

INTOXICANTS AND CULPABILITY

DOUGLAS HUSAK*

I: THE CONCEPTUAL FRAMEWORK

Anglo-American jurisdictions differ widely about how intoxication affects criminal liability generally and culpability in particular.¹ In fact, it is hard to think of many substantive issues on which jurisdictions diverge more. A host of approaches have been defended.² Since my aims are normative rather than descriptive, I make no effort to summarize the various alternatives that states have taken. My objective is more foundational. Although jurisdictions resolve the problem in different ways, they tend to agree about how the issue should be conceptualized. I am less confident, however, that we should accept the basic framework they presuppose. If I am correct that this framework is problematic, I will at least have offered an explanation of why the issue is so intractable. But I also hope to contribute toward its resolution.

In view of both the practical importance and theoretical difficulty of this issue, it is surprising that it has not generated more interest among philosophers of criminal law. In short, the topic is radically under-theorized, at least in the United States.³ First, consider its practical significance. An astonishing number of crimes are perpetrated by persons who are intoxicated to some degree or

*Professor of Philosophy, Rutgers University.

¹ I speak of intoxicants generally rather than of alcohol in particular. Any substance that is *psychoactive*---that is, any substance that affects thought, perception, mood or behavior through its impact on the central nervous system---should be included in a discussion of the impact of intoxicants on culpability. Although the law has struggled most with alcohol, any principled resolution of this issue must be capable of being extended to other kinds of intoxicants---both licit and illicit.

² See the proposals surveyed in Meghan Paulk Ingle: "Law on the Rocks: The Intoxication Defenses are Being Eighty-Sixed," 55 *Vanderbilt Law Review* 607 (2002). The most promising such alternative, I think, is to enact a new offense of "committing the actus reus of offense X while intoxicated." See Rebecca Williams: "Voluntary Intoxication---A Lost Cause?" (forthcoming).

³ In the United Kingdom, the topic has been addressed by at least three reports of the Law Commission, the most recent of which was written primarily by Jeremy Horder, one of the country's most distinguished legal philosophers.

another.⁴ By contrast, relatively few crimes are committed by defendants who are conceivably eligible for excuse or mitigation under conditions that have received far more scholarly attention. Although philosophers of criminal law have produced volumes about the rationale and parameters of self-defense, for example, the significance of this topic in the real world pales alongside that involving intoxication. As a theoretical matter, the very amount of disagreement among jurisdictions provides ample indication of the depth and complexity of the issue. If the impact of intoxication on culpability were easy to specify, one would expect more convergence among Anglo-American states.

Although commentators differ about how to resolve the issue, they seemingly concur that it presents a specific example of a more general problem in criminal law theory. This more general problem might be called *actio libera in causa*, namely, the problem that arises when persons culpably create the conditions of their own defense. Each instance of this general problem shares the following structure. At t₂, when defendants commit the actus reus of an offense, they apparently lack the culpable state the statute requires in order to impose liability. As a matter of logic and legality, they should be acquitted. But few commentators are willing to allow them to evade punishment on this ground.⁵ The reason for this unwillingness is that these defendants have culpably done something at t₁ that subsequently deprives them of the culpability they otherwise would possess at t₂.⁶ In the specific context at hand, the act of becoming grossly intoxicated at t₁ is said to prevent defendants from having the degree of culpability (recklessness, knowledge, or purpose) a statute requires when they commit an actus reus at t₂.

In order to impose punishment, theorists who presuppose that the issue of intoxication is a specific instance of the general problem of *actio libera in causa* and do not favor acquittal need a rationale for treating defendants *as if* they possess a culpable state they lack. In other words, they need

⁴ Alcohol is a factor that contributes to approximately 40% of the violent crimes committed in the United States. More than 5 million of the persons under correctional supervision were under the influence of alcohol at the time of their offense. See National Institute on Alcohol Misuse and Crime (2009), <http://www.alcoholandcrime.org/npamc/issues/alcohol-and-crime/>. In addition, illicit drugs also contribute to criminal behavior. See Douglas Husak: "Drugs, Crime, and Public Health: An Insight from Criminology," (forthcoming).

⁵ One commentator wryly expresses this point by saying "we are left with the simple policy decision that we will not allow defendants to adduce evidence that would lead to their acquittal, because then we would have to acquit them." Williams: *Op.Cit.* Note 2, p.y.

⁶ Admittedly, this apparent agreement conceals many important differences. Some commentators advocate punishment on *policy* grounds, while others seek to provide reasons of *principle* in favor of punishment. In this paper I am solely concerned with the latter sort of reasons.

a rationale to embrace a legal fiction. The most promising such rationale is that these defendants have a *different* culpable state that is *as bad or worse* than the state they lack and the statute requires. Defendants cannot complain of injustice, this rationale continues, if the law *substitutes* the (as bad or worse) culpable state they actually have for the (less or equally bad) culpable state the statute requires. Thus the discussion quickly moves to a consideration of whether and under what circumstances the culpability of becoming intoxicated is as bad as and thus can be substituted for the culpable state the statute requires.⁷

It would be a mistake, however, to suppose that the issue of how intoxication bears on culpability is controversial because substitution rules are inherently objectionable. They are not. Many rules and doctrines in the criminal law---those governing willful ignorance⁸ and transferred intent,⁹ for example---are best construed as substitution rules. Admittedly, the provisions governing willful blindness and transferred intent have been challenged and could be altered without drastic repercussions. In fact, however, substitution rules are pervasive throughout the criminal law. The entire culpability structure of the Model Penal Code---its sequential ordering of culpable states from the worst (purpose) to the not-so-bad (negligence)---presupposes a set of substitution rules.¹⁰ Of course, we still need to identify the conditions under which substitution rules are justified. According to Susan Dimock, “a substitution rule is permissible only if proof of the substituted element would lead inexorably to belief in the essential element.”¹¹ If *lead inexorably* is construed as *entailment*, Dimock’s suggestion is too stringent. After all, *none* of the culpable states in the Model Penal Code hierarchy entail those below it, even though the substitutions the Code allows are relatively uncontroversial.¹² No commentator

⁷ The phenomenon I call *substitution* has been described in various ways. Moral philosophers have come to refer to it as *tracing*: when a defendant does not know something at t2 she would have known but for her culpable act or omission at t1, her blame at t2 can be traced to her culpable conduct at t1. For a nice discussion of tracing and non-tracing cases, see Holly M. Smith: “Non-Tracing Cases of Culpable Ignorance,” 5 *Criminal Law and Philosophy* 97 (2011).

⁸ See Douglas Husak and Craig Callendar: “Wilful Ignorance, Knowledge, and the ‘Equal Culpability’ Thesis: A Study of the Deeper Significance of the Principle of Legality,” in Douglas Husak, ed.: Philosophy of Criminal Law: Selected Essays (Oxford: Oxford University Press, 2010), p.200.

⁹ See Douglas Husak: “Transferred Intent,” in Husak: *Id.*, p.91.

¹⁰ *Model Penal Code*, §2.02(5).

¹¹ Susan Dimock: “What are Intoxicated Offenders Responsible for? The ‘Intoxication Defense’ Re-examined,” 5 *Criminal Law and Philosophy* 1, 9 (2011).

¹² See Douglas Husak: “The Sequential Principle of Relative Culpability,” in Husak: *Op.Cit.* Note 8, p.177.

protests because a statute requiring knowledge can be breached by a defendant who acts purposely, even though purpose does not entail knowledge and knowledge does not entail purpose.

In any event, substitution rules and their justification are not my central topic. My more limited objective is to argue against attempts to understand the effect of intoxication on culpability as a substitution rule. My alternative does not construe this issue as a specific instance of the general problem of *actio libera in causa*. With a small caveat, we need not consider what the intoxicated defendant did at t1 to assess his degree of culpability at t2.¹³ In order to justify the punishment of intoxicated defendants, we need only consider them at t2. In what follows, I hope to explain why so many thoughtful commentators presuppose the framework I reject. In the course of defending my alternative, I need to challenge conventional wisdom both about the nature of culpability and about the effects of intoxicants.

II: EXISTING SCHOLARSHIP AND THE MODEL PENAL CODE

In the United States, scholarly work on the topic of the relevance of intoxication to culpability typically focuses on whether we can offer a philosophically respectable defense of §2.08 of the *Model Penal Code*. Roughly, this provision is as follows. If an element of a penal statute requires the culpable states of knowledge or purpose, a defendant is not liable for breaching that statute if he lacks knowledge or purpose with respect to that element, even though he is intoxicated and *would* have had the required knowledge or purpose had he been sober. For this category of crimes, liability is precluded by a state of intoxication that “negatives” the culpable state the statute requires. But a very different outcome is provided if an element of a penal statute requires only recklessness or negligence. In such cases, an intoxicated defendant who lacks recklessness or negligence with respect to that element is liable if he *would* have had the required recklessness or negligence had he been sober. For this category of crime, liability is *not* precluded by a state of intoxication even though it negatives the required culpable state.

It is hard to construe §2.08 as anything other than a compromise between two supposedly unpalatable extremes.¹⁴ Intoxication is regarded as sometimes but not always relevant to culpability and

¹³ The caveat refers to intoxication that is *non-voluntary*. See Part V *infra*.

¹⁴ Other jurisdictions strike a compromise by employing very different terms. The notoriously cryptic provision allowing intoxication to negate mens rea for crimes of specific intent but not for crimes of general intent is a similarly puzzling compromise.

liability. More specifically, it is material to the liability of defendants who are accused of breaching statutes requiring some (higher) culpable states, but not to that of defendants who are accused of breaching statutes requiring other (lower) culpable states. No one has succeeded in offering a principled reason why the Code draws a boundary differentiating knowledge from recklessness in assessing the relevance of intoxication to liability. Even if this differentiation is sensible on policy grounds, its rationale as a matter of principle is utterly mysterious. The matter is especially puzzling if we construe knowledge as a special case of recklessness.¹⁵ According to the Code, defendants who act knowingly (with respect to a result element, for example) are “practically certain” that that result will obtain, while defendants who act recklessly are merely conscious of a substantial risk that it will obtain. As the probability of the risk becomes higher, it eventually crosses the threshold and is transformed into knowledge. If a statute requires that persons are not liable unless this threshold is crossed, a defendant is in a more favorable position to evade liability because of the effects of his intoxication.¹⁶

The gist of §2.08 is sometimes misunderstood. The hypothesis is not that intoxication has the power to cause persons to do things---most importantly, to commit crimes---that they would not have done while sober. What defendants would have *done* under counterfactual conditions is not exactly the issue addressed by §2.08. Such a hypothesis may seem relevant to liability on several grounds, one of which invokes a character theory of excuses. On at least some versions of this theory, persons become eligible for punishment because of their bad character. But the badness of a defendant’s character is not always reflected when he commits a crime he would not have committed but for his intoxication.¹⁷ If we justifiably punish only those acts that reflect a defendant’s bad character, it is arguable that at least some acts performed by extremely intoxicated defendants should not be punished.¹⁸ I will have a bit more to say about character theories in Part III. For now, it is enough to show that this hypothesis about the

¹⁵ Knowledge is treated as a “limiting case of recklessness” in Larry Alexander and Kimberly Kessler Ferzan: Crime and Culpability (Cambridge: Cambridge University Press, 2009), p.32.

¹⁶ For example, the relevant statutes in most jurisdictions do not allow liability to be imposed on defendants who possess a controlled substance unless they *know* the substance they possess is controlled. Thus (if the Model Penal Code’s provisions on intoxication are followed), a defendant who is too drunk to know that what he possesses is a drug would not be liable. But a few states (e.g., Florida) allow liability when defendants are merely *reckless* about the nature of the substance they possess. Thus a defendant who is too intoxicated to be aware of the risk that the substance he possesses is a drug would be liable if he would have been conscious of that risk when sober.

¹⁷ A version of a character theory is defended in G.R. Sullivan: “Making Excuses,” in A.P. Simester and A.T.H. Smith, eds.: Harm and Culpability (Oxford: Oxford University Press, 1996), p.131.

¹⁸ For critical thoughts about character theories of excuse, see Jeremy Horder: Excusing Crime (Oxford: Oxford University Press, 2004), especially pp.118-125.

power of intoxicants does not underpin §2.08. When intoxication is relevant to culpability, its relevance is not due to its alleged power to lead us to perform acts out of character. Instead, its relevance is due to its effect on a culpable state a given statute requires for liability. Most of these states are *cognitive*. Thus the more relevant hypothesis underlying §2.08 is that extreme intoxication can cause persons not to believe (and thus not to know) facts they would have believed (or known) while sober, where knowledge of these facts is a material element of the offense charged. On this hypothesis, some extremely intoxicated individuals do not actually commit the crimes for which they are prosecuted---as long as these crimes are construed to include mens rea (more specifically, knowledge) and not merely actus reus. What these persons would have *done* while sober is not exactly the point.¹⁹ Instead, the question is what these persons would have *known* (or *believed*) while sober.

The first part of §2.08---that allows intoxication to preclude liability when it causes a defendant to lack a required culpable state of purpose or knowledge---is pure and straightforward. Legality requires that persons are not subject to punishment unless they breach a penal statute, and a defendant who does not satisfy the *mens rea* of a statute is no more worthy of punishment than a defendant who does not satisfy its *actus reus*. But the Code deviates from this result for offenses that require the culpable states of recklessness. In these cases, the law perpetrates a fiction. It treats defendants *as if* they had culpable states they actually lack. Thus this latter part of this provision---the part that does not allow the effects of intoxicants to preclude liability for crimes requiring recklessness---is more in need of justification. Much contemporary literature on the topic of the relation between intoxicants and culpability seeks either to support or to attack a purported defense of the latter part of this provision.²⁰

Later I will suggest that this framework may be defective; we should not try to resolve the issue of how intoxication affects culpability by deciding whether and under what circumstances the act of becoming intoxicated at t1 substitutes for, or is as bad as, the state of being reckless (that is, the state of being conscious of a substantial risk) at t2. Still, I join those many thoughtful commentators who

¹⁹ For a discussion of the possible implications of a character theory on intoxication and liability, see Victor Tadros: *Criminal Responsibility* (Oxford: Oxford University Press, 2005), especially pp.297-299.

²⁰ A few commentators have questioned whether rules about intoxication must be construed as substitution rules. According to one theorist, "rather than substituting the intent to become intoxicated for the intent to commit the crime, the act of becoming intoxicated, when coupled with a violent offense, has become the crime." Heather MacMillan-Brown: "No Longer 'Leary' about intoxication: In the Aftermath of *R. v. Daviault*, 59 *Saskatchewan Law Review* 311, 332 (1995). This view mirrors that taken by Justice Ginsburg in her concurrence in *Montana v. Egelhoff*, 518 U.S. 37 (1996).

conclude that whatever culpability such a defendant has at t1 often is *not* as bad as recklessness at t2.²¹ Persons become intoxicated for different reasons, under different circumstances, and with different expectations about how they will be affected.²² As a general matter, however, it is almost impossible to accept the claim that the act of becoming intoxicated is negligent, let alone reckless. Whatever culpability is exhibited by defendants who become intoxicated---even when their intoxication is extreme---typically pales in contrast to that needed to hold someone liable for a serious crime such as manslaughter. Suppose Jones kills by engaging in conduct in which he consciously disregards a substantial risk of death. Suppose Smith kills by engaging in the same conduct, although he is not conscious of the risk. Smith, however, would have been conscious of the risk but for his intoxication. I fail to understand why many commentators apparently believe that Jones and Smith are equally culpable for their acts of killing. This equivalence is plausible only in cases in which Smith is aware at t1 of his propensity to become homicidal at t2.²³

But I will not seek to defend my intuitions about the relative culpability of Jones and Smith. Claims that two defendants are or are not equally culpable are notoriously controversial and difficult to support or attack. Instead, I will argue that we should not try to resolve the issue of how intoxication affects culpability by deciding whether and under what circumstances the act of becoming intoxicated at t1 is as bad as the state of being conscious of a risk at t2. Two crucial assumptions are needed to suppose that this framework of inquiry provides a sensible resolution of the problem of how intoxicants affect culpability. First, we must assume that intoxication is relevant to culpability because of its power to affect the cognitive states of knowledge and belief. I will challenge this assumption in Part III. In the remainder of this Part, I want to highlight a second assumption that underlies the framework built by §2.08: We must assume that the Model Penal Code contains the correct culpability structure. In other words, we must assume that assessing the impact of intoxicants on such states as knowledge and recklessness is philosophically important because law and morality should countenance these states in its theory of culpability. If we could assess the culpability of a defendant without determining what he knows or believes, a theory of the impact of intoxication on culpability could adopt an entirely different

²¹ Among these commentators is Susan Dimock: "The Responsibility of Intoxicated Offenders," 43 *Journal of Value Inquiry* 339 (2009).

²² Gideon Yaffe profitably contrasts justified, non-justified, and unjustified acts of becoming intoxicated. See his "Intoxication, Recklessness and Negligence," *Ohio State Journal of Criminal Law* (forthcoming).

²³ According to a study in Wales, most persons who commit the actus reus of a crime while grossly intoxicated have no prior convictions. Thus it is hard to understand how they could have been expected to anticipate that their intoxication would lead to *any* crime.

conceptual framework. In other words, if the culpability structure of the Model Penal Code is defective, an assessment of §2.08 would not go far in establishing the relevance of intoxicants to culpability.

I have become persuaded that inquiries about whether given a defendant has or lacks the cognitive states included in the Model Penal Code do not always raise the right questions in determining whether and to what extent he is culpable for his criminal acts. Oftentimes these inquiries take us down the right path, but sometimes they do not. I have two grounds on which to question whether we should conceptualize the culpable state of recklessness to involve the conscious awareness of a risk of harm.²⁴ Since my reservations extend beyond the topic of intoxicants, it is helpful to summarize them here.

The first basis of my skepticism involves uncertainty about what is meant by *conscious awareness* of a risk. More often than not, the determination of whether a given defendant is consciously aware of a risk (and thus eligible for liability for a crime requiring recklessness) depends on what he believes. Under the Code, recklessness entails conscious awareness; conscious awareness entails awareness; awareness entails knowledge; and knowledge entails belief. Hence a defendant who does not believe he has created a risk cannot be reckless for having created it. In most cases, we are perfectly confident in determining whether we have or lack the relevant belief. In a number of contexts that are important for the criminal law, however, such confidence is lacking. Consider two such contexts. First, in cases in which a proposition (“I have created a risky condition by doing x”) temporarily slips our mind, it is very hard to say whether we continue to believe it.²⁵ Second, in cases in which we become distracted (by texting while driving, for example), it is similarly difficult to decide whether we believe the proposition (“I am driving carefully”) from which our attention has been diverted.²⁶

Statutory definitions of recklessness require that we consciously disregard the belief that we have created a risk, but what exactly does this mean? Surely this definition does not demand us to have an occurrent belief. In other words, we can be reckless even though we are not silently rehearsing the proposition “this is risky” to ourselves at the moment we cause harm. But if we can be reckless despite the absence of an occurrent belief, what kind of belief is required? Presumably, we can be reckless because of our *tacit* beliefs. But the criteria to identify our tacit beliefs are philosophically contentious.

²⁴ I do not mention additional difficulties, such as the problem of deciding (beyond a reasonable doubt!) what a person would have believed under counterfactual conditions.

²⁵ See Douglas Husak: “Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting,” 5 *Criminal Law and Philosophy* 199 (2011).

²⁶ Douglas Husak: “Distraction and Negligence,” in Lucia Zedner, ed.: Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth (Oxford: Oxford University Press, forthcoming).

The dispositional accounts such criteria typically apply are notoriously problematic.²⁷ In a number of contexts, these criteria yield no answer to the question of whether a defendant has or lacks the particular belief that would suffice to establish his recklessness.

Second, it is difficult to specify the *content* of the belief of which the defendant must be aware in order to be liable for a crime of recklessness.²⁸ Ideally, the particular belief of which he must be aware should correspond precisely to that specified by the statute he is accused of breaching. If he is charged with homicide, for example, he must have been aware that his conduct created a risk of death. Often, however, it is uncertain how close a correspondence is needed between the belief the defendant actually possessed and the harm the statute requires. This general problem is exacerbated if we suppose that intoxicated defendants are reckless at t2 because of the risks they disregard by drinking at t1. It is unusual, I submit, for defendants who drink at t1 to disregard the risk of the specific harm they actually cause at t2. Few intoxicated defendants who commit the actus reus of arson, for example, are aware of the risk that their drunkenness will lead them to start a fire. I see no reason why the need for a correspondence between the mental state the defendant possesses and the mental state required by the statute should be relaxed in cases of intoxication.²⁹

The foregoing two problems have led me to question whether the law asks the right questions. In order to determine that a defendant is reckless, must we always decide that he has or lacks given beliefs? It would be helpful if our judgments of culpability did not depend so crucially on the very controversial determination of the beliefs persons hold at the time they cause harm. Of course, judges and practicing lawyers may have no option but to grapple with this difficult issue as best they can if they hope to make accurate judgments about culpability in jurisdictions that conform to the Model Penal Code. But legal philosophers need not concede that the Code contains the correct culpability structure. In what follows, I will question the Model Penal Code assumption that the cognitive states of knowledge and belief are crucial for assessing the recklessness of given defendants.

²⁷ The adequacy of dispositional accounts is called into question by the phenomenon of *alief*. See Tamar Szabo Gendler: "Alief and Belief," *CV The Journal of Philosophy* 597 (2008).

²⁸ See Kim Ferzan: "Opaque Recklessness," *91 Journal of Criminal Law & Criminology* 597 (2001).

²⁹ Of course, if the culpable state at t1 need only be worse than or as bad as that required under the statute at t2, it is arguable that there is less need for an exact correspondence between the particular risk of which the defendant is aware at t1 and the risk required by the statute he is charged with violating. If a defendant believes he runs the risk of rape (a very serious crime) at t1, but he subsequently commits the actus reus of robbery (a less serious crime) at t2, might we be justified in holding him liable under a substitution rule?

III: SUFFICIENT CARE

I hope to make progress toward a better account of recklessness by pursuing a suggestion made by Peter Westen.³⁰ One might begin by inquiring why our judgments of culpability often seem sensitive to what a defendant believes. Westen would answer that we care about beliefs not for their own sake, but because of what they generally reveal about the persons who have them. What is relevant, according to Westen (that is, what is intrinsically morally important) is whether and to what extent persons exhibit sufficient care for the legitimate interests of others when they act.³¹ The presence or absence of given beliefs is often an excellent indication of whether we care enough about others. If I have no idea that the glass of juice has been poisoned when my back was turned, the fact that I leave it around for you to drink is not evidence that I care too little about your welfare. In many cases, however, beliefs are a clumsy indicator of the extent of my caring. *If* we decide that a groom who does not attend his own wedding has forgotten the relevant belief (viz., “today is my wedding day”), we would not be uncertain about whether he cares enough about his bride to evade blame.³² Similarly, *if* we decide that a person who is distracted while driving does not believe he is creating a danger while texting, we would not be uncertain about whether he cares enough about the safety of others to evade liability should his car strike a pedestrian. In such cases, philosophical confusion about the exact content of the beliefs held by these persons seems beside the point in deciding whether they are culpable.

My intuitions support Westen’s analysis. When we hold a person to be reckless for his conduct, we regard him as having shown too little care and concern for the interests of others at the time he acts. Intuitions aside, however, why should we accept Westen’s account? One reason is that we literally punish people, not their acts. If we are justified in punishing people for their acts, there must be something about *them* that justifies our punishment. That is, punishment is justified only if we are able to make some inference from the act to the person who performs it. This inference may be minimal and

³⁰ Peter Westen: “An Attitudinal Theory of Excuse,” 25 *Law and Philosophy* 289 (2006).

³¹ For an earlier argument that the criminal law should care more about conative than cognitive states, see Kenneth Simmons: “Rethinking Mental States,” 72 *Boston University Law Review* 463 (1992).

³² I owe this example to R.A. Duff: *Intention, Agency, and Criminal Liability* (Oxford: Blackwell, 1990), p.163.

need not take us very far down the road to what I earlier described as a character theory. Even acts out of character may tell us enough about the person who commits them to justify punishment.³³

Suppose Westen---or at least, my interpretation of Westen---is largely correct.³⁴ In determining whether and to what extent someone is reckless, we need not struggle to identify the content of his cognitive states. Instead, we should move directly to the more important inquiry: whether and to what extent his conduct indicates the presence or absence of the degree of care that law demands for the interests of others. If so, we may take a wrong turn by supposing that the relevant question for determining the impact of intoxication on recklessness depends on how intoxication affects cognitive states such as belief. This question *may* be helpful, but only because of what it indirectly reveals about what is more important. What is ultimately decisive, I think, is how intoxication affects our *degree of care*. More specifically, what is relevant is whether and to what extent intoxication affects the degree to which persons have or lack the amount of care the law demands us to show for the interests of others.³⁵

It is important to note that this approach does not require us to conceptualize the issue of how intoxicants affect culpability as a specific instance of the more general problem of *actio libera in causa*. That is, we need not find a rationale to substitute the culpability a defendant exhibits at t1, when he becomes drunk, for that needed at t2, when he commits the actus reus of the offense. Instead, we need only assess the culpability of the intoxicated offender at t2, the moment his conduct causes harm. If his conduct at this time indicates a lack of sufficient care for the interests of others, we are justified in holding him to be reckless and liable for any crime for which that culpable state is required.

Admittedly, intoxication may well be the factor that caused this particular defendant to lack sufficient care. But why is this historical fact important in assessing his culpability? Most reckless defendants would be able to point to a prior event that caused them to be less careful than the law demands. Some earlier event led them to be hasty, greedy, distracted, forgetful, or the like. The fact that their lack of care at the time of their offense is caused by these prior events has no special salience.

³³ Moreover, acts *in* character may *not* tell us enough about the person who performs them to justify punishment. See Westen: *Op.Cit.* Note 30, pp.333-334.

³⁴ I am unsure whether Westen himself would accept the use I make of his work. Among other difficulties, he explicitly advances his view as a theory of *excuse* whereas I employ it as a theory of *recklessness*. I do not think that this account can be extended to // forms of culpability, including purpose (or intention). As R.A. Duff indicates, persons who cause harms intentionally are guided by the wrong reasons; persons who cause harms recklessly are not guided by the rights reasons. See R.A. Duff: [Answering for Crime](#) (Oxford: Hart Pub. Co., 2007), p.151.

³⁵ Gideon Yaffe also draws heavily from Westen in defending his views about the effect of intoxication on culpability. See *Op.Cit.* Note 22.

Why should intoxication be any different? No one should think that our ability (or inability) to identify the cause of wrongful behavior suffices to excuse it. As Stephen Morse continually reminds us, “a cause is just a cause, and causation per se is not an excuse, whether the causation is ‘normal’ or ‘abnormal.’”³⁶

As I have indicated, we need to make *some* inference to the person who acts in order to be justified in punishing *him*, and this need indicates the grain of truth in character theories. But we *can* make such an inference when a defendant lacks sufficient concern for the interests of others because she is intoxicated: namely, she is a person who lacks sufficient concern for the interests of others when she becomes intoxicated. Admittedly, this inference is minimal. But why require more? Not everyone loses concern for the interests of others when they become intoxicated. The fact that a particular defendant reacted to intoxicants in this way is a peculiar fact about *her*. Perhaps we would resist this inference if we thought that intoxicants raise serious issues of personal identity. Such issues would arise if intoxicants had the power to transform us into totally different persons---like the fictional substance that transformed the peaceful Dr. Jekyll into the monstrous Mr. Hyde. Although the question is partly empirical, I doubt that any intoxicant---and certainly not alcohol---has the power to transform us so radically. When intoxicated defendants commit criminal acts that express insufficient concern for the interests of others, we know all we need to know about them to make the required inference to the person we punish. Or so I claim.

IV: THE EFFECTS OF INTOXICANTS

Westen’s approach (or, again, my interpretation of it) does not require us to identify the cognitive states held by grossly intoxicated defendants in order to allow us to decide whether they are reckless. This result is fortunate, and not only for the reasons I have given. In addition, this result is fortunate because it is not at all clear that intoxication alters our beliefs. Although empirical links between alcohol and violence are widely confirmed and stronger than for any widely used illicit substance,³⁷ researchers lack a good understanding of how intoxication affects the elements that plausibly contribute to culpability---cognition, volition, and desire. Obviously, my remarks will only scratch the surface of a topic that is controversial both empirically and conceptually.

³⁶ Stephen J. Morse: “Uncontrollable Urges and Irrational People,” 88 *Virginia Law Review* 1025, 1040 (2002).

³⁷ Mark A.R. Kleiman, Jonathan P. Caulkins and Angela Hawken: Drugs and Public Policy (Oxford: Oxford University Press, 2011), especially p.120.

But let us begin by imagining two familiar scenarios. First, consider a drunken driver who swerves back and forth over a double yellow line on a highway. Do we suppose that he lacks some of the relevant beliefs he would have held were he sober? What specific beliefs do we imagine him to lack? Do we suppose that he does not believe that he is driving, or does not believe he is swerving, or does not believe that his swerving is risky? Second, consider a drunken male who forces a non-consenting female to have sex. Again, do we suppose him to lack one or more beliefs he would have held were he sober? Which specific beliefs do we imagine him to lack? Do we suppose that he does not believe he is having sex, or does not believe his partner is not consenting, or does not believe that consent is needed for his act to be permissible? I concede that any of these answers is *possible*, but I am skeptical that intoxication has this effect on drivers or rapists (or anyone else). In short, even extreme intoxication rarely if ever causes persons not to believe what they otherwise would have believed. I have already mentioned the difficulties in formulating and applying criteria to identify the content of beliefs. But these difficulties need not detain us, because a better account of the effect of intoxicants on recklessness is available.

Instead of supposing that intoxication affects cognitive states such as belief, it is more plausible to suppose that it affects the state Westen identifies as central to recklessness. More particularly, intoxication seems to alter the degree of care we exhibit for the interests of others. When grossly intoxicated, many persons alter the ratio of care they demonstrate for their own interests relative to those of others. In other words, they become selfish and self-indulgent. The beliefs of our drunk driver or intoxicated rapist may be intact, but these persons lose the degree of care they otherwise exhibit for the interests of other motorists or sex partners when these interests compete with their own. If I am correct, it is misleading to say that intoxicants cause us to be in a state in which we are less culpable, so that we need to substitute our culpability in becoming intoxicated at t1 for the degree of culpability a statute requires at t2. Instead, the effect of intoxication is more direct. Intoxication is the very factor that causes us to be culpable at t2.

Might we conceptualize the impact of intoxication on levels of care so that beliefs are altered after all? If so, intoxication would be relevant to recklessness as defined by the Model Penal Code. Empirical evidence has long suggested that intoxication can skew our estimates of risk and lead us to judge that situations are less dangerous than we would otherwise suppose.³⁸ Of course, our assessments of risk are notoriously defective under the best of circumstances, but intoxication may lead

³⁸ See G. Agostinelli and G. Miller: "Drinking and Thinking: How Does Personal Drinking Affect Judgments of Prevalence and Risk?" 55 *Journal of Studies on Alcohol* 327 (1994).

us to make judgments that are even less reliable. Even if true, however, this evidence may not undermine my thesis that the relevance of intoxication to recklessness does not consist in its impact on belief. First, recklessness would be affected only if intoxication led people to judge that the level of risk fell below whatever threshold makes it *substantial*---since the Code defines recklessness as the disregard of a substantial risk. Our estimates of danger may not fall below that threshold, even though we are grossly intoxicated. In addition, many jurisdictions appear to allow determinations of whether a risk is reckless to be made by the judge or jury rather than by the accused, so that the subjective probability attached by the individual defendant is beside the point. Most importantly, even if belief *is* affected, this effect is relevant only because of what it reveals about the level of care of the person who has it. For each of these reasons, the empirical evidence to which I refer is unlikely to show that intoxication affects recklessness because of its power to alter our cognitive estimates of risk.

Of course, matters are not quite so simple. Intoxicants do not affect all people uniformly. Anecdotes confirm the incredibly wide variation in individual response to alcohol. As the scope of discussion is widened to include all intoxicating substances, this degree of diversity expands still further. Moreover, intoxicants generally and alcohol in particular seem to have the peculiar effect of preserving or even elevating the degree of care we exhibit for persons in our own group, while decreasing our concern for persons outside it. Evidence for this statement begins by noting that heavy drinking typically takes place in peer groups, and we should not try to understand intoxication without acknowledging this group dynamic.³⁹ When persons in groups drink heavily, they often look out for and protect other drinkers in their own group. All too frequently, however, they attach too little weight to the interests of persons outside of their group.

A few other findings should be mentioned in understanding the effects of intoxication. It is notable that expectations and setting play an enormous role in how persons respond. Experiments consistently show that the consumption of an actual intoxicant is not necessary to change one's level of care. Instead, what is necessary is the belief that one has consumed an intoxicant, coupled with expectations about how one should feel and act when intoxicated. Drinkers given a placebo they are told is intoxicating tend to exhibit stereotypical drunken behavior: loud and boisterous conduct, slurred speech, and the like. But when drinkers are given an intoxicating beverage they are told is a placebo,

³⁹ See Thomas Vander Ven: [Getting Wasted: Why College Students Drink Too Much and Party So Hard](#) (New York: New York University Press, 2011).

they are far slower to exhibit these stereotypical behaviors.⁴⁰ These experiments (along with others) suggest that intoxicated behavior is partly learned.⁴¹ If so, one would anticipate a great deal of variation between cultures as to how people react to the ingestion of intoxicants. A wealth of evidence confirms this expectation. The loutish behavior of college students in the United States and Great Britain, for example, tends not to be replicated around the Mediterranean, even when persons in the latter countries consume greater quantities of intoxicants.

I am not entirely confident about the relevance of these findings for a theory of intoxicants and recklessness. Still, one point seems clear. Since the effects of psychoactive substances are mediated by belief, we should not be quick to attribute the behavior we observe in intoxicated offenders to the chemical properties of the substances themselves. Intoxicants do not work like the fictional substance consumed by Dr. Jekyll, which rendered him powerless to resist his transformation into Mr. Hyde. The supposition that an intoxicant affects persons directly through its chemical properties is impossible to square with the data. Instead, the behavior we observe involves a complex interplay of drug and setting---and also tells us a good deal about the drinker himself.⁴²

Despite the individual and cultural variations I have mentioned, it would probably be desirable to have a rule of law governing the conditions under which intoxication is allowed to affect culpability. In the absence of a rule, defendants would be permitted to introduce evidence of intoxication in any case, leaving its relevance to be determined by the trier of fact without guidance by law.⁴³ In all likelihood, this abdication would lead to chaos and inconsistency. Any such rule, however, is destined to remain flawed as long as we retain the definition of recklessness in the Model Penal Code---a definition that works well enough for most purposes. The Code's definition of recklessness forces us to try to

⁴⁰ For example, see M. Zack and M. Vogel-Sprott: "Drunk or Sober? Learned Conformity to a Behavioral Standard," 58 *Journal of Studies on Alcohol* 495 (1997).

⁴¹ See Muriel Vogel-Sprott and Mark T. Fillmore: "Learning, Expectancy, and Behavioral Control Implications for Drug Abuse," in Todd R. Schachtman and Steve Reilly, eds.: Associative Learning and Conditioning Theory (Oxford: Oxford University Press, 2011), p.213.

⁴² The classic source is Norman E. Zinberg: Drug, Set, and Setting: The Basis for Controlled Intoxicant Use (New Haven: Yale University Press, 1984).

⁴³ According to one commentator, this approach is taken in Australia, New Zealand, and South Africa. See Dimock: "Intoxicated Offenders," *Op.Cit.* Note 11, p.17.

conceptualize intoxication as affecting our cognitive states, when its more plausible impact is on our level of care for the interests of others.⁴⁴

V: A SMALL CAVEAT: NON-VOLUNTARY INTOXICATION

Henceforth I have spoken only of the effect of *intoxication* on culpability generally and on recklessness in particular. I have contended that judgments about the recklessness of a defendant at t2---at the moment she commits the actus reus of an offense---need not consider the prior event at t1 that caused her to act. The fact that she was caused to have less concern for the interests of others than the law demands because of intoxication is no more relevant to her culpability than the fact that she was caused to have less concern for the interests of others because of any other factor.

Almost certainly, however, this generalization is too sweeping, and I need to qualify it by introducing a caveat. To this point, when I have spoken of intoxication, I should be understood to refer to *voluntary* intoxication. Although jurisdictions differ about the conditions under which intoxication is allowed to reduce or preclude culpability, all (as far as I am aware) concur that intoxication should be allowed to negate culpability when it is *non-voluntary*. That is, the rule that somehow allows culpability at t1 to be substituted for culpability at t2 admits an exception when intoxication at t1 is non-voluntary. And most theorists appear to believe that the law is correct in this matter. When a defendant commits the actus reus of an offense at t2 because she became *non-voluntarily* intoxicated at t1, the cause of her condition at t2 seems relevant to her culpability.

The law probably has good reason to differentiate voluntary from non-voluntary intoxication in its overall approach to the effect of intoxicants on culpability. Still, I am not absolutely certain that this differentiation is warranted. Even when a defendant lacks sufficient concern for the welfare of others because he has become intoxicated non-voluntarily, I am not sure that an inference to the person we punish cannot be made. After all, it is likely that only a small subset of non-voluntarily intoxicated persons would have committed the crime with which the defendant is charged. That a particular non-voluntarily intoxicated defendant committed this crime surely is a significant fact about *her*. In addition, it is easy to exaggerate the significance of the apparent agreement among jurisdictions in recognizing an exception for offenders who become intoxicated non-voluntarily. The law applies very restrictive rules to

⁴⁴ If we retain the hierarchy of culpable states recognized by the Code, it may even be true that §2.08 is as good as any competitive rule that might be proposed.

decide when intoxication is nonvoluntary.⁴⁵ For example, when a defendant ingests a substance he did not believe to be intoxicating, his subsequent state is typically treated as voluntary if a reasonable person in his circumstances would have known of its intoxicating properties. Dimock claims “even if... someone else puts drugs into a person’s alcohol drink without his knowledge, his intoxication is not involuntary because it is in part due to his ingesting substances that are known by reasonable people to be intoxicants.⁴⁶ As these examples indicate, non-voluntary intoxication is exceedingly unusual.⁴⁷ Thus I describe this caveat as “small.”

Even so, I confess to sharing the intuition that the culpability of a defendant at t2 who exhibits insufficient concern for the interests of others because of a clear instance of non-voluntary intoxication is unlike that of a defendant whose concern is equally deficient because of voluntary intoxication. Defending this intuition (if sound) proves to be one of the most difficult issues in a theory of intoxicants and culpability. *Non-voluntary* conduct at t1 has an impact on culpability at t2 that voluntary conduct at t1 lacks. Why?

First, a small digression. The supposition that non-voluntary intoxication at t1 has an impact on culpability at t2 may help to explain why the entire topic of intoxicants and culpability is typically regarded as an instance of the general problem of *actio libera in causa*. If we are confident that the non-voluntary ingestion of intoxicants poses the general problem of how culpability (or its absence) at an earlier time can have an impact upon culpability (or its absence) at a later time, it seems strange to think that the voluntary ingestion of intoxicants should be resolved within an entirely different normative framework. Nonetheless, I suspect that different frameworks are appropriate. Although I have indicated that we do not generally exculpate persons by identifying the cause of their behavior, it remains true that *some* kinds of causes exculpate. The fact that a defendant is forced to commit the actus reus of an offense under duress, for example, is clearly relevant to his culpability and blame. The normative problem, then, is to explain why the fact that insufficient concern is caused by non-voluntary intoxication should exculpate while an identical lack of concern caused by voluntary intoxication should not. Can an

⁴⁵ “The conditions on involuntary intoxication are stringent.” Dimock: *Op.Cit.* Note 10, p.17.

⁴⁶ *Id.*,p.4. Dimock cites two Canadian cases as authority for this proposition.

⁴⁷ It is interesting that involuntary intoxication is *not* regarded as especially unusual when defendants have sexual relations with victims whose condition was brought about without their knowledge or consent. For a nice discussion of the possible inconsistency in this disparate treatment, see Alan Wertheimer: [Consent to Sexual Relations](#) (Cambridge: Cambridge University Press, 2003), especially p.235.

explanation be given? I can only gesture toward a possible answer, although I am not at all certain that it is satisfactory---or even that an answer is needed at all.

In light of the highly restrictive nature of the criteria by which intoxication is deemed to be non-voluntary, only the clearest examples of non-voluntariness will qualify. Consider a defendant who is physically forced against his will to consume debilitating quantities of intoxicants---like Cary Grant in the Alfred Hitchcock thriller *North By Northwest*. When barely conscious, Grant is placed behind the wheel of a car and made to “drive” to his death---or so the villains hope. In this extreme case, Grant’s agency is not implicated at all. He did not *do* something to allegedly create the conditions of his own defense. Instead, something was done *to* him. Perhaps the substitution rule that allows culpability to be defeated by prior causes is more lenient in such cases. In this light, consider the old philosophical chestnut: the otherwise law-abiding defendant who becomes homicidal at t2 because a mad scientist forcibly implants an electrode in his brain at t1. No jurisdiction, I think, would treat the fact that he had been surgically altered against his will at t1 as irrelevant to his culpability at t2. Are all clear cases of non-voluntary intoxication (or of some other non-voluntary event that causes subsequent criminality) analogous? If so, I advance the following tentative hypotheses: we differentiate between cases in which later culpability is called into question because of a prior event that does *not* involve an act on the part of the defendant from those in which later culpability is called into question because of a prior act the defendant has performed.

This line of thought raises a central question: why should the law differentiate between cases in which exculpation is alleged because of the absence of actus reus from those in which exculpation is alleged because of the absence of mens rea? That the law often *does* treat the absence of actus reus unlike the absence of mens rea is beyond dispute. For example, non-voluntariness functions as a defense even to crimes of strict liability, where no mens rea is needed.⁴⁸ But why should the law draw this contrast? One promising answer alleges that the former line of exculpation is more *basic* than the latter.⁴⁹ Antony Duff offers a sophisticated theoretical apparatus designed in part to explain the priority of actus reus to mens rea. When defendants do not act, they are not *responsible* for the crimes they “commit”. According to Duff, however, defendants who lack mens rea *are* responsible for their crimes, even though they may have an excuse for committing them.⁵⁰ One need not accept Duff’s entire theory

⁴⁸ Admittedly, authority for this proposition is sparse. See *State v. Baxter*, 571 P.2d (1977).

⁴⁹ See also Horder: *Op.Cit.* Note 18.

⁵⁰ See Duff: *Op.Cit.* Note 34.

of responsibility to understand why exculpation due to the absence of an actus reus should be governed by different principles than those that apply to the absence of a mens rea. But it seems plausible to allege that the absence of an act is a more fundamental basis of exculpation than the mere absence of culpability *for* an act. Something one *does* is less likely to create the conditions of his defense than something done *to* him. Of course, much more needs to be said to account for the caveat I discuss here. But I hope to have provided the beginning of an explanation of why the criminal law might differentiate non-voluntary from voluntary intoxication at t1 in order to assess the culpability of a defendant at t2.