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An introduction

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Part III

Criminal responsibility and punishment

10 Responsibility and guilt

As a distinct and limited area of the whole of what we call 'the law', criminal law is concerned to control and prevent certain kinds of conduct deemed to be harmful or in other ways undesirable. It has always proved difficult to find a precise definition of a crime that is not circular, which distinguishes it clearly from morally wrongful actions, and in particular from other areas in law that it overlaps, such as the law of torts, or civil wrongs. There are numerous differences, but the main practical one lies in the consequences of the actions, in the civil remedy available or in the punitive sanction. Criminal conduct is probably best described as the kind of conduct – acts or omissions – that the law seeks to discourage or prevent through the threat or implementation of punitive sanctions, whether or not it actually is morally wrong or harmful. It is the unlawfulness of the conduct that is central to the definition.

Criminal law is concerned, however, not only with acts, but also with the states of mind accompanying them. Liability to the sanctions of law can be either 'subjective' or 'objective' in the sense that it is related to the subjective state of the agent's mind, or solely to the act. When it is the latter, liability is said to be 'objective' or 'strict'. The performance of the unlawful act is sufficient to confirm guilt. The established norm in English criminal law is that liability is not strict, but requires proof of a guilty state of mind (*mens rea*) in addition to the unlawful act (*actus reus*). In other words, some degree of fault on the part of the offender is required. This norm is the outcome of a complex doctrine that has evolved in the history of common law. The basic idea is that, in order to be held criminally liable, the agent must have committed an offence freely, knowingly and deliberately. To many legal writers today, full commitment to the doctrine of *mens rea* is – at least in its basic implications – an essential condition for a just legal system.

This interpretation, however, is not self-evident. There are numerous exceptions to the norm of fault-requirement, which are by no means universally condemned as injustices. Strict liability controversially imposed by Parliament in 1994 on owners of dangerous dogs, for example, is thought by many to be wholly justified. This kind of unconditional shouldering of responsibility without fault also exists in civil law, as illustrated by *Rylands* v.

Fletcher (1868), in which a mill-owner was held liable for inadvertently causing the flooding of neighbouring property. This landmark case established a comprehensive rule laying down 'strict liability in the case of the escape of dangerous things from a man's land' (Baker 1991: 277). Furthermore, quite apart from instances in which unconditional liability is stipulated by law, there are numerous grey areas, especially in the context of unlawful injury or killing, in which it is not always readily agreed that lack of *mens rea* should absolve the agent from responsibility. The uncertainty in such cases will be one of the central themes in this chapter.

Free agency and responsibility

One of the fundamental conditions for attributing moral responsibility to anyone for a harmful act they have committed is the assumption that we are talking about a free agent. The general question to be dealt with here concerns situations and circumstances in which we might be inclined to say that, although an act that is normally understood to be criminal has been committed, there is insufficient blame to warrant criminal prosecution because the agents were genuinely not in control of their own actions. In such cases, it is commonly argued, we cannot make the assumption that we are dealing with a free agent. If circumstances place the will of the agent under such pressure that there was no alternative to the course of action taken, it seems that we cannot meaningfully say that a free choice was made. If we cannot say this, then we cannot in all fairness hold the agent liable to punishment. It is this question about the meaningfulness of choices that has to be examined closely.

Excuse or justification

In the context of wrongful or harmful acts, there are many ways in which it can be argued that the agent is blameless. In the case of the volitional argument – that there was no unconstrained will, hence an absence of real choice – the distinction between excuse and justification is vitally important. The distinction is familiar to everyday moral arguments for exonerating harmful behaviour. If the agent is justified, the contention is that despite the harm, no wrong has been committed. A violent act in self-defence, for example, is presented as a justification rather than an excuse. If, by contrast, excusing conditions are cited, the argument is that the act was wrongful but understandable in the circumstances. The claim, for example, that one was in an impossible situation because provoked beyond endurance, is more plausibly interpreted as an excuse than as a justification. With a justification, it is presumed that if faced with the same situation again, one would take the same course of action; with an excuse, which is inherently an admission of human weakness, the tacit argument is that in similar circumstances one would not do it again.

Both arguments of excuse and justification have been employed regularly in legal defences based on necessity or duress. The distinction is important, despite the fact that in many senses the legal consequences are identical. This is because the moral plausibility of any particular defence rests upon a clarification of the different implications of excuse and justification. A justified act is not regarded as wrongful or unlawful, hence the agent is free of blame and criminal liability. An excused act is a wrongful and unlawful act, but the agent is again not liable. The difference is commonly said to lie in the attitude of empathy with the predicament of the offender whose acts are excusable rather than justified. When harmful acts are lawful, the defence does not need to rely on understanding or empathy. This distinction should be borne in mind in the following account of the defences of necessity and duress.

Necessity and duress

These two defences share some common features, but are crucially different in several ways. With the plea of either necessity or duress, it is said that the agent is acting with a constrained will. What we will need to consider for each of these defences is, first, the sense in which it can be convincingly argued that there is no free will, and, second, whether this constraint of the will is more plausibly interpreted as an excuse for admitted wrongdoing, or as a justification that clears the defendant of moral and legal guilt. Acting through necessity is acting under pressure from dangerous natural circumstance. Fear of death in a storm at sea or a mountain blizzard might motivate criminal acts that in any other situation would never be contemplated. The defence is one of necessity when the source of the danger is an impersonal natural force. Acting under duress is acting under pressure from threats by other persons. Fear of serious injury or death at the hands of others might similarly motivate acts that would never otherwise be contemplated. The defence is one of duress when the source of the danger is human. With either defence, the argument is that they were left with no alternative, that they were in some sense compelled to act in the way they did.

Life and death necessity

Situations of extreme danger bring the problems with these defences into sharp focus. When the threat of death is imminent, so the argument goes, the pressure is such that the will as an instrument of free choice is effectively neutralised, and responsibility for one's actions is nullified. Two famous cases will illustrate the problems here.

In the case of *R*. v. *Dudley and Stephens* (1884), two sailors who had survived a shipwreck had been charged with murder. After drifting in an open boat for twenty days with very little food or water, they had agreed that the only way to survive was to kill the sick cabin boy and eat his flesh. Four days after this, the survivors – including another sailor who had refused to

participate in the killing – were rescued. At the subsequent trial, the defence was that the killing was justified by necessity. Against public protest in their favour, Dudley and Stephens were convicted of murder and sentenced to death. Shortly thereafter, they were reprieved and released.

The substance of the argument for the defence of necessity was that, under pressure from a prolonged period of hunger and thirst, the men could no longer be considered free agents. In these extreme circumstances, the course of action they took was the only possible one. In such situations, the will to resist temptation is weakened and the instinct for survival takes over. The only alternative would have been a sacrifice that no one could reasonably be expected to make.

One difficulty with this argument is that it is not clear how it could be construed as a justification. This would require that the killing of the cabin boy was in these circumstances reasonable and lawful. Reference to the instinct for survival seems to constitute an implicit admission that the act could not be justified. It would be more plausible to argue the case for excusing conditions, thereby conceding the wrongful nature of the act, but pleading necessity by virtue of the weakening of the will.

There was little chance, however, that either argument would prevail. The defence that the act was justified by necessity was rejected on the grounds that the law did not recognise the absolute duty to preserve one's own life. According to Lord Coleridge, 'to preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die' (Allen 2001: 321). This comment set the tone for later generations of judges presiding over similar cases.

The earlier case of *U.S.* v. *Holmes* (1842) was on the face of it a more plausible candidate for justification by necessity. Holmes was a member of the crew in an impossibly overcrowded lifeboat carrying forty-one survivors from the wreck of an immigrant ship bound for New York. On his initiative, the crew had thrown sixteen passengers overboard in the course of one night, so that the rest would have a chance of survival. Against expectations, the boat did reach safety and Holmes was charged with wilful manslaughter.

In cases like this, there is a natural tendency to obscure the main issue with matters peripheral to the central moral dilemma. Questions about who should have been held responsible, about whether or not lots should have been drawn, about whether it is possible to be certain that a boat is about to sink, all tend to divert attention from the dilemma and how it affects the will. Given the reality of the dilemma – that if a number of people are not sacrificed, everyone will die – then the important question for the issue of responsibility concerns the freedom of action of Holmes and the crew. In what sense can it be said that they had no alternative to this course of action? In what sense were they being 'compelled' to commit these acts? Most prominent among the arguments in defence of their course of action was the 'state of nature' argument. Beyond the reach of civilisation, so the

argument goes, normal moral and legal codes do not apply. In a state of emergency, the Hobbesian natural rights to self-defence and self-preservation take over. It is quite unrealistic and unreasonable – it is argued – to apply the moral or legal norms of any particular society in these circumstances.

The main difficulty with this line of argument lies in the inconsistent attitude towards the efficacy of the will. The purpose of the defence of necessity is to establish the virtual disappearance of free will, under pressure of natural circumstances. On the state of nature argument, though, what virtually disappears is not the will but a sense of moral restraint; the will is, if anything, stronger than normal. The choice is for continued life, rather than death. What might be said to disappear is the ability to *direct* the will. If the argument is for justification rather than excuse, then the course of action that will save the greatest number of lives is the rational one. It is the argument for excuse that depends upon the contention that the will is weakened in such situations, because if decisive action such as that taken by Holmes or Dudley is morally wrong and in violation of law, then they must argue that they were not in command of their will to do what was right. The source of the confusion in the arguments in defence of these acts lies in the equivocation between justification and excuse.

In the recent ruling on the case of the conjoined twins (*Re A (Children)*, 2000) (see Chapter 7), the nature of the case was such that justification rather than excuse was called for. The implications of this case for the defence of necessity have to be approached with caution. Although it has been said of this case that 'it is now clear that necessity may be a defence to murder' (Smith and Hogan 2003: 267), it is also true that the judges explicitly warned that general principles should not be extrapolated from the ruling on this highly individualised case. In the judgement of Lord Justice Brooke, the absolute stipulation by Lord Coleridge in *Dudley and Stephens* that the taking of the life of an innocent is ruled out, because it is impossible to judge between the comparative value of lives, is reasoned to be inapplicable in the case of the twins due to the fact that they are making no such judgement, but rather allowing that the unfortunate victim is 'self-designated for a very early death' (Allen 2001: 338). The crucial point is that there is no 'selection' problem here. This is the key difference from a case in which one is selected from a number of possible victims. Coleridge's second reason, that the necessity defence would cut the law loose from morality, is acknowledged in the reasons given by Brooke to represent a moral position still widely subscribed to, but he argues only that the court finds this position less than obvious, adding that it was beyond the court's competence to adjudicate between these philosophies. He nevertheless endorses the principle of using minimal and proportionate evil to avoid inevitable and irreparable evil, thus complementing Ward's conclusion that the law must allow in these circumstances the choice of the lesser evil. The overall effect of these reasons does seem to point in the direction of a general necessity

defence, but as we shall see now, the issues with the defence of duress are significantly different.

Acts carried out under duress

Despite the similarity between the defences of necessity and duress, there is a sense in which the connection between duress and free will is less prone to ambiguity. It is plain, for example, how a false confession extracted under duress – under threats of beatings and torture – is invalid because it is not a confession given of one's own free will. Without the intimidation, the false confession would not have been made. It also seems clear that when duress is raised as a defence to a serious criminal charge, what is meant is analogous to the signing of a false confession. Without the threats, the crime would not have been committed.

A key point in the distinction between necessity and duress is that there is an asymmetry in respect of justification and excuse. While it is plausible to argue that necessity can serve either as an excuse for unlawful behaviour or as justified, and hence lawful, it is unimaginable that duress could be anything but an excuse. To argue necessity is to insist that one had to do it, in a sense that at least leaves open the possibility that it was entirely justified. To argue duress is to argue that one was forced to do it, in a sense that immediately suggests that it was contrary to what was willed or desired. The nature of this defence is easier to examine than necessity, because it does not equivocate between excuse and justification. The focus is squarely upon the hopeless predicament of people who find themselves facing impossible choices; the only possible defence is the impossibility of the choice. This is an excuse for the wrongdoing one is forced into; it is not a justification. By its very nature, a crime committed under duress cannot be represented as the right thing to do.

What we need to consider now is the scope of duress. What kinds of act does it apply to? If one were literally compelled to commit a criminal act by, for example, being physically forced to pull a trigger, we have a morally clear reference point. In such a case, it is dubious to speak of an 'act' at all; an act requires more than a muscular contraction. Here one simply becomes the unwilling instrument of another's purpose. If these were the circumstances, there would be no responsibility or blame. What is the situation, though, if the compulsion is less than literal? Can duress still absolve the agent from blame?

The case of *D.P.P.* v. *Lynch* (1975) is the most important one relating to duress in recent years because it unsettled the law and challenged the legal and moral doctrines on duress, before itself being reversed in 1987. The facts of the case were that Lynch was the driver of a car used by a paramilitary group for the killing of a police officer. He claimed that he had nothing to do with the group: that he was acting under duress and that he was convinced he would have been shot if he had not obeyed. These factual claims were not disputed.

The question at the heart of the controversy surrounding this case concerned the apparent injustice of holding fully responsible someone who was acting under such extreme duress. Lynch was initially convicted of aiding and abetting murder, because it was held that the defence of duress was not available for cases involving murder or closely related offences. On appeal to the Lords, a retrial was ordered on the grounds that the jury should have been allowed to consider the defence of duress.

Why was the defence not available at this time? The situation in English law prior to 1975 was that duress was available as a defence to a range of offences less serious than murder, for example, shoplifting or robbery, perjury or other offences not resulting in death. The specific exclusion of duress for murder was a long-established principle in common law, resting on the seventeenth-century authority of Matthew Hale, who had declared that:

> if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent.
>
> (Hale 1972)

These words were echoed by the equally authoritative Blackstone (Blackstone 1829), establishing a firm principle in common law. Given the choice between killing and dying oneself, the latter course must be taken.

In overturning these authorities, Lords Morris and Wilberforce insisted that they were not creating new law, but drawing out the principles of the law as a whole. It was argued (by Morris) that the words of Hale were inappropriately extended to cases in which the defendant played a role but was not the actual killer. Wilberforce argued that there was no convincing principle justifying the withdrawal of the defence from the most serious crimes connected with murder. They also pointed to logical anomalies and inconsistencies in the law, whereby, for example, duress might be available on a charge of assault, then suddenly be withdrawn when the victim dies and the charge becomes one of murder. The overall purpose of these arguments was to establish the principle that each case be treated on its own merits and the defence of duress put to the jury, regardless of the seriousness of the charge.

English law on these matters then entered a period of confusion and uncertainty, during which it was unclear whether duress was available as a defence to murder and closely related offences, such as attempted murder, accessory before the fact, or aiding and abetting. The situation was resolved in 1987, when the Law Lords took the unusual step of overruling their own earlier decision, declaring *Lynch* to be unsound law and restoring the *status quo ante*.

What were the uppermost factors in the minds of those deliberating? On the question of authority and precedent, Lord Hailsham and the others in

the majority in 1987 disputed the contention by Wilberforce that they were not departing from existing law in the *Lynch* ruling. The authorities of Hale and Blackstone were now firmly reasserted, as was the ruling against Dudley and Stephens. On the question of principle, Hailsham argued that it was the purpose of law to protect innocent lives and set clear standards of behaviour for the avoidance of criminal responsibility. In cases of necessity and duress alike, it never had been accepted that one could take the life of another to save one's own, and it never should be. In all such cases, there was a clear duty to follow the words of Hale and sacrifice one's own life. Morally speaking, this might seem highly demanding, but in recent history – as Hailsham pointed out – there are countless examples of people making this sacrifice. A particularly telling analogy had been drawn earlier by Lord Simon, who argued that it was inconsistent to allow the defence of duress in criminal courts when it had not been allowed to the defendants at Nuremberg when they argued that they had been obeying superior orders.

In terms of policy, admitting the defence of duress to murder was already producing undesirable consequences. Actual killers – as opposed to those like Lynch who were reluctantly assisting – were increasingly pleading duress, claiming to have been terrorised by stronger personalities. The most prominent consideration in terms of policy, though, had already been voiced in earlier dissenting judgements; the general admission of duress for murder would positively encourage gangsters, terrorists and kidnappers to commit murder by proxy.

The reaction to these arguments by those in favour of widening the scope of duress was that the 'terrorist charter' argument was unduly alarmist and unrealistic; that duress in murder cases was only comparable with war crimes if the defendant was the actual killer; and, most importantly, that allowing the defence did not mean automatic acquittal, but rather that it would be left to the jury to decide, on very high standards of proof, whether the circumstances of the case in hand genuinely merited a complete excuse. What was unjust was refusing to put it to the jury at all. These arguments, however, did not prevail.

What is perhaps most noticeable in these arguments is that there are persuasive reasons of policy in conflict with the apparent requirements of justice. Although the Hailsham line of argument was presented in such a way as to admit to no conflict of this nature, it is nevertheless clear that considerations of policy, or recognition of the dangers inherent in admitting the defence, have overridden the principle of guaranteeing individual justice. Given that it is generally agreed that the will has to be free in order to hold an agent responsible for any act, it must be the case that there is no justification apart from considerations of prevention and deterrence for arbitrarily stipulating that duress is to be absolutely excluded at a certain level of seriousness. Whether it stops short of actual murder or of aiding and abetting is beside the point.

Is it true or false, then, that somebody in Lynch's position is morally responsible for the killing carried out with their assistance? It is indisputable that he was causally responsible, hence that his actions were partly instru-

mental in bringing about the death. This in itself, though, is never enough to establish guilt. Did he also have 'a guilty mind'? This depends on whether his ability to choose was really eliminated. His choice was between assisting in the crime or facing what he believed to be his own certain death. The pressure on the will in such a situation does not amount to literal compulsion, but it can hardly be denied that the ability to choose is severely constrained.

If the doctrine of *mens rea* is sound, and if we accept that the will is virtually neutralised by threats of imminent death in such circumstances, then it must be concluded that the volitional condition was not satisfied and he was not guilty of aiding and abetting murder. The outcome of the decision to restore the situation prior to *Lynch* is that victims of duress in murder cases are taken to be fully culpable and punishable. In terms of the basic principles relating to the justification of punishment, what these prevailing voices are in effect saying is that, although it may be unfair, we cannot afford not to punish people who find themselves in these situations. They need to be punished even if they do not deserve to be. Prevention and deterrence are more important than avoiding a limited amount of injustice.

Intention and responsibility

Intending to cause or inflict harm in one way or another is, generally speaking, a prerequisite of establishing blame or responsibility, whether legal or moral. In a legal context, it is the intention to commit an act prohibited by law that is relevant. The general question concerning intention to be examined here can be phrased as follows. When there is no doubt that a criminal act has been committed, are there any circumstances under which the agent might be exonerated or excused responsibility, on the grounds that the act was unintentional? Conversely, when is the agent guilty in mind as well as in deed, in terms of what he or she means to happen?

Making sense of malice and recklessness

The paradigm case of unintended harm is that of a pure accident. With genuine accidents, it is commonly believed, there are no rational grounds for blame or recrimination. In such cases, it is tempting to assume that the explanation for there being no blame is the absence of malice in the act. In common usage, malice indicates ill will or vindictiveness. This is precisely what is missing in an accidental act that causes harm. As with many other legal concepts, however, the meaning of malice in law is very loosely related to this common usage.

According to a well-established legal definition of malice, it has a very specific meaning that does not require any kind of ill will. What was required, according to Kenny (1902), was *either* 'an actual intention to do the particular kind of harm that in fact was done', *or* 'recklessness as to whether such harm should occur or not', in the sense that the risk of harm

was foreseen, but the agent continued regardless. This definition is only contingently related to the more conventional, non-legal meaning of malice. It means either 'specific intent' or recklessness.

None of these terms, however (intention, malice, recklessness), have had a stable meaning in the evolution of English law. Their legal meanings are to some extent interdependent, as we shall see. Two nineteenth-century cases will illustrate the difficulties involved in attributing malice to those whose defences rest on the claim that there was no intention to commit the offence.

In *R*. v. *Faulkner* (1877), a sailor charged with arson admitted to attempting to steal rum from the spirit room of a ship. In striking a light, he accidentally ignited the rum, which resulted in the complete destruction of the ship by fire. His initial conviction for arson was overturned by the Appeal Court on the grounds that he had neither the actual intent to destroy the ship, nor reckless disregard for such an outcome, because there was no evidence that he believed the stealing of the rum could have such unexpected and dangerous results. Given that arson meant 'unlawful and malicious setting fire to something', the trial judge was considered to have interpreted the word 'malicious' too broadly and intuitively.

One point to reflect on here is that if the subjective interpretation of malice, in terms of what he actually believed, is more in line with common usage than the objective interpretation, in terms of what it would have been reasonable to believe, then it was the Court of Appeal rather than the trial judge that was interpreting the word more intuitively. On the general point, however, they were following a more precise legal definition and ignoring the loose connotations of the word 'malicious'.

The case of *R*. v. *Martin* (1881) had different implications for the interpretation of malice and specific intent. The Court of Appeal upheld the conviction of a man for the unlawful wounding of a number of people at a theatre. His defence had been that there was no malice in his turning out of the lights and barring of the exit, just 'mischief', and that he had intended to create panic, not to cause injuries. It was explicitly ruled not only that malice required no ill will, and hence that it could include 'mere mischief', but also that it could include acts without the specific intent to commit the kind of harm that actually occurred. It was also held that it was an unlawful act calculated to injure *in the sense that it was likely to injure*.

On the face of it, the rulings in *Faulkner* and *Martin* are inconsistent. What they have in common is the depersonalisation of the concept of malice; the legal concept has nothing to do with personal feelings. Where they seem to be at odds, though, is on the issue of foreseeability of harm. The *Faulkner* ruling rests on the question of what the sailor actually believed about the risk he was taking. The *Martin* ruling, by contrast, was indicating an objective test, in terms of the actual likelihood of injury to the theatre-goers. This tension between the subjective and objective test of malice in terms of foresight and foreseeability has become increasingly significant in more recent rulings on intention.

Kenny's 1902 definition was clearly indicating a subjective test. If there had to be either actual intent or recklessness in the sense that the accused had foreseen the risk and proceeded regardless, the implication was that it was not sufficient to argue that the risk *should* have been foreseen or that 'a reasonable man' *would* have foreseen it. Kenny's definition was endorsed in a dispute over the meaning of malice in the case of *R*. v. *Cunningham* (1957). The defendant had inadvertently caused an injury to a woman who was sleeping in a room adjacent to a gas meter that he had ripped from the wall in the course of stealing from the meter. As a result of the fracturing of the gas pipe, she had inhaled the escaping gas, and he was charged with larceny and 'unlawfully and maliciously administering a noxious thing', contrary to S.23 of the 1861 Offences Against the Person Act.

Did Cunningham administer the gas 'maliciously'? In common usage, it seems clear that he did not. It played no part in his calculations, and there was no ill will to someone, the presence of whom he did not even suspect. He might still be thought guilty of the injury, despite the absence of this kind of malice, because the act was so obviously dangerous. In legal terms, though, it is not so clear. At the appeal against conviction, the defence cited *Faulkner* as relevant precedent, while the prosecution cited *Martin*.

Cunningham's appeal was allowed, the Lords ruling that the judge had misdirected the jury on the meaning of malice. The judge's direction had been that 'maliciously' (in the wording of the statute) meant 'wickedly': 'doing something which he has no business to do and perfectly well knows it'. The upshot of this direction was that the jury had no alternative but to convict on the second charge if they found him guilty on the first charge of larceny. What he had 'no business doing' was the act of larceny, which was the same act as that which brought about the unintended poisoning. The Lords reiterated the rejection by Kenny and other authorities of the equation of malice with wickedness, and pointed out that, with the proper definition before them, one could not say how a jury would have decided the case on the second charge of maliciously administering the gas. The crucial question would have been whether he had understood the risk and proceeded regardless. This reaffirmation of the 'subjective' test of malice, in terms of what the defendant actually believed, settled the law on this matter for some years. It established what came to be known as the 'Cunningham' test for recklessness.

With the subsequent development of case law, however, there has been more detailed scrutiny of the concept of recklessness. The decisive ruling by the Lords on *R. v Caldwell* (1982), a case involving damage to a hotel and endangering lives with fire, established the wider 'Caldwell' test for recklessness. This was in effect the reinstatement of the objective test for malice (discussed above) in terms of actual likelihood of injury or damage to property. On this test, recklessness was now defined in such a way that encompassed both possibilities – the defendant either saw the risk and proceeded to take it, or gave what was an objectively obvious risk no thought at all, and proceeded to take it. The general idea here is that if you

'close your eyes to the obvious', you are just as guilty as one who sees the risk and ignores it. With the Caldwell test, the prosecution does not have to prove that the risk was actually appreciated by the defendant.

These two subjective and objective 'limbs' of the Caldwell test were supposed to cover every case of recklessness. However, a loophole (known as 'the Caldwell lacuna') soon appeared. The problem arises when a defendant had indeed seen the risk but then discounted it as unlikely and proceeded to take it. This might apply, for example, in cases of dangerous driving, when the driver sees but wrongly dismisses the risk of overtaking on a dangerous stretch of road (*Reid,* 1992), in cases of playing with a partly loaded revolver without realising that the chambers rotate on firing (*Lamb,* 1967), or taking a calculated risk with an exposed electric cable (*Merrick*, 1996). Neither the first nor the second limb of the Caldwell test seems to cover such cases, in which they have not closed their eyes to the obvious; on the contrary, they have seen the risk and miscalculated, but the fact that they calculated and rejected the risk exempts them from the first limb as well. There have been numerous rulings on the lacuna, but the problem has not been resolved. One important ruling to note was the confinement of the lacuna to cases of *bona fide* mistake, with the Lords declaring that grossly negligent mistakes would fall under the second limb of the Caldwell test (*Reid,* 1992).

One point to be clear about is that, although there were some judicial attempts to extend the objective Caldwell test to all offences, it never in fact replaced Cunningham, but merely restricted its application. In the years following the Caldwell ruling there was considerable uncertainty as to how the law stood on this matter. Originally applied to reckless manslaughter (*Seymour,* 1983), this was later explicitly ruled out in *Adomako* (1995). *Caldwell* came to apply mostly to criminal damage and regulatory offences. The subjective Cunningham test was reaffirmed for most offences against the person, including any offence, the statutory terms of which includes the word 'maliciously' and to all offences of assault. In all such cases, the burden of proof continued to rest with the prosecution to establish either intent or subjective recklessness.

The criticisms of the Caldwell definition by lawyers and legal philosophers for this increasing complexity, and the potential for injustice to particular defendants who did not conform with the reasonableness standard, came to a head with the Lords' ruling in *R. v. G. and another* (2003) that the Caldwell test was no longer to apply. The agreed facts of the case were that two boys aged 11 and 12 had set fire to some newspapers on a concrete forecourt while camping unaccompanied by their parents, and had expected them to burn out. The fire spread and caused £1 million worth of damage. The new ruling explicitly restored the Kenny definition and the Cunningham test for recklessness in cases of criminal damage, so that actual awareness of the risk must be proved in all cases. As we will see in Chapter 13, however, this development has not closed the question of the appropriate test for recklessness. At around the same time that the Lords were making this

ruling, for example, Parliament was passing the Sexual Offences Act (2003), according to which the sexual offences of rape and indecent assault when carried out reckless as to the victim's consent required an assessment of the reasonableness of the belief that there was in fact consent, in order to constitute a defence. This is a version of the objective test, which runs contrary to the spirit of *G. and another*.

Intention and motive

Motive, in common language, is relatively straightforward. It means a reason behind an action in the sense that it is what moves you to action. The motives for seeking food and drink are hunger and thirst. Intention is a more complex concept involving aims or goal-directedness, conscious deliberation and purposefulness, but its essential meaning can be conveyed by its indication of a design or plan. The intention to seek food and drink is the possession of some kind of design or plan on how to obtain it.

The deliberations of a jury will nearly always involve assessment of intention and scrutiny of motive. Was there evidence of conscious design? Did the defendant mean to do it? Why did he do it? Despite the fact that intention and motive are not near-synonyms, they are often confusingly conflated. The question *why* an arsonist, for example, set fire to a building has no intrinsic connection with the question of whether or not he or she *meant* to do it. A strongly motivated arsonist might as easily start a fire by accident as someone without any motive or desire to start one. Although the two concepts are clearly distinct, we need to understand why they can appear merely as two ways of referring to the same thing.

Motive is usually at most an indicator or symptom of guilt, while intention is a condition of guilt. Motive is in a sense incidental; it is presented only as part of the evidence for the prosecution that the defendant is guilty as charged. Given that a criminal act has been committed, the presence of a motive is neither a necessary nor a sufficient condition of guilt, while intention is normally necessary and sometimes sufficient to establish guilt. A crime without any apparent motive is no less a crime, but a crime that is not intended is in normal circumstances not a crime at all.

With such a clear distinction, it might well be wondered how intention and motive can ever become confused. The manner in which this reversal occurs is not easy to pin down. Consider again the motive behind an act of arson. The motive might be hatred, revenge or jealousy; it may be the wish to frighten, terrorise or kill the occupants; it might be the desire to defraud an insurance company; it might be a protest against the architecture. Any of these reasons might be the correct answer to the question, 'Why did you do it?' Some, but not all, of them would be appropriate answers to the question, 'What did you intend to happen?'

Answers to the 'why' question are also relevant, then, to the intention question. It is directly relevant and indeed central to *mens rea* to establish

the extent of what was intended: for example, 'What consequences did you intend?' or 'How far did you mean to go?' The answer might be 'I only meant it as a warning; I didn't mean to kill anyone.' This question and answer relate to intention and responsibility, but also sound like an explanation of motive, of why the act was done. It is the possibility of so much overlap or coincidence between intention and motive that lies at the root of the confusion. The two concepts are logically distinct, but on some occasions the distinction is less apparent than on others. Whatever the motive, certain additional outcomes might be intended. What is immediately relevant here, though, is what the perpetrator intended to happen as a consequence of igniting the building. As far as the guiltiness of mind is concerned, the normal procedure in law is to exclude motive and focus on the intention or purpose of the defendant. The following case illustrates this inclination to exclude motive from account. It also illustrates the ease with which legal reasoning can fall into conceptual confusion.

In a 1947 case (*R.* v. *Steane*), an Englishman living in Germany at the outbreak of war had succumbed to threats to send his family to a concentration camp, and reluctantly agreed to make broadcasts for German radio. After the war he was charged with treason, the wording of which included the phrase 'doing an act likely to assist the enemy with intent to assist the enemy'. It was argued in Steane's defence that there was no such intent because his true purpose was to protect his family. His defence rested on the assumption that the understandable motive behind the act would exonerate him. Steane did not deny 'doing the act'. Further, the court accepted his explanation as a true account of his reasons for committing the offence.

The general question at issue was whether or not he had a 'guilty mind'. An intuitive non-legal response to this general question might be that there was no subjective guilt and therefore no criminal intention, that he did not intend to assist the enemy even though he was pressurised into doing so.

In his direction of the jury, the trial judge reasoned that while Steane's motive was a worthy and innocent one, his intention was nevertheless to assist the enemy. On this interpretation, the ascription of such intention is nothing more than a morally neutral statement of fact. Objectively speaking, it was reasoned, there was no question that he did intend to assist the enemy, albeit reluctantly. Steane was accordingly convicted of treason, but the conviction was overturned on appeal. The appeal judges took the view that, although it was right to distinguish intention from motive, there was no actual proof of criminal intent, and that the jury was not entitled to assume intent unless they could show that the defendant's actions were not free and unconstrained. On this interpretation, the criminal intent and thereby the *mens rea* were undermined not by motive but by volition. He was deemed not to have performed the act voluntarily. The implication of this decision was that blameless motives were still held to be irrelevant to the question of guilt.

Intention and foresight

With the question of how an agent's foresight relates to responsibility and *mens rea*, we arrive at the heart of the conceptual difficulties raised by intention. Single acts or particular courses of action nearly always have multiple effects, some of which are less obviously connected with the acts than others. These less obvious effects may be perfectly harmless, or they may not. When somebody chooses to follow a certain course of action with one definite outcome in mind, while clearly understanding in advance that this action will also cause other consequences that it is no part of their purpose to bring about, there is evidently a sense in which they are responsible for those secondary side-effects. They have foreseen the consequences and chosen to proceed. When this advance understanding is, for whatever reason, less than clear, there is a problem in determining the extent of responsibility. This is a general statement of the moral problem of unintended consequences, which applies in many different fields, and the complexity of which varies according to the clarity of foresight attributed to the agent.

When the main purpose is lawful, as in the case of a doctor performing a dangerous operation with consent, or administering morphine for the relief of suffering, the doctor is not taken to be responsible for the secondary consequence of the death of the patient, so long as it remains the unintended secondary consequence. When the main purpose is unlawful, involving criminal damage or harm, the question is whether or not there is further blame, and if so to what extent, when the outcome of the unlawful act goes beyond what was fully and explicitly intended. If, for example, an arsonist intends only the destruction of a building, but the fire results in the death of the occupants, the question is whether he or she can be convicted of murder or manslaughter in addition to the arson that was fully and explicitly intended. There are two distinct questions here: (1) does the arsonist in some sense intend the second outcome? And (2) to what extent is the arsonist responsible for the second outcome?

The crucial consideration in any attempt to provide coherent and consistent answers to these two questions is that of the *foreseeability* of the second consequence. There are two extreme points of reference here: (a) it was neither foreseen nor foreseeable; the deaths were entirely unpredictable and accidental, hence – it might be suggested – there is no blame at all; and (b) it was so likely to occur as to be recognised as an inevitable accompaniment of the first consequence, and hence – it might be thought – there is as much blame as if it had been fully and explicitly intended.

These are the two extremes that, in the practical reality of concrete cases, do not often apply. The third possibility (c) lies on a spectrum between these two points; the second consequence was foreseeable with varying degrees of possibility or probability. This would point to the conclusion that there was some degree of blame for the second consequence of the action, the exact extent to be determined by the level of probability.

What we have to ask now is whether there is really a clear-cut distinction between what is 'fully and explicitly intended' and what is anticipated as a possible or probable side-effect. Is the latter in any sense intended or not? In cases of type (a) – cases of genuine accident – it is difficult to see how it could be. With the other extreme (b) – given the certainty with which the outcome is contemplated – it is tempting to say that there is no difference, that the intention is really full and explicit. With the most common type (c), though, we have the difficult problem. What is deeply ambiguous here is whether or not the secondary consequence is clearly envisaged. On the one hand, it is human nature to put unwanted possibilities and dangers out of mind; on the other hand, one is reluctant to accept that in high-risk activities involving the use of fire, dynamite, guns or fast vehicles, the substantial risk of causing fatal injuries can be ignored to the extent that we can say that there was no intention at all to kill.

The traditional solution to this problem was provided by Bentham's distinction between direct and oblique intention. For Bentham, what is directly intended is a consequence, the prospect of production of which plays a causal part in bringing about the action. The consequence is obliquely intended when it is contemplated as likely to follow from the action, but played no causal part in bringing about the action (Hart 1968: 237; Bentham 1970: ch. 8, no. 6). Bentham's purpose here was to extend intention and liability beyond the confines of the directly intended results of acts to include those that are 'contemplated as likely'. Whether this is justified or not, it gives us a clear-cut distinction in as far as it excludes from direct intention anything that is not an inherent part of the plan or design behind the action; however, it does not get us much further with the question of whether the secondary consequence is clearly envisaged. What exactly does 'contemplating' as likely mean?

Glanville Williams's more recent explication of Bentham's distinction solves this by simply stipulating that, in contrast to direct intention, oblique intention is 'something you see clearly, but out of the corner of your eye'. 'Oblique' means that 'it is not in the straight line of your purpose'. He adds that oblique intent is 'a kind of knowledge or realisation' (Williams 1987: 417–21), by which he means that it is known as a moral certainty. The obliquely intended consequence, on this interpretation, is seen clearly as a virtually certain accompaniment of the directly intended consequence. This was not what Bentham had in mind, and it seems closer to our type (b), that of inseparable consequences, which actually applies to very few concrete cases, and which suggests that the 'oblique' intention is, for all practical purposes, full and explicit, which is to say that it is actually intended. The problems with cases of type (c) – the complex cases in which there are varying degrees of perceived risk attached to the act or course of action – remain unresolved.

Another popular interpretation of the direct–oblique distinction is known as 'the failure test'. This is initially more convincing. The question is

whether the agent would regard the enterprise as a success or failure in the event of the non-occurrence of the intended consequences. When directly intended consequences do not occur, the enterprise is seen as a failure. With obliquely intended consequences, by contrast, their non-occurrence has no implications either way for success or failure. In the arson case, for example, the plan to destroy the building is not affected by the injury or deaths of the occupants. In the real case of *R.* v. *Desmond, Barrett and Others* (1868), in which several people were inadvertently killed in an attempt by the defendants to blow up the wall of Clerkenwell Jail, these deaths were not integral to the plan, which was to release the prisoners; the non-occurrence of these deaths would have been compatible with the success of the enterprise.

This failure test is certainly in line with Bentham's meaning, but all it does is provide a practical test for objectively distinguishing between acts in terms of what their agents intend to achieve. It gives no guidance on the question of the extent of their responsibility for the secondary effects that are thus non-essential to the plan, according to their state of mind with respect to these effects. If it does suggest reduced responsibility for this reason, it is misleading, because if the only way to destroy a building is by risking the death of the occupants, the oblique intention is for all practical purposes indispensable to the plan. To say then that the deaths were not required or desired to count the enterprise as a success would – given that they were calculated to be wholly unavoidable – be quite unconvincing.

It follows that the key question for determining the degree of responsibility for secondary effects relates, not to a clarification of the difference between direct and oblique, but to the kind of test that is applied by the courts to establish the *mens rea* requirement for murder. The main issue here is whether the test is a subjective one, in the sense that it is a matter of determining what the defendant actually foresaw and believed about the circumstances in which death was caused; or an objective one, in the sense that it is a matter of determining what was reasonably foreseeable and believable about those circumstances.

If the test for the *mens rea* for murder is subjective, it means that the court has to reach a conclusion from the evidence about the defendant's actual state of mind at the time of the offence. What consequences did he foresee? How likely did he believe them to be? What did he intend when he proceeded with the act? These are the questions to be asked. If, by contrast, the test is objective, it means that it is sufficient for the court to establish what it would have been reasonable to believe in the position of the defendant. What consequences should a reasonable person have foreseen? How likely in fact were they? What can the defendant be taken to have intended, bearing in mind the foreseeability and likelihood of the consequences? These are very different questions. What they indicate is what is known as the test of 'the reasonable man'.

It is important to understand how the law stands on this issue and also to ask which of these tests is more reasonable and fair, in terms of the *mens rea*

for murder. Consider first the implications for the case of *Desmond, Barrett and Others*. Did Barrett in fact intend to kill the victims of the explosion? On the subjective test, his own reckoning of the situation and assessment of the risks of using dynamite, his actual foresight of what he expected to happen, would have to be assessed. This is what the prosecution would have to prove. On the objective test, they would only have to prove that any reasonable person would have foreseen the risk of causing injury or death. It would then be assumed that Barrett as a reasonable man must have foreseen it, and hence that he intended it.

This issue became controversial with a Law Lords' ruling on a very different case of 'foreseeable death' in 1961. The facts of *Smith* v. *D.P.P.* were essentially that a man trying to drive away in a car containing stolen goods caused the death of a police officer who was clinging to the door of the car. Gathering speed, the driver zigzagged until the policeman was thrown off, into the path of an oncoming car. Smith returned immediately and claimed that he had not meant any harm, that he had panicked in his attempt to escape.

Smith was convicted of murder and sentenced to death. At the Court of Criminal Appeal, the defence argued that the judge had misdirected the jury by applying the test of the reasonable man, when the test should have been whether he actually intended to cause serious harm or death. The Court agreed and substituted a conviction for manslaughter and a ten-year prison sentence. When the appeal by the Crown went to the Lords, the argument between defence and prosecution revolved around the issue of the appropriate test for *mens rea*.

Did Smith intend to kill PC Meehan? The prosecution argued that the law made a presumption that a man intends the natural and probable consequences of his acts. From that, an intent to cause serious harm or death can be inferred. Any reasonable person would have seen such harm or death as the natural consequence of driving in this manner. Smith was a reasonable man in the sense that he was neither insane nor incapable of forming an intention. Therefore, Smith must have intended serious injury or death. It was no defence to say that he did not actually foresee these consequences.

The case for the defence was that a murder conviction could only be upheld if the intention to cause serious harm or death was actually in the mind of the accused. A central point was their insistence that the presumption of intent (of natural and probable consequences) should be regarded as disprovable by the specific circumstances of the case, in this instance the claim that the defendant was driven by fear and panic. They added that if the reasonable man test is to be used, it must be that of the reasonable man in the position of the defendant.

Faced with these alternatives, the Lords came to the unanimous decision that Smith had been properly convicted of murder, and that it was indeed sufficient to apply the reasonable man test and make the presumption of intent. In rejecting what they called 'the purely subjective approach', they

declared that it was self-evidently wrong because it would oblige the jury to take the word of the defendant and acquit him, and that this subjective test would constitute a serious departure from all previous law. This judgement was mainly backed up, oddly enough, by reference to the authority of O.W. Holmes. Holmes had written in 1881 that the law would not inquire whether an offender did actually foresee the consequences or not. For him, the test of foresight was not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen (Holmes 1968). This was an odd authority to cite as representative of 'all previous law', because Holmes was known to be out of step with prevailing legal opinions on objective liability.

What makes it unclear whether this judgement does or does not conform with the principles of the *mens rea* doctrine is the studied ambiguity in the presumption that he intended the natural and probable consequences of his act, as to whether this presumption means that – as a sane and sober man – he must actually have done so, or that if – as a reasonable man acting unreasonably – he did not intend them, then so much the worse for him. This ambiguity pervades the judgement. Even on the former interpretation that Smith must in fact have intended the death, it means that the determination of actual intent is taken out of the hands of the jury. They are simply instructed to make the connection without reference to the defendant's own account of his actions.

Whatever the perceived rights and wrongs of this decision, it was not long before Parliament intervened to overrule it and restore the subjective test by statute, in the 1967 Criminal Justice Act, Section 8. This section implicitly rejected the reasonable man test by laying down that courts or juries were to determine whether a person had committed an offence, not by inferring intent or foresight of results of his actions solely from their natural and probable consequences, but by deciding whether he did intend or foresee them by reference to all the evidence as appears proper in the circumstances. It was this contrast between the presumption of intent and reference to 'all the evidence' that was vital. The totality of evidence included what the presumption was designed to exclude; the defendant's own account of his actions, however apparently unreasonable, are indispensable to the jury's consideration of whether or not there was actual intent to do serious harm or kill. This meant, not that the natural and probable consequences of an act were to be disregarded, but that there was to be no *presumption* that they were intended.

This clarification of the law seemed to have settled the matter in favour of the subjective test, but the following twenty years saw several decisions that appeared to throw doubt upon it. The most important was that of *Hyam* v. *D.P.P.* (1975), a case in which a woman was convicted of murder for having started a fire in which two children died. The act involved pouring petrol and newspaper through the letterbox of the front door and igniting it. On her own account, her intention was only to frighten the occupant – her lover's fiancée – into leaving the neighbourhood. Her defence was that she

did not intend to start a full-scale fire, and that there was no intention to harm or kill anyone.

When Hyam's appeal against conviction for murder reached the House of Lords, having been rejected by the Court of Appeal, the conviction was again upheld, but by a narrow 3–2 majority. Included in the ruling was a declaration that the intention to cause death or really serious injury was not required, if it could be shown that the defendant intended to expose a potential victim to the *risk* of such harm. This would be sufficient, regardless of whether the defendant desired such consequences. Hyam, then, was properly convicted of murder, because, although she might not have actually intended harm or the death of her victims, she deliberately placed them at serious risk.

What this amounted to was a substantial extension of the *content* of direct intention, which was now to be understood to include the knowing and deliberate exposure of people to potentially deadly risk. At the same time, as A.S. Kenny has argued (1978), it was implicitly attempting to do away with the direct–oblique distinction, by restricting responsibility to those acts that are directly intended. What this meant was that defendants in Hyam's position had to take full responsibility for such actions, and could – if found to have deliberately created this risk, rather than intending no more than to frighten – be convicted of murder. This further specification about risk was intended by Hailsham as an explanation of why this conviction was legally sound.

Was this a covert attempt to reintroduce the objective test, the presumption that the defendant intends the natural and probable consequences of his or her actions? Did it mean that intent was being imputed to Hyam? It might appear so, if it is interpreted as meaning that, because fire and petrol are so dangerous, she could not possibly have intended less than serious injury. For the same reason, one could have drawn similar conclusions about the danger of the accelerating car in the case of *Smith*. This, however, is a common misinterpretation of the *Hyam* ruling. It was not suggested that Hyam *should*, as a reasonable person, have known the risk. The jury had to satisfy themselves that she actually did know the seriousness of the risk she was exposing the occupants to. The test remained explicitly subjective.

The crucial point is that actual intent always has to be proved. The conditions for establishing the *mens rea* for murder do not point one way or the other for the guilt or innocence of any of these defendants. The crux of the matter is that real actual intention is a necessary *mens rea* condition for murder. In the words of Lord Lane, ruling on a later case (*R.* v. *Nedrick*, 1986):

> a jury simply has to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision, the jury must pay regard to all the relevant circumstances, including what the defendant himself said and did.
>
> (Allen 2001: 90)

Probability and foresight

The law on the question of the *mens rea* required for murder was clarified further and ostensibly settled in the mid-1980s, but not without further complication. There are two connected problems here. First, in the phrase 'natural and probable consequences of an act', does 'natural' mean the same as 'probable'? Second, is the intending of these consequences the same thing as foreseeing them?

For any natural course of events, which can take one turn or another, there are estimates of probability and virtual certainty of possible outcomes of acts. For any dangerous act, such as the firing of a gun, there is usually more than one possible sequence of natural consequences. If the one sequence realised in the actual world involves the death of someone in the line of fire, this outcome will be seen in retrospect as the natural – perhaps inevitable – outcome of the act. If, however, another quite different sequence were to be realised, such as the unexpected harmless deflection of the bullet, it would be seen in retrospect as an equally natural – if unlikely – outcome of the act. The point is that a process is natural regardless of whether it is seen in advance as virtually certain, as fairly probable, or as a remote possibility. Whatever the prediction, a complete chain of cause and effect will still be traceable after the event.

In any of the cases discussed in the last few sections, it seems reasonable to suppose that the degree of probability or certainty of the outcome that did in fact occur should play a vital role in arguments about the evidence for the actual intent. Consider some slight variations on the actual cases. If the constable had died as a result of being thrown back immediately from the car, rather than dragged fifty yards up the road, the much lower likelihood of death would have counted heavily in favour of the defendant. If Hyam's fire had caused deaths only by spreading to neighbouring houses because of a freak change of wind, the evidence of intent to kill would have been very much weaker. The assessment of likelihood, then, in the mind of the defendant and in the judgement of the jury, is an indispensable part of the evidence for intent.

Just as the probability of the consequences of an act is relevant as evidence for intent to kill, so also is the foresight of these consequences. If it is found that the defendant saw that X would probably happen, or was virtually certain to occur, the strength of evidence here would increase in proportion to the level of probability foreseen. The point here is that foresight is evidence of actual intent; it does not actually constitute intent. The existence of intent is inferred from the fact of foresight. It is not in itself sufficient to prove that the defendant foresaw an outcome, whatever the degree of probability or certainty. This proof is a preliminary to drawing the inference from foresight to intent, which is left to the jury.

Conclusion

These are some of the key themes in the question of what determines criminal responsibility, the details of which are regularly disputed in the appeal

courts. If the doctrine of *mens rea* is broadly speaking a just one, not only in its basic principles but also in the ways in which it is converted into just decisions, the source of the idea of justice it represents remains an open question. Being subject to evolution in the common law, pronouncements and adjustments to the application of the doctrine by Parliament and the Law Lords have been guided by a concern for precedent and continuity with earlier interpretations, but such adjustment always involves clarification and thereby a new interpretation of what is supposedly already implicit in the law. What should be clear from the sample of cases is that there is a permanent tension within the concept of criminal justice, between the principles of justice as recognised by the *mens rea* doctrine and the perceived requirements of public policy.

Study questions

General question: Is *mens rea* vital to a just legal system?

Further study questions: Can there be criminal guilt if *mens rea* is not satisfied? In what sense should lack of control over one's actions excuse an offender from criminal responsibility? Compare the defences of necessity and duress. In what circumstances should constraint of the will by necessity or duress be a defence against a serious criminal charge? To what extent should we be held legally responsible for the unforeseen or unintended consequences of our actions? Should the courts apply the objective or subjective test in cases of recklessness? Is the Caldwell lacuna an inevitable loophole? Should the causing of death without direct intention be regarded as murder or as manslaughter? What is the purpose of the distinction between direct and oblique intention? Is it defensible or should it be scrapped in favour of the common meaning of intention?

Suggestions for further reading

Major contributions to the analysis of criminal responsibility and the philosophy of action include Hart (1968), Kenny (1978), Duff (1990), Norrie (1993), Katz (1987) and Moore (1993).

On free will, necessity and duress, see Mackie, 'The Grounds of Responsibility', in Hacker and Raz (1977), Norrie (1993: ch. 8), Fuller's (1949) imaginary case of 'the Speluncean Explorers' and Suber's (1998) extension of the same case. See also the selections on 'free will' in Morris (1961: IX).

On intention and foresight, see Bentham (1970: ch. 8), Hart (1968: ch. 5), Duff (1982, 1990), Gavison (1987: ch. 6), Kenny's 'Intention and Mens Rea in Murder', in Hacker and Raz (1977), Glover (1977: ch. 6) and Norrie (1993: ch. 3). See also the selections on 'intention and motive' in Morris (1961: IV).

On strict liability and crimes of negligence, see Hart (1968: ch. 6), Jacobs (1971: chaps 4, 5), Kenny (1978: chaps 1, 3) and Ten (1987: ch. 5), and also Hart's 'Legal Responsibility and Excuses', and Wasserstrom's 'Strict Liability in the Criminal Law', in Kipnis (1977). See also the selections on 'negligence, recklessness and strict liability', in Morris (1961: IV).

Elliott & Wood's Casebook on Criminal Law (Allen, 2001) contains the relevant cases and critical discussions of the problems dealt with in this chapter. Further discussions of the same cases can be found in Smith and Hogan (2002) and Elliott and Quinn (1996).