THE MORAL SIGNIFICANCE OF BELIEF AS A COMPONENT OF INTENTION IN THE CRIMINAL LAW

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ABSTRACT

Analyses of intended action, in a criminal law context as elsewhere, tend to agree that it comprises a relevant desire and belief. While much attention has been paid to the element of desire, little has been paid to belief. This thesis suggests that closer attention to belief is necessary in understanding the moral differences between intention crimes and other crimes. It argues that a mental state akin to belief is a necessary component in all intention crimes, considers whether "belief" is the correct term and what it means in this context, and considers the moral context in which intention crimes are categorised. Having considered those matters, it seeks to identify the role that belief plays and the type of belief required. It then seeks to identify the moral role that belief plays, considers what other factors are of moral importance, and compares the moral importance of belief with those other factors. It is submitted that this analysis reveals the central moral importance of belief, and provides a clearer and more morally satisfactory distinction between intention and other *mens rea* than has been identified hitherto.

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INTRODUCTION

Background

The concept of intention and its application in the criminal law have generated a great deal of work. Is there anything left to say on these issues? This thesis will argue that there remain matters that have not received enough attention, and that by attending to them, it is possible to clarify what the common ingredients of the *mens rea* of intention crimes really are or ought to be.

Those who have examined the concept of intention often include belief as one of its essential features. A person is not, generally, held to have acted intentionally unless she had a relevant belief about the results of that action. Despite this, the concept of belief in the context of the criminal law has not received much attention[1]. It is taken as a given. Attention is often focussed on other matters, and by so doing, whether explicitly or implicitly, judgement is made on the importance of belief without, it is submitted, proper attention being directed to belief itself. This thesis will argue that an understanding of belief is essential if intention, and in particular the moral dimension of intention crimes, is to be understood.

The problem of the meaning of intention

One of the main difficulties with the concept of intention – and one of the main reasons there has been so much discussion about it – is that the word itself and its

[1] Stephen Shute, "Knowledge and Belief in the Criminal Law" in *Criminal Law Theory: Doctrines of the General Part* edited by Stephen Shute and A.P. Simester, Oxford, 2002.

derivatives can validly be interpreted in different ways. If pressed with examples, many of us can feel unsure whether certain actions can properly be considered as intended – especially when the person acting does not particularly want the result to occur. If a contract killer shoots someone, unhappy about earning his living that way, does he intend to kill? If I shoot at someone through a closed window, do I intend to break the glass? If I pull my child's bad tooth out, do I intend to cause her pain? Perhaps most people would feel instinctively that the first of these was intended and the last of them was not intended, but would be unsure or would differ on the second of them. Can a definitive line be drawn between those we consider intended and those we do not?

If the meanings of "intend" and its derivatives can validly remain open to interpretation, after decades of intensive scholarly argument, perhaps no such line can be drawn, in terms of ordinary usage. But the criminal law needs to draw a clear boundary somewhere and somehow. It should do this without doing violence to the language, so as to be intelligible. But if "intention" cannot be precisely defined in ordinary usage, some degree of artificiality is inevitable while that word is used. And what the law ought to do is ensure that the concept of intention serves rather than dictates the operation of justice – punishing those whose moral culpability is such that they ought to be punished, and punished proportionally, for those crimes that properly have the *mens rea* of intention.

How does belief fit into this inquiry?

It has been noted that most commentators accept that belief is a requirement of intention. That contention will be addressed in the course of this thesis, but if it may be correct, and belief is always, or ordinarily, a component of intention, it ought to be understood if intention is to be understood. Since there is still significant disagreement about what intention means in the criminal law, it makes sense to examine its constituent parts to discover if they are understood in the context. If it is accepted that belief is one of those constituent parts, it follows that its nature should be understood and its importance in this context assessed. It is notable that the disagreement about intention tends to focus on "oblique intention", which – as Chapter 1 identifies – is essentially action treated as intention in which there is a belief about the resulting harm, but no

desire for the harm or for what flows directly from it. Attention has tended to focus on the importance of desire in this context, often with no, or barely any, consideration of the importance of belief.

A number of important questions remain unanswered while these issues remain unresolved. If intention crimes were to be limited to "direct intention", where would that leave "oblique intention" crimes? How could any distinction in level of punishment be justified morally? What practical implications might there be if there was a greater emphasis generally on desire (or other factors) and less or no attention paid to belief?

If beliefs are essential or at least important components of criminal intention, it follows that belief ought to be understood if criminal intention is to be understood. It will be argued that, as a consequence, the concept of criminal intention can only make *moral* sense if the concept of belief is understood in that context.

Structure of the thesis

The first four chapters will seek to analyse the concepts and the context involved in this inquiry: the relevant type of intended action, the role of belief in that type of action, what "belief" means in this context, the moral context in which intention crimes should be considered, and the role belief plays in that moral context. The remaining chapters will then consider the moral significance of belief in that context and its importance when compared with other factors.

Chapter 1 will seek to establish what is meant by intended action for the purposes of the criminal law, and to establish whether belief is always a necessary component of such action. The chapter will then attempt to resolve the confusion of terminology, identified earlier in the introduction, in the way that actions resulting in intention crimes are described.

Chapter 2 will seek to identify what the mental state referred to as "belief" is: whether what is being referred to really is "belief", and what relevant characteristics that mental state has.

Chapter 3 will seek to establish the particular moral context in which the importance of belief is to be assessed, by identifying how the concept of moral responsibility is treated within the criminal law, specifically with regard to intention.

Chapter 4 will build on the analysis in the preceding chapters to seek to establish with more precision what role belief plays in intention crimes and what type of belief is required for such crimes.

Chapter 5 will consider what moral role belief has to play in intention crimes.

Chapter 6 will consider the moral significance of other factors involved in intention crimes.

Chapter 7 will consider the moral significance of belief compared to these other factors, given the moral context within which the criminal law operates.

The **Conclusion** will summarise the findings of the preceding chapters, and add some final remarks, in particular concerning the definition of intention crimes.

CHAPTER 1

DEFINING INTENDED ACTION AND ESTABLISHING THE ROLE OF BELIEF

Commentators who have considered the concept of intention, whether in the context of the criminal law or otherwise, have tended to assume that intended action requires a relevant belief (and often, if not always, a relevant desire). But it is not immediately obvious that belief is a necessary component of such action. Since the moral significance of belief as such a component is clearly to some extent dependent on whether it is a necessary component at all, and whether it is necessary in every case, an attempt will be made to establish what is meant by intended action for the purposes of the criminal law and establish whether belief is always a necessary component of such action.

Having established what intended actions are relevant, and before addressing the role belief plays in intention crimes in greater detail in the remainder of the thesis, this chapter will then attempt to resolve the confusion of terminology, identified in the introduction, in the way that actions resulting in intention crimes are described.

"Belief" is usually the word used in this context. Whether that is the word that should be used, and precisely what it means in the context of intention, will be addressed in the next chapter. For the purposes of this chapter, the word "belief" will be used.

For the purposes of criminal law, a distinction has come to be made between "direct intention" and "oblique intention". These will be addressed in turn.

"Direct intention"

An intended action of this kind (also referred to as "paradigm intention") is usually described in such terms as *one that the agent wanted or desired to occur*, or *one that it was her purpose to achieve* – whether the action is itself the purpose or is a means to another purpose.

Despite the disagreements about what intention is, there is a degree of agreement among many commentators about what its components should include. Some sort of consensus finds its way into the textbooks. Most commentators agree that the intended acts connected to the agent's purposes include not only the ends of such purposes but also the means of achieving such ends. However intention is described, concepts of belief and desire are usually referred to in any in-depth analysis.

But it is not obvious from some descriptions of intention that a relevant belief is always required. Some descriptions include it as a component in certain circumstances and not in others. A.P. Simester & G.R. Sullivan's formulation, for example, is that someone intends to do an action (or bring about a consequence) if:

> (a) He *wants* to do that action (or to bring about that consequence), or
> (b) He *believes* it is possible for him to achieve something he wants by doing that action (or by bringing about that consequence); and
> (c) He behaves as he does because of his desire in (a) or his belief in (b).[2]

Clearly belief is a component if (c) is coupled with (b). But belief does not appear to be a component if (c) is coupled with (a). Here the end is also the means: the action that is desired is simply the one that is done, and desire is simply coupled with action. This category may be regarded as that of the purest intentions – the paradigm of paradigms. Such an interpretation may suggest that what is of essential importance to intention is the desire behind it, and that beliefs only play a supporting role on occasions – perhaps when separate means are required to achieve the ends.

There is another problem: one can apparently intend an action or consequence even if one does not believe that it will succeed. An example of an act involving criminal intent is suggested in *Smith and Hogan Criminal Law*, and is often referred to:

> If D has resolved to kill P and he fires a loaded gun at him with the object of doing so, he intends to kill. It is immaterial that he is aware that he is a poor shot, that P is nearly out of range, and that his chances of success are small. It is sufficient that killing is his object or purpose... that he acts in order to kill.[3]

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[2] *Criminal Law: Theory and Doctrine*, Oxford, 2003, page 128.
[3] London, 2002, page 70-71.

D's chances may be small (in fact, Antony Duff has argued that one can intend to do something that is objectively impossible[4]), and his belief may also be that his chances are small (whether the subjective belief can be that success is impossible will be addressed later in the chapter). In fact this example can be used to tackle both problems raised. It can usefully demonstrate that D may have other beliefs relevant to intention besides that relating to his chances of success. For example, he would seem to believe that:

a) the gun is loaded;

b) by pressing a finger on the trigger a bullet will be released at speed;

c) by aiming the gun in the direction he has pointed it, the bullet may hit P;

d) the thing he sees in that direction is a human being;

e) that human being is P;

f) if the bullet hits P it may kill him;

and so on.

Some of these examples are beliefs that seem obvious, and because they are obvious, may not be consciously considered by D. (Whether there are such things as unconscious beliefs will be addressed in the next chapter. For the moment, however, it is the importance of any such "beliefs" – however they are classified – that is being considered.) But these beliefs are a part and parcel of D's action, without which his purpose will fail. One crucial belief in establishing criminal intention of murder is that D believes his target to be a human being. Like the other beliefs listed, D may not give this any prior consideration, although he presumably does give prior consideration to the target's being P. Whether in fact it is P is not of importance in establishing criminal intent. But inherent in D's belief that he is aiming at P is his belief that P is a human being. If one were to ask D whether he was aiming at a human being, his honest answer would have to be in the affirmative. If he actually believed that P was a monkey, he would not have the *mens rea* of murder.

If D could only vaguely see the target, and he could not tell at that range what the target was, the position becomes less clear. For example, assume that instead of the Smith and Hogan example, D was on a firing range, trying to improve his marksmanship

[4] *Intention, Agency and Criminal Liability*, Oxford, 1990, page 56.

skills prior to his attempt to kill P. He is shooting at long-range at what he has been told are a line of dummies. He does not believe P to be in the vicinity of the firing range, but one of the dummies reminds him of P, and D shoots at that target believing (without any doubt) it to be a dummy. He has suddenly abandoned his desire to improve his marksmanship and shoots merely to satisfy his fantasy of killing P. As it so happens, the target was P, who dies. Can D have committed murder?

According to the *Simester and Sullivan* formulation above, a combination of a) and c) may appear to allow it – if D can properly be said to be behaving "because of his desire" to kill P. It is not immediately clear whether murder has been committed in such a scenario.

Glanville Williams appeared to suggest that a similar scenario could be murder in discussing the case of *R v Finney*[5]. *Finney* was a negligence case, in which a medical attendant turned on a tap with scalding water into a bath, apparently thinking that the patient had got out, but the patient was still there, and died. Williams used it to consider a different level of culpability (of negligence). But he supposed that if the attendant had earlier communicated his desire to kill that patient, "it would turn the case from one of possible manslaughter to one of clear murder"[6]. Does that mean that if the attendant believed that he was pouring water into an empty bath, but had the desire to kill the patient, he would be guilty of murder?

What Williams stated later in the same work suggests that he did not mean this. He defined intention as follows: "Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else foresight that the result will certainly follow."[7] A requisite circumstance for the attendant to know would surely include that he had some chance of hitting the patient with the water. Otherwise it is a mere wish. If the attendant believed he was pouring the water into an empty bath, his thoughts could be characterised as: "If only the patient was here, and this scalding water was pouring over him, and I could get rid of him." However abominable that desire, for it to amount to intention it must, based on

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[5] (1874) 12 Cox 625.

[6] Glanville Williams, *The Mental Element in Crime*, Jerusalem, 1965, page 11.

[7] Ibid, page 20.

Williams's reasoning, be grounded in some knowledge of some chance of success. If that is correct, a relevant belief needs to accompany the relevant desire.

One cannot, on that basis, intend to do that which one believes one cannot do. Many commentators appear to support this contention. To give some examples: Aristotle[8]; Antony Duff[9]; B.F. Malle, L.J. Moses and D.A. Baldwin[10]; John R. Searle[11]; and Donald Davidson[12].

However, not all commentators appear to agree. The arguments of those who may be read as holding the contrary view are assessed below.

Jennifer Hornsby has stated that "people can attempt to do what they believe to be impossible"[13]. She draws this conclusion from the example of someone who is "quite confident that she stands no chance whatever of success in saving a drowning a child" but "is anxious not to be seen to have done nothing", and thus has "a desire to be seen to have attempted to save the child" and so dives in. Hornsby is concerned with attempting rather than intending at this point, and she does not comment on whether the diver intended to do that which she believed to be impossible. But whatever her views may be on intention in this context, strictly speaking the desire in Hornsby's scenario is, as she stated, to be *seen* to attempt to save the child. It would follow that her intention was to make the same gesture, rather than actually save the child. If the diver believed that the *gesture* would or may succeed, she was not intending to do what she believed to be impossible. Alternatively, if the diver was intending to save the child (perhaps in addition to being seen to try), Hornsby may mean by "*quite confident* that she stands no chance of success" something less than a complete conviction (just as Smith and Hogan's D may be quite confident that his shot will not hit P, but still considers there to be some chance of success). In that case, there is a belief in the possibility of success. Whatever Hornsby

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[8] *The Nicomachean Ethics*, III ii, Penguin edition, 2004, page 55. At least (according to this translation), Aristotle considered that one could not choose the impossible, and assuming that Aristotle would agree that intention involves choice, he would presumably consider intention in the same way.

[9] *Intention, Agency, and Criminal Liability*, Oxford, 1990, page 56.

[10] The editors of *Intentions and Intentionality: Foundations of Social Cognition*, Cambridge Massachusetts, 2001, in their Introduction, pages 3-4.

[11] *Intentionality: An essay in the philosophy of mind*, Cambridge, 1983, page 34 and pages 103-4.

[12] *Essays on Actions and Events*, Oxford, 1980, pages 100-1.

[13] "On What's Intentionally Done" in *Action and Value in Criminal Law*, edited by Stephen Shute, John Gardner and Jeremy Horder, Oxford, 1993, page 60, footnote 10.

precisely meant, her example does not, it is submitted, give any strong grounds for the case that one can intend to do that which one believes to be impossible.

Michael E. Bratman has stated that "there need be no irrationality in intending to A and yet still not believing that one will."[14] Although not believing that one *will* is different to not believing that one *might*, he gave as one example something that appears to be an intention to do the impossible: "Suppose there is a log blocking my driveway; and suppose I intend to move the log this morning but believe that since it is too heavy I will not move it." He decides to call a tree company to move it that afternoon. "So my plan for the day includes my moving the log this morning and my having the tree company move it this afternoon. But it seems folly to plan to cause the log to be moved twice."[15] Bratman suggests that the rational person drops his original intention to move the log himself after forming the better plan of using the company.

Bratman's log example raises at least three issues. Firstly, was there ever a real intention to move the log personally? It may have been briefly considered and then dropped – in which case it hardly amounts to a plan or intention. Secondly, assuming that there was such an intention, it seems irrational and nonsensical for P to continue to "plan to cause the log to be moved" himself when he believed that he will not do so. Thirdly, does P have a complete conviction that he cannot move the log himself? Bratman stated that P's belief is that he "will not" move the log, and does not state that P's belief was that the feat was *impossible*. Perhaps he meant instead that P considered the chances of his moving the log extremely small: P thought about trying to move it himself, but dismissed that plan as unrealistic, and so called the tree company. Whatever situation (or situations) he envisaged, Bratman did not go on to defend a position that someone can have an intention to do something while believing that it is literally impossible.

Michael Moore has stated that "Although it is rare, one can even aim at the object of one's desire while having no belief that one can attain it and even while having a belief that one cannot attain it."[16] However, he did not go on to suggest that "aim" in this

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[14] *Intention, Plans, and Practical Reason*, Harvard, 1987, page 38.
[15] Ibid, page 39.
[16] *Placing Blame*, Oxford, 1997, page 410.

context amounted to intention. Perhaps Moore was referring to a mere wish. In any event, he did not go on to defend a position that an intention can exist in such circumstances.

G. E. M. Anscombe has been cited as a proponent of impossible intentions, although it may be that she has been misrepresented. She has stated that "in some cases one can be as certain as possible that one will do something, and yet intend not to do it."[17] She gives as examples someone intending to cling on to a ledge, and someone intending not to break down under torture – both as certain as possible that they will fail. It may be that Anscombe (like Hornsby and Bratman) meant something less than impossibility (for example, believing that there is an outside chance of being rescued). But even if she did mean impossibility, the person who intends to cling on to the ledge and the person who intends not to break down under torture do not intend to do so forever or for the rest of their natural lives (unless they are deranged and believed they could do so). It is quite possible and rational to continue to believe that one can keep going from this moment to that, seeking to put off the inevitable for as long as possible. Such intentions do not have to be tied to an indefinite period of time. The circumstances of these examples can perhaps mislead by inviting a conflation of the impossibility of a long-term intention (getting out of the situation) with the short-term intention (keeping going). In more mundane circumstances, the separation is easier to understand. I may intend to eat a meal because I am very hungry and, if pressed about it, honestly say that I believe I will die unless I eat something at some point. But of course, I believe that I will die anyway, eventually. Eating only puts the moment off for a while, and continuing to eat may do so for a few decades. Anscombe's examples are similar except that time is more pressing – the timeframes are minutes and hours rather than days and decades.

But in any event, in another part of the same book Anscombe appears to take a different approach to that attributed to her[18] in the above passage. She stated that to understand a person's intentions, "the future state of affairs mentioned must be such that we can understand the agent's thinking it will or may be brought about by the action

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[17] *Intention*, Oxford, 1957, page 92.

[18] By, for example, B.F. Malle & J. Knobe, "The Distinction between Desire and Intention: A Folk-Conceptual Analysis" in *Intentions and Intentionality: Foundations of Social Cognition* edited by B.F. Malle, L.J. Moses and D.A. Baldwin, Camb, Mass or London, 2001.

about which he is being questioned."[19] She gave as an example of this going upstairs in a house claiming to be getting a camera, and being challenged that it could not be done, since the camera was in the cellar: "If I say: 'No, I quite agree, there is no way for a person at the top of the house to get the camera; but still I am going upstairs to get it' I begin to be unintelligible."[20] It would appear that Anscombe too was not defending the position that an agent can intend to do what she believes to be impossible.

Irving Thalberg, however, appears on the face of it unequivocal on this issue. He has stated that "a person can intend to do something which he believes to be impossible"[21]. But examination of his argument as a whole shows this contention to mean something other than what it initially suggests. He qualifies the contention by stating that "For the majority of hazardous enterprises, there is at least one example of past success. So probability of success is greater than zero." A probability greater than zero is not, of course, the same as impossibility. He gives an example of a recently drowned swimmer found by a lifeguard. "Despite the apparent futility of it, he gives the victim artificial respiration."[22] Thalberg accepts that the lifeguard may have other intentions – for example, to look as though he is trying to revive the body – but considers that the lifeguard could still have the intention to resuscitate: "In fact these other aims could give him all the more reason to try, and consequently have the intention of making the drowned man breathe."[23] We do not believe that we can make corpses breathe; but one can certainly try or intend to revive someone if one believes that the "probability of success is greater than zero" – i.e. believing that there is a chance that it is not a corpse yet. In other words, one can intend such a thing where there is a belief that success is possible, however improbable. Thalberg is saying that one can intend the "impossible" when what is meant is not literally "impossible" but rather "highly improbable".

The disagreement between these commentators and others perhaps has more to do with terminology – the meaning of such words as "impossible" in the contexts referred to. While a minority of commentators may be read as suggesting that there can be an

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[19] Ibid, page 35.
[20] Ibid, page 36.
[21] *Enigmas of Agency: Studies in the Philosophy of Human Action*, Humanities Press, 1972, page 107.
[22] Ibid, page 110.
[23] Ibid, page 111.

intention to do what the agent believes impossible, none has argued this in a literal sense, at least not persuasively.

This makes sense in a criminal law context. Going back to the firing range, D's intention – or his purpose – was to shoot at a dummy, albeit because of a desire of killing P. D would have regarded himself as having failed if he missed the dummy, but not if he missed P.[24] P's death was just a bonus. It was not, surely, his intention. To take another example, if someone irritated me, and I resisted the urge to punch her, and later vented my anger at a punchbag, wishing that it was her face, I would surely not have intended to punch her: what I intended to do was punch the bag.

Back at the firing range, murder may become more likely the closer P is to D. What if D is close enough to think there is a reasonable chance that it is P – he does not believe strongly that it is either P or a dummy, but fires anyway? Whether one considers that murder or manslaughter may depend on one's moral standpoint. What if P was much nearer to D and D recognised him immediately and fired at him with the desire to kill him? Few would presumably have difficulty in considering the *mens rea* for murder satisfied in that scenario.

In these examples, D's desire may be the same, but his belief about what he is aiming to do – whether to hit a dummy or kill a human being (who happens to be P) – differs. If it is objected that the desire is also different, because in some instances it amounts to a fantasy rather than anything connected to reality, then that is because the desire differs as a result of the relevant belief. Belief in this instance is thus crucial in evaluating the *mens rea* of the offence – whether it amounts to intention or recklessness or something else.

The same is true in considering any intention offence. For example, even a kleptomaniac cannot intend to steal something she firmly believes she owns, however strong her desire may be to obtain the possessions of others – if she did "attempt" to "steal" her own possessions she would be indulging in fantasy. A crime of direct intention always requires the agent to believe that the relevant harm was at least the possible result of her action.

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[24] This way of testing intentions has been identified by Antony Duff as the "failure test": see his *Intention, Agency and Criminal Liability*, Oxford, 1990, especially at page 61.

"Oblique intention"

An intended action of this kind is described along the lines of the following: *one that the agent did not want or desire or have as her purpose, but one that she was virtually certain would occur as a consequence of her action.* It is immediately easier to see the importance of belief in this type of intention: the agent must have believed (or had some similar mental state of awareness) that the harm would (virtually certainly) have happened.

Belief is clearly necessary for oblique intention, but it may not be sufficient. Under the law as currently settled after the judgment in *R v Woollin*, a jury is "entitled to find" the intention for murder when a defendant foresees the serious harm or death as a virtually certain consequences.[25] It follows, therefore, that a jury is also entitled not to find intention in such circumstances. In *Woollin,* the House of Lords did not specify in what circumstances such intention might not be found, but it is has been suggested that the wording of the test suggests that such intention requires more than simply the level of foresight – possibly requires, for example, an immoral purpose or motive[26]. However, foresight – the belief element – is clearly a necessary feature of this type of intention. Without it, oblique intention would simply not exist. The gradations of belief – from possible to probable to certain – are of key importance in a jury's ascertaining whether they can find intention, and also to the debate about whether this type of criminal intention should be enlarged or abolished or further refined.

[25] [1999] 1 AC 82. The judgment did not state that this interpretation of intention applied to all intention crimes. But commentators have assumed that the same reasoning would apply.

[26] For example, see Alan Norrie in "After Woollin" [1999] Crim.L.R.532. Norrie's argument on this point is considered in Chapter 7.

The meaning of "intention" and similar words in this context

The first part of this chapter has endeavoured to demonstrate that intention crimes always require a belief component. Having identified the different types of actions that result in intention crimes, and before going on to consider the moral significance of belief as a component of them, it is worth considering how those actions should be described.

Words such as "intention", "intended", "intentionally", "deliberately", and "knowingly" are used to describe actions of the sort being discussed, without it necessarily being clear what precisely is meant by those words: whether the description is of directly intended actions, obliquely intended actions, or both, or something else. Without adopting a particular interpretation of what such words mean in the particular context of intention crimes, they are apt to mean different things in different contexts. Is it possible to identify a description that covered all relevant actions – both directly and obliquely intended?

One of the reasons that there have been such difficulties in understanding – and disputes in interpreting – the concept of intention in the criminal law is that the word "intention" and its derivatives pose particular problems. Is the ordinary meaning of intention always to be understood as being directed to purposes, or can its meaning be widened? One attempt to clarify these linguistic problems was by R. A. Duff. He sought to differentiate between "intended" acts and acts committed "intentionally". According to Duff, the former include only directly intended results; whereas the latter also include obliquely intended consequences.[27]

However, this distinction has not been universally accepted.[28] And Duff himself accepted that there is a normative aspect to intentionality[29], from which it follows that pinning the meanings down is to some extent artificial. He also made no attempt to defend his distinction linguistically. There remain problems with the distinction in certain contexts. Elsewhere, Duff stated that the man who drinks a bottle of whisky does

[27] R. A. Duff, *Intention, Agency and Criminal Liability*, Oxford, 1990, page 95.
[28] See for example Jennifer Hornsby, "Action and Value" in *Action and Value in the Criminal Law* edited by Stephen Shute, John Gardner and Jeremy Horder, Oxford, 1993.
[29] Ibid, page 85.

not intend to get a hangover[30]; but can it be said that the man brought about such an expected side-effect "intentionally"? Such an example seems to strain the meaning of the word. The problem with using the word "intentionally" is that it retains the concept of "intention", and suggests in this case that the man purposefully gave himself a hangover.

H. L. A. Hart considered that the meaning of "intentionally" in certain circumstances was opaque. For example, the person who breaks glass to hear the noise "would be said to have broken the glass intentionally (though not, perhaps, to have intentionally broken the glass)"; and in the case of *R v Desmond, Barrett and Others*[31], in which the dynamiting of prison walls resulted in deaths in nearby buildings, while one might not say of such a person that "he intentionally killed" one could also not say that he "did what he did *un*intentionally".[32]

Hart and Duff agreed that, whatever words may be used, Mr Barrett was fully responsible for the expected side-effect of his action in trying to escape. For the same reason, it can be argued that the man who drinks a bottle of whisky is fully responsible for his own hangover. And that example could be extended further, into a criminal context: if person A spiked the drink of person B, for the purpose of enjoying the spectacle of person B becoming drunk, despite believing that person B had a medical condition that was particularly susceptible to alcohol and that she would get dangerously ill, we would hold person A fully responsible for the resulting illness. In each of these cases – in respect of the hangover, the deaths, and the illness – we feel instinctively that the agent is as responsible for these effects as for the means and ends of the agent's actions that preceded them (even if we would consider those harms caused as means or ends to be morally worse – a matter that will be addressed in later chapters).

This does in turn beg the question – what is meant by full responsibility? Strictly speaking, of course, no one is fully responsible for anything – chance will always play a part. But Duff and Hart presumably mean something other than this. We react differently to people, and consequently ascribe different levels of responsibility, depending on how much influence they exert over the results of their actions. Later

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[30] Ibid, page 90.

[31] *The Times*, 28 April 1868.

[32] H. L. A. Hart, *Punishment and Responsibility*, Oxford, 1968, page 120.

chapters will address this issue in more depth, but for the present it can be observed that harms considered to have been inflicted intentionally or deliberately generally warrant greater censure, and accordingly greater punishment, than those considered inflicted carelessly or accidentally. Someone who chooses to inflict harm may be said to be fully responsible for that harm; someone who chooses not to inflict harm but to do something that may result in harm may be held responsible for that harm, but not to the same degree; someone who chooses to do something that she does not believe creates any risk of harm may not be responsible for that harm at all, unless it is thought that she should have appreciated that risk. If Mr Barrett's choice to use dynamite necessarily, as far as he was concerned, entailed killing people, he should be held fully responsible for those deaths – just as responsible as if he had wished them. That does not mean that those are the only moral considerations (such matters will also be addressed in later chapters). For the present, it is merely the purpose to establish a means of accurately identifying and describing actions for which the agent ought to be held fully responsible – for which harms she had chosen to inflict.

A number of commentators have noted that the meaning of "intention" and similar words is imprecise, and that the usage can very much depend on the user.[33] It has also been noted that the law may justifiably bend such usage to its own ends, if those ends are better served by doing so.[34] However, it remains unsatisfactory that in dealing with the legal concept of intention – which, in this thesis as elsewhere, includes consideration of much non-legal writing on the precise meaning of intention – what is being discussed may not actually mean "intention" at all, as it is commonly understood.

Whether there may be a more precise description

As noted in the previous section, "intentional" arguably has a wider meaning than "intended". But can this be clarified? Are there any synonyms of these words that may

[33] For example, see Nicola Lacey, "A Clear Concept of Intention: Elusive or Illusory?", Modern Law Review 1993, 621. at page 627

[34] John Gardner and Heike Jung, "Making Sense of Mens Rea: Antony Duff's Account", (1991) Oxford Journal of Legal Studies, 559, at page 579.

assist in understanding these words? Do any such synonyms better describe the way in which harm is caused by agents who commit intention crimes?

Some dictionary definitions will be considered first, using two dictionaries.

In dictionary 1[35]: "Intentional" means simply "deliberate". "Intended" means "planned or meant".

In dictionary 2[36]: "Intentional" means "done on purpose". "Intended" means "1. done on purpose; intentional. 2. designed, meant."

This does suggest, then, that there may be a difference between "intended" and "intentional", although the difference is only hinted at, and cannot be said to follow necessarily. The synonyms for both words are *deliberate, planned, meant, purpose, designed.* The definitions of these words in turn refer to some of the others. Dictionary 1 defines "deliberate" as "1. done on purpose. 2. careful, unhurried." Dictionary 2 defines it as "1. intentional" and gives a number of other meanings. So while understanding precisely what the words mean remains elusive, there are clear connections between them.

It seems to be the case that some of these words have what may be described as "hard" and "soft" meanings in common usage: "to have an intention to do something" can be different from "doing something intentionally", in a similar way that "having a purpose to do something" can be different to "doing something on purpose", and "deliberating to do something" can be different to "doing something deliberately". Plans and designs, however, do not seem to have soft meanings: there is no adverbial form of plan, and "designedly" retains the hard meaning of "design" – for example, it seems particularly odd to say that the man who drank a bottle of whisky designedly got a hangover, unless a hangover was one of his purposes.

Intentionally, deliberately, on purpose all seem to have potentially wider meanings than can be understood directly from what an agent's intentions or deliberations or purposes were. Of these three, it is submitted that *deliberately* has the widest meaning in this context. That may be because the word "deliberate", as noted in the dictionary definitions given above, has at least two quite different meanings. One is akin to

[35] Paperback Oxford English Dictionary, Oxford, 2002.
[36] Concise Oxford Dictionary, Oxford 1990.

intentional, another is more precise – "careful, unhurried". The statement "she hit someone deliberately" can be interpreted in two distinct ways: firstly, that she hit the person on purpose or intentionally; and secondly, that she did so with care or precision or something similar. In the former sense, deliberateness does not require deliberation – it might have been a rash reaction, without much thought being given to the action at all.

The Latin root of "deliberate" means to weigh. That implies choice, whether a carefully or hastily weighed-up one, and may explain why a "deliberate act" suggests either one that is merely chosen or one that is carefully administered, depending on the circumstances. The Latin root of "intention" means intention itself or plan or purpose. These roots may explain why "intentionally" is freighted with suggestions of purposes, plans and desires, whereas "deliberately" is not, or not as much. That is why, if Mr Barrett believed that people would inevitably die if his dynamite exploded (that he believed that the deaths were part and parcel of what he was doing), it seems to make more sense to say that he *deliberately* killed them, even though it was no part of his intention (or plan or wish) that they should die, than to say that he *intentionally* killed them. Similarly, in another example discussed by commentators, the person who boards a plane that is destined for Manchester, in order to flee a particular place, and having no desire to go to Manchester, may be more readily understood as *deliberately* going to Manchester than as *intentionally* going there.

It is interesting to note that the latest work by the Law Commission that has considered intention (in the context of the law on homicide) sometimes uses the words "intentional" and "deliberate" as alternatives, as though they were similar ways of describing the same resulting harms, without explaining whether there is any difference between the descriptions. For example: "Murder is a crime centred on intentional or deliberate killing...".[37] The Consultation Paper goes on to analyse the problems posed by the differences between the ordinary meaning of intention as being "aim or purpose" and the wider meaning given to it in law, without considering what "deliberate killing" may mean, and whether that description might better serve the purpose for which "intentional" is used.[38]

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[37] Law Commission's Consultation Paper No 177, page 32.

[38] Ibid, pages 93 onwards.

Elsewhere, deliberate actions are often used to describe what is meant by intentional actions, perhaps suggesting that the concept of deliberateness is simpler than that of intention. For example, A.P. Simester and G.R. Sullivan's introduction to the concept of intention includes the following: "Both in law and in society at large, praise and blame are most obviously incurred for conduct that a person intends: D attracts greater censure if she deliberately breaks V's vase than if she carelessly drops it."[39]

Are there any other viable options for describing this type of action? Another possibility, and one that gets round the difficulties of shades of meaning discussed above, would be to use the word "knowingly". The main problem with this option is that knowledge is a different concept than belief – in particular, it requires at least that the agent's belief is true, and possibly that it is justified. There may be other problems that substitution of knowledge for belief might cause.[40] Unfortunately the word "believingly" – to the extent that the word has any currency at all – does not mean precisely what would be required of it in this context (in that it means something akin to "credulously").

This may all sound like quibbling, but it is submitted that the words used in these contexts do cause problems. And it is suggested that the use of the word "deliberately" is the word best suited to ascriptions of full responsibility, and avoids more problems than do the other words. It is admitted that the use of the word "deliberately" does not solve them all. For example, it may seem odd to say that the man who drinks a bottle of whisky deliberately gives himself a hangover. Where the consequence is causally far removed from, or otherwise distinct from, the desired result, the description "deliberate" can still seem too strained, albeit less strained than other descriptions. And the flipside of the distinction that has been identified between deliberateness and deliberation is that "deliberately" can suggest the latter, and so can cause confusion (however, properly used, it may be that this confusion can be avoided). No word fits the purpose perfectly, and "deliberately" seems the best suited, as it seems to have the widest application. It is also more commonly used in ordinary discourse than "intentionally" to describe consequences people cause through their actions.

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[39] *Criminal Law: Theory and Doctrine*, Oxford, 2003, page 126.

[40] Stephen Shute considers these differences, and some of the problems of using knowledge rather than belief as the basis for *mens rea*, in "Knowledge and Belief in the Criminal Law", in *Criminal Law Theory: Doctrines of the General Part*, edited by Stephen Shute and A. P. Simester, Oxford, 2002.

Summary

The first section of this chapter has endeavoured to show that belief is a necessary component of intention – that no serious argument can be maintained against the contention that intention crime actions will always involve relevant beliefs. That does not mean that it is the only component, or that it is necessarily more important than any others. This chapter has also not come to any conclusions about what strength or type of beliefs may be required – for example, whether and when beliefs as to possibilities, probabilities or certainties may be required. But it has, hopefully, established that belief is one of intention's essential building blocks, and accordingly needs to be understood if the *mens rea* of intention offences is to be understood.

The second section of this chapter has used this conclusion to assist in identifying an accurate description of all intention crime actions. While absolute precision may be impossible, it has been submitted that "intention" itself causes more problems than it solves. For the purpose of the rest of the thesis, the words "deliberate" and "deliberately" will be used to describe all situations in which the agent chooses to inflict consequences, whether as means, ends, or side-effects.

Precisely what "belief" is in this context and its moral significance in respect of intention crimes will be addressed in the chapters that follow.

CHAPTER 2

IS "BELIEF" THE CORRECT TERM IN THIS CONTEXT? WHAT RELEVANT CHARACTERISTICS OF THIS MENTAL STATE CAN BE IDENTIFIED?

The previous chapter argued that belief, or some belief-like state, was a necessary feature of the *mens rea* of intention crimes. It did not seek to identify what that mental state is. "Belief" is the word usually used in analyses of intention in this context. But before going on the consider the role that this mental state plays in intention crimes, it will be helpful to identify precisely what the state is – whether it really is "belief", and what relevant characteristics it has.

Whether belief is the relevant mental state

The relevant mental state considered in Chapter 1 is to do with our understanding of the environment around us at the time of, and in the particular context of, the actions that result from our intentions. Going back to the man on the firing range in Chapter 1, it has to do with such matters as whether he understands the gun to be loaded, what he understands will result from his physical actions in pulling the trigger, and what he understands he is aiming at. There are clearly words other than belief that could be used. As well as "understands", we may refer to these mental features as, for example, perceptions or assumptions, or refer to them as being what someone accepts or considers to be the case.

Some commentators have argued that we should define and use such words more precisely, and restrict the use of words such as belief in these contexts. L. Jonathan Cohen, for example, has suggested that many of the mental states that may have been identified as beliefs are in fact "acceptances", which differ from beliefs in important respects. The key difference, he stated, was that "Belief is a disposition to feel,

acceptance a policy for reasoning."[41] According to Cohen, generally speaking, people can be held responsible for their acceptances, but not their beliefs[42]. If Cohen's definitions are accepted, it may follow that only some of the relevant mental states for intention would be beliefs – some would be acceptances. Not only would that pose definitional difficulties, it would also have an impact on an assessment of the moral significance of these states, not least because the degree of responsibility that attaches to each is, according to Cohen, markedly different.

However, no agreement has been reached as to whether Cohen or others are right in seeking to adopt such restrictive definitions[43]. One of the reasons being that, as with intention, words such as belief and acceptance can mean different things to different people, and can even mean different things to the same people, given their uses in different contexts. A variety of meanings of such words are valid within certain lexical constraints. While there may be some people who would prefer to use words such as acceptance or assumption instead of belief in respect of the mental states being considered here, it seems unlikely that any definitive view could ever be reached about this.

So while it cannot be asserted with any confidence that belief is the correct word to use in the context of the relevant mental state for intention, no sufficient body of opinion exists to suggest that another word should be preferred, and belief continues to be the word preferred by most writers on criminal law[44]. In any event, this thesis is only considering the importance of the relevant state, not how it should be classified. In the absence of compelling reasons for an alternative approach, "belief" will be the word used for this mental state in all circumstances from now on.

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[41] L Jonathan Cohen, *An Essay on Belief and Acceptance*, Oxford, 1992, page 5.

[42] Ibid, page 21.

[43] Cohen's analysis has been challenged by a number of commentators: see, for example, John-Pierre Dupy, "Choosing to Intend, Deciding to Believe" and David Clarke, "The Possibility of Acceptance Without Belief" in Pascal Engel, ed., *Believing and Accepting*, Kluwer Philosophical Studies Series, 2000.

[44] For example, it is the word used in the sections on intention in both *Smith and Hogan Criminal Law*, London, 2002, and A.P. Simester and G.R. Sullivan's *Criminal Law: Theory and Doctrine*, Oxford, 2003. "Belief" (and, where facts are proved, "knowledge", which has its own special problems, which are not considered here) is also the preferred word for this mental state in the statutory definitions of offences in English law.

The rest of this chapter will attempt to ascertain the relevant characteristics of belief, which should clarify what is meant when the word is used in this context.

The meaning of belief

There has been much dispute about what belief is, and what characteristics it consists of. Some of these arguments, and some of those characteristics, are of no relevance to the issues being addressed in this thesis. But there are a number of characteristics that are of relevance. They have an impact on whether, and to what extent, acts are deliberate, and whether, and to what extent, we can be held morally responsible for those acts. The following characteristics have been identified as of importance: 1) beliefs are subjective and internal; 2) beliefs are that their contents are true; 3) beliefs can be unconsciously held; 4) beliefs are generally involuntary; 5) a belief *that p*, without more, is simply *that p*, not *that possibly p*, or *that probably p*, or *that certainly p*. These characteristics are considered below.

1) Beliefs are subjective and internal. Beliefs have to be distinguished from any objective or outsider's account of reality. A person's belief can be irrational, outrageous, and even demonstrably untrue – but still exist: a child may genuinely believe that Santa Claus exists; an amputee may genuinely believe he feels his severed limb.

This is an obvious point, but it matters as far as intention is concerned because there is a temptation to make assumptions about what other people's beliefs should be in certain contexts, and fail to focus on what their beliefs actually are. Thus it may be tempting to assume that a person who, we think, has no chance of hitting the thing she is aiming at cannot intend to hit it. But if she believes she has a decent chance, and that is what she is trying to do, she does intend it – she may be intending the impossible, but she is intending what she believes to be possible. The reverse is also the case: we may think she is aiming to hit something, but she may believe she has no chance of hitting it, and may not be aiming for it (perhaps, for example, she is aiming *towards* it, making a gesture of trying to hit it), and has no intention of hitting it.

Similarly, because belief is an internal state, whose existence and character are known only to the agent, assertions of belief by an agent may be indicative but are not conclusive of whether the agent has such a belief.

2) Beliefs are that their contents are true. If one believes *that p*, one believes it to be true *that p*.[45]

This proposition has been questioned in certain contexts. It has been argued that people are capable of believing things that they believe to be untrue – for example, that they are capable of self-deception, and can hide from themselves unpalatable truths[46]. In addition, attention has been drawn to irrational beliefs, which, it has been argued, the agent may be said to know to be untrue, such as the nervous insomniac's thought that the house she is in is about to fall down, despite the evidence that strongly suggests otherwise[47].

However, it may be that conclusions have been reached about these mental states without focusing sufficiently on the agent's mental state itself. It is important to consider section 1 above in this context: beliefs are subjective, and we can be tempted to be too hasty to draw conclusions about other people's beliefs. It is also important to isolate beliefs in time. There need be no rational inconsistency in believing something and later on believing the opposite, and moving backwards and forwards from such positions repeatedly.

Towards the end of Evelyn Waugh's *Brideshead Revisited*, one of the characters, Lord Marchmain, is dying. It becomes unclear to the narrator at one point whether Marchmain thinks he will recover or accepts that he will not. One of the other characters, Cara, tells the narrator that Marchmain seems at times to accept, and at others not to accept, that his illness is terminal. Is it possible that Marchmain believes that he is going to recover while also believing that this is not the reality? (Note again section 1 above: it is

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[45] See Stephen Shute, ibid, page 183; and Bernard Williams, *Problems of Self*, Cambridge, 1973, pages 136-137.

[46] H. H. Price, in *Belief*, Humanities Press, London, 1969, at page 301 considered that people can believe that they do not have certain beliefs. Bernard Williams, ibid, page 149 onwards, considered it possible that one could persuade oneself to believe something that one knew to be untrue. Michael Losonsky, "On Wanting to Believe" in Pascal Engel, ed, *Believing and Accepting*, Kluwer Philosophical Studies Series, 2000, at page 126, argued that we can persuade ourselves to believe things that are not true if it assists us, especially in a social context.

[47] Joseph Raz, in *Engaging Reason*, Oxford, 1999, at page 15, considered that such thoughts may not be beliefs at all.

Marchmain's beliefs that are relevant – they may be different from what the narrator or the other character thinks his beliefs to be, and may be different from anything Marchmain himself asserts.)

Given this evidence, there appear to be several possible attitudes Marchmain may have to his illness that are not states of believing something that he believes to be untrue. There are at least four explanations. Firstly, Marchmain may not believe that he will recover, but may just want to believe it, seeking to put the reality out of his mind as much as possible. In this case, he believes that he is terminally ill. He may pretend to the other characters occasionally that he will recover, or he may prefer at certain times to think of other things, and carry on as though he will recover without consciously considering the reality of his condition; but his belief that he is terminally ill remains (even if it is dormant – see section 4 below). Secondly, he may not believe that he really is terminally ill, despite the apparently overwhelming evidence to the contrary, and despite what the narrator, the characters, and readers may think is the only rational belief to have about that evidence. He may have persuaded himself (selected the evidence in a particular way, for example) that he really will recover. He may make comments about dying occasionally, but he never, at this stage, believes that death is imminent. Thirdly, he may only have a partial belief that he is terminally ill – for example, he accepts that there is significant evidence in favour of that conclusion, but still considers that there is a chance that he will recover. Fourthly, he may sometimes believe that he is terminally ill, and may sometimes believe that he is not. In none of these situations does Marchmain believe something that he believes to be false.

It is beyond the scope of this thesis to analyse such complex psychological phenomena in any depth. But it is surely the case that any *full* beliefs are those that the agent must believe – at the time – to be true. It is a logical impossibility for an agent fully to believe something while also believing that something to be untrue. Beliefs may be partial beliefs, and thus may admit of a measure of uncertainty; and they may also change over time. Whether partial beliefs can ever be a sufficient basis for intention crimes will be considered at section 5 below and in later chapters, but it is submitted that, at least in most cases, intention crimes are based on full beliefs. It also ought to be noted that beliefs – whether full or partial – may waver: one can believe p at one moment and

believe *not-p* (or otherwise disbelieve *p*) the next. But the *mens rea* of intention crimes can depend on a belief held at one moment but not held at another: it does not matter, for the purposes of establishing what the agent believed to be the case, whether there were different beliefs before or after the intention was formed.

3) Beliefs can be unconsciously held. At any one time, a person's beliefs do not need to be consciously considered in order to exist[48]. Most beliefs may fall into this category[49]. Our appreciation of what we understand the world around us to be consists of a very large set of beliefs that may be considered from time to time but generally lie dormant until triggered by some other thought or event[50].

4) Beliefs are generally involuntary. This is a much-argued topic[51]. The assertion here is that many (perhaps most) beliefs occur without any act of will. This would seem to be the case with perceptual beliefs: the evidence of our senses provides information that we simply accept – such as feeling cold. Such beliefs cannot, in any ordinary context, be accepted or rejected at will. Other beliefs may be more complicated, and seem to involve volition at some stage – although it is disputed whether the final act of believing is voluntary or not.

Beliefs relevant to intention crimes are perhaps never complicated to such a degree. They do not result from decision-making processes, but rather from an appreciation of the world about us – beliefs such as, for example, I am holding a gun, it is loaded, I am aiming it at person P, etc. However, the process that leads to the forming of beliefs – such as the mental conditions that we allow to exist and the attitudes to propositions that

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[48] See, for example, J. R. Searle, ibid, page 2; H.H. Price, ibid, page 42 and page 300; and Jonathan E Adler, *Belief's Own Ethics*, Cambridge, Massachusetts, 2002, page 171 onwards.

[49] See Daniel C. Dennett, ibid, page 55.

[50] J. R. Searle (ibid, page 141 onwards) considered that a number of unconscious beliefs are not really beliefs at all, but could better be described as "The Background". Whatever they may be called, however, the fact that they are so important to our understanding of the world means that they are relevant mental states equivalent to beliefs as far as criminal intention is concerned.

[51] The debate takes in Hume and Descartes among others, and has not been settled. According to L. Jonathan Cohen, ibid, page 21, belief is always involuntary, and can be distinguished from "acceptance" partly on this basis. Bernard Williams (ibid, page 148 onwards) argued that belief is essentially involuntary, but that there are "roundabout routes" to believing at will. Michael Losonsky (ibid, page 103 onwards) argued that although belief is involuntary, any process of inquiry that leads to it is not, on which basis it can be concluded that beliefs are the product of volition.

we have – are to some extent under our control[52]. The extent to which that matters morally will be considered in later chapters.

5) Belief *that p*, without more, is simply *that p*, not *that possibly p*, or *that probably p*, or *that certainly p*. In other words, if one believes a proposition, without considering any qualification about the proposition, one simply believes in its truth, and one does not assign to that belief any degree of probability or claim of certainty.

This issue has also been the subject of much debate[53]. If I believe that it is raining, what do I believe about the probability or certainty that it is raining? It seems incontrovertible that I believe more than that it is only possibly raining – more than the proposition that "there is more than a 0% chance and less than a 50% chance that it is raining". But do I mean that I believe it is probably raining – "there is more than a 50% chance but less than a 100% chance that it is raining" – or do I mean that I believe it is certainly raining – "there is a 100% chance that it is raining"? At the risk of seeming perverse, it is suggested that I mean none of these. I simply believe that it is raining. I have not considered what the chances are. I have what Michael Bratman calls a "flat-out belief", which is different to (and in a sense more than) a probability, but is not necessarily a 100% belief[54].

If I formed the belief that it was raining by walking over to the window in my office and witnessing it apparently pouring down outside, and if, when I returned to my desk away from the window, someone said, "Was it raining?", I might simply say, "Yes". If the person said, "Are you sure?", I might consider further and remember how it looked and sounded to be pouring, and say, "Yes, absolutely sure". If the person then said, "Well, didn't you know that there's an irrigation system that's just been installed outside that makes it look like it's raining out of the windows?" At this point, my previous confidence may weaken, and I may say, "Well I'm not certain, but it didn't look like irrigation – I'd say it's still most likely that it's raining." My last two assertions ("absolutely sure" and "most likely") are based on different mental processes to my initial

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[52] See Jonathan E Adler, ibid, page 56.

[53] Richard Swinburne for example, has argued that "Normally to believe that *p* is to believe that *p* is more probable than not-*p*": *Faith and Reason*, Oxford, 1981, at pages 4 to 5. Jonathan E Adler(ibid, page 42) has argued that beliefs without any qualifications are full beliefs – that is, beliefs as to certainty, not probability.

[54] Michael E. Bratman, *Intention, Plans, and Practical Reason*, Harvard, 1987, page 36.

one: the initial assertion is based on a simple yes-or-no belief – a "flat-out" belief, involving no considerations of probability or certainty. Only when questioned did I go back to this simple belief, and analyse how confident I was about it, and firstly affirm my assurance, and then (given other evidence) qualify my considerations of its probability.

Most beliefs we have are simple, full beliefs.[55] Beliefs can be partial – I can believe that something is probable or possible – but these are beliefs qualified, or partial beliefs.

Can partial beliefs as well as full beliefs be sufficient in establishing intention? As mentioned in Chapter 1, it is important to distinguish between belief as to success and belief as to aim. Beliefs as to success can certainly be partial beliefs that are sufficient for intention – one can believe that the chances of success are probable, or only possible, but still intend the result. But beliefs about what one is aiming to do are different. If I believe that what I am shooting at is probably a dummy, but that it is possibly a person, I am not deliberately trying to hit someone: this, it is submitted, would amount to reckless killing if death resulted – i.e. manslaughter. If I simply believe that it is a person, without qualification, I have the *mens rea* for murder. If I consider how strong my belief is and conclude that I am sure that it is a person, I also have that *mens rea*. But what if I believe that it is probably a person, but I am not sure? From a moral or instinctive standpoint, we may feel that the *mens rea* for murder is made out. From a conceptual standpoint, we may have more trouble, because the aim of the gunman is not clear – he is not, according to his own beliefs, without doubt aiming at a person. This issue will be considered in more depth later.

Summary

In the absence of any persuasive arguments to depart from convention, "belief" will be the word used in this thesis to describe the relevant mental state for intention.

The following characteristics of belief have been identified as of particular importance: 1) beliefs are subjective and internal; 2) beliefs are that their contents are true; 3) beliefs can be unconsciously held; 4) beliefs are generally involuntary; 5) a belief *that p*, without more, is simply *that p*, not *that possibly p*, or *that probably p*, or *that*

[55] See Jonathan E. Adler, ibid, page 231.

certainly p. These characteristics should assist in analysing the role belief plays in intention, and the moral significance that it has.

CHAPTER 3

MORAL RESPONSIBILITY AND INTENTION

The previous chapters have argued that belief, or some belief-like state, was a necessary feature of the *mens rea* of intention crimes, and identified what that mental state is. The thesis will now seek to establish the particular moral context in which the importance of belief is to be assessed, by identifying how the concept of moral responsibility is treated within the criminal law, specifically with regard to intention.

Does moral responsibility exist?

It has been suggested that people cannot truly be morally responsible for anything. If that was the case, it would seem pointless to make any inquires about moral significance. Arguments about this will not be addressed here in any detail. Instead, there will be a brief discussion of some of them, in order to understand how the criminal law exists alongside or in spite of them, and how intention, and the belief component of it, can be understood in that context. The end of the chapter will consider what conclusions it may be permissible to draw about these arguments for the specific purposes of this thesis.

1) Determinism. Determinism is the theory that every event has a cause. If the theory is correct, it is arguable by extension that every event is predetermined, and that there is no such thing as free will – accordingly, we are not free agents, and there is no such thing as moral responsibility. This extended argument is sometimes referred to as "hard determinism".

This is a problem that has exercised many minds for many years, and remains open to debate. Many philosophers have sought to reconcile determinism with moral responsibility by seeking to refute the extension to the theory described above – a position sometimes called "soft determinism". Others take issue with the concept of determinism itself. Some suggest that science has demonstrated or will demonstrate that

hard determinism is correct.[56] But as far as commonly understood morality is concerned, the hard determinist position is rejected. As Jonathan Glover has stated, "no one disputes that men sometimes choose to do things"[57], and people do blame each other according as their (apparent) choices impact on others. We are more inclined to blame someone for apparently deliberately causing harm than for running a risk that led to that harm, and to exonerate when that person could not have chosen otherwise than cause the harm. The determinist may say that no one really has a choice, but as H. L. A. Hart has stated, "This is how human nature in human society actually is and as yet we have no power to alter it."[58]

2) Moral luck. As Galen Strawson has said, "People do not make themselves to be the way they are."[59] How can people be blamed for actions that result from defects of character, when character is the result of luck – not something that the agent can choose? It may be no use rejoining that, whatever bad character traits we are born with, we have the choice of controlling the effect of those traits, since the ability to exercise self-control is yet another aspect of our characters that we are born with – as is the willingness and ability to develop such self-control and otherwise be willing and able to learn to deal with those traits in other ways.

This problem is similar in some ways to that of determinism. The central objection to the argument may be similar: we do make moral judgements about people (not just their actions), and that is the way human society is – even if, on close inspection, it may be hard to justify the basis for those judgements.

3) Meaninglessness. A.J. Ayer stated that sentences expressing moral judgements "do not say anything. They are pure expressions of feeling and as such do not come under the category of truth and falsehood."[60] If such statements are not verifiable, does that mean that there is no such thing as objective morality? If moral judgements are just matters of

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[56] For example, Richard Dawkins has said, in an article for www.edge.org, "What is your dangerous idea? 2006": "Assigning blame and responsibility is an aspect of the useful fiction of intentional agents that we construct in our brains as a means of short-cutting a truer analysis of what is going on in the world in which we have to live."

[57] Jonathan Glover, *Responsibility*, London, 1970, page 16.

[58] H. L. A. Hart, *Punishment and Responsibility*, Oxford, 1968, page 183. A number of commentators have made a similar point: see for example M. Fischer and M. Ravizza, *Responsibility and Control*, Cambridge, 1998, page 1.

[59] Galen Strawson, *Freedom and Belief*, Oxford, 1986, page 95.

[60] A. J. Ayer, *Language, Truth and Logic*, Pelican, 1971, page 144.

personal preference, there may be no validity in assessing the moral significance of anything – of claiming that any moral judgements are right or wrong.

A counter-argument might dispute that we can draw the conclusion that moral judgements are pure expressions of feeling. Ayer may be right about it, but how can anyone know? Furthermore, moral judgements are not solely individual affairs: groups of people can form a consensus about certain moral issues, and these conclusions can be (although are by no means always) similar in different societies. Even if a condemnation of murder were nothing more than an expression of feeling, it may have a social validity and importance beyond questions of what can be said to be true and false in a logical analysis of such a statement.

4) Social control. It has been objected that morality – or at least, what any given society may accept as morality – is nothing more than the means by which one set of individuals seeks to exert control over another. "Every people has its own Tartuffery and call it its virtues," Nietzsche wrote. "What is best in us we do not know – we cannot know."[61] It is arguable that whatever is referred to as morality is simply self-interest masquerading as something noble. Extolling religious virtues of poverty and meekness may simply be a good way of stopping the have-nots from rebelling against the haves. Laws concerning property benefit those lucky enough to have more possessions than others. The criminal law tends to be imposed by the rich on the poor. And against any claim of the objectivity of moral standards, it is easy to point to differences in moral standards from age to age and country to country.

To all these objections it may simply be said that morality is an essentially social phenomenon[62] – that does not mean that it does not exist, or has no value. There are some moral values that more or less everyone agrees on, such as the prohibition against killing another person without lawful excuse. Other prohibitions, such as theft, may be harder to identify, agree on and justify, but are accepted by most people in some format as a necessary means of social regulation.

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[61] Nietzsche, *Beyond Good and Evil*, section 249, in Friedrich Nietzsche, *Basic Writings*, The Modern Library Classics, 2000, page 375.

[62] In our secular (or at least, not theologically driven) society, this seems to be broadly accepted. See, for example, H. L. A. Hart, *The Concept of Law*, Oxford, 1961, page 189 (itself taking its cue from Hume), J. L. Mackie, *Ethics: Inventing Right and Wrong*, London, 1977, page 42 onwards, and Philippa Foot, *Virtues and Vices*, University of California, 1978, page 189 onwards.

Criminal law and moral responsibility

Whatever doubts philosophers and others have had about moral responsibility, human beings do tend to behave on the basis that it exists[63]. It is thus not surprising that the criminal law in England and Wales – as in other jurisdictions – assumes its existence.[64] For this reason we have the concept of *mens rea*: to be guilty of crimes requiring *mens rea*, it is insufficient for the agent to be causally responsible for the harm in question; she must also be morally responsible – she must have a "guilty mind". Not all crimes require *mens rea*: the criminal law includes a large number of strict liability offences; but their existence is defended on the basis that their social necessity outweighs the potential injustice to the "innocent" offender – moral responsibility may be excluded, but its existence is not denied. Most offences, and all the most serious, require a degree of moral fault, through the infliction of harm negligently, recklessly, or intentionally. Defences to crimes include categories called "excuses", "justification", and "mistake", and specific defences such as "diminished responsibility" and "provocation" exonerate or mitigate on the basis of the existence, or level, of the agent's moral responsibility for the harm caused.

This is not to say that law is to be equated with morality. There are many immoral acts that are not crimes, and crimes that are not immoral acts.[65] Nevertheless, it would be uncontroversial to suggest that most criminal laws ought to punish only those who are morally responsible for the harms they cause. To punish otherwise – at least, for the more serious offences – would offend most people's sense of justice. That is why, in a country whose rulers rely to an extent on the consent of its citizens in enacting and enforcing laws, there is a general requirement for *mens rea*, there are the gradations from negligence to recklessness to intention in attributing culpability in respect of different

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[63] See Jonathan Glover, ibid.

[64] As Thomas Morawetz states in his *The Philosophy of Law*, New York, 1980, at page 202: "legal liability... presupposes that persons have control over their actions, that they have the capacity to act voluntarily and exercise free choice."

[65] H. L. A. Hart in *The Concept of Law*, Oxford, 1961, page 153 onwards, identified a number of key differences between morality and any given set of legal rules.

offences, and there are a number of defences based on the exclusion or limitation of moral responsibility.[66]

The place of moral responsibility in the criminal law

It may be clear that moral responsibility is a key feature of criminal law, but how is it, and how should it be, dealt with? In administering criminal justice, there are considerations other than the degree of moral fault of alleged offenders. When and in what way does and should moral responsibility fall to be considered?

Perhaps most importantly, there is a tension between what may be considered the general objective of crime of minimising harm that people cause to others[67], and the desirability of doing justice in individual cases to reflect the degree of the agent's moral responsibility. J. Rawls' view was that the first – utilitarian – objective could justify the practice of the system, whereas the second – retributive – objective could justify its application in particular cases.[68] H.L.A. Hart proposed a similar justification.[69] But even if this view is accepted, the tensions between the two objectives remain, and it is often the case that one objective gains at the expense of the other.

The criminal law strikes some sort of balance between both objectives. Moral responsibility is a key feature of most offences and many defences. That means that the identification of moral responsibility plays a significant role at the conviction stage. But not everyone agrees that it should play such a significant role at that point. The most notable proponent of an alternative approach in recent decades was Barbara Wootton.[70] Her view was that the conviction stage should establish only whether the defendant was causally responsible for the relevant harm. Issues of moral responsibility should be relevant only at the sentencing stage, when the primary concern was find an appropriate

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[66] This point was also made by Hart: ibid, page 200 onwards.

[67] In the House of Lords case of *R v Powell and English* [1998] 1 Cr.App.R. 261 (the leading authority for the principle that a secondary party to murder need have no intention to cause harm), Lord Steyn said, "The criminal justice system exists to control crime."

[68] J. Rawls, "Two Concepts of Rules", page 105 onwards, in H. B. Acton ed., *The Philosophy of Punishment*, London, 1969.

[69] H.L.A. Hart, "Prolegomenon to the Principles of Punishment" in his *Punishment and Responsibility*, Oxford, 1968.

[70] Barbara Wootton, *Crime and the Criminal Law*, 2nd edition, London, 1981.

course of action to prevent the defendant from causing similar harms again. Such an approach could lead to some very different outcomes to those we are used to, and probably even to those that Wootton would wish. The absent-minded driver may get life imprisonment; the one-off murderer may get nothing.

Few would go as far as Wootton. She herself backed away from the application of some of the results that her approach suggested – for example, she recognised that *mens rea* had to be a requirement of certain crimes, such as theft. And she was not denying the existence of individual moral responsibility, or its importance in the criminal law: she accepted that the question whether harm is deliberately inflicted has important social consequences, but believed only that such questions were better dealt with at the sentencing stage rather than the conviction stage. So even a utilitarianism that goes this far – and which goes much too far for most people – still finds it necessary to make some compromises with our retributive instincts.

In contrast to Wootton, there are those who would like to see moral responsibility play a greater role at the conviction stage. There are also those who wish to take the debate beyond the traditional utilitarian and retributive arguments. The relative merits of different theories of punishments will not be addressed here. It can be observed, however, that the criminal law as it exists makes moral responsibility a condition of most offences, and of all the most serious offences, and that even critics of this recognise the importance of moral responsibility at some stage in the criminal justice process.

Intention and moral responsibility

One of the ways in which the criminal law makes moral responsibility relevant at the conviction stage is in stipulating that certain crimes require a relevant intention.

The reason for this seems rooted in the different human reactions to harms inflicted deliberately rather than otherwise. Whether or not it can be justified, deliberate harm tends to result in greater blame than non-deliberate harm, and accordingly results in

severer punishment. This appears to be the way human beings have reacted for a long time.[71]

In the criminal law, intention found its way into the definition of certain offences in a haphazard way. As the *mens rea* for murder, for example, it grew out of the common law requirement of "malice aforethought", and remains determined by the common law. Other crimes requiring intention, such as theft, are now governed by statute, but drew on the development of the concept in the common law. But in whichever way the concept arrived, it is plainly an accepted one now.

Under the current law, intention crimes are only committed if offenders have aimed at the relevant harm, or at least foreseen it as a virtually certain consequence of their actions (or the successful outcome of them). Intention is the most culpable form of moral responsibility in terms of the agent's attitude towards, or appreciation of, harm. This may be because, traditionally at least, morality has been considered as essentially concerning choice: the degree to which actions are within our control[72]. Deliberate harm results from the agent's choosing to proceed with a course of action that she believes will cause that harm, or at least will do so if her action is successful. Such an agent more definitely chooses the resulting harm than if she only risks causing it or causes it negligently: its occurrence is more within her perceived control.[73] Intention is thus a *moral* concept: it distinguishes conduct by the extent of an agent's moral responsibility.[74]

Intention is required for many offences at the conviction stage. This is one aspect of the criminal law that differs from the system Barbara Wootton advocated. In particular, intention is required at this stage for the most serious offences, such as murder, serious assault, theft and rape. The criminal law thus recognises the importance of distinguishing this aspect of moral responsibility in determining what offence has been committed, not just what sentence may be appropriate. Tribunals – usually lay tribunals of juries and

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[71] See William Kneale, "The Responsibility of Criminals", in H. B. Acton ed., *The Philosophy of Punishment*, London, 1969, page 180.

[72] See, for example, Aristotle, *The Nicomachean Ethics*, Book III ii (Penguin Classics, 2004, pages 54-55), and Hyman Gross, *A Theory of Criminal Justice*, Oxford, 1979, page 87 onwards.

[73] The differentiation between intention and other *mens rea* categories suggested here is considered in more depth in Chapter 5 below.

[74] A detailed analysis of the link between intention and morality can be found in R. A. Duff, *Intention, Agency and Criminal Liability*, Oxford, 1990; in the particular context of what has been discussed, see page 102.

magistrates, rather than legal professionals – have to decide such matters. These distinctions are therefore clearly considered socially important. It is not simply a matter of sentencing, determined by a judge, that, for example, distinguishes a reckless driver who kills from a person who kills for money; it is considered proper for a tribunal to convict the one of manslaughter and the other of the more socially opprobrious charge of murder.

Summary

The concept of intention in the criminal law is grounded in morality, and it brings the question of moral responsibility into the conviction stage of the criminal justice process for those offences for which it is a requirement. Despite a number of objections to the assumptions that moral responsibility exists, or can meaningfully be assessed, the existence of the concept of intention in the criminal law is clearly based on such assumptions. The arguments about those objections are unlikely ever to be resolved. But morality is a social reality. While acknowledging that the moral assumptions behind this reality may be hard to justify, it remains worthwhile analysing it on its own terms. Since belief is a necessary component of intention crimes, and intention in this context is a moral concept, it remains worthwhile considering the significance of belief in any moral examination of intention crimes.

CHAPTER 4

THE TYPE OF BELIEF AS A COMPONENT OF INTENTION

The first two chapters argued that belief is a necessary feature of the *mens rea* of intention crimes and identified what precisely is meant by "belief". The last chapter established how the concept of moral responsibility is treated within the criminal law with specific regard to intention. This chapter will identify what role beliefs play in intention and what type of belief is required for such crimes, so that the remaining chapters can consider the moral role that it plays.

What role does belief play as a component of intention?

In Chapter 1 it was observed that a relevant belief was always required in intention crimes. But precisely what role does it play, and how can its role be evaluated in a moral context? Can a person's belief by itself be morally relevant to criminal intention, or does its moral significance derive in some other way?

In Chapter 2 it was observed that it is arguable that people could be held morally responsible simply for holding beliefs, even if those beliefs were – to some degree, at least – involuntary. It may be objected that someone should not be held morally responsible on the basis of a belief if it is involuntary

It is important to clarify what role belief plays *as a component of intention*, as opposed to what role belief may play in any other moral assessments of intended action. Beliefs that are arguably immoral in themselves involve a value judgement. They include beliefs such as "all black people are inferior", or "other people's pain is of no importance", or "non-consensual sex is permissible". Such beliefs are not the relevant components of criminal intention. As identified in Chapter 1, the belief required for deliberate harm is

an attitude to the likelihood of the relevant harm occurring. Beliefs amounting to an opinion about such harms – about whether, for example, the harms are excusable, justifiable, or do not matter – are not the components of intention. They are still important beliefs in other contexts. Having immoral beliefs, or having no moral beliefs, at the relevant time will often feature when intention crimes are committed: they may help explain why such crimes occur, and may be relevant in considering the appropriate sentence. But they are not relevant in terms of the moral significance of belief as a component of intention – which is what this thesis is exclusively concerned with.

To take an example, the contract killer whose *modus operandi* is shooting people in the head may have any number of immoral beliefs – that his victims all deserve their fate, that he simply does not care, that anyone would do the same for the money involved – but the relevant belief component of the *mens rea* of murder is that of believing that his victims will die or suffer serious harm if his shots hit their targets. That belief is not immoral in itself, but acting on it will be.

Similarly, the beliefs that, for example, stabbing someone will cause them serious harm, or that by taking someone's property away from them I will permanently deprive them of it, are not immoral. What is immoral, or may be, is acting on such beliefs. Morality in this context concerns the choice on which beliefs are made: I act immorally if I choose to do something *despite* believing that it will or may cause harm (or if I should have realised that it may cause harm), and without good excuse.[75]

This thesis is therefore only concerned with beliefs as far as they inform us of the choices on the basis of which we decide to act, and in that context, the morality of beliefs themselves are irrelevant.

What type of belief?

Having identified broadly what type of belief constitutes the relevant component of intention, some further clarification is needed about the characteristics of such beliefs in considering what moral role it plays. The following contentions will be addressed in

[75] A similar account of intentional harm is given by R.A. Duff in his *Intention, Agency and Criminal Liability*, Oxford, 1990, at pages 79-80.

turn: 1) the belief concerns the successful outcome of actions; 2) the belief is of virtually certainty of harm; 3) the belief is not unconscious; 4) the belief must be that held by the agent; and 5) the belief cannot be falsely held.

1) The belief concerns the successful outcome of actions. As noted in Chapter 1, the belief as to the chances of the harm occurring is based on the *successful* outcome of an agent's action. This point seems to have been overlooked on occasion.

The direction to juries on murder trials approved in *R v Woollin*[76] states that juries should be told, in the cases where a simple direction is insufficient, that the requisite intention can only be found if "death or serious 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." Following that direction strictly, Smith & Hogan's gunman (referred to in Chapter 1) – firing without much hope of success but trying to kill and succeeding – would not be guilty of murder. Of course, in fact the gunman should be guilty of murder, and the reason is that he believes that death or serious harm is a certainty *if his action is successful.* Even if his purpose was to practise his shooting, and the target happened to be a person, provided he believed that he would cause such harm he would still be guilty of murder – because his foresight was that the harm was virtually certain to occur if his action was successful.[77]

The following passage from Glanville Williams alludes to this important requirement (underlining added):

> [S]uppose that a villain of the deepest dye blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. It is not his aim to cause the people on board to perish, but he knows that success in his scheme will inevitably involve their deaths as a side effect.[78]

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[76] [1999] 1 AC 82.

[77] This is not to say that there are no moral differences between this scenario and one in which the aim was to kill, nor is it to say that the law would treat them in the same way. Such matters are considered in later chapters.

[78] From "Oblique Intention" (1987) 46 Criminal Law Journal, 417. The importance of the link between the belief about the harm and the success of the agent's plan has also been acknowledged by Greg Taylor in "Concepts of Intention in German Criminal Law", (2004) Oxford Journal of Legal Studies, 99 (especially at page 107).

Deliberate acts require more than foresight of harm. Such acts are inextricably linked to the agent's reasons for acting.[79] This does not mean, however, that culpability only attaches to a harm connected to those reasons – in Williams's example, we still hold the deep-dyed villain fully responsible for the deaths of the passengers, and consider that he deliberately caused those deaths. But it does mean that foresight of harm has to be considered *in the context of* the agent's purposes: we consider that an agent deliberately causes harm if she foresees that the harm will occur if her action is successful. It is noted that the Law Commission has recognised this to some degree in its latest consideration of the *mens rea* for murder.[80]

2) The belief is of virtually certainty of harm. The law currently demands virtual certainty: *R v Woollin*. As pointed out in Smith and Hogan[81], it is unfortunate that, in respect of murder at least, the law focuses on the fact of whether the harm was, objectively, a virtual certainty rather than exclusively on whether that was the agent's belief. It is also unfortunate, as pointed out by J. C. Smith[82], that a jury is only "entitled to find" intention in such a situation, suggesting that there may be situations in which they may not do so.[83] However, virtual certainty remains the test, rather than probability or possibility. Something short of virtual certainty had been the test for a number of years.[84] The Law Commission has endorsed the current standard.[85]

Some believe that probability ought to be the test. The following example is often cited in support: a person sets off a bomb in a shopping area, gives a warning, but believes it is likely (rather than virtually certain) that those trying to defuse it will die.

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[79] A view endorsed by Joseph Raz in his *Engaging Reason*, Oxford, 1999, especially pages 47 and 231, and Donald Davidson, "Actions, Reasons, and Causes", in his *Essays on Actions and Events*, Oxford, 1980, page 7. Michael E. Bratman, *Intention, Plans, and Practical Reason*, Harvard/London, 1987, especially page 32, made a similar point in connecting intentions with plans.

[80] Law Commission's Consultation Paper No 177, especially at page 93 onwards.

[81] *Criminal Law: Theory and Doctrine*, 2002, page 71.

[82] Commentary on *R v Woollin* [1998] Crim.LR. 890.

[83] The Court of Appeal in *R v Matthews and Alleyne* [2003] Cr App R 30 subsequently ruled that "the law has not yet reached a *definition* of intent in murder in terms of appreciation of a virtual certainty."

[84] Following the judgment in *DPP v Smith* [1961] A.C. 290 and a number of decisions after it.

[85] *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No. 218), paragraph 8.15.

Such a person should, it has been said, be guilty of murder.[86] It is easy to see why revulsion at a crime of that sort should prompt such a response. But that alone, it is submitted, is not sufficient to widen the definition of intention. However recklessness and intention are categorised, it will be possible to find cases of the former that are morally more reprehensible than the latter. That can be addressed by thoughtful sentencing. A better approach is to consider what difference is made when examples are considered all things being equal. With the terrorist example, it is submitted that there remains a significant moral difference between the person who believes it is more likely than not that people will die and the person who believes it is virtually certain that they will die (for example, by giving no warning). Admittedly, in this extreme example, the difference is not huge, but it exists – and in other examples, the difference will be much greater.

However, it must be admitted that there is a fine line between what might be called "deliberate harm" and the deliberate exposure to likely harm. Some (like Lord Goff)[87] consider that there is no moral difference. The most prudent course may be to sit on the fence, as R.A. Duff has done[88], and perhaps go further and accept that if society considers that such harms are morally indistinguishable, so be it. But there are at least good practical reasons for keeping the virtual certainty test. Why should the test be more likely than not rather than, say, a significant risk? What about a straight 50:50 case? What about a defendant who gave no thought to the probability? How would juries be directed about it? It would be hard to establish a consensus and justification for the appropriate test.

And why should probability be the test, and not possibility? Antje Pedain and others have argued that since deliberate exposure to the risk of harm is significantly morally different to indifference about that risk, the degree of probability is immaterial as far as establishing intention is concerned, which would allow a bare possibility of risk to be

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[86] For example, Lord Goff, "The Mental Element in the Crime of Murder", Law Quarterly Review, 1998, 30.
[87] Ibid.
[88] Ibid, page 95.

sufficient, provided it was deliberately created.[89] It is submitted that, while this correctly identifies the problems involved in making moral assessments based on levels of probability, distinguishing intention and recklessness on this basis is more clearly a step too far, and would lead to bizarre results. For example, a motorist who enjoyed driving fast because of the thrill of the risk of an accident – a risk she believed to be infinitesimal – may be guilty of murder, whereas a motorist who deliberately killed a pedestrian who stepped in front of her car may only be guilty of manslaughter. It is also submitted that there are significant conceptual and evidential difficulties in discerning an intention to create a risk, and distinguishing that from running a risk that happens to come one's way. These difficulties have emerged in certain analyses of murder cases such as that of *R v Hyam* [1975] AC 55. In a recent article, M. Cathleen Kaveny[90] argued that Mrs Hyam, who started a fire in a house, apparently with the purpose of frightening the occupant, believing that there was a risk of causing death, *intended* to create that risk, and so ought to be guilty of murder. But that use of "intended" raises familiar problems concerning the meaning of intention. Kaveny argued that the use of the word "intended" in criminal law should not be strained beyond its ordinary meaning of direct intention. But who *intends* to create risks, on the ordinary meaning of intention? Surely that is rare. (The reckless driver mentioned above may have such an intention – but should she have the *mens rea* of murder?) If Mrs Hyam's purpose was to frighten, presumably she would not have cared in the least if she believed that there had been no risk at all, provided the victim had believed there to be a risk, and was frightened as a result. It was the frightening that counted. It cannot be said that on the ordinary meaning of intention, she intended to create the risk – another straining of its meaning is required if it is to be used in this way.[91]

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[89] "Intention and the Terrorist Example" [2003] Crim.L.R. 579. See also Anthony Kenny, "Intention and Malice Aforethought" in his *The Ivory Tower*, Oxford, 1985, page 14, for a similar suggestion.

[90] "Inferring Intention from Foresight", (2004) Law Quarterly Review, 81.

[91] Kaveny contrasted *Hyam* with other cases in which defendants would seem to have appreciated a likelihood of serious injury or death (*R v Maloney* [1985] AC 905 *R v Hancock and Shankland* [1986] AC 455), and stated that whereas each of the latter might only have intended to create an "apparent risk", in Mrs Hyam's case "the terrifying risks attendant on a blaze inside the front door was precisely what she planned" (at page 99). Kaveny did not provide any further explanation of how she came to these different conclusions.

It is submitted that the conceptual and practical difficulties of lowering the threshold from virtual certainty outweigh those of keeping it as it is. Although the language of the virtual certainty test is a little hard to penetrate, the principle behind it is readily understandable, and it provides the clearest distinction between deliberate and reckless acts. As a compromise, it may be that in cases such as *Hyam*, and the terrorist example, a middle way could be found to include something such as "callous indifference to loss of life", either as alternative *mens rea* for murder under the current law, or as a new serious homicide offence (as proposed by the Law Commission[92]). But such killings do not seem to be deliberate. For all the above reasons, and in the absence of any strong moral arguments to the contrary, it is submitted that the relevant belief should always be a "full belief", or a "flat-out belief", as identified in Chapter 2 – a belief that the relevant harm *will* happen (if the action is successful) rather than *may* or *will probably* happen.[93]

3) The belief is not unconscious. As noted in Chapter 2, beliefs can be unconscious. It is submitted that as far as appreciating harm is concerned, in order to commit harm deliberately, the agent must be to some extent conscious of the belief at the time of the action that causes the harm. However, this is a difficult point. A number of beliefs associated with the awareness of the harm may be unconscious – as noted in Chapter 1, someone firing a gun, for example, has a number of unconscious beliefs about the physical act required to do so, and about what happens once the trigger is pulled, and so on. On the other hand, awareness of the causing of harm itself seems to be something that is required in order for a deliberate act to occur: in order to choose to cause a result, one surely needs to be aware of the possibility of that result.

Others would disagree with this last point. Hyman Gross, for example, takes the view that knowledge of the harm is not necessary at the time of the action that causes it, and gives the example of a counterfeiter who trains himself to think of other things at the time that he passes counterfeit notes – who ought still to be guilty.[94] It may be argued against this that such a person may still have a relevant belief about the notes, albeit that he is

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[92] Law Commission Consultation Paper No 177 – Overview, paragraphs 5.31 to 5.37.

[93] Jonathan E Adler, in a general rather than a specifically criminal context, endorsed the view that intentional action was facilitated by full, rather than partial, belief: *Belief's Own Ethics*, Cambridge, Massachusetts, 2002, page 232.

[94] Ibid, page 90 onwards.

thinking predominantly of other matters – a subconscious belief, perhaps.[95] Another way of considering such cases is to identify the action as spread over a longer period of time than the physical act of passing notes[96]. The latter approach may be a way of understanding why the perpetrators in cases such as *R v Church*[97] were properly found guilty of murder.

There is a range of different views on these matters[98], and the psychological implications are beyond the scope of this thesis. But it is submitted that the belief as to harm has to have been consciously, or at least subconsciously, considered, even if only fleetingly.[99] If an agent is unaware of the possibility of harm, she does not appreciate the moral nature of her action, and should not, on a moral basis, be guilty of an offence requiring an intention to cause that harm.

4) The belief must be that held by the agent. It was noted in Chapter 2 that there can be a temptation to assume, despite perhaps evidence to the contrary, that an agent must have believed something. Such a temptation should be avoided. For an intention crime it is the agent's belief that is relevant. If the agent did not believe that harm would result from the successful outcome of her action, she could not have deliberately inflicted it – she did not choose to inflict it. If she believed there was only the risk of harm, she may be guilty of a recklessness crime, and if she did not believe there was such a risk but should have done, she may be guilty of a negligence crime. In this respect, as noted above, it is submitted that the virtual certainty test in *R v Woollin* is wrong. Inferences will have to be made about a defendant's state of mind in deciding cases (the fact that something appears obvious to the jury may be evidence that it would have been obvious

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[95] See Chapter 2, section 3), which considered the possibility that someone (Lord Marchmain in that example) may believe something while choosing not to think about it. Consider also the following example of reckless driving: someone looks at her speedometer as she sets off down a busy shopping street and sees that it reads 60 m.p.h., makes no effort to slow down, but thinks about other things as she carries on and starts knocking down pedestrians. She may still be understood to be aware at that stage that she is travelling too fast.

[96] Action is not purely physical, and the identification of any act depends on how we choose to describe it: see R. A. Duff, ibid, page 40 onwards and page 116 onwards.

[97] [1966] 1 QB 59. Death was caused while the attacker believed he was disposing of the corpse after a fight.

[98] As noted in Stephen Shute's article "Knowledge and Belief in the Criminal Law" in *Criminal Law Theory: Doctrines of the General Part*, edited by Stephen Shute and A. P. Simester, Oxford, 2002, page198.

[99] Glanville Williams endorsed a similar view in *The Mental Element in Crime*, Oxford, 1965, page 18 onwards.

to the defendant), and tribunals will never know for sure what that state of mind was, but the test should not incorporate an objective element of what the defendant should have believed.[100]

5) The belief cannot be falsely held. This is to reiterate a point made in Chapter 2 in this context. Someone cannot believe *p* and *not-p* simultaneously. She may believe the alternatives at different times, or believe something to a limited extent only. For intention crimes it is submitted that the agent's own full belief concerning the harm is required at the relevant time. As has been discussed, identifying the relevant time may be problematical, but it must be closely linked to the action that results in the harm. For the same reason, it is submitted that "wilful blindness" – shutting one's eyes to the obvious – is not the same as belief.[101] This is connected with the points made in sections 3 and 4 above: the fact that to an outsider a certain belief is "obvious" does not mean it is obvious to the agent. If it is obvious to the agent, that agent will believe it, because one cannot have a belief that one considers false. If it is not obvious to the agent, even if it should have been, the agent may not believe it, and even if that can properly be described as "wilful blindness" to the relevant harm, it is insufficient for an intention crime – intention being, as has been noted, a subjective concept.

6) The belief need not match the harm, but must be proportionate to it. The belief about the harm that will occur does not need to match exactly the harm that does occur, but it has to be similar to it. In one type of situation, the **victim** is different to the one believed to be harmed, and the doctrine of "transferred malice" applies: someone undertaking an action believing that A will be harmed, which actually results in B being harmed, is culpable notwithstanding that she did not foresee or wish any harm to B. In another type of situation, the **type** of harm that results may be different to that envisaged: X believes that by stabbing Y, Y will die from her wounds, but instead Y suffers a heart attack on seeing the knife and dies anyway; X is still guilty of murder. In a further type of situation, the **seriousness** of harm that results may be different: M stabs N believing that serious harm will result, and N dies; M is still guilty of murder. On the last of these, the current law may be considered somewhat harsh in its attribution of responsibility:

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[100] See Simester and Sullivan, ibid, page 138: "Intention is a subjective concept, and any inference made from the evidence is *not* a presumption."

[101] Further reasons for rejecting the doctrine can be found in Stephen Shute, ibid, page 196 onwards.

someone can still be convicted of murder even though death may not be foreseen as even a remote possibility. The application of this principle tends to apply to assaults rather than other crimes. The harm envisaged must be to some degree proportionate to the harm caused: so murder cannot ordinarily be committed if only slight harm was foreseen. It may be that despite the apparent harshness, there are sound social reasons (and perhaps therefore sound moral reasons) for adopting to some extent the maxim "The stone belongs to the devil when it leaves the hand that threw it."[102]

Summary

As far as the belief component of intention is concerned, it is not the belief itself that attracts moral censure. The relevant belief is that harm will or may occur as a result of the agent's action. The moral significance derives from the choice to act *despite* such a belief. The following properties of such a belief have been identified: 1) the belief concerns the successful outcome of actions; 2) the belief is of virtually certainty of harm; 3) the belief is not unconscious; 4) the belief must be that held by the agent; 5) the belief cannot be falsely held; and 6) the belief need not match the harm, but must be proportionate to it.

[102] Quoted approvingly in Jeremy Horder's article, "Two Histories and Four Hidden Principles of Mens Rea", (1997) Law Quarterly Review, 95, which considered the incorporation of the "malice principle" and the "proportionality principle" in the criminal law. According to Horder, the malice principle is that if someone wrongly directs her conduct at the interest of another, such malice may justify liability even if she had no foresight of the harm caused; and the proportionality principle is that a person is liable for harm caused even if she did not appreciate that type or severity of harm, provided she foresaw some harm that was proportionate to it.

CHAPTER 5

THE MORAL ROLE OF BELIEF AS A COMPONENT OF INTENTION

Chapters 1 to 3 identified that belief is a requirement of intention crimes, analysed what "belief" itself means, and considered the moral context in which belief plays a part. Chapter 4 identified what role belief plays and what type of belief is required as a component of intention. This chapter will consider what moral role belief has to play in intention crimes. The final chapters will compare it with other factors that may be of moral significance.

How does belief assist in defining intention?

Although Chapter 1 covered some of this ground, a little more about the definition of intention is needed at this stage. That chapter suggested that intention crimes under the current law could best be described as being harms that were deliberately committed – harms that people choose to inflict. But is that how intention crimes ought to be defined? Are there more accurate ways of defining them?

Although what is meant by intention in the criminal law is hard to pin down, a clue to its meaning can be found by considering what distinguishes it from other *mens rea* concepts. Intention is contrasted in the criminal law with recklessness, negligence, and blamelessness. What attitude towards harm do these states of mind require? It is submitted that, for any given harm, under the current law the position is roughly as follows: the agent **intends** the harm if she believes that it will occur if her action is successful; she is **reckless** if she believes that her action involves a risk of that harm's occurring, such risk being considered unreasonable; she is **negligent** if she should have believed that her action involves the unreasonable risk of that harm's occurring; and she

is (generally speaking) **blameless** otherwise.[103] It can be seen that on this account the agent's mental state depends, at least to a significant degree, on differences in the agent's belief about the harm. If the action of the agent is imagined as a gunshot, the victim of the directly or obliquely intended harm is believed by the agent to be directly in line and within range of his shot (the directly intended harm resulting from, for example, a wish to kill the victim; the obliquely intended harm resulting from, for example, a wish to check whether the gun works); the victim of the reckless harm is believed to be in the vicinity of, say, a randomly fired shot; the victim of the negligent harm is not believed to be in the vicinity of the shot but the agent did not bother to consider whether there were any people there when she should have done; the victim of a blameless harm perhaps ran on a prohibited area of a firing range, unseen by the agent.

On this account of the differences, criminal intention can be morally distinguished on the basis that the agent understands a significantly closer connection between her actions and the harm that results than she does otherwise. It is more of her choosing. As identified in the previous chapter, under the current law she only commits an intention crime when she realises that the harm *will* (not *may*) result if her action succeeds. Such an outcome is more within her control.[104] It is this type of action, it is submitted, that we think of as constituting deliberate harm.[105] And it is deliberate harm, whether it is categorised as intention or otherwise, that ought to be distinguished from reckless and negligent harm.

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[103] R. A. Duff adopts a similar distinction in his *Intention, Agency and Criminal Liability*, Oxford, 1990, at page 10, although he later concludes that in certain circumstances recklessness need not require the appreciation of the risk (page 157 onwards). The distinction offered here between recklessness and negligence is that given by C. L. Ten in his *Crime, Guilty and Punishment*, Oxford, 1987, at page 101.

[104] H. L. A. Hart, in his *Punishment and Responsibility*, Oxford, 1968, page 119 onwards, identified the extent of an agent's control as the key determinant of intention crimes.

[105] A similar explanation to the one given here of the differing levels of culpability can be found in Hyman Gross, *A Theory of Criminal Justice*, Oxford, 1979, page 87 onwards. However, Gross identifies four levels, splitting what has been identified as intention here into two – "intentionally" and "knowingly" causing harm, akin to direct and oblique intention. The moral differences between the two will be considered in the rest of the chapter and the following ones. It is worth noting here, though, that Gross considers "knowingly" causing harm as "intentionally doing what creates imminent danger of harm", whereas oblique intention as understood under English law requires foresight of a virtual certainty of harm, rather than appreciation of only the danger of harm.

But the theory advanced above is only one way of accounting for the difference between these *mens rea* terms[106]. Some maintain that the difference between recklessness and intention is that recklessness requires the running of an *unreasonable* risk, whereas there is no test of reasonableness with intention.[107] However, it is submitted that the requirement of unreasonableness for one and not the other *mens rea* term is in itself because of the different scale of appreciation of harm: we all take risks of causing harm, some of which are unreasonable and some of which are not; but those who deliberately cause harm without good excuse necessarily act immorally. Driving a car always involves a risk of causing harm; the reckless driver is one who takes an unreasonable risk. But trying to knock down a pedestrian will necessarily be immoral, unless there is a good excuse for doing so (the pedestrian is aiming a gun at the driver, for example); without such an excuse that action will always be unreasonable. Thus deliberate harms are always prima facie unreasonable, and defining this *mens rea* concept in terms of unreasonableness would be otiose.[108]

An alternative, or additional, way of distinguishing intention from recklessness is to insist, as some commentators such as Lord Goff[109] have done, that intention crimes require a purposive element, which is lacking in recklessness crimes. They claim that for *mens rea* to amount to intention the causing of harm must be a means to some purpose or an end in itself, as the ordinary meaning of intention suggests. In other words, only directly intended harms would amount to intention crimes.[110]

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[106] It ought to be noted here that some consider that negligence is not a category of *mens rea*, since, it has been said, there is no "guilty mind". However, it is often treated as one, and there are reasons for doing so, since the lack of appreciation itself – which is a state of mind – is considered culpable.

[107] For example, see A. P. Simester and G. R. Sullivan in their *Criminal Law: Theory and Doctrine*, Oxford, 2003, page 139. However, it is noted that later in the same work, Simester and Sullivan illustrate the difference between recklessness and intention with the example of someone having sexual intercourse recognising that the victim may not be consenting, which would amount to recklessness, and someone having sexual intercourse believing that the victim does not consent, which would amount to intention (page 144): this suggests rather that the key difference is the agent's differing expectations of harm.

[108] A view endorsed by J. C. Smith in "'Intent': A Reply" [1978] Crim.L.R. 14, at page 20.

[109] "The Mental Element in the Crime of Murder", Law Quarterly Review, 1998, 30.

[110] It is submitted that Goff might have underestimated the uncertainties surrounding the meaning of intention. For example, he provided the following contrast: a person shooting through a window to hit someone intends to break the window, whereas in trying to blow up a parcel on a plane, which is likely to result in the death of the pilot, "I simply do not care whether he lives or dies." (Ibid, at page 47.) On the face of it, it would seem that the gunman does not care about the breaking of the window either, but Goff does not provide any further comment on this.

So where would that leave "oblique intention" in the law? There would seem to be two alternatives: consider it as a form of recklessness, or give it a category on its own[111]. Lord Goff suggested that the Scottish concept of "wicked recklessness" may be adopted to allow convictions for murder in certain such scenarios (such as a person who bombs a passenger plane for the insurance money). This suggests that oblique intention may be simply a more extreme version of recklessness (which could be incorporated into intention offences in certain situations). One way of looking at this may be to say that the agent is simply taking a more likely, and more serious, risk of harm.

Goff's proposal, it is submitted, is essentially to get round the linguistic problems posed by intention. He considered that wicked recklessness could cover all certain consequences that were not directly intended, whether the agent envisaged the harm or not. The difficulty with the proposal is that in cases where the harm is envisaged, the act is not really reckless, since the agent believes that the harm is certain to occur if her action is successful. The insurance bomber, in this scenario, believes that the passengers will die if her bomb goes off: she is being more than reckless with their lives; she is deliberately ending them in the process of enriching herself. If the harm is not envisaged, the act is not reckless either, since the agent believes that she is taking no risk at all, and should properly be considered negligent. The insurance bomber in this (hard to imagine) scenario cannot be said to be taking a risk, since she has not turned her mind to the possibility of the passengers' deaths. The linguistic problems seem merely to have been switched from intention to recklessness.

Any deliberate action may, in literal terms, be described as taking a risk (a "sure-fire risk") and that goes for directly intended harm as well. Recklessness, and risk-taking, ordinarily understood mean something other than this. One is more than reckless when one believes that something is virtually certain to happen as a result of one's actions.

If there is to be any value in distinguishing intention specifically from recklessness, it is submitted that the latter cannot include actions foreseen as virtually certain.[112] For there is a moral distinction underpinning the linguistic differences, and it can be understood in a non-legal context. If someone hit me and admitted afterwards that she

[111] As it is given in the Model Penal Code, which separates "intentionally" from "knowingly" (Hyman Gross, ibid, page 82).

[112] A view endorsed by J. C. Smith in "'Intent': A Reply"[1978] Crim.L.R.14.

knew she was going to hit me, but explained her action as practising her boxing, and said that my head just happened to be in the way of her left hook, I would consider her action more than reckless – and worse than reckless. I might (but would not necessarily) think even worse of her if I believed that her true purpose was to hurt me. But even if I believed that her purpose genuinely was to practise her boxing I would nevertheless consider that she had deliberately hit me, and think of her action in a quite different way than if she had been careless.

And how do we classify an action where the purposes are uncertain? When Hamlet kills Polonius, his precise purpose may be unclear – who did he believe was behind the arras, and why did he strike? But it is submitted that his prima facie guilt of murder is established because (despite claiming he did not know what he had done) it is obvious that he believed his actions, if successful, would result in death. He might under our criminal law be able to argue diminished responsibility, or (less likely) provocation, or (less likely still) insanity. But the "rash and bloody deed" is actually more than rash, and more than reckless: he deliberately killed, and that conclusion can be deduced directly from his belief about the harm he caused. Those that believe intention crimes should be restricted to purposive acts would demand of a jury that it should establish precisely what Hamlet's purposes were – which even he might have been unclear about. Instead, it is submitted that the *mens rea* for murder is established because we recognise that the act was a deliberate killing, whatever motives lay behind it.

We take avoidable risks of harming others on a regular basis – such as every time we drive a car. Some risks are beyond the ordinary, are considered unreasonable, and amount to recklessness. But deliberately causing harm is of a different order. As noted above, causing such harm is always unreasonable, unless there is an absolute excuse for it, such as self-defence. To put it in Kantian terms, the right of an individual not to be used as a means towards someone else's ends is more clearly and more severely infringed if harm is deliberately rather than carelessly inflicted. Many philosophers have agreed that morality is particularly concerned with human will and moral choices.[113] It follows

[113] The following philosophers appear to have accepted this, for example: Aristotle (in *The Nicomachean Ethics*, Book III ii: Penguin Classics, 2004, pages 54-55), Aquinas (in *Quaestio Disputata de Caritate*, 2, he agreed with Augustine that "sin is a fault of will": *Selected Philosophical Writings*, Oxford World's Classics, OUP, page 422), Descartes (in the Dedication to The Principles of Philosophy, at VIIIA, 3: *Key*

that the more the will is directed to the harm, as is the case with deliberate harm compared to reckless harm, the more the agent will tend to be culpable.[114]

It is for this reason that oblique intention must be distinguished from recklessness. It must either be classified as intention or given a separate classification. And it is submitted that this distinction is for sound moral reasons. An agent who acts believing that harm *will* result if her action is successful naturally and rightly attracts greater opprobrium than one who acts believing only that it *may* result. Thus the concept of intention is distinguished from recklessness and negligence on the basis of the different beliefs of the agent, and there are good moral reasons for doing so.

Intention as commonly understood may indeed mean something other than the meaning ascribed to it in the criminal law. But the concept of intention should be used to describe what the law requires of it, rather than to shape the law to best fit its precise meaning. As argued in Chapter 1, "deliberate" may be a better way of describing the relevant harms in this context. But if intention is used to describe all those criminal states of mind not captured by negligence and recklessness, it must include oblique intention.

Attempts

It might be objected that the above analysis of the classification of intention crimes appears weaker when considering attempt crimes. While it is easy to understand how directly intended crimes can be attempted, since the purpose of the action is clearly linked to the relevant harm, it can be harder to imagine how some obliquely intended crimes could be attempted. For example, in the example given earlier in the chapter of harm obliquely intended from a gunshot (the purpose being, for example, checking whether the gun works), it may be hard to understand how attempted assault or attempted murder

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Philosophical Writings, Wordsworth Classics, 1997, page 275), Hobbes (in *Leviathan*, Part I, Chapter 15: Penguin Classics, 1985, at page 206), Kant (in *Grounding for the Metaphysics of Morals*, First Section: Hackett Publishing Company, 1993, page 7 onwards), J. S. Mill (in *Utilitarianism*, II, second footnote: *On Liberty*, Oxford World's Classics, OUP, 1998, page 150), and R.M. Hare (in *The Language of Morals*, Oxford, 2nd Edition, 1961, page 1).

[114] William Wilson, in his *Central Issues in Criminal Theory*, Oxford, 2002, page 135 onwards, especially at pages 139-140, endorsed this as a fundamental social distinction that needed reflecting in the way offences were punished. It seems that Wilson would, however, disagree with the way in which deliberate harm has been distinguished from recklessness in this thesis.

could result from such a scenario. It has been argued that "generally, what agents do intentionally, they attempt to do"[115], and it may be argued further that the difficulties of imagining attempted obliquely intended harms indicate that criminal intention should only encompass directly intended harms.

This is not the place to discuss the law of attempts in any detail. However, while it is true that the ordinary meaning of the word "attempt" is strained when describing some obliquely intended actions, it is submitted that there is no moral difficulty in ascribing the same degree of moral responsibility and a similar level of punishment for an action in such circumstances as for an attempt at a similar directly intended harm. While the person firing the gun at someone is not strictly speaking attempting to cause the person harm, as part of what she is attempting to do that person will invariably be harmed if her action is successful. She is in a physical sense *aiming* to hit the person.[116] From a moral perspective, she is choosing to cause harm just as much as if she directly intended the harm.

It would be very rare that someone would be convicted of an attempt in such circumstances; because of the absence of harm and the difficulties of establishing motive, the evidence is unlikely to support it. But in rare cases where the evidence may support it – such as an attempt by a plane bomber trying to collect the insurance on the plane, where the preparatory actions and the motive may be clearly established – there seems no reason why attempted oblique intention offences should not in principle exist.

Summary

Belief always has a central moral role to play in defining intention crimes. It is not the moral quality of the belief itself that is important, but rather the fact that an agent chooses to act in a particular way despite the belief that harm will occur if the action is successful. Without that belief, a crime cannot properly be distinguished from one committed

[115] Jennifer Hornsby, "On What's Intentionally Done", in *Action and Value in Criminal Law*, edited by Stephen Shute, John Gardner, and Jeremy Horder, Oxford, 1993, at page 58.

[116] It is admitted that in other examples of obliquely intended harm there will not be as clear a physical aim as there is in this example. However, it is a useful figurative example for obliquely intended actions generally, and another example of shooting will be referred to in the next chapter for similar reasons.

recklessly or negligently. All such harms caused, whether by direct or oblique intention, should be distinguished from those committed recklessly or negligently. That distinction is important, because we react differently to harms caused deliberately rather than otherwise, and ascribe different levels of responsibility accordingly. It is for that reason that the distinction is properly reflected in the categorisation of *mens rea* concepts in the criminal law.

CHAPTER 6

OTHER FACTORS OF MORAL IMPORTANCE

Chapters 1 to 4 set about defining the terms with which and the context in which the moral significance of belief could be assessed. Chapter 5 concluded that belief is always of central moral significance in intention crimes. In order to establish what *degree* of significance it has, this chapter will consider the moral significance of other factors involved in intention crimes.

Factors other than belief that may have moral significance in intention crimes

This section will consider, firstly, what components other than belief are necessary for intention crimes, and secondly, what other factors may be of moral significance.

1) Necessary components. Although there are other ways of describing these components, it would be uncontroversial to suggest that an intention crime will, broadly speaking, always consist of the following: an act, directed by an agent's will, desiring that something, such as a particular objective, will result, and believing that the causing of the relevant harm will result if that action is successful.[117]

The act itself tends to be thought of in purely physical terms, although it has been argued that it is partly comprised of a psychological element.[118] That psychological element would in itself, it seems, be the product some of the remaining components (the will, desire, and belief). The pure physical act – the bodily movements – would seem to have no moral significance on its own.

The agent's will – the choice of the agent in acting in that way – distinguishes voluntary acts from involuntary acts. Involuntary acts may be, for example, mere

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[117] A similar identification of the relevant mental components involved in killing someone can be found in Michael Moore, *Placing Blame*, Oxford, 1997, at page 407.

[118] See for example Anthony Duff, *Intention, Agency and Criminal Liability*, Oxford, 1990, page 41 onwards.

reflexes, such as flinching from pain. There is some debate at the margins between these descriptions[119] – are actions such as breathing or something done while sleepwalking, voluntary or involuntary? – but such matters do not need to detain this inquiry. The question for now is whether the willing itself is a moral factor. It was argued in previous chapters that the choice an agent makes despite a belief about the harm caused is the reason that belief is morally significant – for example, I decide to fire a gunshot in a certain direction *despite* my belief that if I am on target someone will die. There is a link here between will and belief. Both are necessary. Not willing the act (because, for example, I had no control over it) or not believing that any harm would result (because, for example, I was unaware of the risk of any harm) should amount to a defence for any intention crime. Will is also closely connected to desire: whenever someone acts, she does so for a reason[120], and that reason springs from a desire (or some other "pro-attitude"[121]). Will cannot exist without desires and beliefs, and once will has been established, beliefs and desires are necessary features of it and can explain it. To take a simple example: suppose someone hits another person. If the action was the result of a reflex – the assailant had just been stung by a bee – there may be no will and therefore no relevant belief or desire associated with the action. If the action was willed – the assailant reacted to an insult – there would have been a belief about what the action would achieve if successful and a desire (for example, to revenge the slight). Even if the desire was not closely connected with the harm caused – perhaps the assailant wanted to show off her boxing technique – there was nevertheless a relevant desire associated with the action. Associated desires and beliefs are therefore required for an action to be willed. Although in some senses the will can be considered as a separate component, it can be explained psychologically, or at least morally, by reference to the agent's beliefs and desires.

The remaining component, and, it would appear from the preceding analysis, the most important leaving aside belief, is desire.

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[119] For example, see Michael Moore's essay "More on Act and Crime" in his *Placing Blame*, ibid.

[120] "Reason" is used in its wider meaning here – as something that could be rational or irrational.

[121] Such as a reason to do something: see Donald Davidson, "Actions, Reasons, and Causes", in his *Essays on Actions and Events*, Oxford, 1980. It is not proposed to get into the debate here about whether all reasons require desires, which may anyway be beyond rational inquiry: see Philippa Foot, *Virtues and Vices*, University of California, 1978, page 156.

There are, as has been acknowledged, different ways of identifying the components of intention. However it is done, though, most commentators agree with the result of the analysis above that the key moral components of intention crimes are belief and desire.[122]

2) Other factors. The factors other than components of intention that may be considered of moral relevance to intention crimes are almost limitless. The particular character, history and situation of the defendant, the relationship with the victim, the involvement of others – a range of such factors will often influence the moral response to particular crimes. Some of these factors will often influence the severity of the sentence, and some may afford defences or partial defences. Unlike belief or desire, such factors are not considered relevant to the question whether the *mens rea* of intention crimes is established initially. Nevertheless they can be at least as important morally as the defendant's component belief or desire. We may, for example, consider a hungry penniless person who steals some food significantly less blameworthy than a hungry millionaire who does so because he despises giving money to people of a particular race – a judgement that is based on the characters and situations those people are in, rather than their component beliefs or desires at the time of committing the offences.[123]

However, since it is not normally argued that such factors should assist in determining the *mens rea* of intention crimes, consideration of these factors will wait until the next chapter, when the relative moral significance of belief, desire and other factors are considered in the moral context within which the criminal law operates.

The rest of this chapter will accordingly concentrate on the moral importance of desire.

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[122] See, for example: Donald Davidson, ibid, page 6; Michael Moore, ibid, page 411; Glanville Williams, *The Mental Element in Crime*, Oxford, 1965, page 20; and A. R. White, "Intention, Foresight and Desire", (1976) Law Quarterly Review, 569, at page 590.

[123] Non-component beliefs and desires may be important in such a judgement. For example, the millionaire's beliefs about race may be relevant, but such beliefs are not components of the relevant intention.

The moral significance of desire in intention crimes: a necessary and/or aggravating factor?

As noted above, an intention crime will always result from an agent's voluntary action, which in turn always involves an agent's desire or other "pro-attitude" (the word "desire" will be used for present purposes, since it is the word most usually used in this context). There has been much debate on the moral importance of the connection between the desire and the harm caused.

It is because some consider this connection of particular importance that they consider there to be a moral distinction between directly and obliquely intended crimes. In this connection, the "doctrine of double effect" is often invoked. One version of that doctrine is as follows:

> According to this principle, there is an important distinction between what you aim at, either as one of your ends or as a means to one of your ends, and what you merely foresee happening as a consequence of your action. It is much worse, for example, to aim at injury to someone, either as an end or a means, than to aim at something that you know will lead to someone's injury. Doing something that will cause injury to someone is bad enough; but according to the principle of Double Effect, it is even worse to aim at such injury.[124]

In fact this description may be too simplistic for some supporters of the doctrine. If the basis for the doctrine is the closeness of the connection between the desire and the harm, the moral difference is not simply between directly and obliquely intended harms. In particular, desiring the harm itself as an end may be worse than desiring an end that involves harm as a means. So according to Michael Moore, for example, the person who bombs a passenger plane to get the insurance money from the destruction of the plane (oblique intention) is not as immoral as the person who bombs it to get the insurance on the passengers' lives (direct intention), but the person who bombs it simply because he hates the passengers (also direct intention) is the most immoral of all.[125]

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[124] G. Harman, *The Nature of Morality*, Oxford, 1977, page 58.
[125] Michael Moore, ibid, page 451.

In fact, those that agree that the doctrine does provide an important rule or signpost for moral distinctions sometimes disagree about the reasoning underpinning it. Philippa Foot, for example, considers that the doctrine itself does not justify the differences, and that justification depends on different duties that are owed in different circumstances.[126] Warren Quinn disagreed with that analysis, and considered that the doctrine was based on the injunction against using other people as means to one's ends.[127] J. L. Mackie considered that there may be practical reasons for the moral distinction – for example, a harmful side-effect may be more avoidable in terms of what the agent is trying to do, so that she may be hoping that the harm will not occur – but concluded that the doctrine did not apply in all situations.[128] Some of those who believe that there are such moral differences concede that it is difficult to justify.[129] In addition, supporters of the doctrine admit that it does not apply in all situations.[130] In another camp entirely, there are those, such as H. L. A. Hart, who consider that there is nothing, or very little, of moral significance in the distinctions at all.[131]

There is, therefore, a range of views about the doctrine. However, the prevalent view is that the doctrine does have some valid moral application, and that it, or something associated with it, justifies the following distinction: that when harms are desired, or when the harms are the means to some other desires, actions causing such harms are (or are sometimes) morally worse than actions that cause harms as side-effects.[132] This seems to go straight to the heart of the issue whether intention crimes require a relevant desire as well as a relevant belief. A few examples will now be considered to examine this further.

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[126] Ibid, page 27 onwards.

[127] *Morality and Action*, Cambridge, 1973, especially page 170 onwards.

[128] *Ethics: Inventing Right and Wrong*, London, 1977, page 161 onwards.

[129] See for example Thomas Nagel, *The View from Nowhere*, Oxford, 1986, page 183.

[130] See, for example, Philippa Foot, *Virtues and Vices*, University of California, 1978, page 22; and J. Boyle, "Who is Entitled to Double Effect" (1991) 16 The Journal of Medicine and Philosophy ,475, cited in the Law Commission Consultation Paper No 177 at page 113.

[131] *Punishment and Responsibility*, Oxford, 1968, pages 122-124. Glanville Williams also considered that, at least as far as the law was concerned, there should be no moral difference recognised between means and consequences: *The Sanctity of Life and the Criminal Law* (1958, Carpentier Lectures at Columbia, 1956), 286, quoted in the Law Commission Consultation Paper No 177.

[132] The importance of the doctrine was recognised (albeit essentially rejected for the purposes of establishing criminal intention) in the Law Commission Consultation Paper No 177, paragraphs 4.72 to 4.91.

Example 1: the plane bombers. As noted above, Michael Moore considered there to be significant moral differences between the following plane bombers (labelled for convenience A, B and C): Bomber A wanted the insurance money from the destruction of the plane, Bomber B wanted the insurance money from the deaths of the passengers, and Bomber C simply wanted the passengers dead.

It is submitted that many people would consider there to be no moral difference between any of the bombers. They may take the view that deliberate unjustified killing is equally bad in any situation, all other things being equal.

Others may consider that there are moral differences, but not on the basis of whether the harm caused was a side-effect, means or end. Some may consider that killing through anger is worse than killing through greed. Some may consider the opposite.

On the other hand, some may find the distinction between ends, means and side-effects morally important, quite apart from the issue of motives. But it is submitted that most people in this group would be likely to consider there to be a greater difference between Bomber C as against Bombers A and B, than between Bombers A and B – if, indeed, they considered there to be any difference between A and B at all. If this is correct, why might it be so?

Those who find C more reprehensible than A or B may consider that while killing people for gain is clearly immoral, killing people for the sake of killing is worse – is particularly barbaric, sadistic, depraved, or something similar.[133] Perhaps this differentiation may make sense if we imagine considering each of the bombers in the other scenarios. We can imagine Bombers A and B swapping roles without difficulty – given their attitude to the destruction of life if it results in their financial gain, they are unlikely to be worried precisely how the money is made. But we would be surprised if A or B would swap with C, if in C's scenario there was no financial reward in blowing up the plane. Bomber C, however, would be happy to swap with either A or B, and bomb anyway, whether there was a financial gain or not.

This example suggests that we do, or some of us do, take desires into account when attributing moral blame. But it also suggests that whether and how we take them into

[133] Moore stated that the desire to kill or torture or disfigure "for the sheer joy of it seems rather paradigmatic of true evil": ibid, page 408.

account is not clear-cut, and may depend on the circumstances. The moral difference in this example between directly and obliquely intended harm appears slight or even non-existent, whereas (if there is a difference at all) there appears a greater difference between the two types of directly intended harm.

Example 2: the Strategic Bomber and the Terror Bomber. These examples have been referred to by a number of commentators.[134] The Strategic Bomber targets a munitions factory, expecting that in doing so a nearby school will be destroyed and all its pupils will die. The Terror Bomber targets the school itself, also expecting that all the children will die. According to the doctrine of double effect, the Terror Bomber is the more culpable, since she is aiming to kill the children – she is using their deaths as a means to the end of (for example) winning the war.

According to Michael Bratman, the difference between the two can be understood by recognising that they have different plans: the Strategic Bomber's plan, unlike the Terror Bomber's, does not include the deaths of the schoolchildren, and those deaths may be avoided if the plan can be accommodated to do so.[135]

On the other hand, A. P. Simester has stated that as far as the criminal law is concerned, such distinctions may not be important. In certain circumstances there may be a greater need to deter the Strategic Bomber (such as if her chances of success are greater than that of the Terror Bomber), and thus it may be unwise to distinguish in absolute terms between them. Simester also notes that in neither case does the bomber desire the killing of the children itself – a point similar to that made in respect of the plane bombers in Example 1) above. He further makes the point (also made in Chapter 5 above) that in the case of both scenarios, the agent chooses to inflict the harm.[136]

The fact remains, though, that all things being equal, many people would consider there to be something worse about the actions of the Terror Bomber than those of the Strategic Bomber. Why might this be? It is maybe because we think that the Strategic Bomber is in some sense less willing for the children to die. Perhaps she has considered

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[134] For example, Michael E. Bratman, *Intention, Plans, and Practical Reason*, Harvard/London, 1987, at page 155.

[135] Ibid, page 155.

[136] "Why Distinguish Intention from Foresight?" in *Harm and Culpability* edited by A. P. Simester and A. T. H. Smith, Oxford, 1996, page 71 onwards.

the destruction of the munitions factory as a viable way to win the war she is fighting, but would not have considered killing children as a means to do so. She starts out, perhaps, with a less ignoble aim than the Terror Bomber – it is only later that she realises, regretfully, that children will die as a consequence. The Terror Bomber, on the other hand, starts out thinking about killing children as a way of securing her objectives – something we consider in itself objectionable.

But note that a number of assumptions are being made here: other factors have been fed into the scenarios. In the scenarios described, the Bombers have a choice – target the munitions factory or target the school. We are less likely to sympathise with the Terror Bomber in such a scenario – *we* would rather target the munitions factory if we were put in such a position, and we find it abhorrent if someone would rather target the school. But what if the starting positions were different? Consider the following different scenarios: the Strategic Bomber had been told that the only means of winning the war was to target the factory, and the Terror Bomber had been told the only means of doing so was to target the school. The only desire in both instances may be the winning of the war. If we felt that the objectives of the war were morally sound (say, the defeat of Nazi Germany), then rather than being inclined to condemn, we might feel sorry for each of the Bombers, and in equal measure, having been put in such a moral dilemma. But if we then found out that the Strategic Bomber did not in fact regard it as a moral dilemma at all and had no qualms about what she did, but that the Terror Bomber agonised and tried to find some other solution before reluctantly going ahead, having been convinced that the war could not be won otherwise, we may feel more moral sympathy for the Terror Bomber.

Whatever the scenario, in neither case, as Simester noted, is there a desire to kill children. There may be a difference between the attitudes of the bombers in the connection between the desire and the harm caused – that connection may be considered more remote in the case of the Strategic Bomber (since what she is doing is directed at the munitions factory rather than the school). And it may be that that causes a difference in our moral reactions to the directly and obliquely intended harms. But the scenarios need to be fleshed out first in order to decide this. It is no use here simply stating that "all things being equal" the Terror Bomber is the more culpable: the circumstances can be

equal in different ways, as suggested above. So while there may be something in (or connected to) the doctrine of double effect that affects our reaction, such a reaction is likely to depend on other factors.

Example 3: the Doctors' Dilemmas. There are many examples of medical dilemmas used to examine the doctrine of double effect and related issues. Although some of these are not necessarily scenarios that fall within the ambit of the criminal law, they may help to illustrate the moral differences being discussed. Here, three situations will be considered, all concerning patients with terminal illnesses: 1) Doctors with limited resources take the decision to stop treating one patient and use the resources instead to treat five patients. 2) Doctors find a new gas that, if successful, will save five patients. Unfortunately, the only way of testing it to see if it works in time is to try it on another patient who they know will die as a result. They decide to go ahead anyway. 3) Doctors find a gas that will save five patients. Unfortunately, those patients cannot be moved from their ward, which is adjacent to a ward holding a patient who also cannot be moved, and whose disease they know is so sensitive to the fumes that she will die when it is used. They decide to go ahead anyway.[137]

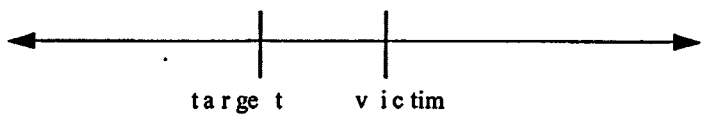
The point of these scenarios is to examine why we find the first acceptable and the others unacceptable. The difference between the first two could be explained by the doctrine of double effect: in scenario 1), the deaths are foreseen, but are not means to an end; whereas in scenario 2), the people killed are used as means towards an end. But as Philippa Foot has observed[138], in scenario 3) the deaths are not a means but a side-effect: nevertheless we feel it is similarly unacceptable. The patient is still being used. It is similar with the plane bombers in Example 1): whether the insurance covers the people or the plane, we feel it is equally (or very nearly equally) unacceptable, whether people are used as a means or just used as part and parcel of what is being done.

Nevertheless, is there *some* moral difference between scenarios 2) and 3)? Some may feel that killing people in *order to do* something or by *targeting* those people or *deliberately using* them is still worse than foreseeing that they will die as a result of the agents' actions. As suggested previously in Example 2), this is perhaps because we

[137] This last scenario is borrowed from Philippa Foot's *Virtues and Vices*, University of California, 1978, page 29, and it has been adapted for the second scenario.
[138] Ibid.

imagine that those involved have the deaths more in mind at the outset: perhaps the doctors in scenario 2) conceive of the death of the patient earlier in their thinking, rather than as something that occurs after their initial planning. However, again, this appears not to be to do with desire as such: none of these doctors want anybody to die – in fact their desires are quite the reverse and in themselves perfectly morally sound, in that they simply want to save lives. It is the disregard for the individuals' rights to life that we condemn in scenarios 2) and 3). There may, again, be a difference in these scenarios between the closeness of the desire and the harm caused. But it is submitted that the moral difference between them, if it exists at all, is slight.

Example 4: the callous markswoman. The markswoman chooses to practise her shooting by aiming at a see-through human-shaped target. As it happens, a person who has a similar shape to the target stands within the outlined figure. In the first scenario, the target is between her and the victim. She believes that if she hits the target she will hit the person who is standing behind it. In the second scenario, she takes aim from the opposite direction, so that the victim is between her and the target: she can still see where the target will be, and believes that a successful shot will hit the person first and be of sufficient velocity to travel through that person and hit the target on the other side. Diagrammatically, the markswoman's belief about a successful shot can be imagined in each case as following the path of each direction of the arrow below: in the first scenario the markswoman is shooting from left to right, in the second scenario she is shooting from right to left.



With the first shot, the markswoman believes that, if successful, she will hit the target without hitting the person first, but that hitting the person will be a necessary consequence of doing so. With the second shot, she believes that, if successful, she will hit the person first – hitting the person is a necessary means to hitting the target.

According to the doctrine of double effect, it would appear that the markswoman's action in the second scenario is morally worse than her action in the first. That, it is submitted, would be a bizarre conclusion, and one that most people would be unable to understand or agree with. If the scenario was altered so that the markswoman was a soldier and the target was in fact another human being (who was to be killed for some morally acceptable reason), and there was no way of avoiding killing the innocent bystander from whichever direction the shot came, it does not seem to be morally preferable for the soldier to take aim from one direction rather than the other. Examples such as this are perhaps rare, but suggest that the doctrine is not of universal application. And as has been noted, some supporters of the doctrine do agree with this.

The example may also suggest that, whatever scenario is being considered, we hold people similarly responsible for harms committed along the line of the arrow (in whichever direction) in the diagram, unless other moral considerations are relevant. This is a diagrammatic means of what has been described in this thesis as "deliberate harm". When an agent aims at a particular result, she may expect that, if successful, a number of other results will happen at the time, or before or after it, either as a means to achieve it or as side-effects of it. All results on the line of the arrow are results caused deliberately – i.e. those results that the agent has chosen to cause, and for which she should be held fully responsible. As Hyman Gross stated, "motives differ from intentions in that motives are the source of *power* for the act, while intentions supply the *direction*", the one supplying the spring and the other the aim.[139] This diagrammatic line of full responsibility – along which lie all results an agent believes will occur if her action is successful – can be used to demonstrate whether an intention crime has, prima facie, been committed. Whether particular results may be morally more reprehensible than others may depend on factors apart than their place on the line.

[139] *A Theory of Criminal Justice*, Oxford, 1979, pages 107-108.

The moral significance of desire in intention crimes: a justificatory or excusatory feature?

Certain desires may provide defences to intention crimes, or are at least connected to such defences. An agent who believes that harm will result from her actions may be acting for good reasons that outweigh the fact that harm is caused. This suggests that intention crimes are not to be ascertained only on the basis of the agent's beliefs. To take two examples: if someone deliberately kills another in a fight, the killer may be guilty of murder *unless* the action was caused in self-defence (or whatever other defence may be relevant); the person who deliberately cuts off another's arm may be guilty of a serious assault *unless* she is, for example, a surgeon performing a legitimate operation. As stated earlier in this thesis, deliberate harm is only morally acceptable if there is a lawful excuse for it.

It should also be noted that the relevant desires in this context are socially acceptable ones. There is thus an objective evaluation of whether such desires amount to justifications or excuses, even though there is a subjective assessment of the agent's particular beliefs and attitudes in that context. So while the reasonableness of the amount of force used to repel an attack (or imagined attack) must be judged on the agent's perceptions, and is thus subjective to that extent, the existence of self-defence as a defence at all is objective. The person who believes it is morally acceptable to castrate a serial rapist may genuinely desire justice, but if she carried out such an action it would constitute an intention crime notwithstanding that good, if seriously misguided, desire.

So even the desire for something morally good can result in the committing of intention crimes. To take an extreme example to illustrate this further, imagine that a religious fundamentalist believed that the world was so corrupting that anyone growing up in it now would be certain to spend the eternity of an afterlife in hell. Imagine further that this person believed that the only way to ensure that as many did not suffer this fate as possible was to kill babies in maternity wards so that they could go straight to heaven. She believed that she herself would go to hell for her actions, but was prepared to accept that. The slaughter that followed might, on her own account, have occurred for very noble motives: at the cost of her own eternal torment she was saving others from a fate

literally worse than death. The desire itself was the preventing of others' pain and the securing of their happiness. But that would not and should not, of course, be a defence to murder.

The account offered so far in this section gives desire a role to play as *defences* to intention crimes. However, according to some, including supporters of the doctrine of double effect, in certain circumstances desire can act to negative any intentional harm being committed in the first place.[140] It has been suggested for example that the reason that surgeons are not be guilty of intention crimes is because they are acting from good motives – they do not desire the harms they cause, but rather seek improvements in their patients' health, or an alleviation of their pain [141]. While this is true to an extent, it is submitted that this is not the whole answer. Would or should a surgeon who sought to improve patients' health (and was perfectly competent at her job) but actually enjoyed the harm she caused to her patients be guilty of assault – and, if any patients died, of murder? The answer is surely not, even if such a desire could be proved.

It is worth also considering the flipside of that example. What would our response be if someone disguised herself as a surgeon and managed to get into an operating theatre and amputate some limbs, acting throughout with the desire to cure the patients? Such a person would and should be guilty of assault (albeit that the sentence may take into account the misguided motives of the impostor).[142]

The reason we differentiate between the surgeon and the impostor is that surgeons and other medical staff who are authorised to operate on people have, in effect, a special social dispensation that operates as an automatic defence to intention crimes, provided they work within agreed parameters (which can, of course, be difficult to define): they have a rebuttable permission to cause the harms that occur, because society recognises that such harms are brought about for the purpose of preventing or curing greater

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[140] See for example J. Finnis, "Intention and Side-Effects" in R. G. Frey ed., *Liability and Responsibility* (1991), page 32 onwards, quoted in the Law Commission Consultation Paper No 177.

[141] See, for example, Anthony Kenny, "Intention and Malice Aforethought", in *The Ivory Tower*, Oxford, 1985, page 14.

[142] If one of the patients died, would this be murder? It is submitted that it should not, provided that death was not foreseen as a virtual certainty, because it is not a deliberate killing – but of course the *mens rea* for murder is currently wider than this, and includes an intention to cause serious harm, which may be satisfied in this scenario. This is one of the instances in which that *mens rea* appears too wide. Manslaughter would be more appropriate, since the agent took an unacceptable risk of killing someone.

harms.[143] This is strongly linked to the notion of causing harm for good reasons, but it is more complicated than that simple notion suggests. People have rights not be used by others, even if the motives of the users are virtuous. This is why the doctors in two of the scenarios in Example 3) above were morally culpable, even though their desires – to save lives – were morally sound.

There are other situations where harm is caused for the purpose of preventing greater harm or suffering for that same person, or to prevent harm to some other person. For example, it may be morally permissible to shoot someone dead who is screaming in agony and clearly burning to death. There is also the case of *R v Steane*[144], in which the defendant made propaganda broadcasts for the Nazis under threats of being sent with his family to a concentration camp. Defences of self-defence, necessity and duress are not sufficiently developed under the criminal law to cater for these and many such scenarios[145], but it is submitted that there is no reason why they should not be extended to cover them.[146] In each such case a proscribed harm has been caused, and in cases where a good (or adequate) motive can be established, such defences ought to be available; but if such a motive cannot be established, the deliberate causing of such a harm should be punished. It seems preferable to provide specific defences for the few occasions when good motive can excuse deliberate harm, than to muddy the conceptual waters and complicate mattes in practice by altering the definition of deliberate harm by which offences are prima facie established.

Thus "good" desires can be relevant in terms of establishing whether an intention crime has been committed, but such desires are only relevant in particular situations, and are not enough on their own.

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[143] A similar conclusion was reached by the Law Commission, citing the analysis of I. Kennedy and A. Grubb, *Medical Law: Text and Materials* (2nd ed. 1994), that a doctor may be excused deliberately causing death in certain circumstances not by virtue of the doctrine of double effect but "because the law permits the doctor to do the act in question": Law Commission's Consultation Paper 177, page 117.

[144] [1947] KB 997.

[145] The case of *Re A* [2001] Crim.L.R. 400 has arguably developed the defence of necessity, and demonstrates how it may be possible for such defences to be developed generally, whether, as in that case, through the common law or – as may be preferable – by statute.

[146] It was noted by William Wilson in his *Central Issues in Criminal Theory*, Oxford, 2002, page 152, that the criminal law does attempt to use these three defences in this way. Wilson considered that using such defences ignored the problems posed by the meaning of intention. However, it is submitted that the adoption of the concept of deliberate harm advanced in this thesis would remove these problems.

Beyond the doctrine of double effect

A significant part of this chapter has addressed the doctrine of double effect. That has been necessary partly because the doctrine has been much discussed in the context of intention over the last few decades. This chapter has suggested that it has – or may have – some moral relevance to intention crimes. But some of the examples considered also suggest that its importance in this context has been overstated. It appears that only sometimes might it have any relevance at all – as some of its supporters will in fact concede. And even when it is relevant, there may well be other factors that will be of greater moral importance.

Desire as a component may be of importance beyond the question of whether the relevant harm is a means or consequence. As has been noted, it may be that the degree of closeness the desire has to the harm is more pertinent. While in certain circumstances the harm as a means will be closer to the desire than the harm as a consequence, sometimes (as in the markswoman example) there will be no real difference between them. And some may consider that there is a greater moral difference between, on the one hand, a harm willed for its own sake and a harm used as a means, than on the other, a harm used as a means and a harm that occurs as a consequence. In other words, there may be a sliding scale of culpability depending on how close the agent's desire is connected to the harm, rather than the simpler dichotomy of direct intention and oblique intention suggested by the doctrine of double effect.

But focusing on the doctrine may also obscure the fact that desire is not just important in terms of its closeness to the harm, and is not important purely in terms of whether a particular desire is "good" or "bad". Firstly, the *nature* of the desire often affects the way we react to harms caused by other people. Secondly, the judgements we make about such desires tend to depend on the particular *circumstances* in which the harm is caused, and through which that desire is understood.

To take an example, the person who enjoys torturing an innocent child to death is considered particularly immoral not only because her desire is very close to the harm caused, but also because she chooses to inflict it on a particularly vulnerable person,

without apparently any excuse. On the other hand, if a parent of the victim becomes clinically depressed when the murderer fails to be convicted despite conclusive proof of guilt, and the parent kills the murderer, and derives great satisfaction from doing so, she would not be considered as blameworthy – while we still recognise the need to censure such an action severely, we can sympathise with the perpetrator to some extent, and consider that her situation may provide some mitigation for her actions. Both wanted to cause pain, but the second offender has some excuse, whereas the first had none. In addition to the presence or absence of excuses, factors other than the desires may have significance in terms of our reaction, such as the relative age, vulnerability and innocence of the victims.

Summary

Desire has been identified as the other relevant component in intention crimes apart from belief. The following points can be drawn from the analysis of the importance of desire:

- There will always be a desire prompting the action that results in the harm. However, the closeness of the connection between that desire and the harm can vary significantly.
- The doctrine of double effect may be of relevance in determining the degree of censure in certain circumstances. However, it is not always relevant, and even when it may be, its importance can be slight.
- Nevertheless desire is often a relevant factor in determining how we react to deliberate harm. It may play a part in determining whether we consider particular deliberate harms intention crimes at all – albeit only a part. Desire can also be relevant in determining what level of censure we consider appropriate – albeit that there are often other relevant factors involved.
- The closeness of the desire to the harm caused, the nature of the desire, and the other circumstances in which that desire arose, can be more important than the question of whether the harm was directly or obliquely intended.

CHAPTER 7

BELIEF COMPARED TO OTHER FACTORS

Chapter 5 concluded that belief was a morally important component of intention crimes, but Chapter 6 concluded that there are many situations in which desire is also morally important, and that there can be a number of other relevant factors, depending very much on the nature of the offence. This last chapter will consider the moral significance of belief compared to these other factors, given the moral context within which the criminal law operates, as identified in Chapter 3.

Placing the moral relevance of the belief component in the criminal law

Chapter 3 concluded that the concept of intention brings the question of moral responsibility into the conviction stage of the criminal justice process for those offences for which it is a requirement. Subsequent chapters have identified that the key morally distinguishing feature of an intention crime is the deliberateness of the agent's action, which depends on the belief component, and establishes the extent of the agent's responsibility. But precisely what role should the belief component play in deciding what, if any, punishment is appropriate for such crimes, and how can its role be justified morally? It can play a role in two places: in determining whether a crime has been committed at all, and in determining the appropriate type and level of punishment. These will be considered in turn.

1) Whether an intention crime has been committed. The preceding chapters have identified that in the criminal law intention crimes are distinguished from other crimes on the basis of the belief component (albeit that the test of "virtual certainty" is somewhat ambiguous about it). They have suggested that there is good reason for this, in that people do distinguish morally between deliberate and non-deliberate actions. Chapter 6 concluded that desire, while being a necessary feature of any action, was not one that

needed to be directed to the harm concerned in order for the agent to commit deliberate harm. It was argued that desires and other factors may nevertheless be of moral significance. They may provide, or be linked to, defences. It may also be appropriate for their significance to be reflected at the sentencing stage, once deliberate harm without lawful excuse has been established.[147] However, it is submitted that the belief component rather than a desire component should determine whether a particular crime had been committed. A consideration of some intention offences may help to demonstrate why this makes moral sense.

Commentaries on the concept of intention have spent much more time on murder than on other intention crimes. It is for this reason that in considering particular intention crimes this thesis has focused on murder, and that offence will be considered first below. But if the concept of intention is to be consistent throughout the criminal law (which, absent any compelling reasons to the contrary, it is submitted it should be), it is important to consider how any interpretation of intention may work with other offences. There are a large number of other intention crimes: two of them will also be considered – theft and rape.

Murder (and other assault crimes). Some commentators would like the distinction between murder and manslaughter to be based, at least in part, on desires[148] (and at least one even has mistakenly believed that it is[149]). But Chapter 6 concluded that it was doubtful that most people would agree that the law should allow deliberate killers to be excused from charges of murder on the basis that their desires were sufficiently at variance with their actions. It could result in people discussed in earlier chapters, such as Mr Barrett, the plane-insurance bomber, and the callous markswoman, escaping convictions of murder. To equate these killers with reckless killers, such as dangerous drivers, is not only conceptually awkward, in that their actions are more than reckless, but also feels morally wrong. The alternative is to identify a separate class of homicide for

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[147] Some support for this proposition can be found in H. L. A. Hart, *Punishment and Responsibility*. Oxford, 1968, at page 122, and John Gardner and Heike Jung: "Making Sense of Mens Rea: Antony Duff's Account" (1991) Oxford Journal of Legal Studies 559, at pages 580-581.

[148] For example, Anthony Kenny: see "Intention and Malice Aforethought", in *The Ivory Tower*, Oxford, 1985, page 14.

[149] J. R. Lucas, in *Responsibility*, Oxford, 1993, at page 50, stated: "There is a moral difference between what I deliberately set about achieving and what happens as an unwanted consequence of my action or inaction. Manslaughter is bad, but murder much worse."

oblique intention crimes. But that seems a pointless complication, given that there is no good reason to believe that there is a clearer moral difference between directly and obliquely intended harms than between other types of deliberate harms (such as between premeditated and instinctive killings). There may also be practical difficulties in instituting laws that require establishing criminal desires.

The issue of whether and how "bad" and "good" desires can be used to categorise homicide offences was considered in the previous chapter. It should also be noted here that some commentators consider that certain oblique intention homicides should not be classified as murder in the *absence* of a desire. One example given is as follows: someone who works in a chemical factory does not secure chemicals on the site at the end of her shift because her employer tells her not to; she believes that by not doing so it is virtually certain that one of the children who always play on the site afterwards will touch the chemicals and suffer serious burns; and a child indeed suffers such burns and dies as a result. It has been suggested that it may be right to give a jury "moral elbow room" to convict such a person of manslaughter rather than murder.[150] In another scenario, a motorist turning a bend on a mountain road is confronted with a group of hikers in the road; she has only two options – to hit them or to veer off the road into the valley to her probable death; and she chooses the former, resulting in a hiker's death.[151] It has been suggested that the mental element of murder is satisfied, and that it may be appropriate to allow a consideration of reasonableness to determine the issue. In both these cases, it is submitted that although the *mens rea* of murder may be theoretically satisfied on the virtual certainty test, there is no *actus reus* for the *mens rea* to bite on. In the chemical case, the worker did not put the chemicals in a dangerous position while believing that as result there was a virtually certainty that they would cause harm. In the driving case, the driver did not do anything to the car while believing that there was a virtual certainty that as a result the car would cause harm. In each case it is arguable that the person concerned was culpable of an omission that caused the harm, but even leaving

[150] This is taken from the Law Commission's Consultation Paper 177 (Overview) "A New Homicide Act For England and Wales?", page 12. It is perhaps worth noting that the worker does not in fact appear to believe it to be a virtual certainty that a child will die, since he envisages a group playing, and only one of them suffering harm, which suggests only a risk (albeit perhaps a serious one) of harm. But this may simply be a mistake.

[151] William Wilson, *Central Issues in Criminal Theory*, Oxford, 2002, page 155.

aside the problems of causation, neither person appears to be under a legal duty to act: liability for omissions is only imposed where defendants are under such duties.[152] It therefore appears that it is the absence of an *actus reus*, rather than of a particular desire, that renders each person innocent of murder.

Alan Norrie has suggested, in considering decisions of the Court of Appeal and House of Lords on oblique intention, that there may be other reasons why oblique intention may not, in certain scenarios, be sufficient to establish murder.[153] He distinguished the cases of, on the one hand, *R v Moloney*[154] and *R v Woollin*[155] from, on the other hand, *R v Hyam*[156] and *R v Nedrick*[157]. In the former cases, Norrie stated, there was no "moral animus" between the killers and their victims: "Moloney felt affection for his stepfather. Woollin had seemingly never harmed his baby before." In the latter cases (in which the defendants set houses on fire), there was "no redeeming aspect in the moral relationship between the parties." Norrie thus suggests that certain crimes would not amount to murder because there would be an absence of "moral animus". It is submitted, however, that there are good reasons why "moral animus" should play no part in the *mens rea* for murder. Norrie's suggestion would appear to excuse those such as terrorists and contract killers who had no particular feelings for their victims. By contrast, it also appears to condemn as murderers those who, for example, are in abusive relationships and hate their tormentors, and try only to frighten them off. Furthermore, of the cases Norrie considered, it is unclear that differences of "moral animus" do in fact determine our moral reactions. It is a fair inference that if Mr Moloney believed that it was virtually certain that the result of pulling the trigger of the gun he was holding would be the death of his stepfather, few people would have any difficulty in finding that, whatever the prior history of the relationship between them (and unless, for example, Mr Moloney was suffering from a serious psychological disability or had some other excuse), he committed murder. Cases such as that of Mrs Hyam fall into the difficult category of

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[152] See Helen Beynon, "Doctors as Murderers", [1982] Crim.L.R. 17 on this principle and the conditions in which such duties may exist.
[153] In "After Woollin" [1999] Crim.L.R. 532.
[154] [1985] 2 W.L.R. 648.
[155] [1998] 3 W.L.R. 382.
[156] [1974] 2 W.L.R. 607.
[157] [1986] W.L.R. 1025.

probable harms: as was submitted in Chapter 5, there are strong arguments why such offences may be considered as murder; but there are also good arguments, and perhaps more persuasive ones, to the contrary (and a new offence, of callous indifference to death, may be appropriate in such scenarios). But we still tend to draw moral distinctions of the basis of the beliefs of such people. We would find Mrs Hyam more culpable if she considered there to have been a likelihood of people dying rather than a slight risk of people being injured, and more culpable still if she had been sure that the woman or the children would die. Considering the case of Mr Moloney again, we would find him less culpable if he had not been sure whether pulling the trigger of the gun would kill his stepfather than if he had been sure. Such distinctions are objective, and are based on the widely accepted principle of moral choice. Distinctions on the basis of factors such as "moral animus" seem more subjective and difficult to justify morally, and if and when they can be agreed on and justified, they would seem to depend very much on the facts of particular cases, and are therefore perhaps better addressed at the sentencing stage.

What has been said of murder can also be applied to other assault offences for the same reasons, albeit that the types of harm envisaged and/or resulting are less serious.

Theft (and other property offences). The *mens rea* of theft is "the intention of permanently depriving" another of her property, and doing so dishonestly. Rarely will the desire involved in theft be itself immoral: the most likely desire involved in theft is material gain. For that desire (or any other) to result in a theft crime, it needs to be joined with a belief that the property belongs to someone else and with dishonesty in appropriating it. There will always be a desire associated with theft, as with any action, but desire is not a requirement. Desires and other factors may provide the motive and may aggravate or mitigate the offence, but it is the belief component that establishes the intention, and intention plus dishonesty that establishes the mental element of the crime.[158]

[158] The dishonesty element makes the relevant harm in theft harder to identify than in murder or other assault crimes. The belief aspect of intention is as to the owner of the property. However, that would not be sufficient to establish that the agent believed that harm would result from her actions in appropriating the property. She also has to appropriate the property dishonestly. But that is also partly dependent on her belief about the property – *she* has to believe that what she is doing is regarded as dishonest, and as a result, understands that society considers that her actions cause harm (*R v Ghosh* (1982) 75 Cr.App.R. 154).

Cases of oblique intention cannot be envisaged for theft crimes. However, scenarios can be envisaged in which possessions will drop into people's hands without any desire to obtain such property. For example, suppose armed robbers plan to take control of a security van by force in order to steal its contents. They have no desire to possess the van – in fact they would much rather be rid of it – but they come to realise after the robbery that unless they take permanent possession of it, it may provide evidence linking them to the crime, so afterwards they take it to pieces, reconstitute it and hold on to it. It is not any desire that establishes culpability of theft, but rather the belief that it belonged to others and the dishonesty in appropriating it.

It should also be noted that there are a number of theft offences apart from simple theft, which similarly do not require a desire component. Furthermore, there are a range of property crimes, such as drug trafficking and money laundering offences, that do not have the traditional *mens rea* of negligence, recklessness and intention, but instead have similar mental elements based solely on the level of belief, whether, for example, "having reasonable grounds to suspect", "suspecting", or "knowing" facts about the property that make the relevant conduct criminal. This provides further indication that the *mens rea* for all property crimes is based on relevant levels of belief, and is not dependent on particular desires.

Rape (and other sex offences). Rape is something of a composite of intention, recklessness and negligence: the intention is to have sex, not reasonably believing that the other person consents (Sexual Offences Act 2003, section 1). Desire is not what makes it a crime – there is nothing wrong with desiring sex. A crime is only committed when the deliberateness to have sex is coupled with the lack of reasonable belief. The person who rapes sadistically may be deserving of a worse sentence, but the non-sadistic rapist is still a rapist. He has used his victim to the same extent.

Thus the sadistic rapist does not become a rapist only because of a desire to have sex with someone who does not consent. That desire may provide his motive for committing rape, but he only commits rape if he has sex and does not reasonably believe that the other person consents. If he has sex with someone who he reasonably believes is consenting (even if he wishes that the person was not consenting) he does not commit

rape. It is submitted that this is for good reasons: if the law was otherwise, the male partner in a consenting couple indulging in rape fantasies would be guilty of rape.

Desire and other factors may provide the motive, and may aggravate or mitigate the offence, but do not establish its mental element. As with theft, it is belief, not desire, that is the relevant component of intention for rape. For the same reasons, the same is true of other sex offences requiring intention.

2) Appropriate punishment. Once it has been established that an intention crime has been committed, a variety of moral factors may be relevant in assessing the type and level of punishment, depending on the facts of the particular case. These can include the desire of the agent, and (as Chapter 6 identified) any number of a wide range of other factors.

The fact that the belief component existed should not feature at all at the sentencing stage. It is a yes-or-no question, and once it has been established at the conviction stage that the agent believed that the harm would result if her action was successful, that is the end of that inquiry.

However, it will be usual for the particular harm to vary within categories of crime, and so *type* of belief about the harm will vary, and may be of relevance to sentence. In respect of murder, for example, a belief that serious harm would result may give good grounds for a lower tariff than a belief that death would result.

The *strength* of the belief – the belief as to the virtual certainty or otherwise of the harm's occurring, which establishes whether the crime has been committed – should not have any impact on the sentencing, since it is an all-or-nothing state of mind. However, if the "virtual certainty" test was to be replaced with a lower threshold of foresight, which thus established a range of beliefs as to probability sufficient for conviction, there would be scope for grading punishments according to the strength of belief.

Beliefs other than the belief component may be relevant at the sentencing stage; but, as mentioned in Chapter 5, such beliefs are not the concern of this thesis.

Moral justification of the categorisation of intention crimes by the belief component

The account above accords roughly – and, it is submitted, ought to accord more accurately – with the way in which charges of intention crimes are currently tried, and in

which those convicted of intention crimes are sentenced. In other words, this thesis is arguing that once it has been established that the relevant causative action is voluntary, belief ought to be the *only* moral factor in determining whether an intention crime has prima facie been committed (other factors being relevant in ascertaining whether there is a defence). But can that categorisation by the belief component be morally justified? A number of reasons are offered below in an attempt to offer such a justification.

1) Justifications of punishment and the purpose of criminal law. Many attempts have been made to justify punishment. The traditional distinction is between utilitarian and retributive theories, but many variants exist, which can be categorised in various ways. According to J.R. Lucas, for example, there are the following groups of theories: "Preventive" (to prevent the criminal from re-offending); "Deterrent" (to deter both the criminal from re-offending and others from offending at all); "Reformative" (to reform the criminal so that she is no longer minded to be antisocial); "Vindictive" (to pay people back for having done wrong); and "Vindicative" (to vindicate the law and the victim by making the wrongdoer visibly not get away with it).[159]

Whichever theory or combination of theories is considered to provide the best justification of punishment, it is submitted that common to all is a requirement that there is some conformity to socially accepted moral standards. With retributive theories this is more or less self-evident. The extent to which the moral retribution is or should be socially accepted may be open to question, but since morality – or at least, the interpretation of morality by the legislature and the courts – is a social concept, punishment on a retributive model is likely to conform at least roughly to a socially accepted moral standard. With utilitarian theories the link is less obvious; but if such theories are to work in practice, it is likely that punishments need to take account of social reactions to different types of crime. It has been noted earlier in this thesis that it is widely accepted that people react differently to harms committed deliberately as opposed to those committed otherwise. A clumsy blow is distinguished from a deliberate one; the person who absent-mindedly picks up someone else's property is distinguished from the thief. If the overall sum of harm is to be minimised, those who cause harm in a socially blameless way should not (as far as possible) be punished at all, and severer deterrents

[159] *Responsibility*, Oxford, 1993, Appendix 2, page 280 onwards.

should generally be provided against intention crimes than against recklessness and negligence crimes: to do otherwise would substantially weaken people's respect for laws in general, cause more laws to be broken, and result in more harm. It may also be the case that there is a greater need to deter deliberate harm, since such harm may tend to result in greater suffering.[160]

Since the distinction between deliberate and non-deliberate harm is often of great importance socially, it is unsurprising that the distinction tends to be decided at the conviction stage.[161] To abolish the distinction may cause a great deal of social damage for no good reason. There is also the risk that the law would be seriously out of kilter with social norms: decisions by the courts could be made without people understanding the reasons behind them, and the power of the state could grow unchecked, with the attendant dangers that can be recognised in authoritarian states.[162]

If morality's ultimate end (or at least a significant one of those ends) is the maximising of good and the minimising of harm[163], rules governing a society should as far as possible be followed by members of that society, and those rules should promote that end as far as possible. If the law does not reflect morality as commonly understood – or as is commonly capable of being understood – there is the risk that the rules will be broken more frequently, and greater harm will result. Conversely, if the law makes sense to people, then they are more likely to avoid flaunting it if it is, as far as practicable, consistent with morality as commonly understood or understandable. If, for example, the same punishment results for death caused through blameless, negligent or reckless driving as for death resulting from a contract killing, some people may take the view that punishment is a lottery, and they may as well do as they like.

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[160] See, for example, Mirko Bagaric, *Punishment and Sentencing: A Rational Approach*, London, 2001, at page 104. However, see also Barbara Wootton, *Crime and the Criminal Law*, 2nd edition, London, 1981, at page 27 and elsewhere, who argued that many non-intentional offences (such as death caused by driving) create more harm cumulatively, and thus may merit equally severe punishment.

[161] Not everyone considers that it should be decided at this stage: see for example Barbara Wootton, ibid. Wootton's proposals were considered in Chapter 3.

[162] This has been noted by, for example, William Kneale in "The Responsibility of Criminals" at pages 194-195 in H.B. Acton ed., *The Philosophy of Punishment*, London, 1969.

[163] John Kekes, for example, considered it to be "common ground among those who are committed to morality and who think about its nature that its ultimate purpose and justification is to prevent evil and promote good": "The Reflexivity of Evil", in E. F. Paul, F. D. Miller, J. Paul eds, *Virtue and Vice*, Cambridge, 1998, page 225.

2) Justification of moral responsibility: choice and constitutive luck. Distinguishing deliberate harms from others may accord with our instinctive notions of morality, but there remains the problem of whether it can be justified. It has been argued in previous chapters (especially Chapters 5 and 6) that the reason deliberate harm is considered more culpable than other types of harm is that the former is more of the agent's choice: a deliberate harm can be accurately described as a fully chosen harm, but a reckless or negligent harm cannot be. As has been noted in Chapter 3, will and choice have traditionally been understood as the touchstones of morality, and so (absent other considerations) we hold people most morally responsible for harms they have fully chosen to cause.

But given the problems of hard determinism and other objections to the concept of moral responsibility, and the fact that moral reactions are influenced by factors other than the extent of a person's responsibility for her actions, is there anything to be said for placing greater significance on those other factors? The criminal law punishes people more for their actions than for their characters, and on the basis of their cognitive more than their affective states. It may be considered unfair and unwise to load severe punishments on what may be momentary lapses by some, while others, whose antisocial tendencies are far more pronounced, may be treated much more leniently.[164]

This brings the discussion back to the moral relevance of desire. Regardless of people's actions – their moral choices – if some have more immoral desires than others, should they not be treated more harshly? One answer to this is that people cannot choose their desires, and it may be unfair to blame them for something that is beyond their control.[165] People do judge others for their desires in certain circumstances – the paedophile may be judged simply for the sort of person she is, whatever her actions. But usually it is recognised that it is not the desire that is wrong but the acting on it – such as wanting sex with someone and not resisting when the realisation dawns that the other party is underage. The stigma attaching to paedophiles is a rare case of people being blamed *simply* because of their desires (and that stigma may be the result of ignorance

[164] In recent years there have been a number of proponents of "virtue theory", who seek to identify ethics by character rather than actions. See for example Michael Slote, *From Morality to Virtue*, Oxford, 1992.
[165] This point has been made by, for example, Galen Strawson in his *Freedom and Belief*, Oxford, 1986, at page 49.

and fear rather than actual moral outrage). Normally we do not blame people on the basis of their desires alone, but because of the way in which, or the extent to which, they act on them. It is submitted that very few if any desires can be justifiably considered *themselves* immoral (sadistic desires may be an exception, although again it is arguable that merely having such desires is not itself immoral).[166] We do consider, however, that in some way people have the choice whether to act on their desires.[167]

It is not possible to decide whether this is justifiable without again considering the question of moral responsibility. As noted in Chapter 3, there is the further question of whether people should be blamed for their lack of self-control, since it seems as much a matter of "constitutive luck"[168] whether we are born with good or bad self-control as whether we are born with tendencies to have good and bad desires. But instinctively we continue to feel that people have more of an internal say in their moral choices than in their desires – that the former are more in their control – and that it is appropriate to judge people accordingly.

Morality is not a science, and it cannot be proved that a person born with bad desires is less immoral than someone who makes bad moral choices or vice versa. We perhaps know too little about matters such as the true extent of moral responsibility to base criminal law on one theory or another. It does seem, however, that even if it cannot be fully justified, there are some grounds for concluding that it is more justifiable to judge people morally on the basis of their actions rather than their desires, if only because our experience suggests that there is little that we can do about our desires, but we can, in some way, have some control over whether and how we act on them.

Criminal law is not a science either, and has to deal with society as it is. Accepted morality remains a social reality, and that morality agrees that it is more appropriate to judge choices than desires. And what does seem unequivocal is that the existence of

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[166] Greg Taylor in "Concepts of Intention in German Criminal Law", Oxford Journal of Legal Studies, Vol. 24, No.1 (2004) 99 noted (at page 106) that "an actor's final goal (getting rich, enjoying life more) is, generally speaking, unlikely to be punishable in itself."

[167] It has been argued that determinism is compatible with moral responsibility: see, for example, J.M. Fischer an M. Ravizza, *Responsibility and Control*, Cambridge, 1998, page 25.

[168] The effect of constitutive luck and other types of moral luck is discussed by Andrew Ashworth in "Taking the Consequences" in *Action and Value in the Criminal Law*, edited by Stephen Shute, John Gardner and Jeremy Horder, Oxford, 1993.

punishment may have an impact on whether we "choose" to act on immoral desires.[169] At a practical level, given that debates about moral responsibility do not appear capable of being settled, that may be more important. Although it may be the case that the individual who is heavily punished for making a bad "choice" is not in fact truly culpable, or as culpable, as society holds her to be, nevertheless if the punishment she receives reduces the amount of harm she is likely to commit in the future, and deters others from doing so, then there is at least an argument that it may serve some good social purpose overall, even taking into account some possible injustice to her.[170] There is no sufficiently strong competing argument to justify punishing those on the basis of their desires. Furthermore, if people were to be punished for having desires regardless of choices they made, that would logically include punishing them for desires that had no harmful results or no likelihood of harmful results, which seems to serve no useful purpose, and seems hard to justify.[171] If we cannot answer the question whether choices or desires should be culpable, and since criminal law exists to limit harmful actions, there are thus good reasons why it should concentrate on actions rather than characters. The law has limited expertise and limited resources: it cannot and should not be the final arbiter of all moral judgements.

So punishment primarily based on choice, action, and cognitive states appears better suited in performing the social function of preventing harm. It may be morally appropriate, and indeed socially beneficial, to take account of desires, characters and affective states in determining the level of punishment. But to decide whether people should be punished for offences at all on the basis of such characteristics would be socially harmful, and contrary to the main purposes for which the criminal law exists. The main moral justification for belief-based categorisation is thus perhaps the broader social justification of reducing harm.

3) Particular practical problems of an alternative. As well as the broad social justification identified in section 2) above, there are a number of specific practical

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[169] This has been noted by, for example, D.J. O'Connor in his *Free Will*, London, 1971, at pages 32-33.

[170] For public policy arguments in favour of punishing those who may not be truly autonomous for the harms they cause, see John Kekes, ibid. For public policy arguments in favour of punishing those who have complete subjective defences, see Jeremy Horder, "Cognition, Emotion, and Criminal Culpability", Law Quarterly Review 1990, 469.

[171] On this see C.L. Ten, *Crime, Guilt and Punishment*, Oxford, 1987.

reasons why distinguishing intention offences on the basis of desires and other characteristics rather than on belief may be socially harmful, and thus morally disadvantageous.

Firstly, there are good moral reasons for avoiding unnecessary complications: the more chaotic the system, the less harm is likely to be averted, and the more injustice is likely to occur. Simplicity in a system of law should not trump other moral concerns; but compelling moral reasons should be required in order that a more complicated system (with the greater potential for harm that would be involved) is preferred.[172]

Whereas desires and other factors vary enormously, the belief component is of universal application. In establishing that the *mens rea* of an intention offence has taken place, a court can be told to consider a simple question in every case: did the defendant cause the harm deliberately? Or, if more explanation is required in particular circumstances, did the defendant believe that her action if successful would (virtually certainly) result in the relevant harm?

It would be much more difficult to devise a common test on the basis of desire. It would be insufficient to ask the question whether the defendant desired the relevant harm, because except in very rare cases the harm itself is not desired.[173] Even if such a test was expanded to include causing the relevant harm as a means to a desired end this would not solve the problem. There would be evidential difficulties in establishing whether the relevant harm was a means rather than a side-effect. There may be a mixture of desires, some good and some bad. A full assessment of the morality of desires involved in an action would require a much more complicated, and practically unworkable, series of tests – in fact the only workable system that could be envisaged is one in which the court

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[172] Nigel Walker made a similar point in a different context (*Why Punish?*, Oxford, 1991, page 137), when he stated: "If an objective is obviously or probably unattainable, and attempts to obtain it involve the imposition of suffering, hardship, or inconvenience, this in itself amounts to a conclusive moral objection to those attempts."

[173] Sadistic crimes, though rare, do of course occur. However, some philosophers have even doubted that there can be such thing as pleasure in causing harm. Augustine, for example, did not consider that anyone could murder purely for pleasure (*Confessions*, II v 11: Oxford World's Classics, 1998, page 30). G.E.M. Anscombe noted that "Hobbes believed, perhaps wrongly, that there could be no such thing as pleasure in mere cruelty, simply in another's suffering; but he was not *so* wrong as we are likely to think." (*Intention*, Oxford, 1957, page 73.) As Anscombe noted, what precisely is desired is perhaps not the harm itself but, for example, the pleasure derived from power over the victim. However, two such consequences are clearly very closely linked, and for the purposes of this thesis it is assumed that people sometimes do desire the harms they cause.

simply decides whether the relevant action resulted from, on balance, good or bad desires, which appears too loose a test in deciding such important matters.

Deciding whether offences had been caused on the basis of other factors could not involve any standard at all and would, if anything, be even more impractical.

Even if a test could be established, there may be considerable difficulty in establishing motives and other factors evidentially. An advantage of the constant belief standard is that it is relatively easy to establish. Although, as with any assessment of mental states, courts can never *prove* the existence of the belief component, in law as in life it is usually relatively easy to infer whether harm has been inflicted deliberately or not. Desires and motives tend to be much harder to establish to the same degree of satisfaction.[174] We often do not even understand our own desires, which may be a mixture of various emotional and instinctive urges and considered reasons.[175] As has been stated, "The Devil himself knows not the heart of man".[176] What would happen if a defendant might have acted out of one or both of two desires, one good and one bad? Similarly, the plethora of other factors that may impact on a moral assessment of a particular action may be difficult to establish, especially to the criminal standard of proof. Would further evidence need to be admitted in respect of, for example, a defendant's background, a victim's background, and the history of the relationship between them? It is not difficult to imagine severe practical difficulties of mounting fair trials on this basis. The resulting lack of certainty may cause considerable confusion among adjudicators, who have a difficult enough job as it is.

Secondly, basing liability for offences on the findings of others as to what motives or other desires or characteristics the defendants had, and whether such findings met with approval or disapproval with courts, is not only arguably unfair in itself, but is also likely to diminish the chances of the criminal law being socially accepted as objective and fair. Minorities and the materially disadvantaged may well feel more vulnerable if such a system was implemented. For example, an unemployed black man from a broken family

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[174] See, for example, William Wilson, *Central Issues in Criminal Theory*, Oxford, 2002, pages 154-155, and Thomas Morawetz, *The Philosophy of Law*, New York, 1980, page 226 onwards.

[175] Greg Taylor in "Concepts of Intention in German Criminal Law", (2004) Oxford Journal of Legal Studies, 99, stated (at page 122) that "Disposition is a complex psychological phenomenon, sometimes involving contradictory states of mind, not a simple matter of yes or no, on or off."

[176] Quoted in Nigel Walker,*Why Punish?*, Oxford, 1991, page 98.

with a juvenile criminal record may already feel, facing judgment on a criminal charge by lay magistrates who are white and comfortably-off, that he has little chance of justice; but how much more apprehensive might he feel realising that his guilt is to be assessed, not for what he had done, but for the sort of character he was? Furthermore, if the criminal law is to have any restorative function, it requires the possibility – indeed the promise – of recognition of moral improvement. To condemn people for having bad characters reduces the prospect of rehabilitation. That seems not only unfair to the defendant, but also not in the interests of society at large, to do so.[177]

Thirdly, punishing people for the way they are and what thoughts they have – rather than what they do – would mean greater state interference in people's lives. It would be difficult to construct definitions of offences without providing the conditions for what (at least) the liberal-minded would regard as unwarranted state intrusion. An example given earlier in the chapter of the possible criminalising of the male partner in a consenting couple indulging in rape fantasies indicates these dangers. Not only would there be greater state interference, but that interference would also be more uncertain: it would be much more difficult for me to predict when the state may punish me on the basis of its assessment of my desires, and to avoid situations in which I am punished on that basis, than it is when punishment is based on cognitive failings, which are easier for society to assess and easier for individuals to avoid. It is relatively easy to identify when we may consider committing deliberate harm. It is more difficult to identify when we may have desires that may be disapproved of in a particular context, or whether we are acting in or out of character, or whether we are displaying socially inappropriate "moral animus" towards someone else. The rule of law functions properly only when people have a good idea where they stand in relation to the law. Not only would an alternative system be offensive to liberal values, it is also less likely to encourage people to conform to the law.

[177] One of the reasons Hyman Gross, in *A Theory of Criminal Justice*, Oxford, 1979, considered that the law ought to concentrate on acts not persons was that people change over time – it may be unfair, as well as unwise, to blame someone for the person she is at a particular time (page 29).

Summary: why belief tends to be of more moral significance than other factors

There are differences in our moral reactions to who people are and what they do – even if the two are often linked – and we feel that punishment is more appropriately geared towards actions than personalities. In George Eliot's *Daniel Deronda* we may feel revulsion, or we may feel sympathy, or we may feel both, towards Gwendolen Harleth, when she fails to rescue her abusive husband from drowning. It is plain that she desired his death. But we feel that the question whether she should be punished depends on her action at the crucial time: did she choose to kill him? If she did, her desires, her background, and a number of her other characteristics may determine the appropriate level of punishment. But we need to settle that central issue first. We recognise that the criminal law exists to prevent and condemn harms, not to judge moral character.

It is submitted that it follows from consideration of the points raised in this chapter that there are good moral reasons why the belief component of intention should be used, rather than the desire component or some other factor, to determine whether an agent has criminal intention. In fact, it may be that supporters of the doctrine of double effect, and any others who consider desire to be of particular importance, would agree with this to some extent.[178] It has been submitted that there may be good enough moral reasons in themselves for focusing on choice as the main determinant of intention, but the difficulties of establishing a justification for this have been acknowledged. But in any event there are plenty of good practical, social reasons why this basis of categorisation is to be preferred to an alternative based on desire or character. Given the absence of any compelling moral reasons favouring the alternative, it is submitted that these reasons provide sufficient moral justification in themselves.

[178] For example, Michael Moore, in his *Placing Blame*, Oxford, 1997, at page 411, has stated: "The differences in culpability between belief states undoubtedly exceeds the difference in culpability between the most culpable belief (of certain wrongdoing) and the yet more culpable states of intention or desire."

CONCLUSION

Summary of the preceding chapters

The introduction identified that the debates about the meaning of intention in the criminal law have not been settled. It also identified that there had not been a full analysis of the moral role that belief plays as a part of the concept of intention in this context.

Chapter 1 concluded that belief is a necessary component of intention – that no serious argument can be maintained against the contention that intention crime actions will always involve relevant beliefs. It used this conclusion to assist in identifying an accurate description of all intention crime actions. While acknowledging that absolute precision may be impossible, it was submitted that the word "intention" itself causes more problems than it solves. For the rest of the thesis the words "deliberate" and "deliberately" were used to describe all situations in which the agent chooses to inflict consequences, whether as means, ends, or side-effects.

Chapter 2 concluded that, in the absence of any persuasive arguments to depart from convention, "belief" would be the word used in this thesis to describe the relevant mental state for intention. It identified the following characteristics of belief as being of particular importance: 1) beliefs are subjective and internal; 2) beliefs are that their contents are true; 3) beliefs can be unconsciously held; 4) beliefs are generally involuntary; 5) a belief *that p*, without more, is simply *that p*, not *that possibly p*, or *that probably p*, or *that certainly p*.

Chapter 3 concluded that the concept of intention in the criminal law is grounded in morality, and that the concept brings the question of moral responsibility into the conviction stage of the criminal justice process for those offences for which it is a requirement. Despite a number of objections to the assumptions that moral responsibility exists, or can meaningfully be assessed, it was argued that the existence of the concept of intention in the criminal law is clearly based on such assumptions. It was further argued

that while the arguments about those objections are unlikely ever to be resolved, morality based on such assumptions is a social reality. While acknowledging that the moral assumptions behind this reality may be hard to justify, it was argued that it remains worthwhile analysing it on its own terms. And since belief is a necessary component of intention crimes, and intention in this context is a moral concept, it remains worthwhile considering the moral significance of belief.

Chapter 4 concluded that as far as the belief component of intention is concerned, it is not the belief itself that attracts moral censure. The relevant belief is that harm will or may occur as a result of the agent's action. The moral significance derives from the choice to act *despite* such a belief. The following properties of such a belief were identified: 1) the belief concerns the successful outcome of actions; 2) the belief is of virtually certainty of harm; 3) the belief is not unconscious; 4) the belief must be that held by the agent; 5) the belief cannot be falsely held; and 6) the belief need not match the harm, but must be proportionate to it.

Chapter 5 concluded that belief always has a central moral role to play in defining intention crimes. It was submitted that it is not the moral quality of the belief itself that is important, but rather the fact that an agent chooses to act in a particular way despite the belief that harm will occur if the action is successful. Without that belief, a crime cannot properly be distinguished from one committed recklessly or negligently. All such harms caused, whether by direct or oblique intention, should be distinguished from those committed recklessly or negligently. That distinction is important, because we react differently to harms caused deliberately rather than otherwise, and ascribe different levels of responsibility accordingly. It is for that reason that the distinction is properly reflected in the categorisation of *mens rea* concepts in the criminal law.

Chapter 6 considered other factors of moral significance in establishing intention crimes, and identified desire as the other relevant component apart from belief. The following points were drawn from the analysis of the importance of desire:

- There will always be a desire prompting the action that results in the harm. However, the closeness of the connection between that desire and the harm can vary significantly.

- The doctrine of double effect may be of relevance in determining the degree of censure in certain circumstances. However, it is not always relevant, and even when it may be, its importance can be slight.
- Nevertheless desire is often a relevant factor in determining how we react to deliberate harm. It may play a part in determining whether we consider particular deliberate harms intention crimes at all – albeit only a part. Desire can also be relevant in determining what level of censure we consider appropriate – albeit that there are often other relevant factors involved.
- The closeness of the desire to the harm caused, the nature of the desire, and the other circumstances in which that desire arose, can be more important than the question of whether the harm was directly or obliquely intended.

Chapter 7 compared the moral significance of belief with other factors, including desire and character. It concluded that there are differences in our moral reactions to who people are and what they do – even if the two are often linked – and we feel that punishment is more appropriately geared towards actions than personalities.

It was submitted that it followed from consideration of the points raised in this chapter that there are good moral reasons why the belief component of intention should be used, rather than the desire component or some other factor, to determine whether an agent has criminal intention. It was submitted that there may be good enough moral reasons in themselves for focusing on choice as the main determinant of intention, but the difficulties of establishing a justification for this were acknowledged. But, it was further argued, in any event there are plenty of good practical, social reasons why this basis of categorisation is to be preferred to an alternative based on desire or character. It was submitted that, given the absence of any compelling moral reasons favouring the alternative, these practical reasons provide sufficient moral justification in themselves. The following moral and practical reasons were identified in particular:

- Many intention crimes can only be established on the basis of the belief component.
- In respect of those intention crimes that may arguably be established on a different basis, such as murder, people still tend to draw important moral distinctions on the basis of whether the harm is committed deliberately or not.

- Because the making of moral distinctions between deliberate and non-deliberate harm is a social fact, there is the risk of erosion of the rule of law if that fact is not sufficiently recognised.
- Basing crimes on the belief component is to base them on the question of the agent's choice. Choice has long been considered the touchstone of morality. There is more reason to suppose that we have some control over our moral choices than over our desires and other characteristics.
- Even if distinguishing intention crimes on the basis of choice cannot be justified morally, there is good reason to believe that punishment based on choice is more likely to deter criminal activity than punishment based on desire or character. Limiting such activity is the primary aim of the criminal law.
- Whereas the belief component test is of universal application, it would be hard to establish a universal test based on desire or other factors. In addition, whereas the belief component is relatively easy to establish, it would often be difficult to establish motives and relevant characteristics to the appropriate standard of proof. Any unnecessary complication brought about by such changes would allow greater harm and more injustice to occur.
- Basing convictions on the subjectivity of character assessments may weaken the impartiality of the law, or at least its perceived impartiality. In particular, that could leave many of the oppressed in society feeling more at risk of prejudice. Furthermore, it could reduce the effectiveness of the law's restorative function.
- Basing convictions on such criteria may allow unwarranted state intrusion into people's lives, and, by causing uncertainty as to what amounted to intention offences, may undermine the rule of law.

Final comments

Iris Murdoch stated that, in respect of moral issues, "The concept of intentionality is... likely to cause confusion; I think we are better without it."[179] Intention certainly has caused confusion in the criminal law, and that confusion has not been cleared up. It is a moral issue, but one bound up with terminology. If the terminology can be clarified, the moral issue may become clearer.

It has been submitted that the criminal law has correctly recognised, albeit only implicitly and in an unsatisfactory manner, that belief is the key moral component of intention crimes. To base it on desire or any other factor would be socially damaging. It ought to be more clearly recognised that it is the belief component that should determine whether someone has criminal intention, and it ought to be more clearly expressed in the law. In order to clarify this in law, it is the final submission of this thesis that the concept of intentional harms ought to be replaced with the concept of deliberate harms. A full definition of deliberate harm would be as follows: *a harm is committed deliberately when a defendant believes that it will (virtually certainly) occur if her action is successful.* Defences could cover all situations in which deliberate harm is caused with lawful excuse. Sentences could address aggravating or mitigating factors associated with socially unacceptable desires and other factors.

Redefining these crimes as deliberate harms – focussing on belief and thereby on moral choice – would leave the difficulties and debates over the meaning of intention in the past. The most serious of offences – those in which harms were fully chosen – would then be more clearly categorised on the basis of accepted moral principles, more clearly focussed on the key purpose of the criminal law of minimising harms in a way that is fair and socially legitimate, and more clearly defined for adjudicators to understand.

[179] *Metaphysics as a Guide to Morals*, Penguin Books, 1992, page 294.

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