3

MENS REA: THE MENTAL ELEMENT

CENTRAL ISSUES

1. A defendant is taken to have intended a result if it was her or his aim or purpose. If the result was foreseen as virtually certain to occur as a result of the defendant's actions, and the defendant realized this, then the jury are entitled to find that the defendant intended the result.
2. Defendants will be found to be reckless if they appreciated that because of their actions there was a chance that the result might occur, and it was unreasonable for them to act as they did.
3. A defendant will be negligent if he or she behaved in a way that a reasonable person would not. It is rare for negligence to be sufficient *mens rea* for a serious criminal offence.
4. If a defendant is voluntarily intoxicated when committing an offence, then generally he or she will be found to have been reckless. If the defendant, even though intoxicated, intended the result, then the jury should find that there was intention.

PART I: THE LAW

1 THE MEANING OF *MENS REA*

Mens rea[1] is the legal term used to describe the element of a criminal offence that relates to the defendant's mental state. Those who suffer from Latin-phobia may prefer the phrase 'the mental element of the crime'. Different crimes have different *mentes reae*:[2] some require intention, others recklessness, negligence, or knowledge. Some crimes do not require proof

[1] This Latin phrase means 'guilty mind'.

[2] *Mentes reae* is the plural of *mens rea*.

of any mental state of the defendant. These are known as strict liability offences and will be discussed in Chapter 4.

It has often been suggested that *mens rea* plays the crucial role of ensuring that only blameworthy defendants are punished for their crimes. Someone who causes another's death by an unforeseeable accident does not deserve punishment; someone who causes another's death intentionally does. However, in assessing a defendant's blameworthiness his or her state of mind is only part of the picture. A mercy killer and a contract killer may both intend to kill, but most people would not regard their actions as equally wicked. Indeed, the existence of defences such as duress or self-defence demonstrate that *mens rea* is not by any means the law's sole criterion for determining blameworthiness. Also the courts have made it quite clear that *mens rea* is not equivalent to moral guilt. In *Yip Chiu-Cheung*[3] a police officer, as part of an undercover operation, pretended to be a drug dealer and agreed with a drug baron to import drugs. The Privy Council confirmed that the police officer had the *mens rea* for a conspiracy to import drugs. In moral terms his behaviour was not blameworthy (some would even say it was commendable), but in the eyes of the law he had the *mens rea* for the conspiracy because he agreed to import drugs.[4]

This chapter will consider the following concepts that are used throughout criminal law: (a) intention, (b) recklessness, (c) negligence, and (d) knowledge. These are not the only kinds of *mens rea*. Others will be discussed elsewhere in the book in the context of specific offences. For example, dishonesty will be discussed when we consider property offences. Which *mens rea* is required depends on the particular offence. For example, murder requires proof that the defendant intended death or grievous bodily harm, while criminal damage requires proof that the defendant was reckless as to whether the property belonging to another would be damaged. Occasionally an offence will have a different *mens rea* in respect of different aspects of the *actus reus*. For example, in rape the defendant must intend to commit sexual intercourse, but need only be reckless as to whether the victim was not consenting.

As a general rule intention is seen as the worst kind of *mens rea*, recklessness the next worst, and negligence the least serious. Therefore these concepts will be discussed in that order.

2 INTENTION

DEFINITION

Intention is to be given its normal meaning: purpose or aim. In the majority of cases the judge should just ask the jury to give intention its everyday meaning. In exceptional borderline cases the jury can be directed that they are entitled to find intention if a result was virtually certain to occur and the defendant realized it was virtually certain to occur.

In the criminal law the concept of intention is the most blameworthy state of mind: it is usually worse to kill someone intentionally than to kill someone recklessly or negligently. Despite it being such an important concept, the meaning of intention has caused problems

3 [1995] 1 AC 111 (HL).

4 Although, not surprisingly, he was never charged with the offence.

for the courts.[5] The core meaning of intention is fairly straightforward. What have caused difficulties are cases on the borderline of intention and recklessness. We shall first look at the basic meaning of intention, before moving on to consider such problematic cases.

2.1 THE CORE MEANING OF INTENTION

The House of Lords made it clear that the legal meaning of the word 'intention' is the ordinary meaning of the word. This led Lord Bridge in the House of Lords in *R v Moloney*[6] to explain:

> The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.

So the 'golden rule' is that judges normally avoid defining intention by telling the jury to give it its ordinary meaning. The Court of Appeal has praised a trial judge who simply asked the jury in a murder trial to consider whether the defendant intended to kill the victim and avoided 'chameleon-like concepts of purpose, foresight of consequence and awareness of risk'.[7] In *Hales*[8] the Court of Appeal indicated that only in rare cases will the judge need to give further directions to the jury on intention. In *Ogunbowale*[9] the defendant gave the victim a karate-style strike against the neck. It was said in such a case there was no need to give a complex direction on intention.[10] Presumably that was because there was no other purpose the defendant could have had other than causing harm, and so the only real issue was whether it was serious harm that was intended. →1 (p.175)

But what is the ordinary meaning of intention? The courts have not told us because (presumably) they think it is obvious. The widely accepted view is that the defendant intends a consequence of his action if he acts with the aim or purpose of producing that consequence. Lord Asquith in *Cunliffe v Goodman*[11] explained that intention 'connotes a state of affairs which the party intending . . . does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about.'

It should be remembered that the jury will need to be persuaded beyond reasonable doubt that the defendant intended the result. In *Haigh*[12] there was clear evidence that the defendant had smothered her child. However, there was no evidence as to how or in what circumstances she had done this. In such a case the Court of Appeal held the jury could not have been persuaded beyond reasonable doubt that the mother had intentionally killed the child. She could therefore be guilty of manslaughter, but not murder.

5 *DPP v Smith* [1961] AC 290 (HL); *Hyam v DPP* [1975] AC 55 (HL); *Moloney* [1985] AC 905 (HL); *Hancock and Shankland* [1986] AC 455 (HL); *Woollin* [1999] 1 AC 82 (HL).

6 [1985] AC 905, 926.

7 *R v Wright* The Times, 17 May 2000 (CA).

8 [2005] EWCA Crim 1118.

9 *R v Ogunbowale* [2007] EWCA Crim 2739.

10 i.e. to give a direction based on *Woollin* [1999] 1 AC 82 (HL).

11 [1950] 2 KB 237, 253 (CA).

12 [2010] EWCA Crim 90.

A useful test for seeing whether a result was the purpose of the defendant is to rely on Antony Duff's *test of failure*:[13] had the result not occurred would the defendant regard himself as having failed in his plan? Consider the following case. David throws a burning rag into Veronica's house, wanting to frighten her by causing a fire. The rag in fact sets fire to the house and Veronica is killed. Here, had the rag not caused a fire and so Veronica had not been frightened, David would have regarded his enterprise as a failure. David therefore intended to cause the fire. However, had Veronica lived, David would not have regarded the enterprise as a failure (he wanted to frighten her, not kill her) and therefore he did not intend to kill Veronica.[14]

Although Duff's test is a very useful one there is one set of cases where it has to be treated with caution. That is where a result is a means to achieve a desired end. Imagine Martin kills his great aunt Alfreda in order to get his inheritance. The purpose of Martin's action was to get the inheritance. Using Duff's test of failure we could say that Martin would be delighted if Alfreda had lived, but he had somehow got hold of her money. However, it is generally agreed that Martin would be said to intend his great aunt Alfreda's death. This is because under his plan the desired result (obtaining the inheritance) will be achieved through the means of killing her. So when we consider the purpose of the defendant this includes not only the aim, but also the means he wants to use to achieve that end.

To further clarify the core notion of intention, it is useful to distinguish it from other concepts.

Distinguishing intention and foresight

In relation to the core meaning of intention, whether the defendant's act was likely to produce the consequence is irrelevant. If Neil sees Mary a long way away and shoots at her, hoping to kill her, but realizing that because Mary is so far away he is unlikely to succeed, Neil will still be found to have intended to kill Mary. That is because it was his purpose to kill her. However, many commentators accept that if the defendant believes that it is impossible for his action to cause the result, he cannot be said to intend it, however much he may have wanted the result to occur.[15] This is because he cannot be said to act with the purpose of producing a result if he did not believe that the result could possibly be caused by his act.

The House of Lords in several cases made it clear that foresight of a consequence is not the same as intention, but it is evidence from which a jury may infer or find intention.[16] The defendant may foresee that there is a risk that he will hit a fellow golf player by hitting the ball towards the green when there are people still on it, but that does not mean he intends to hit them. However, the degree of likelihood is evidence from which a jury may infer that a defendant intended a result. As Lord Scarman put it in *Hancock and Shankland*:[17]

> the greater the probability of a consequence the more likely it is that the consequence was foreseen and . . . if that consequence was foreseen the greater the probability is that the consequence was also intended . . . [T]he probability, however high, of a consequence is only a factor.

13 Duff (1990 and 1996: ch. 1). 14 Duff (1990a). 15 *Ibid*, 58.

16 *Hyam v DPP* [1975] AC 55 (HL); *Moloney* [1985] AC 905 (HL); *Hancock and Shankland* [1986] AC 455 (HL).

17 [1986] AC 455, 473.

In other words the jury may reason that, given all the evidence of the case and the fact that the consequence was so likely to occur following the defendant's actions, the consequence must have been the purpose of his actions and therefore he intended the result. If Charlotte points a gun at Emily, fires and thereby kills Emily, Charlotte may say to the jury 'I did not want to kill Emily, my purpose was to see how loud the bang was when the gun went off.' The jury in such a case is likely to disbelieve Charlotte and decide that she must have wanted to kill Emily.

Distinguishing intention and motive

The courts have consistently stated that 'intention is something quite different from motive or desire'.[18] In other words it is possible to intend a consequence without wanting it to happen. In *Hales*[19] the defendant ran over a police officer in his car in attempting to escape from an arrest. It was not his motive to kill the police officer, but he was, Keene LJ explained, 'prepared to kill in order to escape' and therefore intended to kill. That said, of course, proving that someone had a motive to kill the victim is strong evidence that that person intended to kill the victim. Imagine that Dorothy cooks Agatha a meal and puts rat poison in the food, killing her. If the jury hears evidence that Agatha had recently made a will leaving Dorothy a large legacy, the jury are less likely to believe Dorothy if she claims this was an absent-minded mistake and more likely to decide that Dorothy intended to kill Agatha. →2 (p.202)

Distinguishing intention and premeditation

A person may act instinctively in the heat of the moment and yet intend to kill.[20] It should not be thought that a person can intend a result only if he has carefully formulated a plan as to how he is going to produce the result. The person who kills in the heat of an argument wanting to kill the victim can be said to intend to kill as much as the premeditated killer.

Most of what has been said so far is uncontroversial and cases of this kind have not greatly troubled the courts. Far more problematic are cases of so-called indirect intention or oblique intention: where it is not the defendant's purpose to produce the result, but the result was a virtually certain consequence of the defendant's actions.

2.2 BORDERLINE CASES OF INTENTION

As we have seen, in the majority of cases it is enough for the judge to direct the jury that they are to give intention its normal meaning and there is no need to give further direction to the jury.[21] Indeed in *MD* it was held to be inappropriate to give further direction in a normal case.[22] Further direction is only necessary in 'very rare'[23] or exceptional'[24] cases where, even though it is very likely that the result will occur following the defendant's actions, the result

[18] *Moloney* [1985] AC 905, 926. [19] [2005] EWCA Crim 1118.

[20] See Cane (2000) for a discussion of 'fleeting' states of mind.

[21] Lord Bridge in *Moloney* [1985] AC 905, 926 thought it would be necessary to give a further direction only in 'rare' and 'exceptional' cases.

[22] [2004] EWCA Crim 1391. [23] *McNamara (Richard)* [2009] EWCA Crim 2530.

[24] *Allen* [2005] EWCA Crim 1344, para. 63; *Phillips* [2004] EWCA Crim 112.

was not the defendant's purpose.[25] In many cases, for example where the defendant shoots the victim, it will be unbelievable that the defendant could have any other purpose in mind other than to kill or cause serious injury. But it is not impossible to think of cases where although the defendant's act was very likely to cause death, that was not the defendant's purpose. An oft-quoted example is where a person plants a bomb on an aeroplane, hoping to destroy items on board which he has insured. Although he does not want the pilot of the plane to die he knows that this will inevitably occur if the bomb goes off in mid-flight. In such cases, it is necessary for the judge to give a further direction to the jury. *Woollin*, the leading case of the House of Lords, is the latest in a long line of cases discussing the correct direction to give a jury in these borderline cases. It represents the present law.[26] The key question for the House of Lords was the appropriateness of a direction proposed by Lord Lane CJ in the Court of Appeal case of *Nedrick*:[27]

> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

R v Woollin
[1999] AC 82 (HL)[28]

Stephen Woollin (the appellant) killed his 3-month-old son after throwing him onto a hard surface in a fit of temper. At one point in his summing up the judge directed the jury that if they were satisfied that the appellant had realized that there was a substantial risk that the child would suffer serious harm, they could convict him of murder. The appellant appealed unsuccessfully to the Court of Appeal. He then appealed to the House of Lords.

Lord Steyn

The Court of Appeal certified the following questions as of general importance:

'1. In murder, where there is no direct evidence that the purpose of a defendant was to kill or to inflict serious injury on the victim, is it necessary to direct the jury that they may only infer an intent to do serious injury, if they are satisfied (a) that serious bodily harm was a virtually certain consequence of the defendant's voluntary act and (b) that the defendant appreciated that fact?
2. If the answer to question 1 is "yes," is such a direction necessary in all cases or is it only necessary in cases where the sole evidence of the defendant's intention is to be found in his actions and their consequence to the victim?'

On appeal to your Lordships' House the terrain of the debate covered the correctness in law of the direction recommended by Lord Lane CJ in *Nedrick* and, if that direction is sound, whether it should be used only in the limited category of cases envisaged by the

[25] *R v Hayes* [2002] All ER (D) 6 (CA).
[26] See Coffey (2009) for a summary of the current law.
[27] [1986] 1 WLR 1025 (CA).
[28] [1998] 4 All ER 103, [1998] 3 WLR 382, [1999] 1 Cr App R 8, [1998] Crim LR 890.

Court of Appeal. And counsel for the appellant renewed his submission that by directing the jury in terms of substantial risk the judge illegitimately widened the mental element of murder.

[Having quoted extensively from **Lord Lane's** direction in *Nedrick* **Lord Steyn** concluded:]

The effect of the critical direction is that a result foreseen as virtually certain is an intended result.

. . .

The Crown did not argue that as a matter of policy foresight of a virtual certainty is too narrow a test in murder. Subject to minor qualifications, the decision in *Nedrick* was widely welcomed by distinguished academic writers: see Professor JC Smith QC's commentary on *Nedrick* [1986] Crim LR 742, 743–744; Glanville Williams, 'The *Mens Rea* for Murder: Leave it Alone' (1989) 105 LQR 387; JR Spencer, 'Murder in the Dark: A Glimmer of Light?' [1986] CLJ 366–367; Ashworth, *Principles of Criminal Law*, 2nd ed (1995), p 172. It is also of interest that it is very similar to the threshold of being aware 'that it will occur in the ordinary course of events' in the Law Commission's draft Criminal Code (see *Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com No 218 (1993) (Cm 2370), App A (Draft Criminal Law Bill with Explanatory Notes), pp 90–91): compare also Professor JC Smith QC, 'A Note on "Intention"' [1990] Crim LR 85, 86. Moreover, over a period of twelve years since *Nedrick* the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear. It is true that it may exclude a conviction of murder in the often cited terrorist example where a member of the bomb disposal team is killed. In such a case it may realistically be said that the terrorist did not foresee the killing of a member of the bomb disposal team as a virtual certainty. That may be a consequence of not framing the principle in terms of risk taking. Such cases ought to cause no substantial difficulty since immediately below murder there is available a verdict of manslaughter which may attract in the discretion of the court a life sentence. In any event, as Lord Lane eloquently argued in a debate in the House of Lords, to frame a principle for particular difficulties regarding terrorism 'would produce corresponding injustices which would be very hard to eradicate': Hansard (HL Debates), 6 November 1989, col 480. I am satisfied that the *Nedrick* test, which was squarely based on the decision of the House in *Moloney*, is pitched at the right level of foresight.

. . . It may be appropriate to give a direction in accordance with *Nedrick* in any case in which the defendant may not have desired the result of his act. But I accept the trial judge is best placed to decide what direction is required by the circumstances of the case.

The disposal of the present appeal

It follows that the judge should not have departed from the *Nedrick* direction. By using the phrase 'substantial risk' the judge blurred the line between intention and recklessness, and hence between murder and manslaughter. The misdirection enlarged the scope of the mental element required for murder. It was a material misdirection. . . .

The status of *Nedrick*

In my view Lord Lane CJ's judgment in *Nedrick* provided valuable assistance to trial judges. The model direction is by now a tried-and-tested formula. Trial judges ought to continue to use it. On matters of detail I have three observations, which can best be understood if I set out again the relevant part of Lord Lane's judgment. It was as follows:

'(A) When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?

If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result. . . .

(B) Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

(C) Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence.' (Lettering added)

First, I am persuaded by the speech of my noble and learned friend, Lord Hope of Craighead, that it is unlikely, if ever, to be helpful to direct the jury in terms of the two questions set out in (A). I agree that these questions may detract from the clarity of the critical direction in (B). Secondly, in their writings previously cited Glanville Williams, Professor Smith and Andrew Ashworth observed that the use of the words 'to infer' in (B) may detract from the clarity of the model direction. I agree. I would substitute the words 'to find.' Thirdly, the first sentence of (C) does not form part of the model direction. But it would always be right for the judge to say, as Lord Lane CJ put it, that the decision is for the jury upon a consideration of all the evidence in the case.

Appeal allowed; conviction of murder quashed; conviction of manslaughter substituted.

This decision makes it clear that in a murder case the jury should usually just be told to give intent its normal meaning. Where it is not the purpose of the defendant to cause death or grievous bodily harm only rarely will the defendant be found to have the *mens rea* for murder (an intention to kill or cause grievous bodily harm). Only if the death or grievous bodily harm was a virtually certain consequence of the defendant's actions and the defendant realized this was so, can the jury find that the defendant intended death or grievous bodily harm.

Parliament has made it clear that just because a defendant foresaw death was a likely result of his actions does not mean that he necessarily intended death.[29] Section 8 of the Criminal Justice Act 1967 states that a jury

shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

→3 (p.180)

29 *Moloney* [1985] AC 905 (HL).

EXAMINATION TIP

The following provides a useful chart for deciding whether a defendant has intention:

Was it the result of the defendant's purpose?	YES: he intended it. NO: ask the next question:
Was the result a virtually certain result of his actions and did the defendant realize that the result was a virtually certain result of his actions?	YES: then the jury is entitled to find that he intended the result. NO: he did not intend the result.

The *Woollin* virtual certainty test at first sight appears straightforward, but there are a number of uncertainties about its interpretation: →4 (p.178)

(1) What does 'virtually certain' mean? It means that the result will occur unless something completely unexpected occurs.[30] For example, if George pushes Edward off the top of a high cliff, it is conceivable that despite the fall Edward will not suffer death or serious injury. Just occasionally there are stories of people falling great heights without serious injury, but it is virtually certain that Edward will suffer death or serious injury. In other words, 'virtually certain' means as certain as we can be about anything.

(2) If it is shown that the event was virtually certain to result from the defendant's acts and the defendant appreciates this, *must* the jury find intent or *may* the jury find intention? There has been much academic debate on this question.[31] It was considered by the Court of Appeal in *Matthews*[32] who after a careful analysis of the authorities made it clear that it was a misdirection for a judge to tell a jury that if a result was foreseen as virtually certain then they *must* find intention. However, the Court of Appeal felt that there were cases, including *Matthews* itself, where, having answered the *Nedrick* questions affirmatively, a finding of intent would be 'irresistible'.[33]

(3) How should the jury decide whether or not to find intention? What factors are the jury to take into account? The answer is that they may take into account any factors they wish. It is likely that a jury would consider the motives of the defendant and the circumstances of his actions. Compare these cases:

(a) Alice plants a bomb on an aeroplane intending to blow up the plane so that she can claim money for goods on board which she has insured. She knows it is virtually certain that the bomb will cause the death of those on the plane.

(b) Ben is at the top of a burning building with his baby. As the flames grow closer he is convinced he and the baby are about to be burnt to death. He throws the baby from the rooftop, even though he knows the baby is almost bound to die because he believes that that is the only way the baby's life may be spared.

Although the matter is entirely in the hands of the jury it is likely that the jury would find that Alice, but not Ben, intended to kill. A jury is likely to be sympathetic to a person who is acting from a good motive (like Ben) rather than a person acting from a disreputable motive (like Alice). In fact case (b) is particularly striking because Ben's purpose was to

30 *Ibid*, 925. 31 e.g. Mirfield (1999). 32 [2003] EWCA Crim 192.
33 See also *Stringer* [2008] EWCA Crim 1222.

save the life of the baby. Therefore to find that he intended to kill the baby seems almost perverse.[34]

(4) There is some doubt whether, using the *Woollin* test, it is necessary to show that the result was actually virtually certain, as well as showing that the defendant believed it was. It appears from the approved *Nedrick* direction to the jury that both must be shown. So the bomber who placed the bomb on the plane may not, under the *Woollin* test, be said to intend the result if (unknown to the bomber) the plane was fitted with a special device which meant that it could normally land safely even if a bomb went off in its cargo hold. This is a little odd, in that it suggests that the structure of the plane can affect the legal classification of the defendant's state of mind. However, Professor Allen[35] has argued, relying on Lord Steyn's *dicta*: 'a result foreseen as virtually certain is an intended result', that all that needs to be shown is that the defendant foresaw the result as virtually certain. His view was not taken up by the Court of Appeal in *Hayes*[36] or *Matthews*[37] which, without discussing the issue, assumed that the *Woollin* direction required both that the result was in fact virtually certain to occur and that the defendant realized this.

(5) What is the significance of Lord Steyn changing the word 'infer' in the *Nedrick* direction to the word 'find'? Unfortunately Lord Steyn did not explain the reason for the change. Here are two possible explanations:

(a) He may simply have thought that 'find' was an easier word for juries to understand than 'infer'. This view, then, is that Lord Steyn did not mean to change the meaning of the direction, just to use more everyday language. If this view is correct then it is not surprising that he offers no explanation for the change.

(b) He may have meant to suggest that foresight of virtual certainty is not just evidence from which one could infer intention, but actually is intention (in the legal sense). The word 'infer' is used when we use one fact to presume the existence of another fact. For example, you infer from the fact that someone is wearing a wedding ring that he or she is married. Being married and wearing a wedding ring are not the same thing, but one is evidence of the other. Therefore talk about inferring intent from foresight of virtual certainty indicates that foresight of virtual certainty and intent are different, but that one is evidence of the other. By contrast, saying that you can find intent from foresight of virtual certainty might suggest that a jury is entitled to conclude that foresight of virtual certainty is intention. The main argument in favour of this view is that Lord Steyn refers to an article of Professor Smith who was critical of the courts' use of the word 'inference' and argued that foresight of virtual certainty actually is intention.

(6) Is the *Woollin* test just to be used in cases of murder, or does it apply to other crimes which require proof of intention? Notably Lord Steyn expressly restricted his discussion to murder. Therefore, whenever a crime requires proof of intent the court must consider whether the intention is restricted to its core meaning or whether the *Woollin* direction also applies. In Part II we shall consider further the different roles that intention plays in the criminal law.

[34] It should be added that in many cases where a defendant had a good motive for acting as he or she did, a defence will be available.

[35] Allen (2007: 68). [36] [2002] All ER (D) 6 (CA). [37] [2003] EWCA Crim 192.

QUESTION

Bill is suffering from a terminal illness and is in great pain. His doctor gives him a large dose of painkillers which cause Bill's death within 24 hours. Consider the following states of mind the doctor could have. Which would lead to a conviction of murder?

1. The doctor wants to lessen Bill's pain by the pills, although she knows that the pills will hasten Bill's death.
2. The doctor believes Bill has suffered enough and wants to end his pain by killing him.
3. The doctor wants Bill to die because she knows Bill has left her a large sum of money in his will.

For guidance on answering this question, please visit the Online Resource Centre that accompanies this book: www.oxfordtextbooks.co.uk/orc/herringcriminal5e/.

Read accounts of the trial of Dr Moor (P. Arlidge, 'The Trial of Dr David Moor' [2000] *Criminal Law Review* 31; J. Smith, 'A Comment on Moor's Case' [2000] *Criminal Law Review* 41) for a discussion of a case involving a doctor alleged to have 'mercy killed' his patient.

FURTHER READING

For further reading on the correct interpretation of the *Woollin* decision, read:

Norrie, A. (1999) 'After *Woollin*' *Criminal Law Review* 532.

—— (2000) *Punishment, Responsibility, and Justice* (Oxford: OUP), ch. 8.

Pedain, A. (2003) 'Intention and the Terrorist Example' *Criminal Law Review* 579.

Simester, A. and Shute, S. (1999) 'Letter' *Criminal Law Review* 41.

Smith, J.C. (1998) 'Commentary on *R v Woollin*' *Criminal Law Review* 890.

Wilson, W. (1999) 'Doctrinal Rationality after *Woollin*' *Modern Law Review* 62: 448.

See Part II for reading on the theoretical approaches to intention.

2.3 INTOXICATION AND INTENT

What about a case where a defendant is charged with an offence which requires proof of intent, but at the time of the offence he was intoxicated through alcohol or drugs? Where the defendant is intoxicated (involuntarily or voluntarily)[38] the jury or magistrates should consider the intoxication as part of the evidence in deciding whether the result was the defendant's purpose or whether he foresaw the result as virtually certain:[39]

(1) If the drunken defendant had as his purpose the result he intended it: a 'drunken intent is still an intent'.[40]

[38] See p.156 for a discussion of the difference between voluntary and involuntary intoxication.

[39] The question for the jury or magistrates is whether or not the defendant had the intention, not whether or not the defendant, in his drunken state, was capable of forming an intention (*Hayes* [2002] All ER (D) 6 (CA)).

[40] *Majewski* [1977] AC 443 (HL).

(2) If the drunken defendant lacked intent he is not guilty of an intent-based crime, although he may be guilty of a recklessness-based offence.

A good example of how intent and intoxication can interrelate is *Moloney*.[41] There the defendant and his stepfather had engaged on a long drinking spree. They then decided to engage in a shooting competition to see who could load and fire a gun the fastest. The defendant won, but in so doing shot his stepfather dead. His evidence was that he had fired the gun with the purpose of winning the shooting competition. His story would, no doubt, have been disbelieved by the jury had he been sober, but the fact he was intoxicated made his version of events more believable. Note here though that his defence is not the intoxication, but the fact that he lacked *mens rea*. His intoxication was evidence from which the jury could conclude he lacked intent.[42]

3 RECKLESSNESS

If purpose is at the heart of intention, risk-taking is at the heart of recklessness. For many years the law on recklessness was confusing because there were two definitions of recklessness, which have become known as *Cunningham* recklessness and *Caldwell* recklessness. Some crimes used one and some the other. However, the House of Lords has abolished *Caldwell* recklessness and so now there is only one kind of recklessness used. For once a change in the law has made it easier for students to understand rather than harder!

3.1 *CUNNINGHAM* RECKLESSNESS

DEFINITION

There are two elements that need to be shown for *Cunningham* recklessness:

(1) The defendant was aware that there was a risk that his or her conduct would cause a particular result.
(2) The risk was an unreasonable one for the defendant to take.

The taking of a risk

In *Cunningham*[43] Byrne J explained that recklessness meant that 'the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it'. Two points in particular need to be stressed about this definition. First, it is necessary to show only that the accused foresaw that there was *a* risk. It does not have to be foreseen as highly likely to occur. Second, the question is whether the accused foresaw the risk, not whether the risk was obvious or would have been foreseen by a reasonable person. This point is demonstrated in *Stephenson*,[44] where the defendant (who suffered from schizophrenia) lit a fire in a haystack and destroyed it. Because of his illness he did not realize that in lighting a match there was a risk to the haystack. Although the risk to the haystack was obvious and most people would have foreseen the risk, the defendant did not, and so he was

41 [1985] AC 905 (HL).
42 He was still guilty of manslaughter.
43 [1957] 2 QB 396 (CA), at 399.
44 [1979] QB 695 (CA).

not *Cunningham* reckless. →5 (p.185) Indeed as the court emphasized the question was not even whether the defendant could have foreseen the risk. The simple point was he did not foresee it and so was not reckless.

This requirement that the defendant consciously took a risk caused problems in the following case:

R v Parker
[1977] 2 All ER 37[45]

Daryl Parker was fined £10 plus 75p compensation to the Post Office after causing criminal damage to a telephone kiosk. He had had a terrible evening. He had overslept on the train home after a function in London and missed his station. He was charged an excess fare for travelling further than his ticket permitted. He tried to telephone for a taxi but the telephone did not work. He was seen by the police to 'smash down' a telephone handset onto the dialling box of the public telephone and thereby damage it.

Lord Justice Geoffrey Lane

What was in dispute was, first of all, whether it was the appellant who had caused the damage to the telephone receiver; he said it was not he who had caused the damage; and, secondly, the degree of force which he had used when bringing the handset down on to the receiver. The way in which the appellant himself when giving evidence described the situation was this:

'I went to the telephone box to call a taxi. I put two pence on the slot—not in, but on—I picked up the headset [that must have been the handset]; I heard a tone . . . I did not know it was necessary to put two pence in before dialling. I dialled two or three times without success. I put the headset down, hard. It did not fit on to the cradle so I put it down hard again. I did not lift it before putting it down the first time. I must have missed the cradle the first time. I did not intend to damage it nor was I reckless as to whether I damaged it or not. It did not occur to me that what I was doing might damage it. I was simply reacting to the frustration which I felt. As I put the telephone down hard for the second time there were the police opening the door.'

. . .

The complaint made by counsel for the appellant is that the learned judge misdirected the jury in regard to the necessary mental element on which the jury had to be satisfied before convicting. . . .

[Counsel for the appellant] draws support from a decision of this court, *R v Briggs* [1977] 1 All ER 475. That was a case where the facts were very different from those in the instant case. In the course of the judgment the following passage is to be found ([1977] 1 All ER 475 at 477, 478):

'A man is reckless in the sense required [and that is dealing, of course, with s 1 of the Criminal Damage Act 1971] when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act. That being so, it is clear from the three passages to which I have in particular referred that the judge did not give a correct direction to the jury on this aspect of the case. Using the words which he did, he might have cured the defect by explaining to the jury in clear terms that the test to be applied was the test of the state of the appellant's mind, but he did not put that anywhere in his summing-up.'

[45] [1977] 1 WLR 600, (1977) 63 Cr App R 211.

> We are bound by that decision and, indeed, at least so far as the first sentence which I have read is concerned, we would not for one moment wish to disagree even were we able to so do. The test is the test of the defendant's state of mind. But, and in the facts of the instant case it is a substantial 'but', the circumstances of this case are that the appellant was plainly fully aware of all the circumstances of the case. He was fully aware that what he was handling was a telephone handset made of Bakelite or some such material. He was well aware that the cradle on to which he admittedly brought down the handset was made of similar material. He was well aware, of course, of the degree of force which he was using—a degree described by counsel for the appellant before us as slamming the receiver down and—demonstration by counsel whether wittingly or not, was given of a hand brought down from head-height on to whatever the receiving object was.
>
> In those circumstances, it seems to this court that if he did not know, as he said he did not, that there was some risk of damage, he was, in effect, deliberately closing his mind to the obvious—the obvious being that damage in these circumstances was inevitable.
>
> In the view of this court, that type of action, that type of deliberate closing of the mind, is the equivalent of knowledge and a man certainly cannot escape the consequences of his action in this particular set of circumstances by saying, 'I never directed my mind to the obvious consequences because I was in a self-induced state of temper.'
>
> We, accordingly, do not differ from the views expressed in *R v Briggs* [1977] 1 All ER 475 with the exception of adding to the definition these words: 'A man is reckless in the sense required when he carries out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act.'
>
> *Appeal dismissed.*

What is noticeable here is that the Court of Appeal was willing to stretch recklessness to its limits in order to convict the defendant whom it regarded as blameworthy. Having a risk in the back of your mind is not the same as consciously taking a risk, although the Court of Appeal was willing to accept that it was sufficient to amount to *Cunningham* recklessness.[46]

The risk was unreasonable

This requirement is rarely in dispute. It will be unusual for there to be a case where it is reasonable for the defendant to take a risk that a person will be injured. However, there will be some cases where it is. If the defendant is driving and a child runs out in front of his car and he swerves out of the way, the swerve may pose a risk to other road users, but to swerve would often be regarded as reasonable. It should be stressed that this requirement is objective. In other words that whether the risk was a reasonable one to take is to be decided by the standards of the ordinary and reasonable person.[47] Whether the defendant thought it was or was not reasonable to take the risk is irrelevant.

46 See Part II of this chapter for further discussion.

47 One important issue will be whether the defendant's behaviour was socially useful. A defendant who harms another while carrying out medical treatment is likely to be acting reasonably, while a defendant who harms another while shooting birds for fun will find it harder to persuade a jury his behaviour was reasonable.

Intoxication and recklessness

Defendants who were voluntarily intoxicated at the time of the offence and therefore failed to foresee a risk which they would have foreseen if they had been sober, will be treated as having foreseen the risk.[48] This means that defendants will not be able to claim that they failed to foresee an obvious risk because they were drunk.[49] If defendants are involuntarily intoxicated then there are no special rules, and defendants will be reckless if they foresaw the risk, but if they did not foresee the risk they will not be reckless.[50]

QUESTIONS

1. If a psychologist gave evidence that Mr Parker was so angry that he was not aware of a risk, would he deserve to be acquitted? Is there a clear difference between (a) consciously being aware of a risk, (b) putting a risk to the back of your mind, and (c) not being aware of a risk?
2. Thousands of deaths and injuries occur each year in cars. Anyone driving a car is aware that in driving a car there is a risk they will injure someone. Is it beyond doubt that it is still reasonable to drive cars? What about skiing?
3. Is it justifiable to describe as 'reckless' people who are so drunk that they do not see an obvious risk, but not people who are so angry that they do not see an obvious risk? (We will return to this question in Part II.)

3.2 *CALDWELL* RECKLESSNESS

As already mentioned *Caldwell* recklessness has now been abolished. However, it is useful to know in outline what it was and why the House of Lords decided to abolish it.

DEFINITION

Defendants were *Caldwell* reckless if:

(1) they are aware of a risk; OR

(2) there was an obvious and serious risk AND they failed to consider whether or not there was a risk.

Caldwell recklessness was different from *Cunningham* recklessness because it included defendants who were not aware of an obvious risk. *Caldwell* recklessness fell into disrepute because it punished defendants for failing to notice a risk which would have been obvious to a reasonable person. The issue was considered in *Elliott v C*,[51] where a 14-year-old girl with learning difficulties set fire to a shed by lighting white spirit. The court stated that Lord Diplock in *Caldwell* had made it clear that the test was whether a reasonable person would have realized that the lighting of the spirit would create a risk of damage to the shed,

48 It is sometimes said that a defendant who is voluntarily intoxicated is prevented from introducing evidence that he did not see a risk because he was intoxicated. However, as Simester (2009) argues that seems to require the courts to proceed on the basis of a fiction.

49 *Bennett* [1995] Crim LR 877 (CA).

50 *Kingston* [1995] 2 AC 355 (HL).

51 [1983] 2 All ER 1005 (DC).

not whether the risk was obvious to the defendant or obvious to a reasonable person of the defendant's age and mental abilities.[52] As she had failed to consider the risk and it would have been obvious to a reasonable person, she was guilty of criminal damage. The decision caused an outcry amongst academic commentators. Had they been tabloid writers it would have been given the title 'the most hated case in Britain'. The reason for the outrage is this: it can lead to the punishment of a defendant who fails to appreciate a risk that she was incapable of foreseeing. C was liable for failing to foresee a risk that because of her mental condition she may have been incapable of foreseeing. The harshness of this approach is revealed by the following example: a blind person is walking down the pavement and walks into a bicycle left lying on the pavement, damaging it. As the risk would be obvious to an ordinary (sighted) person he would be *Caldwell* reckless as he failed to foresee the risk. This is extraordinary. With this in mind it was not surprising that the House of Lords in *G and R* decided that *Caldwell* recklessness had to go: →6 (p.186)

R v G and R
[2003] UKHL 50[53]

One night two boys, aged 11 and 12, went camping without their parents' permission. In the early hours of the morning they set fire to some newspapers under a wheelie bin they found outside a supermarket. The fire spread and ultimately burned down the supermarket and adjoining buildings. They were convicted on the basis that it would have been obvious to a reasonable person that what they were doing was posing a risk to property. They unsuccessfully appealed to the Court of Appeal, and then on to the House of Lords.

Lord Bingham of Cornhill

1. The point of law of general public importance certified by the Court of Appeal to be involved in its decision in the present case is expressed in this way:

'Can a defendant properly be convicted under section 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk but, by reason of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it?'

The appeal turns on the meaning of 'reckless' in that section. This is a question on which the House ruled in *R v Caldwell* [1982] AC 341, a ruling affirmed by the House in later decisions. The House is again asked to reconsider that ruling . . .

28. The task confronting the House in this appeal is, first of all, one of statutory construction: what did Parliament mean when it used the word 'reckless' in section 1(1) and (2) of the 1971 Act? In so expressing the question I mean to make it as plain as I can that I am not addressing the meaning of 'reckless' in any other statutory or common law context. In particular, but perhaps needlessly since 'recklessly' has now been banished from the lexicon of driving offences, I would wish to throw no doubt on the decisions of the House in *R v Lawrence* [1982] AC 510 and *R v Reid* [1992] 1 WLR 793.

29. Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change. So the

[52] *Elliott v C* was followed in *Stephen (Malcolm R)* (1984) 79 Cr App R 334.
[53] [2004] 1 AC 1034, [2003] 3 WLR 1060, [2003] 4 All ER 765, [2004] 1 Cr App R 21, [2004] Crim LR 369.

starting point is to ascertain what Parliament meant by 'reckless' in 1971. As noted above in paragraph 13, section 1 as enacted followed, subject to an immaterial addition, the draft proposed by the Law Commission. It cannot be supposed that by 'reckless' Parliament meant anything different from the Law Commission. The Law Commission's meaning was made plain both in its Report (Law Com No 29) and in Working Paper No 23 which preceded it. These materials (not, it would seem, placed before the House in *R v Caldwell*) reveal a very plain intention to replace the old-fashioned and misleading expression 'maliciously' by the more familiar expression 'reckless' but to give the latter expression the meaning which *R v Cunningham* [1957] 2 QB 396 and Professor Kenny had given to the former. In treating this authority as irrelevant to the construction of 'reckless' the majority fell into understandable but clearly demonstrable error. No relevant change in the mens rea necessary for proof of the offence was intended, and in holding otherwise the majority misconstrued section 1 of the Act.

30. That conclusion is by no means determinative of this appeal. For the decision in *R v Caldwell* was made more than 20 years ago. Its essential reasoning was unanimously approved by the House in *R v Lawrence* [1982] AC 510. Invitations to reconsider that reasoning have been rejected. The principles laid down have been applied on many occasions, by Crown Court judges and, even more frequently, by justices. In the submission of the Crown, the ruling of the House works well and causes no injustice in practice. If Parliament had wished to give effect to the intention of the Law Commission it has had many opportunities, which it has not taken, to do so. Despite its power under *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 to depart from its earlier decisions, the House should be very slow to do so, not least in a context such as this.

31. These are formidable arguments, deployed by Mr Perry [counsel for the Crown] with his habitual skill and erudition. But I am persuaded by Mr Newman QC for the appellants that they should be rejected. I reach this conclusion for four reasons, taken together.

32. First, it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R v Majewski* [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

33. Secondly, the present case shows, more clearly than any other reported case since *R v Caldwell*, that the model direction formulated by Lord Diplock (see paragraph 18 above) is capable of leading to obvious unfairness. As the excerpts quoted in paragraphs 6–7 reveal, the trial judge regretted the direction he (quite rightly) felt compelled to give, and it is evident that this direction offended the jury's sense of fairness. The sense of fairness of 12 representative citizens sitting as a jury (or of a smaller group of lay justices sitting as a bench of magistrates) is the bedrock on which the administration of criminal justice in this country is built. A law which runs counter to that sense must cause concern. Here, the appellants could have been charged under section 1(1) with recklessly damaging one or both of the wheelie-bins, and they would have had little defence. As it was, the jury might have inferred that boys of the appellants' age would have appreciated the risk to the building of what they did, but it

seems clear that such was not their conclusion (nor, it would appear, the judge's either). On that basis the jury thought it unfair to convict them. I share their sense of unease. It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension. Nor, the defendant having been convicted, is the problem cured by imposition of a nominal penalty.

34. Thirdly, I do not think the criticism of *R v Caldwell* expressed by academics, judges and practitioners should be ignored. A decision is not, of course, to be overruled or departed from simply because it meets with disfavour in the learned journals. But a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention. One need only cite (among many other examples) the observations of Professor John Smith ([1981] Crim LR 392, 393–396) and Professor Glanville Williams ('Recklessness Redefined' (1981) 40 CLJ 252). This criticism carries greater weight when voiced also by judges as authoritative as Lord Edmund-Davies and Lord Wilberforce in *R v Caldwell* itself, Robert Goff LJ in *Elliott v C* [1983] 1 WLR 939 and Ackner LJ in *R v Stephen Malcolm R* (1984) 79 Cr App R 334. The reservations expressed by the trial judge in the present case are widely shared. The shopfloor response to *R v Caldwell* may be gauged from the editors' commentary, to be found in the 41st edition of *Archbold* (1982): paragraph 17–25, pages 1,009–1,010. The editors suggested that remedial legislation was urgently required.

35. Fourthly, the majority's interpretation of 'recklessly' in section 1 of the 1971 Act was, as already shown, a misinterpretation. If it were a misinterpretation that offended no principle and gave rise to no injustice there would be strong grounds for adhering to the misinterpretation and leaving Parliament to correct it if it chose. But this misinterpretation is offensive to principle and is apt to cause injustice. That being so, the need to correct the misinterpretation is compelling.

36. It is perhaps unfortunate that the question at issue in this appeal fell to be answered in a case of self-induced intoxication. For one instinctively recoils from the notion that a defendant can escape the criminal consequences of his injurious conduct by drinking himself into a state where he is blind to the risk he is causing to others. In *R v Caldwell* it seems to have been assumed (see paragraph 18 above) that the risk would have been obvious to the defendant had he been sober. Further, the context did not require the House to give close consideration to the liability of those (such as the very young and the mentally handicapped) who were not normal reasonable adults. The overruling by the majority of *R v Stephenson* [1979] QB 695 does however make it questionable whether such consideration would have led to a different result.

37. In the course of argument before the House it was suggested that the rule in *R v Caldwell* might be modified, in cases involving children, by requiring comparison not with normal reasonable adults but with normal reasonable children of the same age. This is a suggestion with some attractions but it is open to four compelling objections. First, even this modification would offend the principle that conviction should depend on proving the state of mind of the individual defendant to be culpable. Second, if the rule were modified in relation to children on grounds of their immaturity it would be anomalous if it were not also modified in relation to the mentally handicapped on grounds of their limited understanding. Third, any modification along these lines would open the door to difficult and contentious argument concerning the qualities and characteristics to be taken into account for purposes of the comparison. Fourth, to adopt this modification would be to substitute one misinterpretation of section 1 for another. There is no warrant in the Act or in the *travaux préparatoires* which preceded it for such an interpretation.

38. A further refinement, advanced by Professor Glanville Williams in his article 'Recklessness Redefined' (1981) 40 CLJ 252, 270–271, adopted by the justices in *Elliott v C*

[1983] 1 WLR 939 and commented upon by Robert Goff LJ in that case is that a defendant should only be regarded as having acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged, where such risk would have been obvious to him if he had given any thought to the matter. This refinement also has attractions, although it does not meet the objection of principle and does not represent a correct interpretation of the section. It is, in my opinion, open to the further objection of over-complicating the task of the jury (or bench of justices). It is one thing to decide whether a defendant can be believed when he says that the thought of a given risk never crossed his mind. It is another, and much more speculative, task to decide whether the risk would have been obvious to him if the thought had crossed his mind. The simpler the jury's task, the more likely is its verdict to be reliable. Robert Goff LJ's reason for rejecting this refinement was somewhat similar (*Elliott v C*, page 950).

39. I cannot accept that restoration of the law as understood before *R v Caldwell* would lead to the acquittal of those whom public policy would require to be convicted. There is nothing to suggest that this was seen as a problem before *R v Caldwell*, or (as noted above in paragraphs 12 and 13) before the 1971 Act. There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time. Similarly with recklessness: it is not to be supposed that the tribunal of fact will accept a defendant's assertion that he never thought of a certain risk when all the circumstances and probabilities and evidence of what he did and said at the time show that he did or must have done . . .

41. For the reasons I have given I would allow this appeal and quash the appellants' convictions. I would answer the certified question obliquely, basing myself on clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report 'A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill' (Law Com No 177, April 1989):

'A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to—

(i) a circumstance when he is aware of a risk that it exists or will exist;
(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.'

[**Lords Rodger** and **Steyn** gave speeches agreeing that the appeal should be allowed. **Lord Hutton** and **Lord Browne-Wilkinson** agreed with **Lord Bingham**.]

Appeal allowed.

R v G, then, confirms that for criminal damage *Caldwell* recklessness should not be used and instead a defendant will be reckless if he or she realizes that there is a risk of the harm arising and decides to take that risk, when to do so is unreasonable. In *Attorney-General's Reference (No. 3 of 2003)*[54] the Court of Appeal confirmed that *R v G* has abolished *Caldwell* recklessness not just for criminal damage, but for all crimes which had used *Caldwell* recklessness. In *Brady*[55] the Court of Appeal rejected an argument that after *G and R* a defendant would only be reckless if he foresaw an obvious and significant risk. It was enough if the defendant foresaw a risk. In that case the defendant had perched on some railings above a

[54] [2004] 2 Cr App R 367.
[55] [2007] EWCA Crim 2413.

dance floor and then by accident fallen onto the crowds below causing a woman a serious injury. The Court of Appeal suggested one way of looking at the case would be to say that by getting onto the railings he had realized there was a danger he would fall and hurt someone. Therefore even if the falling off was entirely accidental, in getting onto the railings he had taken the risk he would cause an injury and that could be enough to render him reckless.

To many *G and R* is a welcome decision removing the unfairness that resulted from using the *Caldwell* test in cases like *Elliott v C*. The decision, however, is certainly not without its critics. One major source of disappointment was the failure of the House of Lords to consider an alternative to either *Caldwell* or *Cunningham* recklessness. Here are two alternatives that their Lordships might have considered:

(1) Defendants would be reckless if they were aware of a risk or failed to consider a risk which should have been obvious to a reasonable person of their age and mental abilities.

(2) Defendants would be reckless if they were aware of a risk or failed to consider an obvious risk, without a good explanation.[56] This would lead to the acquittal of those who failed to see a risk due to an illness or emergency, but lead to the conviction of those who failed to see the risk due to drunkenness or anger.

As a result of *G and R* critics are concerned that it will be too easy for a defendant to claim that they did not consider a risk to others and so be entitled to acquittal. Indeed if a defendant can persuade the jury that he is an utterly selfish person who gives no thought to other people's welfare then he should be acquitted if he does a dangerous act without thinking about its consequences. It may be that in such cases the jury will simply disbelieve a defendant or convict regardless of the judge's direction. Alternatively it is likely that we will see in the future much weight being placed on the decision in *Parker* (excerpted above at p.145) and the idea of a risk being 'in the back of a defendant's mind'. You should also note that although the House of Lords in *G and R* proudly asserted the importance of proving a subjective *mens rea* (i.e. an actual awareness of risk), they also confirmed the rules relating to intoxication whereby a defendant who is voluntary intoxicated can be convicted without awareness of the risk. The House of Lords presented the intoxication rules as a special exception to the normal requirement of having to prove a subjective state of mind, but given the number of crimes committed by intoxicated people it is not clear whether in courtrooms the intoxication rules are in fact the normal rule, rather than an exception. →7 (p.197)

FURTHER READING

Child, J. (2009) 'Drink, Drugs and Law Reform: A Review of Law Commission Report No. 314' *Criminal Law Review* 488.

Crosby, C. (2008) 'Recklessness—The Continuing Search for a Definition' *Journal of Criminal Law* 72: 313.

Field, S. and Lynn, M. (1993) 'Capacity, Recklessness and the House of Lords' *Criminal Law Review* 127.

Gardner, S. (1993b) 'Recklessness Refined' *Law Quarterly Review* 109: 21 (a very useful commentary on *Reid*).

56 This kind of approach was indicated by the House of Lords in *Reid* [1992] 3 All ER 673.

Halpin, A. (1998) 'Definitions and Directions: Recklessness Unheeded' *Legal Studies* 18: 294.

—— (2004) *Definition in the Criminal Law* (Oxford: Hart), ch. 3.

Kimel, D. (2004) 'Inadvertent Recklessness in the Criminal Law' *Law Quarterly Review* 20: 548.

Leigh, L. (1993) 'Recklessness after Reid' *Modern Law Review* 56: 208.

Norrie, A. (1996) 'The Limits of Justice: Finding Fault in the Criminal Law' *Modern Law Review* 59: 540.

Simester, A. (2009) 'Intoxication is Never a Defence' *Criminal Law Review* 3.

Williams, G. (1981b) 'Recklessness Redefined' *Cambridge Law Journal* 252.

4 NEGLIGENCE

DEFINITION

If the defendant has behaved in the way in which a reasonable person would not, then he or she is negligent.

There are a large number of crimes for which the *mens rea* is negligence,[57] although most of them are minor crimes of a regulatory nature. There are therefore few reported cases which discuss its meaning. Negligence uses an objective test. In other words the defendant's state of mind is not relevant in deciding whether the defendant is negligent. There is no need to show that the defendant intended or foresaw a risk. What matters is the conduct of the defendant: did the defendant behave in a way which was reasonable in the circumstances? If the defendant behaves in the way in which a reasonable person would not then he or she is negligent. To give a practical example, if a defendant while driving crashes into the car in front, to decide whether or not he or she was negligent you simply ask: would a reasonable person in D's shoes have crashed the car or not? If even a reasonable driver would have crashed then the defendant is not negligent. If the reasonable person would not have been travelling as fast as the defendant or would have braked earlier and avoided the accident then the defendant is negligent. →8 (p.193)

There are a number of disputes over the meaning of negligence:

(1) What if the defendant has acted as a result of panic or fear? Consider a case where a person is driving a car when suddenly a child runs out in front of her and she swerves to the right and hits an oncoming car. We might say that in fact it would have been better and reasonable to swerve to the left, where the driver would have hit no one.[58] Is the driver negligent? The answer seems to be that a defendant is expected to act only as a reasonable driver would do. Even reasonable people reacting to an emergency would not necessarily respond in the way that in retrospect would have been the ideal way of acting. As long as he or she

[57] As we shall see in Part II, some commentators argue that negligence should not be regarded as a form of *mens rea*.

[58] *Simpson v Peat* [1952] 2 QB 24, 28 (CA) considers a similar example.

responded in a way that a reasonable person might have done when faced with a similar emergency the defendant will not be negligent.

(2) Is the standard expected of the person 'reasonable' or 'ordinary'? Does negligence require people to live up to the standard of behaviour which we think people *ought* to abide by, or the standard of behaviour that is the norm? In many cases these will be identical tests. But not always. We know that drivers ought always to keep strictly to the speed limits. However, we also know that most drivers do on occasion exceed them. If the driver was driving at 35mph in a 30mph speed zone could he or she claim not to be driving negligently if it could be demonstrated that on that stretch of road most drivers exceeded 30mph?[59] There is no definitive ruling on this question by the courts.

(3) What if the defendant is unable to act in accordance with the standard of the reasonable person? Simester and Sullivan[60] argue that the defendant should be expected to live up only to the standard expected of a reasonable person with the defendant's physical characteristics, including age, sight, and hearing. So, for example, a blind defendant would be expected to act only as a reasonable blind person would. There is, however, limited case law to support this proposition.[61] It is well established that a learner driver can be convicted of careless driving if he or she is driving at the standard below that expected of the reasonable driver, even if he or she is not doing too badly for the first ever effort at driving.[62] Also the cases of *Elliot v C* and *G and R*[63] suggest that the standard in *Caldwell* recklessness is strictly objective and the defendant is not to be judged by the standard expected of a reasonable person with his or her characteristics. If this was so for recklessness it might also to be true of negligence, however unacceptable that is.

(4) Is it possible to expect the defendant to show a higher standard of behaviour than that expected of the reasonable person? It is clear that if a person is purporting to act in a professional capacity he or she is expected to act as a reasonable professional. For example, a doctor is expected to exercise the skill expected of a reasonable doctor, not just the standard of an ordinary person.[64]

5 GROSS NEGLIGENCE

In relation to manslaughter a defendant's negligence must be labelled gross negligence (in essence really bad negligence) if there is to be a conviction.[65] It must be shown that the defendant killed negligently and that this negligence was so bad as to justify a criminal conviction. Manslaughter is the only offence which requires the negligence to be gross. We will discuss this in detail in Chapter 5.

6 DISTINGUISHING BETWEEN INTENTION, RECKLESSNESS, AND NEGLIGENCE

We are now in a position to define more precisely the difference between intention and recklessness and between recklessness and negligence. The precise boundary between

59 Such an argument could not, of course, defeat a charge that he or she was breaking the speed limit.

60 Simester, Spencer, Sullivan, and Virgo (2010: 151–3).

61 *Hudson* [1966] 1 QB 448, 455 provides an *obiter dictum* that might support their argument.

62 *McCrone v Riding* [1938] 1 All ER 721.

63 [2002] EWCA Crim 1992.

64 *Adomako* [1995] 1 AC 171 (HL).

65 *Ibid.*

intention and recklessness is that point at which the *Woollin* direction applies: cases where a result was not the defendant's purpose but it was foreseen as virtually certain. It is clear that if the result was the defendant's purpose then the result is intended. If the result is not the defendant's purpose but is foreseen as a possible result of his actions then the defendant is reckless. The borderline between intent and recklessness is where the defendant foresees the result as virtually certain. After *Woollin* it is for the jury to decide whether a person who falls into this hinterland intends or is reckless.

The difference between recklessness and negligence is fairly straightforward. To be reckless the defendant must foresee the result, while for negligence the only question is whether the defendant acted as a reasonable person would. However, the division between the two becomes more complex when *Parker*[66] is raised. There a defendant was found reckless because the knowledge of the risk was in the 'back of his mind'. There is a temptation to conclude that because a risk is one a reasonable person would have known about, the defendant must have known about it really, somewhere in his or her brain. If this argument is used too readily the division between recklessness and negligence becomes blurred. Further it should be recalled that a defendant who is voluntarily intoxicated can be convicted of a recklessness-based crime if the risk was one he would have known about if sober. This can be regarded as a form of negligence-based liability.

7 INTOXICATION

At various points so far we have discussed the impact of intoxication upon intention and recklessness. It is useful now to bring these threads together.[67] Intoxication can be relevant in a criminal case in three ways:

(1) The defendant may for some crimes seek to rely on his intoxication as evidence that he lacked *mens rea*.[68]

(2) The prosecution may in some crimes seek to rely on the defendant's intoxication to establish the defendant's *mens rea*.

(3) There are certain crimes that specifically refer to being intoxicated. For example, it is an offence to drive a vehicle while under the influence of drink or drugs.[69] These offences will not be discussed in this book.

To understand the law on intoxication it is necessary to make two important distinctions: between voluntary and involuntary intoxication and between offences of basic and specific intent.

> **DEFINITION**
>
> A summary of the law on intoxication:
>
> Defendants who are involuntarily intoxicated can introduce evidence of their intoxication to persuade the jury that they lacked the *mens rea* of the crime. If, however, the jury finds they had the *mens rea* they will be guilty. If they did not, they are not guilty.

[66] [1977] 2 All ER 760 (CA).

[67] For a very helpful discussion see Simester (2009).

[68] Although the Public Order Act 1986, s. 6(5) specifically states that the defendant has the burden of proving that he was not voluntarily intoxicated for the purposes of that particular offence.

[69] Road Traffic Act 1988, s. 4(2).

Defendants who are voluntarily intoxicated can introduce evidence of their intoxication to prove that they lacked the *mens rea* in crimes of specific intent and are therefore not guilty. In crimes of basic intent the fact that they were intoxicated when they committed the crime will provide the evidence that they had the necessary *mens rea*. →9 (p.197)

7.1 INVOLUNTARY AND VOLUNTARY INTOXICATION

In simple terms someone is voluntarily intoxicated if he or she chooses to take substances which he or she knows or ought to know are intoxicating. In fact it is a little more complicated than this. It is necessary to distinguish a case where the defendant has taken alcohol or illegal drugs from those where the defendant has taken lawful substances, such as medicines prescribed by a doctor.

Alcohol and illegal drugs

Where the defendant has voluntarily taken a substance and is aware that the substance is alcohol or an illegal drug then he or she is voluntarily intoxicated. This rule even applies where the defendant thought he or she was taking a low-alcohol drink. This was made clear in *Allen*,[70] where the defendant was drinking his friend's home-made wine, which he believed had only a little alcohol in it. In fact it contained a high level of alcohol. He was held to be voluntarily intoxicated. It would be quite different if he had thought that what he was drinking was a non-alcoholic fruit punch, which in fact had alcohol (or drugs) in it. In such a case the defendant would be involuntarily intoxicated. Similarly, a person who was forced to drink alcohol or take drugs against his or her will would be involuntarily intoxicated. A person who is addicted to drugs or alcohol is treated as voluntarily taking the substances.[71]

Legal substances

If the defendant is taking a lawful substance, he is voluntarily intoxicated if he is aware that the substance would have this effect on him. In the case of medicine prescribed by a doctor the defendant will be voluntarily intoxicated if he took the medicine in a way not prescribed by the doctor (e.g. by exceeding the stated dose).[72] In *Hardie*[73] the defendant was given some out-of-date valium tablets. He was told that the tablets would calm his nerves and do him no harm. In fact he became intoxicated and caused a fire. He was held to be involuntarily intoxicated. The judgment does not make it clear whether the test is that the defendant is voluntarily intoxicated if he *knew* the substance was intoxicating, or whether the defendant *ought to have known* that the substance was intoxicating.

70 [1988] Crim LR 698 (CA).

71 It is possible that a drug addict or alcoholic could rely on a defence of insanity or diminished responsibility (on a charge of murder) (see the discussion in Chapter 12).

72 *Quick* [1973] QB 910 (CA).

73 [1984] 3 All ER 848 (CA).

7.2 OFFENCES OF BASIC AND SPECIFIC INTENT

As is clear from the summary of the law above the distinction between crimes of basic and specific intent is important.[74] Unfortunately the House of Lords' decision which emphasized the distinction (*Majewski*) failed to explain precisely what was meant by it. Subsequently courts, academics, and students have struggled to explain the distinction. The most popular view appears to be that offences of specific intent are those which have intention as their *mens rea*; whereas crimes of basic intent are those for which the *mens rea* element can be satisfied by recklessness.[75] Greater uncertainty surrounds crimes which contain elements of intent and elements of recklessness. For example, rape, where the *mens rea* is an intent to engage in sexual intercourse with negligence as to whether the victim consented. Commentators are divided on such crimes. Some suggest that the court will decide whether a crime is predominantly one of recklessness or intent and label it one of specific or basic intent accordingly.[76] Others argue that it is simply a case of applying the specific intent rule to the intent part of the crime, but the basic intent rules to the basic intent part. So a defendant who is drunk and therefore believes the victim is consenting is guilty of rape, but a defendant who is so drunk that he does not intend sexual intercourse[77] would have a defence. The Court of Appeal addressed the issue in the following case:

R v Heard
[2007] EWCA Crim 125

The appellant was convicted of a sexual assault. This offence is defined in s. 3(1) of the Sexual Offences Act 2003:

(1) A person (A) commits an offence if—

(a) he intentionally touches another person (B)

(b) the touching is sexual,

(c) B does not consent to the touching and

(d) A does not believe that B consents.

The appellant while very drunk exposed his penis and rubbed it against the thigh of a police officer. Due to his intoxication he had no recollection of the incident. He claimed that he lacked the intention necessary under section 3(1)(a). The trial judge ruled that the intentional requirement was one of basic intent and so therefore voluntary intoxication was no defence.

Lord Justice Hughes

14. The first thing to say is that it should not be supposed that every offence can be categorised simply as either one of specific intent or of basic intent. So to categorise an offence

74 It is discussed in detail in Horder (2005b).
75 *Caldwell* [1982] AC 341 (HL). Ward (1986) argues that no one explanation seems able to fit every case.
76 Simester, Spencer, Sullivan, and Virgo (2010: 690).
77 It would be hard to imagine a jury ever believing a defendant who made such a claim.

may conceal the truth that different elements of it may require proof of different states of mind. . . .

15. The offence of sexual assault, with which this case is concerned, is an example. The different elements of the offence, identified in paragraphs (a) to (d) of section 3, do not call for proof of the same state of mind. . . . It is accordingly of very limited help to attempt to label the offence of sexual assault, as a whole, one of either basic or specific intent, because the state of mind which must be proved varies with the issue. For this reason also, it is unsafe to reason (as at one point the Crown does) directly from the state of mind required in relation to consent to the solution to the present question.

16. Since it is only the touching which must be intentional, whilst the sexual character of the touching is, unless equivocal, to be judged objectively, and a belief in consent must be objectively reasonable, we think that it will only be in cases of some rarity that the question which we are posed in this appeal will in the end be determinative of the outcome.

17. We do not think that it determines this appeal. On the evidence the Appellant plainly did intend to touch the policeman with his penis. That he was drunk may have meant either:

i) that he was disinhibited and did something which he would not have done if sober; and/or

ii) that he did not remember it afterwards.

But neither of those matters (if true) would destroy the intentional character of his touching. In the homely language employed daily in directions to juries in cases of violence and sexual misbehaviour, "a drunken intent is still an intent." And for the memory to blot out what was intentionally done is common, if not perhaps quite as common as is the assertion by offenders that it has done so. In the present case, what the appellant did and said at the time, and said in interview afterwards, made it perfectly clear that this was a case of drunken intentional touching . . .

18. We do not attempt the notoriously unrealistic task of foreseeing every possible permutation of human behaviour which the future may reveal. But it nevertheless seems to us that in the great majority of cases of alleged sexual assault, or of comparable sexual crimes, as in the present case, the mind will have gone with the touching, penetration or other prohibited act, albeit in some cases a drunken mind.

19. It is, however, possible to envisage the exceptional case in which there is a real possibility that the intoxication was such that the mind did not go with the physical act. In *R v Lipman* (1969) 55 Cr App R 600 the defendant contended that when he killed his victim by stuffing bedclothes down her throat he was under the illusion, induced by hallucinatory drugs voluntarily taken, that he was fighting for his life against snakes. If an equivalent state of mind were (assumedly genuinely) to exist in someone who committed an act of sexual touching or penetration, the question which arises in this appeal would be directly in point.

20. A different situation was also put to us in the course of argument. Its formulation probably owes much to Professor Ormerod's current edition of *Smith and Hogan's Criminal Law* (11th edition, page 624). It is that of the intoxicated person whose control of his limbs is uncoordinated or impaired, so that in consequence he stumbles or flails about against another person, touching him or her in a way which, objectively viewed, is sexual for example because he touches a woman on her private parts. Can such a person be heard to say that what happened was other than deliberate when, if he had been sober, it would not have happened?

21. In the present case the Judge directed the jury that drunkenness was not a defence, although coupling with it the direction that the touching must be deliberate. Whether or not the jury's decision was likely to be that the appellant had acted intentionally (albeit drunkenly), the Judge had to determine whether or not it was necessary for the jury to investigate the

suggestion that the appellant was so drunk that his mind did not go with his act. That question may also face judges and juries, as it seems to us, in many cases where a defendant wishes to contend that he was thus intoxicated, and scientific or medical evidence can say no more than that in an extreme case drink or drugs are capable of inducing a state of mind in which a person believes that what he is doing is something different to what he in fact does. In those circumstances, and in deference to the full argument which we have heard, we have concluded that we should address the issue, rather than confine ourselves to saying that this conviction is safe.

22. We are in the present case concerned with element (a), the touching. The Act says that it must be intentional. We regard it as clear that a reckless touching will not do. The Act plainly proceeds upon the basis that there is a difference between 'intentionally' and 'recklessly'. Where it wishes to speak in terms of recklessness, the Act does so: see for example sections 63(1), 69(1)(c) & (2)(c) and 70(1)(c). It is not necessary to decide whether or not it is possible to conceive of a reckless, but unintentional, sexual touching. Like their Lordships in *R v Court* [1989] 1 AC 28, we think that such a possibility is a remote one, but we are unable wholly to rule it out. One theoretical possible example might be a Defendant who intends to avoid (just) actual physical contact, but realises that he may touch and is reckless whether he will.

23. Because the offence is committed only by intentional touching, we agree that the Judge's direction that the touching must be deliberate was correct. To flail about, stumble or barge around in an unco-ordinated manner which results in an unintended touching, objectively sexual, is not this offence. If to do so when sober is not this offence, then nor is it this offence to do so when intoxicated. It is also possible that such an action would not be judged by the jury to be objectively sexual, on the basis that it was clearly accidental, but whether that is so or not, we are satisfied that in such a case this offence is not committed. The intoxication, in such a situation, has not impacted on intention. Intention is simply not in question. What is in question is impairment of control of the limbs. . . . We would expect that in some cases where this was in issue the Judge might well find it useful to add to the previously-mentioned direction that 'a drunken intent is still an intent', the corollary that 'a drunken accident is still an accident'. To the limited, and largely theoretical, extent that a reckless sexual touching is possible the same would apply to that case also. Whether, when a defendant claims accident, he is doing so truthfully, or as a means of disguising the reality that he intended to touch, will be what the jury has to decide on the facts of each such case.

24. The remaining question is whether the Judge was also correct to direct the jury that drunkenness was not a defence.

25. We do not agree with [counsel for the appellant's] submission for the appellant that the fact that reckless touching will not suffice means that voluntary intoxication can be relied upon as defeating intentional touching. We do not read the cases, including *DPP v Majewski*, as establishing any such rule. As we shall show, we would hold that it is not open to a defendant charged with sexual assault to contend that his voluntary intoxication prevented him from intending to touch. The Judge was accordingly correct, not only to direct the jury that the touching must be deliberate, but also to direct it that the defence that voluntary drunkenness rendered him unable to form the intent to touch was not open to him.

30. There are a number of difficulties about extracting Mr Stern's proposition [that *Majewski* decides that it is only where recklessness suffices that voluntary intoxication cannot be relied upon] from the passages cited.

i) Lord Elwyn-Jones was addressing the submission made on behalf of the appellant in *Majewski* that it was unprincipled or unethical to distinguish between the effect of drink upon the mind in some crimes and its effect upon the mind in others. In rejecting that

submission, and upholding the distinction between crimes of basic and of specific intent, he was drawing attention to the fact that a man who has got himself into a state of voluntary intoxication is not, by ordinary standards, blameless. Both the Lord Chancellor and others of their Lordships made clear their view that to get oneself into such a state is, viewed broadly, as culpable as is any sober defendant convicted of a crime of basic intent, whether because he has the basic intent or because he is reckless as to the relevant consequence or circumstance. Throughout *Majewski* it is clear that their Lordships regarded those latter two states of mind as equivalent to one another for these purposes. It therefore does not follow from the references to recklessness that the same rule (that voluntary intoxication cannot be relied upon) does not apply also to basic intent; on the contrary, it seems to us clear that their Lordships were treating the two the same.

ii) The new analysis of recklessness in *Caldwell* may have led readily to the proposition that voluntary intoxication is broadly equivalent to recklessness, thus defined. But that analysis and definition of recklessness have now been reversed by the House of Lords in *R v G* [2004] 1 AC 1034. As now understood, recklessness requires actual foresight of the risk.

iii) Since the majority in *Caldwell* held that it was enough for recklessness that the risk was obvious objectively (thus, to the sober man) no question of drink providing a defence could arise; it follows that the explanation of *Majewski* which was advanced was plainly obiter.

iv) Lord Diplock's proposition in *Caldwell* attracted a vigorous dissent from Lord Edmund-Davies, who, like Lord Diplock, had been a party to *Majewski*, and with whom Lord Wilberforce agreed. They dissented not only from the new definition of recklessness, but also from the analysis of *Majewski*. Their view was that arson being reckless as to the endangering of life is an offence of specific, not of basic, intent; that would seem to have been because the state of mind went to an ulterior or purposive element of the offence, rather than to the basic element of causing damage by fire.

v) There were, moreover, many difficulties in the proposition that voluntary intoxication actually supplies the mens rea, whether on the basis of recklessness as re-defined in *Caldwell* or on the basis of recklessness as now understood; if that were so the drunken man might be guilty simply by becoming drunk and whether or not the risk would be obvious to a sober person, himself or anyone else. That reinforces our opinion that the proposition being advanced was one of broadly equivalent culpability, rather than of drink by itself supplying the mens rea.

31. It is necessary to go back to *Majewski* in order to see the basis for the distinction there upheld between crimes of basic and of specific intent. It is to be found most clearly in the speech of Lord Simon, at pages 478B to 479B. Lord Simon's analysis had been foreshadowed in his speech in *DPP v Morgan* [1976] AC 182, 216 (dissenting in the result), which analysis was cited and approved in *Majewski* by Lord Elwyn-Jones (at 471). It was that crimes of specific intent are those where the offence requires proof of purpose or consequence, which are not confined to, but amongst which are included, those where the purpose goes beyond the actus reus (sometimes referred to as cases of 'ulterior intent'). Lord Simon put it in this way at 478H:

'The best description of "specific intent" in this sense that I know is contained in the judgment of Fauteux J in *Reg v George* (1960) 128 Can CC 289, 301 "In considering the question of mens rea, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while,

in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act." '

That explanation of the difference is consistent with the view of Lord Edmund-Davies that an offence contrary to s 1(2)(b) Criminal Damage Act is one of specific intent in this sense, even though it involves no more than recklessness as to the endangering of life; the offence requires proof of a state of mind addressing something beyond the prohibited act itself, namely its consequences. We regard this as the best explanation of the sometimes elusive distinction between specific and basic intent in the sense used in *Majewski*, and it seems to us that this is the distinction which the Judge in the present case was applying when he referred to the concept of a 'bolted-on' intent. By that test, element (a) (the touching) in sexual assault contrary to s 3 Sexual Offences Act 2003 is an element requiring no more than basic intent. It follows that voluntary intoxication cannot be relied upon to negate that intent.

...

33. For all these reasons, this conviction is in no sense unsafe. Further, our view is that the Judge's directions were substantially correct. Sexual touching must be intentional, that is to say deliberate. But voluntary intoxication cannot be relied upon as negating the necessary intention. If, whether the Defendant is intoxicated or otherwise, the touching is unintentional, this offence is not committed.

Appeal dismissed.

As already mentioned, prior to this case many academics had suggested that the difference between basic and specific intent offences lay in whether or not intention or knowledge was an aspect of the *mens rea* from the crime. If it was the offence was one of specific intent; whereas crimes of recklessness, negligence, or strict liability were basic. However, that appears not to have been the approach accepted in *Heard*. If it had been then subsection (a) of this offence would have been regarded as involving specific intent. Instead the court took the 'radical'[78] approach of saying that an offence of specific intent is one that requires an 'ulterior intent' (para. 31). That is an intent to do more than simply the act; but an intent to produce a further consequence. So here the requirement that the touching be intentional did not carry an ulterior intent. The only intent required related to the act itself. Therefore it was not an offence of specific intent, but basic intent. This reasoning, which was *obiter*, has not been well received by commentators.[79] It would raise a question over whether murder is a crime of specific or basic intent because there is no ulterior intent required there. Yet murder has long been regarded as a crime of specific intent and it is very unlikely the courts will change their mind on that.[80]

Particular difficulty comes from the use in *Heard* of the concept of an accidental touch. Hughes LJ gives an example of a drunken dancer who grabs a woman's 'private parts' while flailing around. It might be thought that as he is drunk and the offence is one of basic intent that therefore he is to be convicted. However Hughes LJ disagrees, saying, as the touching was accidental, he has a defence. It is unclear why this is not regarded reckless. If he had been sober he would have seen the risk. It is not quite clear how Hughes LJ's hypothetical dancer differs from the appellant in the case. True it seems in that case his touching of his penis was not accidental, but was the dancing? One can only hope that the Supreme Court is

[78] Ormerod (2007b: 656).
[79] e.g. Simester, Spencer, Sullivan, and Virgo (2010: 690); R. Williams (2007).
[80] See e.g. *Moloney* [1985] AC 905.

asked soon to look at this issue and produce some clearer guidance.[81] Interestingly, the Law Commission[82] has suggested the case is wrongly decided.

It may be that *Heard* is best understood as a rather special exception to the general rule that basic intent refers to where intent is required for the *mens rea*. There were two aspects of *Heard* which were special. First, unusually, there was no lesser recklessness based crime for which the defendant could be convicted of. Normally if a drunken defendant lacks intention, there is a lesser recklessness-based crime for which they are still liable. That was not the case here and so his drunken lack of intention would have meant he could escape all liability had the Court of Appeal not decided that the offence should be treated as one of basic intent.[83] Second, it might be argued that drunken sexual assaults are particularly harmful and common in our society and so protection of the public justifies a departure from the normal approach.

7.3 STATING THE PRESENT LAW

Given the state of confusion following *Heard* it is difficult to summarize the current law with certainty. The following is the best summary of the current law, albeit one that is inconsistent with the *obiter* statements in *Heard*.

A voluntarily or involuntarily intoxicated defendant who has *mens rea* for the offence

A defendant who is voluntarily or involuntarily intoxicated but has the *mens rea* required for the offence is guilty.[84] This is true for all crimes. As is often said, 'a drunken intent is still an intent', and we can add 'drunken recklessness is still recklessness'. It is not a defence for intoxicated defendants to claim that they would not have committed the offence had they been sober.[85]

The defendant is involuntarily intoxicated and lacks the *mens rea* for the offence

In such a case the defendant must be acquitted.[86] So if Barbara asks for an orange juice and is (unknown to her) given an orange juice spiked with a large amount of vodka, and she then becomes so intoxicated that she is unaware of what she is doing and attacks someone, then she is not guilty of an assault. It should be stressed that she will be acquitted because of her lack of *mens rea* and not because of the intoxication itself.

The defendant is voluntarily intoxicated and lacks the *mens rea* for the offence

If the defendant is voluntarily intoxicated and lacks the *mens rea* then the effect of the law is that such a defendant will be deemed reckless, but the defendant will be acquitted of an

81 For further discussion of this case, see R. Williams (2007).
82 Law Commission Report No. 314 (2009a: para. 2.8).
83 See the discussion in Simester (2009).
84 *Ibid*.
85 *Bowden* [1993] Crim LR 379 (CA).
86 The question is whether or not the defendant had the *mens rea*, not whether the accused was capable of forming it (*Sheehan and Moore* (1974) 60 Cr App R 308 (CA)).

offence requiring intention.[87] It should be noted that in most cases where the defendant is acquitted of an offence requiring intent (e.g. murder) he may be convicted of a lesser offence which requires recklessness (e.g. manslaughter).

Intoxication to enable the commission of a crime

If the defendant has taken drink for the purpose of giving herself the courage to commit the crime she is still guilty, even if at the time she lacks the *mens rea*. This was established in *A-G of Northern Ireland v Gallagher*.[88]

> **FURTHER READING**
>
> Simester, A. (2009) 'Intoxication is Never a Defence' *Criminal Law Review* 3.
>
> Smith, J.C. (1987) 'Intoxication and the Mental Element in Crime' in P. Wallington and R. Merkin (eds) *Essays in Honour of F.H. Lawson* (London: Butterworths).
>
> Ward, A. (1986) 'Making Some Sense of Self-Induced Intoxication' *Cambridge Law Journal* 45: 247.
>
> White, S. (1989) 'Offences of Basic and Specific Intent' *Criminal Law Review* 271.

8 KNOWLEDGE AND BELIEF

> **DEFINITION**
>
> Knowledge involves a positive belief that a state of affairs exists. A defendant who fears that circumstances may exist and deliberately decides not to make any further inquiries in case his or her suspicions prove well founded will be said to know the circumstances.

For some offences it must be shown that the defendant did an act knowing or believing that a certain state of affairs existed. It should be noted that in cases where the *mens rea* is knowledge, careful consideration should be given to which aspects of the *actus reus* need to be known.[89] For example, the offence of handling stolen goods requires proof that the defendant knew or believed that the goods were stolen.[90] The difference between knowledge and belief appears simply to be based on whether the facts known or believed turned out to be true. If they were true then the defendant knew them to be true, if they were false the defendant believed them to be true.[91] Knowledge requires a positive belief. A suspicion may not be enough.[92] The court in *Reader*[93] makes it clear that belief that property might be stolen is not enough for a belief that it is stolen. This does not mean that the defendant must be absolutely

[87] *Sheehan and Moore* (1974) 60 Cr App R 308 (CA).
[88] [1963] AC 349 (HL).
[89] *Forbes (Giles)* [2001] UKHL 40, [2001] 4 All ER 97 (HL).
[90] As Shute (2002a) points out, statutes involving knowledge rely on a variety of formulations.
[91] Shute (2002a).
[92] *Grainge* [1974] 1 All ER 928 (CA); *Forsyth* [1997] 2 Cr App R 299, 320 (CA).
[93] (1977) 66 Cr App R 33 (CA).

certain that the circumstances exist. If he or she assumes a set of facts to be true and has no serious doubt about them, then that state of mind amounts to knowledge.[94]

If the court decides that the defendant was aware that there was a risk that the circumstances existed, and deliberately decided not to make any further enquiries to find out whether his or her fears are true, then in effect the defendant is presumed to know the facts. This is sometimes known as the doctrine of 'wilful blindness'. The House of Lords in *Westminster CC v Croyalgrange Ltd*[95] explained:

> it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed.

An example of wilful blindness is if Margaret has a friend, William, whom she knows is a regular burglar and William offers Margaret a television for £10. Margaret may decide to buy the cheap television and not to ask William where he got the television from for fear of hearing that it has been stolen. The court may be willing to find that Margaret knew the goods were stolen and hence could be guilty of knowingly handling stolen goods.[96]

It should be emphasized that knowledge and belief are subjective concepts. The question concerns what the defendant knew, not what a reasonable person would have known.[97] Although knowledge is a subjective concept occasionally a statute specifically asks the jury or magistrates to consider what the defendant ought to have known. For example, a defendant is guilty of an offence under the Protection from Harassment Act 1997 if he ought to know that his behaviour would harass the victim.

9 TRANSFERRED *MENS REA*

The doctrine of transferred *mens rea* is often called the doctrine of transferred malice. That is a misleading label as the doctrine does not apply just to malice, but to any *mens rea*. The doctrine applies where a person aims to harm one person or piece of property but misses and harms another.[98] The classic example of the application is where A shoots at B, but misses and instead kills C. Contrast the following examples:

(1) Darren shoots at Marjorie, intending to kill her, but the bullet misses and kills Anna. If Darren is charged with the murder of Anna, is the intention to kill Marjorie sufficient *mens rea*? The answer is 'yes'. The *mens rea* (intention to kill Marjorie) can be 'transferred' to the *actus reus* (the killing of Anna) to create the offence of murder.

(2) Craig shoots at Nick, misses and damages Narinda's property. If Craig is charged with criminal damage to Narinda's property the doctrine of transferred *mens rea* does not lead to a conviction. This is because adding together the intention to kill Nick and the damage

94 *Griffiths* (1974) 60 Cr App R 14 (CA); *Woods* [1969] 1 QB 447 (CCA).
95 [1986] 2 All ER 353, 359 (HL).
96 See Hellman (2009) who argues that there can be cases where one is justified in being wilfully blind. She has in mind professionals acting in accordance with good practice or a parent respecting a child's autonomy.
97 Although the concept of wilful blindness blurs these concepts.
98 A good example of the application of the doctrine is *Mitchell* [1983] 2 All ER 427 (CA).

to Narinda's property does not create an offence.[99] The *actus reus* and *mens rea* are those of different kinds of offences (murder and criminal damage). Although transferred *mens rea* might not assist in this context, this does not mean that Craig has not committed an offence. Craig will be guilty of attempting to kill Nick. Indeed Craig may be guilty of criminal damage, not using transferred *mens rea*, but because he has been reckless as to damaging Narinda's property.

(3) Brian is being attacked by Josh and in order to defend himself throws a brick at Josh. Josh ducks and the brick hits Elizabeth. Brian's intent to injure Josh can be transferred to Elizabeth, and so too can his defence of self-defence. So Brian would be able to use self-defence to any charge relating to Elizabeth's injuries.[100]

(4) Paul shoots dead someone whom he believes to be Helen, his enemy. To his horror he discovers he has shot Jade, who looks like Helen. Here Paul is guilty of Jade's murder. There is no need to rely on the doctrine of transferred *mens rea*. Paul intended to shoot dead the person in front of him and that person did die. Although Paul was mistaken as to that person's identity that mistake is irrelevant to his *mens rea*;

(5) Devina shoots into a crowd, not caring who is killed, and Tanya dies from the shot. Here the law relies on 'general malice': where a defendant does an act intending to kill anyone in the way then the defendant is guilty of murder if he kills someone.[101] →10 (p.208)

EXAMINATION TIP

When answering a problem question always remember that whenever the doctrine of transferred *mens rea* applies there are always two offences to consider:

(1) an attempt to commit the intended offence; and

(2) the full offence involving the harm that occurred.

One particularly difficult case on transferred *mens rea* was *Attorney-General's Reference (No. 3 of 1994)*,[102] where the accused stabbed his pregnant girlfriend. As a result of the wound the child was born early and died from the wound. One key issue was whether the defendant could be charged with murder. You might at first think that this case could be resolved by a straightforward application of the doctrine of transferred *mens rea*. The accused's intention to cause grievous bodily harm to the girlfriend can be transferred to the killing of the baby to create the offence of murder. The difficulty with this reasoning is that at the time of the stabbing the foetus was not a person in the eyes of the law. The House of Lords held that it was not possible to transfer the intent to kill from the mother to the child who (at the time of the stabbing) did not yet exist as a legal person.[103] What about arguing that the defendant's intention to kill or cause grievous bodily harm to the girlfriend could be transferred to the child who actually died? The House of Lords described the argument as involving an impermissible 'double transfer': from the mother to the unborn child; from the unborn child to

[99] *Pembliton* (1874) LR 2 CCR 119. If Craig attempted to damage Nick's property and in fact damaged Narinda's the offence would be made out.

[100] *Gross* (1913) 77 JP 352.

[101] *Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245 (HL). See the useful discussion in Horder (2006: 386–8).

[102] [1998] AC 245 (HL).

[103] Although the foetus is not regarded as a person, it can still be a criminal offence to kill a foetus; see, e.g., the offence of procuring a miscarriage contrary to the Offences Against the Person Act 1861, s. 58.

the person it would become in the future. The House of Lords was still able to hold that the defendant was guilty of manslaughter because (as we shall see in Chapter 5) for that offence there was no need to show an intent to injure any particular person.[104]

FURTHER READING

Bohlander, M. (2010) 'Transferred Malice and Transferred Defenses: A Critique of the Traditional Doctrine and Arguments for a Change in Paradigm' *New Criminal Law Review* 13: 555.

Horder, J. (2006) 'Transferred Malice and the Remoteness of Unexpected Outcomes from Intentions' *Criminal Law Review* 383.

10 COINCIDENCE OF *ACTUS REUS* AND *MENS REA*

It is a general principle of criminal law that the requirements of *mens rea* and *actus reus* should coincide in time. So, for example, in a murder case the defendant must intend to kill or cause grievous bodily harm by doing an act which causes the death of the victim. Consider these examples:

(1) One evening Adele decides to kill Sandy at some point in the future and spends the whole night deciding how to do so. The next morning, driving to work, Adele falls asleep at the wheel of her car and drives into a pedestrian killing him. The pedestrian happens to be Sandy. Adele is not guilty of murder. Although the evening before Adele had the *mens rea* for murder and Adele did actually kill Sandy, the *mens rea* and *actus reus* did not coincide at the same time[105] and so Adele should not be convicted of murder.[106]

(2) Spencer is driving along uttering murderous words about Alison whom he hopes to kill as soon as an opportunity arises. Spencer is not paying attention to his driving and crashes into a bus shelter, killing someone who happens to be Alison. Although you may think that the *actus reus* (the causing of the death of Alison) and the *mens rea* (an intention to kill Alison) existed at the same time, this is not a case of murder. Spencer did not intend to kill *by that act*. In other words, he did not intend to kill Alison with the act that caused her death.

(3) Alex stabs Kate intending to kill her and Kate collapses. Alex repents of his actions and desperately tries to save Kate's life. But despite his best efforts she dies. Although it could be argued that at the time of Kate's death Alex did not intend her to die this is in fact irrelevant in the criminal law. The key question is whether at the time Alex did the act which caused the death he had the *mens rea*. At the time of the stabbing Alex had the *mens rea* and so he is guilty of murder.

(4) Johnny is driving his car and begins to feel sleepy. He decides to drive on rather than to stop for a rest. He falls asleep at the wheel and kills a pedestrian. Although

[104] Care needs to be taken in drafting the indictment when transferred malice cases are involved (see *Slimmings* [1999] Crim LR 69 (CA)).

[105] At the time of the killing she was asleep and was not intending anything.

[106] She may be guilty of causing death by dangerous driving.

at the time when he drove into the pedestrian he was acting involuntarily and so technically 'not driving',[107] his careless driving (in deciding not to stop for a rest and to continue) caused him to fall into an involuntary state, which, in turn, caused the pedestrian's injuries.[108] He is guilty of causing death by dangerous driving.

10.1 'EXCEPTIONS' TO THE COINCIDENCE REQUIREMENT

Despite the requirement that the *mens rea* and *actus reus* coincide the courts have developed ways of flexibly interpreting it, or some would say creating exceptions to it. The case law can be divided into three kinds of cases.

The defendant may have the *mens rea* at one point in time and then later (without *mens rea*) perform the *actus reus*

A good example of this kind of case is *Meli v R*.[109] The appellants as part of a preconceived plan struck a man over the head. They thought he was dead and threw what they thought was his corpse over a cliff. In fact medical evidence established that the blow to the head had not killed the victim, but being thrown over the cliff had. The difficulty was that at the time of the *actus reus* (throwing the body over the cliff) the appellants lacked *mens rea*, although they had had the *mens rea* earlier when they hit the victim. The Privy Council held that they could properly be convicted of murder as their acts were part of a plan and so could be described as 'one transaction'. As long as the act performed with *mens rea* and the act which constituted the *actus reus* could be described as part of one transaction then the defendant could be convicted.[110] The Court of Appeal in *Le Brun*[111] extended this reasoning to a case where there was no preconceived plan. In that case the defendant hit his wife and she collapsed. He then picked her body up to take it inside. He dropped her and she died. It was held that he could be convicted of manslaughter as the hitting and the carrying of the body could be regarded as one transaction or a single 'sequence of events'. Key to this case was the fact that the defendant was carrying his wife inside to hide what he had done. Had he been taking her to a doctor the court might well have decided that there was not one sequence of events.[112]

The approach to cases of this kind was approved by Lord Mustill in *Attorney-General's Reference (No. 3 of 1994)*[113] where he summarized the position:

> The existence of an interval of time between the doing of an act by the defendant with the necessary wrongful intent and its impact on the victim in a manner which leads to death does not in itself prevent the intent, the act and the death from together amounting to murder, so long as there is an unbroken causal connection between the act and the death.

107 He was an automaton.
108 *Kay v Butterworth* (1945) 173 LT 191.
109 [1954] 1 WLR 228 (PC).
110 See also *Moore* [1975] Crim LR 229 (PC) and *Church* [1966] 1 QB 59 (CCA).
111 [1991] 4 All ER 673 (CA).
112 An alternative line of reasoning the court adopted was that the original hit was an operating cause of the death in the sense that the attempt to carry her away did not break the chain of causation.
113 [1998] AC 245, 265 (HL).

Whether the series of events is part of the same sequence of events or part of an 'unbroken causal connection' is a question of fact for the jury.

The defendant committed the *actus reus* at one point in time (without the necessary *mens rea*), but at a later point in time he has the *mens rea*

An example of such a case is where the defendant while asleep starts a fire, then afterwards realizes what he has done and runs off. The courts have dealt with such cases in two ways:

(1) The prosecution could argue that the defendant's initial act should be seen as a continuing act which is still continuing at the point in time when the *mens rea* arises.

(2) An alternative way of considering such cases is to argue that the defendant's failure to stop the harm he was causing amounted to a criminal omission for which the defendant could be convicted. The most significant case discussing this approach is *Miller* (which is excerpted at p.77).[114] There it will be recalled that once the defendant has set off a chain of events which poses a danger he is under a duty to act to prevent the danger arising. Once the defendant is aware of the danger, but fails to prevent it materializing or mitigate it, the *mens rea* and the *actus reus* (the failure to act) coincide.

These arguments were considered in the following case:

Fagan v Metropolitan Police Commissioner
[1969] 1 QB 439 (QBD)[115]

The appellant, who was driving his car, was asked by a police officer to pull over. The appellant did so, but ended up on the policeman's foot. The police officer apparently then said: 'Get off, you are on my foot.' The appellant did not move the car. When the police officer repeated the request the appellant eventually did so.

Mr Justice James

The justices at quarter sessions on those facts were left in doubt whether the mounting of the wheel on to the officer's foot was deliberate or accidental. They were satisfied, however, beyond all reasonable doubt that the appellant 'knowingly, provocatively and unnecessarily' allowed the wheel to remain on the foot after the officer said 'Get off, you are on my foot'. They found that, on these facts, an assault was proved.

Counsel for the appellant relied on the passage in *Stone's Justices' Manual* (1968 Edn.), Vol. 1, p. 651, where assault is defined (Viz., 'An assault is an attempt by force, or violence, to do bodily injury to another. It is an act of aggression done against or upon the person of another without his consent; not necessarily against his will, if by that is implied an actual resistance or expression of objection made at the time . . .'). He contends that, on the finding of the justices, the initial mounting of the wheel could not be an assault, and that the act of the wheel mounting the foot came to an end without there being any *mens rea*. It is argued that thereafter there was no act on the part of the appellant which could constitute an *actus reus*, but only the omission or failure to remove the wheel as soon as he was asked. That

114 [1983] 2 AC 161 (HL).
115 [1968] 3 All ER 442, [1968] 3 WLR 1120, (1968) 52 Cr App R 700.

failure, it is said, could not in law be an assault, nor could it in law provide the necessary *mens rea* to convert the original act of mounting the foot into an assault. Counsel for the respondent argues that the first mounting of the foot was an *actus reus*, which act continued until the moment of time at which the wheel was removed. During that continuing act, it is said, the appellant formed the necessary intention to constitute the element of *mens rea* and, once that element was added to the continuing act, an assault took place. In the alternative, counsel argues, that there can be situations in which there is a duty to act and that, in such situations, an omission to act in breach of duty would in law amount to an assault. It is unnecessary to formulate any concluded views on this alternative.

. . .

To constitute this offence, some intentional act must have been performed; a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault; they can only shed a light on the appellant's action. For our part, we think that the crucial question is whether, in this case, the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot, or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment, a distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault. For an assault to be committed, both the elements of *actus reus* and *mens rea* must be present at the same time. The '*actus reus*' is the action causing the effect on the victim's mind: see the observations of Parke, B., in *R. v. St. George* (1840), 9 C. & P. 483 at pp. 490, 493. The '*mens rea*' is the intention to cause that effect. It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed on an existing act. On the other hand, the subsequent inception of *mens rea* cannot convert an act which has been completed without *mens rea* into an assault.

In our judgment, the justices at Willesden and quarter sessions were right in law. On the facts found, the action of the appellant may have been initially unintentional, but the time came when, knowing that the wheel was on the officer's foot, the appellant (i) remained seated in the car so that his body through the medium of the car was in contact with the officer, (ii) switched off the ignition of the car, (iii) maintained the wheel of the car on the foot, and (iv) used words indicating the intention of keeping the wheel in that position. For our part, we cannot regard such conduct as mere omission or inactivity. There was an act constituting a battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant's argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

[**Lord Justice Parker** agreed with **Mr Justice James's** judgment.]

[**Mr Justice Bridge** handed down a dissenting judgment.]

Appeal dismissed.

It is unclear when the *actus reus* occurred

An example of this difficulty is revealed in the rather grizzly facts of *Attorney-General's Reference (No. 4 of 1980).*[116] Here the defendant slapped his girlfriend, pushed her down the stairs, put a rope around her neck, dragged her back up the stairs, cut her throat and cut her body into pieces. It was unclear which of these acts had caused her death, although it was clear one of them had! The Court of Appeal held that as long as the defendant had the necessary *mens rea* at the time of each of the possible acts that caused the death he could be properly convicted of murder or manslaughter.

FURTHER READING

Marston, G. (1970) 'Contemporaneity of Act and Intention in Crimes' *Law Quarterly Review* 86: 208.

Sullivan, G.R. (1993b) 'Cause and the Contemporaneity of *Actus Reus* and *Mens Rea*' *Criminal Law Journal* 487.

REVISION TIP

When you come to revise specific criminal offences you will need to learn both the *actus reus* and *mens rea* for those offences. But remember with the *mens rea* that you will need to learn not only whether intention, recklessness or negligence is required, but for what. So do not just say the *mens rea* for murder is intention. You need to say that the *mens rea* for murder is an intention to kill or cause grievous bodily harm to the victim.

QUESTIONS

1. Peter believes that his enemy, Olive, may possibly be allergic to peanuts. He puts peanut oil on Olive's toothbrush, hoping to kill her. It turns out that Olive is allergic to the oil and after brushing her teeth suffers an allergic reaction and dies. Bob, Olive's friend, wants to terrify Peter to teach him a lesson. He sets fire to Peter's house. Peter dies in the fire. Did Peter intend to kill Olive? Did Bob intend to kill Peter?

For guidance on answering this question, please visit the Online Resource Centre that accompanies this book: www.oxfordtextbooks.co.uk/orc/herringcriminal5e/.

2. Steve is rollerblading down a pavement. Someone steps out in front of him. Without thinking, he jumps to one side. He crashes into a car and scratches the paintwork. Was Steve reckless as to damaging the car? Was he negligent?

[116] [1981] 1 WLR 705 (CA).

PART II: *MENS REA* THEORY

11 GENERAL DISCUSSION ON *MENS REA*

Sanford Kadish has suggested that the existence of *mens rea* shows that the criminal law regards people as autonomous agents who are responsible for the choices they make rather than robots which have malfunctioned and need to be mended.[117] Indeed commentators see *mens rea* as being at the heart of the criminal law, fulfilling several important roles:[118]

(1) It ensures that censure correctly attaches to a criminal conviction. If a criminal conviction is to signify that society censures an individual for his or her actions then it is not enough just to show that the defendant harmed the victim. He or she must have done so in a blameworthy way.
(2) *Mens rea* is not just about ensuring that only blameworthy people are convicted, but also that they are convicted of the right offence.[119] Many people would draw a clear moral distinction between, for example, an intentional killer and a negligent one. Such distinctions, it is said, should be reflected in the criminal law. Hence we distinguish between murder and manslaughter.
(3) *Mens rea* may also help to define the wrong done to the victim. If you are out shopping and are pushed over your reaction will be different depending on whether you were deliberately or accidentally pushed over. If it was deliberate you will feel you have been attacked; if it was accidental you are likely to find the incident far less traumatic. The intention behind the action in part defines the kind of harm the victim has suffered.
(4) *Mens rea* ensures that the victim is given fair warning of what is criminal.[120] Citizens can be confident in knowing whether or not what they plan to do will be a crime if they are only liable if they intend or foresee a harm to another. A law which made it a crime even though the defendant had no *mens rea* would mean even a citizen trying very hard to comply with the law may unwittingly commit a crime.
(5) Chan and Simester[121] argue that the requirement of *mens rea* also helps restrict the ambit of the criminal law so that it does not cover too many people. They argue it helps protect freedoms and helps in the fight against over-criminalization.

It is interesting to consider what a criminal law would be like if it contained no *mens rea* requirements. Baroness Wootton[122] proposed such a legal system. At the heart of her thinking was the view that the criminal court was not in a position to assess the blameworthiness of a defendant. We would need to know far more about human psychology and courts would have to be told far more about defendants' personal history if they were truly to assess blameworthiness.[123] Wootton proposed that offences should simply require proof that the defendant harmed the victim. At the sentencing stage the judge would be free to take into account the defendant's state of mind along with other relevant considerations. Opponents of proposals such as Wootton's point out that under them we would then have to accept that

[117] Kadish (1987b: 3). [118] See Chan and Simester (2011) and Moore (2011).
[119] Brudner (2008). [120] Chan and Simester (2011). [121] *Ibid*. [122] Wootton (1981).
[123] Some would say that only an omniscient, good God would be in a position to make such a judgment.

a person could be guilty of a crime even though he or she was entirely blameless for his or her actions. It is true that such a defendant may receive no punishment, but the censuring effect of a conviction itself would be lost. We could not assume that a person found guilty of a crime was morally blameworthy. A person who deliberately killed the victim and a person who killed another through no fault of his or her own would both be guilty of murder.[124] There are, however, benefits to Wootton's approach. It does acknowledge the harm done to the victim. Imagine the trauma a rape victim feels when her assailant is acquitted because he was not aware that she was not consenting. Her perception is understandably that the criminal law has failed to acknowledge that from her perspective she was raped, whatever the defendant's state of mind. A further important point is Wootton's argument that we must not be over-confident in the law's ability to assess the moral blameworthiness of a defendant.

However, most commentators reject the notion of a criminal law system without *mens rea* and insist that serious criminal offences must require proof of *mens rea*. Professor Williams has argued that the requirement of *mens rea* is 'a mark of advancing civilisation'.[125] Indeed, as we shall see in Chapter 4, the House of Lords[126] has stated that there is a presumption that offences require proof of *mens rea* unless there is clear evidence rebutting that presumption. But before English and Welsh lawyers get too puffed up with pride on the humanity and moral subtlety demonstrated by their criminal legal system's use of *mens rea* three points should be emphasized:

(1) As William Wilson has pointed out, we pride ourselves in not punishing animals, infants, or the insane on the basis that they are not responsible agents. Yet animals that attack other animals or people are liable to be put down, children who commit serious crimes are likely to be taken into state care, and the insane are hospitalized. As Wilson notes, 'The rhetoric says that such a response is not a mark of blame and such treatment is not punishment. The reality is that those concerned would hardly know the difference.'[127]

(2) A point which will be made several times in this chapter is that the extent to which criminal law seeks to examine the moral blameworthiness of a defendant's actions is limited. For example, a defendant who argues that his criminal behaviour has more to do with his socio-economic background than personal blameworthiness will have little chance of success before a court.

(3) Although *mens rea* is seen as an important principle, in fact many crimes do not require proof of the defendant's state of mind.[128] The large majority of crimes are negligence-based or are offences of strict liability, which require only proof that the defendant acted in a particular way. Andrew Ashworth suggests that there are thousands of strict liability offences.[129] Even if we consider just the more serious offences which cannot be heard by magistrates and must be tried in the Crown Court, over half of these are offences of strict or objective liability.[130]

[124] Although one could give them markedly different sentences. Indeed, if blameworthiness became irrelevant such a system logically could return to the practice (common in medieval law) of sentencing animals for criminal offences (Evans 1987)!

[125] G. Williams (1983: 70). [126] *B v DPP* [2000] 2 AC 428 (HL). [127] W. Wilson (2003: 120).

[128] Ashworth and Blake (1996). [129] Ashworth (2009: 96).

[130] Lacey, Wells, and Quick (2003: 23–8).

Despite these important points the judiciary and many academics place much weight on the significance of *mens rea* and much academic and judicial ink has been spilt trying to define the key *mens rea* terms discussed in Part I.

Some academics have sought to develop a guiding theory for allocating blame.[131] But, it should be emphasized that other commentators are very sceptical about such attempts to find an overarching theory of criminal law.[132] For them the benefits and disadvantages of particular states of mind for particular offences need to be judged on their own merits, without there being any attempt to fit these into an overarching theory.

12 CHOICE/CAPACITY/CHARACTER THEORY

The debate over the correct definition of the *mens rea* terms reflects the disputes over the choice, capacity, and character theories. These were mentioned in Chapter 1 and will be discussed in more detail in Chapter 12, so will be mentioned only briefly here:

(1) **The choice theory** centres on an argument that people are responsible for the things they chose to do. People should be guilty of a crime only if they chose effectively to do the *actus reus*.[133]

(2) **The capacity theory** is similar to the choice theory in that it accepts the argument that people are responsible for what they chose to do. But it also accepts that it is proper to punish those who *could* have effectively chosen to act lawfully, but did not.

(3) **The character theory** focuses on the argument that the defendant is responsible for his or her character. If his or her criminal actions reveal character traits that are opposed by the criminal law he or she should be punished.

These different theories suggest alternative understandings of *mens rea*. The choice theory supports crimes based on intention and *Cunningham* recklessness, but would not support offences based on *Caldwell* recklessness, negligence, or strict liability, where the defendant did not necessarily choose to commit a crime. The capacity theory would also support intention and *Cunningham* recklessness, but would also be willing to support criminal liability for inadvertence, at least in so far as the defendant *could* have appreciated the risk. The capacity theory would therefore support the acquittal of *Stephenson*,[134] but deplore the conviction of C in *Elliott v C*.[135] The capacity theory would also be happy for some convictions to be based on negligence, but only where the defendant had the capability of acting non-negligently.[136] The character theory would be less obsessed with the defendant's foresight or intention than the other theories. Although, usually, an intentional or *Cunningham* reckless act would indicate bad character, it need not always. The character theory could distinguish between a deliberate killing and a mercy killing, in that arguably the former but not the latter indicates a bad character. Some negligence or strict liability could be supported on the basis that the defendant's actions revealed that he did not care enough about other people. Other commentators have rejected an

131 It should not be forgotten that issues such as burden of proof, the privilege against self-incrimination, and trial by jury have a very important impact on the way the *mens rea* requirements operate in practice.

132 See e.g. Horder (1993).

133 G. Williams (1997).

134 [1979] QB 695 (CA).

135 [1983] 1 WLR 939 (QBD).

136 M. Moore (2000: ch. 7) suggests that liability for negligence could be supported on the basis of unexercised capacity.

approach for *mens rea* which focuses on grand overarching theories. John Gardner argues:

> the question of what should be the mens rea for a particular crime is a question which calls, in the first instance, for a local answer specific to that crime. For it depends . . . on what exactly is wrong, or is supposed to be wrong, with perpetrating that particular crime.[137]

13 SUBJECTIVE/OBJECTIVE

As we have already seen in Chapter 1, another way of looking at the disputes over *mens rea* terms is to see them as a disagreement between the objectivists and subjectivists.[138] Subjectivists focus on what was going on inside the defendant's mind when he or she committed the crime: what did he or she intend, foresee, know, or believe? Objectivists tend to focus more on the defendant's actions: is what the defendant did unreasonable? Objectivists may consider what a reasonable person in the defendant's shoes would have intended, foreseen, known, or believed.

Although there is sometimes talk of a battle between subjectivism and objectivism it is perfectly sensible to take the view that some offences should be drafted in objective terms and others in subjective terms.[139] Generally subjectivists support liability for intention and *Cunningham* recklessness and reject *Caldwell* recklessness, negligence, and strict liability as objectivist, although, as we shall see, it is in fact far more complicated than this.

QUESTIONS

1. Is 'inadvertence' or 'indifference' to a risk a state of mind or an absence of a state of mind?
2. Read R. Tur, 'Subjectivism and Objectivism: Towards Synthesis' in S. Shute, J. Gardner, and J. Horder (eds) *Action and Value in Criminal Law* (Oxford: OUP, 1993). Do you think it is possible to synthesize subjectivism and objectivism?

14 NORMAL MEANING

One theme that has run through many of the judicial decisions is that *mens rea* words like 'intention' and 'recklessness' should carry their normal, everyday meaning.[140] At first this seems uncontroversial. After all, it is far easier for a jury to give words their normal meaning than some technical, legal meaning which they may misunderstand.[141] Further, giving such words their normal meaning helps to make the law predictable and readily understandable to ordinary people. For example, if dishonesty in theft was given a highly technical, outdated meaning a defendant might justly complain 'how on earth was I meant to know that dishonesty meant that?' Also, giving such words their ordinary meaning enables the law to

137 Gardner (2008: 27).
138 See Tur (1993) for a further discussion on subjectivism and objectivism.
139 Sullivan (2002b: 222–3).
140 *Brutus v Cozens* [1973] AC 854 (HL).
141 A point stressed by the Court of Appeal in *Belfon* (1976) 63 Cr App R 59. See also Buxton (1988).

keep abreast of changes in the moral and cultural climate. Defining dishonesty in terms of the standards expected of the ordinary, honest person is said by some to mean that the legal concept of dishonesty is kept in line with current standards of morality. ←1 (p.135)

However, some commentators reject any assumption that the legal meanings and normal meanings of words should be the same.[142] Does the word 'intention', for example, have an everyday meaning? Even if it does is it precise enough to assist in borderline cases?[143]

Behind this debate on whether words should have their normal meaning is a debate over how much power a jury should have. If the judge provides a precise legal definition of the concept the judge (in theory) retains control over the definition of the term.[144] If the jury are to give the term its normal meaning then they retain a degree of discretion in deciding, for example, what the current standards of morality are. The hidden use of references to ordinary language is brought out in the following passage by Nicola Lacey. She has just considered those scholars who seek to clarify the notion of intention using 'conceptual analysis', who, she suggests, appear to believe that if only we could come up with a morally sophisticated definition of intention the difficulties in the law would be resolved. She rejects this because:

> the real source of uncertainty and disagreement in the application of criminal law concepts such as intention is not ultimately to do with the concept, but with practical, moral and political issues. Should this person be convicted, and of what offence?

She then turns to those who believe that giving intention its normal meaning will resolve the problems over the definition of intention:

N. Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 *Modern Law Review* 621

Ordinary Usage

At the other end of the spectrum, we have the resort in the face of difficulties of definition to 'ordinary usage.' It should be noted that ordinary usage is itself something of a chimera. For just as 'legal usage' is arguably a relatively specific and autonomous area of discourse, many other areas of linguistic usage develop particular, local and technical meanings for 'ordinary' words. And even within these local areas, usage is fluid and often contested. This notwithstanding, the resort to the 'common usage' or the 'ordinary person's understanding' of a particular term is a familiar technique in criminal law—perhaps most famously debated in recent years in the context of the concept of dishonesty under the Theft Act 1968. On the view which appeals to 'ordinary usage,' the attempt to articulate and fix particular conceptual analyses in legislative or judicial form is both unnecessary and misguided. It is unnecessary because, in the case of concepts such as intention, dishonesty, violence and so on, 'ordinary people' have a clear if unarticulated sense of what these terms mean. So it can simply be left to the jury or the lay magistrate to apply those ordinary understandings to the case at hand. And it is misguided, because part of the function of criminal laws which employ those terms is precisely to bring to bear on the alleged offender the standards of judgment thought to be buried within and reflected by 'ordinary usage': the thought behind the legal proscription in

[142] G. Williams (1987). [143] Gardner and Jung (1991). [144] Lacey (1993a).

question is the application of a general rather than a technical standard in this respect. The 'ordinary language' view is therefore motivated by at least two concerns: the investment of *mens rea* terms with 'ordinary' or 'common sense' meanings, and the delegation of decision making power in Crown Court cases to jury rather than judge. In some sense, on this view, the framers of criminal laws articulate definitions of offences in terms of a combination of legal and factual questions. The line between questions of law and those of fact is notoriously hard to draw, but the approach based on 'ordinary language' does appear to make conviction depend, in a wide range of cases, on questions of fact—or what might more accurately be called 'lay evaluation.' We should note the attractions to law makers of the rhetorical force which attaches to legislation framed in terms of 'ordinary' terms which resonate with citizens' pre-legal ideas of wrongdoing.

To set out the view which appeals to 'ordinary language' is already to suggest its main weakness as a tool of legal practice. This lies in its assumption that a settled, widely shared understanding underpins the usage of all or most such terms employed by criminal law. It seems only reasonable to observe that this assumption is undermined by recent case law history. Even giving due weight to the opacity of the trial judges' directions in recent murder cases such as *Moloney*, *Hancock and Shankland*, and *Nedrick*, it is hardly to be doubted that the return of the jury for further advice about the meaning of 'intention' must be put down not just to bewilderment in the face of legal 'guidelines' but also to uncertainty and disagreement over 'ordinary language.' On all the evidence, and in ordinary terms, could Moloney be said to have intended to kill his stepfather; could Hancock and Shankland be said to have intended to kill or seriously injure the drivers and occupants of the vehicles coming up the motorway? Can at least some 'core' notion of intention be identified, in relation to which 'penumbral' cases can easily be incorporated within 'ordinary' usage?

In the face of this kind of problem, judges and commentators have often favoured an intermediate position in which the resort to ordinary language is buttressed by recourse to conceptual analysis and stipulation. Typically, this has consisted in the incomplete and often negative delineation of the term in question, either in terms of a partial definition, or of judicial guidelines, or both. A good example would be dishonesty under the Theft Act 1968, of which section 2 partially defines dishonesty by excluding three specific instances and including another. This is supplemented at the judicial level by guidelines which set out two questions which the jury has to ask itself in determining whether the defendant is dishonest. These questions mark out the concept without supplying the ultimate standard to be applied. A similar compromise strategy is being worked out in the case of intention, and the recent cases will now be analysed in more depth. My aim is to suggest that the strategy entails a fundamental tension, widely present in criminal law cases. This tension is interesting, because it undermines the traditional doctrinal insistence on the importance and (at least relative) possibility of coherence and consistency of principle in criminal law.

15 INTENT

Although academics have written an enormous amount about intent and its meaning has been a matter of heated debate, in practice intent is rarely relevant in criminal trials.[145] Very few offences require proof that the defendant intended a result. Recklessness or negligence is normally sufficient. Nevertheless intent is an important concept in the criminal law because it is widely regarded as the 'worst' kind of *mens rea*.

[145] Lacey (1993b: 621).

But what makes intent the most serious form of *mens rea*? Michael Moore[146] explains that an intended action is one where the actor seeks to control the action and its result in the sense used in moral assessments. In other words a person seeks to exert as great a control as possible over an action and its result where that action is intended.[147] Other commentators have seen an intended act as the ideal conception of a voluntary act.[148] Intention reflects not just a choice to act in a way which will lead to a result, but a wholehearted decision to act in order to bring a result about.[149] If Harry stabs James wanting to kill him, he has, to the greatest extent possible, committed himself to James's death. If Ivy stabs Katie, not wanting to kill her but being aware that there is a risk that she may, Ivy associates herself to a lesser extent with Katie's death than Harry did with James's.

Before we look at some of the controversial theoretical issues surrounding intention, there is an important point to make. Much of the discussion of the meaning of intention has occurred in the context of the law of murder. It is all too easy in discussing this topic to confuse the issue 'Did D intend to kill V?' with the question 'Should D be convicted of murder?' But these are separate questions.

We must now turn to some of the most controversial issues surrounding the concept of intention.

15.1 DISTINGUISHING INDIRECT INTENTION AND DIRECT INTENTION

As you will have gathered from the summary of the law in Part I, the greatest area of dispute is over the extent to which a result which is not the actor's purpose, but which was foreseen by him, can be said to be intended by him. There is widespread agreement that if it was the defendant's purpose to cause a result or the defendant wanted the result to occur in order to achieve his purpose then he intended it.[150] We called this the 'core meaning of intention' in Part I of this chapter.[151] As mentioned there, the courts have been troubled by cases of indirect or oblique intention. Commentators have equally been divided on the issue. To assist in understanding the different views taken we will consider four hypothetical cases:

(1) **The desperate surgeon**. D, a surgeon, has a wife who is in desperate need of a heart transplant. D removes a heart from a healthy patient (V) and transplants it into his wife. D does not want V to die (his purpose is to save his wife's life), but is aware that if he removes V's heart V will die.
(2) **The aeroplane bomber**. D puts a bomb on an aeroplane which carries goods which D has insured. His plan is to blow up the plane in mid-flight and claim the insurance money on the destroyed goods. He knows that if the bomb goes off it is virtually certain that the pilot will die. In due course the bomb goes off, killing the pilot.
(3) **The burning father**. D is holding his baby on the top of a burning building. As the flames get very close he throws the baby from the building in a last ditch attempt to save the baby's life, but aware that the baby is almost bound to die as a result of the

146 M. Moore (1997: 204ff). 147 Kessler Ferzan (2002). 148 Duff (1990a: 113).

149 Gardner (1998: 227). See also the discussion in Bratman (1999).

150 e.g. Finnis (1991: 36). M. Moore (1996) argues that if killing is one's aim this is invariably worse than killing as a means to some other end (e.g. obtaining an inheritance).

151 See the discussion of whether purpose is preferable to want or desire in Goff (1988), and Kugler (2002: ch. 1).

fall. Unfortunately the baby does indeed die, but miraculously the father is rescued by a helicopter.

(4) **The revengeful wife**. D, on discovering that her husband is having an affair with V, sets fire to V's house. Her purpose is to scare V away from her husband, although she knows it is likely that V or her family will be inside and may therefore die.

Four views will be sketched in outline here,[152] but there are nearly as many views on what intention is as there are people who have written on the issue: ←4 (p.141)

The 'pure intention' view[153]

This view is promoted by those who argue that intention should mean purpose, nothing more and nothing less.[154] Supporters point out that it is quite possible to foresee a result as virtually certain but not intend it. You may foresee that by drinking ten dry sherries in the bar you will get a hangover the next morning, but that does not mean that you intend to get a hangover when you drink.[155] John Finnis has written that he may foresee that his lecture will confuse half those attending, but that does not mean he intends them to be confused.[156] As Wilson points out: 'If I pull my child's loose tooth out, knowing this cannot be done without him suffering significant pain, only a passing spaceman from Mars could reach the conclusion that I intended to hurt him.' Although if Wilson is correct in saying this quite a few lecturers in criminal law are Martians!

Looking at our scenarios there is no doubt that under the 'pure intention view' the plane bomber, the burning father, and the revengeful wife did not intend the death of V.[157] More problematic is the desperate surgeon. You might think that the pure intention view would hold that the surgeon's purpose was to save his wife's life and so he did not intend to kill V. However, the argument 'I intended to take V's heart out, but did not intend to kill her' is very unattractive. One possible escape route for supporters of the pure intent view is to say that intending to take someone's heart out simply is intending to kill them; the two consequences are inseparable.[158] There is, in our world, no difference between taking out someone's heart and killing them.

Supporters of the pure intention view often support the 'ethical doctrine of double effect', which has been defined by John Keown in the following extract:

J. Keown, *Euthanasia, Ethics and Public Policy* (Cambridge: Cambridge University Press, 2003), 20

According to this ethical tradition, it is permissible to allow a bad consequence to result from one's actions, even if it is foreseen as certain to follow, provided certain conditions are

[152] The names I have given to these theories are mine. [153] Finnis (1991: 32).

[154] M. Moore (1999). This narrow view of intention is popular with those who take the view that it is never justifiable intentionally to take someone's life. See e.g. Finnis (1991).

[155] Duff (1990a: 61). [156] Finnis (1991: 64).

[157] Supporters of this view suggest that if we do not like this conclusion in respect of, say, the plane bomber, then we should change the law on what the *mens rea* for murder is, rather than artificially stretch the law on intention.

[158] R. Cross (1967: 224) gives an example of a head-hunter who removes someone's head for his collection, but denying that he intended to kill the 'owner' of the head. For further discussion, see Simester (1996a and 1996b).

satisfied. Those conditions are identified by the principle of 'double effect.' According to this ethical principle, it is permissible to produce a bad consequence if:

- the act one is engaged in is not itself bad;
- the bad consequence is not a means to the good consequence;
- the bad consequence is foreseen but not intended; and
- there is a sufficiently serious reason for allowing the bad consequence to occur.

It should be noted that Keown's explanation of the doctrine of double effect is more than a description of *mens rea*. The fourth factor requires the jury to make a moral assessment of what the defendant did.[159]

The 'moral elbow room' view[160]

Here the view taken is that intention is purpose, but that where a defendant is aware that a result is virtually certain to follow from his actions the jury should be given a discretion to decide whether the mental state is wicked enough to be called intention. This would enable supporters of this view to reach what many people would regard as intuitively the correct result: the plane bomber and the desperate surgeon intended to kill V; the burning father and the revengeful wife did not. In these cases some argue that the defendant's wicked recklessness was tantamount to intention and should therefore be treated as such.[161]

Opponents argue that such a test would produce too much uncertainty. Should the case of the desperate surgeon be left to the jury's deliberation: should we not be clear that that is intention? Leaving cases such as that of the plane bomber to the jury means that there is a danger that different juries may reach different conclusions on different facts, leading to the injustice of inconsistent verdicts. It should be the law, not the whim of the jury, which decides whether a person's state of mind constitutes intention.

The 'oblique intention' view

This view is that a result which is foreseen as virtually certain is simply intended. If a person knows that a result will occur as a result of his acts he intended it. Or at least that state of mind is more appropriately classified as intention than recklessness, even if, strictly speaking, it is not intention.[162] Therefore the desperate surgeon, the plane bomber, and the burning father intended to kill V, but the vengeful wife did not (she saw V's death as likely, not virtually certain). The problem scenario for this view is the burning father. Supporters simply reply that although he intended V's death he should be given a defence to ensure he is not guilty of murder. To opponents of this view, to say that the father intended to kill the child when he had the opposite purpose (to save the baby's life) is unsupportable.[163]

159 For further discussion see Foster, Herring, Hope, and Melham (2011).
160 The phrase appears in Horder (1995: 687).
161 Horder (2005b: 38).
162 Simester (1996a).
163 Duff (1990a: 98); Norrie (1999).

The 'Hyam' view

This view suggests that if a result is foreseen as likely then it is intended. Although it has the support of the majority of the House of Lords in *Hyam*, it in fact has few supporters nowadays. Supporters of this view would decide that in all four of our scenarios the defendants intend to kill. Opponents of the view argue that if foresight of a result is intention then the boundary between intention and recklessness becomes hopelessly blurred. ←3 (p.140)

In the following passage, Glanville Williams expresses his support for the oblique intention view:

G. Williams, 'Oblique Intention' (1987) 46 *Cambridge Law Journal* 417 at 424–5

Arguments for recognising oblique intent

That cases of the types mentioned should be treated in the same way as ordinary cases of intention is obvious, but opinions differ between two methods of carrying out the policy. One method would be that already proposed: to relax the definition of intent sufficiently to allow oblique intent as a kind of intent. The other would be to redefine all crimes of intention, when it is desired to bring in oblique intent, by making express provision for it.

The second alternative would involve defining murder, for example, as causing death (i) with intent to cause death or serious injury, or (ii) with knowledge that such death or injury is virtually certain. This would make the law perfectly clear, but the definitions of the relevant crimes would become slightly more cumbrous. There appears to be no possibility that Parliament would now revise the law of murder to make specific provision for this additional mental state (upon which the prosecution would rarely need to rely), and any attempt to do so would reopen the whole thorny issue of risk-taking and murder. And not only murder but also various other crimes requiring intention would need the extended definition.

The first alternative would avoid this drawback. As was shown before, there are solid reasons for saying that oblique intent is recognised in the law as it stands, and if the courts accept this opinion no legislative departures are needed.

The case for taking a broad view of intention is particularly strong where the desired consequence is inseparably bound up with the foreseen though undesired consequence. (i) Consider *Arrowsmith* v. *Jenkins*. A political campaigner commenced to address people on the highway, and continued to do so although she knew that she was causing the highway to be blocked, to a degree that (whether she knew it or not) the law regarded as unreasonable. She was convicted of wilfully obstructing the highway, even though her purpose was to hold a meeting, not to obstruct the highway. In the circumstances, holding the meeting was the same thing as obstructing the highway; they were simply two sides of the same coin. (ii) The following were the facts of a notorious Brighton case of 1871. A woman inserted strychnine into a chocolate and attempted to administer it to V. The chocolate she gave having been found to be poisoned, the woman said that she did not know it, and tried to prove her innocence by showing that poisoned chocolates were circulating in the locality. She did this by introducing strychnine into a confectioner's stock of chocolates; and the buyer of some chocolates died. The poisoner was held guilty of murder; yet her primary intent was to dispel the suspicion against her. She did not want anyone other than V to die, and would not have felt frustrated if, by chance, no one died. In those days the crime of murder was much wider than now; but if the poisoner felt sure that her poisoned chocolates would kill someone, would she not still be rightly convicted of murder on the ground that she intended to kill, notwithstanding that she did not desire to do so?

A peculiar group of cases are those where the law theoretically requires proof of fact *y* but the courts regard it as readily satisfied by proof of *x*. A publisher may be convicted of conspiracy to corrupt public morals, obscenity, or blasphemy, on account of an assumed intent to commit these crimes, if he knowingly publishes matter which the jury find to have a tendency to corrupt public morals, to deprave and corrupt those to whom it is published, etc.; and no evidence is needed to support the jury's conclusion. Strict proof of the purported conclusion would be practically impossible, requiring a large sociological enquiry and a consensus on disputed values. The courts simplify the matter by making the equation $x=y$, *x* being the physical event that the defendant intends (the publication) and *y* being the jury's determination that it amounts to *y*.

15.2 IS INTENTION AN ISSUE OF FACT OR AN ISSUE OF MORAL RESPONSIBILITY?

Is intention a factual concept or is it one that involves a judgment?[164] In other words is intention a psychological fact: if we could see everything that was going on inside the defendant's mind would we know if there was intent? Or is intention in the nature of a moral judgment: is the defendant's state of mind bad enough to deserve the label 'intention'?[165] In the following passage, Alan Norrie discusses these different approaches to intention:

A. Norrie, *Crime, Reason and History* (2nd edn, London: Butterworths, 2002), 47–50

(i) Two approaches to direct and indirect (oblique) intention

It will be helpful if we begin by exploring the meaning of the concept of intention. This is not straightforward for we can identify not one but two conceptions, both of which are relevant to the law. The first is the one that is favoured by the 'orthodox subjectivists' such as Williams and Smith and Hogan, and which has a prominent position in the law itself. It is a formal, 'factual', psychological definition. The second is a more morally substantive, less factual and psychological, account which is reflected in the work, for example, of Anthony Duff (1990), John Gardner (1998) and Jeremy Horder (2000). Here, the emphasis is not on whether the individual as a matter of fact conceived an intention, revealing psychological control of the ensuing action, but rather whether that person's intention was *in its intrinsic quality* morally good or bad. I argue that this latter understanding is also to be found in or behind the law, often in conflict with the first approach, and that we need to understand this interlacing of conflicting views.

(a) The formal psychological ('orthodox subjectivist') approach

In this approach, the paradigm case is the easiest. To talk of intending to do something is to talk of 'meaning' or 'aiming' to do it. It concerns applying one's mind to a particular task

[164] Linked to this issue is a debate over the extent to which defences, such as necessity, become merged with the notion of intention.

[165] See Horder (1995a). It should be noted that other *mens rea* terms do involve an element of moral judgment. A person is reckless only if he takes an unjustifiable risk; a person is negligent only if he behaves unreasonably. It would not, therefore, be extremely radical to suggest that intention carries an element of moral judgment. For further discussion of this point, see Simester and Chan (1997).

and directing one's action to a particular 'aim', 'end' or (the standard lawyer's synonym) 'purpose' (Smith and Hogan, 1999, 54). Our 'purpose' is what we intend to bring about through our actions.

In perhaps most situations it will be relatively clear that an outcome was the direct product of an individual's purpose. A punch on the nose will normally (though not always) be brought about by an intention to punch someone on the nose, so that outcome and intention are directly linked. But there are other situations in which an outcome will not be directly linked to an intention or purpose (end) but will be either a means to a particular end or a by-product or side-effect of such an end. The outcome is not the product of a direct intention, but emerges *obliquely,* as the consequence of the achievement of a desired end (Williams, 1987). Where the outcome is indirectly achieved as a means to an end or as a side-effect (which may not be desired in itself), can one be said to intend it?

Where the means are *necessary* to the desired end, and knowingly undertaken in that light, it is argued that the individual intends the means as well as the end, even if he does not desire (or like) the means themselves. Where the side-effect is known to be a *certain* by-product of achieving one's purpose, it is also argued that one intends the side-effect in addition to the purpose. This analysis conforms with that of Lord Hailsham in *Hyam* ((1974) at 52) where he stated that 'intention' must 'include the means as well as the end and the inseparable consequences of the end as well as the means . . .' For the 'orthodox subjectivist', this linking of what was intended to matters that were strictly not intended involves no element of artificiality: it is quite acceptable to talk of intentions as being either direct or indirect (oblique) (cf Williams, 1987; Goff, 1988, 45–7; Smith and Hogan, 1999, 55). Where artificiality would enter the analysis would be if the means or side-effect were not a *necessary* consequence but a consequence about which there was a degree of chance or probability of its occurrence. Where a side-effect was known to be likely, possible, or probable, one could say that the person *took the risk* that the consequence would occur, but not that he intended it to occur. In other words, he was *reckless* as to its occurrence . . ., rather than intending it.

Finally, an important point of qualification. In the last paragraph, we spoke of *necessary* means and *certain* side-effects of one's actions. But the world is such that we can never act with one hundred per cent certainty that a particular means will be necessary or that a by-product is bound to be created. The world is full of unanticipatable and unanticipated effects which alter or wreck the best-made calculation. I intend to injure my enemy standing behind a closed window by throwing a stone. In 999 cases out of 1000, I must break the window in order to achieve my purpose. On the occasion in question, by a fluke, the window is thrown open as the stone leaves my hand. Or, I intend to collect the insurance on a parcel on a plane by timing a bomb to explode in mid-air. I know it to be a plane without parachutes or ejector seats. It is as certain as can be that the pilot will be killed but, by a freak, he falls from a great height and lives. Could the stone thrower or the bomb planter claim that the possibility of a fluke or freak stopping the means or side-effect occurring meant that he did not intend it, since it was not *absolutely bound* to happen? Could he rely on the chance in a thousand to say that the means or side-effect was not intended since it was not *genuinely* certain to occur? Could he claim that he very much hoped that the window would be thrown open or the pilot would be saved, and that given the possibility of the outside chance, he therefore did not intend the side-effect?

The answer on this analysis is that our actions and plans are always subject to the intervention of the unexpected and this is as true of our direct purposes as of the means to our ends or side-effects of our purposes. The unexpected may defeat the achievement of our purpose or render our calculation of means and side-effects wrong, but it does not cancel our intentions or purposes whether those are either direct or indirect. We need therefore to

qualify the argument about the certainty of means or side-effects by talking of certainty 'for all practical purposes'. Judges have used the phrases 'moral' or 'virtual' certainty to denote a situation where an event will occur 'barring some unforeseen intervention' (*Nedrick* (1986)). The important point to note is that 'virtual certainty' *is* a kind of certainty (the only kind in fact that ever exists) and not a kind of high probability or chance.

(b) The morally substantive approach

Duff's critique of the foregoing approach is that it fails to reflect the way in which we understand wrongdoing. Orthodox subjectivism splits one moral judgment, whether a person directed his moral energies into doing something wrong, into two (subjective and objective) components. The 'objective' component is the harm that constitutes the wrong or the crime, which is measured in terms of the bad consequences it produces. The 'subjective' element is the fault of the wrongdoer, which is judged by whether the objective consequences were *as a matter of fact* known, foreseen or intended. For Duff, this approach is inadequate for it fails to reflect the nature of our moral judgments, in which 'objective' wrongdoing and 'subjective' fault are always combined. Thus to judge harm, we need to know about the *moral* quality of what was intended:

> '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 . . . *attacks* my life and my most basic rights; and the harm which I suffer in being murdered . . . essentially involves this wrongful attack on me . . . 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'. (Duff, 1990, 113)

And to judge intention, we need to know its moral quality:

> '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.' (Duff, 1990, 112–13)

The intention to do wrong is not a crime because a person has a psychological intention to do a criminal act, but because that intention manifests moral wrong-doing. The idea that intentions reveal bad moral attitudes leads to less emphasis on the precise forms of intention and more on what they reveal about the wrongdoer's motives. For the orthodox subjectivist, a person is guilty of murder where he intends to kill or cause serious ('grievous bodily') harm, or foresees death or serious injury as a virtual certainty, but not where he foresees death or serious injury as a probability. (These are the law's requirements too.) For the orthodox subjectivist, there is doubt as to whether intending to cause serious harm ('implied malice') is a sufficient alternative mental state to a direct intention to kill. Even foreseeing death as a virtual certainty (indirect intention) smacks to some of a false constructivism because there is no direct link between what was intended and the outcome of death. Only an intention actually to kill truly links with the result. Certainly foreseeing death or serious injury as a probable consequence (reckless killing) does not link what was intended sufficiently to the outcome of death to count as murder.

For Duff, the killer in all these situations may legitimately be convicted of murder. Where there is foresight of virtual certainty of death or serious injury, the killer displays 'an utter indifference to [the victim's] rights or interests' (Duff, 1990, 114). Further, where a person

foresees the probability of death by exposing his victim to its serious risk (which English law does not see as murder), Duff argues that it is legitimately charged as murder. Such a person is 'wickedly reckless' and guilty of murder, for death 'is an integral aspect of his intended attack' (Duff, 1990, 177). On the orthodox subjectivist approach, as with the law of murder, such a person is guilty only of reckless manslaughter. With the morally substantive approach, this is not so. The moral quality in the act is more important than a precise distinguishing of different psychological states.

QUESTIONS

1. Larry Alexander and Kimberly Fessler Kerzan (2009) have argued that we should not draw a distinction between intention and recklessness. They both indicate essentially the same vice: insufficient concern for others. He sees the justifiability of the risk as more important than the difference between foresight (recklessness) and purpose (intent). Distinguishing in moral terms the mercy killer and the terrorist risking people's lives in terms of the justifiability of the risk taken is more persuasive than considering the cases in terms of purpose or foresight. Do you agree?
2. The Law Commission (2006: para. 9.10) has suggested the following definition of intention:

   '(1) A person should be taken to intend a result if he or she acts in order to bring it about.

   (2) In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action.'[166]
3. Would this result in a change in the law?

FURTHER READING

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Kugler, I. (2002) *Direct and Oblique Intention in the Criminal Law* (Aldershot: Ashgate).

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16 RECKLESSNESS

16.1 SUBJECTIVE AND OBJECTIVE FORMS OF RECKLESSNESS AND INADVERTENCE

As shown in Part I of this chapter there were until relatively recently two kinds of recklessness in English and Welsh criminal law: *Cunningham* recklessness and *Caldwell* recklessness. Neither form of recklessness has escaped criticism. ←5 (p.145)

Criticisms of *Cunningham* recklessness

Cunningham recklessness is too narrow, say some commentators. Can it be right that a defendant who cares so little about other people that he does not consider whether his actions might harm them deserves to be acquitted? Should defendants who are so angry or self-absorbed that they do not notice the risks they are posing to others be acquitted?[167] Indeed, critics point out, it is noticeable that if a defendant fails to notice a risk because he is drunk he is still *Cunningham* reckless: Why restrict this to drunkenness? Why not include other blameworthy reasons for failing to see an obvious risk? Critics add that attempts by the courts to include 'putting awareness to the back of your mind'[168] within the concept of recklessness demonstrate that pure *Cunningham* recklessness is too narrow. And does *Cunningham* recklessness pre-suppose that we can draw a clear line between our conscious and sub-conscious awareness?[169]

Supporters of *Cunningham* recklessness are often supporters of the choice theory. They argue that a defendant cannot be said to have chosen to undertake a risk of which he was unaware. Indeed he cannot be blamed for being indifferent to other people's welfare if he was not aware that they were at risk of being harmed.[170] We can only guess what the defendant's attitude would have been had he been aware of the risk. Michael Moore[171] concludes that there is a fundamental difference between a choice (advertent risk) and an unexercised capacity (inadvertent risk). Some supporters of *Cunningham* recklessness are willing to accept that a

[167] S. Gardner (1993). [168] e.g. *Parker* [1977] 1 WLR 600 (CA). [169] See Bandes (2010).
[170] White (1991: ch. 7). [171] Moore (1996: ch. 1).

person may be blameworthy for failing to notice an obvious risk, but argue that such a person is not as blameworthy as the person who sees the risk and nevertheless takes it. Inadvertent defendants may deserve blame, but they do not deserve to be classified as reckless.[172]

Criticisms of *Caldwell* recklessness

Caldwell recklessness has many critics. The decision enraged some commentators so much that ordinary standards of etiquette when commenting on judicial decisions were put aside, with Professor Smith calling Lord Diplock's reasoning in the case 'pathetically inadequate'.[173] One particular ground of criticism is based around the decisions in *Elliott v C*[174] and *Coles*.[175] By convicting these defendants on the basis of failing to see a risk which would have been obvious to a reasonable person (even if it would not have been obvious to a reasonable person of those defendants' mental abilities), they are said to go against fundamental principles of justice. Even accepting the moral thrust of *Caldwell* recklessness (we blame a defendant for failing to see a risk which he *should* have seen) such an argument is legitimate only where the defendant could have foreseen the risk. To punish someone for failing to do something he or she was incapable of doing seems manifestly unjust.[176] It is hard to mount a defence of the reasoning in these cases except on the basis that it is more important to protect victims from harm from others than to achieve justice in every case. ←6 (p.148)

Although there is hardly a consensus amongst commentators, it seems that a majority would accept that *Cunningham* recklessness is too narrow, while *Caldwell* recklessness is too wide. Is there a middle way between the two forms? Some commentators have suggested that the decision of the House of Lords in *Reid*[177] hinted at one.[178] In cases of inadvertence we should ask why the defendant failed to see an obvious risk. If the defendant has a good reason (e.g. a sudden emergency) he is not reckless. But if he does not have a good reason (e.g. he is angry) then he is reckless.

We will now consider the writings of two theorists who have sought to develop a middle way between *Cunningham* and *Caldwell* recklessness.

16.2 AN INSUFFICIENT REGARD FOR THE INTERESTS OF OTHERS: VICTOR TADROS

Victor Tadros describes the vice of recklessness as an insufficient regard for the interests of others. In the following passage, he explains why he thinks that people can be responsible for the way they form their belief that their actions are or are not risky:

V. Tadros, 'Recklessness and the Duty to Take Care' in S. Shute and A. Simester (eds) *Criminal Law Theory* (Oxford: OUP, 2002), 248–50

We are responsible for our beliefs. That idea, it seems to me, is part of the motivation of many of those who argue for objective recklessness. Some who argue for a very strong form

[172] Kessler Ferzan (2001). [173] J.C. Smith (1981). [174] [1983] 2 All ER 1005 (DC).

[175] [1995] 1 Cr App R 157 (CA).

[176] Whether on the detailed facts of the particular case C deserved to be punished is discussed in Field and Lynn (1992).

[177] [1992] 3 All ER 673 (HL). [178] Field and Lynn (1993).

of objective recklessness seem to think that it is the falsity of the defendant's belief that provides the target for criminal liability. But, as we have seen, that one has all of the virtues associated with belief formation in proper balance does not guarantee that one's beliefs will all be true. One can have all of the virtues associated with believing and yet hold false beliefs, even beliefs that most ordinary reasonable people would not hold. For this reason, our responsibility for our beliefs is not sufficient ground for imposing criminal liability in cases where the defendant had a false belief that there was no risk involved in the action that she performed. Consequently, our attention turns from the nature of the belief that is held to the process of belief formation.

To see this, let us return to example (6). [I am driving home to watch the football and I come to a junction. I am about to rush out, not caring that a pedestrian might be killed. However, I suddenly realize that I might damage my lovely new car and consequently look either way, just as a responsible driver would. I form the belief that there is no danger but I fail to notice a pedestrian who unexpectedly dashes in front of my car, and run her over.] In that example, I formed a belief that there was no danger to pedestrians, but that was not a response to my concern for pedestrians but rather my concern for my car. However, I did all that was required of me to ensure that the way was clear; I fulfilled my responsibility. In that case it is wrong to make me criminally liable for the death of the pedestrian. I had *done* as much as could be expected of a truly virtuous person, even though I was not truly virtuous. That I was indifferent to the fate of the pedestrian is not sufficient reason to hold me criminally liable. Fulfilling my responsibility to ensure that the way was clear ought to absolve me of criminal liability even if false beliefs are formed. The falsity of the belief itself is not sufficient evidence of fault. If we are to find fault, we must find it in the process of belief formation. Furthermore, it may be that the defendant has not formed his belief in the way that he ought and yet criminal liability may still be inappropriate. For it must be shown that, in holding a false belief, the defendant manifests the appropriate kind of vice.

It might be thought that the appropriate kind of vice is displayed whenever the defendant has formed an irrational or unreasonable belief about the risks. If that were the case, irrationality or unreasonableness would not simply be descriptions of the nature of the belief itself, regardless of who holds it, but descriptions of the way in which the belief was formed. Such a view might be supported by Joseph Raz's recent analysis of irrational beliefs. 'A belief is irrational', Raz writes, 'if and only if holding it displays lack of care and diligence in one's epistemic conduct'. Showing lack of care and diligence, it might be argued, displays a vice that is central to the imposition of criminal liability. After all, that one fails to take care or be diligent also shows that one is insufficiently motivated by the interests of the individuals who might suffer from one's lack of care and diligence.

However, it is not at all clear that the fact that one holds an irrational belief necessarily shows a vice of this kind. That one holds an irrational belief is not itself evidence of a lack of care on the part of the believer. A number of other vices might result in the formation of an irrational belief. It might be that the defendant is merely stupid or illogical; vices which, whilst in themselves warranting blame, do not give rise to the kind and degree of blame that the imposition of criminal liability expresses. If one has such vices, one can take all the care that is required and yet fail to form rational beliefs. In fact, this argument might even be stretched to include some other failings, such as some instances of arrogance.

Consider *R v Shimmen*, in which a martial arts expert attempted to perform a kick near to a window without breaking it. Suppose that he formed the belief that there was no risk involved at all due to an arrogant belief in his own ability. We might conclude that he had manifested a vice in breaking the window, and consequently attribute responsibility to him for breaking the window. But is it correct to attribute criminal liability to him? The difficulty in

doing so is that the criminal law should not be interested in the kinds of vice that Shimmen manifested. That Shimmen was arrogant does not show clearly that Shimmen was 'insufficiently different' to the interests of others. It may be that he cared deeply about the shopkeeper and his window, and was sincerely mortified at having broken it (and not because of a change of heart, motivation, or perspective), but truly (though arrogantly) believed that he was doing nothing to put the window at risk. Shimmen may have been responsible for breaking the window but, at least on this presentation of the facts, he did not display an appropriate vice in breaking the window and consequently he ought not to be made criminally liable for it. He did not show an insufficient regard for the interests of others. And that, as I argued above, is central to the concerns of the criminal law.

These considerations militate against many popular constructions of objective recklessness. For example, accounts that rely on the risks that the defendant ought to have recognized, even those such as Hart's that restrict liability to the capacity of the accused to recognize the risks involved in performing a particular action, are too broad. Defendants such as Shimmen, on my construction of the facts, ought to recognize the risks and have the capacity to recognize the risks. Nevertheless, they ought not to be made criminally liable.

This should help to guide us in formulating an appropriate definition of objective recklessness. An appropriate definition of objective recklessness would focus on the process of belief formation. And it would be required to distinguish between cases of mere irrationality, stupidity, or arrogance and cases where the formation of an irrational belief shows that the defendant was not adequately motivated by the interests of others. In an earlier part of the discussion, I suggested that our responsibility for our beliefs is grounded on two facts. The first fact is that belief formation is governed by norms. There are norms that govern the ways in which we ought to see the world, and to interpret what we see. One important aspect of the intellectual virtues has to do with the system of norms that we ought to apply to the formation of beliefs. The second fact is that we have some control over which evidence we are presented with. There are also norms that apply to evidence-gathering; the intellectual virtues relate to the system of norms we apply to evidence-gathering as well. Might these two facts provide grounds upon which we can construct a test for objective recklessness? It will be no surprise that I think that they can.

However, one caveat is in order. My claim is not that these are the only ways in which belief formation is sufficiently vicious to warrant criminal liability. It may be that the test of objective recklessness can be extended to include other cases, in particular cases where the offending belief is derived from a further belief that was viciously formed. Space does not permit me fully to discuss such cases here, though I will try to illuminate some potential problems for assessing liability in such cases. The two cases that I will concentrate on here are, I think, the central cases. The first is where the individual has sufficient information at his fingertips to form the belief that there is a significant risk of a wrong being done to another but, due to a motivational reason of a particular kind, fails to form the belief that such a wrong will be brought about. The second is where an individual knows that a situation that he is in, or the activity that he is performing, might give rise to particular risks and fails to investigate whether there are such risks. In the next section I will show how these two cases might be appropriate targets for the imposition of criminal liability.

. . .

D. Conclusions

From this discussion, we can derive a test of recklessness that can be applied where the agent has failed to realize the risks that his action created. The agent will be reckless if the following conditions are fulfilled:

> (a) the action was of a kind that might carry risks with it according to the beliefs of the individual; and either:
>
> (bi) given those beliefs the agent failed to fulfil his duty of investigating the risks; or
>
> (bii) the agent wilfully blinded himself to the existence of the risks.
>
> Where these conditions are not fulfilled it might well be appropriate to make the defendant civilly liable for any harm that is caused through his risky action. But, for the most part at least, criminal liability is inappropriate. This is because the criminal law, unlike the civil law, is concerned not with distributing losses but with punishing the defendant for harms both for which he is responsible and which manifest the appropriate kind of vice.
>
> The test proposed marks a middle way between purely objective and purely subjective accounts. In favour of objective accounts, there are at least some cases where one can attribute *mens rea* to the defendant despite the fact that she does not recognize the risks involved in what she is doing. If her background beliefs are such that she ought to investigate the risks and she does not perform that investigation adequately, or if she forms a belief that there is no risk for a non-evidential reason, it is appropriate to regard her as reckless for the purposes of the criminal law. On the other hand, the test is sensitive to considerations of the rule of law that subjectivists are concerned with. Citizens are given a fair opportunity to know when they are and are not breaching the criminal law, without being required to go far beyond the call of duty in investigating the risks involved in acting day-to-day. It is only those actions that are already recognized by the defendant as risky that have attached to them burdens of investigation, at least as far as the criminal law is concerned. Furthermore, the central purpose of the criminal law, of punishing those who manifest vices such as cruelty or indifference, is achieved without also making criminals of the stupid, the ignorant, or the clumsy.

16.3 PRACTICAL INDIFFERENCE: ANTONY DUFF

Antony Duff[179] has proposed an understanding of recklessness based on the concept of practical indifference:[180]

> An appropriate general test of recklessness would be—did the agent's conduct (including any conscious risk-taking, any failure to notice an obvious risk created by her action, and any unreasonable belief on which she acted) display a seriously culpable practical indifference to the interests which her action in fact threatened?

This proposal is an attempt to develop a form of recklessness which is in between *Caldwell* and *Cunningham* recklessness. It is wider than *Cunningham* recklessness but narrower than *Caldwell*. It captures both those who see a risk and take it and those who fail to see a risk because they are practically indifferent to the needs of others.[181] The significance of the term 'practically indifferent' is that Duff is able to argue that inadvertence caused by practical indifference is a subjective state of mind: an attitude of the defendant. Whether or not a defendant notices a risk indicates what his or her attitude towards such risks is. The failure to notice an obvious risk might indicate that the defendant could not care less whether the risk materialized. He gives as an example a bridegroom who is found drinking in a pub at the

179 Duff (1990a: 172). 180 See also Simons (1992) who uses the term 'culpable indifference'.

181 Gardner and Jung (1991) take the view that advertence to a risk can be described as an example of indifference.

time of his wedding and explains that he completely forgot about his big day. Quite simply this is the kind of thing one should not forget about and we can properly assume that he did not regard the wedding as sufficiently important.[182] Duff argues that what we do reflects what we care about. Others reject the argument that an action can encapsulate inadvertence.[183] Kessler Ferzan discusses eating an ice-cream cone.[184] Does this show an indifference to whether I gain weight, she asks? It might, or it might in fact be that I debated long and hard within myself whether or not to eat the cone, given its weight-inducing possibility. In the latter case it could hardly be said that I was indifferent to putting on weight, she argues.[185] Another way of considering practical indifference is to ask how would the defendant have acted if he or she had been aware of the risk. If he or she would have acted in the same way then that demonstrates that he or she has the same lack of concern for others as a person who deliberately takes a risk of harming others.[186]

Although Duff's proposal is attractive it has received its critics. Alan Norrie[187] focuses on the example of rape, which Duff discusses. Duff argues that a man who does not ask a woman whether she consents to sexual intercourse and just assumes that she does is practically indifferent to the woman's interests and can therefore be classified as reckless. Norrie argues that although any right-thinking person would blame such a man, we cannot say that he is necessarily indifferent to the woman's interest. He may hold outrageous views on women's consent to sexual intercourse (e.g. that any woman would want to have sexual intercourse with him), but it does not follow that he is *indifferent* to the woman.[188] He may genuinely care whether or not she consents but believe she consents because he is irresistibly attractive, for example. Norrie argues that Duff is classifying such a man as 'practically indifferent' not because that is actually his state of mind, but because 'we' are appalled at his attitude towards women. Norrie is happy to blame such a defendant, but he says Duff cannot claim that doing so is a subjective test. Norrie argues that Duff moves from the notion that the defendant ought to have realized this risk to the notion that the defendant was indifferent to the risk too quickly. Duff's response to this argument is that he does not accept the argument that we can consider states of mind divorced from actions.[189] In other words the actions of the defendant are the actions of an indifferent person, and hence the defendant is classified as indifferent. This reply will convince only those who agree with Duff's understanding of the meanings of actions. However, most subjectivists do not.[190]

More supportive critics may agree with Duff that the practically indifferent people are blameworthy, but argue that he needs to demonstrate that they are sufficiently blameworthy to be classified along with the advertent as reckless. Brady[191] picks up on Duff's example of the groom in the pub at the time of the wedding and argues that we may blame him, but surely he is not in the same class of blameworthiness as the groom who is drinking while fully aware that the bride and all the guests are waiting for him. In other words, even if inadvertence may be blameworthy, it is not as blameworthy as advertence.[192]

182 Although if the defendant had simply forgotten about the risk: would that suggest a lack of consideration? See for discussion of forgetting risks Husak (2011).

183 Kessler Ferzan (2001).

184 *Ibid*, 618.

185 A further difficulty is how the law should deal with a defendant who fails to see a risk due to his racist or sexist beliefs.

186 Simons (1992).

187 Norrie (2001: ch. 4).

188 See also Brady (1996).

189 Duff (1996: ch. 1).

190 See further Kessler Ferzan (2002).

191 Brady (1996).

192 For an alternative analysis based on the notion of 'acceptance', see Michaels (1998).

By contrast Alexander and Kessler Ferzan focusing on insufficient concern for others focus on a subjective test. Notice that their approach has relevance for them not only to *mens rea* issues, but also the law on causation (see the extract at p.199):

L. Alexander and K. Kessler Ferzan, 'Beyond the Special Part' in S. Green and R.A. Duff (eds) *Philosophical Foundations of Criminal Law* (Oxford: OUP, 2011), 232–5

In Crime and Culpability, we analyse what it would mean for the criminal law to take retributive justice seriously. How would we formulate crimes if they were designed to give individuals what they deserve? In our view, individuals deserve punishment when they act culpably, and an actor is culpable when he exhibits insufficient concern for others. (Culpability as insufficient concern for others is a view not only of criminal culpability but also of moral culpability more generally; for us, culpability is a univocal notion.) Actors demonstrate insufficient concern for others when they (irrevocably) decide to harm or risk harming other people (or their legally protected interests) for insufficient reasons—that is, when they act in a way that they believe will increase others' risk of harm without and regardless of any further action on their part, and their reasons for unleashing this risk fail to justify doing so. If Alex decides to drive 100 miles an hour on the highway, whether we deem Alex culpable and deserving of blame and punishment will depend upon whether he has chosen to impose this risk to impress his friends with how fast his car can drive or, alternatively, to transport a critically injured friend to the hospital.

As criteria for insufficient concern, the criminal law need not employ the Model Penal Code's four mental states—purpose, knowledge, recklessness, and negligence. The same type of assessment is involved whether we are judging purpose, knowledge, or recklessness—a weighing of the risks the actor believes he is imposing and his reasons for doing so. When an actor purposefully aims to injure another—injuring is his conscious object for acting—his reasons are presumptively culpable. When an actor knowingly harms another—believes to a practical certainty that his act will harm—the degree of risk is presumptively culpable. But, in instances of both purpose and knowledge, these presumptions may be rebutted by showing that the actor was justified in imposing the risk that he did. In contrast, as formulated, recklessness requires the risk to be unjustified, thus building lack of justification into the mental state itself. In all of these cases, however, for a defendant ultimately to be deserving of punishment, the risks he takes must be unjustified. The current approach of separating this single criterion for culpability into three discrete mental states creates doctrinal difficulties as well as the false impression that these three mental states neatly line up in a culpability hierarchy.

Negligence, on the other hand, is not culpable. There is no principled and rationally defensible way to construct the 'reasonable person' against whom we judge the actor and who we are to presume would have adverted to the risk to which the actor failed to advert. Infinite possible constructs exist between full omniscience and the actor's own subjective beliefs, but there is no reason to privilege any of these constructs as the appropriate normative standard against which to judge the actor. Moreover, even if we could construct such a perspective, the negligent actor lacks the requisite control over this 'risk'. Risk is a matter of epistemic perspective, and a 'negligent' actor who assesses a risk as lower than others would is not culpable for his epistemic shortcomings. It is the risk that the actor estimates—not the risk an actor possessed of more information, a better perspective, or superior inferential ability would have estimated—that determines culpability.

QUESTIONS

1. Anne finds a gun in a park and for a joke, assuming that it has no bullets in it, fires it at her friend Bertha. In fact there are bullets in the gun, and Bertha's eye is seriously injured. Anne is not guilty of assaulting Bertha (she did not intend and was not *Cunningham* reckless as to the injury). If Bertha were later to die from her injuries Anne might be guilty of manslaughter (she may be grossly negligent). Is this the law being an ass?
2. Is it arguable that for minor crimes such as criminal damage the law is entitled to use a more objective test so that cases can be dealt with more quickly in the courts, while for more serious offences, such as an assault, the law should take more time to ensure that the defendant really is blameworthy and hence a subjective test should be used? Is it more justifiable to punish a defendant for indifference when he is doing something which he knows to be particularly dangerous (e.g. driving)?

FURTHER READING

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Kessler Ferzan, K. (2002) 'Don't Abandon the Model Penal Code Yet! Thinking Through Simons's *Rethinking*' *Buffalo Criminal Law Review* 6: 185.

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Simons, K. (2002) 'Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"?' *Buffalo Criminal Law Review* 6: 219.

Staihar, J. (2010) 'Culpability and the Relevance of Substantial Risks, Motivations, and Lesser Harms' *Law and Philosophy* 385.

Tadros, V. (2002a) 'Recklessness and the Duty to Take Care' in S. Shute and A. Simester (eds) *Criminal Law Theory* (Oxford: OUP).

—— (2005) *Criminal Responsibility* (Oxford: OUP), ch. 9.

17 NEGLIGENCE

Although many crimes are based on negligence, nearly all of them concern minor offences which carry a slight stigma, such as motoring offences. As noted in Part I of this chapter

liability for negligence does not depend on the state of mind of the defendant but rather what the defendant did: did he or she act in a way in which a reasonable person would not have acted? This has led some commentators to argue that negligence should not be classified as a *mens rea*, a state of mind.[193] Of greater importance is the fact that many commentators feel that it is improper for the criminal law to use negligence.[194] ←8 (p.153)

17.1 OPPOSITION TO THE USE OF NEGLIGENCE IN CRIMINAL LAW

Clearly those who support the choice theory will object to liability based on negligence.[195] A negligent actor has not chosen to risk the harm to others. Character theorists will find it easier to support the doctrine because a negligent act may indicate a blameworthy characteristic (e.g. a lack of concern for others). However, Michael Moore argues that a single negligent act does not manifest a careless disposition.[196] A single act of negligence might simply be an accident or forgetfulness. It is only once a pattern of negligent acts develops that we may conclude that the defendant's character is in fact indifference to others. Moore concludes that the character theory cannot explain why an isolated act of negligence is punished. Indeed most of us take risks of causing harm to others at times, it is very hard not to.[197]

17.2 SUPPORT FOR THE USE OF NEGLIGENCE IN CRIMINAL LAW

We will now consider the writings of those who seek to support liability for negligence, at least in some cases. Professor Herbert Hart has sought to justify a modified form of negligence. The defendant should be liable if, given his or her mental and physical capabilities, he or she had the capacity to see the risk:

H.L.A. Hart, 'Negligence, *Mens Rea* and the Elimination of Responsibility' in H.L.A. Hart, *Punishment and Responsibility* (Oxford: OUP, 1968), 152–7

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice.' But . . . there is no reason (unless we are to reject the whole business of responsibility and punishment) *always* to make this protest when someone who 'just didn't think' is punished for carelessness. For in some cases at least we may say 'he could have thought about what he was doing' with just as much rational confidence as one can say of any intentional wrong-doing 'he could have done otherwise.'

193 e.g. G. Williams (1982).
194 e.g. Kenny (1978).
195 e.g. M. Moore (2000); Brady (1980b); Mackie (1977: 210).
196 M. Moore (1997: 241).
197 See further Alexander and Kessler Ferzan (2009). Although see Leipold (2011) who emphasizes that negligence only captures those who take unreasonable risks.

Of course, the law compromises with competing values over this matter of the subjective element in responsibility. . . .

The most important compromise which legal systems make over the subjective element consists in its adoption of what has been unhappily termed the 'objective standard.' This may lead to an individual being treated for the purposes of conviction and punishment as if he possessed capacities for control of his conduct which he did not possess, but which an ordinary or reasonable man possesses and would have exercised. The expression 'objective' and its partner 'subjective' are unhappy because, as far as negligence is concerned, they obscure the real issue. We may be tempted to say with Dr Turner that just because the negligent man does not have 'the thought of harm in his mind,' to hold him responsible for negligence is *necessarily* to adopt an objective standard and to abandon the 'subjective' element in responsibility. It then becomes vital to distinguish this (mistaken) thesis from the position brought about by the use of objective standards in the application of laws which make negligence criminally punishable. For, when negligence is made criminally punishable, this itself leaves open the question: whether, before we punish, both or only the first of the following two questions must be answered affirmatively.

(i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?

(ii) Could the accused, given his mental and physical capacities, have taken those precautions?

. . . If our conditions of liability are invariant and not flexible, *i.e.* if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard. In *such* cases, indeed, criminal responsibility will be made independent of any 'subjective element,' since the accused could not have conformed to the required standard. But this result is nothing to do with negligence being taken as a basis for criminal liability; precisely the same result will be reached if, in considering whether a person acted intentionally, we were to attribute to him foresight of consequences which a reasonable man would have foreseen but which he did not. 'Absolute liability' results, not from the admission of the principle that one who has been grossly negligent is criminally responsible for the consequent harm even if 'he had no idea in his mind of harm to anyone,' but from the refusal in the application of this principle to consider the capacities of an individual who has fallen below the standard of care.

It is of course quite arguable that no legal system could afford to individualise the conditions of liability so far as to discover and excuse all those who could not attain the average or reasonable man's standard. It may, in practice, be impossible to do more than excuse those who suffer from gross forms of incapacity, viz. infants, or the insane, or those afflicted with recognisably inadequate powers of control over their movements, or who are clearly unable to detect, or extricate themselves, from situations in which their disability may work harm. Some confusion is, however, engendered by certain inappropriate ways of describing these excusable cases, which we are tempted to use in a system which, like our own, defines negligence in terms of what the reasonable man would do. We may find ourselves asking whether the infant, the insane, or those suffering from paralysis did all that a reasonable man would *in the circumstances* do, taking 'circumstances' (most queerly) to include personal qualities like being an infant, insane or paralysed. This paradoxical approach leads to many difficulties. To avoid them we need to hold apart the primary question (1) What *would* the reasonable man with ordinary capacities have done in these circumstances? from the second question (2), *Could* the accused with *his* capacities have done that? Reference to such factors as lunacy or disease should be made in answering only the second of these questions. This simple, and surely realistic, approach avoids difficulties which the notion of

individualising the standard of care has presented for certain writers; for these difficulties are usually created by the mistaken assumption that the only way of allowing for individual incapacities is to treat them as part of the 'circumstances' in which the reasonable man is supposed to be acting. Thus Dr Glanville Williams said that if 'regard must be had to the make-up and circumstances of the particular offender, one would seem on a determinist view of conduct to be pushed to the conclusion that there is no standard of conduct at all. For if every characteristic of the individual is taken into account, including his heredity the conclusion is that he could not help doing as he did.' (The General Part (1st Ed.) p. 82.)

But 'determinism' presents no special difficulty here. The question is whether that individual had the capacity (inherited or not) to act otherwise than he did, and 'determinism' has no relevance to the case of one who is accused of negligence which it does not have to one accused of intentionally killing.

QUESTIONS

1. Is punishing negligence punishing someone for an omission: for failing to act as a reasonable person would have done? Is this legitimate, given the law's general reluctance to punish omissions?
2. Is it more legitimate to punish for negligence when the defendant is doing an activity which is known to be dangerous (e.g. driving, carrying out an operation) than where the defendant is doing something that is not especially risky?

FURTHER READING

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Huigens, K. (1998) 'Virtue and Criminal Negligence' *Buffalo Criminal Law Review* 1: 431.

Leipold, A. (2010) 'A Case for Criminal Negligence' *Law and Philosophy* 455.

Simester, A. (2000) 'Can Negligence be Culpable?' in J. Horder (ed.) *Oxford Essays in Jurisprudence* (Oxford: OUP).

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18 INTOXICATION

18.1 INTOXICATION AND CRIME

Alcohol

Many commentators accept that there is a link between alcohol and crime.[198] But the strength of that link is a matter of debate.[199] The following comment summarizes the general opinion: 'alcohol may be neither a necessary nor sufficient *cause* of crime, but may

[198] Marsh *et al* (2001).

[199] Although for a disturbing account of the levels of drinking among young people and the resultant crime, see Richardson and Budd (2003).

nevertheless *affect* crime'.[200] Consider these statistics which may yet persuade you to take a vow of temperance(!):

(1) 45 per cent of victims of violent crime believe their attackers were intoxicated.[201]
(2) 58 per cent of rapists were intoxicated.[202]
(3) 37 per cent of domestic violence offenders were drunk.[203]
(4) 88 per cent of criminal damage cases involved a drunk offender.[204]
(5) In 2008, 6,769 people in England and Wales died from causes directly linked to alcohol consumption.[205]
(6) Alcohol-related crime costs the UK £7.8 billion a year[206] and costs the NHS £2.7 billion.[207]

Although these statistics may indicate a strong connection between alcohol and crime, at least one commentator has expressed the view that given the number of people intoxicated at any given time among the general population it is not surprising that so many offenders are drunk.[208] Another unorthodox response is that crime leads to intoxication rather than the other way round.[209] It may be added that many victims of violent offences were drunk at the time.[210]

Drug misuse

Of course alcohol is a kind of drug, but it is a legal one. There is a well-established link between illegal drug use and crime, although there is some dispute whether serious drug users are usually involved in crime before starting their drug misuse.[211] The link between drug crime and property offences committed to finance a drug habit is well established. A recent study suggested that 30 per cent of those arrested were addicted to drugs.[212]

18.2 ALCOHOLISM AND DRUG DEPENDENCY: ILLNESS OR WEAKNESS?

There is much debate over the correct understanding of alcohol and drug dependency. On the one hand there are some who see alcoholism (properly known as alcohol dependency syndrome) and drug addiction as a kind of illness or disease which should be treated as a medical condition.[213] Others see them as a major social problem caused by people's own character weaknesses (drunkenness being an 'odious and loathsome sin')[214] requiring a tough response from the criminal justice system.[215] In the terms of a criminal trial there is a debate whether intoxication should be regarded as an aggravating or mitigating factor.[216] It

[200] Raistrick *et al* (1999: 54). [201] Home Office (2009). [202] Alcohol Concern (2005).
[203] Home Office (2009). [204] Home Office (2000c). [205] National Health Service (2010).
[206] Alcohol Concern (2005). [207] National Health Service (2010). [208] South (1999: 948).
[209] Raskin, White, and Gorman (2000). [210] Home Office (2000c). [211] Hough (1996).
[212] Travis (2001).
[213] Jellinek (1961). For a rejection of the 'disease' view, see Fingarette (1988).
[214] See the discussion of the history of the law's response towards intoxication in Horder (1997a).
[215] See the excellent discussion in Tomlie (2002). [216] *Bradley* (1980) 2 Cr App R (S) 12.

may be that attitudes towards drugs are changing, with at least one commentator controversially suggesting that young people now regard drug misuse as 'normal' behaviour.[217]

18.3 EXPLAINING THE PRESENT LAW ON INTOXICATION

As was seen in Part I, the law's approach to intoxication can be regarded as confusing. In relation to crimes involving intention (specific intent offences) intoxication is simply regarded as part of the evidence the jury can take into account in deciding whether the defendant intended the result.[218] Similarly for recklessness (basic intent offences) and involuntary intoxication the question is simply whether the defendant foresaw the risk, and the involuntary intoxication is simply part of the evidence concerning what the defendant foresaw. The only special legal rule concerns crimes of recklessness where the defendant was voluntarily intoxicated. One explanation is that the defendant is treated as having foreseen the risk (whether or not in fact he did) and therefore reckless. How can we explain the law? ←9 (p.156)

This 'presumption of recklessness' could be explained in this way: a person who takes alcohol or drugs is aware there is a risk that he may behave in an unpredictable way. Behaving in an unpredictable way must include committing a crime. Therefore by drinking or taking drugs the defendant is aware that he or she runs the risk of carrying out an offence.[219] He or she is therefore reckless. This reasoning has been criticized on several grounds:

(1) Section 8 of the Criminal Justice Act 1967[220] requires a jury to consider all the evidence before deciding whether the accused foresaw a result. This has been interpreted by some commentators[221] to mean that the jury should not rely on presumptions of foresight.

(2) Even if it is accepted that there is recklessness at the time of the drinking there is no coincidence of the *actus reus* and *mens rea*, as is normally required in the criminal law.[222]

(3) The foresight, as explained in the argument above, is that the defendant is aware that he may commit some crime after drinking. However, normally in offences requiring recklessness it is necessary to show that the defendant foresaw a specific kind of harm (e.g. that she would injure someone).

(4) Some argue that the explanation of the law is unconvincing where the defendant has never drunk alcohol before and is unaware of its potential effects. There are similar problems where the defendant is an experienced drinker who, for example, has had two dry sherries before dinner all his life, without ever committing an offence, but on one night the sherries intoxicate him and he commits a crime.[223] In such cases these defendants may justifiably claim that they did not foresee that they might commit an offence.

[217] H. Parker (1997).

[218] Coles and Jang (1996) suggest from a psychological perspective that intoxication cannot affect a person's intent.

[219] See e.g. *Bennett* [1995] Crim LR 877. This explanation appears to have been explicitly rejected in *Heard* [2007] EWCA Crim 125, para. 30.

[220] Quoted above at p.140. [221] e.g. Allan (2003: 154–6).

[222] Weight was placed on this argument by the High Court of Australia in *O'Connor* (1980) 54 AJLR 349.

[223] Orchard (1993).

In the light of these objections some fall back on the view that the law here is based on public policy. What the law is really doing is deterring drunkenness and protecting people from those who become violent when drunk. Indeed Lord Salmon in *Majewski* explained that the decision was not based on logic, but on 'justice, ethics and common sense'.

An alternative explanation of the present law is that it concerns only the law of evidence. The defendant is prevented from introducing evidence of his intoxication to demonstrate that he did not foresee a risk.[224] If the risk was an obvious one and the defendant is not able to introduce evidence that he did not foresee because he was drunk then the jury will almost inevitably find that he foresaw the risk. But why does this 'rule of evidence' apply to recklessness but not intention (remember the defendant *can* introduce evidence of intoxication to rebut intention)? Jeremy Horder's explanation is that where a crime involves intention that intention is an aspect of the wrong done to the victim.[225] Where that is lacking the kind of wrong done to the victim is missing.[226] Opponents of Horder's analysis argue that in the criminal law it is inappropriate to reject relevant evidence. To do so is to base the law on what we know to be a fiction.

18.4 ALTERNATIVES TO *MAJEWSKI*

The opposition to *Majewski* inevitably gives rise to the question whether there are alternative approaches the law could take towards intoxication. Here are some:

(1) There should be no special legal regulations governing intoxication. It would be possible simply to treat intoxication as one piece of evidence that a jury considers to decide whether a defendant had intention or recklessness. So, a drunken defendant who did not foresee a risk would not be reckless. This approach has been adopted by the courts in Australia and New Zealand.[227] In fact, in very few cases in those jurisdictions have intoxicated defendants been able successfully to plead that they lacked *mens rea*.[228] It appears that an intoxicated defendant who claims he did not foresee a risk is often disbelieved by the jury.[229] An alternative interpretation is that Australian juries are unwilling to acquit intoxicated defendants and convict them regardless of the judge's direction.

(2) Some who argue that the criminal law should penalize drunkenness could argue that drunkenness should constitute the *mens rea* for any offence.[230] Such a view might be supported on the basis of an individual's 'responsibility... to stay sober if his intoxication will jeopardise the lives and safety of others'.[231] Few support this view. Even taking a hostile view of intoxication, convicting a defendant of an intent-based offence, rather than a recklessness-based offence, seems unnecessary.

(3) There should be a new offence of 'causing harm while intoxicated'.[232] The Law Commission Consultation Paper proposed an offence of causing certain kinds of harm

224 Wells (1982).

225 Many people would regard a deliberate push as a different kind of wrong from an accidental push.

226 For further discussion, see Gough (1996).

227 Orchard (1993). Australia, South Africa, and Canada have all abandoned the *Majewski* rule.

228 Orchard (1993).

229 Indeed in the study reported in Mitchell (1988) not one intoxicated person in the sample acted involuntarily.

230 Keiter (1997).

231 Justice David Souter in *State v Dufield* 549 A 2d 1205, 1208 (NH, 1988).

232 Law Commission Consultation Paper No. 127 (1993). The Butler Committee (1975) proposed an offence of dangerous intoxication.

while intoxicated to a significant extent.[233] Law Commission Report No. 229 rejected this on the basis of fierce opposition from many respondents to the Consultation Paper. Opponents of the Consultation Paper's approach might argue that such an approach draws an inappropriate distinction between drunken and sober vandals who lack concern towards others.[234] The most recent proposals of the Law Commission are extracted below.

(4) An argument can be made for a crime of public intoxication.[235] A Home Office report has stated: 'Public drunkenness can give rise to serious problems of disorderly conduct, nuisance, criminal damage and alcohol-related assaults, particularly in the proximity of licensed premises at closing time. In addition, it can create a fear of alcohol-related violence, which impacts on the quality of life for many. The government is determined to tackle these issues.'[236] However, one study suggested that less than 1 per cent of intoxicated people commit serious criminal offences.[237]

(5) An alternative approach is to see the 'problem' as not with intoxication, but with our understanding of intoxication. If our legal system was not so in thrall to subjective recklessness and was willing to include within recklessness a concept of failing to foresee an obvious risk for some blameworthy reason, then there would be no difficulty in classifying voluntarily intoxicated defendants who fail to foresee an obvious risk as reckless.[238]

The Law Commission has produced a report on intoxication and crime. Their proposed reform was as follows:[239]

Law Commission Report No. 314, *Intoxication and Criminal Liability* (London: TSO, 2009), paras 5.1–5.14

Recommendation 1: the *Majewski* rule

5.1 There should be a general rule that

(1) if D is charged with having committed an offence as a perpetrator;

(2) the fault element of the offence is not an integral fault element (for example, because it merely requires proof of recklessness); and

(3) D was voluntarily intoxicated at the material time;

then, in determining whether or not D is liable for the offence, D should be treated as having been aware at the material time of anything which D would then have been aware of but for the intoxication.

Recommendation 2: the rule for integral fault elements

5.2 If the subjective fault element in the definition of the offence, as alleged, is one to which the justification for the *Majewski* rule cannot apply, then the prosecution should have to prove that D acted with that relevant state of mind.

Recommendation 3: the integral fault elements

5.3 The following subjective fault elements should be excluded from the application of the general rule and should, therefore, always be proved:

233 Virgo (1993) is generally supportive. 234 Gough (1996). 235 Ashworth (1980).
236 Home Office (2000c). 237 Mitchell (1988). 238 Gardner (1994).
239 See Child (2009) for a very helpful discussion of their proposals. Their proposals for intoxication in cases of inchoate offences and secondary liability have not been copied.

(1) intention as to a consequence;
(2) knowledge as to something;
(3) belief as to something (where the belief is equivalent to knowledge as to something);
(4) fraud; and
(5) dishonesty.

Recommendation 4 (defences and mistaken beliefs)

5.4 D should not be able to rely on a genuine mistake of fact arising from self-induced intoxication in support of a defence to which D's state of mind is relevant, regardless of the nature of the fault alleged. D's mistaken belief should be taken into account only if D would have held the same belief if D had not been intoxicated.

Recommendation 5 ("honest belief" provisions)

5.5 The rule governing mistakes of fact relied on in support of a defence (recommendation 4) should apply equally to "honest belief" provisions which state how defences should be interpreted.

Recommendation 6 (negligence and no-fault offences)

5.6 If the offence charged requires proof of a fault element of failure to comply with an objective standard of care, or requires no fault at all, D should be permitted to rely on a genuine but mistaken belief as to the existence of a fact, where D's state of mind is relevant to a defence, only if D would have made that mistake if he or she had not been voluntarily intoxicated.

Involuntary Intoxication

Recommendation 10 (the general rule)

5.10 D's state of involuntary intoxication should be taken into consideration:

(1) in determining whether D acted with the subjective fault required for liability, regardless of the nature of the fault element; and
(2) in any case where D relies on a mistake of fact in support of a defence to which his or her state of mind is relevant.

Recommendation 11 (species of involuntary intoxication)

5.11 There should be a non-exhaustive list of situations which would count as involuntary intoxication:

(1) the situation where an intoxicant was administered to D without D's consent;
(2) the situation where D took an intoxicant under duress;
(3) the situation where D took an intoxicant which he or she reasonably believed was not an intoxicant;
(4) the situation where D took an intoxicant for a proper medical purpose.

5.12 D's state of intoxication should also be regarded as involuntary if, though not entirely involuntary, it was *almost* entirely involuntary.

Evidence and Proof

Recommendation 12 (prosecution alleges that D was intoxicated)

5.13 If the prosecution alleges that D was voluntarily intoxicated at the material time:

(1) there should be a presumption that D was not intoxicated at the material time;

(2) it should be for the prosecution to prove (beyond reasonable doubt) that D was intoxicated at the material time;

(3) if it is proved (or admitted) that D was intoxicated, there should be a presumption that D was voluntarily intoxicated;

(4) if D contends that he or she was involuntarily intoxicated, it should be for D to prove it (on the balance of probabilities).

Recommendation 13 (D claims he or she was intoxicated)

5.14 If D claims that he or she was intoxicated at the material time:

(1) there should be a presumption that D was not intoxicated at the material time;

(2) D should bear an evidential burden in support of the claim that he or she was intoxicated at the material time;

(3) if D's evidential burden is discharged (and the prosecution wishes to contend that D was not intoxicated), the prosecution should have to prove (beyond reasonable doubt) that D was not intoxicated;

(4) if D is taken to have been intoxicated, there should be a presumption that D was voluntarily intoxicated;

(5) if D contends that he or she was involuntarily intoxicated, it should be for D to prove it (on the balance of probabilities).

FURTHER READING

Child, J. (2009) 'Drink, Drugs and Law Reform: A Review of Law Commission Report No. 314' *Criminal Law Review* 488.

Mackay, R. (1995) *Mental Condition Defences in the Criminal Law* (Oxford: OUP), ch. 8.

Simester, A. (2009) 'Intoxication is Never a Defence' *Criminal Law Review* 3.

Sullivan, G.R. (1996a) 'Making Excuses' in A. Simester and A. Smith (eds) *Harm and Culpability* (Oxford: OUP).

Tolmie, J. (2001) 'Alcoholism and Criminal Liability' *Modern Law Review* 64: 688.

19 MOTIVE

19.1 IS MOTIVE RELEVANT IN THE CRIMINAL LAW?

The courts have been consistent in stating that motive and intention are separate. Indeed it is often said that motive is irrelevant in the criminal law.[240] In *Lynch v DPP*[241] the

[240] J.C. Smith (2002: 95). *Contra* W. Wilson (2002: ch. 5). [241] [1975] AC 653 (HL).

defendant was told by a group of terrorists that he would be killed if he did not assist in a killing. The House of Lords held that he intended to assist in the killing, even though his motive was to avoid being killed by the terrorists. However, the position is not this straightforward. It seems that in some cases the courts do attach significance to the defendant's motives. Here are three examples:

(1) In *Steane*[242] a defendant who, during the war, assisted the enemy[243] because he feared that otherwise his family would be sent to a concentration camp was held not to have intended to assist the enemy.

(2) In *Adams*[244] it was held that a doctor who gave pain-relieving drugs to a patient, aware that these may slightly shorten the patient's life span, did not intend to kill the patient.

(3) In *Gillick v West Norfolk and Wisbech AHA*[245] the House of Lords held that a doctor who gave a girl aged under 16 contraceptive advice and pills would not necessarily be committing the offence of aiding and abetting unlawful (underage) sexual intercourse. Even though the doctor might know that as a result of the advice a girl might therefore engage in sexual intercourse, he did not intend to assist her. ←2 (p.137)

It seems that in fact it is misleading to describe motive as irrelevant. There are many ways that motive may in fact be relevant in the criminal law:

(1) Motive may help in establishing what the defendant's purpose is. Often a person's motive is to produce a particular result, in which his or her motive and intention are the same. Indeed Norrie[246] argues that it is difficult to imagine someone having an intention to do something without having a motive. Motive, he suggests, is the driving force behind the intention.

(2) Motive may be relevant in deciding, in cases of oblique intention, whether the jury will find from virtual certainty and foresight of that virtual certainty that there was intention.[247]

(3) Some offences specifically require proof of motive, for example racially aggravated assaults.[248]

(4) In relation to defences it is important to know whether what motivated the defendant's actions was the justifying reason.[249] For example, in order to plead self-defence defendants must use force in order to defend themselves and not out of revenge.

(5) It is impossible to assess whether the defendant was acting dishonestly for the purpose of property offences without considering the motive of the defendant.

(6) Motive can be relevant at the sentencing stage. As Norrie tersely remarks, 'Having insisted upon a strict legal code so as to protect the liberty of the individual, it transpires that the individual's liberty is ultimately dependent not upon the rule of law at all but on a group of men operating with a wide discretion at the sentencing stage.'[250]

242 [1947] KB 997 (CA).
243 This was an offence under special wartime regulations.
244 *Bodkin Adams* [1957] Crim LR 365.
245 [1985] 3 All ER 402 (HL).
246 Norrie (2001: 36).
247 Ashworth (2009: 170–3).
248 Crime and Disorder Act 1998, s. 28(1)(b).
249 See J. Gardner (1998).
250 Norrie (2002: 200).

(7) There have been cases where it is widely thought that the jury has acquitted the defendant because they have believed he acted from the best of motives, despite a clear direction from the judge that he is guilty in the eyes of the law.[251]

19.2 ARGUMENTS IN FAVOUR OF TAKING MOTIVE INTO ACCOUNT

It seems odd that if *mens rea* is all about ascertaining the blameworthiness of the defendant that motive is not taken into account. Most people would see a clear difference in moral terms between a contract killer and a mercy killer, but the difference lies in their motivation (not their intention).[252] Even so under the law of murder they are treated identically. Indeed, as hinted at in Part I, motive may be an even better guide to blameworthiness than intention or recklessness.

Alan Norrie[253] has argued that the line between motives and intention is in fact almost impossible to draw. He argues that once we look at what causes intentions and start looking at motive we inevitably bring in complex social and political explanations for people's actions. For example, once we start to consider greed as a motivation we inevitably have to consider the unequal distribution of goods in our society which nurtures feelings of greed. Norrie argues that the legal system, in not wanting to challenge the social and political status quo, avoids entering such treacherous waters by generally refusing to consider motives. However, he argues, where it is convenient to do so motive can suddenly become relevant again, for example in permitting the doctors in *Gillick* to prescribe contraception to under-16-year-olds.[254]

19.3 ARGUMENTS AGAINST TAKING MOTIVE INTO ACCOUNT

Antony Duff[255] justifies the statement that motive is irrelevant to the criminal law by redefining what commentators mean by such a statement: motive is relevant only when Parliament has declared it to be relevant as part of the definition of an offence. If Parliament has not so declared it the courts cannot permit the defendant to raise his good motive as a defence. For example, if the government had decided to permit trials of genetically modified crops, but a defendant, opposing the growing of such crops, destroyed them, to permit him a defence to a charge of criminal damage on the basis that the jury or magistrates believed that the defendant was acting from good motives would be to undermine the authority of Parliament. If the defendant objects to the law the way to raise it is through political channels and not by committing crimes and raising the issue by way of a defence. A similar point could be made in relation to euthanasia. The legal response to euthanasia should be decided by Parliament, not by juries deciding on individual cases whether the defendant's motives were good. Duff accepts that such an argument is appropriate only as long as there are suitable channels for individuals to raise their points of view. In relation to those in desperate poverty who steal, the solution to their difficulties is to seek the assistance of welfare provision: that is the 'forum' for dealing with dire poverty, not by committing theft and raising poverty as an issue. Although it should be emphasized that Duff accepts that his argument has legitimacy only providing that the welfare provisions are adequate.

[251] e.g. *Ponting* (Central Criminal Court, 11 February 1985).
[252] Kessler Ferzan (2008).
[253] Norrie (2002: 170–81).
[254] See further Gardner and Jung (1991).
[255] Duff (1998b).

FURTHER READING

Motive

Ashworth, A. (1996) 'The Treatment of Good Intentions' in A. Simester and A. Smith (eds) *Harm and Culpability* (Oxford: OUP).

Binder, G. (2002) 'The Rhetoric of Motive and Intent' *Buffalo Criminal Law Review* 6: 1.

Duff, A. (1998b) 'Principle and Contradiction in the Criminal Law: Motives and Criminal Liability' in A. Duff (ed.) *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press).

Horder, J. (2000) 'On the Irrelevance of Motive in Criminal Law' in J. Horder (ed.) *Oxford Essays in Jurisprudence* (Oxford: OUP).

Husak, D. (1989a) 'Motive and Criminal Liability' *Criminal Justice Ethics* 1: 3.

Kessler Ferzan, K. (2008) 'Beyond Intention' *Cardozo Law Review* 26.

Norrie, A. (2002) *Punishment, Responsibility, and Justice* (Oxford: OUP), 170–81.

Tadros, V. (2011) 'Wrongdoing and Motivation' in S. Green and A. Duff (eds) *Philosophical Foundations of Criminal Law* (Oxford: OUP).

Knowledge and belief

Callender, D. (1994) 'Wilful Ignorance, Knowledge and the Equality Culpability Thesis' *Wisconsin Law Review* 129.

Shute, S. (2002a) 'Knowledge and Belief in the Criminal Law' in S. Shute and A. Simester (eds) *Criminal Law Theory* (Oxford: OUP).

Sullivan, G.R. (2002b) 'Knowledge, Belief and Culpability' in S. Shute and A. Simester (eds) *Criminal Law Theory* (Oxford: OUP).

Wasik, M. and Thompson, M. (1981) '"Turning a Blind Eye" as Constituting *Mens Rea*' *Northern Ireland Law Quarterly* 32: 328.

20 THE 'CORRESPONDENCE PRINCIPLE'

At the end of Part I of this chapter it was emphasized that when you learn what the *mens rea* of a crime is it is not enough just to learn that intention or recklessness is required, but you should learn what must be intended or foreseen. However, this raises the so-called correspondence principle, which is one of the most controversial issues in criminal law. Imagine an offence of causing grievous bodily harm. If we assume that the offence involves recklessness, what exactly must D foresee: grievous bodily harm, at least actual bodily harm, or any harm however minor? These possibilities reflect three views that could be taken:

(1) **The correspondence principle**. The principle requires the *mens rea* of a crime to match the *actus reus*. In other words the defendant must intend or be *Cunningham* reckless as to the *actus reus*. So in this case the defendant must foresee grievous bodily harm. Anything less will be inadequate.

(2) **The 'proportionality' principle**. The defendant need foresee only an injury which is proportionate to the *actus reus*.[256] It does not matter if the injury is slightly more than that foreseen, but if the injury is in a different league from that foreseen (it is not proportionate) the defendant should not be responsible for it. In our example actual bodily harm is close to grievous bodily harm. If the defendant had only foreseen a touching he should not be guilty of an offence involving grievous bodily harm because that would be of a different degree of seriousness.

(3) **The 'moral threshold' principle**. Supporters of this view simply require that the defendant foresaw some kind of harm. Once the defendant acts, foreseeing that he will injure the victim, he loses the sympathy of the law and is responsible for the harm caused.[257]

There are two questions that may be asked here:

20.1 WHICH PRINCIPLE BEST REFLECTS THE LAW?

Although there may be some fine historical precedent for the correspondence principle,[258] it is in fact honoured far more in the breach than in the observance in current criminal law. Of course all strict liability offences infringe it; even murder (which accepts intention to do grievous bodily harm for the *mens rea*) does not observe it. Of the significant offences against the person only section 18 of the Offences Against the Person Act 1861 (inflicting grievous bodily harm with intent to cause grievous bodily harm) complies with it.

20.2 WHICH PRINCIPLE IS MOST JUSTIFIABLE IN THEORY?

Underlying the debate behind these theories is the notion of 'moral luck', which we will discuss in detail in Chapter 14.[259] Imagine that the defendant picks up a stick and throws it at the victim. What happens next may be described as a matter of luck: the stick may hit the victim, the victim may jump out of the way, a sudden gust of wind may blow the stick out of the way, a passer-by may push the victim out of the way. It is then argued that what the defendant can control is his action and his state of mind, but what happens beyond that is just chance that should not affect his liability. If you are persuaded by this argument a number of consequences follow which we shall discuss at various points in this book (e.g. the argument that attempted crimes and complete crimes should be treated identically).[260] However, the argument is relevant in relation to the correspondence principle because it holds that a defendant who throws the stick intending actual bodily harm is equally blameworthy whether it causes actual bodily harm or grievous bodily harm. The level of harm the stick throwing causes is just luck. Therefore the defendant should be guilty only of intentionally causing actual bodily harm. He should not be responsible for the higher level of harm that occurred because of his action: that was just bad luck.[261] Michael Moore in

[256] Tadros (2002b). [257] See Ashworth (2008b) for a powerful critique of this view.

[258] Although J. Gardner (1994) denies that the correspondence has even been part of the law.

[259] Duff (2008); Enoch and Marmor (2007); Nagel (1979); Mandil (1987); Schulhofer (1974); B. Williams (1981); Honoré (1989); J.C. Smith (1971); Fletcher (1998).

[260] Ashworth (1988).

[261] For a theological perspective, see Stern (1999).

his book has gone so far as to say that 'a majority of respectable criminal law theoreticians' take this view.[262]

Those who reject the argument tend to raise a number of arguments:

(1) Most people do not regard the consequences of people's actions as just 'bad luck'. It was not just bad luck that the victim suffered grievous bodily harm; it was because the defendant threw a stick at him! Had he or she not thrown the stick the chance factors (the wind, the movements of the victim) would not have had a role to play. Jeremy Horder[263] has talked of a defendant 'making his own bad luck'. Many people have sympathy for a defendant who genuinely causes an injury by bad luck (e.g. when he or she trips over a paving stone and bumps into someone). However, where a person has set out to cause an injury to someone he or she cannot claim it is an accident, he or she loses the sympathy of the law, and is now liable for the consequences of his or her actions. In response Mitchell has stated while the defendant 'cannot claim that his victim's death was simply bad luck, the prosecution cannot deny that luck did play a part in it'.[264]

(2) Surveys of public opinion indicate that the majority of people questioned do support making people liable for the harms they cause, even if that harm is greater than they foresaw or intended.[265]

(3) Consequences matter to onlookers and to the perpetrator. Nagel,[266] in a famous example, discusses a person who leaves a child in the bath with the tap running to answer the door and chats, forgetting the child. If the child manages to survive we dismiss the action as careless; if the child dies this transforms our judgment and the action becomes appalling.[267] We expect different reactions from onlookers and the defendant depending on the consequence of the act (relief rather than outrage, for example). The fact that the consequences do affect our emotional reaction could be said to indicate that a moral difference exists between the two.

Simester and Sullivan argue that it is important to distinguish between acts where the luck (the risk of harm) is extrinsic or intrinsic to the nature of the act.[268] For those actions which are inherently dangerous the defendant cannot claim that it is just bad luck if someone is injured. For those actions which are not inherently dangerous then it may be regarded as luck whether or not the victim is injured. An example of an intrinsically dangerous act is dangerous driving. Other acts are not inherently dangerous. Simester and Sullivan consider the hypothetical scenario of a secretary who is told to collect blood samples as part of a staff survey, but fails to do so. When a worker later falls ill and a blood transfusion cannot be provided because the worker's blood group is not known this is bad luck: she could not have known that her failure to collect the samples for the survey would have fatal consequences.

In the following extract, Michael Moore stresses that we have two reasons for blaming people: culpability and wrongdoing. He admits that culpability is the poorer relation as it is both necessary and sufficient as the basis for punishment, but wrongdoing is neither:

[262] The impressive list includes: Kadish (1994); Gobert (1993); Becker (1974); Jarvis Thomson (1989); Ashworth (1988); Gross (1979); Schulhofer (1974); Feinberg (1970).

[263] Horder (1995d).

[264] Mitchell (2009: 504).

[265] Robinson and Darley (1995 and 1998).

[266] T. Nagel (1979).

[267] For a rejection of attaching weight to these arguments see Gardner (2011).

[268] See further Tadros (2008).

M. Moore, *Placing Blame* (Oxford: OUP, 1997), 213–16

The problem of moral luck, as Nagel frames it, is how we can justify holding people more responsible for causing harm than for merely intending or risking harm when they lack that *control* (over whether the harm occurs or not) we generally require for responsibility.

Moral luck is good when an actor fails to cause the harm he has intended or risked, for the actor gets moral credit for something over which he lacked control; moral luck is bad when the actor does cause the harm he intended or risked, because he gets moral demerits for something over which he lacked control. Nagel's question is how such luck could be justified in the face of our control requirement for responsibility.

The question as Nagel poses it arises only if we think that there is such a thing as moral luck. By this, I do not mean to join Kant *et al.* in denying that wrongdoing has any independent moral significance. I mean that an anti-Kantian here might deny that there is any *luck* involved in being held more responsible for successful wrongdoing than for intended or risked wrongdoing that does not materialize. There undoubtedly is some luck involved in whether we cause the harms we intend or risk, but there will be *moral luck* only *vis-à-vis* some moral baseline of the normal that places all such luck on the side of the extraordinary.

We do have a criminal law doctrine that explicitly deals with the question of luck with regard to consequences. This is the doctrine of proximate causation. The proximate cause tests in criminal law have as their function the separation of harms in fact caused by a defendant's voluntary act into two camps: those freakishly so caused, in which event the actor is liable only for lesser crimes of attempt, specific intent, or risk-imposition; and those more normally so caused, in which event the actor is liable for the more serious punishments reserved for completed crimes. Sometimes these tests are explicit about their being tests of luck. The Model Penal Code, for example, provides that an act is the cause of a harm when the harm would not have happened but for the act, and (with complications here ignored) the 'actual result is not too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense'. Even when the proximate cause tests are not explicitly directed to this freakishness or luck question, they implicitly aim at just this factor. The foreseeability test of proximate causation, for example, seems to be aimed at an actor's culpability: could he have foreseen that such a harm would result from his action? In reality, given the well-known conundrum about specifying the details of the harm about which to ask foreseeability questions, what the test really asks is whether the 'freakishness of the facts refuses to be drowned' or not.

Consider some examples of Hart and Honoré's: (1) A defendant culpably throws a lighted cigarette onto some bushes; the bushes catch fire, but would burn themselves out if it were not for a normal evening breeze that comes up, carrying the fire to the forest and burning it down. (2) Same as (1), except that the breeze that comes up is a gale force wind never before seen at this time of year, which wind uproots the burning bushes and carries them to a distant forest, which ignites and burns. (3) Same as (1), except no breeze, normal or abnormal, arises; rather, a would-be extinguisher of the fire in the bushes himself catches fire, and in his agony he runs to the forest, which burns. (4) Same as (1), except a second culpable defendant is the vehicle for transferring the fire from the bushes to the forest: he sees that the fire in the bushes is about to go out, so he pours a gasoline trail from the forest to the burning bushes, in order to burn down the forest, which then occurs.

On the direct cause notion of proximate causation that Hart and Honoré so elegantly explore the initial defendant in (1) and (3) is criminally liable for burning down the forest, whereas in variations (2) and (4) the causal routes from defendant's act to the ultimate harm

are too accidental, too fortuitous, too much a matter of chance or luck, for the defendant to be liable for such harm; at most, he can be held only for attempted destruction of the forest, or for risking its destruction.

Notice that the normal breeze in (1), the gale in (2), the movements of the clumsy would-be fire extinguisher in (3), and the actions of the arsonist in (4), are all equally outside the control of the initial fire-starter. In Nagel's sense of 'luck', thus, all cases involve moral luck: bad moral luck in (1) and (3) where the fire-starter is held liable, and good moral luck in (2) and (4), where he is not. Nagel's sense of 'luck' is thus obviously not the same as that employed in the criminal law doctrines of proximate causation and the morality that underlies them, for those doctrines use a different notion of luck to distinguish some as matters of luck and others not.

The notion of luck always involves some baseline of comparison. As the proximate cause tests of the criminal law use the notion, the baseline is the normal way things come about. When a defendant negligently operates a train too fast, so that he cannot stop it before it hits another's railroad car, there is no luck involved in his injuring the second car because that is how such things normally happen. When, however, the same negligently speeding defendant causes the same damage to the same car, but does so because a first collision (which does no damage) throws the defendant against the reverse throttle of his engine, thereby knocking him unconscious, whereupon his engine goes in reverse around a circular track, colliding with the other's car and then causing it damage, there is luck involved because of the abnormal conjunction of events taking place between the defendant's act and the harm.

Moral luck, on this concept of luck, would exist whenever the consequence of moral blame or credit is brought on one in an abnormal, freakish, or chance way. If one were truly to blame for someone else's actions over whom one had no control, for example, that would be a case of (bad) moral luck. But if one's blameworthiness only comes about in the normal, non-freakish, not-by-chance way, there is no *moral* luck involved in such blameworthiness, wherever it exists, even if there is luck involved. The crucial question, of course, is to spell out when blameworthiness attaches in a normal, as opposed to an abnormal, way. Nagel thinks that this notion of normalcy is to be fleshed out with his idea of control: blameworthiness for a harm would attach in a normal way only if the agent was in control of all factors causally contributing to that harm. Yet this is surely not the notion of normalcy presupposed by the criminal law's notion of luck. And this last observation is not the observation that Nagel requires *complete* control (of *all* factors) while the criminal law and the morality that underlies it only requires control of *some* factors; rather, the observation is that the notion of control is alien to the criminal law's idea of luck. The baseline is freakishness of causal route, not degree of control by the agent of the intervening factors. For notice again: the actors equally lack any control of the breezes or second agents whose interventions were necessary for the destruction of the forest in scenarios (1) to (4) above. It is the normalcy of causal route that decides the normalcy of moral blameworthiness in such cases, ideas of normalcy to which control is simply irrelevant.

In the following extract, Jeremy Horder applies some of this theoretical material to the issue of transferred *mens rea*: ←10 (p.165)

J. Horder, 'Transferred Malice and the Remoteness of Unexpected Outcomes from Intentions' [2006] *Criminal Law Review* 383 at 384–6, 390–1, 398

[*H*]*ow* D causes the actual V's death is of no legal importance . . . So long as D acts with the fault element of murder, and kills in consequence, they may be convicted of murder

(other things being equal).... The justification for convicting of murder in such cases is the assumed moral insignificance of the way someone is killed, as well as of the identity of the person killed (the central issue according to the impersonality doctrine), when death has been intentionally caused. In that regard, the transferred malice doctrine is really better understood as an application of what I will call the "prohibited outcome" doctrine. So long as the prohibited outcome comes about (intentional killing), it matters not how or respecting whom.

...

There has been an understandable difference of opinion amongst scholars over whether a murder conviction is ever appropriate when D killed someone they did not attempt to kill, even though D's attempt to kill did in fact end in a killing. I will assume that, at least in some instances, it can be appropriate to convict D of murder in these circumstances. I will argue, however, that the range of instances in which this is appropriate is now rightly coming to be circumscribed by what I will be calling the "remoteness" principle. The remoteness principle may serve to prevent conviction in the following kinds of example:

Example 1: D fires a gun at V1, intending to kill V1. D misses, but the noise of the gun being fired startles a bystander, V2, who consequently dies of a heart attack.

Example 2: D shoots V1, intending to kill V1. V1 is wounded and taken to hospital. Whilst waiting for treatment, V1 is seen by his father, V2. V2 is so aghast at the sight of V1 covered in blood that the shock kills him. V1 survives.

Example 3: D shoots at V1, intending to kill V1. The bullet misses, but enters a munitions factory behind V1. The bullet sets off an explosion that kills a large number of people.

Broadly speaking, Andrew Ashworth is right to argue that the appropriate charges, on facts such as these, are attempted murder in relation to the intended victim, and (where appropriate) manslaughter in relation to actual victim(s). A conviction for murder—a crime of specific intent—would often fail to label D's crime in a "morally representative" way in any of these kinds of instances. Sensible use of prosecutorial discretion is, though, probably the best way to ensure that this unrepresentative labelling is avoided, rather than creating a legal barrier to conviction for murder. In part, this is because one should not, in fact, completely bar murder convictions in such cases.

For Glanville Williams, a murder conviction in relation to the actual victim would be appropriate as long as, "the consequence was brought about by negligence in relation to the actual victim". I share Williams' instinct that a murder conviction should not be completely ruled out in such cases. Williams purports to give legal effect to this instinct through the inclusion of a specific further fault element of negligence in relation to the actual death, alongside the intention to kill. I believe, however, that this—the presence or absence of negligence—does not adequately conceptualise the basis for determining whether a murder conviction is or is not appropriate in the three examples. What should matter in these examples is not only that the actual victims were unintended victims, but also that they died in an unanticipated way. This double element of deviation from D's plan is what, in principle, may make the deaths too "remote" from what D intended for murder to be a representative label. This idea of "remoteness" provides a better way of understanding when a murder conviction would or would not be justified, in terms of representative labelling...

The transferring of malice is really the application of a doctrine in particular circumstances, rather than a doctrine in itself. I am calling the doctrine of which it is an application the "prohibited outcome" doctrine. The prohibited outcome doctrine is "permissive", in that it allows liability when a particular kind of interest has been culpably invaded or destroyed, even when the victim was not the intended victim, or the interest was not invaded or destroyed in the

way intended. By way of contrast with the prohibited outcome doctrine, the remoteness doctrine is a restrictive doctrine. It constrains the reach of liability that would otherwise be justified by the prohibited outcome doctrine, by factoring in consideration of how the remoteness of outcome from intention (or foresight) affects the representative character of conviction for a particular offence. The remoteness doctrine is, in turn, related to but distinct from a separate rule that restricts the reach of the prohibited outcome doctrine in justifying criminal liability. This is the rule that a fault element for one offence cannot be "translated" into the fault element for another offence.

So, in explaining the legal concept of transferred intent, we need to concern ourselves with four doctrines, principles or rules (terminology, in this respect, is not so very important):

(a) prohibited outcome doctrine (the transferring of malice being a warranted application);

(b) the labelling principle (conviction must constitute a representative label for D's wrong);

(c) the remoteness doctrine (transfers of intent must not compromise the labelling principle);

(d) the 'no-translation' rule (different fault elements cannot be transferred between crimes).

The so-called doctrine of transferred malice operates as a residual example of a "common law doctrine" within the criminal law. That is to say, it must be grasped through an appreciation of the examples in which it has been held to apply, or not to apply, rather than through the application of a general rule.

. . .

The persistence of the prohibited outcome doctrine is one manifestation of the law's hostility to the view that all elements of "bad luck" in bringing about a consequence must be eliminated, before one can begin proper moral assessment of the agent's action in bringing it about. This is most obvious in the doctrines of causation. Consider an example in which D stabs V with intent to kill, and V only dies after negligent treatment at the hospital. There is little doubt that D may be guilty of murder, even if proper treatment might have saved V, unless the treatment was grossly in itself, criminally-negligent. What will matter is whether the jury regard the stab wound as still an operating, albeit perhaps a now more minor, cause of death, or just the setting in which another cause—the negligent treatment—is operating. If the jury do regard the stab wound as a still operating cause, D's "bad luck" in actually causing V's death, as things turn out, will not affect his liability for murder. Like the causal doctrines that operate to draw these distinctions, the remoteness doctrine is meant to ensure that, whilst bad luck need not be eliminated before moral responsibility can adequately be judged, what happened as a result of D's conduct must not be *almost solely* a matter of bad luck. The burden is, then, on those who oppose the transfer of malice under the prohibited outcome doctrine to say why luck should favourably affect D's responsibility in such cases, but not in the cases (other than those in which D's involvement is relegated to mere historical background) where the causal chain takes a preventable turn.

21 INDIVIDUALISM AND *MENS REA*

An interesting critique of the current approach to *mens rea* is that it is over-individualistic. In other words our notions of culpability focus on what the defendant intended or foresaw, rather than considering the defendant within his or her community and society. The argument is developed by Victoria Nourse in the following extract:

V. Nourse, 'Heart and Minds: Understanding the New Culpability' (2002) 8 *Buffalo Criminal Law Review* 361

My second fear is that all this emphasis on the proper 'state of mind' occludes an important assumption shared by most of the participants in this debate—the assumption that it is the individual who is the proper focus of the debate. The common law was, I believe, quite a bit more sensitive to this assumption than are we moderns. When the [American] Model Penal Code drafters eschewed common law formulations, they not only got rid of ambiguous terms, they got rid of an entire structure of culpability. Whether we are looking for desire or acceptance or indifference, the modern debate has followed this trend. It has located culpability in the hearts and minds and capacities of individual defendants. We ask whether we should judge the defendant by his choices or his character or his desires. This focus on the individual must be false or at least incomplete; we don't live in bubbles or on islands. People commit crimes against others; and it is the relation between the 'other' and the 'defendant' that informs most of our judgments about the relative blameworthiness of the parties. We know this, in a sense. We know that for all our focus on individuality, all our attempts to describe defendants more and more particularly, whether it be in terms of their choice or their character or their virtue, that this has only led to reaction—to cries of hyperindividualism and abuse excuse and loss of agency.

It is time to reconsider more actively the assumption that the best way to protect individuals is to describe their hearts or minds, rather than to judge their relations to each other. This, by the way, has nothing to do with communitarianism or antiliberalism; it is simply a call for a 'relational individualism,' a call for the consideration of a different, and more direct (in my view), means to protect individuals. Even those who aim toward radical individuation, those who study mind for a living, recognize that the question of protecting individuals is in determining how an 'individual can stand in a healthy relation to his society,' precisely because the very notion that an individual exists at all depends upon a social world of relations.

A final comment (whose implications await elaboration elsewhere): In the end, crime is about power. Power is a relation, a relation that implies not only our regard for each other but the relation between citizens and state. This is why a criminal code will always be susceptible to public, majoritarian sentiment about culpability and blameworthiness even if drafted with the best intentions to protect individuals from unthinking minoritarian norms. Criminal law scholarship must stop hiding the ball in positivism and descriptivism, pretending to be a science, rather than a set of contingent norms. It must openly navigate the risks to the few and the many, to majorities and minorities, rather than deny that they exist. This navigation is impossible in a state of denial: if all the norms are buried in places that look like they are facts of nature, like passion and time and risk, then normativity will continue to be denied. That doesn't mean that the norms go away, it simply means that they will have more force, propelling us back and forth between apparent lenience and vengeance, abuse excuse and legal moralism, more a victim of a crude and unthinking politics than we ever hoped or desired.

It is not enough, any longer, in my view, to imagine culpability either in the image of a lonely cunning self or a cruel deterministic world. The man on an island needs no criminal law for he is fundamentally alone. The man with no government needs no criminal law since he may simply 'take the law into his own hands.' The criminal law helps to constitute our relation to each other as well as the nation in which we live. Conduct an intellectual experiment: Eliminate mens rea entirely from the criminal law and what do you have? A criminal law used to punish the innocent or the accidental is a hallmark of totalitarian regimes. History, if nothing else, tells us that when rulers seek to oppress their people, they repair easily to

the criminal law. There is more at stake in a criminal code than individuals, state of mind, or particular words. The criminal law poses important questions about, quite literally, how we govern each other.

QUESTION

Read Dillof (1998) who poses the following hypothetical:

Andre is undertaking shooting practice at a firing range. His enemy Brett wanders into the range close to the target. Andre fires two shots in quick succession: one at Brett and then one at the target. Evidence later shows that the shot Andre aimed at Brett in fact hit the target and the shot he aimed at the target hit Brett.

Is this a case of murder? If not, how is it different from a transferred malice case?

FURTHER READING

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—— (2009) 'More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-Punch Killer' *Criminal Law Review* 502.

Morse, S. (2000) 'The Moral Metaphysics of Causation and Results' *California Law Review* 88: 879.

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22 CONCLUDING THOUGHTS

Most serious crimes require proof that the defendant had a particular state of mind. These requirements play an important role in determining the extent of the defendant's blameworthiness. However, as this chapter shows, it can be a difficult job for the jury to decide what was going on inside someone's mind. Even if it is possible to do that, it is far from easy to know how to assess their blameworthiness. While the House of Lords have declared that the criminal law requires a subjective *mens rea* for criminal offences, this has proved a difficult requirement to implement. Defendants who should have seen a risk are, in some cases, blameworthy and some defendants who have seen a risk are not. Further, although the terms intention, recklessness, and negligence are readily distinguishable at a broad level, drawing the precise boundaries between them has proved troublesome.