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A Clear Concept of Intention: Elusive or Illusory?

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Introduction

The conception of intention occupies a peculiar place in criminal law. Whilst its doctrinal and ideological importance is hardly to be questioned, its practical significance at the level of enforcement is very different from that envisaged by criminal law doctrine. And although it has been subjected to at least as much judicial and academic scrutiny as any other *mens rea* term,¹ theoretical and practical consensus around a clear concept of intention seems as far away as ever. In this article, I shall revisit the territory of recent cases considering the concept of criminal intention, focusing in particular on the decision of the House of Lords in *Moloney*.² It will be argued that a careful re-reading of the case can help us to see some important issues which the orientation of many commentaries around a conceptual analysis of intention has tended to obscure. In particular, the aim is to examine the significance of, and ambivalence within, appeals to 'common sense' and 'ordinary language' in resolving the practical difficulties which continue to arise in the interpretation of offences which include a requirement of intention. Whilst the recent cases and debates about intention provide a useful forum for such an inquiry, the points which emerge from my analysis have equal significance for other areas of criminal law. They also, I shall suggest, raise some important questions about the ideals of consistency and certainty which inform much of the relevant debate, and have implications for the approach which those of us who study and teach criminal law should take to the ambit of our studies.

A Why Bother About Intention?

Before embarking on any substantive analysis, however, it is important to consider some sceptical suggestions to the effect that intention has already had a good deal

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1 *Mens rea* is the (not entirely happy) umbrella term used by most criminal law scholars to refer to a range of practical attitudes or states of mind on the defendant's part, which form part of the definition of many offences.

2 [1985] 1 All ER 1025.

more attention from criminal law scholars than it really deserves. Two kinds of scepticism are worth considering. The first kind of sceptic — let's call her the descriptive sceptic — focuses her critical attention on the remarkable continuity among criminal law commentators in terms of their recognition of intention as the central use of *mens rea*. Legal philosophers with such divergent views as Hart³ and Duff⁴ have accorded intention this kind of paradigm status. Albeit in different ways, each of them sees a requirement of intentional action as a key expression of the values associated with the 'principle of *mens rea*' — the presumption that each offence, absent clear indications to the contrary, requires proof that the defendant had some form of *mens rea* — which is central to criminal law doctrine. For Hart, the agent who acts with intent exercises most fully and freely the capacities for knowledge, choice and control which are the basis for genuine responsibility. For Duff, the agent who acts with intent most closely and dispositionally identifies herself with her action, for which she can hence be held accountable. Intentional conduct, in other words, constitutes the paradigm of self-determined action. Similarly, legal commentators like Williams,⁵ Smith and Hogan,⁶ Card, Cross and Jones,⁷ Clarkson and Keating⁸ mark this centrality by dealing with intention first among *mens rea* terms. Despite important differences in their interpretations of the moral values underlying the 'principle of *mens rea*,' each of these commentators expressly or implicitly suggests that offences which require proof of intention express those values fully.

Against this, the descriptive sceptic points out that intention in fact now has to be proved in a very small number of offences, the vast majority requiring only proof of recklessness or negligence. Furthermore, she argues, the offences in which intention does have to be proven, notably that of murder, whilst among the most serious in criminal law, are also among the least frequently charged. And the one main exception to this — the offence of theft — is arguably removed from the category of offences which genuinely require intention to be proved because of the extraordinarily extended conception of intention permanently to deprive embodied in section 6 of the Theft Act 1968. In the light of this marginality of intention in criminal law in practice, why should criminal law commentators continue to accord it so much attention?⁹

The other kind of sceptic I shall call the reductive sceptic. His argument is reminiscent of legal realism: he might suggest that legal concepts such as intention merely serve to mask retrospective rationalisations of substantive value judgments which courts or commentators want to make. On this view, the debate about competing conceptions of intention is just so much hot air: no actual conception in fact constrains the substantive ascriptions of responsibility in question. The function of the concept of intention in legal discourse is hence not logical, but ideological.

3 H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

4 R.A. Duff, 'The Obscure Intentions of the House of Lords' (1986) *Crim LR* 771; 'Intentions Legal and Philosophical' (1989) *OJLS* 76; *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990).

5 G. Williams, *A Textbook of Criminal Law* (London: Stevens, 2nd ed, 1983).

6 J.C. Smith and B. Hogan, *Criminal Law* (London: Butterworths, 7th ed, 1992).

7 R. Card, Cross and Jones, *Criminal Law* (London: Butterworths, 12th ed, 1992).

8 C. Clarkson and H. Keating, *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 2nd ed, 1990).

9 See N. Lacey, C. Wells and D. Meure, *Reconstructing Criminal Law* (London: Weidenfeld and Nicolson, 1990) chs 1 and 4.

I have some sympathy with both of these kinds of scepticism, although I reject them in the particular form in which I have set them out. As far as the descriptive sceptic is concerned, her substantive claim seems to me to be right: but I dispute the conclusion which she draws from it. Certainly, the practical marginality of applications of doctrinal conceptions of intention, and the converse importance of other, lay and official, conceptions of intention in the practice of criminal enforcement has implications for what we should study and teach in law courses. Indeed, this is true not only in the case of offences which require proof of *mens rea* but also for offences which are formally of 'strict' liability, where research has shown that informal attributions of blame premised on assumptions about potential defendants' attitudes influence regulators' enforcement decisions.¹⁰ But the practical marginality of intention does suggest that the continuing centrality accorded to the concept by judges and commentators, as well as its continued presence in some of the most serious criminal offences, poses rather different, and equally interesting questions to those addressed by the traditional commentaries. In short, it suggests that intention has an ideological significance in criminal law which outweighs its empirical significance.

This is, of course, a conclusion with which the reductive sceptic will be sympathetic. But his basic claim seems to me to be more problematic than that of the descriptive sceptic. For whilst it is incontrovertible (and widely accepted by traditional as well as radical commentators) that legal concepts are incapable of *determining* particular outcomes in many cases, it seems equally clear that they predispose areas of law towards certain outcomes over others.¹¹ Indeed, this constraining power of legal concepts has been an important tool in the construction of critical arguments about the political biases of criminal law — for example, arguments about the extent to which the conceptual structure of *mens rea* requirements renders problematic the criminalisation of corporations.¹² The reductive sceptic's argument therefore seems to undermine projects of critical scholarship as much as those of orthodox doctrine, and his claims should be rejected, at least in the strong form in which I have presented them. But there is a grain of truth in his argument. This lies in the insistence that the practical application of legal concepts such as intention is in a particular context: that of ascriptions of responsibility and, in criminal law, culpability. Hence, to the extent that legal concepts are not determinative of outcomes, substantive ethical and political issues (as indeed philosophical commentators assume) inevitably underlie their application. And it seems unlikely, to say the least, that these can ever be completely accommodated within an ideal set of legal concepts.

B Competing Conceptions of Intention in Criminal Law

In considering recent discussions of the concept of intention in criminal law, it will be useful to distinguish between those which emphasise the importance of conceptual analysis, and those which give greater emphasis to the claims of 'ordinary usage.' This, it should be noted, is not an absolute distinction:

10 See eg W.G. Carson, 'White-collar Crime and the Enforcement of Factory Legislation' (1970) 10 BJ Crim 383; G. Richardson, 'Strict Liability for Regulatory Crime: The Empirical Research' (1987) Crim LR 295; see also C. Wells, 'The Decline and Rise of English Murder' (1988) Crim LR 788; N. Lacey, C. Wells and D. Meure, *Reconstructing Criminal Law*, op cit n 9, pp 233–256.

11 A.W. Norrie, 'A Critique of Criminal Causation' (1991) MLR 685, pp 689, 693.

12 See C. Wells, *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993).

commentators like Williams,¹³ Buxton,¹⁴ and Clarkson and Keating,¹⁵ who favour appeals to ordinary usage in fixing criminal legal concepts, do not eschew entirely a discussion of the conceptual issues about the relationship between intention, desire and foresight. Conversely, those like Ashworth,¹⁶ Griew,¹⁷ or Card, Cross and Jones,¹⁸ who are critical of too ready a recourse to the test of usage, do not reject it entirely and are generally sympathetic to the idea that legal usage should not depart too radically from ordinary usage. Frequently, as in the recent work of Antony Duff,¹⁹ the relationship between conceptual analysis and appeals to usage is somewhat opaque. This very opacity seems significant to me, and I shall return to it once I have set out the positions which lie at either end of the conceptual analysis/common usage spectrum.

Conceptual Analysis

The role of conceptual analysis in debates about the meanings of legal terms such as intention is widely regarded as simply inevitable: since concepts are the basic currency of the intellect, human practices are constructed and carried on in terms of conceptual frameworks which it is incumbent upon us to analyse. Yet conceptual analysis is further motivated by some very familiar and widely held political commitments. These are beliefs associated with the rule of law and indeed the 'principle of *mens rea*' which forms a central part of criminal law doctrine. Most importantly, they include the idea that criminal law, which imposes significant burdens and risks on citizens, should be as clear, certain, consistent and coherent as possible, so as to enable us to plan our lives around its proscriptions (an idea which depends upon the assumption of a rationalist, anti-determinist conception of human behaviour). Conceptual analysis can contribute to this ideal, so the argument goes, by fixing or explicating our legal concepts as clearly as possible and hence by promoting certainty and predictability. This, incidentally but significantly, is also assumed to have the benefit of rendering criminal law most efficient from the legislator's point of view: clear concepts are tools which enable the law-makers to catch within the ambit of criminal law just those forms of behaviour which they want to proscribe. If only we could persuade all actors in the criminal process to abide by the same, clear definitions of legal concepts, the ideal of the rule of law would, on this view, be realised. The hope which this line of thought holds out is itself powerful in reinforcing the idea of the rule of law as desirable and attainable, and the more powerful because of its elusiveness.²⁰

Among defenders of this kind of conceptual analysis, we need further to distinguish those whom we might call the 'stipulative analysts' and those we could call the 'moral analysts.' The stipulative analysts do not claim that the clearly delineated concepts which they advocate necessarily correspond to any moral, metaphysical or usage-based distinctions or standards. What matters is simply that

13 *A Textbook of Criminal Law*, *op cit* n 5.

14 R. Buxton, 'Some Simple Thoughts on Intention' (1988) *Crim LR* 484.

15 *Criminal Law: Text and Materials*, *op cit* n 8.

16 A. Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991).

17 E. Griew, 'Consistency, Communication and Codification' in P.R. Glazebrook (ed), *Reshaping the Criminal Law* (London: Stevens, 1978).

18 *Criminal Law*, *op cit* n 7.

19 *Intention, Agency and Criminal Liability*, *op cit* n 4.

20 The plausibility of these aspects of the rule of law ideal rests upon a number of questionable assumptions not only about the possibility of clarity and consistency in legal proscription and enforcement but also about the motivational and cognitive bases for offending behaviour.

law — typically by way of legislative fiat, and preferably by systematic codification — should stipulate a particular concept, and that it be held to. This kind of approach is perhaps best exemplified by recent projects of draft codification by the Law Commission and its working party.²¹ The moral analysts, by contrast, think that the role of conceptual analysis is to delineate legal concepts which do indeed reflect matters such as differences of culpability and responsibility. The moral analysts tend to be much more alive, therefore, both to the context in which legal concepts are to be applied, and to the substantive issues about culpability and the broader functions and meanings of criminal justice which inevitably underlie the practical application of legal concepts. They express rather than obscure the facts, for example, that what was at issue in cases such as *Gillick*²² or *Steane*²³ was the substantive scope of the doctor's and Steane's respective duties rather than a formal conceptual debate about the meaning of intention. Antony Duff's recent work²⁴ is a good example of this kind of sensitivity, although his parallel appeals to usage are occasionally suggestive of a broader (and I think less tenable) claim to the effect that distinctions reflected in settled usage themselves reflect stable moral distinctions. Duff's work also illustrates the great difficulty in showing an adequate sensitivity to the practical, responsibility-ascribing context of the interpretation of an action as intentional whilst avoiding a circularity which is close to a kind of reductive scepticism. Even in Duff's careful analysis of the relationship between intention and judgments of culpability, it is sometimes difficult to tell which is the horse and which the cart.²⁵ Indeed, the circularity can be seen as an implication of the idea that, in criminal law, attributions of *mens rea* simply are (at least provisional) attributions of culpability.

What the stipulative and the moral conceptual analysts share is a certain kind of optimism — an optimism which strikes me, along with many others, as misplaced. The optimism has ultimately to do with the extent to which conceptual analysis can contribute to the rule of law ideals of certainty and consistency, and proceeds from a rather simple-minded subscription to the general attainability and value of those ideals. It relates to a number of distinguishable claims. In the first place, the stipulative analysts seem misguided in their assumption that formal, conceptual

21 Law Commission, *Criminal Law: Codification of the Criminal Law* No 143 (London: HMSO, 1985); *A Criminal Code for England and Wales* No 177 (London: HMSO, 1989); *Legislating the Criminal Code: Offences against the Person and General Principles*, Consultation Paper No 122 (London: HMSO, 1992).

22 *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402. In this (civil) case, Gillick challenged the legality of a DHSS Memorandum of Guidance which suggested that a doctor was entitled in exceptional circumstances to prescribe contraception for girls under 16 without consulting their parents. She sought declarations that the Memorandum was without legal authority and that doctors and other Family Planning professionals were not permitted to give contraceptive treatment or advice to any child of hers below the age of 16 without her (Mrs Gillick's) consent. The question arose as to whether a doctor giving such treatment or advice could be liable as an accessory to the offence of unlawful sexual intercourse under the Sexual Offences Act 1956. Lords Fraser, Scarman and Bridge agreed that this would depend on the doctor's intention.

23 [1947] KB 997. Steane was charged with doing acts intended to assist the enemy during war time. He had participated in propaganda broadcasts, after threats on the lives of his family had been made by the German authorities. He was acquitted on the basis that his acts were intended to save his family rather than to assist the enemy. Like the views expressed by some of the judges in the *Gillick* case (*op cit* n 22), this analysis blurs the supposedly clear line between intention and motive in criminal law. It is interesting, therefore, to note Lord Bridge's reference near the end of his speech in *Moloney* to the propriety of the approach taken in *Steane*.

24 *Intention Agency and Criminal Liability*, *op cit* n 4.

25 cf Duff, *ibid* pp 87, 99, 102.

analysis would be likely, if embodied in legislation or judicial decision, to promote certainty in a significant way. For the real source of uncertainty has, arguably, little to do with technicalities and everything to do with substantive political and ethical disagreements about both ascriptions of responsibility and the legitimate functions and varied meanings of criminal law. Indeed, the short way to undermine this aspect of the stipulative analyst's optimism is to point to the continuing uncertainties and indeterminacies which pervade areas of criminal law in which concepts have been quite fully stipulated. A good example would be judicial disagreements about the contours of the concept of recklessness, which continued long after the detailed elaboration of that concept in *Caldwell*.²⁶ Second, whilst the moral analyst correctly places substantive questions on the agenda, she seems over-optimistic in assuming that subtle distinctions of culpability can ever be captured in *invariant* conceptual distinctions embedded in concepts which have to be applied across a wide range of substantive offences and contexts.²⁷ So, third, it seems doubtful whether, by either stipulative fiat or fiat underpinned by arguments about moral distinctions, we could in any case make particular concepts stick. Conceptual and substantive disagreements would be bound to continue and, in any case, legal concepts have to be expressed in language which is itself relatively open-textured and hence susceptible of further interpretation. So there is room for scepticism about even the modest idea that conceptual debate helps gradually to narrow down the ambit of disagreement. And, finally, the impact of conceptual analysis is unlikely to be more than moderate given the fact that unclarity of particular legal terms is only one among many sources of indeterminacy in criminal law. Other important ones are the interpretation of how groups of ideas in definitions of offences fit together — how far does the *mens rea* requirement run, for one common example; the time frame over which criminal law definitions are to be applied; and the way in which we individuate and translate descriptions of defendants' actions into definitions of offences which are inevitably open-ended.²⁸

Among these various points, the principal message is this: the real source of uncertainty and disagreement in the application of criminal law concepts such as intention is not ultimately to do with the concept, but with practical, moral and political issues. Should this person be convicted, and of what offence? What is the appropriate role of criminal law in this area? Conceptual analysis of *mens rea* terms, let alone their stipulation, is inadequate as a lid to keep a jar containing these kinds of substantive issues shut. I am not unaware of the echo of reductivism here, and so I should repeat that I do not regard the stipulation of particular conceptual definitions as irrelevant or impotent. They certainly do predispose outcomes in particular directions. But they do not, as the history of criminal law shows, do so in the determinative way which strong advocates of conceptual analysis assume. Finally, it should be noted that the main burden of my argument so far has been what might be called an 'immanent' critique of the analysts' position: I have generally been questioning the validity of the arguments *given* their subscription to certain ideas associated with the rule of law. I shall return below to the further question of whether this immanent critique throws doubt on the recommendations of the underlying commitment itself.

26 [1982] AC 341: see eg *Elliott v C* [1983] 2 All ER 1005; *Kong Cheuk Kwan* (1985) 82 Cr App R 339; *Shimmen* (1987) 84 Cr App R 7.

27 See J. Gardner and H. Jung, 'Making Sense of *Mens Rea*: Antony Duff's Account' (1991) 11 OJLS 559.

28 See M. Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 *Stanford L Rev* 181; Lacey, Wells and Meure, *Reconstructing Criminal Law*, op cit n 9, ch 1.

Ordinary Usage

At the other end of the spectrum, we have the resort in the face of difficulties of definition to 'ordinary usage.' It should be noted that ordinary usage is itself something of a chimera. For just as 'legal usage' is arguably a relatively specific and autonomous area of discourse, many other areas of linguistic usage develop particular, local and technical meanings for 'ordinary' words. And even within these local areas, usage is fluid and often contested. This notwithstanding, the resort to the 'common usage' or the 'ordinary person's understanding' of a particular term is a familiar technique in criminal law — perhaps most famously debated in recent years in the context of the concept of dishonesty under the Theft Act 1968.²⁹ On the view which appeals to 'ordinary usage,' the attempt to articulate and fix particular conceptual analyses in legislative or judicial form is both unnecessary and misguided. It is unnecessary because, in the case of concepts such as intention, dishonesty, violence and so on, 'ordinary people' have a clear if unarticulated sense of what these terms mean. So it can simply be left to the jury or the lay magistrate to apply those ordinary understandings to the case at hand. And it is misguided, because part of the function of criminal laws which employ those terms is precisely to bring to bear on the alleged offender the standards of judgment thought to be buried within and reflected by 'ordinary usage': the thought behind the legal proscription in question is the application of a general rather than a technical standard in this respect. The 'ordinary language' view is therefore motivated by at least two concerns: the investment of *mens rea* terms with 'ordinary' or 'common sense' meanings, and the delegation of decision-making power in Crown Court cases to jury rather than judge. In some sense, on this view, the framers of criminal laws articulate definitions of offences in terms of a combination of legal and factual questions.³⁰ The line between questions of law and those of fact is notoriously hard to draw, but the approach based on 'ordinary language' does appear to make conviction depend, in a wide range of cases, on questions of fact — or what might more accurately be called 'lay evaluation.' We should note the attractions to law makers of the rhetorical force which attaches to legislation framed in terms of 'ordinary' terms which resonate with citizens' pre-legal ideas of wrongdoing.

To set out the view which appeals to 'ordinary language' is already to suggest its main weakness as a tool of legal practice. This lies in its assumption that a settled, widely shared understanding underpins the usage of all or most such terms employed by criminal law. It seems only reasonable to observe that this assumption is undermined by recent case law history. Even giving due weight to the opacity of the trial judges' directions in recent murder cases such as Moloney, Hancock and Shankland,³¹ and Nedrick,³² it is hardly to be doubted that the return of the jury for further advice about the meaning of 'intention' must be put

29 The debate stems from the fact that the Theft Act offered only a partial definition of dishonesty (s 2). Subsequent cases have developed guidelines which make the attribution of dishonesty for the purposes of the section depend upon whether 'ordinary people' would regard the behaviour in question as dishonest and whether the defendant realised this to be the case (*Ghosh* [1982] 2 All ER 689). These questions are to be determined by the jury. For discussion, see R. Tur, 'Dishonesty and the Jury: A Case Study in the Moral Content of Law' in A. Phillips Griffiths (ed), *Philosophy and Practice* (Cambridge: Cambridge University Press, 1985) p 75; Lacey, Wells and Meure, *Reconstructing Criminal Law*, *op cit* n 9, pp 469–470.

30 A. W. Norrie, 'Subjectivism, Objectivism and Criminal Recklessness' (1992) 12 OJLS 45.

31 [1986] 1 All ER 641.

32 [1986] 3 All ER 1.

down not just to bewilderment in the face of legal 'guidelines' but also to uncertainty and disagreement over 'ordinary language.' On all the evidence, and in ordinary terms, could Moloney be said to have intended to kill his stepfather: could Hancock and Shankland be said to have intended to kill or seriously injure the drivers and occupants of the vehicles coming up the motorway?³³ Can at least some 'core' notion of intention be identified, in relation to which 'penumbral' cases can easily be incorporated within 'ordinary' usage?

In the face of this kind of problem, judges and commentators have often favoured an intermediate position in which the resort to ordinary language is buttressed by recourse to conceptual analysis and stipulation. Typically, this has consisted in the incomplete and often negative delineation of the term in question, either in terms of a partial definition, or of judicial guidelines, or both. A good example would be dishonesty under the Theft Act 1968, of which section 2 partially defines dishonesty by excluding three specific instances and including another. This is supplemented at the judicial level by guidelines which set out two questions which the jury has to ask itself in determining whether the defendant is dishonest.³⁴ These questions mark out the concept without supplying the ultimate standard to be applied. A similar compromise strategy is being worked out in the case of intention, and the recent cases will now be analysed in more depth. My aim is to suggest that the strategy entails a fundamental tension, widely present in criminal law cases. This tension is interesting, because it undermines the traditional doctrinal insistence on the importance and (at least relative) possibility of coherence and consistency of principle in criminal law. But, I shall argue, it does so in ways which are rather different from (and which have subtler and less unambiguous implications than) those pointed out by one common approach to 'critical' legal analysis in the criminal law sphere.

C Appeal Courts, Juries and the Idea of Intention

In the cases of *Moloney*, *Hancock and Shankland* and *Nedrick*, the Court of Appeal and the House of Lords engaged in an extended and somewhat tortuous analysis of the idea of intention in the context of murder: their reasoning expressly applies, however, to intention generally in criminal law. Because of the facts of these particular cases, and because of the last major House of Lords decision in the area — the case of *Hyam*³⁵ — the main practical and conceptual question which arose was how the concept of intention related to that of foresight. In particular, the cases concern whether foresight of consequences as virtually or 'morally' certain constitutes an intention to bring those consequences about. On this basic conceptual issue, as is well known, the three successive cases of *Moloney*, *Hancock* and *Nedrick* failed to take up a clear stance, judicial analysis veering between implicit inclusions and exclusions of 'oblique intent' as species of

33 In *Moloney*, the defendant, who was charged with murder, had shot his stepfather at close range during an argument. Both Moloney and his stepfather had imbibed a large amount of alcohol and, according to Moloney's evidence, were engaged in a contest of speed in loading their respective guns. Moloney denied intending to kill or seriously injure his stepfather. In *Hancock*, the defendants, who were miners on strike, had pushed a concrete block from a bridge into the path of a taxi which was carrying a miner to work. They were charged with the murder of the taxi driver, who was killed in the subsequent crash. They denied having intended to cause death or grievous bodily harm.

34 *Ghosh*, *op cit* n 29.

35 [1975] AC 55.

intention, often in the space of as little as a few phrases. The really important and interesting feature of the cases from my point of view is, however, not their resounding failure in this respect. It is rather the source of that failure and, more generally, the judicial methodology which led to what I have called the compromise strategy.

To develop a better understanding of how this strategy is constructed, as well as of some other significant features of judicial method, let us examine the substance and structure of the various speeches delivered in the House of Lords in *Moloney*. The report opens with a speech by Lord Hailsham. The fact of this speech's having been given is at least as significant as its content. Whilst Lords Fraser, Edmund-Davies and Keith were all content simply to concur with Lord Bridge's opinion, Lord Hailsham, the only member of this court also to have sat in *Hyam*, helps by his articulated concurrence to minimise the appearance of any tension between the two cases. Yet if there is no inconsistency between the approach in *Hyam* and that initiated by *Moloney*, how are we to explain why *Nedrick*, the facts of which were almost identical to those in *Hyam*, was decided differently?³⁶ Lord Hailsham employs a number of rhetorical devices to secure the effect of playing down the inconsistency between *Hyam* and *Moloney*. In the first place, his speech does not comprise a full analysis of the case: rather, it proceeds by reference to Lord Bridge's speech. This helps to emphasise the agreement between the two, not least because most first-time readers of Lord Hailsham's speech will not have read Lord Bridge's more detailed analysis. The structure and position of the speech in effect gives Lord Hailsham both first and last word. After explicitly affirming his agreement with Lord Bridge, Lord Hailsham moves on to deplore what he constructs as failings of the criminal process which have served to bring the case to the House of Lords. Had it not been for the obtuseness of the prosecution, the trial judge and the Court of Appeal (the last of whom should have recognised that the point certified for appeal did not arise and that the case could and should have been disposed of on the basis that the relevant defence had never been put to the jury), the case need never have reached the House. This implies, of course, that no substantial conflict between *Hyam* and *Moloney* exists. The impression is strengthened by references to *Belfon*³⁷ and *Beer*³⁸ which imply that Lord Bridge's analysis in the present case is already firmly established in existing case law. Lord Hailsham singles out the lay justices as the only people who took the sensible view that the facts of the case could not justify a prosecution for murder as opposed to manslaughter. The affirmation of the 'common sense' of the lay justices is reiterated at the end of the speech, and resonates strongly with the direction of the substantive argument: that we should entrust questions of intention to the jury on the basis of common sense inferences. The final noteworthy feature

36 In *Hyam*, the defendant, who was jealous of another woman, had poured petrol and then put burning newspaper through the letterbox of her rival's house. Two children were killed in the ensuing fire. *Hyam* testified that she had not intended to kill or cause grievous bodily harm but rather to frighten her rival into leaving the neighbourhood. She did not know whether the house was occupied at the time, but had established that her lover was not in the house. Her conviction for murder was upheld by a majority of 3 : 2 in the House of Lords. On almost identical facts in *Nedrick*, the defendant's appeal against conviction was allowed by the Court of Appeal, on the basis that the trial judge's direction to the jury that malice aforethought could be established by foresight of death or grievous bodily harm as highly probable — the generally approved distillation of the varying speeches in the House of Lords in *Hyam* — was a misdirection. The bases for this decision were those in *Moloney* and *Hancock*. For further discussion, see below p 635, n. 54.

37 [1976] 3 All ER 46.

38 (1976) 63 Cr App R 222.

of Lord Hailsham's speech is his 'personal explanation' of his role in *Hyam*. Whilst just conceding the possibility of a different interpretation, he makes it clear that his concurrence with Lord Bridge in the present case does not entail any change from his own understanding of his position in the former. He accomplishes this, in particular, by emphasising that the facts in *Hyam* made the *existence* of intention 'apparent,' thus playing down the significance of the *definition* of intent in that case.

After reciting the concurrence of the other three members of the House with Lord Bridge, the report moves on to his speech, which occupies twelve pages as compared with Lord Hailsham's modest one and a half. The speech is a fine showcase for Lord Bridge's not inconsiderable rhetorical powers. It opens with a clipped yet gruesome rehearsal of the facts, which weaves in a highly sympathetic characterisation of the defendant (part of a 'united, happy family'),³⁹ of the circumstances of the homicide and in particular of the role of alcohol, which is described as having contributed to a 'convivial' evening. (This is in striking contrast with the terms of social irresponsibility or danger which more often characterise judicial utterances about intoxicated defendants: the absence of any reference in the case to *Majewski*⁴⁰ is significant in this respect.) The rather elliptical account given by Moloney himself of the circumstances of the argument between himself and his stepfather is quoted, the lack of further comment suggesting that the implied audience (lawyers) will understand (and even identify with) the kind of masculinity contest which led in this case to such tragic results.

Early on, Lord Bridge confronts the aspect of Moloney's testimony which he identifies as having been at the root of his legal problems: his oral statement that 'it was kill or be killed.' This is what Moloney was alleged to have said to one of the first police officers to interview him ('a police patrol officer . . . not a CID officer,'⁴¹ Lord Bridge points out). It was not repeated in his formal, signed statement (given to two *detectives*). The phrase 'kill or be killed,' taken together with accompanying comments about the nature of the argument and ensuing competition, led Moloney's original lawyers to conduct the case on the basis of a plea of self-defence. Lord Bridge points out that this was an unpromising line of argument given its inconsistency with aspects of Moloney's formal statement, which rested on a denial of intent, and with the fact that the dead man's gun was still unloaded (indeed was, mysteriously, broken) at the time of his death. Lord Bridge's approach, throughout his speech, serves to undermine the importance and validity of Moloney's early statements so as to settle the analysis of the case firmly on the intention issue. However, he omits to mention a further factor which might have complicated the self-defence argument: that of the status of drunken mistakes as the basis for self-defence. (Lord Bridge does not seem to consider it plausible that Moloney, in a state of deep shock as well as considerable intoxication, said all the inconsistent things which were attributed to him as he struggled to come up with the kind of coherent story which the police officers' questions demanded yet which his own sense of the enormity of what he had done, along with his disorientation, made quite elusive.) These features of the analysis are symptomatic of a general ambivalence on Lord Bridge's part about the intoxication aspects of the case. Intoxication is central to the plausibility of the claim of lack of intent. Yet

39 *Moloney*, *op cit* n 2, p 1028.

40 [1977] AC 443.

41 *Moloney*, *op cit* n 2, p 1028.

since the case was not argued on that basis, it is difficult for Lord Bridge to found his own analysis explicitly on intoxication.

Early on in the speech, then, Lord Bridge fixes on absence of intention as the 'true and only basis of [Moloney's] defence.'⁴² This enables him to reduce his analysis to a series of apparently simple, either/or questions: was the murder version or the manslaughter version of events 'true'? Here, Moloney's intoxication figures briefly in an initial recap on the facts which lends credence to the idea that Moloney never intended to harm — an interpretation which is commended by the description of the stepfather's challenge as 'ridiculous' or 'absurd'.⁴³ The trial judge is criticised for having taken certain aspects of Moloney's evidence out of context in his summing up, so as to reconstruct what was an admission of the facts with hindsight as an admission of his state of mind at the time; the jury's return for further advice on the issue of intention is taken as further evidence of the fact that the direction must have confused them. The judge is censured for having stated the defence, in his further direction, 'baldly',⁴⁴ as lack of intent, without reference to the specific argument that Moloney did not know he was aiming at his stepfather. Lord Bridge does not, however, berate the judge for having failed to advert to the extent of Moloney's intoxication.

Two features of the either/or analysis developed by Lord Bridge call for comment. In the first place, it plays an important part in minimising the potential for conflict between *Moloney* and *Hyam*. If Moloney had the relevant knowledge, his intention was a matter of common sense, to be left to the jury as per *Beer* (the Court of Appeal's own affirmation of this case is emphasised). If he did not, he had neither intent nor foresight. The facts of the case need never have posed the problem now before the House. Second, we should note the relationship between the either/or analysis and the odd position of intoxication to which I have already referred. The effects of intoxication disrupt an analysis which admits of only two possibilities: either Moloney knew the facts about distance, aim and certain consequences of his conduct, or he did not. The model of deliberative and rational behaviour on which this kind of analysis rests is muddled by intoxication, which suggests other possible interpretations of the kind of attitude which Moloney's behaviour might be taken to express, and how that attitude came about. Factors such as shock and alcohol disrupt the usual plausibility of the rationalist, unified conception of legal subjectivity, and either have to be reduced to 'artificial' legal definitions and strategies or sidelined in the pursuit of a 'normal' legal analysis. In offences of 'specific intent' such as murder, criminal law admits the relevance of intoxication, but only where it is to the degree that a doubt can be raised as to whether the subject did in fact form the relevant intention.⁴⁵ But, in many factual contexts, it is hard to imagine what degree of intoxication, short of total insensibility, would render plausible a claim of lack of intent. Certainly in this case such a level of intoxication is belied by Moloney's competent behaviour in the time immediately following the shooting. This may serve to explain Lord Bridge's ambivalence to the issue of intoxication, adverting to it selectively, briefly, and only where strictly necessary. It is, at one level, the linchpin of the 'no intention' analysis of the facts, but its importance cannot be acknowledged fully for fear of its fragility becoming apparent. All this, of course, should be beside the point given

42 *ibid* p 1030.

43 *ibid* pp 1030, 1032.

44 *ibid* p 1031.

45 See *Sheehan and Moore* [1975] 1 WLR 739.

that Lord Bridge merely has to find the conviction unsafe, not to be certain that Moloney would have been acquitted of murder by a properly directed jury. But the pretence that the situation is clearer than it is helps to underpin the common sense appeal of Lord Bridge's ultimate position.

Lord Bridge's way of dealing with *Hyam* is in effect to construct it as simultaneously relevant and irrelevant to *Moloney*. This is an eminently convenient approach in that it is relatively non-disruptive to the supposed authority and determinacy of precedent. Lord Bridge's anxiety to discount the charge of judicial legislation is evident: in turning to the 'clarification and simplification' of intention, he emphasises that this is 'within the *judicial* function of your Lordships' House' and that it is 'in no sense an academic, but is essentially a practical, exercise.'⁴⁶ The potential embarrassment of having to come clean about judicial creativity and explicitly overrule *Hyam* is evaded by means of some fancy footwork, conveniently available because of the distinction between 'malice aforethought' — the common law's specification of the *mens rea* requirement in murder — and 'intention.' At most, Lord Bridge suggests, *Hyam* extended 'malice aforethought' to encompass foresight of a certain degree of risk: it neither offered nor purported to offer a general definition of 'intention.' This interpretation, however, still leaves open the question of why one murder case (*Hyam*) should be thought irrelevant to the general definition of intention whereas another (*Moloney*), which moreover purports to be consistent with *Hyam*, should have the interpretation of intention as its central concern.⁴⁷ Lord Bridge's approach serves to obscure this remaining difficulty by focusing on Lord Hailsham's speech in *Hyam* rather than on those of Viscount Dilhorne and Lords Cross, Diplock and Kilbrandon. For Lord Hailsham expressed himself in terms of 'intention to expose to a risk' rather than in the language of foresight of (varying degrees of) probability of risk favoured by the other Law Lords. Lord Bridge's recognition of the significant and, on the basis of his own analysis, illegitimate reference to 'risk' is expressed late in his speech so as to make light of what is in fact a crucial difference between himself and Lord Hailsham, and hence between *Hyam* and *Moloney*. Even once it is mentioned, Lord Bridge explains his discomfort in terms of a potential overlap with the formulation of *objective* recklessness in the driving case of *Lawrence*⁴⁸ rather than by pointing up the analytical collapse of the distinction between intention and subjective recklessness which Lord Hailsham's formulation entails. The rest of his analysis of *Hyam* consists of very brief quotations from each of the other members of the House: quotations which are made to lend weight to Lord Bridge's analysis of the relationship between intention and foresight because of their emphasis on the idea that no reasonable jury could have doubted *Hyam*'s intention on the facts had it been left to them. In other words, although these judges would have directed in terms of a certain degree of foresight as malice aforethought, Lord Bridge suggests that this would have made no practical difference in the case, and uses this subtly to undermine the idea that *Hyam* equated foresight with intention. The inconsistency with *Hyam* is further downplayed by Lord Bridge's repeated suggestion, implicit in the above, that the main issue in *Hyam* concerned whether intention to cause grievous bodily harm as

46 *Moloney*, *op cit* n 2, pp 1032–1033, emphasis added.

47 Lord Hailsham's own explanation of this, as we have already seen, lies in the differences in the facts of the two cases (see above, text following n 38). Whatever its validity in distinguishing *Hyam* from *Moloney*, this explanation is clearly deficient in explaining the different approaches taken in *Hyam* and *Nedrick*; see n 36.

48 [1982] AC 510.

opposed to death or life-threatening injury sufficed for malice aforethought. Thus, in a supreme paradox, he implies that *neither Hyam nor Moloney* was really about the relationship between intention and foresight.

A crucial point in Lord Bridge's analysis is reached when he rejects Archbold's definition of intention as including foresight of certain degrees of risk as based on a misreading of the cases.⁴⁹ This point is put without any argument or any analysis of the cases allegedly misread. Nor does his Lordship supply a single reference to any of these cases. Instead, he elaborates his 'golden rule': that in directing juries in cases requiring proof of 'specific intent,' judges should avoid elaboration or paraphrase, and leave the determination of intention to the jury's 'good sense,' except in the few cases where the special nature of the facts necessitates some further guidelines. The only concrete clues we are given as to how these cases might be identified are that neither *Hyam* nor *Moloney* constituted such a case, and that such cases may include those where the relationship between motive and desire calls for illustration by some 'homely example'⁵⁰; again, a strong appeal to lay judgment and common sense can be observed. Lord Bridge then moves to his assertion that foresight cannot be equated with intention itself, but may only constitute evidence from which intention can be inferred. This leaves obscure the question of whether foresight of 'moral' or 'virtual' certainty is itself intention or only strong evidence from which it may be inferred. The assertion that problems of delineating particular degrees of probability preclude drawing a legal line here disguises the fact that Lord Bridge's approach merely pushes this difficulty onto the jury. Because the jury's deliberations are secret, the capacity of these problems of delineation to prevent consensus within the jury will not be revealed. Lord Bridge's speech concludes with the enunciation of guidelines for the jury (since rejected in *Hancock* — see below), accompanied by a strong statement of the importance of rule of law virtues of clarity and simplicity in this area.⁵¹ He emphasises the propriety of laying down such guidelines as 'within the judicial function'⁵² and their efficacy in promoting the desired clarity.

It is the structure and latter part of the speech which, from my point of view, are of most interest. In the earlier part, Lord Bridge is inevitably engaged in a certain level of conceptual analysis: he is distinguishing intention from foresight, albeit apparently leaving open the narrowest case of 'oblique intention.' But having engaged in this partial conceptual analysis, he declines to go further in terms of giving a positive definition of intention. Rather than nailing his colours to a particular conceptual mast — for example by stipulating that intended results are only those which the defendant acts in order to bring about — he steps back into the haven of 'ordinary language.' He contents himself with some rather half-hearted guidelines to the jury which themselves are only to be given in cases whose facts necessitate some specific adversion to the relation between intention and foresight.

49 *Moloney*, *op cit* n 2, p 1036.

50 *ibid* p 1037.

51 *ibid* Lord Bridge's guidelines read as follows:

In the rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Second, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer Yes to both questions it is a proper inference for them to draw that he intended that consequence (*ibid* p 1039).

52 *ibid* p 1037.

It is not difficult to see that this is a strategy which is fraught with contradictions. On the one hand, Lord Bridge has pushed the concept of intention in a particular direction. On the other, he has appealed to its 'ordinary meaning,' as if this were fixed and unproblematic. Conversely, his very admission that guidance to the jury may sometimes be necessary seems to belie his faith in the clarity and convergence of 'ordinary' usage. The two enterprises are consistent if one takes the view that concepts are co-extensive with how people usually speak of them: yet the idea that Lord Bridge holds this view is unsettled by both his apparent lack of confidence in the convergence of usage and his clear attempt at stipulation — a manipulation which would be unnecessary and inappropriate on the co-extension view.

Just in case this might be thought to be an argument *ad hominem*, it is worth taking a brief look at the next case in the area to reach the House of Lords. Other aspects of the tension inherent in the strategy emerge in *Hancock*. Apart from his analysis of the difference in meaning between natural and probable consequences and consequent disapproval of Lord Bridge's guidelines to the jury, which referred only to 'natural consequences,'⁵³ Lord Scarman's main preoccupation is with the propriety of offering jury guidelines in the first place. Once again, we can see a strong reliance on the idea of appeals to 'ordinary' usage and to the 'ordinary' standards of judgment embedded therein and emanating from the jury, and echoes of judicial discomfort at the idea of being seen to act as 'deputy legislators' in this area. Yet there is something of a paradox in Lord Scarman's view of jury guidelines as inherently problematic. For the very rationale of guidelines — consistency of practice, certainty of application — is intimately linked with the rule of law ideal. If ordinary usage is as consistent and reliable as Lords Bridge and Scarman presumably think it is given the importance they accord to it, guidelines would be irrelevant. If it is not, it is hard either to see why guidelines are problematic or why the judges are so keen to resort to jury judgment and to eschew further conceptual analysis and stipulation of their own. Two possible explanations present themselves. The first is simply the strength of the judges' wish to delegate the decision to the jury. The difficulty with this explanation is that, on the assumption of lack of consistency in usage, the desire to delegate seems to fly in the face of the rule of law ideal of consistency — something which the judges have so far been unwilling to question. The second is that the judges have faith in the idea that judgments of culpability based on 'ordinary' usage, which might indeed be more flexible than conceptual elaborations, reflect substantively morally correct distinctions. But, even leaving problems of divergent practice aside, this line of argument brings us dangerously close to the position of the reductive sceptic.

53 See n 51 above. Whilst rejecting the idea of comprehensive guidelines for the jury such as those formulated by Lord Lane in the Court of Appeal in *Hancock*, Lord Scarman in effect offers his own pointers:

In a case where foresight of a consequence is part of the evidence supporting a prosecution submission that the accused intended the consequence, the judge, if he thinks some general observations would help the jury, could well ... emphasise that the probability, however high, of a consequence is only a factor, though it may in some cases be a very significant factor, to be considered with all the other evidence in determining whether the accused intended to bring it about (*Hancock*, *op cit* n 31, p 651).

Lord Scarman also argued that the *Moloney* guidelines required a supplementary 'explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended' (*ibid* p 651).

There is also something strained about both Lord Bridge's and Lord Scarman's expressed hesitations about issuing guidelines: after all, Lord Bridge gives in to the temptation, and some portions of Lord Scarman's judgment are in substance if not in form every bit as normative as Lord Lane's guidelines in the Court of Appeal in *Hancock* which Lord Scarman explicitly disapproves as too detailed.⁵⁴

Of course, there is nothing new about this combined judicial strategy of (complete or partial) conceptual analysis and appeals to ordinary language and the jury's common sense. Lord Diplock's speech in *Caldwell* is just one among a long list of possible examples illustrating the pervasiveness of this approach. What has gone under-analysed, however, is the relationship between and respective attractions of the two prongs of the combined strategy: the contribution each of them makes to the perceived legitimacy of criminal law, and judges' sensitivities to that issue. Here we come back to some of the questions about the ideological significance of different approaches to criminal law which were touched on in the earlier discussion of descriptive scepticism. We have already noted that appeals to 'ordinary' usage from within a 'rule of law' outlook are problematic in that, in many of the areas relevant to criminal law, either usage in general is not settled or the distinctions thought to emanate unproblematically from usage turn out, in the practical context of making judgments based on them, to be contested. Indeed, variety of both usage and the practice of judgment is underpinned, at least in part, by just the substantive disagreements which render effective conceptual stipulation impossible.⁵⁵ The conditions which undermine efforts to make articulated concepts 'stick,' in other words, are the same ones which render Duff's ideal of the 'common law approach' — the gradual articulation of a morally coherent consensus — unrealistic and appeals to 'ordinary language' unreliable.

What, then, is the attraction of the appeal to 'ordinary' usage for judges? In the first place, there are what we might call 'negative' attractions. Judges are well aware of the limitations of conceptual stipulation; moreover, they are sensitive to the dangers of being seen overtly to stipulate legal meanings in ways which might be taken both to trespass on the legislative preserve and to prejudice their impartiality. They are also alive to the variety of contexts in which concepts will

法官們深知概念規定的侷限性；此外，他們對被公認為以可能侵犯立法保留和損害其公正性的方式被公認為規定法律含義的危險性很敏感。

54 See above n 53. Discomfort with the quasi-legislative role collapses at all but the rhetorical level in *Nedrick*, where the need for guidelines in the face of continuing jury bewilderment about the application of the idea of intention to particular cases seems to be acknowledged without further argument. Nonetheless, Lord Lane in this case stops short of positively defining intention, hence implicitly relying on the jury's 'common sense' understanding of the word. Lord Lane also reinforces the view that cases in which a direction on intention needs to be given are the exception rather than the rule:

Where the charge is murder and *in the rare cases where the simple direction* [which tells the jury to decide whether, taking into account all the relevant circumstances, including what the defendant said and did, they think he intended to kill or do serious bodily harm] *is not enough*, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. *The decision is one for the jury to be reached on a consideration of all the evidence* (*Nedrick*, *op cit* n 32, p 4, emphases added).

In the last passage, the judicial balancing act (already noted in the context of *Moloney* and *Hancock*), of delegating to the jury with one hand and offering a judicial prescription with the other, is on full display.

55 See below p 637ff.

have to be applied, and hence to the advantages of preserving a degree of flexibility. In the judge's familiar mode of appeal to and interpretation of authority, ordinary usage comes a useful second when legal authority is lacking. But these negative attractions are far from exhaustive. For the appeal to 'ordinary' usage has a number of discrete and ideologically significant positive attractions. Although they are related, we need for a moment to distinguish between appeals to 'ordinary' usage at large (some of which are disingenuous⁵⁶) and passing of the determination of a particular question to the jury, the jury to decide on its own, non-technical, 'common sense' understanding of the relevant term. In the case of the former, the appeal to 'ordinary' usage usefully underlines the familiarity and commonality of criminal law: it suggests that criminal law operates on the basis of widely shared meanings and widely endorsed judgments. It hence suppresses the idea that criminal law is hierarchical, an exercise of power, based on meanings which are imposed.⁵⁷ So it has a powerful, subtle legitimating effect within legal discourse. In the case of judgments delegated to the jury on the basis of their application of 'ordinary meanings,' this effect is reinforced by the strong ideological meaning of the jury trial: it becomes not only trial by our peers, but also trial on the basis of 'ordinary' standards which, given the size of the majority needed for a guilty verdict, can be regarded as widely shared.⁵⁸ In some senses the overt stipulation of a concept such as intention in a legislative code could be seen as more democratic in that it expresses openly the imposition, the exercise of power, which is what criminal law and criminal justice practice is all about, and which is implicit in the idea of the 'rule of law.'⁵⁹ Thus, whilst the combined strategy of partial conceptual stipulation and appeal to ordinary usage is on one level confused and contradictory, on another it can be seen as logical and effective. To put it colloquially, it is part of a complex strategy which allows criminal law to keep various balls of different shapes and colours in the air at once: to be a system of imposed social control; a system based on reciprocity of obligations and the recognition of certain universally held rights and interests; a system which reproduces and reinforces certain shared meanings; a system which manages or suppresses certain kinds of social conflict; and many other things besides. Thus, what from one point of view looks like judicial contradictoriness from another looks both astute and highly ideologically effective.

56 Including, arguably, Lord Diplock's appeal in *Caldwell*, *op cit* n 26. See n 57 below.

57 My argument here has much in common with that made by W.T. Murphy and R.W. Rawlings, 'After the Ancien Régime: The Writing of Judgments in the House of Lords 1979–1980' (1981) 44 MLR 617. At p 626, Murphy and Rawlings note, in the context of civil cases, how the judicial appeal to 'ordinary' language serves to 'implicate the litigant in the making of the choice,' so that 'he may then be said to have no ground for complaint or cause for surprise.' Murphy's and Rawlings' identification of the Law Lords' preoccupation with the need for simplicity so as to aid the comprehension of the lower courts (see p 620) is also resonant with the rather condescending attitude towards juries' powers of understanding which characterises many appellate judgments in criminal cases. Echoes of this condescension are certainly to be found in *Moloney* and the other cases under consideration here; see eg *Hancock*, *op cit* n 31, p 651 *per* Lord Scarman. But the most spectacular recent example is Lord Diplock's speech in *Caldwell*, *op cit* n 26. Lord Diplock appealed to juries' difficulty in understanding the distinction between foresight of a risk ('subjective' recklessness) and failure to consider the possibility of a risk ('objective' recklessness) to justify his decision that criminal law's conception of recklessness encompassed both attitudes.

58 Like Murphy and Rawlings (*ibid* at pp 624–625) I would emphasise the significance of the indeterminacy as to whose usage or viewpoint judgments based on 'ordinary language' reflect.

59 See J. Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law* (Oxford: Clarendon Press, 1979).

D Fundamental Contradictions or Multiple Meanings?

Let us now pursue the implications of this argument for the issue of how we should approach the study of criminal law, and relate the approach implicit in the analysis so far and approaches sometimes labelled 'critical legal studies' and represented by the work of, among others, Mark Kelman,⁶⁰ David Nelken⁶¹ and Alan Norrie.⁶² The particular debate over appeals to ordinary usage versus conceptual stipulation provides a promising area in which to consider some of the questions raised by critical approaches to criminal law. Typically, such approaches reject the claim that criminal law is characterised by some fundamental, coherent, if inchoately realised, set of rationalising principles. They thus reject what I take to be the orthodox approach to criminal law scholarship: that is, to see it as the enterprise of eliciting, articulating and, where necessary, prescribing the proper principles informing criminal law, ironing out and rationalising apparent contradictions and exceptions, and paving the way for a clear, consistent and coherent theory and practice of criminal law on the basis of a loosely speaking liberal set of principles. The critical scholar sees this approach as both limited and ultimately distorting in terms of the image of criminal justice which it purveys.⁶³ In particular, a certain degree of conceptual incoherence and contradiction is argued to be endemic to criminal law and criminal justice, and part of the role of the criminal law scholar is to confront and attempt to come to grips with this apparent incoherence. Secondly, the conflicts and inconsistencies which arise at the level of criminal law practice and doctrine are seen as symptomatic of deeper, substantive political questions which cannot be effectively submerged by doctrinal rationalisation or by formal conceptual analysis — that which focuses on the clear definition or delineation of terms without addressing itself to underlying political questions. If we are to confront apparent incoherence adequately, we have to go beyond not just the enterprise of the stipulative analyst but also that of the moral analyst; for we cannot assume that all the political issues relevant to an understanding of how criminal law definitions are applied in practice can be explicated in terms of an analysis of the substantive values underlying the concepts in terms of which those definitions are constructed. This means, thirdly, as at least some critical scholars acknowledge, that we have to come to terms with the diversity of roles and meanings which criminal justice has in our society if we are to come anywhere near understanding the significance of a whole range of practical problems which it throws up. These problems range from inconsistencies of enforcement through to what seem on the surface to be conceptual arguments at the level of criminal law doctrine. Not least, we have to come to terms with the ideological and symbolic aspects of criminal law as well as its instrumental functions as one powerful system of social ordering if we are to appreciate both the real significance of these various criminal justice issues and how they relate to one another.

The basis on which the argument of this article has proceeded shares a commitment to these tenets. But the particular argument raises some important

60 M. Kelman, *op cit* n 28.

61 D. Nelken, 'Critical Criminal Law' (1987) 14 JLS 105.

62 A.W. Norrie, 'Oblique Intention and Legal Politics' (1989) Crim LR 768; 'Intention: More Loose Talk' (1990) Crim LR 642; 'A Critique of Criminal Causation,' *op cit* n 11; 'Subjectivism, Objectivism and Criminal Recklessness,' *op cit* n 30.

63 See Lacey, Wells and Meure, *Reconstructing Criminal Law*, *op cit* n 9, ch 1; N. Lacey (ed), 'Crime: Reconstructing the Traditional Syllabus' in P.B.H. Birks (ed), *Examining the Law Syllabus* (Oxford: Oxford University Press, 1992).

questions which those of us committed to developing critical approaches to criminal law must confront. In the first place, whilst the argument has been consistent with scepticism about the possibility of total coherence at the level of legal doctrine, as well as with suspicion that the 'discovery' of coherence is an ideological rather than an empirical enterprise, it suggests a rather different view about the nature of the incoherence which a critical analysis exposes than that to be found in some articles espousing a critical approach. Kelman,⁶⁴ for example, sees this incoherence as an inevitable feature of legal discourse, structured as it is around a number of 'fundamental contradictions' such as that between intentionalist and determinist accounts of human action. Kelman's project is one of critique: the exposure of contingency and arbitrariness at the core of legal doctrine. It is not part of his enterprise to suggest how these contradictions might be evaded or made sense of, let alone transcended. Nor is the historical development of the contradictions explored.⁶⁵ The espousal of this kind of project has led to the accusation that critical scholars are involved in an essentially negative or even nihilistic enterprise: trashing, deconstructing, knocking down, and offering nothing with which to replace the edifice attacked. This point is often misplaced, and certainly should not be allowed to blind us to the importance and positive political significance of critique.⁶⁶ Nonetheless it claims our serious attention, not least because the 'discovery' that criminal law doctrine is fraught with incoherence and contradiction is by now a familiar one. Indeed, in some of its forms it could be said merely to represent a particular version of claims made by orthodox scholars in moments of desperation over judicial or legislative obtuseness. The important and exciting task, of course, is to try to interpret that 'incoherence,' rather than merely expose the awkward judicial or scholarly machinations prompted by the demands of the doctrinal precept of coherence. This indeed is the project of critical legal scholarship such as Kelman's. But the arguments developed in this article suggest that it is an enterprise which cannot be pursued satisfactorily, as has been attempted by critical scholars on some occasions,⁶⁷ exclusively or even mainly by way of analysis of legal doctrine. The 'fundamental contradictions' which critical scholars argue persuasively to be part of the structure of legal argumentation are not applied in a vacuum to cases but develop in relation to much broader social practices. Even the re-reading of cases such as that attempted in this article takes much of its significance from understandings external to both doctrine and judicial argument — understandings proceeding from analysis of the social practices of 'criminal justice' broadly conceived. In developing such an interpretation, the analysis of the recent history of the concept of intention offered here suggests that apparent incoherences, which represent conflicts or illogicalities at the level of legal doctrine, begin to look perfectly understandable, part of a meaningful and to some extent co-ordinated pattern.

Before pursuing this point, I should mention a second issue for critical methodology which arises from the substance of this article. This is the question of the proper place of a focus not just on criminal law in isolation from the broader processes of criminal justice but on a particular, narrowly defined area of criminal law doctrine — that regularly dissected in the appellate courts. My argument is not

64 *op cit* n 28.

65 *cf* Norrie, *op cit* n 11.

66 See P. Goodrich, *Reading the Law* (Oxford: Basil Blackwell, 1986) ch 7.

67 See Norrie, 'Oblique Intention and Legal Politics,' *op cit* n 62.

that we should simply ignore appeal court cases or issues such as the concept of intention just because they are relatively marginal in criminal justice practice broadly understood. In a sense my point is more far-reaching than that. I have argued that, even in a case such as this, where high legal doctrine, refined judicial and academic doctrinal analysis have been brought to bear, they are nonetheless unable fully to explicate let alone resolve the issues at stake. We have to look beyond the boundaries of criminal law and its doctrines to its social meanings, its enforcement practices, its ideological functions and so on. This is true even in so far as we need to concentrate specifically on cases. For the defect of orthodox case analysis, unfortunately shared by some critiques, is that it focuses on the doctrinal aspects of the case and fails to attend to the many other significant aspects revealed by a careful perusal of the law report. My analysis of *Moloney* is an attempt to engage in a re-reading — a reading *of* and *between* the lines — which has often been neglected. And this re-reading brings to the case a sense of the variety of points of significance likely to be found there which proceeds from understandings which are to an important extent external to criminal law. If this more broadly based analysis turns out to be necessary and to have been lacking in the case of this much-analysed decision, it must equally, if not more, be so for all those other issues of 'criminal law' which, when they reach a court at all, are resolved in unreported cases in magistrates' courts. So although my personal sympathies are more engaged when reading the doctrinal analyses in Norrie⁶⁸ or Kelman⁶⁹ than in Smith and Hogan⁷⁰ or Glanville Williams,⁷¹ critical intellectual sympathies should push us, I would argue, towards a rather different conception of criminal law scholarship. They point, in short, towards a criminal law enterprise which dispenses with, or (by way of modest concession to Nelken⁷²) at the very least relaxes, the boundaries between criminal law and criminal justice, and which addresses criminal justice issues explicitly within a particular social and political context.⁷³

To repeat, it is often observed that critical legal scholars destroy without reconstructing. It would be foolishly over-ambitious for me to pretend that I could in the space of this article (if indeed in a wider compass) present anything resembling a solution to the issues which have been raised. What I do hope to do is to set out the kinds of questions which will have to be addressed by criminal law scholars if we are to make further progress towards unravelling the complexities revealed by the apparently rather discrete problem of the concept of intention. In analysing the recent cases, my main emphasis was on an interesting and logically problematic combination of appeals to conceptual stipulation and ordinary usage. The argument was that problems with either approach constantly pushed judges back towards the other, in a kind of endless dialectic. At the doctrinal level, this looks incoherent. But once we step back and think about the broader context within which criminal law operates, it begins to look like a rather meaningful strategy which contributes quite directly and comprehensibly to the perceived legitimacy of criminal law. The judges are seen to desist from behaving like legislators; they

68 *ibid.*

69 *op cit* n 28.

70 *Criminal Law*, *op cit* n 6.

71 *A Textbook of Criminal Law*, *op cit* n 5.

72 D. Nelken, 'Criminal Law and Criminal Justice: Some Notes on their Irrelation' in I.H. Dennis (ed), *Criminal Law and Justice* (London: Sweet & Maxwell, 1987).

73 This sort of enterprise is carried forward in significant parts of works by Norrie, *op cit* ns 11, 30. See also Wells, *op cit* n 12, for an excellent example of the kind of integrated analysis I have in mind.

appeal to common usage in a way which suppresses the extent to which criminal laws are imposed by an exercise of power, emphasising the reciprocity of the system.

It is customary on the left of the political spectrum to regard this kind of strategy as a rather transparent ideological operation: an attempt at mystification which can easily be exposed for what it is. Once we scratch the surface, we will see that the idea of criminal law judgments as rooted in 'ordinary,' consensual social practice is applied only in strictly circumscribed areas, and whatever the real interests of the dominant groups are threatened by it, the 'criminal law' viewpoint and that of the 'ordinary person' quickly diverge.⁷⁴ As E.P. Thompson suggested in his study of certain eighteenth-century criminal laws,⁷⁵ this is too quick a way with the question. For, even from an instrumental point of view, criminal law would not be perceived as legitimate by enough of its subjects if it was really only a thinly disguised system of the oppression of certain groups: it would not be able to sustain a sufficient perception of legitimacy to generate order. But, conversely, as all the evidence about patterns of criminal enforcement shows, the ice here is relatively thin. In fact, in our society, criminal justice is pursued, law and order is maintained, predominantly at the expense of certain very constant demographic groups — groups which also bear a disproportionate burden of other sources of social disadvantage. Indeed, the composition of the most important group from which legitimating 'ordinary judgments' proceed — the jury — whilst in theory random, in practice is socially skewed in both class and ethnic terms.⁷⁶ This poses a perpetual problem for the criminal justice system, whose legitimacy and hence efficacy are always vulnerable to being undermined by the patterned facts of its administration and impact.

The delicate balancing act which criminal justice always has to perform in a relatively open and democratic society is surely one of the most interesting and most under-attended to questions from a criminal law point of view. What even my necessarily crude analysis shows is that, once we look at criminal law not as a body of doctrine but as a social practice, and once we read cases on that basis, apparent contradictions can be reconstructed as both contradictory and sensible. Criminal law in a self-professed democratic society has to operate on the basis of at least a threshold of shared meanings: a critical mass of the population has to see it as something which protects non-partisan interests. Hence, ideas about equality and the reciprocal recognition of important interests are a real part of criminal justice theory and practice. Yet its inevitable involvement in maintaining the status quo — a particular, and unequal, division of goods, powers and entitlements — always threatens to expose it as a naked exercise of power in the interests of some over others. In a real sense, it is both of these things — and many others as well.

In this country we are constantly reminded by politicians and the mass media of rising crime levels: offending behaviour is a salient social problem, and one which, like criminal justice enforcement, has a disproportionate impact on independently disadvantaged groups. This is one important aspect of the social reality of crime. But I would suggest that from a criminological and criminal legal point of view, the questions, 'why do so many people obey the law' and, in particular, 'what role do laws and legal ideology play in forming the social

74 See Norrie, *op cit* n 11, pp 690–691, 694.

75 *Whigs and Hunters* (Harmondsworth: Penguin, 1975); for critical comment, see D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981) pp 162–166.

76 See J. Baldwin and M. McConville, *Jury Trials* (Oxford: Clarendon Press, 1979).

conditions which promote obedience' are both more interesting and more problematic than that of why so many people break criminal laws. Given the very uneven distribution of the (particularly proprietary) interests which criminal law protects, the levels of obedience to criminal law's proscriptions are remarkable. What criminal lawyers need to seek here, and what we can contribute, is an understanding of how criminal legal practices — legislative, judicial and other — help to generate the *image* of reciprocity, fairness and mutuality, notwithstanding both the facts of unequal impact and abuses within the process such as recent publicised miscarriages of justice. For it is this image which underpins the relative efficacy of the whole system, by capturing the beliefs and allegiances of legal subjects.

The analysis here has much in common with Alan Norrie's suggestion that debates in the recent cases on intention have to do with conflicts around liberal conceptions of criminal law as protecting individual rights and as a system of social control.⁷⁷ The difference in emphasis consists in looking beyond legal discourse to expose the ways in which it is a distortion to represent these as in a simple sense contradictory. The claim is that, when one looks at a broad range of social practices within and around the arena of 'criminal justice' — policing, prosecuting, sentencing, punishing, talking about 'crime' in a variety of influential fora — what appear in terms of a strictly logical analysis of both the traditional and the critical kind to be contradictory and confused can rather be understood as part of a delicately balanced equilibrium. The maintenance of this equilibrium depends on holding the tensions at bay by exploiting the logically contradictory discourses but disguising the fact by moving between different levels of and spheres for analysis. It follows that it is central to the critical project to reunite that which orthodox scholarship, the self-conception of legal doctrine and the whole structure of the academy have put asunder, and to question not only the autonomy of 'law' but also that of 'criminal justice.' On this view, all our attempts to understand criminal legal practices have to be seen as specific and partial attempts to come to grips with the general question of how social order is produced and maintained.

A consideration of the implications of judicial recourse to the notion of ordinary usage is one useful strategy in this respect. So far, we have focused on the role of appeals to ordinary usage in underpinning the received legitimacy of criminal law. But we should not forget another important issue which this particular example raises. This is the question of why 'ordinary usage' is indeed such an unreliable resource for criminal law. As we have seen, at the rhetorical level, the idea of common usage can always be used by judges even where the existence of shared meanings is dubious. Of course, judges have to be careful not to be transparently disingenuous, in which case their appeal to 'ordinary' usage as a legitimising device will be likely to backfire. In the case of delegation to juries, the problems are more concrete and immediate. The jury may be unable to agree: different juries may give different conclusions. Urgent and difficult questions arise about the ways in which factors central to the constitution of identity — age, class, ethnicity, gender — fragment the idea of an 'ordinary' viewpoint and complicate our understanding of the democratic credentials and hence legitimating potential of the jury. This threatens not only another aspect of the rule of law ideal, but also the capacity of the appeal to common usage to legitimise criminal law. For if that appeal exposes heterogeneity and fundamental disagreement, in the absence of any

77 'Oblique Intention and Legal Politics,' *op cit* n 62.

deeper consensus about how such disagreements or questions of application 'at the margins' can be negotiated within the relevant interpretive community, it will have been counter-productive and will probably rather expose the sense in which criminal law meanings are imposed from above. This hypothesis suggests that the use of appeals to 'common' meaning or 'ordinary' usage have to be carefully policed by lawmakers and legal actors, and indicates the need for a wide-ranging study of how such appeals are made across a variety of areas of criminal law, and with what kinds of result and implication. It also suggests that the study of areas in which shared understandings of words used in the definitions of offences are problematic will provide useful insights into areas where the legitimacy of criminal justice is threatened, and where the danger of repressive impositions of criminal justice power is greatest.

Conclusion

My conclusion, then, has more to do with the methodology of criminal law scholarship than with any specific prescription for the shape or use of conceptions of intention in criminal law. Certainly, my answer to the question of my title is that the transcendently valid concept of intention which some commentators take themselves to be seeking is illusory rather than elusive. Furthermore, the idea of a socially produced concept of intention which can be applied clearly and stably across a range of cases is, for rather more complex reasons, elusive. But I hope to have shown that this is for slightly different, and rather more interesting, reasons than sceptical arguments have so far acknowledged. In particular, the lessons of the frustration and indeterminacy which seem to be borne of traditional theoretical enterprises in areas such as this should not lead us to throw up our hands in despair. They should rather encourage us to cast our gaze somewhat wider in the search for illumination. The exhortation for criminal law scholars to become interested (even expert) in a wide range of social practices, and to draw on a range of disciplinary techniques, may seem intimidating or overdrawn. The most persuasive argument I can offer in making it is provided by the rather disappointing progress so far made towards the ideas widely subscribed to by criminal law scholars by way of the kind of analysis traditionally, and sometimes radically, endorsed.

Lacey argues that relying on common sense to define "intention" in legal cases can lead to confusion and mistakes.

Different Meanings: In everyday use, "intention" can mean wanting, expecting, or foreseeing something might happen. But in criminal law, "intention" is more specific. Jurors might misunderstand it and interpret it differently than the law requires.

Complex Legal Terms: Criminal law has two types of intention—direct intention (when you aim for something to happen) and oblique intention (when you know something will almost certainly happen as a result of your action). Ordinary language doesn't clearly separate these ideas, so jurors might miss these differences.

Risk of Mixed Verdicts: Because people understand "intention" in different ways, jurors might give inconsistent verdicts in similar cases, leading to unfair results.

Example of Confusion: In some cases, judges told jurors to use "common sense" to decide on intention. But this caused confusion because "common sense" doesn't explain the specific legal meaning of intention.

summary

Hyam

Nedrick



Moloney

TheDiff



R v Woollin

