INTENTION, AGENCY AND CRIMINAL LIABILITY:

Philosophy of Action and the Criminal Law

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To HGM and VJM

Preface

This book offers an introduction to some central legal and philosophical issues concerning criminal liability. It flows from the belief that, in this as in many other contexts, lawyers and philosophers have much to learn from each other: my hope is that students of law will be able to see the relevance to their concerns of philosophical work in the philosophy of action; and that students of philosophy will be able to see the relevance to their concerns of legal materials and legal discussions.

I have tried to keep the book (relatively) brief: this means that I have had to ignore many issues; to leave many arguments underdeveloped; and to make only passing gestures towards various matters which really deserve a much fuller treatment. I have also tried to make it (relatively) introductory: which means that, while some of the arguments are admittedly fairly taxing, I have tried to avoid presupposing any knowledge of either philosophy or the law. For the same reason, I have not tried to refer to *all* the cases and materials that could usefully have been cited: I have, I hope, acknowledged my debts to the published work of others; beyond that, I have simply suggested a small amount of further reading on the various topics which I discuss.

I owe thanks to many people: especially to colleagues and students at Stirling on whom I have tried out many of my ideas and who have provided a friendly and encouraging intellectual environment in which to work; to Andrew Ashworth and Edward Griew, who encouraged my early efforts in this area; to Gordon Graham and Tony Ellis, who suggested that I should write this book and offered both patient support and constructive criticisms; to Roger Shiner, who has been a constant source of stimulating ideas and arguments. I owe a special debt to Murray MacBeath and Michael Menlowe, who commented in detail and very helpfully on earlier drafts of the book – even if I have not always accepted their suggestions or followed their advice. But my greatest debt is to Sandra Marshall: I discussed every aspect of the book with her; and she has provided, throughout the (over-)long process of its writing, incalculable philosophical and moral support.

I have made some use of (but have not simply reproduced) material from various articles: 'Implied and Constructive Malice in Murder' (1979) 95 *Law Quarterly Review* 418; 'Intention, Mens Rea, and the Law Commission Report' (1980) *Criminal Law Review* 147; 'Recklessness' (1980) *Criminal Law Review* 282; 'Intention, Recklessness, and Probable Consequences' (1980) *Criminal Law Review* 404; 'Recklessness and Rape' (1981) *Liverpool Law Review* 49; 'Intention, Responsibility and Double Effect' (1982) *Philosophical Quarterly* 1; '*Caldwell* and *Lawrence*: The Retreat from Subjectivism' (1983) *Oxford Journal of Legal Studies* 77; 'The Obscure Intentions of the House of Lords' (1986) *Criminal Law Review* 771; 'Intentions Legal and Philosophical' (1989) *Oxford Journal of Legal Studies* 76; 'Codifying Criminal Fault: Conceptual Problems and Presuppositions' in I.H. Dennis (ed.), *Criminal Law & Justice* (1987) 93. I am grateful to Basil Blackwell (publisher of the *Philosophical Quarterly*), De-Gorah Charles Publications (publisher of the *Liverpool Law Review*), Oxford University Press (publisher of the *Oxford Journal of Legal Studies*), and Sweet & Maxwell Ltd (publishers of the *Criminal Law Review*, the *Law Quarterly Review* and *Criminal Law and Justice*), for permission to re-use this material.

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Abbreviations

I have used the following abbreviations for frequently cited works in the text and footnotes:

C&K	C.M.V. Clarkson and H.M. Keating, *Criminal Law: Text and Materials*, London, Sweet & Maxwell, 1984.
E&W	*Elliott and Wood's Casebook on Criminal Law*; 4th edition by D.W. Elliott and C. Wells, London, Sweet & Maxwell, 1982.
Gordon	G.H. Gordon, *The Criminal Law of Scotland*, 2nd edition, Edinburgh, W. Green & Son, 1978.
S&H	J.C. Smith and B. Hogan, *Criminal Law*, 6th edition, London, Butterworths, 1988.
TCL	G. Williams, *Textbook of Criminal Law*, 2nd edition, London, Stevens, 1983.

1

Introduction

1.1 *Cases and Questions*

Hyam (1974)

Mrs Hyam's affair with Mr Jones was over, and he was now attached to Mrs Booth. At 2 o'clock one morning, she poured petrol through the letterbox of Mrs Booth's house, set light to the petrol and went home without raising the alarm. The ensuing fire killed Mrs Booth's two daughters, and Mrs Hyam was charged with their murder. She had realized, she admitted, that her action was very dangerous to those inside the house – that it might well cause death or serious injury. But she did not, she insisted, *intend* to kill or injure them; she intended simply to frighten Mrs Booth into leaving town, thus separating her from Mr Jones. So was she guilty of murder?[1]

English law had traditionally defined murder as unlawful killing 'with malice aforethought'. Now 'malice aforethought', as a term of legal art, need involve neither 'malice' in its ordinary extra-legal sense, nor premeditation: but what does it involve? Until 1957, it could amount to an intention to kill ('express malice'); an intention to cause grievous bodily harm ('implied malice'); or an intention to commit a violent felony ('constructive malice'): one who caused death by an action which was intended to kill or to cause grievous bodily harm, or in the course of a violent felony, was guilty of murder. But the Homicide Act 1957 had abolished 'constructive malice', and *Hyam* raised two questions about the post-1957 law of murder: first, what must an agent 'intend' if she is to be guilty of murder; and second, what does 'intention' mean in the criminal law?

The trial judge told the jury that Mrs Hyam was guilty of murder if she

1 See A.J. Kenny, 'Intention and *mens rea* in murder'; *TCL*, pp. 251–4; *C&K*, pp. 486–500.

'intended to (kill or) do serious bodily harm'; and that she had that intention if, when she started the fire, 'she knew that it was highly probable that this would cause (death or) serious bodily harm' (p. 65): the doctrine of implied malice was still part of the law; and an agent intends whatever she foresees as a highly probable consequence of her action.

On the basis of that direction, Mrs Hyam was convicted of murder, since she did realize that her action might well cause serious bodily harm. But the defence appealed, arguing that foresight of bodily harm as even a highly probable consequence of my action did not amount to *intending* to cause bodily harm; and that the Homicide Act had anyway abolished *both* 'constructive' *and* 'implied' malice, so that murder now required an intention to kill or to endanger life.

The Court of Appeal upheld the judge's direction and Mrs Hyam's conviction. An intention to cause serious bodily harm still sufficed for murder; and while in ordinary language 'intention' involved 'aim' or 'purpose', and not mere foresight of consequences, in law foresight of death or grievous bodily harm as a highly probable consequence of one's action constituted the 'intention' necessary for murder.

The House of Lords also upheld her conviction, by a 3:2 majority, but expressed divergent opinions. On the meaning of 'intention', Lord Diplock argued that in law an agent intends what she foresees as the *likely* consequences of her actions. Lord Cross and Viscount Dilhorne thought that foresight of a *probable* (Lord Cross) or *highly probable* (Viscount Dilhorne) consequence might constitute intention, both in ordinary language and in law; and that such foresight of the relevant consequence, whether or not it constituted intention, anyway sufficed to make the agent guilty of murder. Lord Hailsham, however, insisted that murder required an appropriate intention, and that intention is distinct 'from foresight of the probable consequences': I intend that which I *decide* to bring about – though this includes the means to my end, and the 'inseparable consequences' of that end (p. 74).

On the question of just what the murderer must intend or foresee, Lord Diplock and Lord Kilbrandon would have acquitted Mrs Hyam. The doctrine of implied malice had been (rightly) abolished: a murderer, 'if he did not intend to kill, must have intended or foreseen as a likely consequence of his act that human life would be endangered' (p. 93, Lord Diplock); an intention to cause grievous bodily harm was sufficient only if 'grievous bodily harm means some injury which is likely to cause death' (p. 98, Lord Kilbrandon). Lord Hailsham thought otherwise. An intention to cause any 'really serious' (which need not mean 'life-threatening') injury sufficed for murder; so too did an intention to expose others to a serious risk of death or serious injury: since Mrs Hyam acted with the latter intention, she was rightly convicted. Viscount Dilhorne agreed that she was guilty of murder: an intention to cause really serious injury sufficed for murder; and Mrs Hyam's awareness that her action might well cause death or serious injury constituted such an intention. Lord Cross would say only that *if* an intention to cause serious injury sufficed for murder, Mrs Hyam was rightly convicted: but this conditional opinion tipped the balance against her.

Hyam raises several issues. Should murder require an 'intention' to kill; or should an intention to cause serious injury (or to expose others to a serious risk of death or of serious injury) suffice? What should 'intention' mean in the criminal law: do I 'intend' whatever I foresee as a likely or (highly) probable consequence of my action, or is something more that such foresight required; if so, what is that 'more'? If intention is distinct from foresight of likely or probable consequences, why should murder require intention, rather than such foresight: why should a person not be guilty of murder if he causes death by doing what he knows is likely to cause death (or serious injury), whether or not he *intends* that consequence?

Cawthorne (1968)

After a domestic quarrel, Mr Cawthorne fired several shots into a room where his mistress and three friends had taken refuge from him. No one was killed (one person was slightly injured); but he was charged under Scots law with attempted murder.[2]

The defence argued that, although he had acted with an 'utter and wicked recklessness' which would have made him guilty of murder had he actually killed someone, *attempted* murder required an intention to kill – which he certainly lacked. The Court of Justiciary rejected this claim: attempted murder, said Lord Clyde, 'is just the same as murder in the eyes of our law, but for the one vital distinction, that the killing has not been brought off' (p. 36); and Lord Guthrie quoted Alison to the effect that 'a ruthless intent, and an obvious indifference as to the sufferer, whether he live or die, is to be held as equivalent to an actual attempt to inflict death' (p. 38). A person who would be guilty of murder if he caused death is guilty of attempted murder if he does not actually cause death.

This Scottish decision is at odds with English law: under s. 1(1) of the Criminal Attempts Act 1981 I am guilty of attempting to commit an offence only if I act 'with intent' to commit that offence. I am guilty of

2 See G.H. Gordon, 'Cawthorne and the *mens rea* of murder'; *Gordon*, pp. 263–7.

murder if I kill someone whom I intended only to injure severely: if I do not actually cause death, however, I am guilty of attempted murder only if I acted with the intention of causing death. I am guilty of wounding under s. 20 of the Offences against the Person Act 1861 if I wound someone either intentionally or recklessly; but if I do not actually cause a wound, I am guilty of attempted wounding only if I intended to wound.

But why should a criminal attempt require an intention to commit the complete offence, if the complete offence itself need involve no such intention? According to the English Court of Appeal in *Whybrow*,

> 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. ... It is not really illogical because, in that particular case, the intent is the essence of the crime. (p. 147)

But why is the intent the 'essence' of an attempted crime? Why should the chance fact that Mr Cawthorne did not kill anyone save him from a conviction not just for murder, but even for attempted murder?

Furthermore, what does 'intent' mean here? Two years after *Hyam*, the Court of Appeal held that foresight of bodily harm as a likely or (highly) probable consequence of my action could not constitute the 'intention' needed for an attempt to cause bodily harm; whatever *Hyam* decided for the case of murder, criminal attempts require a 'specific intent' which must involve 'a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not' (*Mohan*, p. 11). This implies that, while a broader notion of intention which includes foresight of likely or probable consequences might be appropriate in other criminal contexts (such as murder), the concept must be defined more narrowly in the law of attempts. But why should this be so: why should 'intention' not have the same meaning throughout the criminal law? And what is a 'specific intent', or a 'decision to bring about' a specified consequence, if it is something more than foresight of that consequence, but need not involve a 'desire' for it?

Caldwell (1981)

Mr Caldwell quarrelled with a hotel owner for whom he had been working; one night, when drunk, he set fire to the hotel in revenge. The fire was extinguished without serious damage to the hotel or any injury to the hotel guests: but he was charged with intentionally or recklessly damaging property (under s. 1(1) of the Criminal Damage Act 1971), and with the more serious offence of damaging property with intent to endanger life or being reckless as to whether life would be endangered (under s. 1(2) of the Act). He pleaded guilty to the first offence, but not guilty to the second: he did not intend to endanger life; and since he was so drunk at the time that it did not occur to him that he might be endangering the lives of those in the hotel, he was not, he argued, reckless as to whether life would be endangered.[3]

At his trial, and in the Court of Appeal, everyone agreed that criminal recklessness normally requires *conscious* risk-taking: I am reckless as to the harm my action might cause only if I realize that such harm might ensue; if I am unaware of that risk of harm I am at worst negligent, not reckless as to that harm. As an exception to this general rule, however, one whose unawareness of the risk his action creates is due to self-induced intoxication can sometimes be held reckless as to that risk; and what concerned the lower courts in *Caldwell* was whether this was true of an offence under s. 1(2) of the Criminal Damage Act. But neither this issue, nor the grounds on which the House of Lords held that Mr Caldwell should be acquitted on the s. 1(2) charge, concern us now; our concern is with the Law Lords' understanding of the central notion of recklessness. For by a 3:2 majority the House of Lords rejected the view that recklessness normally requires conscious risk-taking: a person is 'reckless' as to whether property will be destroyed or damaged if

> (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it. (p. 354, Lord Diplock)

Recklessness as to whether life would be endangered should be understood in the same way.

This ruling was vigorously attacked by critics who believe that recklessness should involve an actual awareness that my action might cause the harm as to which I am said to be reckless (and who thought that the courts had finally accepted this view). Lord Edmund-Davies expressed this view in his dissenting judgment: unlike negligence, he said, 'recklessness involves foresight of consequences' (p. 358).

The main question raised by *Caldwell* is thus whether recklessness should be defined as conscious risk-taking; or am I 'reckless' as to some harm if I fail 'to give any thought' to the obvious risk that my action might cause that harm? But we must also ask why the criminal law should be thus concerned with recklessness. Why should the s. 1(2) offence not require an *intention* to endanger life? Alternatively, why should even recklessness be

3 See G. Williams, 'Recklessness redefined'; G. Syrota, 'A radical change in the law of recklessness?'; *S&H*, pp. 61–8.

needed; why should it not be enough that the defendant *negligently* endangered life in damaging property?

Morgan (1975)

A related issue about the nature of recklessness arose six years earlier. Mr Morgan invited three friends to have sexual intercourse with his wife. He told them, they claimed, 'to expect some show of resistance' on her part, 'but that they need not take this seriously since it was a mere pretence whereby she stimulated her own sexual excitement' (p. 186): so they forcibly overcame her (in fact genuine) resistance in the honest, though admittedly unreasonable, belief that it was merely play-acting – that she really consented to intercourse with them.[4]

They were convicted of rape after the trial judge held that rape requires an intention 'to have intercourse with this woman without her consent' (p. 187), and that their alleged belief in her consent could acquit them only if it was based on reasonable grounds. The Court of Appeal upheld this direction, rejecting the defence argument that a man who believes (however unreasonably) that a woman consents does not intend 'to have intercourse without her consent'. Proof that the woman did not consent to intercourse creates a presumption that the defendant realized that fact; he can rebut that presumption, and secure an acquittal, only by showing that he had reasonable grounds for his alleged belief that she did consent.

The House of Lords rejected this argument by a 3:2 majority, and held that one who has intercourse in the honest (though unreasonable) belief that the woman consents is not guilty of rape. Rape does not merely involve having intercourse with a woman who does not in fact consent: it requires an *intention* either to have intercourse without her consent (i.e. realizing that she does not consent) or 'to have intercourse *nolens volens*, that is recklessly and not caring whether the victim be a consenting party or not' (p. 209, Lord Hailsham); and one who believes, however unreasonably, that she consents does not act with either of those intentions.

Lord Edmund-Davies, one of the two dissenting voices, agreed that this was what the law *ought* to hold, but felt bound to find that as the law actually stood, a defendant must cite a reasonable belief in consent to secure an acquittal. Only Lord Simon thought that the law *should* demand a reasonable belief in consent:

> [a] woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him. (p. 221)

4 See the *Report of the Advisory Group on the Law of Rape*; E.M. Curley, 'Excusing rape'; A.J. Kenny, *Freewill and Responsibility*, pp. 57–63.

The Law Lords upheld the defendants' convictions in *Morgan*; for their claim to have believed that Mrs Morgan consented was clearly untrue. But later that year, in *Cogan*, the defendant was acquitted of rape on the basis of a similar claim that his victim's husband had persuaded him into the admittedly quite unreasonable belief that she consented to intercourse with him.

According to *Morgan*, a man is guilty of rape only if he knows that the woman does not consent or is reckless as to whether she consents; and if he believes, however unreasonably, that she consents he is not reckless as to whether she consents. But should we agree that a man who persists with intercourse in the utterly unreasonable belief that the woman consents is not reckless as to her consent? Why, anyway, should rape be defined (as the Sexual Offences (Amendment) Act 1976 defines it) to require either knowledge of or recklessness as to the woman's non-consent? Why should not conviction for a crime as serious as rape require knowledge that the woman does not consent? Alternatively, why should we not convict of rape anyone who has intercourse with a woman who does not in fact consent to it, whether or not he realizes that she might not be consenting; or require only negligence, rather than recklessness, as to her consent as a basis for conviction?

These four cases raise problems concerning '*mens rea*', or 'the mental element in crime'.

1.2 *Actus Reus and Mens Rea*

'*Actus non facit reum nisi mens sit rea*' runs the traditional maxim: an act does not make a person guilty unless his mind is also guilty. Mrs Hyam's act caused death; Mr Caldwell's act endangered life. To convict them of the offences with which they were charged, however, the prosecution had to prove not only that they did acts which had such actual consequences, but also that they acted with the *mens rea* required for those offences: that Mrs Hyam intended to cause death or serious injury; that Mr Caldwell intended to endanger life or was reckless as to whether life would be endangered.

Jurists commonly analyse criminal offences into the two elements of *actus reus* and *mens rea*. The *actus reus* consists in the 'external elements' (elements external to the defendant's mind) of the offence; it typically involves an 'act' by the defendant together with certain specified circumstances and consequences. The *mens rea*, or 'mental element', consists in

the 'state of mind' (normally intention or recklessness) in relation to that *actus reus* which must be proved to secure a conviction. The *actus reus* of murder is the killing (an act which has as a consequence the death) of a human being; its *mens rea* is an intention to cause death or serious injury. The *actus reus* of rape is unlawful sexual intercourse with a non-consenting woman (an act of intercourse a circumstance of which is that the woman does not consent to it); its *mens rea* is (apart from the intention to have intercourse) knowledge that she does not consent or recklessness as to her consent. The *actus reus* of an offence under s. 1(1) of the Criminal Damage Act is an act which destroys or damages another's property; its *mens rea* is an intention to destroy or damage such property, or recklessness as to whether it is destroyed or damaged.[5]

A defendant is guilty of a criminal offence only if he committed its *actus reus* with the appropriate *mens rea*: he can avoid conviction by admitting that he actually committed the *actus reus* of the offence (he caused death; he had intercourse with a non-consenting woman), but offering an excuse which shows that he lacked the requisite *mens rea* (he did not intend or expect to cause death or injury; he thought that the woman consented). As in the criminal law, so with morality. The fact that I give you information which is actually false does not by itself entitle you to condemn me as a liar. You must ask whether I knew the information to be false and whether I intended to deceive you; and I can avoid being branded a liar by offering an excuse which denies the 'mental element' in lying: that I believed the information to be true and did not intend to deceive you.

Our concern is with the 'mental element in crime' and with the role played by the concepts of intention and recklessness in defining that mental element.

The 1985 Draft Criminal Code for English law specified a 'general requirement of fault'. 'Unless a contrary intention appears, a person does not commit a Code offence unless he acts intentionally, knowingly or recklessly in respect of each of its elements' (cl. 24(1)). (The revised 1989 Draft Code includes a similar requirement (cl. 20).)[6] This clause would give statutory force to the principle that criminal guilt requires *mens rea* (a

5 See *S&H*, ch. 4; *TCL*, ch. 3.1; *C&K*, ch. 2.I–III; *E&W*, chs 2–3; A.T.H. Smith, 'On *actus reus* and *mens rea*'.

6 As part of the Law Commission's project of codifying English criminal law, a team of academic lawyers produced a Draft Criminal Code, which was published with a commentary in 1985; *Codification of the Criminal Law* (referred to hereafter as *1985 Code*). After considering comments on the 1985 Code, the Law Commission published its own revised Draft Criminal Code in 1989; *A Criminal Code for England and Wales* (referred to hereafter as *1989 Code*).

'fault element'), consisting in intention, knowledge or recklessness, as to every element of the *actus reus* of the relevant offence; that principle should bind the courts unless the legislature makes clear that no such fault element is required.

As a description of the actual law, this principle is far from exceptionless. Though most (and especially the most serious) offences require intention or recklessness, some need involve only negligence: manslaughter can, perhaps, be committed by gross negligence (*S&H*, pp. 352–5); one who drives 'without due care and attention' commits an offence of negligence (Road Traffic Act 1988, s. 3), as do employers who fail to 'ensure, as far as is reasonably practicable, the health, safety and welfare at work' of their employees (Health and Safety at Work etc. Act 1974, s. 2(1)).

Nor is *mens rea* always required as to every element of the *actus reus*: a man over the age of twenty-four who has sexual intercourse with a girl under the age of sixteen is guilty of an offence even if he neither knows nor has reason to suspect that she is under sixteen (Sexual Offences Act 1956, s. 6); a shopkeeper can be guilty of the offence of selling adulterated milk even if she did not suspect that the milk was adulterated and had taken all reasonable care to ensure that it was not adulterated (Sale of Food and Drugs Act 1875, s. 6; see Food and Drugs Act 1955, ss. 32, 94(4), 113). Liability for such offences is to some degree 'strict'; they do not require any of the normal 'fault elements' of intention, recklessness or even negligence as to one or more of the elements of the *actus reus*.[7]

As a claim about what the law *ought* to be, however, the principle commands wide support. It is surely unjust to hold someone strictly liable for a criminal act he did not commit intentionally, recklessly or negligently: for selling adulterated milk when he had taken all due care to ensure that the milk was pure; or for having sexual intercourse with a girl whom he believed, with good reason, to be over sixteen. And negligence is surely a much less serious fault than intention or recklessness; the more serious kinds of offence, at least, should require intention or recklessness. (In what follows, I will be concerned primarily with serious offences against person or property, such as murder, rape, wounding, assault, theft and criminal damage: for it is to these that the maxim '*actus non facit reum nisi mens sit rea*' applies most forcefully. Although I think myself that *criminal* liability should *always* require at least negligence, I shall not discuss the issue of whether there are some 'statutory' offences (to do, for instance, with pollution and with consumer protection) for which strict liability may be permissible.)

7 On strict liability, see *S&H*, ch. 6; *C&K*, pp. 173–90; *E&W*, ch. 3.6.

The Draft Criminal Codes also specify a hierarchy of 'degrees of fault', which marks intention (or knowledge) as the highest degree of fault, followed by recklessness (*1985 Code*, cl. 23; *1989 Code*, cl. 19); this expresses the principle that intention is the most serious kind of criminal fault. There are indeed some offences, such as murder and criminal attempts, for which recklessness alone is not sufficient; an appropriate intention (to kill or cause serious injury; to commit the complete offence) is needed. In some cases, too, the law distinguishes a more serious offence involving intention from a lesser offence of recklessness: while murder in English law requires intention, the lesser offence of manslaughter need involve only recklessness; and the Offences against the Person Act 1861 distinguishes the simple s. 20 offence of wounding, which can be committed either intentionally or recklessly, from the more serious s. 18 offence of wounding 'with intent to do some grievous bodily harm'. Even when an offence can be committed, as many can, either intentionally or recklessly, the most serious instances of the offence will involve intention: I commit an offence under s. 1(1) of the Criminal Damage Act 1971 if I destroy another's property either intentionally or recklessly; but an act of intentional destruction is the paradigm, and most serious, instance of this offence.

As in the criminal law, so with morality. If I give you false information, you can properly criticize me only if my action was at least negligent. If I mislead you negligently, through failing to notice or guard against the risk that what I say is false, I am to some degree culpable: but my offence is surely worse if I mislead you recklessly, by telling you what I know might well be false; and I am yet more seriously culpable if I intentionally or knowingly deceive you, by saying what is designed to deceive you or what I know will deceive you.

But it is not enough just to note that intention and recklessness are typically taken to be the central species of criminal fault, and that intention is typically thought to be the most serious kind of fault; we must explain *why* this should be so.

Why, first, should criminal guilt require *mens rea* at all? Mr Caldwell did, after all, damage property and endanger life; Mrs Hyam did cause two deaths. Each thus brought about a kind of harm which the criminal law presumably aims to prevent, and which is specified in the definition of the *actus reus* of the offence with which each was charged: so why should they not be convicted of those offences, whatever their intentions or states of mind? Why, more generally, should an agent not be convicted of a criminal offence just so long as what she did amounted to the *actus reus* of an offence – whether or not she intended to commit that *actus reus* or realized that she was or might be committing it? Why should various typical

excuses, which deny intention or recklessness as to the actual consequences of my actions ('I didn't mean to do it'; 'It was an accident'; 'It was a mistake'; 'I didn't realize that that might happen') exempt me from criminal liability; why should not all offences be offences of strict liability?

Why, secondly, should intention and recklessness be so crucial to criminal liability? Even if some kind of 'fault' should generally be required for a criminal offence, why should negligence not suffice; why should we not convict of an offence anyone who negligently causes a harm which the law aims to prevent (convict of wounding anyone who negligently wounds another), rather than convicting only those who commit the *actus reus* intentionally or recklessly?

Why, thirdly, should intention sometimes be distinguished from recklessness, as a categorially more serious kind of fault? For some offences either intention or recklessness suffices as the *mens rea*: why should others require intention rather than recklessness?

An attempt to work towards answers to these questions, and to the questions raised by the four cases with which this chapter began, can best be founded on a discussion of the central concepts of intention and recklessness: for in seeing what these concepts can, or should, mean we shall also see why they should pay such a central role in the criminal law. Recklessness will be discussed in Part II; I shall begin with intention.