INTENTION, AGENCY AND CRIMINAL LIABILITY:

Philosophy of Action and the Criminal Law

R. A. Duff

Basil Blackwell

Contents

To HGM and VJM

view for which I have argued in the case of criminal attempts; and we should not assume that the answer will be the same in every case. We cannot, however, pursue these issues here.

8.5 *Concluding Remarks*

We have now discussed all four of the problem cases with which this book began. Mrs Hyam was rightly convicted of murder, though not for quite the reasons which any of the Law Lords offered; *Caldwell* was wrongly decided, though not merely because it did not make conscious risk-taking a necessary condition of recklessness; *Morgan* was wrongly decided, since it held that an unreasonable belief in the absence of risk must rebut a charge of recklessness; and *Cawthorne* was wrongly decided, since criminal attempts should be defined in terms of a direct intention to do harm.

These verdicts on these four cases have emerged from a discussion of the concepts of intention and recklessness, and their significance for criminal liability; and it is that discussion, rather than the conclusions about these cases to which it has led, which provides the main point of this book. I do not suppose that the arguments which I have offered will persuade everyone; nor indeed have I had the space to develop those arguments in such adequate depth and detail (or to circumscribe them with such cautions and qualifications) that I could claim that they *ought* to persuade everyone. But my aim has not been to provide definitive solutions to the problems which I have been discussing: it has rather been to provide a philosophical framework within which they can be better understood; to sketch some lines of thought which may help to resolve them; and, in doing so, to show how fruitfully philosophy can interact with jurisprudence.

Bibliography

American Law Institute, 1962, *Model Penal Code*, Proposed Official Draft, American Law Institute.

Annas, J. 1977–8, 'How basic are basic actions?', 78 *Proceedings of the Aristotelian Society*, p. 195.

Anscombe, G.E. 1963, *Intention*, 2nd edition, Oxford, Basil Blackwell.

Anscombe, G.E. 1970, 'War and murder', in R. Wasserstrom (ed.), *War and Morality*, Belmont, California, Wadsworth, p. 42.

Ashworth, A.J. 1984, 'Sharpening the subjective element in criminal liability', in R.A. Duff and N.E. Simmonds (eds), *Philosophy and the Criminal Law*, Wiesbaden, Franz Steiner, p. 79.

Ashworth, A.J. 1987, 'Belief, intent, and criminal liability', in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence*, third series, Oxford, Oxford University Press, p. 1.

Ashworth, A.J. 1988, 'Criminal attempts and the role of resulting harm', 19 Rutgers Law Journal p. 725.

Ashworth, A.J. 1990, 'Reforming the law of murder', *Criminal Law Review*, p. 75.

Audi, R. 1973, 'Intending', 70 *Journal of Philosophy*, p. 387.

Augustine, St 1961, *Confessions*, trans. R.S. Pine-Coffin, Harmondsworth, Penguin Books.

Austin, J.L. 1968, 'A plea for excuses', in A.R. White (ed.), *The Philosophy of Action*, Oxford, Oxford University Press p. 19.

Becker, L.C. 1974, 'Criminal attempt and the theory of the law of crimes', 3 *Philosophy and Public Affairs*, p. 262.

Bentham, J. 1970, *An Introduction to the Principles of Moral and Legislation*, ed. J. Burns and H.L. Hart, London, Methuen.

Bickenbach, J. 1983, 'The defence of necessity', 13 *Canadian Journal of Philosophy*, p. 79

Bienen, L. 1978, 'Mistakes', 7 *Philosophy and Public Affairs*, p. 224.

Birch, D.J. 1988, 'The foresight saga: the biggest mistake of all?', *Criminal Law Review*, p. 4.

Blum, L. 1980, *Friendship, Altruism, and Morality*, London, Routledge & Kegan Paul.

Brady, J.B. 1980, 'Punishing attempts', 63 *The Monist*, p. 246.

Buxton, R. 1984, 'Circumstances, consequences and attempted rape', *Criminal Law Review*, p. 25
Buxton, R. 1988, 'Some simple thoughts on intention', *Criminal Law Review*, p. 484.
Buzzard, J.H. 1978, 'Intent', *Criminal Law Review*, p. 5.
Carruthers, P. 1986, *Introducing Persons*, London, Croom Helm.
Casey, J. 1971, 'Actions and consequences', in J. Casey (ed.), *Morality and Moral Reasoning*, London, Methuen, p. 155.
Chisholm, R.M. 1970, 'The structure of intention', 67 *Journal of Philosophy*, p. 633.
Clarkson, C.M.V. and Keating, H.M. 1984, *Criminal Law: Text and Materials*, London, Sweet & Maxwell.
Cohen, M. 1980, 'Questions of impossibility', *Criminal Law Review*, p. 773.
Cook, J. 1969, 'Human beings', in P. Winch (ed.), *Studies in the Philosophy of Wittgenstein*, Routledge & Kegan Paul, London, p. 117.
Cottingham, J. 1986, *Descartes*, Oxford, Basil Blackwell.
Cross, R. 1960, 'The need for a redefinition of murder', *Criminal Law Review*, p. 728.
Cross, R. 1965, 'Paradoxes in prison sentences', 81 *Law Quarterly Review*, p. 205.
Cross, R. 1967, 'The mental element in crime', 83 *Law Quarterly Review*, p. 215.
Cross, R. 1975, 'Centenary reflections on Prince's case', 91 *Law Quarterly Review*, p. 540.
Cross, R. and Ashworth, A.J. 1981, *The English Sentencing System*, 3rd edition, London, Butterworths.
Curley, E.M. 1976, 'Excusing rape', 5 *Philosophy & Public Affairs*, p. 325.
Danto, A.C. 1968, 'Basic actions', in A.R. White (ed.), *The Philosophy of Action*, Oxford, Oxford University Press, p. 43.
D'Arcy, E. 1963, *Human Acts*, Oxford, Oxford University Press.
Davidson, D. 1980, *Essays on Actions and Events*, Oxford, Oxford University Press.
Davidson, D. 1980, 'Actions, reasons and causes', in *Essays on Actions and Events*, p. 3.
Davidson, D. 1980, 'How is weakness of the will possible?', in *Essays on Actions and Events*, p. 21.
Davidson, D. 1980, 'Agency', in *Essays on Actions and Events*, p. 43.
Davidson, D. 1980, 'Intending', in *Essays on Actions and Events*, p. 83.
Davis, L.H. 1979, *Theory of Action*, Englewood Cliffs, N.J., Prentice Hall.
Denning, Lord 1961, *Responsibility Before the Law*, Jerusalem, Magnes Press.
Dennis, I.H. 1978, 'Preliminary crimes and impossibility', 31 *Current Legal Problems*, p. 31.
Dennis, I.H. 1987, 'The mental element for accessories', in P. Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith*, London, Butterworths, p. 40.
Dennis, I.H. 1988, 'Intention and complicity: a reply', *Criminal Law Review*, p. 649.
Descartes, R. 1986, *Meditations on First Philosophy*, trans. J. Cottingham, Cambridge, Cambridge University Press.

Dilman, I. 1975, *Matter and Mind*, London, Macmillan.
Duff, R.A. 1979, 'Implied and constructive malice in murder', 95 *Law Quarterly Review*, p. 418.
Duff, R.A. 1980, 'Recklessness', *Criminal Law Review*, p. 282.
Duff, R.A. 1980, 'Intention, recklessness and probable consequences', *Criminal Law Review*, p. 404.
Duff, R.A. 1981, 'Recklessness and rape', 3 *Liverpool Law Review*, p. 49.
Duff, R.A. 1982, 'Intention, responsibility and double effect', 32 *Philosophical Quarterly*, p. 1.
Duff, R.A. 1982, 'Professor Williams and conditional subjectivism', 41 *Cambridge Law Journal*, p. 273.
Duff, R.A. 1983, '*Caldwell* and *Lawrence*: the retreat from subjectivism', 3 *Oxford Journal of Legal Studies*, p. 77.
Duff, R.A. 1984, 'Mental disorder and criminal responsibility', in R.A. Duff and N.E. Simmonds (eds), *Philosophy and the Criminal Law*, Wiesbaden, Franz Steiner, p. 31.
Duff, R.A. 1986, *Trials and Punishments*, Cambridge, Cambridge University Press.
Duff, R.A. 1989, 'Intentions legal and philosophical', 9 *Oxford Journal of Legal Studies*, p. 76.
Ebersole, F. 1967, 'Where the action is', in Ebersole, *Things We Know*, Eugene, Oregon, Eugene Press, p. 282.
Elliott, D.W. and Wells, C. 1982, *Elliott & Wood's Casebook on Criminal Law*, 4th edition, London, Sweet & Maxwell.
English, P. 1970, 'Did he think it would do the trick?', *Criminal Law Review*, p. 15.
Evans, D. 1982, 'Reason and action', 5 *Philosophical Investigations*, p. 27.
Feinberg, J. 1962, 'Problematic responsibility in law and morals', 71 *Philosophical Review*, p. 340.
Feinberg, J. 1968, 'Action and responsibility', in A.R. White (ed.), *The Philosophy of Action*, Oxford, Oxford University Press, p. 95.
Feinberg, J. 1984, *Harm to Others*, New York, Oxford University Press.
Fingarette, H. 1972, *The Meaning of Criminal Insanity*, Berkeley, University of California Press.
Fitzgerald, P.J. 1962, *Criminal Law and Punishment*, Oxford, Oxford University Press.
Fitzgerald, P.J. 1962, 'Carelessness, indifference, and recklessness', 25 *Modern Law Review*, p. 49.
Fletcher, G. 1978, *Rethinking Criminal Law*, Boston, Little, Brown.
Galligan, D.J. 1978, 'Responsibility for recklessness', 31 *Current Legal Problems* p. 55.
Glazebrook, P.R. 1969, 'Should we have a law of attempted crimes?', 85 *Law Quarterly Review*, p. 28.
Glover, J.C.B. 1977, *Causing Death and Saving Lives*, Harmondsworth, Penguin Books.
Goff, Lord 1988, 'The mental element in the crime of murder', 104 *Law Quarterly Review*, p. 30.

Goldman, A.I. 1970, *A Theory of Human Action*, Englewood Cliffs, N.J., Prentice Hall.
Gordon, G.H. 1969, '*Cawthorne* and the *mens rea* of murder', *Scots Law Times* (News), p. 41.
Gordon, G.H. 1975, 'Subjective and objective *mens rea*', 17 *Criminal Law Quarterly*, p. 355.
Gordon, G.H. 1978, *The Criminal Law of Scotland*, 2nd edition, Edinburgh, W. Green & Son.
Griew, E. 1978, 'Consistency, communication and codification', in P.R. Glazebrook (ed.), *Reshaping the Criminal Law*, London, Stevens, p. 57.
Griew, E. 1981, 'Reckless damage and reckless driving: living with *Caldwell* and *Lawrence*', *Criminal Law Review*, p. 743.
Griew, E. 1987, 'States of mind, presumptions and inferences', in P. Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith*, London, Butterworths, p. 68.
Gross, H. 1979, *A Theory of Criminal Justice*, New York, Oxford University Press.
Hall, J. 1963, 'Negligent behaviour should be excluded from penal liability', 63 *Columbia Law Review*, p. 632.
Halpin, A.K.W. 1987, 'Good intentions', 137 *New Law Journal*, p. 696.
Hampshire, S. and Hart, H.L.A. 1958, 'Decision, intention, and certainty', 67 *Mind*, p. 1.
Harris, J. 1980, *Violence and Responsibility*, London, Routledge & Kegan Paul.
Harris, J. 1984, 'Over-exertion and under-achievement', in R.A. Duff and N.E. Simmonds (eds), *Philosophy and the Criminal Law*, Wiesbaden, Franz Steiner, p. 91.
Hart, H.L.A. 1948–9, 'The ascription of responsibility and rights', 49 *Proceedings of the Aristotelian Society*, p. 171.
Hart, H.L.A. 1961, *The Concept of Law*, Oxford, Oxford University Press.
Hart, H.L.A. 1968, *Punishment and Responsibility*, Oxford, Oxford University Press.
Hart, H.L.A. 1968, 'Acts of will and responsibility', in *Punishment and Responsibility*, p. 90.
Hart, H.L.A. 1968, 'Intention and Punishment', in *Punishment and Responsibility*, p. 113.
Hart, H.L.A. 1968, 'Negligence, *mens rea*, and criminal responsibility', in *Punishment and Responsibility*, p. 136.
Hart, H.L.A. 1983, 'The House of Lords on attempting the impossible', in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, p. 367.
Hart, H.L.A. and Honore, A.M. 1985, *Causation in the Law*, 2nd edition, Oxford, Oxford University Press.
Heath, P.L. 1955, 'Intentions', 29 *Proceedings of the Aristotelian Society* (Supplementary Volume), p. 147.
Heath, P.L. 1971, 'Trying and attempting', 45 *Proceedings of the Aristotelian Society* (Supplementary Volume), p. 193.
Hogan, B. 1970, 'Funeral in Dublin', *Criminal Law Review*, p. 452.

Hogan, B. 1984, 'The criminal attempts act and attempting the impossible', *Criminal Law Review*, p. 584.
Holland, R.F. 1980, 'Good and evil in action', in R.F. Holland, *Against Empiricism* Oxford, Basil Blackwell, p. 110
Hull, C. 1966, *Principles of Behaviour*, New York, Appleton-Century-Crofts.
Hunter, J.F.M. 1987, 'Trying', 37 *Philosophical Quarterly*, p. 392.
Kenny, A.J. 1968, 'Intention and purpose in law', in R.S. Summers (ed.), *Essays in Legal Philosophy*, Oxford, Basil Blackwell, p. 146.
Kenny, A.J. 1975, *Will, Freedom and Power*, Oxford, Basil Blackwell.
Kenny, A.J. 1977, 'Intention and *mens rea* in murder', in P.M. Hacker and J. Raz (eds), *Law, Morality, and Society*, Oxford, Oxford University Press, p. 161.
Kenny, A.J. 1978, *Freewill and Responsibility*, London, Routledge & Kegan Paul.
Law Commission, 1967, *Imputed Criminal Intent (DPP v Smith)*, London, HMSO.
Law Commission, 1978, No. 89, *Report on the Mental Element in Crime*, London, HMSO.
Law Commission, 1980, No. 102, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, London HMSO.
Law Commission, 1985, No. 143, *Codification of the Criminal Law [1985 Code]*, London, HMSO.
Law Commission, 1989, No. 177, *A Criminal Code for England and Wales*, 2 vols *[1989 Code]*, London, HMSO.
Lynch, A.C.E. 1982, 'The mental element in the *actus reus*', 98 *Law Quarterly Review*, p. 109.
McDowell, J. 1978, 'Are moral requirements hypothetical imperatives?', 52 *Proceedings of the Aristotelian Society* (Supplementary Volume), p. 13.
MacIntyre, A.C. 1957, 'Determinism', 66 *Mind*, p. 28.
McNaughton, D. 1988, *Moral Vision*, Oxford, Basil Blackwell.
Malcolm, N. 1958, 'Knowledge of other minds', 55 *Journal of Philosophy*, p. 969.
Malcolm, N. 1971, *Problems of Mind*, New York, Harper & Row.
Malcolm, N. 1968, 'The conceivability of mechanism', 77 *Philosophical Review*, p. 45.
Meiland, J.W. 1970, *The Nature of Intention*, London, Methuen.
Melden, A.I. 1961, *Free Action*, London, Routledge & Kegan Paul.
Midgley, M. 1978, 'The objection to systematic humbug', 53 *Philosophy*, p. 147.
Moore, M.S. 1984, *Law and Psychiatry*, Cambridge, Cambridge University Press.
Mortimore, G. (ed.) 1971, *Weakness of Will*, London, Macmillan.
Mounce, H.O. 1982, 'Reason and action', 5 *Philosophical Investigations*, p. 267.
Nagel, T. 1970, *The Possibility of Altruism*, Oxford, Oxford University Press.
Nagel, T. 1979, 'Moral luck', in T. Nagel, *Mortal Questions*, Cambridge, Cambridge University Press, p. 24.
Nagel, T. 1979, 'War and massacre', in T. Nagel, *Mortal Questions*, p. 53.
Nagel, T. 1988, 'Autonomy and deontology', in S. Scheffler, (ed.), *Consequentialism and its Critics*, Oxford, Oxford University Press, p. 142.
Norman, R. 1971, *Reasons for Action*, Oxford, Basil Blackwell .

Parker, R. 1984, 'Blame, punishment and the role of results', 21 *American Philosophical Quarterly*, p. 269.
Passmore, J.A. 1955, 'Intentions', 29 *Proceedings of the Aristotelian Society* (Supplementary Volume), p. 131.
Prichard, H.L.A. 1968, 'Acting, willing, desiring', in A.R. White (ed.), *The Philosophy of Action*, Oxford, Oxford University Press, p. 59.
Reinhardt, L. 1969, 'Wittgenstein and Strawson on other minds', in P. Winch (ed.), *Studies in the Philosophy of Wittgenstein*, London, Routledge & Kegan Paul, p. 152.
Report of the Advisory Group on the Law of Rape (the Heilbron Report), 1975, Cmnd. 6352, London, HMSO.
Robins, M.H. 1984, *Promising, Intending, and Moral Autonomy*, Cambridge, Cambridge University Press.
Ryle, G. 1949, *The Concept of Mind*, London, Hutchinson.
Scheffler, S. (ed.), 1988, *Consequentialism and its Critics*, Oxford, Oxford University Press.
Scottish Law Commission, 1984, *Attempted Homicide*, Consultative Memorandum No. 61.
Searle, J.R. 1966, 'Assertions and aberrations', in B. Williams and A. Montefiore (eds), *British Analytical Philosophy*, London, Routledge & Kegan Paul, p. 41.
Shiner, R. 1990, 'Intoxication and responsibility', *International Journal of Law and Psychiatry*.
Slote, M. 1985, *Common-sense Morality and Consequentialism*, London, Routledge & Kegan Paul.
Smart, J.J.C. and Williams, B. 1973, *Utilitarianism: For and Against*, Cambridge, Cambridge University Press.
Smith, A.T.H. 1978, 'On *actus reus* and *mens rea*', in P.R. Glazebrook (ed.), *Reshaping the Criminal Law*, London, Stevens, p. 95.
Smith, J.C. 1960, 'The guilty mind in the criminal law', 76 *Law Quarterly Review*, p. 78.
Smith, J.C. 1962, 'Two problems in criminal attempts re-examined', *Criminal Law Review*, pp. 135, 212.
Smith, J.C. 1971, 'The element of chance in criminal liability', *Criminal Law Review*, p. 63.
Smith, J.C. 1978, '"Intent": a reply', *Criminal Law Review*, p. 14.
Smith, J.C. 1978, 'Some problems of the reform of the law of offences against the person', 31 *Current Legal Problems*, p. 15.
Smith, J.C. 1980, 'Comment on *Murphy*', *Criminal Law Review*, p. 311.
Smith, J.C. 1981, 'Comment on *Sheppard*', *Criminal Law Review*, p. 171.
Smith, J.C. 1984, 'Attempts, impossibility and the test of rational motivation', *Auckland Law School Review*, p. 25.
Smith, J.C. 1985, 'Comment on *Moloney*', *Criminal Law Review*, p. 379.
Smith, J.C. 1986, 'Comment on *Gillick*', *Criminal Law Review*, p. 114.
Smith, J.C. 1986, 'Comment on *Hancock and Shankland*', *Criminal Law Review*, p. 181.
Smith, J.C. 1987, 'Comment on *Millard & Vernon*', *Criminal Law Review*, p. 394.

Smith, J.C. 1990, 'A note on "intention"', *Criminal Law Review*, p. 85.
Smith, J.C. and Hogan, B. 1988, *Criminal Law*, 6th edition, London, Butterworths.
Smith, P. and Jones, O.R. 1986, *The Philosophy of Mind*, Cambridge, Cambridge University Press.
Stannard, J.E. 1985, 'Subjectivism, objectivism and the draft Criminal Code', 101 *Law Quarterly Review*, p. 540.
Stannard, J.E. 1986, '*Mens rea* in the melting pot', 37 *Northern Ireland Legal Quarterly*, p. 61.
Stannard, J.E. 1987, 'Making up for the missing element – a sideways look at attempts', 7 *Legal Studies*, p. 194.
Stuart, D. 1968, '*Mens rea*, negligence and attempts', *Criminal Law Review*, p. 647.
Sullivan, G.R. 1988, 'Intent, purpose and complicity', *Criminal Law Review*, p. 641.
Syrota, G. 1982, 'A radical change in the law of recklessness?' *Criminal Law Review*, p. 97.
Taylor, C. 1964, *The Explanation of Behaviour*, London, Routledge & Kegan Paul.
Taylor, C. 1985, 'What is human agency?', in C. Taylor, *Human Agency and Language*, Cambridge, Cambridge University Press, p. 15.
Temkin, J. 1976, 'Impossible attempts – another view', 39 *Modern Law Review*, p. 55.
Temkin, J. 1983, 'The limits of reckless rape', *Criminal Law Review*, p. 5.
Ten, C.L. 1987, *Crime, Guilt and Punishment*, Oxford, Oxford University Press.
Tur, R. 1985, 'Dishonesty and the jury', in A.P. Griffiths (ed.), *Philosophy and Practice*, Cambridge, Cambridge University Press, p. 75.
Wasik, M. 1980, 'Abandoning criminal attempts', *Criminal Law Review*, p. 785.
Watson, G. 1975, 'Free agency', 72 *Journal of Philosophy*, p. 205.
Wechsler, H. and Michael, J. 1937, 'A rationale of the law of homicide I', 37 *Columbia Law Review*, p. 701.
Wells, C. 1982, 'Swatting the subjectivist bug', *Criminal Law Review*, p. 209.
White, A.R. 1961, 'Carelessness, indifference, and recklessness', 24 *Modern Law Review*, p. 592.
White, A.R. 1985, *Grounds of Liability*, Oxford, Oxford University Press.
Williams, B. 1973, 'Morality and the emotions', in B. Williams, *Problems of the Self*, Cambridge, Cambridge University Press, p. 207.
Williams, B. 1973, 'A critique of utilitarianism', in J.J.C. Smart and B. Williams, *Utilitarianism: For and Against*, Cambridge, Cambridge University Press, p. 75.
Williams, B. 1976, 'Moral luck', 50 *Proceedings of the Aristotelian Society* (Supplementary Volume), p. 115.
Williams, G. 1961, *Criminal Law: The General Part*, 2nd edition, London, Stevens.
Williams, G. 1962, 'Carelessness, indifference, and recklessness', 25 *Modern Law Review*, p. 55.
Williams, G. 1981, '"Wilful neglect" in the Children and Young Persons Act', 40 *Cambridge Law Journal*, p. 1.
Williams, G. 1981, 'Recklessness redefined', 40 *Cambridge Law Journal*, p. 252.

Williams, G. 1982, 'Divergent interpretations of recklessness', *New Law Journal*, pp. 289, 313, 336.
Williams, G. 1983, *Textbook of Criminal Law*, 2nd edition, London, Stevens.
Williams, G. 1983, 'The problem of reckless attempts', *Criminal Law Review*, p. 365.
Williams, G. 1986, 'The Lords and impossible attempts', 45 *Cambridge Law Journal*, p. 33.
Williams, G. 1987, 'Oblique intention', 46 *Cambridge Law Journal*, p. 417.
Williams, G. 1988, 'The unresolved problem of recklessness', 8 *Legal Studies*, p. 74.
Winch, P. 1971, 'Trying and attempting', 45 *Proceedings of the Aristotelian Society* (Supplementary Volume), p. 209.
Wittgenstein, L. 1963, *Philosophical Investigations*, trans. G.E. Anscombe, Oxford, Basil Blackwell.

Index

Note: *Bare references to authors are not indexed.*