on the categorical difference between intention and recklessness, he would have been able to identify a significant prima-facie reason for doubting the suitability of ‘recklessness’ as a general \textit{mens rea} term. Vices are identified in part by reference to the \textit{ends} or \textit{motives} of those whose actions exhibit them.} A reckless person, in morality, is one who takes large risks for the sake of relatively unimportant ends. Recklessness as a moral phenomenon cannot be identified except in terms of the agent's flimsy motives. The criminal law, however, hesitates to include considerations of motive in its armory of \textit{mens rea} variables, and rightly so. Leaving aside the special problems which proof of motive raises, there is the general consideration that the evils which the criminal law may legitimately proscribe within the terms of the harm principle can typically be identified quite independently of motive. To introduce motive variables would often be to cross the boundary from the prevention of harms to the proscription of immorality quite
generally. Of course, sometimes the relevant harms simply cannot be identified without reference to motive, and then the law has to put up with the uncertainties of motive standards. The ‘dishonesty’ element in theft is a good example. But, as a rule of thumb, mens rea terms should be motive-independent. ‘Recklessness’ is prima facie a poor choice as a mens rea term just for this reason.

The law needs some mens rea terms, however, and for the sake of the law’s ability to guide those who are subject to it, the chosen terms have to convey the flavour of the offences in which they are used. Morality is short of nominate motive-independent modes of culpability, the terms for which could usefully be transplanted into law. The law’s solution has been to construct a special motive-independent mode of culpability which goes by the name of ‘recklessness’, and which has some features in common with the motive-dependent moral quality of the same name. There is an analogy with the law’s adaptation of ‘malice’ in an earlier period. That too is a word which ordinarily describes a vice, and which is therefore motive-dependent in its moral applications, but which was given a special motive-independent legal definition. And the gradual switch of judicial and legislative loyalties from ‘malice’ to ‘recklessness’ as a standard mens rea term in England was partly a reaction to the fact that ‘malice’ as a legal category drifted too far from its extra-legal application. Malice in the law no longer had any important features in common with the moral quality of the same name. The obvious connection between recklessness and serious risk-taking, meanwhile, meant that the word ‘reckless’ identified the criminal law’s contemporary preoccupations much better, although it is by no means a perfect fit.

When ‘subjectivists’ and ‘objectivists’ disagree about the scope of recklessness in the law, they are often disagreeing about how best to replicate the precise scope of the moral concept of recklessness, with the distinctive mode of culpability which it implies, in a motive-independent variation. The quarrel is pointless: it cannot be done. It is true that the presence or absence of advertence to a risk on the part of an agent can sometimes make a difference, like so many other factors, to the scale of that agent’s moral culpability. ‘Objectivists’ are wrong if they deny this. But inadvertence only mitigates a reckless agent’s moral culpability, as a rule, if she has attenuated cognitive capacities, and even then it does not normally entail that her fault is converted from recklessness to something else, like carelessness, but only that her recklessness is diminished in scale. The quality of the motive is an essential part of what distinguishes a reckless person from a careless person in moral evaluations, and that distinction

And perhaps should be left in the hands of the jury precisely because it must be motive-dependent: see Richard Tur, ‘Dishonesty and the Jury: A Case Study in the Moral Content of Law’ in A. Phillips Griffiths (ed), Philosophy and Practice (Cambridge 1985), 75.

See, for example, the disagreement between Lord Diplock in Caldwell [1982] AC 341 at 347 and Glanville Williams in ‘Recklessness Redefined’, (1981) 40 CLJ 252 at 256. Some ‘subjectivists’, like Jerome Hall (‘Negligent Behavior Should Be Excluded From Penal Liability’, above n 8) and J. C. Smith (‘Reform of the Law of Offences Against the Person’, (1978) 31 Current Legal Problems 15 at 19) proceed on the quite different ground that there is something inherently suspect about inadvertence-based culpability. This view, however, is a product of deep confusion about the nature of choice and voluntary agency.
cannot be replicated by relying on any other factor instead, such as advertence to the risk.

Now Duff prefers 'practical indifference' to advertence as the hallmark of criminal recklessness: 'an appropriate general test of recklessness would be—did the agent's conduct (including any conscious risk-taking, any failure to notice an obvious risk created by her action, and any unreasonable belief on which she acted) display a seriously culpable practical indifference to the interests which her action in fact threatened?' (172). If this is also an attempt to devise a motive-independent reconstruction of recklessness in its moral role—and Duff, true to his ordinary language methodology, does treat recklessness 'in the ordinary meaning of that term' as a point of reference (148)—then his project has similar problems to those of the misguided 'subjectivists' and 'objectivists' we have just referred to. That one has certain attitudes is sometimes what explains one's motives, just as emotions and passions sometimes explain them. But the relationship is a contingent one rather than a logical one. One may reveal oneself to be indifferent to people's interests in many ways other than by pursuing trivial goals at their expense: it may simply come out in one's tone of voice. Conversely, one may pursue trivial goals without indifference to anyone's interests, as in the case of many a compulsive gambler. So the substitution of indifference as part of the legal definition of recklessness plainly cannot operate to secure symmetry between the legal definition and the moral concept. If anything, in fact, it makes the word 'recklessness' even less suitable as a mens rea term. The fact that lawyers and judges are constantly confusing questions of motive with both questions of emotion and questions of attitude means that it would be particularly dangerous to have an attitude-based concept, if this is what Duff's concept really is, denoted in legal contexts by a word that ordinarily denotes a motive-based concept. Duff could really have done with a brand new word or expression—a term of art, as lawyers sometimes put it—to denote the possible mode of mens rea which he is trying to identify and advocate when he talks about recklessness. But perhaps the positivist side of his project made him reluctant to go this far in uprooting established legal terminology.

Let's give Duff the benefit of the doubt here, and put the moral concept on one side. How attractive are Duff's proposals understood simply as proposals for a major category of criminal culpability, whatever it is to be called? The first thing to notice is that the idea of 'practical indifference' seems to take on a much more determinate role here than in the characterization of oblique intention. Here Duff is prepared to accept that some omissive failures of practical rationality do not after all manifest practical indifference: it is not the case that 'any failure to notice an obvious (and serious) risk created by one's action displays a reckless indifference to that risk: for what matters is not just what, but why, the agent fails to notice an obvious risk. Perhaps the German notion of dolus eventualis, which comes close to recklessness but is classified as a form of intention for legal purposes, could have helped Duff here. Interestingly enough, however, Thomas Weigend, 'Zwischen Vorsatz und Fahrlassigkeit', above n 22, argues that the American concept of recklessness should be imported into German criminal law.
to notice an obvious risk’ (165–6). The idea now seems to be that inadvertent production of unjustified side-effects exhibits practical indifference only if the inadvertence is explained by lack of concern on the part of the agent, although advertent production of unjustified side-effects exhibits practical indifference come what may (165). Unfortunately, this seems to draw an arbitrary line. If one can point to the fact that one did not lack concern in mitigation of one’s fault in failing to acquire certain relevant information, it is not clear why one cannot point to the very same fact in mitigation of one’s fault in failing to act on that information once one acquires it. It is true, of course, that one can point to one’s limited cognitive capacities in mitigation of one’s fault in failing to acquire information, but not in failing to act on it. But this is because they are cognitive capacities, which by their nature only bear on one’s powers in relation to the auxiliary, informational premisses of one’s practical thinking. Practical attitudes, by contrast, are evidently just the kind of thing which can explain the quality of one’s operative reasons as well as the quality of one’s auxiliary reasons. So it is hard to see why one’s concern or lack of concern should affect fault stemming from the poor quality of one’s auxiliary reasons but not fault associated with the poor quality of one’s operative reasons. And yet this is precisely the result Duff seems to envisage when he suggests that the advertent production of unjustified side-effects is deemed to involve ‘practical indifference’ whatever the explanation for it, although the inadvertent production of unjustified side-effects involves practical indifference only if explained by lack of concern. It seems that Duff is trying to have it both ways, making practical indifference and simple advertence into alternative foundations for recklessness liability, but misrepresenting the former as if it swallowed up the latter. He does not after all want to make ‘practical attitudes’ the uniquely decisive determinants of criminal culpability, but he certainly wants to go on talking as if he does.

Duff’s implicit division of legal recklessness into an indifference-cum-inadvertence-based variant and a traditional advertence-based variant corresponds, to some extent, to his explicit division of intention into the direct and the oblique variants. With oblique intention and advertence-based recklessness, the requirement of practical attitude is a fiction. All that is required by way of mental element is a certain kind of cognition. Only with direct intention and indifference-cum-inadvertence-based recklessness are we considering anything about the agent’s mind which is other than purely cognitive, and which could intelligibly be described as attitudinal. Duff does in fact discuss the way in which the direct intention/oblique intention distinction is carried over into the field of recklessness. He devises a special category of ‘wicked recklessness’ for those who directly intend to do inherently and obviously risky things, although they may not realize that they are risky (179). But it is interesting to note that this distinction between wicked and ordinary recklessness cuts across the distinction between advertence-based and indifference-cum-inadvertence-based recklessness. One may be inadvertent and indifferent towards some risk in the side-effects of one’s actions as well as towards some risk in the directly intended
results of one's actions. And one may, of course, intend to do something inherently risky, knowing full well about the risk, so that one is advertently as well as 'wickedly' reckless, as well as intending to do something which, because of one's indifference, one does not recognize as inherently risky. So the direct/oblique distinction is reflected in the topography of Duff's recklessness category in two quite different ways. First, there is the split between simple recklessness and 'wicked recklessness', which depends on the location of the risk in relation to one's direct intentions. Secondly, there is the split between advertence-based recklessness and inadvertence-cum-indifference-based recklessness, which embodies the difference between merely cognitive and arguably attitudinal mental states, the difference which is also apparently at the heart of Duff's distinction between oblique and direct intention.

The foundations for all of these distinctions and cross-distinctions are postulated without real exploration on exploitation. As we mentioned before, Duff does not explain exactly why some crimes should be drafted as requiring ulterior, and thus direct, intention, while others may be drafted as requiring only basic, and thus so-called oblique, intention. But things get even more troublesome with recklessness. There are at least four mens rea elements going by the name of 'recklessness' in the book, if we put together the two distinctions in the last paragraph. And yet Duff does not seem to be very interested in the endless possibilities for their separation and selective use in the law, let alone prepared to explain when and why they should be selectively used. Isn't it quite likely that the indifference-cum-inadvertence-based variant would be a suitable mens rea element for some crimes but not for others? It might be ideal for 'recklessness' as to consent in rape, but extremely bad for 'recklessness' in assault, and for a vast array of reasons, ranging from the symbolic to the pragmatic. So shouldn't we, for the sake of clarity, devise different mens rea 'terms of art' to cope with this possibility, and discard all this indiscriminate talk of 'recklessness'? And then shouldn't we embark on some proper exploration of specific classes and examples of crime to show why one culpability category is suitable here, while a different one is suitable there? To be fair, Duff does recognize the possibility of a special role for 'wicked recklessness' in murder, where other forms of recklessness should not, in his view, be sufficient mens rea (175). But then, why insist on classing this as a kind of recklessness at all? Doesn't that make everything more confusing? Why not speak of 'implied malice', the historical term of art? Or clearer still, why not do what judges and commentators have been doing for years and say that the mens rea for murder is intention to kill or intention to do grievous bodily harm? Of course, then one has to give some argument for saying that this should indeed be sufficient mens rea for murder—a tall order indeed—even though other risk-centred forms of mens rea are not. But one cannot provide such an argument merely by pointing out that it is already the state of the law, and then engaging in some subtle re-naming procedures to bring it under the tidy heading of 'recklessness'.
5. Constrained by the Legal Context

There is actually a great deal to be said for Duff's view that 'practical attitudes', in some sense of that expression, should be the criteria for one set of culpability distinctions operating within the criminal law. This is simply because attitudes like indifference and concern are of intrinsic moral significance, being among the features of people which help to shape their characters. But might it not be that such distinctions of intrinsic moral significance sometimes have to be put on one side when we are working within the institutional confines of the law?

Occasionally, Duff mentions problems of legal proof and refers to the constraints which are imposed upon the legal definitions of intention and recklessness by the nature of criminal procedure (28, 34). These are welcome remarks. A philosophical approach to mens rea which does not consider the embeddedness of the various culpability terms in the legal structure and their interaction with the rest of criminal law and criminal justice is bound to be unsatisfactory. There may, in particular, be weighty reasons to adapt the meaning of terms like 'intention' and 'recklessness' for legal purposes. Duff's failure to distinguish his explicit project of clarifying established mens rea terms from his implicit project of defending certain culpability distinctions as morally crucial obstructs his view of this possibility. He never arrives at a really sustained discussion of the view that the law should stipulate distinctively legal meanings for mens rea terms, different from the meanings which give the same terms general moral salience, in order to make them better suited to the legal contexts in which they are to be employed. In other words, he does not give full weight to the problem that the prima-facie desirability of maintaining a rough symmetry between criminal culpability or mens rea on the one hand, and moral culpability on the other, may be perversely defeated by countervailing demands which arise from the special institutional context of the former.

One difficulty for the direct transplantation of moral culpability distinctions into the law arises from the relative specificity of criminal offences. In principle, an offender's mens rea has to be related to a specific description of what he is doing, viz the very description under which it is proscribed as criminal. Duff correctly observes that intention, like other mental states, is by its nature description-relative—it has the property of 'Intentionality', as philosophers with a real passion for confusing jargon sometimes put it.28 The fact that I act intentionally under a given description, in other words, 'does not entail that I act intentionally under other descriptions which may apply' to what I am doing (42). One and the same action may be both the moving of my foot (intended) and the kicking of the cat (unintended). But the individuation of intentions and other mental states, the isolation of a particular description under which what I do is intended or foreseen or known or whatever, will often be extremely difficult. This is particularly so with intention. Much psychological research lends

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28 See John Searle, Intentionality: An Essay in the Philosophy of Mind (Cambridge 1983), 3: 'Intentionality is directedness; intending to do something is just one kind of Intentionality among others.'
support to the view that situations are commonly perceived and assessed as package deals, without particular features being clearly identified as means or ends as opposed to side-effects. When the terrorist fires his rocket-launcher, does he do so in order to injure this bystander over here, or that bystander over there, in order to damage this car here, or that car there? Or just in order to cause some injury and/or do some damage and/or cause some general chaos as the case may be? Psychologists argue that this is often undecidable in principle. People do not necessarily distil their plans and objectives in a way that would allow such specificity. In morality, perhaps, this does not matter too much. Maybe moral principles are so adaptable that there are often several related descriptions under which an immoral act may be intended without the scale or quality of the immorality being significantly affected. In law, however, the specific description under which an act was intended is supposed to be decisive. The focus on specific descriptions is a function of the nullum crimen sine lege principle, which is a component of the Rule of Law or Rechtstaat ideal, and which is necessitated by the role of the criminal law as a system of publicly ascertained guidance for action and inaction. This may itself count as a moral constraint on the extent to which the criminal law should be symmetrical with morality. In the result, the law may have to modify its definitions of intention in order to avoid pervasive and crippling individuation problems. Indeed, rules like that of ‘transferred malice’ in English law can be understood as attempts to refashion the concept of intention strategically, creating ‘artificial intentions’, so that the law is not incessantly obstructed by the impossibility of individuating actual intentions. By the same token, perhaps the inaptly named ‘oblique intention’ has to be treated, for the purposes of the criminal law, as a form of intention, or even (pace Duff) as the central form of intention, even though that might entail serious asymmetry between the principles of criminal culpability and the principles of moral culpability. Perhaps this is the best one can do in the face of the very real difficulties involved in individuating people’s actual direct intentions to the high level of specificity which would be demanded by the nullum crimen sine lege principle, were it the case that the criminal law concerned itself with actual direct intentions.

Although in one sense more specific than moral principles, the norms of the criminal law are in another sense more general. In the application of legal norms, there is no possibility of the infinitely subtle gradation which is available in the context of moral evaluation. Either one has committed a given criminal offence or one has not, and there obviously cannot be an infinite range of offences to match the infinite variety of negative moral judgments. In the criminal justice

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system, therefore, most moral subtleties cannot come into play until the sentencing stage, when the requirements of *mens rea* for the offence in question have already been met. So the requirements of *mens rea* themselves, if they are to be treated as standards of culpability at all, have to be composite standards of culpability, which merely imitate some of the implications of a vast array of salient moral standards. Identifying one set of reasonably vivid moral culpability distinctions—as Duff tries to do in his distinctions among different 'practical attitudes'—is not the same as identifying an appropriate composite model for the law. The law almost certainly needs its own custom-built culpability distinctions. It seems quite likely, indeed, that the law will need to have at its disposal different custom-built distinctions for different kinds of situations. After all, the moral norms associated with property ownership have rather little in common with the moral norms associated with driving. So we should not hold out much hope for any attempt to create plausible composite culpability bands in theft offences which would also work satisfactorily in traffic offences. What is needed to construct a fully-fledged theory of criminal culpability, in fact, is a sensitivity to its nature as a highly complex patchwork superimposed on the even more complex tapestry of moral culpability standards. We should certainly not be seduced into believing that criminal culpability is a direct reproduction of moral culpability merely because the law must necessarily adopt morally loaded terminology here if it is to express itself with reasonable candour as well as reasonable clarity.

And of course, the principles which shape the substantive criminal law have to stand the procedural test. They have to cohere with the three corner-stones of criminal procedure. Firstly, the burden of proof generally lies upon the prosecution. Secondly, there is a privilege against self-incrimination. Finally, at least in the Anglo-American and Scottish contexts, the accused often has a right to be tried by a jury. These procedural constraints cannot be disregarded by those who shape and those who criticize the principles of *mens rea*. Some definitions of *mens rea* terms inevitably raise greater problems of proof and clear articulation than others. It can readily be assumed that the concrete shape of 'intention' in its legal role owes much to the interaction of and the feedback from the procedural norms. It seems quite possible, indeed, that more 'accurate' definitions of intention, capturing the essence of the concept as it features in moral evaluation, might be less readily understood and less readily applied *in concreto* than more artificial, legally stipulated definitions, so that the use of the former actually promotes perverse results. No doubt judges frequently have this impression, for it has dominated a clutch of major cases on the English law of murder beginning with *Hyam* and ending with *Nedrick*. At any rate, a theoretical treatment of *mens rea* which works with Anglo-American and Scottish doctrine has to accommodate the brute fact that there is no clear distinction between substance and procedure in these legal systems. The legal concept of intention is partly

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shaped by the structure of various procedurally requisite presumptions, by the need to specify canons of evidential relevance by charting permissible inferences, by the significant constraints upon the content and style of jury directions dictated by the functional split between judge and jury, and so on. There is no point in wishing this amalgamation of law and procedure out of existence, and criticizing judicial dicta as if they were uttered in a procedural vacuum.

Duff believes, it should be said, that some of these procedural constraints would be relaxed if the courts could be persuaded to retreat from so-called 'dualist' assumptions about the nature of mental states (117). The label ‘dualism’ seems, for Duff, to cover any philosophy of mind in which the mental life of the agent has to be inferred from what we perceive when she acts, rather than itself being directly perceived (28). Since the acceptance or rejection of dualism in this sense bears on the availability of direct evidence in the proof of mens rea, the procedural implications of Duff’s discussion of the topic are considerable. In adverting to those procedural implications, Duff reveals that he is sensitive to the special predicament of the law. But even if Duff is right to see the traditional legal approach to mens rea as underpinned by some eccentric philosophy of mind—and it is far from clear that ‘dualism’, as he describes it, is as eccentric as he makes it out to be—it is not clear what he proposes should become of the Anglo-American and Scottish models of criminal justice, with their pervasive interaction of law and procedure. Should law and procedure be more thoroughly distinguished, as in German criminal law? Or should they, on the contrary, be seen as even more comprehensively intertwined? Much of what Duff says suggests the former. He writes that the failure of ‘dualism’, while it does ‘bear on the question of how intention is to be proved’, does not ‘impinge directly on the questions about the meaning of intention, and about its role as the key determinant of criminal liability’ (135). If this is the kind of procedure-substance divide which Duff envisages, then he is recommending a startling departure from the established modus operandi of the legal systems with which he is concerned. And he cannot do this without an argument to show how those legal systems would be improved by the more thorough separation of substance and procedure. Such an argument would necessarily take him well beyond the problems of mens rea, and into more general jurisprudential concerns. But in the absence of such an argument, Duff’s approach to defining ‘intention’ and ‘recklessness’ in the law seems to require us to step back just a little too far from the very real pressures of the established legal context into which his mens rea proposals are ultimately meant to slot.

Although even in German law there is some cross-fertilization of substance and procedure in this area. Dolus eventualis, for example, is partly shaped by procedural considerations, and any ‘theory’ of dolus eventualis has to take procedure seriously as a pertinent determinant of legal principle. On substance and procedure in German law see Detlef Krauss, ‘Zur Funktion der Prozessdogmatik’, in Heike Jung and Heinz Müller-Dietz (eds), Dogmatik und Praxis des Strafverfahrens: Annals Universitatis Saraviensis 127 (Köln 1989), 7.
6. Duff's Moral and Philosophical Ambitions

The uneasy relationship between Duff's work and the particulars of the legal context reflect the fact that Duff's moral outlook makes him decidedly suspicious of all instrumental justifications for elements in the criminal process. But the nature of the legal context inevitably requires one to go beyond the intrinsic significance of culpability distinctions. One must also examine their instrumental significance. In everyday moral evaluation, one may indeed make judgments by considering exclusively the intrinsic significance of factors bearing upon culpability, and this is because the fact that one makes such judgments need not have any consequential impact upon anyone unless one then proceeds to express the judgments. It is only at the second stage of deciding whether to express one's moral judgments that instrumental considerations need generally come to bear.

But with the law, the judgment is necessarily expressed if it is made. Moreover it is public, and with the criminal law often of devastating import for the person about whom it is made. So the structure of criminal culpability or mens rea must be sensitive, in a way that moral culpability distinctions need not be, to many purely instrumental considerations. How will this way of defining 'intention' in law impact upon and reflect the public perception of 'murderers' or 'thieves'? How will this way of conceiving 'recklessness' affect the likelihood of serious injustice caused by jurors' misunderstandings? To what extent will this definition of 'willfulness' inflict inappropriately serious social stigma upon relatively minor offenders? To what extent will such a treatment of 'dishonesty' by judges encourage jury-members to give vent to their prejudices? Mens rea principles must, as a matter of moral urgency, be partly shaped by numerous instrumental factors identified in questions such as these. Of course, they are not factors to which trial judges should normally give weight in dealing with particular cases, where that would involve subverting or manipulating the applicable legal norms. Typically that would amount to a departure from Rule of Law or Rechtstaat values, which demand conformity between official action and expressed rule. But these instrumental questions are precisely the kind of questions to which legislatures, law reform bodies and appellate courts should give weight when distilling general principles for the future. For such purposes, there is nothing suspect about instrumental reasoning, always assuming that it is not relied upon to the exclusion of matters of intrinsic value—and with the essential rider, of course, that both the instrumental and the intrinsic considerations relied upon have to be admissible within the general constraints imposed upon the law by the harm principle, the Rule of Law and so on.

Duff's hostility to the role of instrumental considerations in shaping the criminal process is made plain in his earlier book, Trials and Punishments. 'A criminal trial', he writes, 'must . . . address and respect the defendant as a rational agent; it must seek her participation, and her assent to its verdict.'34 In principle, that is, the trial should be conducted for the sake of certain intrinsic

34 Duff, Trials and Punishments, above n 6, 116.
value considerations, and should not degenerate into an instrumental technique for deterring potential offenders, making examples of people, reinforcing public confidence or the like. The salient intrinsic value considerations are considerations of respect for autonomy, understood in a rather Kantian way as moral autonomy rather than the more familiar modern ideal of personal autonomy. But the resulting view is very extreme, much more so than any view espoused by Kant himself. For Duff, it seems that even possible future gains or losses of moral autonomy itself should not count in shaping the criminal process. What matters exclusively is respect for the moral autonomy of the accused, not promotion of the future moral autonomy of people in general. Giving weight to the latter would amount, after all, to an instrumentalization of the system. Even Kant, who sees instrumental reasoning as completely alien to morality, does not carry the exclusion of instrumental reasoning over into the law. Kant sees the law as contributing directly (constitutively) to justice, and only indirectly (instrumentally) to virtue. The best the law can normally do is to give potential offenders non-moral reasons (duties of justice) to avoid offending, such that morally upright people will have the proper space for their moral reasoning (duties of virtue), unimpeded by any miscreation on the part of the potential offenders. That is, the law is primarily instrumental, promoting moral autonomy in general rather than respecting it in the case of the accused. If we take a wider view of moral value than Kant does, we can of course find more space for intrinsic moral value in the law. But it does not follow that we should lose all our concern for instrumental considerations. It seems positively bizarre to give all intrinsic considerations absolute exclusionary force vis-à-vis all instrumental considerations, which is what Duff seems to do in his treatment of the criminal trial.

No doubt concerns about respect for moral autonomy underlie many arguments in *Intention, Agency and Criminal Liability*, as in *Trials and Punishments*. No doubt Duff thinks that we do not fully respect the moral autonomy of accused persons if we assess their culpability by reference to instrumental considerations, even if in the process we promote moral autonomy in general by discouraging and stigmatizing autonomy-destructive attacks and injustices of one kind or another. But what we find in the new book is that the conception of moral autonomy with which Duff is working is actually rather un-Kantian in some respects. An accused person's moral standing, her claim to be respected as a moral agent, seems now to be shaped by various factors which Kant would have set aside as irrelevant. First, the distinction between intended consequences and foreseen side-effects, which is at the heart of Duff's project, is not a pivotal one for Kant. The important things for Kant are the ends for which one acts, one's motives rather than one's intentions. Those who give the intentions/side-effects distinction the foundational and general significance which it enjoys in Duff's

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work are typically committed to the so-called ‘Doctrine of Double Effect’ rather than to Kantian categoricals, and Duff seems to be no exception. He speaks, after all, of the ‘distinctive harm of being killed by one who attacks one’s life’ as being qualitatively (incomparably?) different from the harm involved in merely ‘consequential’ death (112). And this seems to be, for Duff as for most adherents of the Doctrine of Double Effect, a fundamental rather than a derivative feature of morality. Secondly, Duff believes that one’s success or failure in carrying out one’s direct intentions, although just a matter of chance, may make a difference to one’s culpability, even as intrinsically assessed. ‘The would be killer whose attempt fails has not in fact made herself a murderer; and that fact should matter to her, to us, and to the criminal law’ (192). So the intention/side-effects culpability distinction is complemented by a success/failure distinction within the category of intended results. This is not at all implausible, but it has its roots in a moral perspective which, quite unlike the Kantian one, finds intrinsic moral significance in familiar emotions such as guilt and regret.37 Kant, after all, is the best-known opponent of the whole idea of moral luck, while Duff seems now to be an enthusiastic advocate. What we have, then, is a shift away from Kantian concerns towards a different ethic, no less insistently anti-instrumental, although perhaps rather less secular in its inspirations. It is evidently not a monistic ethic, grounded in a single value, but it is nevertheless a distinctly unified ethic, centred on a detailed and harmonious picture of the intrinsic moral significance of human interventions in the world. It is also an ethic which comes across vividly in Duff’s arguments, and influences them in virtually every detail.

So Duff’s book stands out as a serious, if ultimately myopic, ethical evaluation of certain doctrines of criminal culpability, contrasting sharply with the sterile, pseudo-moral dogmatics about mens rea which tend to predominate in the Anglo-American legal literature. It has to be said, however, that Duff’s book is presented as something more than an ethical evaluation of the law. It claims to be a ‘philosophical introduction’. Is it indeed philosophical? Is it a contribution to moral philosophy, or to legal philosophy, or to the ‘philosophy of action’, as the subtitle suggests? About this one cannot be so sure. In one sense, Duff still takes too much for granted for his work to count as genuinely philosophical, a fully-fledged piece of theory. Although his work is nothing like as superficial as many arguments in the courts and the textbooks, he still resigns himself prematurely to the existing Anglo-American and Scottish framework of criminal law, if not to the details. There is no suggestion, of course, that he should have filled his ‘philosophical introduction’ with comparative criminal law from all around the

37 Doubtless this un-Kantian concern plays an important tacit role in Trials and Punishments as well. It seems to underlie the shift from the orthodox Kantian view that retributive punishments are the best respecters of moral autonomy to Duff’s view that only penitential punishments are fully-fledged respecters of moral autonomy. To understand better the role of the un-Kantian factors here, see Duff’s ‘Punishment, Expression and Penance’ in Heike Jung, Ulfried Neumann and Heinz Müller-Dietz (eds), Recht und Moral: Beiträge zu einer Standsortbestimmung (Baden-Baden 1991).
world. That would hardly have made the book any more philosophical, and our own occasional footnote references to German criminal law have not been designed to identify lacunae in Duff's work but merely to illustrate the existence of alternative approaches. In order to write a deeply philosophical book on this subject, rather, Duff would have needed a much stronger sense of the contingency of the problems which are raised by those notable legal cases which he analyses so clearly in the first few pages. Those problems are partly conceptual problems, to be sure, and so philosophical problems insofar as philosophers are concerned with the study of concepts. But they are also partly institutional problems. They arise in the way that they do partly because of certain preoccupations deeply embedded in specific legal systems. A philosophical introduction to them is insufficiently philosophical, by certain important standards, unless the extent of the systemic embeddedness is also examined. But Duff largely shrugs off this issue. In that sense he has not ultimately succeeded in working out the general theoretical perspective on mens rea which he has been trying to develop over the years. Certainly, he has bettered all the contemporary lawyers' contributions to the mens rea debate as regards normative coherence, precision of examples, elimination of fallacy and so on. But there is an important sense in which his book is no more philosophical than are the standard arguments of the judges and legal commentators. They are merely rather better arguments in certain very important respects.

There is, of course, another standard by which one might judge the claims of the book to be 'philosophical'. That is: Does it address the really big questions? It certainly addresses some. There is the substantial critical discussion of 'dualist' and 'behaviourist' 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 (116–35). At this point it might have been fruitful for Duff to cross the disciplinary line, seeking out some support in the socio-psychological literature on attribution. There is also a certain amount of moral philosophy (as opposed to bare moral argument) at the heart of the book, when Duff attempts, with some success, to classify accounts of culpability into consequentialist and non-consequentialist groups (99–115). There are, moreover, brief reiterations of various Davidsonian views about 'Intentionality' and practical rationality, although all of these tail off just as they start to get interesting (40–44, 69–73, 99). But there are plenty of other big questions which are more or less left out, and to some extent they are the ones which one would really expect to find answered here, in a book supposedly about the 'philosophy of action'. There is no discussion of the criteria for identifying events as actions in non-paradigm cases, nor of the nature of voluntariness as a feature of actions, nor of the structure of

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inaction, nor of the notorious problem of deviant causal chains. And yet these are the questions which lie at the heart of any writing which is even moderately engaged with contemporary work in the 'philosophy of action'. Moreover, there is no discussion of the distinction between ascription and prescription, and hence of the real distinction between questions of responsibility and questions of culpability. Duff wastes the important word 'responsibility' on a cameo role, as a kind of prima facie culpability. But then, in what terms do we talk of the bare threshold ascriptions of events to people which we conjure up independently of any prescription-loaded questions of blame and condemnation? Likewise, one cannot really view Duff's chapter on dualism as a thorough rehearsal of the distinction between ascription and description, which imposes itself commandingly on any conception of intention as a moral or legal tool. In this sense, as in the sense already identified, Intention, Agency and Criminal Liability stops short of being a philosophical introduction to anything at all—at least of all a philosophical introduction to the problems of action and agency. The book should perhaps have been subtitled 'a clarification and evaluation of criminal law doctrine'—but certainly not 'philosophy of action and the criminal law'.

Or more accurately, we should reiterate, 'a clarification and evaluation of selected criminal law doctrines'. The selectivity is underlined by the fact that many culpability issues which are central to the concerns of the criminal law are barely touched upon. Duff glosses over the permissibility of strict liability (9), notices but does not react to the central importance of negligence as a test case for any theory of culpability (11), and never discusses the role of mistakes in relation to justification and excuse, or indeed the structure of justification and excuse themselves as they bear upon questions of criminal culpability. He overlooks, moreover, the potentially diverse ways in which statutes can achieve similar results: some of his crimes of 'recklessness', for example, could be reconstructed as crimes of intentional endangerment. This poses the more general question of whether there can be a theoretical treatment of mens rea alone. Can any philosophical treatment really sustain a sharp divide between problems of actus reus and problems of mens rea? Duff's critique of 'dualism', problematic as his alternative may be, casts doubt on the ultimate tenability of such a distinction (135). But somehow he never brings these observations fully to bear upon the subject-matter of his own work. In defining the scope of his enterprise, he himself relies on the very actus reus/mens rea distinction which he gives us such good reason to question.

Having so single-handedly stimulated and focused the debate, however, Duff has shaped an exciting programme of further investigation for others, and perhaps for himself. The theory of mens rea in Anglo-American and Scottish law has surely entered a new phase with the publication of Intention, Agency and

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39 On 'deviant causal chains', see Davidson, 'Freedom to Act' in his Essays on Actions and Events, above n 11, 63 at 79–81.
Criminal Liability. Duff has applied a unified, if not entirely convincing, normative perspective to certain perennial problems of the criminal law, in the process laying waste to countless fallacies and inconsistencies in the current legal literature on the subject. He has certainly repeated the kind of coup which Hart pulled off more than twenty years ago, and as nobody else writing in English, it seems to us, has done in the meantime.40

40 We are grateful to Stephen Shute, Jeremy Horder and Simon Gardner for detailed comments on earlier drafts of this article.