INTENTION, AGENCY AND CRIMINAL LIABILITY:

Philosophy of Action and the Criminal Law

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To HGM and VJM

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Criminal Attempts

8.1 *Introduction*

In chapter 7 I discussed the way in which criminal liability may be extended, beyond the paradigms of intended and intentional agency, to cover results which *exceed* the agent's intentions – results which he neither intends nor firmly expects to bring about, but as to which he is said to be reckless. Criminal recklessness should be defined 'subjectively' (though not as orthodox subjectivists define it), in terms of the practical indifference to the interests of others which an agent's actions display: that indifference can be shown in his conscious risk-taking, but also in his failure to notice a risk which he is creating, or in his unreasonable belief that there is no risk.

There is, of course, an 'objective' element in recklessness; for we judge the agent's conduct in the light of an 'objective' standard of reasonableness. But when we turn to the second way in which criminal liability can extend beyond the paradigms of responsible agency, to cases in which what happens *falls short* of what was intended or expected (see p. 139 above), we find a deeper conflict between the subjectivist claim that liability should be determined wholly by the subjective aspects of the defendant's conduct, and the objectivist claim that it should depend in part on what 'objectively' happens. This conflict is most striking in the case of criminal attempts.[1]

The English law of criminal attempts is laid down in the Criminal Attempts Act 1981:

> If, with intent to commit an offence . . ., a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence. (s. 1(1))

1 See generally, *S&H*, pp. 287–306; *TCL*, ch. 17; *C&K*, pp. 351–92; *E&W*, pp. 303–31; *Gordon*, pp. 163–98; A.J. Ashworth, 'Criminal attempts and the role of resulting harm'; G. Fletcher, *Rethinking Criminal Law*, ch. 3.3–4; L.C. Becker, 'Criminal attempt and the theory of the law of crimes'; H. Gross, *A Theory of Criminal Justice*, pp. 127–35.

There are two obvious ways in which a defendant's liability depends, under the law of attempts, on the objective rather than on the purely subjective aspects of her conduct.

First, the law distinguishes attempted from completed crimes: if I try to kill someone, and succeed, I am guilty of murder; but if my attempt fails, I am guilty only of attempted murder. This distinction is reflected in the sentencing practice of the courts; while a failed attempt can in theory be punished as severely as the complete offence would be, courts typically impose lighter sentences on attempts than they would for the relevant complete offence (and some legal systems make this a formal requirement):[2] but the distinction depends on the objective aspects of the defendant's conduct. The subjective aspects of a failed killing and a successful killing may be the same; each agent tries to kill his victim and believes that he will succeed. The distinction between them depends on the objective fact that in one case the intended result ensues (the victim is killed), while in the other it does not (the bullet misses). But that distinction makes a crucial difference to their criminal liability: one is convicted of murder, and sentenced to life imprisonment; the other is convicted only of attempted murder, and probably receives a lighter sentence.

Second, English law defines the *mens rea* of a criminal attempt as an 'intent' to commit the offence attempted, even when recklessness is sufficient *mens rea* for that complete offence. *Either* intention *or* recklessness constitutes the *mens rea* of wounding: but if no wound is actually caused, only a defendant who intended to wound is guilty of attempted wounding; one who acts with a recklessness which would make her guilty of wounding if she caused a wound, but who in fact causes no wound, is not guilty even of attempted wounding. The account which I offered of the *mens rea* of murder in chapter 7 would have convicted Mrs Hyam of murder, since she in fact caused death: but if no one had been killed, she would not have been guilty even of attempted murder in English law (although, following *Cawthorne*, she would be guilty of attempted murder in Scots law; p. 3 above). Two people might thus act with the same kind of recklessness as to some harm – the subjective character of their actions may be just the same. But if one actually causes that harm, while the other does not, that difference in the objective character of their conduct will make a crucial difference to their criminal liability: one is then guilty of a complete offence (of wounding or murder, for instance), whereas the other is not even guilty of attempting to commit that offence.

2 See Criminal Attempts Act 1981, s. 4(1); California Penal Code, s. 664; *C&K*, pp. 353–4; R. Cross and A.J. Ashworth, *The English Sentencing System*, pp. 151–7.

This chapter is concerned with these two features of the law of attempts. *Should* the law make criminal liability depend in these ways on the objective character of the defendant's conduct (on what actually happens), rather than on its subjective character (on the intentions, beliefs and practical attitudes which it displays)?

I shall not discuss the issue of why we should have a general law of attempts at all,[3] nor the problems involved in defining the *actus reus* of a criminal attempt: but I should comment briefly on two other issues which, although they are closely related to the topics of this chapter, I cannot discuss in detail here.

First, the 1981 Act apparently required an 'intent' as to *every* element of the *actus reus* of the complete offence: a man who tries to have sexual intercourse with a woman who does not in fact consent to it is thus guilty of attempted rape only if he acts intentionally or with intent as to her lack of consent (realizing that she does not, or intending that she should not, consent); he is not guilty if he acts only with such recklessness as to her consent as would convict him of rape if he completed the intercourse. The 1985 Draft Code retained this requirement: attempts require 'intention in respect of all the elements of the offence' (cl. 53(2)). But it had been said in *Pigg* (which was decided under the pre-1981 common law of attempts) that recklessness as to the woman's consent sufficed for attempted rape as for rape; the Court of Appeal has held to this view in post-1981 cases of attempted rape (see *Breckenridge*; *Khan*); and the 1989 Draft Code specifies that for criminal attempts in general 'recklessness with respect to a circumstance suffices where it suffices for the offence itself' (cl. 49(2)).

We can distinguish the 'circumstances' from the other aspects of an offence (see p. 42 above): but why should recklessness suffice for the circumstantial aspects of an attempt, if intention is required as to its other aspects?[4] If the ordinary meaning of 'attempt' should guide the law, it supports this proposal: we would not ordinarily say that I 'attempt' to wound another person if, without intending to wound him, I do what I realized might wound him; whereas we would say that a man 'attempted' to rape a non-consenting woman if he tried to have intercourse with her while suspecting that she did not consent. But why should the law follow the ordinary meaning of 'attempt'?

3 See P.R. Glazebrook, 'Should we have a law of attempted crimes?'; *C&K*, pp. 351–3.

4 See G. Williams, 'The problem of reckless attempts'; R. Buxton, 'Circumstances, consequences and attempted rape'; J.E. Stannard, 'Making up for the missing element – A sideways look at attempts'.

Second, there is the problem of 'impossible attempts'.[5] A woman buys what she believes is a stolen video-recorder (*Anderton v Ryan*). If that belief is true, she is guilty of handling stolen goods: but if the recorder has not been stolen, is she guilty of *attempting* to handle stolen goods? On the one hand, since she believed that the recorder had been stolen, she intended 'to handle stolen goods' (see pp. 88–9 above). Had the recorder actually been stolen that intention would suffice to convict her not only of handling stolen goods if she completed her purchase, but of attempted handling if she failed to complete it: so surely it should convict her of attempted handling even if the recorder was not in fact stolen. But, on the other hand, it was no part of her *purpose* to buy stolen goods – the fact that the recorder had not been stolen did not render her action a failure. But if her completed purchase of this (non-stolen) recorder thus marked the success of her intended enterprise, we surely cannot say that she 'attempted' to handle stolen goods: for there was no such handling which she tried, and failed, to achieve.

A man intends to produce cocaine from a powder which was sold to him as being apt for that purpose, and performs (what would be) the appropriate operations on the powder: when the police arrive, he confesses; 'Yes, I admit everything: that's cocaine. I've just had it refined' (see *Nock*). In fact it is not cocaine, since the powder he bought could not have produced cocaine: is he guilty of attempting to produce a controlled drug? On the one hand, he intends to commit that offence, and does acts which he clearly thinks are 'more than merely preparatory' to its commission: so surely he 'attempts' to commit it? But, on the other hand, he is so radically mistaken about what he is actually doing, and so far from actually committing the offence, that we might be tempted to say that 'he is not on the job although he thinks he is . . . he is not near enough to the job to attempt it; he has not begun it' (*Osborn*):[6] for can an endeavour which is so utterly misconceived really amount to an 'attempt'?

5 See *S&H*, pp. 300–6; *C&K*, pp. 383–92; *Gordon*, pp. 193–8; *E&W*, pp. 316–27; H.L.A. Hart, 'The House of Lords on attempting the impossible'; G. Williams, 'The Lords and impossible attempts'; J.C. Smith, 'Attempts, impossibility and the test of rational motivation'; I.H. Dennis, 'Preliminary crimes and impossibility'; H. Gross, *A Theory of Criminal Justice*, pp. 196–232; G. Fletcher, *Rethinking Criminal Law*, ch. 3.3.3; J. Temkin, 'Impossible attempts – another view'; B. Hogan, 'The Criminal Attempts Act and attempting the impossible'; M. Cohen, 'Questions of impossibility'.

6 Quoted in G. Williams, *Criminal Law: The General Part*, p. 638; see P. English, 'Did he think it would do the trick?'.

This is another battleground between subjectivist and objectivist conceptions of criminal liability. For subjectivists will insist that the defendant must be judged on the facts as she believed them to be. However impossible it in fact was for her to commit the offence which she thought she was committing, she should be convicted of attempting to commit it if, had her beliefs been true, she would actually have been committing it: for her action then had the subjective character of a criminal attempt – and it should be that subjective character which determines her criminal liability. Objectivists, however, might argue that she should be convicted of an attempt only if she was actually 'on the job' – only if her action in fact came sufficiently close to the completion of the offence: for if she was not actually 'on the job', her action did not amount to the kind of attack on a legally protected interest which should attract criminal liability.

English law now follows the subjectivists on this issue. The 1981 Act (like the 1989 Draft Code) convicts the defendant of an attempted crime if, had the facts been as he believed them to be, he would have been committing either the complete offence itself, or an act which was 'more than merely preparatory' to its commission:[7] the purchaser of the non-stolen recorder, and the would-be producer of cocaine, are thus both guilty of criminal attempts. I believe myself that there is more to be said for the objectivist view on this question: but this is another matter which we cannot pursue here.

8.2 *The Significance of Failure*

I shall begin with the issue of why a failed attempt should count as a lesser offence, and be punished less severely, than the relevant complete offence; the following section will take up the issue of whether the law should further distinguish attempts from completed crimes by requiring intention as the *mens rea* of attempts.

Pat and Jill each fire a shot at an intended victim, intending to kill him: Jill succeeds in killing her victim, but Pat does not (her victim moves and the shot misses). Is there any difference between their two cases which can justify the distinction which the law draws between them, such that Jill is sentenced to life imprisonment for murder, whereas Pat receives a lighter sentence for attempted murder?

Three preliminary comments are needed to define this issue more precisely.

7 See Criminal Attempts Act 1981, s. 1; 1989 Code, cl. 50(1); *Shivpuri*.

First, I shall discuss only 'complete' attempts in which the agent does all that she can to complete the offence; in which what prevents its completion is not the fact that she desists or is stopped in the course of her attempt, but the fact that her completed attempt fails to produce its intended result: she pulls the trigger, but the bullet misses, or the gun misfires – as distinct from the incomplete case in which she desists or is stopped before pulling the trigger. There are also interesting questions about whether the law should distinguish complete from incomplete attempts, or provide lighter punishments for those who voluntarily withdraw from a criminal endeavour:[8] but the problem of whether it should draw any distinction between attempted and successful crimes is sharpest in the case of complete attempts.

Second, I shall discuss only 'competent' attempts whose failure is due, not to the agent's own incompetence, but to the intervention of some external factor: the gun jams or the victim suddenly moves – as distinct from the incompetent case in which her aim is bad or her whole attempt is misconceived. Objectivists who would decriminalize some impossible attempts might also argue that the incompetence of an attempt should make a difference to the defendant's liability (see J. Harris, 'Over-exertion and under-achievement'). Subjectivists would deny this, since incompetence must be irrelevant to subjective culpability. But the problem which concerns us here, of whether the mere fact of an attempt's success or failure should affect criminal liability, is raised most sharply by competent attempts whose failure is due to mere chance or luck.

Third, I shall discuss only the issue of whether a failed attempt differs *intrinsically* in some relevant way from a completed offence, and not that of whether a consequentialist concern to make the law an efficient means of reducing crime would justify distinguishing them. Various considerations are relevant to that consequentialist issue: the dangerousness of the action or the agent, the desirability of giving one whose first attempt fails an incentive not to try again, the effects on the law's deterrent efficacy of treating attempts more leniently. My concern, however, is with the issue of whether, independently of such consequentialist factors, there is anything in the intrinsic character of a failed attempt as distinct from a completed offence which can justify the law in treating it more leniently; and with the subjectivist's argument that there is no intrinsic moral difference between the two which could justify this legal distinction between them. I am concerned, that is, with justice rather than with utility; with whether it is

8 See A.J. Ashworth, 'Criminal attempts', pp. 734–44; M. Wasik, 'Abandoning criminal attempts'.

just to treat attempts more leniently, rather than with whether it would be consequentially useful to do so.

The central issue is thus this. If the conviction and punishment which a criminal receives should depend, primarily, on the intrinsic culpability or wrongfulness of his action, why should the mere fact that his attempted crime failed bring him a lesser conviction and a lighter sentence? A man who tried, but failed, to burn a girl by throwing a corrosive fluid at her was told by the judge:

> In search of mitigating circumstances the only thing I can find is something which in truth does not redound to your credit and that is that in fact you did her no harm.... But I do take it into consideration and I substantially lessen your sentence on account of that fact because it does, in my view, reduce your crime rather to the category of attempts than the category of completed crimes and you are entitled, fortunately for yourself, to have it remembered that you really only attempted to burn and disfigure this poor girl. (*Carmichael*, p. 143)

Now the fact that his criminal attempt failed can clearly affect the agent's moral and legal liabilities: had he actually injured the girl he would have incurred an obligation to pay compensation, whereas if he in fact caused no such material harm no such compensation is due. But our concern is with punishment, not compensation; and we must now attend to the subjectivist argument that there is no difference in culpability, and should therefore be no difference in criminal liability, between a failed attempt and a completed offence.[9]

What distinguishes Pat's action from Jill's? Not their subjective character: each intends to kill her victim, and does what she thinks will kill him. If we describe their two actions from the agent's own subjective viewpoint, our description will be the same in each case, since such descriptions are independent of what objectively happens. Whether the gun fires or is jammed; whether the shot hits or misses; whether the victim dies or is saved by prompt medical treatment: both Pat and Jill 'try to kill', since both intend to cause death by their actions. The 'one vital distinction' between them is that in one case 'the killing has not been brought off' (*Cawthorne*, p. 36, Lord Clyde). This distinction makes Jill guilty of murder and Pat guilty only of attempted murder: but it depends on the objective rather than on the subjective aspects of their conduct. Whether an

9 See A.J. Ashworth, 'Criminal attempts', pp. 738–50; J.C. Smith, 'The element of chance in criminal liability'; R. Cross, 'Paradoxes in prison sentences'; J.B. Brady, 'Punishing attempts'; R. Parker, 'Blame, punishment and the role of results'; *TCL*, pp. 404–6; *C&K*, pp. 353–61.

action counts as an attempt to kill depends essentially on its subjective character: but whether that attempt succeeds or fails depends on the objective matter of what actually happens.

This objective distinction between Pat and Jill, however, is only a matter of chance, which depends on factors (such as whether or not the victim moves) outside the agent's control. Pat does her best, she does everything in her power, to kill: that she fails is nothing to do with her (as it would be, for instance, if her attempt was only half-hearted), but is due simply to the chance fact that her victim moved. But if it is a matter of mere chance that Pat's action fails to bring about the result which would make her, like Jill, guilty of murder; if she, like Jill, does her best to bring that result about: then surely she should be convicted of the same offence as Jill, and should receive the same sentence. For conviction and sentence should depend on the defendant's culpability; and Pat is just as culpable as Jill, since her action is identical to Jill's in those (subjective) respects which determine culpability.

Justice requires that criminal liability should depend on choice, not chance: on what an agent freely and responsibly does, not on what happens as a matter of chance; on what is within her control, not on factors lying beyond her control. Liability should thus be determined by the subjective aspects of the agent's action, not by its objective aspects: for what she chooses to do, what is thus truly hers as a responsible agent, is her action as subjectively described; the fit, or lack of fit, between the subjective and objective aspects of her action depends on factors outside her control, and should not affect her liability. An attempt to save someone that (through no fault of the agent's) fails is as morally commendable as one that succeeds: for the agent has done what he can to save life. He is commended for the subjective character of his action, as one of saving life, since it is this which he chooses and controls: its objective character, as a failure to save life, lies outside his control and cannot detract from his moral credit. Analogously, Pat can take no moral credit for the failure of her attempt at murder: that failure cannot reduce her culpability; nor, therefore, should it reduce her criminal liability.

This is the core of the subjectivist argument that the law should punish attempts just as severely as completed crimes, since there is 'no moral difference' (no difference of a kind which is relevant to culpability) between them. From this point of view, the distinction which the law actually draws between them reflects a crude version of retributivism, which founds guilt and punishment on the harm actually (or objectively) caused, rather than on the agent's culpability. Any civilized legal system distinguishes accidental killings from wilful murder: although the objective features of the two actions may be the same (a person is killed), their subjective

characters are crucially different; and it is on those that criminal liability should depend. The case of attempted as against completed crimes is the obverse of this. The two actions are alike in their subjective characters and differ in their objective effects: but here too the agents' liability should be determined by the subjective character of their actions.[10]

This subjectivist argument seems to be a powerful one. Whereas in the case of recklessness we saw that orthodox subjectivists offer an inadequate conception of the subjective, the subjectivist's claim in this context, that the subjective character of an action does not include the fact of its success or failure, seems hard to deny. Pat's action surely does have the subjective character of an act of murder, and is thus subjectively the same as Jill's; at the moment when each pulls the trigger, confident of success, each takes herself to be doing the same thing – a deliberate act of killing. Furthermore, each agent's criminal liability surely should depend on the character of her action as thus subjectively defined: for any factor which is to mitigate Pat's guilt, or justify a lesser sentence for her, must be one that shows her to be less culpable than Jill; but how can the chance fact that her shot misses show her to be any less culpable?

To justify the legal distinction between attempted and completed crimes, we need to show that the objective aspects of the defendant's conduct can make a relevant difference to the moral character of her action, and to her own moral and legal standing as the agent of that action: but how could this be shown?

The subjectivist argument outlined above emphasizes one crucial, and clearly relevant, respect in which a failed attempt at crime does not differ from a successful crime; and insists that this is the only respect which is relevant to culpability or guilt. We have also noted one way in which the

10 See A.J. Ashworth, 'Belief, intent and criminal liability', pp. 13–20, 'Criminal Attempts', pp. 741–4. Ashworth appeals to a philosophical account of the essence of action as consisting not in *successful* action, but in *trying* (in an 'exertion'): Pat's action is, strictly speaking, the same as Jill's; each 'tries to kill' – and the success or failure of her 'exertion' is not strictly part of the action. This account of action is, I think, untenable (and faces the objections to Dualism which I discussed in chapter 6 if it portrays the 'trying' or 'exertion' as a mental act distinct from the agent's external bodily movements: see H.L.A. Prichard, 'Acting, willing, desiring'): but we cannot discuss the arguments here (see J.F.M. Hunter, 'Trying'; P.L. Heath, 'Trying and attempting'; P. Winch, 'Trying and attempting'). The subjectivist argument about the punishment of attempts should rather be that even if the paradigm of action consists not simply in trying, but in actually doing what I intend to do, a failed attempt does not differ from that paradigm in any way which should affect criminal liability.

moral or legal implications of a completed crime may indeed differ from those of a failed attempt – that the successful criminal may incur compensatory obligations (to his victim or, in the case of murder, to his victim's dependants) which do not attach to a failed attempt: but the issue of compensation, the subjectivist will insist, has no bearing on the issue of culpability and punishment. I want to look now, however, at some of the other moral implications of success or failure in a wrongful action, in particular at those which may be reflected in the agent's first-person response to what he has done or failed to do, to see if these can have any proper relevance to his criminal liability (see P. Winch, 'Trying and attempting').

Suppose that I have, as I believe, succeeded in killing my enemy, and that I am at once overtaken by remorse: I am horrified by what I have done – by the fact that he is now dead, and that I have murdered him. Quite apart from the legal implications of my crime, I must try to face its moral implications: is there any way in which I can atone or make up for my crime; how can I face other people (his family, his or my friends) as a murderer; how can I live with what I have done? But then, as I approach what I take to be his corpse, I realize that he is not dead – that my shot missed him, but he fainted from shock. 'Thank God', I may cry, 'I didn't kill him.' What does this signify?

In part, of course, it expresses my relief that he is not dead; a relief which I feel for *him*, that he is still alive: it expresses my renewed concern for him and for his good (a concern that was notably lacking when I tried to kill him). But there is more to it than that, since what I feel is not just the relief I might feel on seeing that the victim of an accident has survived: my relief has also, and essentially, to do with the fact that *I* have not killed him, although I tried to. It is in part, that is to say, a relief I feel for myself, that I did not succeed in becoming a murderer; and though the fact that I shall not now be sentenced to life imprisonment for murder might play a part in this relief, it can also involve a *moral* relief that I do not have his death (my murder of him) on my conscience. I must, of course, still be horrified by my attempt to kill him, although it failed: I still have that on my conscience, and must repent it and accept punishment for it; I must try to find some way of expiating or making up for it. But what my relief expresses is the thought that to have a failed attempt at murder on my conscience is quite different from having an actual murder on my conscience; and it is that thought which concerns me here.

Such a response to my failure is, I think, entirely natural. Now a subjectivist might insist that, however natural, it is irrational, in so far as it goes beyond the relief for my intended victim that he is not dead, and implies that the fact of failure makes a difference to the character or extent

of my own guilt. It embodies, she might argue, the same irrational concentration on what actually happens as is embodied in our existing criminal law: but the mere fact of failure *should* make no difference to my understanding of, or to my response to, the moral character of my action. I think, however, that we can find a morally appropriate meaning in this response, and that this meaning is also relevant to the criminal law's response to my action: it can show why the law should distinguish attempted from completed crimes.

The relief which I feel that I have not murdered my victim has to do, in part, with the *finality* of successful actions. If I succeed in murdering my victim, that harm is done – and cannot be undone: I have brought the evil of his death (his murder) into the world, and cannot remove it. The same is true of less serious wrongs. If I have wounded someone, or damaged her property, there is a sense in which that harm may, unlike the harm of murder, be remediable: wounds can be healed, compensation paid, property repaired or replaced, apologies offered. But the damage has still been done and cannot strictly be undone: the history of my involvement as an agent in the world irrevocably includes the fact that I did this harm. If I have failed to cause the harm which I tried to cause, however, I am as it were given a second chance: I can either try again to cause that harm (to kill my victim, for example); or I can repent, and avoid bringing that evil into the world. Of course, even a failed attempt which does no material damage brings about some harm or evil – the evil involved in a deliberate attack on another person's interests. But a failed attack is still crucially incomplete, since there is one kind of harm or evil which it does not bring about, and its failure gives the agent the chance to make sure that it remains incomplete: whereas if the attempt had succeeded, it is too late for the agent to prevent the occurrence of that evil, however much he repents.

On a strictly subjectivist view the moral character of my actions, and my moral standing as their agent, is determined purely by what I intend and try to do; I am as much a murderer, morally speaking, if I try and fail to kill someone as I am if I succeed in killing her. But the response to a failed attempt which I have sketched here suggests that the objective aspects of an action are also crucial to its moral character and to its agent's moral standing; that I define myself as a moral agent by what I actually do or bring about, and not simply by what I try to do. I define myself as a murderer not just by trying to kill someone, but by actually killing him; if my attempt fails, my action has not acquired the fixed and complete character of an act of murder. For actions aim at success: the paradigm of agency is action that achieves its intended result; and our understanding of the moral significance of an action depends on its relationship to that paradigm. A failed attempt falls short of the paradigm of success, and must

be seen as an essentially incomplete action: it will not figure in our or the agent's response to it, or in our understanding of what she has become in doing it, in the same way as a successful action does. A failed killer has not become an actual murderer; and though she must be condemned for her attempt, the character of that condemnation is qualified by the fact of her failure.

But why should that condemnation be qualified by the fact of her failure, since she did all that she could to make herself a murderer and can take no moral credit from her failure? Even if our response to a failed attempt properly includes a relief that it failed, why should that make any difference to the moral condemnation, or to the criminal conviction and punishment, to which she should be subjected? The answer must be that the fact of her failure should qualify these responses to her because it matters: it matters to us, and should matter to her, whether her criminal attempt succeeded or failed, just because it matters to us (and should matter to her) whether or not her victim actually suffered the material harm she tried to cause him. For if the fact of her failure is in this way significant, our responses to her should surely aim to reflect its significance; and they can do that only if they distinguish, as the criminal law does distinguish, between success and failure.

One way to explicate this suggestion is through an account of the purposes of criminal convictions and punishments, according to which one of their essential purposes is to express or communicate, both to the criminal and to the whole community, a proper condemnation of his crime which brings out the character and the seriousness of the wrong he has done (see R.A. Duff, *Trials and Punishments*). Now to follow the subjectivist's advice, and draw no distinction in the criminal law between attempted and completed offences (to convict both the actual and the failed murderer of the same offence, and subject them to the same punishment), would be to say, in effect, that it does not matter to the law whether the attempt to commit a criminal wrong succeeds or not: the same message, the same condemnation, would be communicated to both the successful and the failed murderer. But it does matter to us, and should matter to the agent, whether his attempt succeeded or not; we are, and he should be, relieved if it failed. Surely, then, the law's response to him should itself reflect this; which is what now happens. A conviction and sentence for murder communicates the message 'You have wrongfully killed someone, which is the worst crime that you could have committed'. A conviction and lighter sentence for attempted murder, however, expresses the different message 'You have wrongfully tried to kill someone; but (thank God) you failed'; that message embodies the relief which we feel (and which we hope that the criminal will feel) at her failure.

This is, I think, the best way to justify the distinction which the law actually draws between attempted and completed crimes, though it clearly needs further explanation and argument than I can provide here. It remains true, however, that that distinction makes criminal liability depend, in part, on the objective aspects of a defendant's conduct, thus making it partly a matter of chance or luck; and this conflicts with the deep-rooted principle which underpins subjectivism – that justice requires us to found criminal liability, like moral culpability, on choice rather than on chance. Now that principle is controversial even in moral contexts.[11] But the account I have outlined here still gives it a central place in the criminal law: for the liability of both the successful and the failed murderer still depends on their deliberate choice and attempt to kill someone. The principle is now qualified, however, by the recognition that we cannot entirely separate the objective from the subjective aspects of an agent's action: that the action's objective character, its success or failure, does help to determine its moral character, and should help to structure both the agent's response to what she has done and the responses of others. The would-be killer whose attempt fails has not in fact made herself a murderer; and that fact should matter to her, to us, and to the criminal law.

It is time now, however, to move on to the second issue which I want to discuss: the question of why the criminal law should further distinguish attempted from completed crimes by requiring intention as the *mens rea* of an attempt. Part of the basis for an answer to this question has been provided in this section, in the argument that what actually happens can make a relevant difference to the moral and the criminal significance of an agent's action: but that argument must be developed further to cope with this further issue; and we must begin by recognizing both the force of the contrary argument that the *mens rea* of a criminal attempt should be just the same as that required for the relevant complete offence, and the weakness of the arguments which are typically offered for the existing law.

8.3 *The* Mens Rea *of Attempts I: Subjectivism and the Current Law*

The law of attempts is a law of inchoate crimes: it prohibits and punishes conduct which does not actually bring about the result that constitutes the *actus reus* of a complete offence (death in the case of murder, damage to property in the case of criminal damage, and so on), but which comes sufficiently close to that *actus reus*. Now the most obvious distinction between complete and inchoate crimes lies in the *actus reus*: murder involves an actual killing; attempted murder involves conduct which, though 'more than merely preparatory' to an actual killing, does not actually cause death. I argued in the last section that such a difference in the *actus reus*, in what objectively happens, can properly make a difference to the defendant's criminal liability: but we must now ask why the law should further distinguish complete from inchoate crimes in terms of their *mens rea*. Why should the law not convict of a criminal 'attempt' any agent who acts with the *mens rea* appropriate to a complete offence, and whose conduct comes sufficiently close to the *actus reus* of that offence, rather than convicting only those who *intend* to commit the complete offence?

This is the question posed by *Cawthorne* (p. 3 above). Mr Cawthorne acted with the *mens rea* which would have made him guilty of murder in Scots law had he actually killed someone, and it was a matter of pure chance that his conduct fell short of the *actus reus* of murder (that the shots which he fired did not kill someone): so why should he not be convicted of attempted murder; why should it seem so obvious to so many jurists that attempted murder must involve an intention to kill, when murder need involve no such intention?

We must also ask what 'intention' means in this context. The 1981 Act requires an 'intent' to commit the relevant complete offence, and it had been said in *Mohan* that a 'specific intent' is required (p. 11): but does this mean that the defendant must have *intended* to commit the offence; or need he only have acted *intentionally* as to its *actus reus*? One who aims a blow with the intention of wounding another is clearly guilty of attempted wounding: but what of one who does what he is virtually certain will wound another person, without actually intending to wound?[12]

The Law Commission had originally argued that its broader notion of intention, as including effects of whose occurrence the agent 'has no substantial doubt', was inappropriate for criminal attempts, which should require an 'actual intent' (Law Commission No. 102, para. 2.17). The 1989 Code, however, defines the *mens rea* of a criminal attempt in terms of 'intending to commit an indictable offence' (cl. 49(1)). Given the Code's definition of intention, this means that an attempt requires only intentional agency as to the *actus reus* of the complete offence: if I am 'aware' that my action will 'in the ordinary course of events' cause serious personal harm to another, I am guilty of intentionally causing serious personal harm if I

11 See T. Nagel, 'Moral luck'; B. Williams, 'Moral luck'; J. Feinberg, 'Problematic responsibility in law and morals'.

12 See *S&H*, p. 288; *Millard and Vernon* (and 'Comment' by J.C. Smith).

actually cause such harm, and of attempting to cause serious personal harm if I do not actually cause such harm (*1989 Code*, cls 18(b), 49(1), 70).

We should begin, however, with the question of why the law should require anything more by way of *mens rea* for a criminal attempt than it does for the relevant complete offence.

I noted earlier that a qualifiedly consequentialist conception of responsible agency, which founds an agent's criminal liability on the extent to which she has voluntary control over the occurrence of the relevant effect, would draw no distinction between direct and oblique intention in the context of either complete or inchoate crimes (p. 110 above). A consistent subjectivist, however, must extend this argument to justify a generalized version of the *Cawthorne* doctrine, according to which the *mens rea* of an inchoate crime (of an 'attempt') should be no different from that of the relevant complete offence: for the subjectivist principles which require the law to punish attempted crimes as severely as completed crimes likewise require it to define the *mens rea* of the two in identical terms.[13]

The central argument is this. Criminal liability should depend on choice, not chance; on the subjective aspects of the agent's conduct (since it is these that she controls and that are properly hers), not on its objective aspects (which may be matters of chance). Now if the law rightly convicts of the same offence, of wounding, both the agent who causes a wound intentionally and one who causes a wound recklessly, this must be because there is not a significant enough difference in culpability between them to justify drawing any categorial distinction between the offences for which they are to be convicted; because the subjective culpability of the reckless agent is not significantly less than that of the intentional agent. But the same must then be true of a case in which the agent's conduct comes close to causing, but does not actually cause, a wound: the mere fact (which may be a matter of chance) that a wound is not actually caused cannot alter the relative culpability of the reckless as compared to the intentional agent; so both should still be convicted of the same inchoate offence of attempted wounding. For in the case of an actual wounding both agents commit the same *actus reus* – a wounding; and the *mens rea* with which each acts is taken to be sufficiently similar in culpability to justify convicting them of the same offence. But in a case in which no wound is actually caused, both agents still commit the same *actus reus*, and the *mens rea* with which each acts is just as similar: so both should still be convicted of the same offence.

Furthermore, the difference between one agent who recklessly wounds someone, and another who acts just as recklessly but does not actually wound anyone, may be a matter of chance: each recklessly throws rubbish off a roof, realizing that someone might be passing beneath and might be hit and injured; in one case there is someone beneath who is injured, while in the other case there is not. Now it is bad enough, for the subjectivist, that this chance difference in the objective aspects of the two agents' actions should make the difference between conviction for a complete offence of wounding, and conviction only for an inchoate offence of attempted wounding. It would be even worse if this difference meant that one was convicted of wounding, while the other was convicted of no offence at all: but that is precisely what would happen under the existing law.

Once again, the subjectivist argument seems a powerful one. Why then have jurists been so unwilling to accept its conclusion?

There is a striking lack of developed argument for the orthodox doctrine that the *mens rea* of a criminal attempt should involve an intention to commit the complete offence, even when intention is not required for that offence itself. Too often the argument begins, and ends, with an appeal to the ordinary meaning of 'attempt'. Thus the Scottish Law Commission noted that if 'attempt' is given its ordinary meaning, as involving an intention to bring about the result which is 'attempted', there will be cases in which a charge of murder would lie if death resulted, but not a charge of attempted murder if death did not result (as when the agent, in English law, intends to cause grievous bodily harm; or, in Scots law, acts with the appropriate 'wicked recklessness'). But, the Commission argued,

> [w]hile this may appear to be paradoxical it is so only if one seeks to determine the nature of an attempt by reference to the character of a completed crime: it is not so if one concentrates on the concept of attempt by itself. (*Attempted Homicide*, p. 29)

If we concentrate 'on the concept of attempt by itself', we shall see that attempted murder must indeed be defined in terms of an intention to kill. Similarly, though in a slightly different context, J.C. Smith seemed to think that the criminal law is bound by the ordinary meaning of 'attempt', even if that requires us to acquit some defendants who are just as culpable as those who are to be convicted ('Two problems in criminal attempts re-examined', pp. 135, 217–18; see also *S&H* p. 289).

Now in ordinary, extra-legal language an 'attempt' must indeed involve an intention to do that which is 'attempted': an attempt to murder someone requires an intention to kill her; and the *Cawthorne* doctrine is thus at odds with the extra-legal meaning of 'attempt'. We should note too that in ordinary language an 'attempt' requires a direct intention: I 'attempt' to kill only if I act *in order* to cause someone's death; I do not 'attempt' to kill

13 See A.J. Ashworth, 'Criminal attempts', pp. 754–7; D. Stuart, '*Mens rea*, negligence and attempts'; P.J. Fitzgerald, *Criminal Law and Punishment*, pp. 98–101: also *Gordon*, pp. 263–7; Scottish Law Commission, *Attempted Homicide*.

her if I merely foresee her death as a side-effect of my action (see *S&H*, p. 288). If the law of attempts should follow ordinary language, it must thus require an 'actual intent' to commit the relevant offence: foresight of the relevant result as a certain side-effect of my action (acting only intentionally as to that result) cannot suffice.

But, an advocate of *Cawthorne* may say, this is beside the point: for why should the law be bound by the ordinary meaning of 'attempt'? The extra-legal concept of an attempt reflects the classificatory and discriminatory interests of ordinary life: but we cannot just assume that those interests match the law's interests in defining crimes and ascribing liability; nor, therefore, that the extra-legal concept of an attempt captures precisely that category of actions which the law should prohibit and punish as inchoate crimes. Now the subjectivist argument which I outlined above claims that, as a matter of principle and justice, we should convict of the same inchoate offence all those who act with the *mens rea* required for the relevant complete offence, and whose conduct comes sufficiently close to the *actus reus* of that complete offence. If that argument is sound, then 'the limitations of language should not be allowed to override moral similarities' (A.J. Ashworth, 'Criminal attempts', p. 756): we should either give 'attempt' a technical legal meaning, which will define the appropriate category of inchoate criminal actions; or, if it would cause confusion to give a legal term a meaning which diverges so drastically from its extra-legal meaning, we should simply drop the term 'attempt' from the law, and find some other term which is more apt to the law's purposes. We should, that is, either insist that in law Mr Cawthorne did 'attempt' to kill his victims; or convict him of, perhaps, 'inchoate murder' rather than of 'attempted murder'.

The crucial point is therefore this. If we have a law of inchoate crimes which is expressed as a law of 'attempts', we might initially be inclined to interpret that law in line with the ordinary meaning of 'attempt'. But once we see that the law may need to give technical meanings to ordinary terms, and ask why it should anyway use the term 'attempt' at all, we shall see that we must stand back from the ordinary meanings of the terms which the law actually uses, to face the substantive question of what kinds of action it should prohibit and punish. Now the subjectivist offers us substantive reasons of principle for defining a category of inchoate offences which is wider than that captured by the ordinary concept of an attempt; for convicting of an inchoate offence not only those who 'attempt' (in ordinary usage) to commit an offence, but all those who act with the *mens rea* required for a complete offence and who come sufficiently close to committing its *actus reus*. We cannot rebut that argument simply by appealing to the ordinary meaning of 'attempt', since we cannot assume

that the law should use that term with its ordinary meaning. We need some *substantive* argument to show that the ordinary concept of an attempt captures a legally relevant species of action; we need principled, not merely linguistic, reasons for defining the *mens rea* of an inchoate offence more narrowly than that of the relevant complete offence.

When we look for such arguments in favour of the orthodox account of criminal attempts, however, we find little by way of developed or principled argument.

Two judicial comments are often cited in this context. The first comes from *Whybrow* (p. 147, Lord Goddard):–

> But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if ... death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime.

The second comes from *Mohan* (p. 11, Lord James):–

> An attempt to commit a crime is itself an offence. Often it is a grave offence. Often it is as morally culpable as the completed offence which is attempted but not in fact committed. Nevertheless it falls within the class of conduct which is preparatory to the commission of a crime and is one step removed from the offence which is attempted. The court must not strain to bring within the offence of attempt conduct which does not fall within the well-established bounds of the offence. ... The bounds are presently set by requiring proof of specific intent.

Now an attempt is indeed 'one step removed' from the completed crime; and just because its *actus reus* falls short of that of the completed crime, the *mens rea* 'becomes the principal ingredient of the crime': but why should it follow from these considerations that that *mens rea* must be defined as an inteniton to commit the complete crime, or that 'the intent becomes the principal ingredient of the crime'? We have as yet been offered no argument for this conclusion.

The English Law Commission similarly offered little argument for the claim that the *mens rea* of a criminal attempt should involve 'an actual intent to commit the offence attempted'. Talking of offences of strict liability, for instance, the Commission simply says that

> while there are many instances in which legislation has imposed strict liability where the proscribed conduct is completed, there is less justification for imposing such liability if the defendant neither intended to do nor succeeded in completing the forbidden act. (Law Commission No. 102, para. 2.16)

But we are not told *why* we should not convict defendants of inchoate versions of offences of strict liability (or recklessness), if they do not

actually complete 'the forbidden act'; why we should convict only those who intend to commit the relevant complete offence.

Clarkson and Keating base the claim that criminal attempts should require intention on their general 'equation of criminal liability': 'blame + harm = criminal liability' (*C&K*, p. 572). An agent's criminal liability is a product of the blameworthiness of her conduct and the extent or seriousness of the harm which it actually causes. In the case of completed offences, lesser degrees of blameworthiness than intention (i.e. recklessness and negligence) can properly generate liability, since some actual harm has been caused. In the case of inchoate crimes, however, no actual (or 'first order') harm may be caused, and in such cases 'the highest degree of blame' should be required as a basis for liability. 'As attempt is essentially a crime of *mens rea*, with the *actus reus* performing only a secondary or subsidiary role, only the clearest form of *mens rea* should suffice, namely, intention' (*C&K*, p. 364).

Now their 'basic equation' would indeed justify such a conclusion: but it itself needs further justification, to meet the subjectivist argument that it wrongly makes criminal liability depend on the objective fact of how much harm is actually caused. Whether harm actually occurs or not might be a matter of chance; and a reckless agent who does not in fact cause harm might be no less blameworthy than one who actually causes harm: so why should the former escape conviction not only for the complete offence for which the latter is convicted, but also for 'attempting' to commit it?

We still have no adequate answer to the questions which Ashworth poses:

> One might take every offence for which direct intention is not required, and pose the questions: if recklessness as to consequences is sufficient for the substantive offence, why not for the attempt? If negligence or strict liability is sufficient for the substantive offence, should not a 'more than merely preparatory act' be regarded as a criminal attempt to commit such crimes? ('Criminal attempts', p. 755)

Ashworth himself, while emphasizing the strength of the subjectivist argument that the *mens rea* of a criminal 'attempt' should be just the same as that required for the complete offence, holds back from this conclusion: although it would accord with 'the basic principles of culpability', there are practical considerations (concerning the costs and dangers of extending the ambit of the criminal law too widely) which might make it unwise so to extend the law of inchoate crimes that it criminalizes every reckless or negligent action which comes sufficiently close to the *actus reus* of a substantive offence.

I shall not discuss these practical considerations here, since my concern is rather with the question of whether there are any reasons of *principle*, or

any *intrinsic* distinction between complete offences and their inchoate versions, which can justify the doctrine that the general law of inchoate crimes should be a law of 'attempted' crimes, defined in terms of an intention to commit a complete offence. Many jurists might agree that it is 'almost self-evident that it should not be attempted murder to assault a person by causing grievous bodily harm, although it is murder if in an assault only intending grievous bodily harm the victim dies' (Scottish Law Commission, *Attempted Homicide*, p. 49, H.D.B. Morton): but such appeals to self-evidence arouse the suspicion that rhetoric is being substituted for the kind of justificatory argument which is needed if we are to meet the subjectivist's challenge.

We might also suspect, however, that it is not merely a matter of chance that the law should have come to define this general category of inchoate crimes in terms of the concept of an attempt – a concept which, in its ordinary usage, involves intention; that the law's use of this concept, and the widely shared belief that this is the right concept to use, cannot be wholly groundless; and thus that there may yet be a principled foundation for the orthodox doctrine of criminal attempts. We can discover this foundation by bringing together the argument of the last section about the significance of the objective aspects of an agent's conduct, and the non-consequentialist account of responsible agency which I sketched in chapter 5: we shall then be able to see not only why the general category of inchoate crimes should be defined as 'attempts' to commit a complete offence, i.e. in terms of intention, but also why the intention which is required should be a *direct* intention.

8.4 *The* Mens Rea *of Attempts II: Why Attempts Should be Intended*

If we understand responsible agency and culpability in terms of the qualifiedly consequentialist model which I sketched in chapter 5 – in terms of the agent's foresight of and control over the relevant effects of her actions; and if we accept the subjectivist demand that liability should be based on choice, not on chance: then we must also accept the *Cawthorne* doctrine. An agent acts culpably in so far as she voluntarily, i.e. avoidably, does what she realizes might cause harm; and the extent of her culpability depends, not on the seriousness of any harm which she in fact causes, but on the seriousness of the harm which she expects to cause, and on the extent to which she foresees that harm as a likely, probable or certain effect of her action.

Now on such a view, one who acts intentionally as to some harm is

more culpable than one who acts recklessly as to that harm, since the intentional agent knowingly makes it more likely that that harm will occur than does the reckless agent. We might suggest that the law should therefore *always* distinguish intentional from reckless agency in its ascriptions of criminal liability: that even in the context of completed offences one who intentionally commits the *actus reus* of an offence should always be convicted of a more serious offence than one who commits the *actus reus* only recklessly (we could strengthen this suggestion by defining intentional agency to encompass side-effects which are foreseen as being 'probable', and reserving the concept of recklessness for side-effects which are foreseen as being 'possible': see pp. 95–8 above). We might then follow the lead of the 1989 Draft Code, which distinguishes between the intentional and the reckless causing of 'serious personal harm' (cls 70–1), and draw a parallel distinction (though the Code does not) for every substantive offence.

If we take this view, we shall, of course, draw the same distinction in the context of inchoate offences: we shall distinguish one who acts intentionally as to some criminal harm which does not in fact ensue, from one who acts recklessly as to such a harm; and we shall then have a category of inchoate offences defined in terms of an 'intention' to commit a substantive offence. But, first, since consequentialists see no intrinsic moral difference between direct and oblique intention, we shall still not distinguish between intended and intentional agency as to a harm which does not in fact ensue; our category of inchoate offences of 'intention' will still not be a category of 'attempts', in the ordinary meaning of the term. And, second, the *mens rea* of any inchoate offence (whether of intention or recklessness) will still be the same as that required for the relevant complete offence; we will still have no reason to require more by way of *mens rea* for the inchoate offence.

If, however, we instead combine the kind of non-consequentialist conception of responsible agency which I sketched in chapter 5, with the partly objectivist view of attempts which I sketched above (pp. 189–91), we can see why the law should recognize a general inchoate offence of 'attempting' (i.e. intending and trying) to commit a substantive offence – even if that substantive offence requires only recklessness by way of *mens rea*. (Just the same argument will apply to offences of negligence or strict liability; but I shall not discuss these here.)

For the non-consequentialist, the central paradigm of responsible agency is not (as it is for the consequentialist) intentional agency, but intended agency: it is through my direct intentions that I exert my will, and direct my actions towards good or evil; my actions are given their primary structure and meaning by the direct intentions which guide them. The central paradigm of wrong-doing is thus not (as it is for a consequentialist)

the intentional causation of avoidable harm, but an intended attack upon another's rights or interests – an action which is directed towards evil.

Now I argued above (pp. 189–91) that we cannot separate the subjective from the objective features of an agent's criminal conduct as sharply as the subjectivist wants to: subjectively, she might be a murderer; but the (objective) failure of her attempt to kill makes a difference to our understanding of the moral character of her action. What this shows is that the paradigm of action, and of responsible agency, is completed action in which there is no separation between subjective and objective; in which what actually happens is just what the agent intends. This claim belongs with the non-dualist view of action which I sketched in chapter 6. Dualists might see the distinction between subjective and objective as a distinction between the two distinct *elements* out of which human action is composed: the subjective is the mental element of intention, will, or 'exertion' (see n. 10); the objective is the external element of actual behaviour. A non-dualist, however, treats subjective and objective as two *aspects* of human action. In paradigm cases of action there is no separation between the subjective and the objective (although they can be distinguished for analytical purposes): actions involving some genuine divergence between subjective and objective (as happens in failed attempts) must be seen as abnormal instances of action; we understand them as failed or incomplete versions of the paradigm of completed action.

If we combine this view with the non-consequentialist conception of responsible agency, we can say that the central paradigm of wrong-doing is a successful attack upon another's rights or interests: the central paradigm of murder, for instance, is the intended killing of another person. But I also suggested (pp. 113–14 above) that, for crimes of 'basic intent' in which we are concerned with an agent's liability for some harm (an *actus reus*) which has actually occurred, the non-consequentialist need not distinguish direct from oblique intention. In such cases, she will extend the paradigm of responsible agency to cover one who foresees the relevant harm as a virtually certain (or highly probable) side-effect of his action: although his action still differs in its structure and character from that of one who intends to cause harm, he is fully and culpably responsible for that harm as its intentional agent; a non-consequentialist need see no difference in *degree* of guilt or of culpability between the intentional and the intended doing of unjustified harm.

We can now explain this feature of the non-consequentialist view, by saying that the objective occurrence of the expected harm helps to define the intentional agent's action as essentially harmful: he does cause harm; and his foresight of that harm as an avoidable effect of his action connects him to it closely enough for us to say that he is unqualifiedly its responsi-

ble agent. More generally, in so far as there is no separation between the subjective and the objective aspects of an agent's conduct, he is fully responsible for any harm which he actually causes; and this principle explains both why some think that the law should convict one who recklessly causes harm of the same offence as one who intentionally causes such harm, and why others might argue that their offences should be distinguished. For we could argue, on the one hand, that the reckless agent is subjectively related to the harm which he actually causes; that his conduct involves a sufficient unity of subjective and objective to justify the ascription to him of fully culpable agency as to that harm. But we could then argue on the other hand that subjective and objective are not *fully* united in the case of recklessness, since recklessness is (subjectively) a matter of risk-taking rather than of the intentional doing of harm; and thus that we should distinguish intentional from reckless agency even with crimes of basic intent, since the reckless agent is not unqualifiedly the responsible agent of the harm which he actually causes.[14]

What are we to say, however, of cases in which the subjective and objective aspects of an action diverge more radically; in which the result which the agent intends or expects does not in fact ensue?

If the agent intended and tried to bring that result about, then though she failed to bring it about, that result is still central to the structure and meaning of her action. If I try to injure another person, I relate myself as closely as I can to that harm: the injury I intend to cause gives my action its focus and its purposive structure. The fact that she is not actually injured does make some difference, as we saw (pp. 189–91 above), to the character of my action; I have not in fact, though this may be a matter of pure chance, made myself responsible for an injury which she suffers: but my intention to injure her, and the steps I have actually taken towards that end, define my action as *essentially* injurious. In other words, when an action is structured by a direct intention to do some harm, that relates the agent intimately to that harm, even when it does not in fact ensue: in the absence of the appropriate objective element (the actual occurrence of the harm) the subjective character of the action is still enough to define it as an attempt to cause harm. To call it an attempt to cause harm (to kill, to

14 This argument can apply, however, only when the risk as to which the agent is reckless is *contingently*, not *intrinsically*, related to his intended action: for the recklessness displayed by one who intends to cause serious injury, or by one who persists with sexual intercourse in the unreasonable belief that the woman consents to it, should make him fully responsible, as a murderer or a rapist, for the harm which he actually does (pp. 168–79 above; R.A. Duff, 'Recklessness', pp. 288–9).

injure, to damage property) is to note that it falls short of the paradigm of responsible agency, since the harm has not in fact been caused: but to call it an attempt is also to emphasize its close relation to, as an incomplete version of, that paradigm; and it is in virtue of that relation that the agent is condemned and convicted for a criminal attempt.

This gives us a central category of criminal attempts; of actions which are close enough to the paradigm of responsible criminal agency to share, as it were, in its culpable criminality. What relates the action to the paradigm, however, is its subjective aspect, since its objective aspects fall short of the paradigm. The 'intent becomes the principal ingredient of the crime' (*Whybrow*, p. 147); and whereas a direct intention to commit the relevant offence creates an intimate relation between the (failed) action and the complete offence, the same is not true of recklessness or of oblique intention.

If I do what I realize might injure someone, I take the risk both of injuring her and of making myself responsible for her injury as its agent: but in this case the criminal character of my action, and my relationship as an agent to that injury, depends crucially on what actually happens. If she is actually injured, my recklessness as to that injury makes me responsible for it; 'injuring her' is properly ascribed to me as something I have done (though that ascription may be qualified by 'recklessly'). But if she is not actually injured, my action is seen as *potentially*, rather than *essentially*, injurious, since its subjective character does not relate me so closely to that prospective injury: it is not focused, as an action which is intended to cause injury is focused, on injuring her; its purposive structure is not determined by the prospect of that injury.

The paradigm of criminal action is constituted as a paradigm in part by its subjective dimension (by the intention to do harm), and in part by its objective dimension (by the fact that it causes harm). If that objective dimension is fully present (if harm is caused), we may extend the paradigm to cover actions whose subjective dimension falls short of intention (to cover reckless actions): the weakness of the action's subjective connection to the paradigm is compensated for by the strength of its objective connection – by the fact that harm is actually caused. Without that objective dimension, however (i.e. if the harm is not actually caused), the action's connection to the paradigm depends essentially on its subjective dimension; and if that subjective dimension also falls well short of the paradigm (if it is a matter of recklessness rather than of intention), then we cannot see the action (as we can see a failed attempt) as even an incomplete version of the paradigm. This is, I think, the substance of Clarkson and Keating's argument, and of judicial dicta that 'the intent is the essence' of an attempt, or that attempts are 'one step removed' from the complete offence (pp.

197–8 above). What relates me to a criminal harm as a responsible agent is partly the subjective connection of my action to that harm, and partly its objective connection: the weaker the connection provided by the objective dimension of my action, the stronger must be the connection provided by its subjective dimension if my action is to be counted as even an incomplete version of the paradigm of culpable agency.

The same is true of implied malice in murder, and of the 'wicked recklessness' which would have made Mr Cawthorne a murderer if he had actually killed someone. The intention to do grievous bodily harm to someone relates me sufficiently closely to his death, *if* he actually dies, to make me fully and culpably responsible for that death, as a murderer. That relationship, however, depends more on what actually happens (on whether he actually dies or not) than it does when I try to kill him: although my attack is potentially murderous it is not, without his actual death, as essentially murderous as a direct attempt to kill. One who tries to kill directs herself and her action towards murder; even if death does not ensue, her action is murderous, and she is a would-be murderer. But one who (while intending to injure) neither kills nor intends to kill is much further from being a murderer than one who tries but fails to kill, since there is then neither the fact of death nor the intention to kill to render her action murderous. She takes the risk of becoming a murderer, but if that risk is not actualized, she is not a murderous agent: for she 'neither intended to do nor succeeded in completing the forbidden act' (Law Commission No. 102, para. 2.16).

But what of oblique intention; what if the agent is certain that he will cause harm as a side-effect of his action? Is there really a significant moral difference between, for instance, one who *intends* to kill, as a means to some further end, and one who is fully willing to cause death as a side-effect of his pursuit of such an end? There is still this difference, that the action of one who intends to kill is structured by that intention (by its relation to that prospective death) in a way in which the action of one who foresees death even as a certain side-effect is not: the former directs his will towards the death of another person, and tries to become a murderer; whereas the latter is willing, but does not try, to become a murderer. When death ensues we count them both as murderers: but when death does not ensue we may count only the former as an attempted murderer. For a direct intention to kill makes an action essentially murderous, even in the absence of an actual death to match that subjective intention: but the expectation of causing death as a side-effect does not connect the agent so closely to that death; the fact of death is then needed to render his action truly murderous. An intended attack on another person retains its character as an attack even if it fails: but the expectation that I will harm another

person as a side-effect of my action, while it displays a disregard for his interests which would make me fully responsible for that harm if it actually ensues, does not in the same way define my action itself, in the absence of such harm, as a wrongful attack.

This argument about the *mens rea* of attempts can be extended to cover other offences involving an 'ulterior intent' which 'extends beyond' the *actus reus* of the offence (p. 104 above). In these cases too we may say that direct intention creates a stronger link than does oblique intention between the agent and what she 'intends'; so that while an agent is fully responsible for obliquely intended harm which actually ensues, the difference in subjective structure between intended and intentional agency becomes more significant when the harm does not or might not ensue. Thus one who does acts 'likely to assist the enemy' (see *Steane*; p. 92 above) *with the intention* of assisting the enemy actively associates himself with the enemy's attack on his country: he directs his efforts towards their cause; he makes himself a partner in its prosecution. His action is 'necessarily hostile to [his] country in intention and purpose' (*Ahlers*, p. 626) – more so than that of one whose conduct, though he expects it to help the enemy, is not thus directed towards helping them: he defines himself as a traitor by his intention to assist the enemy. He may still be able to justify or excuse his conduct, perhaps on grounds of duress: but what he must justify or excuse is his deliberate treachery; and to do that he will need to appeal to considerations more powerful than those which might serve to justify or excuse an action which I realize will assist the enemy as a side-effect.

This argument might also help to show why we should not punish some kinds of 'impossible attempt' (see p. 183 above). In the case of the purchaser of a non-stolen recorder, for instance, the supposedly stolen character of the goods was no part of her purpose or direct intention; and, we may then say, in the absence both of a subjective intention to purchase *stolen* goods and of the objective fact of the goods being stolen goods, her action is too distant from the paradigm of an intended handling of stolen goods to count even as an attempt to handle stolen goods. In the case of the would-be cocaine producer, the direct intention to commit the offence connects the action to the paradigm of an intended production of a controlled drug: but what he actually did was so far removed from achieving what he intended that it provided no real objective connection to that paradigm; and we might, therefore, say that it did not constitute an attempt.

We cannot simply assume, however, that the argument which shows why criminal attempts should involve a direct intention to commit the relevant complete offence will apply with equal force to these other contexts: we must look at each case in turn, and ask whether the law should in this context be structured by the anti-subjectivist, non-consequentialist

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

8.5 *Concluding Remarks*

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

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

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