

INTENTION, AGENCY AND CRIMINAL LIABILITY:

*Philosophy of Action and
the Criminal Law*

R. A. Duff

Basil Blackwell

Contents

Preface	viii
Table of Cases	x
Table of Statutes	xiii
Abbreviations	xiv
1 INTRODUCTION	1
1.1 Cases and Questions	1
1.2 <i>Actus Reus</i> and <i>Mens Rea</i>	7
PART I INTENTION AND AGENCY	
2 LEGAL CONCEPTIONS OF INTENTION	15
2.1 The Meaning of Intention	15
2.2 Proving Intention	27
2.3 Why Define Intention?	31
3 INTENTION IN ACTION – A PARADIGM	38
3.1 Preliminaries	38
3.2 Intention, Bare Intention and Decision	44
3.3 Intention and Reasons for Action	47
3.4 Intention and Desire I	52
3.5 Intention, Desire and Belief I	55
3.6 Intention, Desire and Belief II	58
3.7 Intention, Success and Causation	63
3.8 Intention and Desire II	66
4 INTENTION, FORESIGHT AND RESPONSIBILITY	74
4.1 Direct and Oblique Intention	74
4.2 Intentional Action and Responsibility	76
4.3 Aspects of Responsibility	82

4.4	Intention and Circumstances	87
4.5	Individuating Effects	89
4.6	Intentional Agency and Probable Consequences	95
5	COMPETING CONCEPTIONS OF AGENCY	99
5.1	Intention and Responsibility	99
5.2	A Consequentialist View of Responsible Agency	105
5.3	A Non-consequentialist View	111
6	INTENTION, ACTION AND STATES OF MIND	116
6.1	Dualism and the Mental Element in Crime	116
6.2	The Argument from Analogy	120
6.3	Actions and 'Colourless Movements'	123
6.4	Identifying Mental States	127
6.5	An Alternative View	129
PART II SUBJECTIVE AND OBJECTIVE		
7	RECKLESSNESS	139
7.1	Extending the Paradigms	139
7.2	Recklessness in the Criminal Law	142
7.3	'Subjectivism' and 'Objectivism'	149
7.4	'The Thought Never Crossed My Mind'	157
7.5	'I Thought She Was Consenting'	167
7.6	Implied Malice and Murder	173
8	CRIMINAL ATTEMPTS	180
8.1	Introduction	180
8.2	The Significance of Failure	184
8.3	The <i>Mens Rea</i> of Attempts I: Subjectivism and the Current Law	192
8.4	The <i>Mens Rea</i> of Attempts II: Why Attempts should be Intended	199
8.5	Concluding Remarks	206
	Bibliography	207
	Index	215

To HGM and VJM

4

Intention, Foresight and Responsibility

4.1 Direct and Oblique Intention

Chapter 3 analysed the paradigm of intention in action – that core juristic notion of ‘actual intention’ or ‘purpose’. We needed to make this core notion clear, since it is often misunderstood: but we must also ask whether the legal concept of intention should extend beyond this paradigm.

The paradigm distinguishes an action’s *intended effects*, which an agent acts in order to bring about, from its *foreseen side-effects*, which she expects and might want, but does not act in order to bring about. An intended effect provides at least part of her reason for action; its non-occurrence entails at least the partial failure of her action: a foreseen side-effect forms no part of her reason for action; its occurrence or non-occurrence is irrelevant to the success or failure of her action.

Mr Barrett tried to help his Fenian friends escape from jail, by exploding a bomb against the prison wall; the explosion killed twelve people living nearby. He was convicted of murder, on the grounds that he must have known that the bomb was likely to cause death.¹ But even if he foresaw death as a side-effect of his action, he did not act *with the intention* of causing death: he did not plant the bomb as he did because he believed it would cause death; had no one been killed, that fact would not have rendered his action a failure. His intention was to blow a hole in the prison wall; and it was that outcome whose occurrence or non-occurrence determined the success or failure of his action. Or a terrorist might plant a bomb, not with the intention of causing death (not because she believes that it might cause death), but with the intention only of damaging proper-

ty, while realizing that it might well cause death as a side-effect: she may be as sure of causing death as one who intends to kill, but she does not intend to cause death; for her action will not have failed if no one dies.

Even if Mr Barrett and the terrorist were *certain* that they would cause death, they did not intend to kill. But is there not some force to the claim that their intentions did encompass those effects: that ‘intention’ includes at least what the agent foresees as the morally certain side-effects of her action (see pp. 15–27 above)? She does not paradigmatically intend such effects: but perhaps that paradigm does not exhaust the meaning of ‘intention’.

Philosophers as well as jurists sometimes include expected side-effects within the scope of intention. Bentham distinguished ‘direct’ from ‘oblique’ intention: a consequence is

said to be directly ... intentional when the prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act. It may be said to be obliquely ... intentional, when, although the consequence was in contemplation, and appeared likely to ensue in case of the act’s being performed, yet the prospect of producing such a consequence did not constitute a link in the aforesaid chain. (*An Introduction to the Principles of Morals and Legislation*, ch. VIII.6)

I directly intend effects which I act with the intention of bringing about; I obliquely intend the expected side-effects of my actions.

J.W. Meiland draws a similar distinction between ‘purposive’ and ‘non-purposive’ intention: I purposively intend those effects which I act with the intention of bringing about, and non-purposively intend the expected side-effects of what I purposively intend (*The Nature of Intention*, pp. 7–15). And R.M. Chisholm asserts the ‘principle of the diffusiveness of intention’:

[I]f a rational man acts with the intention of bringing about a certain state of affairs *p* and if he believes that by bringing about *p* he will bring about the conjunctive state of affairs *p* and *q*, then he *does* act with the intention of bringing about the conjunctive state of affairs *p* and *q*. (‘The structure of intention’, p. 636)

I fire at a stag with the intention of killing it, and know that in killing the stag I will also kill the king; I act with the intention of ‘bringing about the death of the stag and the death of the king’. I do not act with the intention of ‘bringing about the death of the king’: but his death is ‘at least a *part* of what I intend’ (p. 640).

Chisholm also canvasses the view that such expected side-effects of one’s actions are ‘consented to but not intended’ (p. 639). This is how those who oppose Bentham’s view might talk. For *they* insist on a sharp distinction between those effects which the agent intends, and those which he foresees even as certain side-effects of his actions: the paradigm of intention ex-

¹ *Desmond, Barrett and Others*: see B. Hogan, ‘Funeral in Dublin’; H.L.A. Hart, ‘Intention and punishment’, pp. 119–22.

hausts the meaning of intention; effects which are not paradigmatically intended are not intended at all. If they are foreseen, they are not brought about *unintentionally*; but they are 'consented to' rather than 'intended'.²

This philosophical argument about the scope of intention concerns its ordinary, extra-legal meaning. Both sides have, I think, part of the truth: I do not *intend* (act *with the intention* of bringing about) the expected side-effects of my actions; but I may be said to bring them about *intentionally*. If we are to decide, however, whether the legal concept of intention should reflect these 'different shades of meaning' (Hyam, p. 96, Lord Cross) of the ordinary concept, we must look below the surface of its ordinary usage, to the moral notions of responsibility and agency which that usage embodies: for both the philosophical and the legal controversy about the scope of intention concern something more than 'a problem of linguistics'; both concern the *moral* question of how we should conceive responsible agency.

Bentham counted both direct and oblique intention as species of intention because he saw no crucial moral difference between them (I am, he thought, as responsible for the obliquely as for the directly 'intended' effects of my actions); those who deny that expected side-effects are 'intended' do so because they do see a significant moral difference between 'intention' and foresight of consequences. We shall discuss this moral issue later; but we must first see how the scope of intention can be extended to include side-effects that are not *directly* intended.

4.2 *Intentional Action and Responsibility*

Suppose that Mr Barrett was certain, beyond all reasonable doubt, that his bomb would cause death. He did not act with the intention of causing death: but we would surely hold him fully responsible for the deaths which he in fact caused; and that is why we should say that his intention encompassed those deaths.

We would naturally say not just that people died as a consequence of his action, but that he *killed* those who died. In thus portraying those expected side-effects as the result of his action of 'killing', we ascribe agency and responsibility to him: he was, we are saying, unqualifiedly the agent of those deaths; he was fully responsible for them. We might emphasize this

² See A.J. Kenny, *Will, Freedom, and Power*, pp. 56–8; G.E. Anscombe, 'War and murder', pp. 50–1, *Intention*, p. 42; H.L.A. Hart, 'Intention and punishment', pp. 119–25.

by saying that he killed his victims *intentionally*: he did not cause their deaths unintentionally, by mistake or accidentally; and we can emphasize his responsibility for those deaths by saying that he brought them about *intentionally*.³

An agent strictly *intends* to bring about only those effects which she acts with the intention of bringing about: but she may be said to bring about *intentionally* not only such intended effects, but also at least some of the side-effects which she expects her action to cause.

I should not, however, be said to bring about intentionally *every* expected side-effect of my actions, however certain its occurrence. I intend to cross a snow-covered lawn, knowing that this will mark the snow. I do not act *with the intention* of marking the snow; but is it not also odd to say that I mark the snow *intentionally*? Why is this?

On one view, it is *true* that I mark the snow intentionally: what makes it odd to say that I mark it intentionally is not the meaning of 'intention', but the conversational convention that we should say only what there is some point in saying. We can imagine a context in which 'He marked the snow intentionally' would have a point; the snow should have been left unmarked, and blame is being assigned. But it would usually be pointless and misleading to highlight the fact that I mark the snow by saying that I mark it intentionally: pointless, since that aspect of my action is usually of no interest; misleading, since by thus drawing attention to it we would mislead our listener into supposing that it is of interest. But there is no difference in the action itself between a case in which it is worth saying, and a case in which it would be misleading to say, that I mark the snow intentionally: so the action is intentional in both cases; the point is simply that we should not usually draw attention to it. Likewise, it is *true* that both speakers at the seminar are sober. Since Ian is often drunk, I might properly draw attention to his present sobriety by saying 'Ian is sober today'. But since Pat is always sober, it would be inappropriate to say 'Pat is sober today': for that would mislead you into supposing that she is often drunk (see J.R. Searle, 'Assertions and aberrations').

On this view an action is intentional if it is not unintentional; I mark the snow intentionally if I do not mark it unintentionally. We should, however, reject this view: 'intentional' means more than 'not unintentional'. Ascriptions of intentional agency are, as a matter of meaning, ascriptions of responsibility: to say that Mr Barrett killed his victims intentionally is to

³ See H.L.A. Hart, 'The ascription of responsibility and rights'; J.L. Austin, 'A plea for excuses', pp. 137–8; J. Feinberg, 'Action and responsibility'; J. Casey, 'Actions and consequences'.

hold him fully responsible for those deaths as their agent. To say that I mark the snow intentionally is thus to hold me responsible for the snow's being marked; and such a description of my action is logically (and not just conversationally) inappropriate if it specifies a result (the snow being marked) for which I am not properly held responsible.

But why am I not properly held responsible for marking the snow, if that is a foreseen effect of my voluntary action? Because I am properly held responsible for effects which I intend to bring about, and for *some*, but not *all*, expected side-effects of my actions; the category of intentional agency is wider than that of intended agency, but does not cover all the foreseen effects of my actions. To see why this is so, we must look more closely at what it is to hold an agent responsible for an effect of her action.

To hold someone responsible for an effect, to portray it as the result of her intentional action, is to hold her *answerable* for it: she may be asked to explain or to justify her action as thus described ('marking the snow').

We are held responsible for effects for which we are liable to be *blamed*. To say that A killed B intentionally (to hold him responsible for B's death) is to say that he is to be blamed for killing B unless he can justify (perhaps as self-defence) or excuse (perhaps as due to insanity) his action of 'killing B'. To ascribe responsibility is not yet to blame the agent; it is rather to say that he must justify or excuse his action as thus described if he is to avoid blame for it.

We also ascribe intentional agency when blame is not at issue; 'A marked the snow intentionally' need not imply that A is liable to be blamed for marking the snow. But such action-descriptions are still ascriptions of responsibility: for my intentional actions are those which I may be asked to *explain*, by giving my reasons for them; and we have noted the connection between reason-giving and justification (p. 49 above). To say that 'A marked the snow intentionally' implies at least that we can properly ask A *why* she marked the snow.

When am I properly held responsible for bringing an effect about, or asked to explain or justify my intentional action of bringing that effect about? When that effect is *relevant* to my action, as providing a reason for or against it. An intended effect is relevant as forming a reason *for* which the agent acts. If I cross the lawn in order to mark the snow, I make myself responsible for its being marked: I must be ready to explain my intentional action of 'marking the snow', by explaining why I thought that that was worth doing. An expected but non-intended effect is relevant if it provides a reason *against* the action which caused it. If there is a reason why the snow should not be marked, my intentional action is properly described as 'marking the snow': I can be asked to explain *why* I marked the snow – why I did what there was a reason not to do; and if I cannot adequately

explain or justify my action, by showing that my reasons for doing it were better than the reasons against doing it, you may criticize me for doing what I should not have done. The nature of that criticism (whether you criticize me for acting immorally, or irrationally, for instance) will depend on what kind of reason there is for not marking the snow. But if there is *no* reason not to mark the snow, I should not be said to mark it intentionally: for it would then be senseless to hold me responsible for, to ask me to explain or justify, marking the snow.

There are thus three categories of foreseen effect of my actions: intended effects, which provide my reasons *for* action; expected side-effects which provide reasons *against* the action; and expected side-effects which, since they provide no reason either for or against the action, are irrelevant to it. I bring the first two kinds of effect about intentionally, since I am properly held responsible for them: but I do not bring the third kind of effect about intentionally; such effects should not figure in descriptions of my intentional actions, since I am not properly held responsible for them. So the concept of intention does extend beyond the paradigm of intended agency: it includes, as being brought about intentionally, effects which the agent does not act with the intention of bringing about, but which are properly ascribed to her as their responsible agent.

Philosophers who deny that I 'intend' expected side-effects of my actions are thus right about the scope of 'intend', but wrong to deny that such side-effects fall within the scope of my intentions at all. Those who say that I do intend such side-effects are right to insist that my intentions can encompass such effects, but wrong to say that my intentions encompass *all* the expected effects of my actions. Nor should I be said to 'intend' such side-effects, since I rather bring them about intentionally: but such qualifications as 'obliquely' or 'non-purposively' recognize the paradigmatic status of (directly or purposively) intended agency, and the distinction between intended and intentional agency – as does Chisholm's insistence that I do not simply intend 'to bring about *q*' when *q* is an expected side-effect of my action.

Chisholm partly captures a further truth in his claim that, if I intend to bring about *p* and know that in doing so I shall also bring about *q*, I intend to bring about '*p* and *q*' (*q* is then 'at least a part of what I intend'). Mr Barrett did not intend 'to explode a bomb *and* cause death'; but he intended 'to explode a bomb *despite* the fact that it would cause death'. If there is reason for me not to mark the snow, I may not intend 'to walk across the lawn *and* mark the snow'; but I do intend 'to walk across the lawn *despite* the fact that I shall mark the snow'. To say in such cases that the agent intends to bring about '*p* and *q*' implies, wrongly, that he acts *in order* to bring about *q* as well as *p*. But we may include *q* in our descrip-

tion of what he intends by saying that he intends to bring about 'p despite q': we thus identify q as a side-effect which he foresaw; which provided (we think) a reason against acting as he did; and for which we therefore hold him responsible.

Jurists who claim that I 'intend' any effect which I am (morally) certain will ensue from my action are likewise wrong, in so far as that claim concerns the term's ordinary meaning. They can rightly claim, however (as both the 1985 and the 1989 Codes suggest), that I bring at least some of those effects about intentionally; while the Law Commission's conception of 'actual intention', and the 1985 Code's notion of 'purpose', reflect a general awareness of the stricter paradigm of intended agency (see pp. 25–6 above). Lord Cross was wrong to say (*Hyam*, p. 96) that I 'intend' any effect which I bring about intentionally; but he saw that 'two different shades of meaning' might be involved here.

But the persisting confusion over whether intention should in law encompass an action's morally certain side-effects reflects a failure to distinguish these two aspects of intention, and a vain attempt to give a univocal account of a concept which has these 'two different shades of meaning'. The concept of intention both does and does not encompass such side-effects: it does, in that they are brought about intentionally; it does not, in that the agent does not act with the intention of bringing them about. A recognition of the distinction between intended and intentional agency can cure this confusion: but it still leaves open the substantive question of whether intended or intentional agency should be required for criminal liability; should intentional agency always be sufficient, or should intended agency sometimes be required?

These points can be illustrated by looking again at Lord Bridge's comments on intention, desire and foresight in *Moloney* (pp. 21–2 above).

The problem in understanding what Lord Bridge took 'intention' to mean is that he appealed to the term's 'ordinary, everyday meaning'; but seemed to think that the man who boards a Manchester-bound plane intends to go to Manchester, and that the terrorist who plants a bomb intends to cause death, just because each realizes that the relevant effect is 'morally certain' to ensue: for in ordinary usage I do not 'intend' whatever I foresee as a morally certain effect of my action; I intend only those effects which I act in order to bring about.

The traveller intends to board a plane which he knows is going to Manchester; 'his desire to leave London predominates over his desire not to go to Manchester' (*Nedrick*, p. 1027). Now if he boards the plane *because* it goes to Manchester (that being his best escape route), he intends to go to Manchester: though he dislikes the place, he 'wants' to go there, as a means of escape. But if he simply boards the first available plane,

regardless of its destination, he does not intend to go to Manchester. That this is the plane's destination is no part of his reason for boarding it; if it lands at Luton, not Manchester, his action will not have failed: for he intends simply to escape from London. The truth which is concealed in Lord Bridge's claim that 'he clearly intends to travel to Manchester' is that he travels there *intentionally*: his dislike of the place gives him reason not to do what will take him there; but he is so keen to escape that he intends to 'board this plane despite the fact that it goes to Manchester'.

Of course, travellers usually board a plane intending to go to its destination; and this man could, we shall see, be said to intend to 'board a Manchester-bound plane' (p. 89 below): but he does not intend to go (act with the intention of going) to Manchester. So too, a man who mistrusts women but is desperate to get to his destination might board a plane which he knows is piloted by a woman. He intends to 'travel on this plane despite the fact that the pilot is a woman'; he *intentionally* 'travels on a plane piloted by a woman': but he does not *intend* 'to be piloted by a woman', since that would imply that he boards the plane partly because its pilot is female.

The terrorist plants a bomb, gives a 'timely warning', but knows that experts will try to defuse the bomb; it explodes, killing one of them. Lord Bridge assumed that she is guilty of murder, i.e. that she acts with a 'specific intent' to cause death or serious injury: but his account does not show that she intends to cause death or injury. If she sets the bomb as she does because she believes that it will cause death or injury, she intends to cause death or injury: but her timely warning suggests that she may only intend to damage property; in which case she would not intend to cause either death or injury, since her action would not have failed if the bomb exploded without killing or injuring anyone.

But if she is sure that the bomb will kill if it explodes as and when she intends, surely she is guilty of murder? So she is, but not because she *intends* to kill: she kills *intentionally*, or intends to 'explode the bomb despite the fact that it will cause death'; and such an intentional killing should certainly count as murder. (She kills intentionally if she is sure either that the bomb *will* cause death, or that it will cause death *if* it explodes as she intends; I bring about intentionally both such relevant side-effects as I am sure *will* ensue, and such as I am sure *will* ensue *if* I achieve what I intend: see J.C. Smith, 'Comment on *Moloney*', p. 382.) Our description of her action as an intentional killing, however, depends not just on the *fact* that death ensues, but on our *judgement* that she is fully responsible for that effect. She might dispute that description, and claim that responsibility for that death belongs to those who ignore her 'timely warning' – that the expert brings about his own death, by trying to

defuse the bomb; and our grounds for rejecting that claim are moral, not purely factual (see pp. 83–4 below).

We can distinguish 'intention' (the intention with which an agent acts) both from 'desire' in the narrower sense of that term, and from foresight of even morally certain consequences: but since Lord Bridge talked about intention only in terms of those very notions of desire and foresight, he was unable to draw this distinction; instead, his comments on the terrorist and the Manchester-bound traveller implied that an agent is to be taken to intend an effect if he either desires it or foresees it as a morally certain consequence of his action. Had he recognized more clearly that I 'intend' (in the ordinary meaning of the term) only those effects which I act in order to bring about, he would have recognized that the traveller does not intend to go to Manchester, and that the terrorist may not intend to cause death or serious injury – though they bring those effects about intentionally.

He thus could not *both* argue that the murderer must 'intend', in the ordinary meaning of the term, to cause death or serious injury, *and* convict the terrorist of murder. He could convict the terrorist by saying that murder requires only an intentional, not an intended, killing; but I shall argue later (pp. 173–9 below) that, although both intended and intentional *killings* should indeed be murder, a merely intentional (but fatal) *injuring* should not be murder; that implied malice should require an *intended* causation of serious injury. Lord Bridge's claim that murder requires a 'specific intent' might reflect this view of implied malice: but to maintain this view, while also convicting the terrorist of murder, we need to define the *mens rea* of murder partly in terms of intended agency (as to serious injury) and partly in terms of intentional agency (as to death); which requires us to make explicit the distinction between intended and intentional agency – as Lord Bridge failed to do.

4.3 Aspects of Responsibility

I bring about intentionally those foreseen side-effects which are relevant to my actions as providing reasons against them; it is for these effects that I am properly held responsible. We must now note some complications in these notions of responsibility and relevance.

First, blame and praise involve different criteria of intentional agency. I open a factory in an area of high unemployment, knowing that this will benefit the unemployed. If I act with the intention of helping them, I benefit them intentionally (though whether this is praiseworthy depends on my further reasons for action; if I do it just to obtain good publicity, I

hardly deserve praise). But if that benefit is merely a foreseen side-effect which provides no part of my reason for action (I open the factory there just because labour is cheap), I do not intentionally 'benefit the unemployed': I am not responsible for their good fortune, although *others* see that effect as being relevant to my action, as providing a good reason for doing it. I am responsible for both good and evil effects which I intend to bring about (though both praise and blame may depend on my further reasons for action); I am responsible (liable to blame) for expected evil side-effects of my actions, as their intentional agent; but I am not similarly responsible (liable to praise) for the expected good side-effects of my actions. Praiseworthiness, but not culpability, depends on direct intention; so too, therefore, does intentional agency as to good, but not evil, effects.

Second, we may disagree about the relevance of an expected side-effect. I know that my style of dress offends other people: you see that as a reason against dressing thus; I do not. I do not see it as *a* reason against dressing thus which is outweighed by better reasons on the other side; I do not see it as a reason at all ('I dress as I please; if others are offended, that's their problem, not mine'). Our disagreement reflects differing views of my responsibilities towards others. You think that I should attend to their moral or aesthetic feelings about styles of dress: I think that how I dress is entirely my affair; other people's feelings about it are not my concern. This disagreement generates disagreement in our responsibility-ascriptions and our action-descriptions: you hold me responsible for offending others, and say that I offend them intentionally; I reject that ascription of responsibility and intentional agency. I agree that they are offended because of the way I dress: but I deny that I need to justify or apologize for my action as one of 'intentionally offending them', since their offence is not my concern.

I know that a student's career depends on how I grade her thesis. If I fail the thesis (not in order to harm her, but because it is a bad thesis) do I intentionally ruin her career; am I responsible for that effect of my action? You may say that I am: that foreseen effect is a reason against failing the thesis; I must justify my intentional action of 'ruining her career' if I am to avoid blame for it. You may think that that action can be justified (the preservation of academic standards matters more than saving her career): but a justification is, you insist, needed. I might disagree, however. The fact that an action will ruin someone's career is usually a reason against doing it: but my role as an examiner, I argue, limits my responsibilities in this situation. As an examiner, my duty is simply to assess the academic merits of the thesis; the only consideration to which I should attend is whether it is good enough to deserve to pass. The effect on the student's career if I fail her thesis is irrelevant to my decision: it is not a factor to

which I should attend in making that decision; it does not provide even a weak reason against failing the thesis. My claim is not that I justifiably 'ruin her career' by failing her thesis: it is that I am not responsible or answerable for that effect of my action; I do not intentionally 'ruin her career' (see R.A. Duff, 'Intention, responsibility and double effect').

Ascriptions of intentional agency do not describe neutral facts: they express normative judgements of responsibility, in which we may disagree. You say that I 'intentionally ruin her career' because you judge this effect to be relevant to my action; examiners should, you think, attend to such factors. I reject that description of my action because I reject that judgement; I reject your view of the scope of an examiner's responsibilities. We disagree on the proper description of my intentional action because we disagree on the normative relevance of this effect; and we disagree about that because we take different views of an examiner's responsibilities.

Whether an agent *intends* to bring an effect about depends on *her* view of the relevance of that effect to her action; she acts with the intention of bringing it about only if it provides part of *her* reason for action. But whether we say that she *intentionally* brings about an expected side-effect of her action depends not on whether *she* thinks it is relevant to her action, but on whether *we* think it is something to which she should attend as a reason against acting thus; and we may disagree with her about this.

Third, such disagreement about the relevance of an expected side-effect of an agent's action, and thus about whether he is responsible for it as its intentional agent, is more typically found outside the law than within it. Outside the law our different normative standards (our different moral values, for instance) will generate conflicting criteria of responsibility, of relevance, and of intentional agency: but the law provides authoritative criteria which determine our legal responsibilities, the legal relevance of expected side-effects, and thus the scope (in law) of our intentional agency.

You and I disagree about whether I intentionally ruin the student whose thesis I fail because we have different normative views about the scope of an examiner's responsibilities; and we may be unable to resolve this disagreement. But there is less scope for such normative disagreement within the law. If I take a naked swim in full view of other people, I might deny that I am responsible for (the intentional agent of) the disgust which I know this will cause them to feel; I do not regard that expected side-effect as being relevant to my action ('If they find my harmless conduct disgusting, that's their problem, not mine'): but the law may hold that I intentionally disgust them, and convict me of indecent exposure (*S&H*, pp. 468–70). By its definition of that offence, the law declares that the disgust which others will feel if I expose my body in their view *is* relevant to my action, as a reason against that action to which I must attend: I am thus

legally responsible for (the intentional agent of) such disgust if I do what I know will cause it; I shall not be heard to deny that I cause it intentionally.

But the scope of an agent's legal responsibilities is not always as clear as this. One more complicated case is that of liability for omissions. Pat is drowning, and I see that I could save her life, at some small risk or cost to myself; but I do not save her. Whether I am *morally* responsible for her death (whether I 'let her die', or 'fail to save her') depends on the scope of our moral responsibilities towards others: likewise, whether I am *legally* responsible for her death, and liable to conviction for not saving her, depends on the extent of my legal responsibilities.⁴

In English law I am liable for her death only if I have a special duty of care towards her, based on some special relationship between us. Given such a duty of care, I am in law the intentional agent of her death if I do not do what I see to be necessary to save her; for I am legally responsible for that foreseen effect of my inaction. But without such a duty of care, though I may be held morally responsible for her death, I am not in law its intentional agent even if I do not do what I see that I could easily do to save her: I am not legally responsible for her death, since I have no legal duty to attend to that effect of my inaction; the fact she will die unless I help her is not, as far as the criminal law is concerned, a reason why I ought to help her. If I am charged with failing to save her, the court must thus determine whether my relationship to her was such as to create a special duty of care.

Note, however, that to hold me legally responsible for her death is not yet to condemn me, since I may be able to justify my failure to save her. Even in jurisdictions in which a 'Bad Samaritan' statute imposes a *general* duty to prevent serious harm to others, whether or not I have any special relationship to them, I may be able to justify a failure to prevent such harm by showing that its prevention would have involved 'unreasonable' risk or inconvenience (see J. Feinberg, *Harm to Others*, ch. 4). To hold me responsible for her death is to say that I 'fail to save her', and must justify or excuse that failure if I am to avoid conviction; whereas to deny legal responsibility for her death is to deny that there was in law a 'failure to save' which needs justifying.

The scope of an agent's legal responsibility for foreseen effects of her *actions* may also sometimes be at issue, for instance in case of aiding and abetting.

A doctor who prescribes contraceptives for a girl of fifteen does not,

4 See *S&H*, pp. 48–55; *C&K*, pp. 103–20; *Gordon*, pp. 82–90; J. Feinberg, *Harm to Others*, ch. 4; J. Casey, 'Actions and consequences'.

presumably, *intend* to assist the commission of unlawful sexual intercourse (Gillick; see pp. 61–2 above). But those who argue (as Lord Brandon argued in *Gullick*) that the doctor is none the less guilty of aiding and abetting the commission of that offence, or at least that (as J.C. Smith argues) in law she ‘intends’ to assist its commission, should perhaps be taken to be arguing that she assists its commission *intentionally*; and that such intentional assistance to the commission of an offence should, unless it can be justified, suffice to convict an agent of aiding and abetting.⁵ Even if aiding and abetting should require only intentional rather than intended assistance, however, it could still be argued that the doctor should be acquitted on grounds of lack of the requisite intent: for she might deny that she even *intentionally* assists the commission of unlawful sexual intercourse.

The fact that my action will assist the commission of an offence is one to which the law normally requires me to attend; I am normally responsible for that effect as its intentional agent. If a gunsmith sells a gun to someone who will, he knows, use it to commit a crime, he is guilty of aiding and abetting the commission of that crime even if he does not intend to assist its commission, but only to make his profit from the sale. So too, if a shopkeeper sells contraceptives in the knowledge that they will be used for unlawful sexual intercourse, and that by selling them he assists the commission of that offence, he may be held to assist its commission intentionally, and thus to be guilty of aiding and abetting its commission. But the doctor might argue that her medical role and her relationship to her patient set limits to her responsibilities – limits which do not apply to the shopkeeper. For she has a special duty of care towards her patient’s health: her responsibility is to provide such treatment as is, in her ‘clinical judgement’, ‘medically indicated for the maintenance or restoration’ of her patient’s health (Gillick, p. 190, Lord Scarman). The foreseen fact that that treatment will make it easier for the patient to commit an offence is not her concern: it gives her no reason to withhold the treatment; she is not responsible for, or the intentional agent of, that effect of her medical activity.

This claim is, of course, arguable: some would insist that doctors ought to attend to, and are responsible for, such foreseen effects of their actions. But the point is that to determine whether the doctor intentionally assists the commission of the offence, we must decide what her responsibilities are; and *Gillick* can be taken to hold that her legal responsibilities are limited in this way. The role which I fill can give me legal and moral

5 On the appropriate *mens rea* for aiding and abetting, see *S&H*, pp. 138–50; *TCL*, pp. 334–46; I.H. Dennis, ‘The mental element for accessories’; G.R. Sullivan, ‘Intent, purpose and complicity’; I.H. Dennis, ‘Intention and complicity: a reply’.

responsibilities which I would not otherwise have (a duty to protect someone to whom I have a special relationship, for example): but it can also limit my responsibilities in ways in which they would not otherwise be limited.

Similarly, Devlin J argued in *N.C.B. v Gamble* that if I supply a gun to someone who will, I know, use it to commit an offence, I am guilty of aiding and abetting the commission of that offence. If, however, I return a gun to its legal owner at her request, I am not guilty of aiding and abetting the commission of the offence which I know she will use it to commit: for my action is then not a ‘positive’ act of aiding, but only a ‘negative’ act of ‘refraining from detainee’; and I thus lack the requisite ‘intent’ to aid the commission of the offence (p. 20; see R.A. Duff, ‘Intentions legal and philosophical’, p. 80). What this argument depends on, I think, is the claim that the gun-seller intentionally assists the commission of the offence, since he has a legal responsibility to attend to that foreseen effect of his action, but that in returning a gun to its owner I do not intentionally aid her commission of an offence, since my responsibility now is simply to return her property: what she does with it is not my concern; the fact that she will use it for a criminal purpose is not something to which the law requires me to attend.

These cases of aiding and abetting show that the issue of whether an agent brought about a particular effect intentionally depends, not just on whether he foresaw it as a consequence of his action, but on whether it was something for which he should be held responsible; and that in law, as in morality, I may be able to deny responsibility for some of the foreseen and admittedly harmful effects of my actions.

4.4 Intention and Circumstances

Two complications may cloud the distinction between intended and intentional agency. The first is this: should we distinguish intended from intentional agency as to the *circumstances* of an action?

The 1985 Code draws such a distinction: I act ‘purposely’ as to a circumstance if I ‘want it to exist’; intentionally if I ‘want’ it to exist or am ‘aware ... or almost certain that it exists’ (cl. 22(a)). Smith and Hogan also indicate that it can be drawn:

Intention here means either hope that the circumstance exists – which corresponds to purpose in relation to consequences – or knowledge that the circumstance exists – which corresponds to foresight of certainty in relation to consequences. (*S&H*, p. 60)

Others, however, draw no such distinction. In the Model Penal Code, I act 'purposely' as to a circumstance if I am aware or believe or hope that it exists (cl. 2.02(2)(a)); in the 1989 Code I act intentionally with respect to a circumstance if I hope or know 'that it exists or will exist' (cl. 18(b)); and Glanville Williams say simply that

As applied to the circumstances of an act the notion of intention, according to the usual understanding, means that these circumstances were known to the actor. (*TCL*, p. 116)

Which, if any, of these accounts should we accept?

My actions do not *bring about* their circumstances; a circumstance exists independently of the action, as the given context in which the action is done (see p. 42 above). But we can distinguish among known circumstances, as we can among consequences, those which form part of my reason for action from those which do not; and within the latter category, those which are relevant to my action as providing reasons against it, from those which are irrelevant.

I take what I believe to be Ian's umbrella. The fact that it is his may be part of my reason for action (I take it *because* I believe it to be his; my action will have failed if it is actually mine): in this case I intend to 'take Ian's umbrella'. Or it may be no part of my reason for action (I just want an umbrella to keep dry; I will not mind if it turns out to be mine): in this case, I might see the fact that it is his umbrella as quite irrelevant ('when it rains, anyone's umbrella is fair game'), while you might see it as a highly relevant circumstance which gives me reason not to take the umbrella; and you would then insist that I intentionally 'take Ian's umbrella'. The same criteria can distinguish intended from intentional agency as to both consequences and circumstances.

Acting *intentionally* as to a relevant circumstance is a matter of my awareness that the circumstance exists. But for a circumstance to be part of what I *intend*, more is needed than that I 'want' or hope or believe it to exist: what matters is whether I act as I do *because* I believe that the circumstance does or might exist (see p. 58 above).

But, although we *can* thus distinguish intended from intentional agency as to an action's circumstances, do we not count *any* known and relevant circumstance as part of what the agent *intends*, even if it forms no part of her reason for action? If John has intercourse with a woman who does not, he knows, consent, he intentionally 'has non-consensual intercourse': for (whatever *he* thinks) her lack of consent is crucially relevant to his action. But even if her lack of consent is no part of his reason for action (it is, for him, simply a known but irrelevant fact), we would still surely count it as part of what he *intends*; he intends 'to have intercourse without her consent'. One who intends to destroy a plane which will, he knows, be in

mid-air and full of passengers at the time, surely *intends* not merely 'to destroy a plane', but to 'destroy a plane which is full of people'; our description of what he intends will include that circumstance, even if it is no part of his reason for action (if his aim is just to get the insurance money on the cargo) (see *Hyam*, p. 74).

None of this, however, threatens the distinction between intended and intentional agency as to circumstances. We include circumstances in our description of what an agent intends in the same way, and for the same reason, as we may include expected side-effects. In the case of side-effects we say that she intends to 'do X despite Y': to say that the rapist intends to 'have intercourse without her consent' is likewise to say that he intends to 'have intercourse despite her lack of consent', though the 'despite' is now implied rather than stated. Lord Bridge's traveller does not intend to go to Manchester: but he does intend to 'board a Manchester-bound plane'; to board this plane despite the fact that it is bound for Manchester. A rapist might not intend that his victim should not consent; Mr Barrett did not intend to cause death: but we include these crucially relevant aspects of their actions in our descriptions of what they intend.

4.5 Individuating Effects

The second complication concerns the individuation of effects. An agent does not intend the morally certain side-effects of her action: but can we always clearly distinguish intended effects from foreseen side-effects? I intend to decapitate Pat, to test my new guillotine: her death is, I admit, a morally certain side-effect of my intended action; but I do not, I insist, intend to kill her. Might we not say, however, that death is so 'inseparable' from decapitation that one who intends the latter must also be said to intend the former?⁶

I intend to bring X about, and am certain that in doing so I shall also bring Y about. If Y is to count as a foreseen, but not intended, side-effect of X, they must be *distinct* effects: if Y's occurrence is instead so inseparable from X's occurrence that Y is an implication, rather than a distinct side-effect, of X, then to intend X is to intend Y. But how do we decide if X and Y are thus distinct?

Inseparability is not just a matter of empirical certainty: I am sure that

6 See *Hyam*, p. 74: also R.A. Duff, 'Intentions legal and philosophical', pp. 81–5; G. Williams, 'Oblique intention'; H.L.A. Hart, 'Intention and punishment', p. 120; A.J. Kenny, 'Intention and purpose in law', p. 156.

drinking this bottle of whisky will give me a hangover, but do not drink it with the intention of getting a hangover. Can we say that Y is 'inseparable' from X if Y is *logically*, rather than merely *empirically*, connected to X; if the occurrence of X *entails* that of Y? For if the occurrence of X entails that of Y, the non-occurrence of Y will entail the non-occurrence of X, and thus the failure of the action which was intended to bring X about: the agent must therefore be taken to intend Y as well as X, since she intends any effect whose non-occurrence would entail the failure of her action. A side-effect is an effect which will, as a matter of empirical fact, be caused by the agent's intended action; an 'inseparable' effect is one whose occurrence is logically entailed by that of the intended effect.

Thus, my drinking a bottle of whisky *causes*, but does not *entail*, my getting a hangover: since the fact that I have no hangover therefore does not entail that I did not drink the whisky, I can intend 'to drink the whisky' without thereby intending 'to get a hangover'. But to intend to conceal my victim's corpse *is* to intend to prevent its burial, since preventing its burial is an implication, not a side-effect, of my intended concealment: the fact that the corpse is duly buried would entail that it had been found, and thus that I had failed to conceal it (see *Hunter*). So too, a soldier who fires at a fleeing suspect intending to prevent his escape, intends to cause him serious injury (see *A-G for Northern Ireland's Reference*, 1977, p. 139): such injury is not a distinct side-effect of his intended action, since his shot will prevent the suspect's escape only by injuring him so seriously that he cannot flee; if the suspect is not thus injured the soldier has failed in his intended action of preventing his escape by shooting him.

Such effects as these must count as 'intended', both in ordinary language and in law: not merely because they are 'morally certain' to ensue, but because their occurrence is *entailed* by the success of the agent's intended action. But this logical criterion of inseparability will not always produce a clear result, since the distinction between 'entailment' and empirical certainty is itself not always clear.

To intend to decapitate is surely to intend to kill: but is death logically, rather than empirically, related to decapitation? Perhaps it is: it is part of the *concept* of a human being that such a being is killed by decapitation; the fact that Pat (a human being) is still alive entails that I have failed to decapitate her. But such a claim about the logic of 'human being' is arguable; and it is anyway surely *clearer* that to intend decapitation is to intend death, than that decapitation and death are logically connected: thus to use 'logical connectedness' as the criterion of 'inseparability' would be to use the obscure as the criterion of the less obscure; which is unhelpful.

And what of the man who blows up a plane in mid-air, knowing that

this will kill the passengers on board? Even if their deaths form no part of his reason for action, he surely intends not just to destroy the plane, or to destroy a plane which is full of people, but to *kill* the passengers: but the connection between the intended explosion and their deaths is surely empirical, not logical. Perhaps we could say that those deaths are *part*, rather than a foreseen side-effect, of what he intends. For he intends to destroy the plane; and destroying the plane *includes* destroying its contents. He cannot claim that his action is aimed at the plane *as distinct from* its passengers; the destruction which he intends encompasses them all. So too, to mount a saturation bombing raid on a whole town, intending thereby to destroy a munitions factory in the town, is to intend to kill the civilians living in the town, since the bombs are not aimed at the factory as distinct from the whole town (but a pilot who does aim at the factory as distinct from the rest of the town can deny that he intends to kill the civilians living nearby, even if he is sure that some of the bombs will in fact miss their target and kill civilians).⁷

Perhaps we should simply say that X and Y are 'inseparable' if it is *impossible* for X to occur without Y occurring. We could then distinguish morally certain side-effects from inseparable effects by saying that moral certainty is the certainty that the effect will follow 'in the ordinary course of events ... unless something unexpected supervenes to prevent it' (*Moloney*, p. 929, Lord Bridge); whereas an effect is 'inseparable' from what is intended if it is impossible that (if what is intended actually ensues) anything could supervene to prevent its occurrence. If I drive at high speed down a road with a policeman clinging to my car, intending to knock him off by colliding with the oncoming traffic (see *D.P.P. v Smith*), I intend to cause him serious injury: for whether or not knocking him off in that way *entails* causing him serious injury, it is surely *impossible* to knock him off like that without seriously injuring him.

I am, I confess, uncertain about this. The distinction between intended effects and morally certain side-effects matters, of course, only if the law should sometimes distinguish them, and base liability on intended rather than intentional agency; and we have yet to see whether it should ever do so. But even if the distinction does matter in law, we may have to accept that it is to some degree unavoidably indeterminate, and try to deal with problems case by case.

We must also recognize, however, that the question of whether we

⁷ See G.E. Anscombe, 'War and murder', p. 51; T. Nagel, 'War and massacre', pp. 58-60.

should count X and Y as distinct effects is sometimes a *normative* one – that to answer it we must decide what kinds of action the law *ought* to prohibit and punish.

In *Hills v Ellis*, Mr Hills had impeded an arrest which a police officer was trying to make, and was charged with wilfully obstructing the officer in the execution of his duty (Police Act 1964, s. 51(3)). He admitted intending to impede the arrest, but claimed that since he believed the officer to be arresting the wrong person, his intention was not to *obstruct*, but 'to assist [him] in the execution of his general duty to investigate the circumstances of an offence' (p. 682). So the court had to determine the relationship between impeding this arrest, which Mr Hills admitted to intending, and obstructing the officer in the execution of his duty, which he denied intending. Mr Hills was in fact convicted, on the grounds that, since he did not claim that the arrest was *unlawful*, his belief that it was misguided did not give him 'lawful excuse' to impede it: the court thus in effect held that to impede a lawful arrest *is* to obstruct the arresting officer in the execution of his duty – that to intend the former is to intend the latter. But what this judgement depended on was not a merely linguistic question about the logical relationship between 'impeding an arrest' and 'obstructing a police officer'. It rather depended on the substantive legal issue of what rights and responsibilities should be assigned to police officers and to ordinary citizens: in refusing to allow Mr Hills to distinguish the impeding from the obstructing as distinct and separate effects, the court held that so long as a police officer is acting lawfully it is for him, and not for an intervening civilian, to decide what his duty is and whether he is executing it.⁸

Mr Steane was trapped with his family in Germany at the start of World War II, and was induced by threats to himself and his family to make radio broadcasts for the Germans. He was convicted after the war of 'doing acts likely to assist the enemy, with intent to assist the enemy' (Defence (General) Regulations 1939, Reg. 2A). His defence was that 'he never had the slightest idea or intention of assisting the enemy' (*Steane*, p. 1000); he intended only to save his family from the concentration camp to which they would otherwise have been sent. But the trial judge directed that a man is taken to intend the 'natural consequences' of his acts: Mr Steane therefore 'intended' to give the assistance to the enemy which was a natural consequence of his acts.⁹

8 See G. Williams, 'Oblique intention', p. 419; R.A. Duff, 'Intentions legal and philosophical', p. 82.

9 See G. Williams, *Criminal Law: The General Part*, pp. 40–1, 'Oblique intention', p. 428; C&K, pp. 127–9.

The Appeal Court overturned his conviction. The presumption that a man intends the natural consequences of his acts may be unsafe when he acts 'in subjection to the power of ... a brutal enemy': in such cases 'the guilty intent cannot be presumed and must be proved'; but it was not proved of Mr Steane, whose actions were 'as equally consistent with an innocent intent as with a criminal intent, for example a desire to save his wife and children from a concentration camp' (p. 1006, Lord Goddard). If that was his intention, it would be as absurd to say that he acted 'with intent to assist the enemy' as to say that prisoners of war who do forced labour act 'with intent to assist the enemy'.

The Court's critics argue that Mr Steane should indeed have been acquitted, but not on these grounds: for he did intend to assist the enemy. He did not 'desire' (in the narrow sense) to assist them: but he 'had to' assist them to save his family. He thus intended, albeit unwillingly, to assist the enemy, just as Mr Lynch intended to help the IRA men commit their murder (p. 53 above). Nor was assisting the enemy 'the last thing he desired to do' (Lord Denning, *Responsibility before the Law*, p. 127): the *last* thing he desired was for his family to be sent to a concentration camp; and he desired (extrinsically) to assist the enemy in order to avoid that outcome. If we deny that he intended to assist the enemy, because he intended to save his family, we must likewise deny that one who broadcasts for the enemy in order to earn money intends to assist the enemy: but it would be outrageous to acquit such a person of 'doing acts likely to assist the enemy, with intent to assist the enemy'. Mr Steane's defence should have been duress, not lack of intent; his intention to assist the enemy was excused by the threats under which he acted.

Now Mr Steane knew that the broadcasts which he intended to make would assist the enemy. He thus assisted the enemy *intentionally*: for the fact that an action of mine will assist the enemy is, normally, relevant to that action as a powerful reason against it. (This might not always be so. Mr Ahlers, the German consul in Sunderland in 1914, helped German citizens of military age to return to Germany after the outbreak of war, and knew that this would help the German war effort. But he could perhaps deny that in acting thus he either *intended* to assist, or *intentionally* assisted, the enemy: for, he insisted, his intention was simply to do his legal duty as consul, which required him to help enemy aliens return home when war began. He did not act as he did in order to help the German war effort, but simply in order to do his duty as consul; and that duty also required him to ignore the fact that his actions would assist the enemy, just as a doctor's duty to care for her patient's health requires her to ignore the fact that the treatment which she provides will facilitate the commission of an offence (see p. 86 above). Mr Ahlers, unlike Mr Steane or other private

citizens who did what they knew would assist the enemy, could thus deny even intentional agency as to, and responsibility for, that assistance to the enemy.)¹⁰

If 'with intent to assist the enemy' should be read as requiring only that the defendant intentionally assisted the enemy, Mr Steane should not have been acquitted on grounds of lack of intent; his defence should indeed have been one of duress. But suppose we read it as requiring that the defendant *intended*, in the ordinary meaning of the term, to assist the enemy: could Mr Steane not have denied that he acted with that intention?

The fact that he did not 'want' to assist the enemy, and that his aim was to save his family, admittedly does not prove that he did not intend to assist the enemy as a means to that end. But could he not claim that any assistance to the enemy was a foreseen, but not intended, effect of his actions? He did not make his broadcasts *because* they would benefit the enemy; he would still have made them had he thought that they would hinder, not help, the German war effort; his actions would not have failed had the broadcasts brought no actual benefit to the enemy war effort. If to 'assist' the enemy is actually to benefit their hostile enterprise, he thus did not intend to assist the enemy (nor does the prisoner of war doing forced labour): though *the enemy* intend to benefit from the actions which they force their victims to do, those victims need not themselves intend to assist the enemy.

This defence of *Steane* portrays assisting the enemy as a distinct side-effect of broadcasting for them: but critics might deny that we can thus separate broadcasting from assisting. 'Broadcasting for the enemy' does not have 'assisting the enemy' as a distinct or separate consequence: it rather *constitutes* assisting the enemy; to intend to broadcast for the enemy *is* to intend to assist the enemy. That is why it is absurd to deny that one who broadcasts for the enemy simply in order to earn money intends to assist the enemy; and that is why Mr Steane, and the prisoner of war, whose forced labour also constitutes assisting the enemy, act 'with intent to assist the enemy', and must be acquitted on grounds of duress, not of lack of intent.

Steane thus raises two issues. One concerns the meaning of 'with intent to assist the enemy': should 'with intent', in this and other contexts, be taken to require a (direct) intention to bring about the specified effect; or should intentional agency as to that effect be sufficient *mens rea* for such offences (see pp. 104, 205 below)?

¹⁰ See Ahlers; G. Williams, 'Oblique intention', pp. 436–7; R.A. Duff, 'Intentions legal and philosophical', pp. 84–5.

The other issue, which arises if 'with intent' should require a direct intention, concerns the individuation of effects: can we see the assistance which Mr Steane knew his broadcasts would give to the enemy as a distinct effect of the broadcasts? To answer this question we must determine what 'assist' should mean in the law. Do I 'assist' someone only if I actually make the success of her enterprise more likely (in which case broadcasting for the enemy does not *constitute* assisting them, and Mr Steane can deny that he intended to assist the enemy)? Or do I 'assist' someone if I do, on her instructions, what *she* intends should benefit her enterprise (in which case Mr Steane did intend to assist the enemy)? Similarly, could Mr Lynch argue that he did not *intend* to assist the gunmen's murder (though he assisted it intentionally), since his action of driving them would not have been a failure had they not found or killed their victim: or must he admit that driving them to and from the scene of their crime *constituted* assisting the murder, so that in intending to drive them he intended to assist the murder?

Neither of these issues is a mere 'problem of linguistics' (Hyam, p. 96, Lord Cross), which we could resolve by an appeal to ordinary language: they rather involve the *substantive* issues of what kinds of action the law should prohibit as 'assisting the enemy', or 'aiding and abetting the commission of an offence'; and of whether there is in these cases any significant difference between intended and intentional agency.

4.6 Intentional Agency and Probable Consequences

I bring about intentionally those side-effects of my actions of whose occurrence I am 'morally' certain and for which I am properly held responsible. Some have thought that 'intention' in law should also include side-effects which are foreseen as being highly probable or likely, rather than certain (see pp. 15–16 above). Current orthodoxy rejects this view; such foresight is said to constitute recklessness rather than intention. But we should note the argument in favour of including it within the scope of intention. An agent certainly does not *intend* such side-effects: but might we not say that she brings them about *intentionally* (and suggest that objections to this view reflect a failure to distinguish intentional from intended agency, and a consequently mistaken belief that, since such effects are not intended, they cannot fall within the scope of intention at all)?

One objection to this is that we cannot specify the exact degree of probability which should distinguish intention, as thus broadly defined, from recklessness. The law must surely draw a consistent and clear distinction between intention and recklessness: but speakers use such terms as

'probable' and 'likely' in different ways, which cannot be precisely or consistently defined.¹¹ But even if we reserve 'intentional' for effects which are foreseen as 'morally certain', we face just the same problem in distinguishing 'moral certainty' from high probability; and we can anyway provide adequately clear meanings for three notions which will allow us to draw the appropriate moral distinctions: certainty, probability and possibility. I foresee an effect as 'certain' if I fully expect it to occur ('unless something unexpected supervenes to prevent it': see p. 91 above): I shall be amazed if it does not occur; I cannot truly hope (though I may idly wish) that it will not occur. I foresee it as 'probable' if I think it is more likely to occur than not: I expect on balance that it will occur; if forced to bet one way or the other, I would bet on its occurrence. I foresee it as merely 'possible' if I realize that there is a real chance that it will occur, but expect on balance that it will not (see R. Cross, 'The mental element in crime').

So would it 'push the legal meaning of "intention" far beyond the ordinary meaning of the word' (Law Commission no. 89, para. 43) to say that I bring about *intentionally* any relevant effect which I foresee as a certain or probable outcome of my action? To ascribe intentional agency is to ascribe unqualified responsibility; and the argument for saying that I bring such probable effects about intentionally is that the difference between certainty and probability is not significant enough to qualify my responsibility for those effects. Suppose that Mr Barrett thought it probable, but not certain, that his bomb would cause death (see p. 74 above). Neither he nor one who is certain of causing death cause death *unintentionally*, *against* their expectations; both are 'willing to kill' in pursuit of their aims (Law Commission, *Imputed Criminal Intent*, para. 17). Mr Barrett might *hope*, as one who is certain cannot, that he will not cause death: but can a hope which falls far short of expectation (and which he does nothing to try to fulfil) reduce his responsibility for the deaths which he causes? If it cannot, we may say that he causes those deaths (that he kills) intentionally.

By contrast, one who foresees some harm only as a *possible* side-effect of her action is at worst a reckless, not an intentional agent of that harm: her responsibility for it (her relationship to it as an agent) is qualified by the fact that its occurrence is more a matter of luck or chance than it is in the case of one who expects to cause harm. The harm occurs unluckily and against her expectation: but one who expects harm as a certain or probable effect of his action cannot say that it was unlucky that that harm actually

11 See Hyam, pp. 76-7; p. 16 above; *TCL*, pp. 83-4.

occurred (what else did he expect?); it would rather be lucky if that harm did *not* ensue. To do what I realize will possibly cause harm is, of course, to create the *risk* of that harm intentionally: but the actualization of that risk does not fall within the scope of my intention.

Suppose that Mrs Hyam thought it probable that the fire which she started would at least cause serious injury to someone in the house: this might not justify convicting her of murder for the deaths which she caused (and she may well not have foreseen *death* as a probable effect of her action, since people do often escape such fires); but had she, in fact, caused injury rather than death, would it have been unjust to say that she caused that injury intentionally?

The Law Commission argued (no. 89, para. 43) that this suggestion would 'extend intention into the field of recklessness and even some way beyond it'. 'Into', since both recklessness and doing what I know will probably cause harm are matters of risk-taking. 'Beyond', since recklessness involves an *unjustified* risk, while on this account of intention I would cause harm intentionally even if I justifiably made its occurrence probable: as I rush to save your daughter from falling downstairs, I drop your valuable vase, knowing that it will probably break; if I am justified in doing this I have not damaged the now broken vase recklessly, but on this account of intention I have damaged it intentionally.

But to object that this account would 'extend intention into the field of recklessness' begs what is precisely the question at issue: *should* we categorize foresight of probable effects as recklessness or as intention? Nor is it odd to count as intentional an action which is not (even) reckless: for to call me reckless is already to condemn my action as unjustified, whereas to say that I damaged your vase intentionally leaves room for me to justify damaging it.

But suppose Mr Barrett would not have exploded the bomb if he was certain that it would cause death (and we should surely give someone who foresees harm only as a probable effect of his action the benefit of the doubt, and assume that he would not act thus if he was certain that it would cause such harm). Is not this a significant difference, which the law should mark, between him and someone who plants a bomb despite the certainty that it will cause death? Does this not qualify his culpable responsibility for the deaths which he caused, by showing that he was not whole heartedly 'willing to kill'? Should we not see him, like someone who foresees harm as a possible effect of her action, as an intentional risk-creator, rather than as the intentional agent of the actual harm?

I shall not try to settle this issue here. But even if I should be said to bring about intentionally what I foresee as probable side-effects of my action, we must note that this holds straightforwardly only for *pure* side-

effects, whose occurrence is *wholly* irrelevant to the success or failure of the action.

A surgeon performs an operation which offers her patient his only chance of survival, but which she knows will probably kill him. If he dies, the surgeon has not killed him intentionally: for the sole aim of the operation was to *prevent* his death; if he dies, the surgeon's action has *failed*. I cannot be said to bring about intentionally an effect whose occurrence, though I foresee it as probable, is *against* my intention (see Hyam, p. 74).

Matters are more complex if an agent makes *some* effort to prevent an anticipated side-effect of her action. A terrorist gives a warning of the bomb she has planted. She intends, not simply 'to explode the bomb', since her warning increases the chance that it will be found and defused; nor simply 'to avoid causing death', since she could best do that by not planting the bomb: but 'to explode the bomb, if possible without causing death' ('if possible' meaning that she would not take precautions which would in her eyes unduly prejudice the chances of the bomb exploding). She believes that the bomb will probably cause death, despite her warning: if it does, has she killed its victims intentionally? Their deaths are not pure side-effects of her action, since they mark its partial failure; this distinguishes her from one who is certain that his bomb will kill, or who takes no precautions against causing death: but, unlike the surgeon, it is not her *whole* or even her *primary* intention to prevent death.

I shall not pursue this issue here (but see R.A. Duff, 'Intention, recklessness and probable consequences'). Whether we should say that an agent brings such effects about intentionally depends, I think, on several normative factors – the seriousness of the expected effect, the character of the action which causes it, and the adequacy of the precautions taken: in so far as we think the action unjustified, or the precautions quite inadequate, we may hold the agent fully responsible for that effect as its intentional agent.

But we must now move on, to consider the normative significance of the distinction between intended and intentional agency.

5

Competing Conceptions of Agency

5.1 Intention and Responsibility

The discussion of intended and intentional agency in the last two chapters should have served both to explain these two aspects of the concept of intention, and to show why intention should be the central species of *mens rea*.

Intention is integral to human action. Davidson has indeed argued that *every* human action is intentional under some description, even if it is unintentional under others: if I hit you unintentionally (you get in the way of my expansive gesture; or I mistake you for Ian, whom I meant to hit) there is *something* I am doing intentionally – gesturing or hitting someone (D. Davidson, 'Agency'). We may doubt this claim: scratching my nose is surely an action, but it may not be under any description an intentional action. But human actions are none the less *paradigmatically* intentional or intended actions; and to understand what human agency is we must look to its fullest and most distinctive expression in intended or intentional action.

Intended and intentional agency also form the central paradigms of *responsible* agency. To act with the intention of bringing a result about is to make myself fully responsible for that result – I must be ready to answer for (to explain, to justify, to accept criticism for) my action of bringing it about; and I bring about intentionally those effects for which I am held responsible. I am also responsible, of course, for some effects which I do not bring about with intent or intentionally – if, for instance, I bring them about recklessly: but I am most fully the agent of, and thus most fully responsible for, those which I bring about intentionally or intending to do so.

Intended or intentional agency as to some evil is not, of course, by itself sufficient for either moral or criminal guilt: that I have killed someone intentionally or with intent does not by itself make me guilty of murder,