

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

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,

either in morality or in the law, since I may be able to *justify* or *excuse* that intended or intentional killing. Does this show that intended and intentional agency are not after all the paradigms of responsible agency? It does not: for justifications do not deny responsible agency; and the kinds of excuse which may exempt me from blame or criminal liability at least qualify, even if they do not wholly rebut, the ascription of intended or intentional agency.

The distinction between justifications and excuses is not always clear.¹ It will be enough to say here, however, that a justification admits responsibility for a fully intended or intentional action, but claims that the action was, in the circumstances, right or at least permissible. A plea of self-defence rebuts a charge of wounding not by denying that the agent wounded her 'victim' intentionally, nor by denying responsibility for the wounding, but by claiming that that wounding was rendered right or permissible by the fact that it was the only way to ward off a serious attack by its 'victim' against its agent. One who justifies her action is prepared to *answer* for it, by showing it to be right: the possibility of avoiding blame or criminal liability by justifying our intended or intentional actions, therefore, does not undermine the claim that intended and intentional actions are paradigms of responsible agency.

An excuse, on the other hand, admits that an action was not right or permissible, but claims that the agent should not be held (fully) responsible for it. Now many excuses deny responsibility by denying intentional agency. Pleas of inadvertence, accident or mistake, for instance, deny that the agent acted intentionally under the relevant description: the fact that such excuses deny responsibility by denying intentional agency thus supports the claim that intention is the central determinant of responsible agency. But other excuses seem to admit intended or intentional agency, while denying responsibility; and these may seem to undermine that claim.

Duress and necessity might be such excuses (their status as legal defences is controversial,² but we can discern the relevant points by considering them as moral defences). Sometimes they serve to justify rather than to excuse. If I break the speed limit because a hijacker threatens to kill me if I do not drive faster, or to get a critically injured passenger to hospital, I do not need to *excuse* a *wrongful* act of speeding; I rather *justify* my action under a relevant description ('speeding to save life') which shows that it

1 See J.L. Austin, 'A plea for excuses', pp. 123–5; C&K, pp. 319–25; Gordon, chs 13.13, 13.23; G. Fletcher, *Rethinking Criminal Law*, pp. 759–62, 810–3.

2 See 1989 Code, cls 42–3; S&H, ch. 9.6–7; C&K, pp. 246–68; Gordon, ch. 13; J. Bickenbach, 'The defence of necessity'.

was in that context the right thing to do. Sometimes, however, duress and necessity seem to serve as excuses rather than as justifications. If a captive betrays secrets under torture, or an impoverished mother steals clothes for her children, we might think that the pressures under which they acted could not justify what they did (they did not act rightly), but should excuse it; that they should not be condemned for giving in to such pressure since, as we might say, they 'could not resist' it.

Insanity is another excuse which may deny responsibility without denying intentional agency: if, for instance, someone in the grip of a psychotic delusion kills (with intent) the woman he believes to be persecuting him, he may be acquitted of murder on grounds of insanity.³

Both the meaning and the acceptability of excuses based on necessity, duress and insanity are highly problematic. What does it mean to say, for instance, that a person 'could not resist' some pressure; under what conditions should insanity exempt an agent from responsibility? I cannot discuss these problems here: I do not think, however, that the possibility of excusing intended or intentional actions in these terms undermines the claim that intended and intentional agency are the paradigms of responsible agency. One who is excused on grounds such as these may have acted intentionally: the captive intends to give the enemy the information they seek; the mother intends to steal the clothes; the deluded man intends to kill his persecutor. But in accepting such excuses we also qualify our ascription of intentional agency: for these excuses deny responsibility by denying one of the conditions which such ascriptions normally presuppose.⁴

Intentional actions are done for reasons, and the idea of acting for a reason is bound up with that of rational action – of acting for for *good* reasons which *justify* the action (see p. 49 above). We can say, more generally, that in ascribing intentional agency to others, and in explaining their actions in terms of their reasons for action, we normally presuppose that they are rational agents: that they are capable of grasping and weighing the reasons for and against their actions, and of acting in accordance with what they see to be good reasons for action. Now duress, necessity and insanity, in so far as they operate as excuses, serve to rebut the presumption of rational competence which ascriptions of intentional agency normally involve. Duress or necessity should excuse if the pressure to which the agent is subjected is so severe that it impairs her capacity to grasp, to

3 See C&K, pp. 270–97; S&H, ch. 9.2; Gordon, ch. 10.

4 See H. Fingarette, *The Meaning of Criminal Insanity*, chs III–IV; R.A. Duff, 'Mental disorder and criminal responsibility'.

weigh or to act on good reasons for action – to realize that and why she should resist the pressure, or to carry through a resolution to resist it. Insanity should likewise excuse if and when it involves the serious impairment of the agent's capacities for rational thought and action.

This connection between the ascription of intentional agency and the presumption of rational competence gives further support to the claim that intended and intentional agency are the paradigms of responsible agency. In holding someone responsible for his actions, we suppose that he is in some relevant sense a 'free' agent; that he has, in the traditional terminology, 'free will'. Now the meaning of 'free will', as a precondition of responsibility, is a matter of long controversy. I think it can best be explained, however, in terms of the concept of rational agency: an agent is 'free' in so far as his actions are guided by his understanding of good reasons for action.⁵ But if free or responsible agency is essentially a matter of rational agency; and if intentional agency is, paradigmatically, rational agency: then intentional agency provides the paradigm of responsible agency.

This is why intention is the central or paradigm determinant of moral culpability (at least for the kind of moral culpability which flows from moral wrong-doing). If I am accused of some moral wrong-doing, that accusation is not substantiated merely by showing that I actually brought about some harm or evil (that, for instance, I caused some injury). I am not liable to moral blame for every harm which I in fact cause: it must also be shown that I was morally (and not just causally) *responsible* for that harm or evil; that it can properly be attributed to me as my *action* – as something which I culpably *did*. Now I am, of course, blamed for harm which I cause recklessly or negligently: but I am most culpable, because most fully responsible as an agent, for harm which I bring about with intent or intentionally. To deceive you recklessly or negligently is clearly blameworthy: but to deceive you intentionally, or intending to do so, is a clearly more serious moral offence; it is the paradigm of dishonesty.

As with morality, so with the law. A defendant is accused of some criminal wrong-doing, and is convicted and condemned for that wrong-doing if it is proved against her. But to justify that conviction it must be shown not merely that she committed the relevant *actus reus*, but that she can properly be held responsible for that *actus reus*; that it can be properly attributed to her as its agent.⁶ A conviction for wounding must be justified

5 See A.C. MacIntyre, 'Determinism'; G. Watson, 'Free agency'.

6 See G. Fletcher, *Rethinking Criminal Law*, ch. 6.6–8.

by proof that she was responsible for a wound which she caused (that her responsible action can properly be described as a 'wounding'); and the most serious offence of wounding should involve the most culpable degree of responsibility, i.e. an intended or an intentional wounding.

There are thus two dimensions to legal, as to moral, guilt (see C&K, ch. 9). One concerns the seriousness of the harm done: homicide is a more serious crime than wounding, because death is a greater evil than injury. The other concerns the agent's responsibility for the relevant harm – the degree of 'fault': murder is a more serious crime than manslaughter because the murderer is more fully and culpably responsible for the death which he causes; he is unqualifiedly the responsible agent of that death – a killer. We are concerned here with the second of these dimensions of culpability.

The underlying assumption here is that criminal liability should, in principle, be ascribed in accordance with moral responsibility. A defendant should be criminally liable only for conduct for which she can properly be held morally responsible or culpable; and the extent of her criminal liability (the seriousness of the offence for which she is convicted) should match the degree of her moral responsibility or culpability (see R.A. Duff, *Trials and Punishments*, p. 41, chs 3–4). That is why *mens rea* should be required for criminal liability, and why intention should be the most serious kind of criminal fault.

This assumption typically underpins legal discussions about the definitions of particular offences, about the various species of *mens rea*, and about the status of various excuses: two out of many possible examples must suffice here to indicate its influence. Lord Hailsham argued in *Hyam* that the intention to expose another to a serious risk of death or serious injury is sufficient *mens rea* for murder, since, although that intention is 'factually and logically distinct' from an intention to cause death or serious injury, the two intentions are 'morally indistinguishable' (p. 78): the former intention, that is, makes the agent as fully and culpably responsible for the death which she causes as the latter. And Lord Diplock argued, in *Caldwell*, that recklessness may be constituted either by conscious risk-taking or by failing to give any thought to an obvious risk created by my action, since '[n]either state of mind seems to me to be less blameworthy than the other' (p. 352): either state of mind, that is, makes an agent equally and culpably responsible for the risk which he creates. Both these arguments assume that the law should distinguish two 'states of mind' only if there is some significant moral difference in culpable responsibility between them.

The assumption that ascriptions of criminal liability ought to reflect justified ascriptions of culpably responsible agency explains why 'intention', in something like its ordinary extra-legal meaning, should be the

central species of *mens rea*: but it does not yet tell us whether the law should distinguish *intended* from *intentional* agency.

If the law should be wholly guided by ordinary language, we might suggest that it should require only intentional agency for offences of 'basic' or 'general' intent, but intended agency for offences of 'ulterior' or 'specific' intent (see p. 40 above). For an offence of 'basic intent' need involve only intention as to an *actus reus* which has actually been brought about; and we might naturally translate that as requiring only intentional agency as to that *actus reus*, since we can talk quite naturally of acting intentionally as to (of bringing about intentionally) results which have actually occurred. I should thus be guilty of wounding if I intentionally wound another person. Offences of 'ulterior intent', however, require an intention which 'extends beyond' the *actus reus* of the offence: the defendant must act 'with intent' to bring about some further effect; and we might take that to require intended agency as to that further effect, since we talk more easily of intended than of intentional agency as to effects which may not occur. I should thus be guilty of doing acts likely to assist the enemy 'with intent to assist the enemy', for instance, only if I *intend* to assist the enemy.

But the fact that ordinary language draws such a distinction between intended and intentional agency cannot by itself show that the law should also distinguish them: for we cannot assume that every aspect of the ordinary meaning of 'intention' and its cognates will be relevant to, and should be reflected in, its legal usage. Intended and intentional agency are 'factually and logically distinct', and that distinction may be of interest in some extra-legal contexts (in explaining an action, for instance, we may be interested in whether the agent intended a particular effect or foresaw it as a side-effect of his action): but it may not mark any significant difference in culpability or responsibility; the two species of 'intention' may be 'morally indistinguishable'. Indeed, if criminal liability is a matter of responsible agency; and since I am fully responsible for the results both of my intended and of my intentional actions: then surely intentional agency should *always* suffice for criminal liability; the law need never require intended rather than intentional agency.

This certainly follows from one conception of responsible agency: on a consequentialist view, which sees no intrinsic moral difference between 'intention' and foresight, intentional agency should always suffice for criminal liability. But a different, non-consequentialist view finds a distinct and particular moral significance in *intended* agency: on this view, while intentional agency should indeed suffice for crimes of 'basic intent', intended agency should be required for at least some crimes of 'ulterior intent'.

Legal controversy over the meaning of 'intention' may reflect the con-

flict between these competing conceptions of responsible agency: we can clarify, if not resolve, that controversy by spelling out the nature of these conceptions and of the conflict between them.

5.2 A Consequentialist View of Responsible Agency

I shall begin with consequentialism. The central consequentialist slogan is that the rightness or wrongness of actions depends solely on the goodness or badness of their consequences: an action is right if its consequences are at least as good as those of any available alternative, wrong if its consequences are worse than those of some alternative. Consequentialists differ on what makes consequences good or bad. Utilitarians hold that happiness is the only intrinsic good, and unhappiness the only intrinsic evil: an action is therefore right (its consequences are good) if it maximizes happiness or minimizes unhappiness. Other consequentialists ascribe intrinsic value to ends other than happiness, such as justice or freedom; they assess actions as right or wrong in so far as they assist or frustrate the achievement of those ends. My concern here, however, is not with the particular standards by which consequentialists will assess consequences as good or bad, but with the kind of account which they might offer of the proper criteria of criminal liability. I shall not try to do justice to the many, often very sophisticated, versions of consequentialism: but I shall sketch one influential consequentialist account of the proper aims of the criminal law, which generates a particular view of the meaning and significance of intention in the criminal law.⁷

To a consequentialist a legal system, like any human institution, must be justified by the consequential goods which it secures (or the evils which it averts). She might thus favour the 'Harm Principle': the primary aim of a system of criminal law is to prevent, or reduce, the occurrence of certain kinds of harm (J. Feinberg, *Harm to Others*). Now this principle might seem undeniable: what better aim could the criminal law have than to serve the common good by preventing serious harms which we would otherwise suffer? We must, however, look more carefully at the consequentialist's conception of 'harm'.

What kinds of 'harm' should the criminal law aim to prevent? Most consequentialists, however they judge good and evil, would probably agree

7 On consequentialism generally, see S. Scheffler (ed.), *Consequentialism and its Critics*; J.C.B. Glover, *Causing Death and Saving Lives*; J.J.C. Smart and B. Williams, *Utilitarianism: For and Against*.

on a central set of 'primary' harms, the most obvious of which are death, physical injury and loss of property (each 'primary' harm generates various 'secondary' harms which are harmful in virtue of their relation to that primary harm; if death is a primary harm, then being subjected to the threat, risk or fear of death is a secondary, derivative harm: see H. Gross, *A Theory of Criminal Justice*, pp. 124–5). Thus, for instance, 'the principal end to be served by the law of homicide is the preservation of life' – the prevention of the harm of death (H. Wechsler and J. Michael, 'A rationale of the law of homicide I', p. 730). The crucial point about this reading of the Harm Principle is that such harms are identified as harms without essential reference to human actions as their causes; we can 'hope to analyse the idea of harm ... without mentioning causally contributory actions'.⁸ Death is understood as a harm, independently of what causes it: it might result from human action or from natural causes, but its character as a harm is the same in either case; one who dies from natural causes suffers essentially the same harm as one who is murdered (although in different cases one or the other mode of death might be more painful).

Though such harms are initially identified independently of the conduct which may cause them, the criminal law can prevent them by prohibiting, and thus preventing, conduct which causes them. It can do this in various ways: by prohibiting conduct which actually causes such harms, under descriptions which refer to those harms ('killing', 'wounding', 'destroying property'); or by prohibiting conduct which might cause such harms, under descriptions which refer to those harms ('causing danger to the lieges' (Gordon, pp. 837–40), driving 'in such a manner as to create an obvious and serious risk of causing physical injury' (see Lawrence, p. 526)); or by prohibiting conduct which might cause such harms, under descriptions which do not refer explicitly to those harms ('driving with excess alcohol in the blood', or 'having a firearm in a public place' (Firearms Act 1968, s. 19)). We can focus here on prohibitions referring directly to a primary harm, and on homicide in particular.

A prohibition on 'killing' defines a category of harmful conduct (conduct which causes death) as criminal – as the *actus reus* of an offence. But the law should not penalize *all* conduct which in fact causes death, or hold agents *strictly* liable for any death which they actually cause: for quite apart from the fact that some death-causing conduct may be justified, criminal liability should require *mens rea* as well as an *actus reus*. To see how *mens*

8 J. Feinberg, *Harm to Others*, p. 31: see chs 1–3 more generally; also P.J. Fitzgerald, *Criminal Law and Punishment*, ch. II.

rea might be viewed from this perspective, however, we must distinguish *pure* from *qualified* versions of consequentialism.

A *pure* consequentialist must justify her principles of liability by their consequences; she should adopt those principles which would most efficiently serve the law's aim of preventing harm. Such a view is (like utilitarian accounts of punishment) open to the objection that it cannot generate acceptable principles of liability: that it would impose liability on some who do not *deserve* it, for the sake of increasing the preventive efficiency of the law; that it provides no secure foundation for the kinds of excuse (based on lack of *mens rea*) which should, in justice, preclude criminal liability. We need not discuss this objection here, however: for the conception of criminal responsibility in which I am interested emerges more clearly from a familiar kind of *qualified* consequentialist view.⁹

Some who agree that the primary *aim* of the law must be understood in consequentialist terms as the prevention of harm, but who are also impressed by the objection that a purely consequentialist view would lead to injustice, qualify consequentialism by arguing that justice sets non-consequentialist 'side-constraints' on the means by which we may pursue our consequentialist ends. The punishment of an innocent scapegoat might sometimes be an efficient way of deterring crime and might thus be justified on a purely consequentialist view: but it is forbidden by the non-consequentialist demands of justice, which allow us to punish only the guilty. A pure consequentialist holds that the end justifies any means which efficiently serve it; these qualified consequentialists will forbid some means, which might indeed serve the end efficiently, but which are themselves unjust.

On such a qualified consequentialist view, whether the law should hold someone criminally liable depends not merely on whether it would be *useful* to do so, but on whether it would be *just*. That he commits what is, in fact, the *actus reus* of an offence (that he causes a death) is not by itself enough to make it just to hold him criminally liable (to convict him of homicide): but what more is required? He must, we might initially say, at least have had a *fair opportunity* to obey the law – to avoid committing that *actus reus*: I can be justly convicted of homicide only if I had a fair opportunity to avoid committing the *actus reus* of homicide – to avoid causing death. This makes *knowledge* and *control* the two basic conditions of criminal liability: I have a fair opportunity to obey the law against

9 See H.L.A. Hart, *Punishment and Responsibility*; C.L. Ten, *Crime, Guilt, and Punishment*, chs 2, 5.1; R.A. Duff, *Trials and Punishments*, ch. 6.

homicide only if I know (or could easily realize) that my conduct will or might cause death, and only if I control that conduct – only if I could avoid acting thus.

This argument would justify the principle that criminal liability should normally depend on a 'voluntary act', since it is unjust to hold a person liable for an involuntary act which she could not control. But it so far requires only negligence (an avoidable and culpable failure to take care), not recklessness or intention, as the 'fault element' in criminal liability. For I have a fair opportunity to obey the law against homicide if I could and should realize that my conduct might cause death, and could and should take effective precautions against causing death; if I negligently fail to take those precautions, I can justly be held criminally liable for the death that I cause. We can, however, develop this argument to generate a hierarchy of degrees of criminal fault, making intention the most serious, and negligence the least serious, species of fault.¹⁰

The demand that only those who had a fair opportunity to obey the law should be criminally liable makes negligence a *minimum* condition of liability. But justice also demands that we treat like cases alike (and different cases differently). It would be unjust to convict one who causes death negligently of the same offence, and subject him to the same punishment, as one who causes death intentionally, if there is a relevant difference between them; and there surely is a relevant difference between them, in that one is more culpably responsible for the death which she causes than the other.

An intentional killer *knows* that her action *will* almost certainly cause death; but the worst we can say of a negligent agent is that he *could* and should have realized that he *might* cause death. The death which the intentional killer causes is wholly within her control; she knows that her victim's fate depends on her action; in doing what she knows will cause his death, she chooses to kill him (see H.L.A. Hart, 'Intention and punishment', pp. 121–5). The negligent killer, however, lacks such fully conscious control over the death that he causes: he does not realize that he might cause death; he creates a risk, not the certainty, of death; he does not *choose* to kill (or to endanger life). Now if criminal liability should depend on the conditions of knowledge and control, the *degree* of liability should depend on the extent to which those conditions are fulfilled. Since the intentional agent satisfies them to far greater extent than the negligent agent, her liability should be accordingly greater; she should be liable to

10 For an attempt to provide a strictly consequentialist foundation for this hierarchy, see A.J. Kenny, *Freewill and Responsibility*, pp. 85–92.

conviction for a more serious offence and to a heavier punishment. One who causes death recklessly falls between these two extremes of liability. He is less culpable than the intentional killer, since he is less certain that he will cause death (he chooses to endanger life rather than to kill): but he is more culpable than a merely negligent agent, since he does choose to endanger life (see pp. 153–4 below).

This view of the criteria of criminal liability fits with a wider consequentialist perspective on action and responsibility. If actions are right or wrong only in virtue of their consequences, our primary focus must be on those consequences – on outcomes rather than actions. What matters is that good outcomes should occur and bad outcomes not occur; for instance, that people should be made happy or not be made unhappy. Actions have a derivative importance, as the causes of good or bad outcomes: what matters about a lie, for instance, is not its intrinsic character, but whether its consequences are good or bad.¹¹ If actions thus matter as causes of good or bad consequences (and if the requirements of justice apply to moral culpability as they do to criminal liability), an agent's culpability for some harm which she causes will be a function of the seriousness of that harm and of her responsibility for it; and she is responsible for that harm in so far as she has effective control over its occurrence. But she has such control to the extent that she knows, or could easily realize, that her action will cause that harm, and could avoid that harm by not acting thus: the basic conditions of morally culpable responsibility for the harm that our actions cause are the same as those of criminal liability; knowledge and control.

What shape might the law of homicide now take? The *actus reus* of homicide will be the unjustified causation of death (by a 'voluntary act'). The *mens rea* of homicide will consist paradigmatically in the knowledge that my action will cause death: to act in that knowledge is to be fully and culpably responsible for the death which I cause; I should be convicted of the most serious form of homicide – murder. Lesser degrees of culpable responsibility will attach to those who consciously and unjustifiably create a risk of death, and to those who culpably fail to realize that their actions endanger life: they should be convicted, if they cause death, of lesser offences such as manslaughter or 'culpable homicide'.

On this view the *intentional*, not the *intended*, causation of harm is the paradigm of criminal fault. Conduct is criminal (the *actus* is *reus*) if it causes or threatens a prohibited harm; and its agent is culpable (her *mens* is *rea*) in so far as she controls that conduct, i.e. foresees its harmful effects

11 See T. Nagel, 'War and massacre', p. 54; B. Williams, 'A critique of utilitarianism', pp. 82–9.

and could avoid their occurrence: one who does what she knows will cause harm is the paradigm of a culpable criminal. This paradigm includes, as exhibiting the same species of criminal fault, both one who intends to cause harm (and is sure of doing so) and one who knows that she will cause harm as a side-effect of her action. It can also include one who intends to cause harm but is unsure of success: for he acts in a way which is, in general, very likely to cause harm, since he will act in the way which he thinks is most likely to cause the relevant harm. But there is no difference, in culpability or criminal liability, between the intended and the intentional causing of harm.

This view holds for crimes of both 'basic' and 'ulterior' intent. I am as culpably responsible for an actual harm which I intentionally cause as I am for actual harm which I intended to cause; so too, I am as culpable if I act intentionally as to a harm which does not occur as I am if I act with the intention of causing that harm.

What matters about a criminal 'attempt', for example, is that the agent's action makes likely the occurrence of a primary harm (such as death), and may also cause related secondary harms (such as the fear of death). But one who does what he is sure will cause death does, knowingly, as much to make it likely that both primary and secondary harms will occur as one who acts with the intention of causing death: each is as culpable as the other, and both should therefore be convicted of the same offence. To call this offence an 'attempt' would stretch the legal meaning of 'attempt' beyond its ordinary meaning, since in ordinary language I 'attempt' to kill only if I *intend* to kill: but if one who acts intentionally as to some prohibited harm is just as culpably responsible as one who acts with the intention of causing that harm, as on this view he is, we cannot allow the contingencies of ordinary language to override the substantial reasons which make it right to convict them both of the same offence (see pp. 192–9 below).

The same point holds for any offence involving an 'intent' which 'extends beyond' the *actus reus* of the offence: for that intent will be directed towards some relevant harm which the agent's action makes likely; and one who acts intentionally as to such a harm makes its occurrence as likely, and is as culpably responsible for doing so, as one who acts with the intention of causing that harm.

Consequentialists often claim in moral contexts that there is no intrinsic moral difference between 'intention' and foresight.¹² That claim applies

12 See J.C.B. Glover, *Causing Death and Saving Lives*, ch. 6; J. Harris, *Violence and Responsibility*, pp. 48–55.

equally to the law. The law need never distinguish, as to culpability, intended from intentional agency, or require intended rather than intentional agency for criminal liability; its purposes are best served by the broader definition of 'intention', since that captures the relevant category of responsible agency. (Note, however, that this holds straightforwardly only if criminal liability should depend on the *culpability* of the *action* which constitutes an offence: if it should instead depend partly on the *dangerousness* of the *agent*, a consequentialist might sometimes see reason to distinguish intended from intentional agency, since one who acts with the intention of doing harm may be more dangerous (as being more likely to try again if he fails) than one who foresees harm as a side-effect of his action. But we cannot pursue this issue here.)¹³

5.3 A Non-consequentialist View

This consequentialist view of responsible agency is opposed by a different, non-consequentialist view which finds an intrinsic moral significance in intended action; a significance which depends not on its expected consequences, but on the intentions which structure it. In some moral contexts such a non-consequentialist will argue that an agent's responsibility and culpability depend crucially on whether he intended to do evil, or rather foresaw evil as a side-effect of his action: that, for instance, while it is always absolutely wrong to *intend* the death of an innocent, we may sometimes justifiably do what we know will cause the death of an innocent as a side-effect. I shall not discuss such moral views, or the 'Principle of Double Effect' to which they appeal, here: but we can draw from them an alternative view of the legal significance of intended agency.¹⁴

We can begin by looking again at the Harm Principle, and asking whether we can, as the consequentialist claims, identify each primary harm in a way which makes no essential reference to a human action as its cause.

What, for example, is the primary harm which the law of rape aims to prevent? It is surely a harm which is internal to the *act* of rape: whatever further physical or psychological harm the victim may suffer (and none need be proved on a charge of rape), she suffers a serious attack on her sexual integrity and autonomy; *this* is the harm which rape essentially involves. But we cannot identify this harm without citing an intended

13 See M. Cohen, 'Questions of impossibility'; J.B. Brady, 'Punishing attempts'.

14 See G.E. Anscombe, 'War and murder'; T. Nagel, 'War and massacre', and 'Autonomy and deontology'; R.F. Holland, 'Good and evil in action'.

human action as its source: for only an intended action can thus attack a woman's integrity. We cannot *first* identify this harm as a harm, and *then* discover that it is in fact caused by a human action: for essential to the character of this harm as a harm is the human action which perpetrates it; no non-human process could, logically, harm a person thus. Central to the idea of rape as an evil is thus not the consequentialist idea of an *occurrence* whose cause could be either human or natural, but that of a human *action* which *attacks* the victim; and that action is defined as an attack by the intentions with which its agent acts.

Recklessness as to the woman's consent is, of course, sufficient *mens rea* for rape; a rapist need not act with intent or intentionally as to her lack of consent. But the recklessness which makes a man a rapist is, we shall see later, a feature of the intention with which he acts; the vicious character of that intention is integral to the harm of rape. For what a rapist intends is not (innocently) 'to have consensual intercourse', but (viciously) 'to have intercourse purely for my own gratification'; and it is in acting on that intention that he exhibits the kind of disregard for his victim which constitutes the essence of rape (see pp. 167–73 below).

Now with other crimes there are obvious consequential harms which the law may aim to prevent: murder, wounding, theft and criminal damage cause such consequential harms as death, injury and loss of property. But the example of rape should lead us to look more closely at other cases. For instance, is death (as a consequential harm which we can identify as a harm independently of the human action that may cause it) the precise harm which the law of murder aims to prevent? To say that it implies that a murder victim suffers essentially the same harm as one who dies from natural causes (although a murder might cause more pain or fear than a natural death, the reverse can also be true; and the harm that is essential to murder, which is what concerns us here, does not include pain or fear, since it is suffered by one who is murdered painlessly in her sleep): but is this right?

Both the murder victim and the victim of natural causes suffer death: but the character of the harm that they suffer surely also depends on the way in which they die. One who tries to kill me (and on this view the paradigm of murder is an intended killing) *attacks* my life and my most basic rights; and the harm which I suffer in being murdered (or in being the victim of an attempted murder) essentially involves this wrongful attack on me. The point is not that a murder victim suffers the same (consequential) harm of death as a victim of natural causes, and also suffers the *separate* harm of being attacked: it is that she suffers the distinctive harm of being killed by one who attacks her life. The 'harm' at which the law of murder is aimed is

thus not just the *consequential* harm of death, but the harm which is *intrinsic* to an attack on another's life.

The consequentialist paradigm of crime is the intentional causing of harm: on this non-consequentialist view, the paradigm is rather an *attack* on another's rights or interests; and an attack is an action which is *intended* to do harm. The paradigm of murder is not, as it is for a consequentialist, the *occurrence* of a foreseen and avoidable death, but a wilful *killing*; and the paradigm of a wilful killing is an intended, not just an intentional, killing.

Intended, not intentional, action is on this view the paradigm of responsible agency. Human actions are purposive: they are done for reasons, in order to bring something about; their direction and their basic structure is formed by the intentions with which their agents act. It is through the intentions with which I act that I engage in the world as an agent, and relate myself most closely to the actual and potential effects of my actions; and the central or fundamental kind of wrong-doing is to *direct* my actions towards evil – to *intend* and to *try* to do what is evil. Intentional agency is parasitic on intended agency, in that I bring about intentionally expected side-effects of my intended actions; the fault involved in the intentional causation of harm is likewise secondary to, and parasitic on, the central paradigm of intended wrong-doing.

I have provided only the barest sketch of a non-consequentialist view of responsible agency here: but its meaning and significance can be more easily shown by applying it to some particular legal issues, as I shall do in Part II; and we shall see then how it can justify the claim that the criminal law should sometimes distinguish intended from intentional agency. For to ask whether the law should ever draw this distinction, or require intended rather than intentional agency for criminal liability, is to ask whether it should ever be guided by this non-consequentialist conception of responsible agency; and disagreement over the legal meaning of 'intention', in so far as it reflects a substantial disagreement rather than linguistic confusion, may reflect the conflict between these two conceptions of responsible agency.

In many cases, especially over crimes of 'basic intent', there is in fact no practical conflict between these two views: for the non-consequentialist will agree that in many cases intentional agency is as sufficient a basis for criminal liability as intended agency. She will, for instance, count as a murderer not only one who intends to kill, but also one who kills intentionally by doing, without excuse or justification, what he knows will cause death: while he does not directly attack his victim, he displays such an utter disregard for her life that he is fully and culpably responsible for

her death. In general, when what is at issue is culpability as to some harm which actually occurs, she will usually hold one who intentionally causes that harm to be as culpably responsible as one who intends to cause it; she will not take the difference between intentional and intended agency in such cases to mark any significant difference in *degrees* of responsibility or culpability. The two types of intention exemplify different *kinds* of culpability: one consists in a direct attack on another person, the other in an utter indifference to her rights or interests (intentional harm-doing thus involves the worst form of the fault involved in recklessness). But that difference in kind need not always, and in these cases does not, bring with it a difference in *degree* of culpability.

In other cases, however, and especially over crimes requiring an 'intent' directed towards something beyond or other than the *actus reus* of the offence, the two views may conflict. I shall discuss two such cases later: criminal attempts, as a central example of a crime of 'ulterior intent'; and implied malice in murder, which requires an 'intention' to cause serious injury (pp. 173–9, 199–206 below). In these cases there is a lack of fit between the 'subjective' and the 'objective' aspects of the agent's conduct – between what she intends to do and what actually happens: in crimes of basic intent, what she actually (objectively) brings about is what she intends or expects to bring about; but in these cases she either fails to bring about what she intends (as in a failed attempt), or brings about a harm which she does not intend (as in the case of implied malice). It is when the subjective and objective thus diverge that a non-consequentialist will attach particular significance to the intentions with which the agent acts (two of the problem cases described in chapter 1, *Hyam* and *Cawthorne*, are of this kind). Such a non-consequentialist view can also, I shall argue, help to justify the claim that I can properly be held 'reckless' as to a risk which I am not aware of creating (this bears on the other two problem cases in chapter 1, *Caldwell* and *Morgan*): for what can justify such a claim is the relationship between that risk and my intended action (see pp. 157–73 below).

The discussion in these last three chapters of the concepts of intended and intentional agency, and of the conflict between two different conceptions of responsible agency, has not yet enabled us to resolve the questions or the problem cases with which this book began. It should, however, have laid the foundations for a clearer understanding of those questions and problems. For we have seen that intention is central to *mens rea* because it is central to responsible agency: a criminal charge ascribes responsible agency as to some harm to an agent, and the paradigm of responsible agency is intended or intentional agency. What we have now to ask is whether the law should take intentional agency as the *sole* paradigm of

criminally culpable agency, or sometimes take intended agency as the paradigm; and how, in the light of these paradigms, we should understand recklessness as a further species of criminal fault. Before we turn to these matters, however, we must discuss another issue about the nature intention.