

MENS REA IN MODERN CRIMINAL LAW.

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Allen David Chantry LL.M

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A. D. Chantry, January, 1989.

ABBREVIATIONS

A. C.	Appeal Cases.
All E. R.	All England Reports.
C. L. J	Cambridge Law Journal.
C. L. P.	Current Legal Problems.
Cox CC	Cox Criminal Cases.
Cr App Rep.	Criminal Appeal Reports.
Crim L. R.	Criminal Law Review.
Dears C. C.	Dears criminal Cases.
K. B.	King's Bench Division.
L. Q. R.	Law Quarterly Review.
M. L. R.	Modern Law Review.
M. P. C.	Model Penal Code.
N. L. J.	New Law Journal.
Q. B.	Queen's Bench Division.
Sol. Jo.	Solicitors' Journal.
W. L. R.	Weekly Law Reports.
Yale L. R.	Yale Law Reports.

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ABSTRACT.

A. D. CHANTRY.

MENS REA IN MODERN CRIMINAL LAW.

The purpose of the thesis is to critically analyse the current legal forms of mens rea which are shared by common law and statute, namely intention, recklessness, malice, negligence and strict liability. I shall argue that the current concepts are (i) inadequate since they lack conceptual clarity, consistency and cohesion; (ii) that the concepts of intention and recklessness lack terminological consistency since their parameters extend to states of mind which properly belong elsewhere and (iii) that they are unable to draw out significant moral distinctions in moral culpability with which agents perpetrate criminal offences.

The major cause for the inadequacies of the present structure lies in the number of mental states which constitute mens rea at current law. They are so few that judges have seen fit to manipulate the contours to serve the needs of justice in the cases. This has led to considerable conceptual and terminological confusion both within and between the concepts. But the major failing of the current structure of mens rea, rooted in the same cause, is that it does not sufficiently draw out significant differences in moral status between agents who perpetrate harm. It fails to do this in two ways. First, the concepts of intention, recklessness and negligence are broad in their scope so that each includes a fairly wide area of moral turpitude. Second, where a particular offence admits more than one form of mens rea the conviction does not discriminate between the various requisite mental states and thus denies accurate ascriptions of moral culpability over a large area of mental attitude toward proscribed harm.

I shall offer a new structure of mens rea which would be constituted by (i) direct intention, (ii) concomitant intention, (iii) purpose, (iv) objective, (v) gross recklessness, (vi) simple recklessness, (vii) gross negligence and (viii) simple negligence.

I shall argue that the proposed structure is preferable since the more sophisticated set of fault terms would be (i) conceptually clear, consistent and coherent, (ii) would be more terminologically consistent and (iii) would more clearly express the moral status of the agent in each case concerning the harm brought about by him.

I shall demonstrate that the proposed structure is more able to express differences in moral culpability because (i) the more sophisticated set of mens rea terms would provide a better gradation in moral fault and (ii) it would be a requirement of the proposed structure of mens rea that the court or jury determine the precise mental state with which the agent perpetrates a criminal offence and that mental state would be recorded with the conviction.

The concepts of mens rea which current criminal law uses in ascriptions of criminal responsibility are (i) intention, (ii) malice (iii) recklessness, (iv) negligence and (v) strict liability.¹ The purpose of this thesis is to critically assess the current structure of mens rea and to argue that the various current law concepts are inadequate in that they lack conceptual clarity, cohesion and consistency; lack terminological consistency, and lack consensus with people's views as to what are significant moral distinctions. I shall offer a new structure of mens rea consisting of (i) objective, (ii) purpose, (iii) direct intention, (iv) concomitant intention, (v) gross recklessness, (vi) simple recklessness, (vii) gross negligence and (viii) simple negligence. I shall argue that the proposed structure of mens rea is preferable since it is free from the inadequacies which I have ascribed to the current structure.

My central claim is that our criminal law and its system of mens rea should be structured so that we can accurately record (place a fair label upon) the agent's moral culpability at the conviction stage. My major criticism of the criminal law in relation to the current structure of mens rea is that on two main grounds it fails to take sufficient account of significantly different moral turpitudes with which agents perpetrate activity. First, except in a few selected cases current law is not prepared to distinguish between the agent who perpetrates an offence without more and the agent who perpetrates that offence as a necessary preliminary to a further offence which for some reason does not take place.² However, as we shall see,³ the proposed structure of mens rea enables us to consider the entire causal chain in each case, both past and prospective links, and to attribute blame to the agent not only for what he has done but also for what he aims to bring about by his preliminary activity.

Second, current law does not accurately record significant moral distinctions between agents in offences which admit more than one species of mens rea. In the offence of assault, for example, it must be proved that

the accused intended to cause the victim to apprehend the immediate application of force without his consent, or was reckless as to whether the victim might so apprehend such force. The mental element required is thus intention or recklessness in relation to the assault⁴ and juries convict the defendant without making any reference as to their opinion on whether he intended the assault or whether he merely foresaw the possibility that his victim might apprehend such force. However it is submitted that one might properly question a legal system which does not distinguish between significantly different mental states for the purpose of recording criminal convictions. Is it right to record the same criminality against the agent who takes a hammer to a public telephone in an act of sheer vandalism as that recorded against an agent such as Parker⁵ who slams down and damages the receiver not thinking about damage because he is in a state of self-induced temper? Moreover a judge hearing a later case cannot accurately judge the mental state with which the agent perpetrated the earlier offence. This might lead to a lighter or more severe sentence than might otherwise have been the case.⁶

There are two alternative methods of structuring criminal law in order to accommodate the more accurate recording of moral turpitude with which an offence has been committed. First we might create more offences in relation to a particular type of activity in an ascending order of seriousness according to the agent's mental state which accompanies his activity. We already have instances of this in the criminal law; for example, the different offences under ss.18 and 20 of the Offences Against the Person Act 1861.⁷ We may thus consider dividing rape⁸ into two distinct offences reserving the term 'rape' to cases in which the agent has non-consensual intercourse knowing that his victim does not consent and reserving for a lesser offence those cases in which the agent is not sure that the victim is consenting. Secondly we may retain our existing corpus of criminal offences together with the mens rea requirement for each, but specifically state at the point of conviction the precise mental state with which the agent commits the offence. In this way we have on record whether the agent brought about a particular harm intentionally, recklessly or negligently (where the offence allows the latter two concepts within its definition of mens rea). We shall see in chapter 9 that the proposed structure of mens

rea would apply the second strategy but, since it contains a more sophisticated set of fault terms it would more accurately reflect the moral culpability of the agent.

As a prelude to an analysis of the current law concepts of mens rea it would be useful to discuss the theoretical notions of subjectivism and objectivism which influence in varying degrees the parameters of the various designated mental states in any structure of mens rea.

The Ideal Typical Constructions of Objectivism and Subjectivism.

In what follows I formulate ideal typical constructions of objectivism and subjectivism. The methodology which underlies the formulations starts from an empirical labelling process taking account of the arguments put forward by judges and theorists who have labelled themselves (or have been labelled) either subjectivists or objectivists.⁹ From this initial empirical labelling process I draw out the logical implications from the material and construct what I perceive to be the most coherent¹⁰ and comprehensive version of subjectivism and objectivism.

The Ideal Typical Construction of Objectivism.

On the methodological approach which I have described above, the ideal typical construction of objectivism is constituted by the following propositions, namely (i) an agent intends an effect of his activity where it is a natural consequence thereof, (ii) the minimum mens rea requirement for recklessness is set at the point at which, on the facts and circumstances of the case, the actus reus would have been obvious to the ordinary prudent individual, (iii) liability should be determined by the actual (as distinct from the intended or believed) character and consequences of the agent's activity and/or what a reasonable person would (as distinct from what the actual agent did) foresee, believe or intend.

The first ideal objectivist proposition informs us that the agent intends all the effects of activity which naturally flow therefrom. The second proposition states that the concept of recklessness should be based upon

the notion of what is obvious to the reasonable man to the exclusion of the agent's own mental state pertaining to the risk.

The third ideal objectivist proposition has several features. First, since objectivism is concerned more with outcomes than with mental processes, the agent must have orchestrated some activity which causes or comes demonstrably close to causing injury or damage to another. Second, where an agent, by such activity, brings about (or comes close to bringing about) proscribed harm then his criminal liability shall be judged on the standards and perceptions of the ordinary man in society. Third, since ideal objectivism is generally not concerned with the agent's mental processes it is prepared to accept the concepts of negligence¹¹ and strict liability¹² as constituents of a general structure of mens rea. Fourth, the ideal objectivist proposition informs us, at least implicitly, that de facto innocent activity should not attract liability in cases in which the agent believes that activity to be criminal in nature (for example the agent who stabs a tailor's dummy believing it to be his enemy). The final feature of the third ideal objectivist proposition is that the defence of mistake is permissible provided that is a reasonable one to make in the circumstances of the case.¹³ The features of the third ideal objectivist proposition inform us that objectivism is concerned more with the dangerousness of the act than with the dangerousness of the agent.

The Ideal Typical Construction of Subjectivism.

On the same methodological approach¹⁴ the ideal typical construction of subjectivism, as it applies to criminal responsibility, is constituted by the following five propositions, namely (i) an agent intends an effect of his activity when he aims to bring that effect about or where he is certain that his activity (aimed at something else) will bring that effect about, (ii) an agent is reckless concerning an effect of his activity aimed at something else where he appreciates that there is a risk of that effect which, in the circumstances, render it unjustified for him to take that risk, (iii) criminal liability should depend on choice and what the agent knows or believes to be within his control concerning activity upon which he has embarked rather than what flows or fails to flow from that activity

by chance, (iv) the form of the conviction should mark accurately the moral status of the agent^{who} has brought about proscribed harm and (v) punishment should be awarded in accordance with what the agent has chosen to bring about by a particular exertion and not with what actually occurs or fails to occur.¹⁵

The first ideal subjectivist proposition informs us that the concept of intention is constituted by a conscious decision by the agent to bring about a particular state of affairs by his activity; that is the agent acts as he does in order that a specific change in the world be brought about thereby, or by foresight by him that a particular untoward harm is certain to flow from his activity aimed at something else. Nothing short of direct intention or foresight of certainty will suffice. The second proposition requires as a necessary element of the concept of recklessness foresight by the agent of the possibility of untoward harm which might flow from his activity. This insistence on awareness underlines the cognitive character of subjectivism. The question of whether the reasonable man would have foreseen the harm is a matter of evidence which might persuade the jury that the defendant foresaw the risk but, for the ideal subjectivist, foresight by the defendant of the prospective proscribed harm is a sine qua non to a finding of recklessness. There is thus on the subjectivist construction a clear dividing line between recklessness and negligence: that dividing line concerns awareness (recklessness) and lack of awareness (negligence) by the agent in relation to the untoward harm which his activity produces.¹⁶

The third ideal subjectivist proposition has several features. First, it revolves around the concepts of choice and control and generally excludes chance as a factor in ascriptions of responsibility.¹⁷ Thus, for example, where the agent aims and fires at his victim but his shot misses and kills a cat, the third ideal subjectivist proposition would attribute blame in accordance with that which the agent has chosen to bring about (and convict of attempted murder) and would take no account of what actually happens by chance (on my illustration the death of the cat) unless the agent at least foresees the possibility of the chance effect of his activity.¹⁸ Ideal

subjectivism would not thus accept the principle of transferred intention in cases in which the agent lacked foresight of the risk.¹⁹

The second feature of the third ideal subjectivist proposition is that where the agent is mistaken about some fact or circumstance concerning his activity then he ought to be judged on the facts or circumstances as he believed them to be. Thus where the agent shoots at a tailor's dummy believing it to be his enemy he should be treated for the purpose of ascriptions of liability as if he had in fact shot at his victim. On the other hand where the agent shoots at and injures V believing him to be a tailor's dummy the agent should be guilty of no offence.²⁰ This feature would apply also to defences. For the ideal subjectivist where the agent makes an honest mistake concerning some circumstance of the case then he shall have a defence to the substantive offence however unreasonable that mistake might be. Third, it is necessary that the agent take some physical step towards that which he aims to bring about by his activity. The ideal subjectivist would not thus attribute liability to the agent who merely thinks of committing a crime or who wills a movement of his body in order to perpetrate a particular actus reus but his body fails to respond to that act of willing.²¹

The fourth ideal subjectivist proposition informs us that culpability should count as a factor in ascriptions of liability. For ideal subjectivism it is important that both the actus reus of a particular offence and the specified mens rea requirement should accurately reflect the moral turpitude of the agent. If a particular criminal offence is defined too broadly either in terms of the actus reus or the mens rea then we attach to the perpetrator a label which does not accurately record his moral status or culpability in relation to his activity.²² This ideal typical subjectivist proposition thus insists that the relevant fault element (whether intention, recklessness or negligence) must match the particulars of the offence stated in the conviction: that the mental state of the agent at the time of his activity ought to be defined with the appropriate specificity for the purpose of criminal convictions.²³

The fifth ideal subjectivist proposition is concerned with just what amounts to appropriate punishment²⁴ and insists upon *equal blame and punishment* for the agent who tries and succeeds and the agent who tries and fails on the ground that both have made the same exertion with the same intention and there is thus nothing to choose between them in respect of moral culpability: to award lesser punishment to the agent whose exertion fails to produce the intended result is to base punishment on chance rather than choice.

In Appendix 1 I offer a selection of material from the judges and theorists which indicate the general subjectivist and objectivist positions from which I draw out the necessary inferences in formulating the ideal typical constructions.

Subjectivism, Objectivism, Current Law and Theory.

Recent legislation, case reports and theoretical discussion indicate that the current law and academic writers tend to take positions between various points on a spectrum between the two ideal abstract models of subjectivism and objectivism. The Criminal Attempts Act 1981, arguably at least, steers a midway course between the ideal constructions when defining the threshold of attempts as something which is more than merely preparatory to the commission of the offence²⁵ whilst accepting the ideal subjectivist model concerning the agent who attempts the impossible.²⁶

In relation to an offence which admits only intention a jury must be satisfied that the defendant did in fact intend that the proscribed harm be brought about by his activity,²⁷ but the jury may apply the test of what the reasonable man would have foreseen as virtually certain²⁸ as a standard for the inference that the defendant actually foresaw and intended as a consequence of his activity. I should point out here that there remains some conjecture on whether foresight of certainty amounts to intention at current law. More on this later.²⁹

The concept of recklessness has seen significant movements of position by judges and theorists between the two ideal typical constructions of

subjectivism and objectivism. For some writers³⁰ would count as reckless the agent who does not notice a risk because he does not care about it - the agent who exhibits 'practical indifference' regarding particular facts or circumstances in relation to his activity. The holder of this view requires that this particular agent display practical indifference to a risk which would have been plain to the reasonable man and there is thus a mixture of subjectivism and objectivism in his thinking. Stannard³¹ submits that where D consciously and without justification decides to run a risk he exhibits indifference or thoughtlessness, but such indifference or thoughtlessness can in fact cause D's inadvertence. He posits the case of an agent who sets fire to a bonfire without advertent to the risk of causing the death of many garden insects. He points out that such inadvertence is not culpable but a latter-day Caldwell who sets fire to a hotel without advertent to the risk of injury to guests exhibits "indifference which indicates a shocking state of mind - one that cares as little for human beings as for insects".³² But Stannard concludes his point by stating that D might have good reason why he did not advert to a risk which might render his inadvertence non-culpable, for example honest mistake or a lack of capacity to appreciate the risk.³³ However he submits that some reasons for inadvertence, such as heat of anger or drunkenness will not be sufficient as excusing factors. Duff would ascribe criminal responsibility to the agent whose unawareness of the risk has been brought about by practical indifference to an integral aspect of his activity.³⁴

Professor Glanville Williams, who has been labelled a subjectivist, has accepted that, in cases involving recklessness, the defendant should be convicted if he has failed to foresee a risk which he would have foreseen had he thought about the matter.³⁵ This stance is clearly not entirely subjectivist since the agent does not appreciate the risk at the time of his exertion which produces the untoward harm. Nor is it entirely objectivist since it insists that the agent has the capacity generally to think about the risk and has the capacity to appreciate the risk if he does in fact think about it.

Some judges, too, have taken up positions between the typical ideal constructions.³⁶ In **Morgan**³⁷ Lord Cross was prepared to allow *indifference*

as to the woman's consent as a relevant mental state in the offence of rape. Lord Hailsham was prepared to admit to liability the agent who does not care whether his victim is consenting or not.³⁸ Lord Edmund-Davies decided that a defendant is guilty of rape where he has intercourse without caring whether or not the victim was a consenting party.³⁹ I should point out that Lords Cross and Hailsham insisted that belief in consent, however ill-founded, should secure an acquittal, so they do not extend the scope of recklessness beyond entirely subjectivist limits.³⁹

In the area of beliefs there exist significant differences of opinion between judges and theorists concerning just where on the spectrum between the ideal constructions of subjectivism and objectivism liability ought to be determined. The legislature and the courts are prepared to accept the ideal subjectivist construction and excuse the agent who perpetrates activity in the mistaken belief that there is no risk of untoward harm provided that the belief is honestly, if unreasonably, held. But there are academics who take the objectivist line and count as liable the agent whose wrong belief is unreasonably held.⁴⁰ In the realm of impossible attempts the legislature and the courts apply the ideal typical subjectivist construction and judge the agent on the facts as he believes them to be.⁴¹ But there are those theorists who would wish to apply the objectivist construction to such cases and exclude the agent from criminal liability.⁴²

In relation to defences other than those involving wrongly held beliefs there has been a fair amount of movement in position between the ideal constructions by the criminal law and theorists. In Camplin,⁴³ for example, Lord Simon declared that Bedder⁴⁴ was overruled by s.3 of the Homicide Act 1957 on the ground that since words alone may amount to provocation and since the gravity of the verbal provocation will frequently depend on the personal characteristics of the defendant the Bedder principle is so undermined that it should no longer be followed whatever the nature of the provocation. Lord Simon thus allows the jury to look to the reasonable man endowed with the age, sex, and other personal characteristics of the accused, whether normal or abnormal.⁴⁵ The decision in Camplin thus shifts the objectivist approach to the defence of provocation established in Bedder towards the subjectivist approach since the personal characteristics

of the defendant should now figure in the defence of provocation. There is a further objectivist element in the defence of provocation, namely that the defendant must display a reasonable degree of self restraint.⁴⁶ Thus whilst D must actually lose his self control (a subjectivist condition) liability will depend upon the fact that the reasonable man would have done so in the circumstances (an objectivist condition). Also if a defendant is of unusually high patience but decides, in a state of calm, to kill in circumstances in which the reasonable man would have lost his self control he would not be allowed the defence of provocation.

In the defence of duress current law adopts a generally subjectivist approach but accepts the objective standard that the defendant must be faced with a threat in circumstances which might have affected a reasonably resolute man. Modern objectivists have shifted ground on this defence. For on the principle that the defendant must escape the duress if possible it seems that there is general agreement between subjectivists and objectivists that the court should look subjectively at the individual himself, his capabilities and his knowledge, in order to ascertain objectively whether it was reasonable for him to escape rather than submit to the duress.⁴⁷ In the defence of mistake the law adopts the wholly subjectivist view that the agent should be judged on the facts as he (and not the reasonable man) believed them to be.⁴⁸

In the content of the substantive offences there is some movement between the ideal constructions. In relation to the mental state in theft, for example the requisite mental state is (i) 'intention', which has been construed on the lines of the ideal typical construction of subjectivism, and (ii) 'dishonesty', which is based upon the standards of the reasonable man as opposed to those of the defendant in each case. Professor Smith, a leading subjectivist, in assessing the judgment in Ghosh⁴⁹ which laid down the standard of reasonable and honest people as the test for dishonesty, said that

"(t)his at least gets away from the extreme and unacceptable subjectivism of Gilks and Boggeln v Williams. D is no longer to be judged by his own standards".⁵⁰

In the offence of blackmail there is an element of objectivity in that the victim is expected to demonstrate reasonable (objective) fortitude and not be affected by trivial threats.

Implicit in the examples above of the movements between the ideal constructions is the general principle that the normative standards by which the defendant's conduct is to be judged (was he honest; was he justified in taking the risk; did he exercise reasonable self control; and so on) are objective, not subjective. The subjectivist thus still insists upon an assessment of subjective factors in the cases but is prepared to place those subjective factors in the context of objective standards for the purpose of attributing criminal responsibility.

The conflicting opinions of the theorists on the extent of the subjectivist/objectivist content in the criminal law, and the fact that the offences and defences at current law take diverse positions along the subjectivist/objectivist spectrum indicate that neither ideal typical construction is satisfactory as a basis for the purpose of ascriptions of criminal responsibility.

In the following chapters I shall identify the various current legal concepts of mens rea and the extent to which each conforms to one or other ideal typical construction of subjectivism or objectivism. I shall appraise the relevant arguments which have been put forward by the theorists and judges in connection with the substantive content of each current legal concept and indicate that those concepts are inadequate since they lack conceptual clarity, cohesion and consistency and do not have sufficient regard to significant differences in moral culpability with which agents bring about harm. I shall offer a proposed structure of mens rea and test both the proposed and current law structures against the essential criteria stated above⁵¹ in order to demonstrate that the proposed structure is to be preferred. I begin with the concept of intention.

FOOTNOTES TO CHAPTER 1.

1. Of course there are in addition statutory forms of mens rea including 'knowledge' and 'permitting'. In this thesis I confine discussion to the common law forms of mens rea.
2. Take, for example, the hypotheticals Diana and Doreen who each take a carving knife from a supermarket without paying. Diana plans to use the knife for carving meat but Doreen steals the knife in order to kill her husband in his sleep this evening. Both agents are guilty of theft but there is a significant distinction in the moral status of the agents concerning the purpose which underlies their criminal activity. Examples of offences in which current law does provide for blame and punishment for prospective activity may be found in chapter 2 at p.23ff.
3. Infra chapter 9.
4. See Cross and Jones, 10th ed. at p.134.
5. See infra chapter 6 at p.206.
6. See infra chapter 9.
7. For a discussion on ss.18 and 20 see Smith and Hogan, 6th ed. p.397ff.
8. The current definition of rape is contained in s.1(1) of the Sexual Offences Act 1956 and s.1(1) of the Sexual Offences (Amendment) Act 1976.
9. Selectivity is necessary here since there is some inconsistency in the opinions of some exponents, particularly judges who may be either more or less subjectivist or objectivist in their views in the cases and sometimes within the same case.
10. 'Coherent', that is, with the views which I have taken to be either objectivist or subjectivist.
11. See infra chapters 7 and 8.
12. See infra chapter 8.
13. I should point out that no one judge or theorist accepts the ideal typical construction without qualification since it is built upon the general empirical evidence from which I draw out what is implicit in a rather unorthodox body of opinions.
14. As that adopted in constructing the ideal typical construction of objectivism. see supra p.3.
15. The comments I made in note 13 concerning the ideal typical construction of objectivism apply here also.

16. Interesting discussions on this point include J. C. Smith, 'Case and Comment' in the Criminal Law Review [1981] commenting on Caldwell [1982] AC 341 and Lawrence [1982] AC 510. See also G. Williams, 'Intention and Recklessness Again' in Legal Studies (1982) 2 189. See also McEwan and Robilliard, 'Intention and Recklessness Again: a Response' in Legal Studies (1982) 198.
17. See generally A. Ashworth, *infra* note 22.
18. 'Chosen' includes 'expectation' in addition to 'intention' for if the agent foresees a contingent outcome which might follow upon his activity and continues with that activity then he has chosen to run the risk of bringing about that outcome.
19. For which see chapter 3. p.34ff.
20. Impossible attempts are discussed in some detail in chapter 5.
21. See A. J. Ashworth, 'Sharpening the Subjectivist Element in Criminal Law' in Philosophy and the Criminal Law. Franz Steiner Verlag Weisbaden G.M.B.H. 1984 p.79ff.
22. See A. J. Ashworth, 'The Elasticity of Mens Rea' in 'Crime Proof and Punishment, (1981).
23. *Ibid* p.45ff.
24. See A. J. Ashworth *supra* note 22.
25. See *infra* chapter 5 at p.149ff.
26. See s.1(3) of the 1981 Act.
27. Moloney. [1985] AC 905.
28. The 'Nedrick' test. See [1986] 3 All ER 1.
29. See *infra* chapter 3.
30. See for example R. A. Duff in 'Recklessness' in the Criminal Law Review [1980] p.283ff. and in 'Recklessness and Rape' in the Liverpool Law Review [1981] Vol.III(2) p.62ff.
31. J. E. Stannard, 'Subjectivism, Objectivism and the Draft Criminal Code' in the Law Quarterly Review [Vol.101 October 1985] p.540ff.
32. *Ibid* at p.550-1. He also points out the case of D who has sexual intercourse with V without discussing the state of the stock market or the price of cheese. He states that such inadvertence is not culpable as it does not relate to the activity in issue. But if D does not advert to her consent then he exhibits a culpable state of mind since for him her consent to intercourse is as irrelevant as her opinion as to the state of the stock market or the price of cheese.

33. Ibid at p.551.
34. See R. A. Duff, 'Professor Williams and Conditional Subjectivism' at p.281.
35. See G. Williams, 'Divergent Interpretations on Recklessness' in the New Law Journal [1982].
36. See G. Syrota, 'Mens Rea in Gross Negligence Manslaughter' in the Criminal Law Review [1983] 776 for a selection of cases on the issue of 'practical indifference'.
37. [1976] AC 182.
38. Italics added.
39. I offer a more detailed account of the various judicial opinions on recklessness infra chapter 6.
40. See, for example, J. Harris, 'Overexertion and Underachievement' in Philosophy and the Criminal Law. Franz Steiner Verlag Weisbaden G.M.B.H. [1984].
41. See supra p.7.
42. See, for example J. Harris supra note 40..
43. (1978) 2 All ER 168.
44. [1954] 2 All ER 801.
45. It should be noted that D might not rely on his exceptional excitability or pugnacity, or ill-temper or his drunkenness (per Lord Simon).
46. See Smith and Hogan, 5th ed. at p. 214ff.
47. See for example, Hudson [1965] 1 All ER at p.74.
48. See Smith and Hogan, 4th ed. at p.205.
49. [1982] 2 All ER 689.
50. J. C. Smith, 'The Law of Theft' (5th ed. at p.123). The cases cited are Gilkes [1972] 3 All ER 280 and Boggeln v Williams [1978] 2 All ER 1061.
51. Supra p.1.

CHAPTER 2.

DIRECT INTENTION.

In this and the next Chapter I put forward my proposed model of intention which comprises two distinct mental states, namely direct intention and concomitant intention. I lay down the criteria upon which my model rests and test the models against the current law concepts of direct intention and oblique intention.¹ To the extent that the current law models produce conclusions which differ from the proposed model I shall indicate why the proposed model is to be preferred.

1. Direct Intention

An agent has direct intention concerning a particular change in the world

- (i) when he contemplates or believes that it may flow from a particular exertion and he makes that exertion because of that belief, or
- (ii) when that change is conceptually indivisible from the change at which his exertion is directed.

There are thus two species of the proposed model of direct intention. The first species of direct intention has six features. First the agent must be both aware of and believe that his exertion is capable of producing a particular proscribed harm or change in the world. If the agent is not aware that a particular change in the world will flow from his exertion then he cannot be said to have directly intended it.² If the agent believes that his exertion may bring about a particular change in the world when, on the facts and in the circumstances of the case that change cannot be brought about, the agent nonetheless has direct intention concerning that change when he makes his exertion. Thus where D stabs a corpse in the belief that it is his sleeping victim, V, he directly intends V's death since his activity is capable of producing that consequence on the facts and circumstances as he believes them to be. If, at the time of his exertion, he believes that there is no chance that it will produce the change then the agent cannot be said to directly intend it. Thus where D points a gun towards his enemy, V, and

fires, believing him to be well out of firing range of the weapon, one cannot say that he directly intends V's death whether or not his belief turns out to be false and V is killed. In this case D's direct intention is to discharge a firearm in a particular direction without more. Whether or not D may be subject to criminal liability on other grounds is discussed below.³

A second feature of this first species of direct intention informs us that the agent must in fact aim at or try to⁴ bring about a change in the world which he contemplates as a consequence of his activity. The word 'because' is included to signify that the agent would not act as he does unless he has the belief that his exertion is capable of producing the consequence which he contemplates. Clearly he would not try to achieve a consequence which he believes to be impossible, but if the agent does make an exertion (goes through the motions) without belief in success concerning a particular consequence then he does not directly intend that consequence.⁵ This second feature also informs us that if a particular contemplated effect does not figure as a factor in the agent's deciding to act as he does, then one cannot say that he intends that effect although he may have some other appropriate mental state sufficient for criminal liability.⁶ Suppose, for example, that Daniel is alone in a hot room and decides to open the window in order to reduce the temperature. He realises at the time of his activity that the sudden draught might damage or destroy his aunt Matilda's valuable, if delicate, orchid but Daniel feels that his needs must come first and he opens the window. The precious plant is affected and dies. It is submitted that Daniel cannot be said to have directly intended the death of the plant although he may incur criminal liability on other grounds.⁶ But what if the prospect of the death of the plant appeals to Daniel? Would his desire that the plant die elevate his mental state to one of direct intention? An answer to this question must await an analysis of intention and desire.⁷

However if the death of the plant figures in Daniel's deliberation as a reason, at least in part, for acting as he does then he directly intends the death of the plant on the proposed model. Suppose that

Daniel has two methods of cooling the room. He can turn down a radiator which will do the trick over a short period of time or he can open a window and cool the room more quickly. He realises that the second method may produce a draught and kill the delicate plant. That prospect appeals to Daniel and he chooses the latter alternative accordingly. It is submitted that here Daniel has the direct intention to cool the room and to kill the plant since the latter outcome, at least in part, informs his decision to act as he does.

One final point on the case of the orchid. Suppose that Daniel's only means of cooling the room is by opening the window. Daniel appreciates the risk to the plant. He realises that he can take the plant into another room where it will be safe from the elements but, because its death appeals to him, he leaves the orchid where it is and opens the window in order to cool the room. Does Daniel directly intend the death of the plant by his inactivity in relation to its removal to a safe place? I shall argue later that we ought to count Daniel as having 'concomitant' intention concerning the death of the plant by his activity which was directed at some other effect since he foresees the death of the plant as an 'empirically' certain accompaniment of that activity.⁸

There is a specific test which one might apply in order to establish whether in any case this second feature of direct intention is present, namely the test of failure. The test is briefly this. We may ask what would be the reaction of the agent to the non-occurrence of an anticipated effect of his activity. If the agent feels that his activity has been in some way frustrated; that his plans are in some way thwarted by the failure of the contemplated effect, then we may say that he was, by his activity, trying to bring that consequence about; that he acted as he did because of his belief and that he thus directly intended that consequence. Contrariwise if the agent is relieved that an anticipated consequence of his activity has failed to materialise, or if he is indifferent to that failure, then we may say that his activity was not motivated by his contemplation of that consequence; that that

consequence did not figure as a reason for his acting as he did and that he thus did not directly intend that consequence.

We may apply the test to a hypothetical. Derek plants a bomb at a factory designed to explode after the plant has closed down. Derek is aware that there is a possibility that someone might be injured (overtime might be operating, or some personnel may still be on site after the main workforce has left the building). An employee is injured in the explosion. Does Derek's mental state concerning possible injuries fall within the first species of direct intention? Having taken note of all the facts of the case we may come to the conclusion that Derek would not have considered his mission a failure had no-one been injured, that he would have been relieved to note that his objective had been accomplished without injury to others. If we do come to this conclusion then I think that we are entitled to say that Derek did not directly intend injury to others when he acted as he did, although he will presumably be liable on the ground of some other mental state.⁹

A third feature of the first species of direct intention is that it is not necessary that the agent be certain of success: it is sufficient that he believes that his act may bring about the proscribed harm or state of affairs. Thus so long as the agent believes he has some chance, no matter how slight, of achieving the change in the world by his exertion and he acts as he does with that belief,¹⁰ then he directly intends that change. Fourth, the agent must have actually made some physical exertion directed at a particular effect before one may include him in any assessment of criminal responsibility. The first species of the proposed model of direct intention thus excludes from criminal liability mental exertions which fail to produce the corresponding physical exertions although the mental exertion clearly amounts to direct intention. For example suppose that D is behind V on the top of a cliff and wills his arms to move in order to push V off the cliff but for some physiological reason his muscles fail to respond to his mental exertion. D certainly wills his bodily movement with the direct intention that he cause V to fall from the cliff but he is not subject to liability on the proposed species of direct intention since he has

made no physical change in the world concerning that direct intention. Thus the phrase 'he makes that exertion' relates to a physical act on the part of the agent. A comment by Professor Williams relating to this fourth feature is worthy of note. He suggests that it would be a misuse of language to assert that an agent who plans a crime has an intention to commit that crime when he has, as yet, made no physical exertion towards realisation of his plan.¹¹

A fifth and crucial feature of this first species of the proposed concept of direct intention is that, on the actual facts or on the facts as he reads them to be,¹² the effect contemplated by the agent must be a possible effect of the exertion made by him. The proposed species of direct intention thus has a temporal aspect: it does not include any effect towards which the agent's immediate exertion is directed unless that exertion is capable of bringing that effect about. An agent cannot thus be said to have direct intention in relation to any contemplated effect at any time before he brings himself to the point of an exertion which he believes to be capable of bringing about that effect. Thus where D makes a physical exertion which he believes to be capable of producing effect x then, provided that his case otherwise fits into the first species of direct intention, he directly intends x. But if, by activity which cannot produce effect y, he brings about x as a preliminary to y then the agent cannot be said to directly intend y whilst making the exertion which produces x, although he does directly intend x. If, however the exertion is itself capable of producing both the preliminary effect x and the ultimate effect y then the agent directly intends x and y. Thus where D, with the object of causing his death, takes aim and fires at V through a closed window D will directly intend the damage to the window (preliminary effect x) and the death of V (effect y).

A hypothetical to illustrate the temporal aspect of direct intention would be useful. Suppose that D plans a burglary at a local supermarket. He breaks into the building but is arrested before he lays hands on any of the stock. In this case D directly intends to enter as a trespasser at the point of physical entry into the premises since that exertion is,

per se, capable of producing that consequence; but on the proposed model, D does not directly intend to steal as he enters the building since his exertion (entering the building) is not itself capable of bringing that consequence about. D does not thus have direct intention in relation to theft.¹³

The sixth and final feature of this first species of direct intention is that it is not necessary that the agent desire the contemplated effect aimed at by him.¹⁴

The Proposed Species of Direct Intention and the Current Law Model.

There have been numerous cases in our criminal law which have restricted the concept of intention so that it equates with my model of direct intention. In Cunliffe v Goodman,¹⁵ a civil case, Asquith LJ stated that

"an 'intention' to my mind, connotes a state of affairs which the party 'intending' ... does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition".

It should be pointed out that Asquith LJ was talking about 'intending' and 'contemplating' a future course of action so there is a temporal dimension here which is not shared by the proposed species of direct intention. Nonetheless I think that the dictum shows that the learned Lord Justice views the concept of intention generally in terms of aiming to bring about the proscribed harm.

In Steane¹⁶ D made a broadcast for the Germans after he had been physically assaulted and his family threatened with incarceration in a concentration camp. D was charged with doing acts likely to assist the enemy with the intent to assist the enemy contrary to the then current Defence Regulations. His conviction was quashed on the ground of misdirection by the judge to the jury. It was stated that the jury should have been instructed that it was for the prosecution to prove

that the accused had the *specific intent* of assisting the enemy, and that he should have been acquitted if they had any doubt about the existence of such intent. It is submitted that the Court was restricting the mens rea element of the particular offence to direct intention concerning assistance.¹⁷

In Mohan¹⁸ D was charged with attempting by wanton driving to cause bodily harm to a policeman. The judge directed the jury that it was not necessary to prove direct intent to cause bodily harm: that foresight that his driving was likely to cause bodily harm, or recklessness in relation to it is sufficient. The Court of Appeal quashed the conviction on the ground that intention was an essential ingredient of the offence of attempt. The court defined that concept as "a decision to bring about, insofar as it lies within the accused's power, the commission of an offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not".

In Sinnasamy Selvanayagam¹⁹ D remained in occupation of his home despite a legal order to quit. He was convicted of remaining in occupation with intent to annoy the owner contrary to the Ceylon Penal Code. The Privy Council made the comment that knowledge by the defendant that the owner would certainly be annoyed did not amount to intention to annoy him: that the defendant's 'dominant intention' was to remain in his home. It is submitted that the Privy Council had in mind direct intention concerning the regulatory offence when talking of dominant intention. In Gillick v West Norfolk and Wisbech Area Health Authority²⁰ the House of Lords indicated that contraceptive advice given by a doctor to a female patient under sixteen did not amount to aiding a principal to commit the substantive offence of unlawful sexual intercourse since his advice amounted to the protection of the minor. It seems that the opinion here is that foresight by the doctor that his counselling might encourage sexual intercourse with his patient could not amount to an intention to aid it - that intention requires an aiming at the proscribed harm.²¹

In Thorne v Motor Trade Association²² Lord Atkin stated that where a supplier puts a trader's name on a 'stop list' so that the business would certainly be ruined it is an act done

"in lawful furtherance of business interests, and ... without any express intent to injure the person whose name is published".

Lord Atkin thus restricted intention to direct intention as defined above and was prepared to leave out of his account of criminal responsibility for intentional activity any consequence which would 'certainly' follow upon that specifically intended by the agent.²³ Other cases with which the proposed species of direct intention complies include Belfon,²⁴ and Morgan.²⁵

Most if not all theorists would accept the first species of the proposed model of direct intention.

The case studies above indicate that the courts, in some areas of criminal law at least, are prepared to accept a concept of direct intention which is restricted to what the agent is aiming to achieve by his activity. Those case studies also inform us that for some offences at least the proposed temporal restriction on direct intention is recognised at law. For example in the offence of theft the offence occurs when the agent actually takes hold of the property (the actus reus) with the appropriate direct intention regarding that exertion, i.e. with the intention of permanently depriving the owner of his property. It thus seems that there is no room for any 'future' act in the offence of theft.²⁶ Also in murder the offender must have inflicted or caused the fatal injury to his victim and at that time must have the necessary direct intention, i.e. the intention to kill or cause grievous bodily harm.²⁷ However the temporal aspect of direct intention is not recognised as a universal proposition since, in specific instances, the law is prepared to count planned future activity as directly intended by the agent and hold him liable therefor although his activity has not reached the point of execution.

In the offence of burglary²⁸ for example a person is guilty of burglary if, inter alia, he enters any building or part of a building as a trespasser *with intent to commit any offence stated in s.9(2)*. It is clear that Parliament is talking in terms of direct intention concerning the agent's future activity after he has entered as a trespasser and that the notion of direct intention does not have the temporal restriction which is imposed by the proposed model of direct intention. By s.25 of the Theft Act 1968 a person is guilty of an offence if, when not at his place of abode, he has with him any article *for use in the course of* or in connection with any burglary, theft or cheat. The precise mental state for this offence is not stated clearly but it is suggested that the mens rea for the offence under s.25 is constituted by knowledge by the agent that he has the article in his possession and a direct intention to use it at a future point in time in connection with a specified offence. In the offence of assault with intent to rob²⁹ the intention clearly relates to an effect of future activity in relation to the physical assault itself. The same applies to the offence of assault with intent to commit buggery.³⁰ As Smith and Hogan point out³¹ the offence will be committed where D assaults his victim intending to carry him off and commit buggery some hours later.³² A further example is attempts since there will be cases here for which the law ascribes liability to the agent in respect of activity which cannot itself bring about the consequence planned but is more than merely preparatory to that offence.³³ Thus where D, with a view to committing burglary, damages the door of a house he is guilty of attempted burglary.³⁴ His 'future' intention to steal is thus accepted as direct intention at current law.

A final illustration is conspiracy. By s.1(1) of the Criminal Law Act 1977 it is an offence for a person to agree with another person or persons that a course of conduct "*shall be pursued which, if completed in accordance with their intentions*"³⁵ ... will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement". The words in italics clearly indicate that the law treats as intended an effect of activity the physical causal chain of which has not even begun at the point when the conspiracy is

complete. The above examples of offences which admit as intention the agent's plan concerning prospective activity betokens a lack of consensus between the first species of the proposed concept of direct intention and intention as it is understood at criminal law. Adoption of the proposed model would thus require a significant restructuring of those offences whose mens rea includes an intention pertaining to future activity. Yet I think that direct intention should be restricted to effects which, as the agent reads it, are capable of being produced by a particular exertion, and ^{not to} ~~that~~ any prospective effect at which that exertion is directed but cannot produce.³⁶

Any proposal which would require significant changes to the structure of an existing concept of mens rea at current law requires justification. The major ground upon which my submission rests concerns the issue of conceptual clarity. In the cases the judges have given the concept of intention varying and conflicting meanings so that it is not possible to define that concept with precision. For example we have 'direct intention'³⁷ to signal the fact that the agent must aim to bring about a particular proscribed change in the world; 'dominant intention'³⁸ to restrict intention to the more immediate aim of the agent; 'actual intent';³⁹ 'specific intent'⁴⁰ which, as Cross and Jones point out,⁴¹ is capable of four interpretations; and 'basic intent',⁴² which seemingly applies to any positive state concerning the proscribed change in the world;⁴³ The courts have also talked in terms of 'express intent'⁴⁴ and 'already formed intent'.⁴⁵ The courts have also been prepared to consider foresight of a proscribed change in the world as intention in varying degrees.⁴⁶ Thus foresight of likelihood,⁴⁷ probability,⁴⁸ high probability,⁴⁹ certainty⁵⁰ and several other types of foresight of harm have been designated as intention by the courts. Where the definition of the offence requires an intention concerning a change in the world temporarily beyond the preliminary activity carried out by the agent the courts talk in terms of 'further intention' or 'ulterior intention'.

The various definitions and meanings which the courts have given to the concept of intention means that the notion lacks conceptual clarity and cohesion with other concepts of mens rea. It is this lack of clarity

which has led to so much confusion as to the precise parameters of the concept of intention as it relates to the various specific offences. It is this confusion which fuels the controversy concerning offences in which the requisite mens rea is restricted to intention and thus renders a precise definition essential. But if we are to have a precise definition of intention which might apply across the spectrum of criminal offences (reserving lesser mental states which we wish to attribute to particular offences to some other designated concept of mens rea), then intention must necessarily be vested with minimum content. That minimum content would mean a concept of intention which is restricted in two ways, namely to effects (i) which the agent is aiming to bring about and (ii) which are capable of being brought about by his exertion. If we restrict the temporal aspect of intention in this way we achieve a definition of intention which is generally acceptable in relation to the total spectrum of criminal offences. Then if we wish to punish an agent's attitude toward a risk of untoward harm or his criminal objects which lie beyond his present activity (which will lead to them) we may do so by way of ascribing a different mental state to him. In this way we maintain a concept of intention which is conceptually clear and which is not susceptible to wide interpretations which generate so much confusion.

In order to accommodate my submission within the criminal law it would be necessary to restructure the mental element in those criminal offences which admit intention as to a prospective exertion and in others to restructure the offences themselves. In the offence of burglary, for example, we would need a concept to replace the expression 'with intention' in relation to the further intent⁵¹ with which D enters as a trespasser, since, on my definition of intention, D cannot intend one of the four ulterior offences until he has made an exertion which is itself capable of producing one of them (simple entry as a trespasser is not sufficient). I shall argue later⁵² that we may designate the mental state pertaining to the prospective change in the world as 'purpose' or 'objective'. We may thus charge D with entry as a trespasser for the purpose of committing one of the four offences stated in s.9(2). Also we may wish to define the s.9 offence so that D must directly intend to

enter as a trespasser. In relation to s. 25 of the Theft Act 1968⁵³ we would need to redefine the mens rea concerning the prospective activity of stealing or cheating.⁵⁴ It is submitted that D, in such a case, carries the item *for the purpose* of committing one of the designated harms.⁵⁵ In relation to the offence of assault with intent to rob⁵⁶ and assault with intent to commit buggery⁵⁷ we would need to redefine the mens rea regarding the prospective forcible taking of property or buggery respectively. I submit that we may charge D with assault for the purpose of committing robbery or for the purpose of committing buggery.⁵⁸

In respect of the inchoate offence of attempt we would need to redefine the mens rea element concerning the actus reus towards which the agent has done something which is more than merely preparatory. This issue takes up nearly the whole of my discussion in Chapter 5⁵⁹ but it is worth noting here that the first species of the proposed concept of direct intention pushes the parameters of the offence of attempt to the last act necessary in order to bring about the substantive offence since D cannot intend the substantive offence until he has made an exertion which, as he reads it, is capable of producing the actus reus. Finally the mens rea concerning the prospective harm in the inchoate offence of conspiracy would need redefinition. My view is that the defendants should be charged with conspiracy for the purpose of committing the substantive offence.⁶⁰

A second point for consideration here is whether we are entitled to include in ascriptions of criminal responsibility both the preliminary criminal offence brought about by the agent and the criminal objective which is the reason why the preliminary criminal offence has been brought about by him. An illustration will assist discussion here. Suppose that Donald breaks into an armoury and takes a rifle. His plan is to use the rifle to assassinate the king later that evening. Can we charge Donald with burglary (the preliminary offence) for the purpose of assassination (the agent's objective)? One or two offences do allow us to ascribe liability for the unattained objective where the preliminary activity is itself criminal in nature.⁶¹ In at least one offence the law attributes liability for an innocent exertion which is in fact a

preliminary towards a criminal objective. In the offence of burglary the agent who has entered a building as a trespasser (an exertion which is not criminal in nature) with a view to committing one of the four offences stated in s.9(2) of the Theft Act 1968 is guilty even if he does not succeed in bringing about his criminal objective. But the criminal law has been slow to extend criminal responsibility in this way and refuses to attribute liability in relation to an objective which is remote from the preparatory activity. On current law Donald would be guilty of burglary but would not be charged in connection with the objective (assassination) which informs that otherwise preparatory activity.

My view here is that, in assessing criminal activity, we are entitled to consider the whole causal chain which leads to the agent's objective; that we are entitled to pick out from the causal chain both past and prospective links which constitute criminal offences, and ascribe liability to the agent in respect of those offences. Donald should be charged with burglary for the purpose of, assassination. More on this later.⁶²

To summarise on the first species of the proposed concept of direct intention. An agent directly intends an effect of his activity where he (i) contemplates or believes that it may flow from his activity and (ii) he acts as he does because of that belief. As the agent reads it the exertion must be capable of bringing about the effect at which it is directed. An agent cannot directly intend a prospective effect until his activity has reached a stage at which (as he sees things) it is capable of producing that effect. Desire for the effect is not a necessary prerequisite for the purpose of ascriptions of criminal liability on the basis of direct intention.

(ii) Direct Intention as Conceptual Certainty.

I turn now to the second species of the proposed concept of direct intention.⁶³ One may note from my summary above that the first species of direct intention does not extend to foresight of the effect

simpliciter but rather insists upon the agent's aiming to bring the effect about by his activity. Foresight of certainty is thus not sufficient. However I think that foresight of certainty should figure as a species of intention since there is a moral distinction to be drawn between the agent who anticipates an effect as a probable accompaniment of his exertion aimed at some other effect (and who is thus reckless concerning the effect) and the agent who foresees the untoward effect as certain to flow from his exertion aimed at some other effect. That moral distinction may be drawn by the inclusion of foresight of certainty in the concept of direct intention. However it is submitted that there are two distinct kinds of foresight of certainty, namely foresight of 'conceptual' certainty and foresight of 'empirical' certainty. The former concept constitutes the second species of direct intention and is discussed below. The latter concept constitutes my proposed model of concomitant intention which is discussed in detail in Chapter 3.

The second species of the proposed concept of direct intention takes the following form.

An agent has direct intention concerning an untoward effect of his activity where that effect is conceptually indivisible from the effect at which his exertion is directed. The agent will generally be liable for the untoward and indivisible effect whether or not he actually alludes to it. In such a case, however he may avoid liability where he can prove on the balance of probabilities that at the time of his activity there existed some legally recognised factor sufficient in the circumstances to prevent his perception of the untoward and indivisible effect. Subject to this proviso an agent will be liable for an attempt at both the effect aimed at by him and the untoward and indivisible effect where he has brought his activity to that point of the causal chain which brings him within the actus reus of attempt.⁶⁴

The substance of the proposed species of direct intention requires some elucidation.

1. Indivisible Effect.

Where, on the facts and in the circumstances of the agent's exertion, an effect y is indivisible from the directly intended⁶⁵ effect x, then y is 'conceptually related' to x and is thus conceptually certain to flow from the agent's exertion should that be successful in bringing about x. It is submitted that in such cases to directly intend x is to directly intend y. Thus where the Heir Apparent shoots and kills his father then the death of the king and the immediate installation of the prince in accordance with ancient tradition are indivisible transactions and, on my submission, the prince directly intends both the king's death and his accession as king. A classic illustration is provided by Glanville William's amoral surgeon who cuts out his patient's heart in order to experiment with it, not intending to kill his patient, but knowing that he is killing him. In this case the patient's death must logically follow upon the surgeon's activity: the removal of the heart and the death of the patient are indivisible. On my submission the surgeon directly intends his victim's death.⁶⁶

There are several case studies which demonstrate that the current criminal law treats as intended an untoward and indivisible effect of the agent's activity aimed at something else.

In D.P.P. v Luft⁶⁷ the House of Lords held that an intention to prevent the election of one candidate necessarily involves an intention to improve the chances of success of the remaining candidates though the person so intending is indifferent which of them is successful. In Hunter⁶⁸ three men accidentally killed their young female victim in the course of horseplay. In panic they hid the body under some stones. They were found guilty of conspiracy to prevent the burial of a corpse. The Court of Appeal decided that where an agreement to conceal a body in fact prevented burial then the offence is proved although prevention of burial was not the object of the agreement. It is submitted that both judgments were grounded on the fact that the two consequences in issue were indistinct and in fact constituted the same transaction.

In Hills v Ellis⁶⁹ a by-stander, D, took hold of the arm of a police officer in order to prevent him from making what D thought to be a mistake in arresting the wrong man. D's aim was to prevent a mistake being made but his act necessarily hindered the officer and he was found guilty of obstructing him.⁷⁰ Similarly in Lewis v Cox⁷¹ D's friend had been arrested by the police and put into a van. D continued in his efforts to open the door of the van in order to establish just where his friend was to be taken. His intention was not to obstruct the police but his activity necessarily brought about that effect. It is submitted that both cases provide examples of my proposed second species of direct intention. In Arrowsmith v Jenkins⁷² D set up an impromptu meeting on the highway thus causing an obstruction. She was convicted of wilfully obstructing the highway although, on her submission, her intention was to hold a meeting and not to obstruct the highway. It is submitted that the defendant was rightly convicted. In the circumstances of the case there is no distinction between the meeting and the obstruction of the highway - they are of a piece and to intend one is surely to (directly) intend the other. The same holds for the case of Hills and Ellis:⁷³ the taking hold of the constable's arm and obstructing him in carrying out his duty are one and the same thing, it thus matters not which was the motivation behind the agent's activity; both were directly intended on the proposed second species of direct intention.

Some theorists have alluded to untoward and indivisible effects although using different terms. Duff writes

"suppose that I intend to decapitate Brown: can I say that his death is a foreseen but not intended consequence of my action? Most commentators agree that I cannot: that the connection between the intended result and his death is too "close" to allow this distinction ... The connection is rather *logical*.⁷⁴ "Brown is decapitated but survives" does not specify any intelligible possibility since it is part of the logic of "human beings" that decapitation kills them".⁷⁵

From my explication of the notion one may note that conceptual certainty involves an untoward harm x which is indivisible from directly intended

harm y; that in such cases $x = y$, and that we are thus justified in holding conceptually certain consequences as directly intended by the agent. I think that most judges and commentators are prepared to include the notion of 'conceptual certainty' within the parameters of intention generally. Lord Hailsham drew the limits of intention at 'virtual certainty' in *Hyan*⁷⁶ and may thus be counted as accepting conceptually certain results as directly intended by the agent. As Glanville Williams would include cases of virtual certainty as intended he would clearly accept conceptually certain consequences as directly intended.⁷⁷ Clarkson and Keating state that a consequence ought only to be regarded as intended when it is the aim or objective of the agent, or is foreseen as *certain*⁷⁸ to result.⁷⁹ It is clear from this statement that the learned authors are prepared to count as intended conceptually certain consequences.⁸⁰

However I should point out that whilst most, if not all, judges and theorists include the concept of conceptual certainty as a species of intention, they would also count empirically certain effects⁸¹ as intended: they would not thus discriminate between the two proposed species of 'certainty'. It also seems clear that they insist upon foresight by the agent of both the effect aimed at by him and the effect which is certain to flow from his exertion as a necessary prerequisite to criminal liability. This represents the ideal typical construction of subjectivism concerning the concept of intention.⁸²

2. Failure to Allude to an Untoward and Indivisible Effect.

Notwithstanding this general approach by the judges and theorists my submission here is that a conceptually certain consequence of his intended activity should be counted as directly intended by the agent whether or not he actually contemplates that consequence at the time of his activity. Thus where D embarks upon activity in order to prevent V from winning an election he should be counted as directly intending to assist the only other candidate to win even though the thought of his aiding the other had not crossed his mind. This contention falls outside the traditional subjectivist notion of intention which requires actual

contemplation of the untoward harm, but I think that the departure is justified on the ground that the effect intended and the indivisible second effect are of a piece and to intend one is to intend the other.

3. The Proposed Rebutting Provision.

The notion of conceptual certainty is subject to the proviso that the defendant who brings about conceptually certain harm y by activity aimed at x may be able to avoid liability for the occurrence of y (but not of x if x constitutes a criminal offence) where he can prove to the satisfaction of the court or jury on the balance of probabilities that there was present some legally recognised factor in sufficient degree in the circumstances to prevent him from perceiving the occurrence of y. It is envisaged that Parliament would stipulate the legally recognised factors when creating this second species of the proposed species of intention. I discuss this issue in some detail in Chapter 7.⁸³ Generally the legally recognised factor would be one of (i) lack of capacity or (ii) misperception of a fact or circumstance concerning the conceptually certain harm.

We may illustrate (i) with a case study. In Elliot v C⁸⁴ D, a fourteen year old girl of low intelligence who had not slept for some twelve hours and had had no food or drink during that time, entered a garden shed, poured spirit onto a carpet and set a match to it. The shed was destroyed. D was charged with arson to the shed, contrary to s.1(2) of the Criminal Damage Act. D was acquitted by the magistrates but the appeal by the prosecution was successful on the ground that D had been reckless concerning the damage to the shed in accordance with the criteria laid down by the House of Lords in Caldwell.⁸⁵ But it is submitted that the damage to the shed was a conceptually certain accompaniment of her setting fire to the spirit (or the carpet, whichever she had in mind at the time of her exertion) since damage to the shed was an indivisible effect of her soaking the carpet with spirit and setting fire to it. On the proposed second species of direct intention she is thus guilty of causing criminal damage with direct intention. But she would be able to avoid liability if the court or jury

were satisfied on the balance of probabilities that, given the subjective factors present, she was unable to appreciate the conceptually certain effect of her exertion aimed at some other effect.⁸⁶

We may illustrate (ii) by means of a hypothetical. Suppose that D has been advised that P is the only nomination in a forthcoming election. Subsequently, unknown to D, a second nomination is put forward. D is active in trying to prevent the election of P and does not allude to the fact that he is, by that activity, improving the chances of the other candidate to win the election. D's belief that P is the only candidate prevents his perception that he is, by his activity, assisting the only other candidate to win.

4. Conceptual Certainty and Attempts.

Where the agent has done something which is more than merely preparatory to the commission of the substantive offence he is guilty of an attempt at that offence.⁸⁷ It is submitted that on the second species of direct intention the agent who brings about the actus reus of attempt at the offence aimed at should also be liable for an attempt at the untoward and indivisible effect of his activity. This contention flows naturally from the nature of the proposed notion of conceptual certainty: the agent who brings about effect x would be counted as directly intending conceptually certain effect y since y is indivisible from the primary consequence x at which his activity is directed, i.e. $x = y$. It is because harm x and y are indivisible that to aim at x is to aim at y and the agent should be counted as attempting y in cases in which he has attempted but failed to bring about effect x by his activity. My submissions here are, however subject to the proposed proviso. If D has attempted to bring about x having failed to allude to the prospect of indivisible effect y through either lack of capacity or misperception of some fact or circumstance concerning y then he may not be said to be attempting y.

We may summarise the second species of the concept of direct intention by way of noting its features. Note here that the features concerning the first species of direct intention⁸⁸ apply here also concerning the effect x at which the agent's exertion is directed. The features are

- (i) the agent must be aware or believe that his exertion may produce effect x.⁸⁹
- (ii) he must be aiming to bring x about by his exertion.⁹⁰
- (iii) that exertion must be physical in character.⁹¹
- (iv) it is not necessary that D is certain of success concerning x.⁹¹
- (v) effect y must be conceptually indivisible from effect x.⁹²
- (vi) It is not necessary that the agent contemplate effect y at the time of his exertion aimed at x although he may avoid liability if his failure to allude to y was caused by some factor which prevented him from perceiving the indivisible effect of his activity.⁹³
- (vii) Where the agent brings about the actus reus of an attempt at x he will be liable for an attempt at x and also an attempt at the indivisible effect y subject to the proposed proviso in (vi).⁹⁴

Direct Intention and The Current Law Concept of Transferred Intention.

Donald aims and shoots at the king with the intention of killing him but the bullet misses its target and strikes and kills the Queen standing close by. This case brings into focus the current legal concept of transferred malice or transferred intention. It is suggested that the latter term is, perhaps, more appropriate since many of the old offences which admitted malice have been repealed,⁹⁵ and today we talk generally in terms of intention rather than malice.⁹⁶ I shall use the latter term for the purpose of present discussion. The current law on transferred intention is that where an agent aims at a particular harm to V₁ but in fact causes that harm to V₂ then we may transfer the agent's intention to the unintended actus reus and convict him of the appropriate offence.⁹⁷ Thus on current law an agent intends a consequence of his activity which he does not aim at, and the risk of which he might not even know about, where that consequence has been brought about by activity aimed at a separate but identical consequence.

An early case which illustrates the doctrine of transferred intention is Gore.⁹⁹ In that case the defendant, Agnes Gore, with the intention of killing her husband, added ratsbane to a medicine which had been prepared for her husband by an apothecary. Her husband became ill and returned the potion to the apothecary who tasted it and died of the poison. Agnes was convicted of the murder of the apothecary since "the law conjoins the murderous intention with the event which thence ensued". The doctrine thus combines the agent's mens rea (the intention to kill in Gore) with the identical albeit untoward actus reus brought about by the agent and holds him criminally responsible for the unintended consequence as though he had brought about that consequence with direct intention to do so.

In Latimer⁹⁹ D swung his belt at V₁, a male adversary. The belt struck him lightly and re-bounded into the face of V₂, a female friend of V₁. D was charged with maliciously wounding the woman contrary to s.20 of the Offences Against the Person Act 1861. D argued that an intention to wound the particular person struck was a prerequisite for the statutory offence. In the Court For Crown Cases Reserved Lord Coleridge C.J. decided that malice against V₁ was sufficient to sustain a conviction for wounding V₂.¹⁰⁰

The doctrine can only apply, however, where the harm brought about by the agent is the same as that which he tried to bring about by his activity. In Pembliton¹⁰¹ it was established that malice cannot be transferred from one statutory offence to another. In that case D threw a stone at an adversary but the missile missed the designated target and damaged a window in a public house. He was convicted of malicious damage to the window (a statutory offence) but his conviction was quashed on appeal since his malice was directed at the well being of his adversaries and not toward the safety of surrounding property. It is interesting to note here that Lord Coleridge and Blackburn J. agreed that had the jury been directed (as they were not) that if the prisoner knew there were windows behind, and that the probable consequence of his activity would be that a window would be broken, that would be evidence

of malice. The learned judges were in fact suggesting that Pembliton may have been guilty of malicious damage caused recklessly.¹⁰²

The doctrine of transferred intention applies to secondary parties to a criminal offence. Thus where D counsels P to kill V₁ and P shoots to kill V₁ but strikes and kills V₂ then D will be guilty of the murder of V₂ as a secondary party.¹⁰³ Also the doctrine applies to defences generally. Thus where D strikes out at V₁ in self defence but his blow strikes V₂ then his criminal liability will be assessed on the basis that he had in fact struck V₁ and not V₂.

The doctrine of transferred intention begs several questions. First, can we transfer an innocent intent to an untoward identical harm which constitutes the actus reus of a criminal offence? Let us take a variant of a hypothetical postulated by Austin as an aid to discussion here.¹⁰⁴ Suppose I find that my donkey is suffering from a particular disease and a veterinary surgeon has recommended destruction of the beast. I go to the field where it grazes, take aim and fire. At that moment the donkey moves and the bullet strikes a donkey belonging to you. Now I certainly aim at my donkey with the intention of killing it but the bullet misses and kills your donkey. Can one transfer my innocent intent to the untoward harm (the death of your donkey) and convict me of a criminal offence concerning the death of your donkey?

One might respond that the intention (or malice) must relate to prospective proscribed harm and that an innocent intent aimed at an innocent effect is not sufficient. This leads to a second question. Where the agent aims at what he wrongly believes to be proscribed harm x but he brings about untoward identical harm y which is proscribed, can we transfer the agent's objectively innocent (although subjectively criminal) intent to the proscribed harm y and convict? As an illustration suppose D shoots at a particular species of bird believing it to be protected at law when it is not. The bullet misses its target and kills a bird which is protected by the criminal law. Can we transfer the 'wicked' intention and convict D of the appropriate offence?

Third,¹⁰⁵ using the traditional form of the doctrine - 'transferred malice'- can one apply the doctrine to a case in which 'foresight' is the mental state in issue? Suppose, for example, that D is about to throw a brick at a window. He realises that if he goes through with his activity there is a risk of injury to V₁ standing close by. He throws the brick at the window but it misses and strikes and injures V₂ who, given the facts and circumstances of the case, neither D nor the reasonable man could have contemplated as being at risk. It is clear that D would not be guilty of the appropriate offence under the Offences Against the Person Act 1861 on the 'Cunningham' test of malice¹⁰⁶ but can we hold D guilty on the basis of transferred malice?

Fourth, given that D's intention concerns a specific offence, can we transfer his intention where he has brought about a lesser substantive offence? Suppose, for example that D throws a brick at V₁ intending to cause serious injury. The brick in fact strikes V₂ causing a bruise. Given the facts and circumstances of the case neither D nor the ordinary person could have anticipated such injury to V₂. In this hypothetical D intends grievous bodily harm¹⁰⁷ but in fact brings about actual harm¹⁰⁸ so the offences are not the same. But one might say that serious harm includes actual harm (and both include an assault) and also that an intention to cause serious harm includes and extends beyond an intention to cause actual harm: so can we transfer D's intention concerning V₁ to the injury inflicted upon V₂ and convict him of an offence under s.47 of the Offences Against the Person Act 1861?

Fifth, where the defendant has succeeded in bringing about intended harm x but has also brought about identical untoward harm y does the doctrine enable us to transfer D's (successful) intention to the untoward harm and convict him in respect of both harms? Suppose that D, in a field, shoots at V₁ intending to kill him. He succeeds but the sound of the shot causes cattle in the next field to bolt killing V₂, a farm hand. Can we convict D with the murder of V₂ on the basis of transferred intention even although that intention was an element in D's successful enterprise regarding V₁?¹⁰⁹

Sixth, what is the position where D, in a field, aims at V₁, intending to kill her, causes her grievous bodily harm, and the sound of the shot causes cattle in the next field to bolt killing V₂? Do we transfer the intention to kill to the death of V₂, or retain the intention (which presumably incorporates serious injury) for the serious injury inflicted on V₁ and exclude the death of V₂ from liability? Can we split the mens rea so that we may convict D of both the murder of V₂ on the basis of transferred intention and the attempted murder of V₁ and/or causing grievous bodily harm to her with direct intention contrary to s.18 of the Offences Against the Person Act 1861?

Seventh, is the doctrine of transferred intention not incompatible with the general legal requirement that there must be contemporaneity between actus reus and mens rea. An illustration will assist here. If we juxtapose the facts of Gore¹¹⁰ so that Agnes places the poison in the medicine and hands the mixture to her husband, V₁, who drinks some and becomes ill. He hands it to his father V₂ with the instruction that he return it to the apothecary and obtain a fresh supply. Agnes is advised about the instruction to father, realises that her plot has failed and decides not to try again. V₂ places the contaminated mixture in the cupboard and forgets to do his son's bidding. A week has passed by and V₂ is ill with the same complaint as that suffered by his son. Agnes goes to the cupboard and, believing the medicine to be a fresh supply, pours a spoonful and administers it to V₂ who subsequently dies. Is Agnes guilty of the murder of V₂? Adopting a consistent approach to the doctrine of transferred intention Agnes would be guilty of the murder of V₂ since the doctrine conjoins the original mens rea with the actus reus (the death of V₂) and holds her guilty in respect of the unintended result. If this is right then the doctrine seems to be out of line with the general legal requirement of contemporaneity between actus reus and mens rea.¹¹¹

One might be able to explain away these questions on the contours of transferred intention but they at least suggest that the doctrine is open to several difficulties or objections. Should the doctrine of

transferred intention figure as a concept in the assessment of criminal responsibility?

Ashworth points out that the doctrine of transferred intention was a necessary expedient in earlier centuries when the law on attempts was passing through its development stages, but claims that the doctrine is no longer necessary given the present sophisticated state of that inchoate offence.¹¹² He suggests either of two alternatives to the doctrine namely

- (i) liability for the crime attempted, ignoring the accidental result, or
- (ii) liability for the actual result based upon recklessness.¹¹³

Presumably Ashworth would allow some lesser mental element where the offence in issue admits such.

Ashworth points out that we may select either alternative to the doctrine of transferred intention depending upon which we consider appropriate to the particular case. He cites the case of Pembliton¹¹⁴ and says that we might charge D with an attempt under the appropriate section of the Offences Against the Person Act 1861 since to charge him with property damage (caused recklessly) would not accurately describe his moral turpitude. Ashworth's reasoning is surely correct but his example is not in fact one of transferred intention. Perhaps a more appropriate example of Ashworth's suggestion is where D aims at the destruction of property x (value £100) but his exertion causes the destruction of property y (value £2.500). Here the harm brought about is identical in nature to the harm intended and we may thus transfer the intention. Ashworth would presumably argue however that we should charge D with an attempt concerning the destruction of x and not with the substantive offence concerning y since the case will then be heard as a summary offence in the magistrates' court and the conviction and sanction would presumably reflect more accurately D's moral turpitude.¹¹⁵

In relation to Ashworth's suggested alternatives to the doctrine of transferred intention I would point out that in a case in which the

agent lacks an appropriate mens rea for the untoward identical harm which he brings about by his activity aimed at something else¹¹⁶ we cannot charge him with the substantive offence as an alternative to transferred intention: we would be restricted to a charge of an attempt at the harm at which the agent's activity is directed.

Williams agrees with Ashworth that in cases of criminal damage we could conveniently do away with the doctrine of transferred intention since it "can make the offender guilty of damage far exceeding that which he intended or foresaw, and can even make him guilty where he was not negligent as to the damage that occurred".¹¹⁷ However Williams does not accept Ashworth's suggestion that we ought to abolish transferred intention in respect of injuries to the person and deal with such cases as attempts on the main ground that "we do not generally regard an attack upon X as either more or less reprehensible than an attack upon Y".¹¹⁸ He argues that current practice involves lenient treatment for the offender who is guilty of an attempt and that this is in accord with public feeling since D has not brought about any harm. But if we convict the agent of an attempt when he has actually brought about injury the court would probably feel disposed to apply a more severe sentence for the attempt, and this might lead to the abandonment of the general practice of lenient sentencing policy concerning attempts. For Williams lenient sentencing for attempts is desirable on the practical ground that it reduces the scale of punishment thereby reducing pressure on the prisons. With respect to Williams, Ashworth does offer an alternative to a charge of attempt concerning the harm aimed at.¹¹⁹ In any event I shall argue below that we have the legal machinery (other than a charge of attempt simpliciter) to blame and award appropriate punishment to the agent who fails to bring about the harm aimed at but brings about untoward identical harm.¹²⁰

I should like to object to the doctrine of transferred intention on two main grounds. First, the invocation of transferred intention for unintended identical harm is not necessary where the agent has a relevant lesser mental state concerning the untoward identical harm, for we may charge him with the substantive offence in relation to it.

Second, invocation of the doctrine is not fair in cases in which the agent does not have a necessary lesser mental state concerning the untoward identical harm since to convict him amounts to the imposition of constructive liability in the sense that he is liable for harm which, given the facts and circumstances of the case, neither he nor the ordinary man could have anticipated.

We may illustrate this point with the case of D who shoots at V_1 but misses and kills V_2 hidden behind a curtain. Now if we convict D in respect of the unintended consequence of his act (the death of V_2) then we are ascribing criminal liability to him for a consequence as to which he is not even negligent. Also suppose that Douglas, in a field, shoots at Vera with the intention of killing her. The bullet misses but the sound of the shot causes cows in the next field to bolt killing farmer Styles. The doctrine of transferred intention would hold Douglas guilty of the murder of Styles but, on the facts, Styles' death might not have been reasonably foreseeable so why should we count Douglas as having intended that death?

I agree with Ashworth that we ought to exclude the doctrine of transferred intention from our criminal law. However my suggestion for an alternative strategy differs from his. In my view the one alternative to the doctrine of transferred intention is that we may (i) convict the agent of an attempt at the harm aimed at and, (ii) where appropriate convict the agent of the substantive offence concerning the identical untoward harm, i.e. where the agent has some mental state concerning the untoward identical harm which is recognised by the offence with which he is to be charged. The suggestion uses the existing legal machinery without the need to resort to the somewhat artificial concept of transferred intention. For example in the case where D shoots at V_1 with the intention of causing grievous bodily harm but the bullet misses and cause grievous bodily harm to V_2 standing nearby we may convict D of both an attempt under s.18 of the Offences Against the Person Act 1861 in relation to V_1 and the substantive offence under s.20 of that Act in relation to the harm sustained by V_2 which he has brought about maliciously. In this way we more accurately record the moral

blameworthiness of D. He has aimed to bring about serious harm to a fellow being in circumstances which create a danger of serious harm to someone other than the intended victim. My strategy differs from transferred intention in two material respects. First the agent will be charged with an attempt at the harm aimed at in every case. Second, where the agent lacks a necessary mental state concerning the untoward identical harm then we cannot charge him in connection with that harm.

But there are objections to the use of the law of attempts and recklessness (or other appropriate mental state) as instruments for blame and punishment of the agent who has brought about an unintended and identical consequence to that aimed at by him. First one might say that there is no point in charging an agent with an attempt simpliciter in cases in which the untoward harm brought about was not reasonably foreseeable since he will receive a lighter sentence for an attempt when he has in fact brought about harm identical to that intended. My response here is that in cases of transferred intention the agent has in fact completed the last act necessary in order to bring about the harm aimed at by him and is thus as morally blameworthy as the agent who succeeds in his enterprise. We are thus justified in applying the same punishment as that which might be awarded for the consummated offence.¹²¹ On this argument there is thus no distinction in the sentence awarded to the agent whether we use the concept of transferred intention or the law of attempts in relation to the actual harm aimed at by the agent.

However where the agent has some necessary mens rea concerning the untoward harm the agent is liable for both an attempt at the harm aimed at by him and for the commission of the identical untoward harm which he has brought about. On this basis the agent would receive both blame and punishment which is at least commensurate with that which is currently awarded under the doctrine of transferred intention. This leads to a second and converse argument that if we convict and punish for both an attempt at the harm aimed at and commission of the substantive offence (where appropriate) in relation to the untoward harm then we award too much punishment to the agent since had he been successful with his attempt he would have been liable for the substantive offence only (by

way of intention). In response I would state that on my suggested formula the agent is either guilty of a lesser substantive offence (e.g. an offence under s.20 and not s.18 of the Offences Against the Person Act 1861) or liable to lesser punishment for the substantive offence since he has brought about the proscribed harm recklessly rather than intentionally. This response does not fully meet the argument since overall punishment would still be greater on the proposed alternative to transferred intention, especially if we accept Ashworth's suggestion of equal punishment for the completed attempt and the consummated offence. However invocation of the doctrine that an agent cannot be punished twice in relation to the same transaction would meet the argument.

A third objection to the suggested removal of transferred intention is that whilst one might concede that for property crimes there might be some justification for the discountenance of transferred intention¹²² one cannot say the same for the crime of murder. An agent is guilty of murder where he has caused the death with the necessary malice aforethought. But there are no degrees of death as there are values (intrinsic or otherwise) of property, so, it may be argued, we should accept the argument that if D intended to kill and did kill, it cannot be correct to describe the killing as unintended merely because the victim was V₁ instead of V₂

Glanville Williams provides an answer to this claim in his plea for observance of ordinary language and the form of the indictment. He says that the claim

"sounds plausible only because part of the real intention is omitted. Although the result in the sense of killing was intended, the result in the sense of killing (V₂) was not intended. After all, the accused is not indicted for killing in the abstract; he is indicted for killing (V₂); and it should therefore, on a strict view, be necessary to establish mens rea in relation to the killing of (V₂)".¹²³

Smith and Hogan disagree with Williams holding that

"the killing of (V₂) is only unintentional in a respect which is

immaterial. The test of materiality in a difference of result is whether it affects the existence of the *actus reus* which D intended. Thus it would be immaterial that D intended to shoot P in the heart but, because of a quite unexpected movement by P, shot him (unintentionally) in the head. The *actus reus* is the killing of a human being - any human being - under the Queen's peace, and his identity is irrelevant".¹²⁴

My own view is that Williams is confining his restriction on untoward effects to consequences which are unforeseen by the defendant who is not negligent. It seems that he would convict of murder the agent in the example raised by Smith and Hogan.¹²⁵ Also Williams would convict of murder the agent who shoots and kills V₁, believing him to be V₂ on the basis that he is directing his activity at a fellow being.¹²⁶ Williams' reluctance to convict for murder is thus restricted to cases in which the agent, D, has failed to bring about the death of his intended victim but his activity has brought about the death of another in circumstances in which neither D nor the ordinary person could have anticipated that death. I am in agreement with this reasoning. For the reasons stated above¹²⁷ D should be convicted of attempted murder only.

To summarise on transferred intention. The doctrine applies to untoward harm which the agent brings about whilst aiming at (and presumably missing) an identical harm. When the doctrine is applied the agent's failed attempt is ignored and he is liable for the untoward identical harm as if he had directly intended it. The doctrine thus covers (i) untoward harm which the agent (or an ordinary person) might have contemplated as a possible effect of his activity and (ii) untoward harm which neither the agent nor the ordinary man could have contemplated as a possible effect. It is submitted that the doctrine of transferred intention is unnecessary since we have existing legal machinery to attribute adequate blame and punishment to the agent in cases (i) and (ii) above. As regards (i) we may convict him of both an attempt at the harm aimed at and the substantive offence concerning the harm caused on the basis of an appropriate mental state concerning that harm. As regards (ii) we may convict the agent of an attempt at the harm aimed at

without more. This is right: we ought not to attribute liability to the agent here since to do so would mean the attribution of liability for an effect as to which he was not negligent. If my submissions are accepted then the doctrine of transferred intention is rendered otiose.

Transferred Intention and Mistaken Identity.

Donald, with the intention of killing the King, takes aim in the gloom and shoots at and kills the Queen. In this hypothetical the agent knows that he is shooting at a fellow being with the intention of killing that person; but here, unlike cases of transferred intention which involve incompetence in execution, he has misperceived the facts or circumstances surrounding his intentional activity. It is submitted that cases of mistaken identity are thus distinct from cases of transferred intention. But if my submission is accepted then just what strategy ought we to adopt for the purpose of assessing criminal liability in such cases?

My view here is that in relation to offences against the person the agent should be convicted of the appropriate offence concerning the injury caused without reference to his mistaken perception as to the identity of the victim. My suggestion is based upon my plea for the recognition of, and strict adherence to, the principle of fair labelling. In our instant case, Donald has directed activity at a human being with the intention of causing the death of that person¹²⁸ and a conviction for murder of the victim is in accord with the principle. The same statement can be applied to the case of a non-fatal offence against the person.¹²⁹

However there is a problem for the preservation of the principle of fair labelling in cases of mistaken identity concerning property crimes. Suppose D damages V₁'s cheap flower pot believing it to be V₂'s rare ancient Greek urn (value say £10,000). Given s.38 of the Criminal Justice Act 1988¹³⁰ the agent has committed a summary offence and the case will be heard in the magistrates' court. However a conviction for criminal damage without more would not reflect the agent's moral

turpitude since, at the time of his act, the agent believed that he was committing a more serious offence. The same problem arises in the contrary case in which the agent damages V_1 's property of high value (over £2,000) mistaking it for V_2 's relatively worthless property: to convict him with the more serious offence would not present an adequate picture of his moral turpitude. I think that the strategy to apply in cases of mistaken identity concerning property offences is for the jury to decide upon guilt in relation to the actus reus and the specific mens rea requirement of the offence without reference to D's belief about value. Where the jury convicts then the judge may frame the conviction so that it takes into account the agent's state of mind concerning the financial extent of the damage which he believes he has caused. Thus where D is convicted of criminal damage to V_1 's expensive property which, at the time of his activity he believed to be V_2 's cheap property the judge might phrase the conviction (say) "causing criminal damage to property estimated by him at less than £10".¹²¹

One might interject that if we are to quantify the agent's belief as to value of the property he believed he was damaging (accurate or inaccurate) in the phraseology of the conviction then we may find difficulties in establishing the defendant's valuation of the property which he intended to destroy. Also one might ask if we are to put a precise figure on that value in each case or whether we would apply general bands. My response here is that we ought to at least have a definite point of valuation at £2,000 so that we can mark the difference in the agent's intention to commit a summary or more serious offence under s.38 of the Criminal Justice Act. That apart we may perhaps have bands of say £1,000. This would both reduce or eliminate the problem concerning the establishment of the defendant's valuation of the property which he intended to destroy and provide fairly significant gradations of seriousness in moral turpitude displayed by the agent as he brings about the actus reus of the offence.

Direct Intention and Hope.

What of the case in which the agent hopes that his activity will produce a particular effect although he is not sure about a particular fact or circumstance pertaining to his activity? Suppose for example that D takes aim and fires at V's bed hoping but unsure whether or not V is there. Does D directly intend V's death? In such a case D is certainly aiming to achieve the effect hoped for and the second constituent¹³² of direct intention is thus present. My view is that the other two constituent parts of direct intention are also present since, in such cases generally, D is aware that the fact or circumstance might be present (otherwise he could not hope for the effect at which his activity is directed) and he believes that his activity may produce the effect hoped for if the fact or circumstance does in fact obtain.¹³³

Smith and Hogan agree with my view.¹³⁴ They contend that

"an act may be intentional with respect to circumstances as well as consequences. Intention here means either hope that the circumstance exists - which corresponds to purpose in relation to consequences - or knowledge that the circumstance exists - which corresponds to foresight of certainty in relation to consequences".

Salmond says

"he who steals a letter containing a cheque, intentionally steals the cheque also if he hopes that the letter may contain one, even though he well knows that the odds against the existence of such a circumstance are very great".¹³⁵

I would accept this contention but think that there may be cases in which the possibility becomes so remote that one cannot say that D intends the effect he hopes for.

To summarise the proposed concept of direct intention. An agent directly intends an effect when

(i) he believes that his exertion may bring about that effect and he makes that exertion because of that belief (i.e. he aims at that effect), or

(ii) that effect is indivisible from an exertion aimed at something else, subject to the proviso that he may avoid liability if he can prove the presence of some factor which prevented him from perceiving the indivisible effect of his activity.

I turn now to the second species of the proposed model of intention, namely concomitant intention.

FOOTNOTES CHAPTER 2.

1. In fact the current law talks of only one type of intention which includes direct intention and foresight to some degree. Bentham calls the latter oblique intention for which see chapter 3.
2. Although he may be liable on other grounds. see, for example, my model of gross and simple negligence infra chapters 7 and 8.
3. See infra Chapter 8 dealing with the proposed general offence of criminal damage. But what if D, in order to prove to a friend that he is out of range, tries to shoot V in order to demonstrate that it cannot be done. If the proof is to be persuasive then D must actually try to hit V and one normally supposes that if one tries to do x then one intends x. My response to the question is that in the proposed hypothetical D is aiming the gun in V's direction with the belief that he cannot possibly hit him, and does what he does with the direct intention of demonstrating the truth of that belief. D cannot thus be said to have directly intended V's death whether or not death follows upon his activity.
4. Professor Jackson asks if there is not a distinction between 'aiming at' and 'aiming to'. He thinks that if the latter is included there might be such aiming without the agent acting. My view here is that an agent cannot aim to bring about a change in the world by inactivity since his inactivity cannot itself influence the sequence of events which may or may not lead to that change. The agent may thus only allow the sequence of events to take its course by his inactivity. 'Aiming' is thus confined to positive activity.
5. See preceding paragraph.
6. For example recklessness for which see infra chapter 6.
7. For which see infra Chapter 3 at p.100.
8. 'Concomitant intention' and 'empirical certainty' are explained infra chapter 3.
9. E.g. gross recklessness for which see infra chapter 7.
10. See the second feature of this species of direct intention supra p.2.
11. G. Williams, 'Oblique Intent' in the Cambridge Law Journal [1987] at p.418. Professor Williams is here talking about mental processes which have not been converted into any form of physical activity (i.e. the agent has decided to commit a crime but is yet to do anything about it) but the text indicates that Professor Williams is prepared to exclude 'acts of willing' from ascriptions of liability.
12. The phrase 'or on the facts as he believes them to be' is intended to catch the agent who is trying to bring about an effect which is not

de facto possible, as where D shoots at a tree stump believing it to be his enemy V. See chapter 5 for a discussion on impossible attempts.

13. Theft here will be D's purpose or objective for which see chapter 4.

14. The feature is discussed in detail infra Chapter 3 p.90ff.

15. [1950] 2 KB 237.

16. [1947] KB 997.

17. C.f. Cross and Jones 10th ed. at p.34. The learned authors think that the assistance was a means to a desired objective. I agree with the learned authors but I reach their conclusion by another route. My own view is that Steane foresaw the assistance as a conceptually certain consequence of his directly intended activity of making the broadcasts and that his mental state equates with the second species of the proposed concept of direct intention discussed below p.37ff. On this analysis Steane had direct intention concerning that assistance. Note here that Ahlers [1915] KB 616 provides a similar case study indicating the harmony between current law and the proposed species of direct intention.

18. [1976] QB 1

19. [1951] AC 83.

20. [1984] QB 581.

21. See also Salford Health Area Authority ex parte Janaway (1988) Times January 5 cited in Smith and Hogan 6th ed. 58.

22. [1937] AC 797.

23. See also Gollins v Gollins [1964] AC 644 in which Lord Reid thought that 'aimed at' is a phrase in ordinary use understood by everybody. "If you aim at something you intend to hit it and if you hit it unintentionally you have not aimed to hit it". In R v Mohan (supra note 18) the dicta of James LJ indicate, in the law of attempts at least, the agent intends a consequence if his purpose is to achieve it.

24. (1976) 63 Cr App Rep 59.

25. [1976] 3 All ER 46. Australian courts, too, have adopted this limited view of intention. see, for example, La Fontaine (11 A.L.R. 526). See generally J. C. Smith, "'Intent' a Reply" in the Criminal Law Review [1978] 14.

26. Duff is not sure that theft would not count as a crime of purpose on my account (for which see below chapter 4) for, D's mere appropriation of V's property is not by itself enough to deprive him permanently of it. D may need to keep it or at least refrain from returning it. But I would submit that permanent deprivation is a state of affairs which commences immediately D takes the item from V with the intention of

permanently depriving V of it. It is possible that V may recover the property at some future date (the police may find it in D's possession) but later possibilities do not affect the position at the taking from D with the intention to permanently deprive. This is in accordance with s.1 of the Theft Act 1968: theft is complete at the taking with the intention to permanently deprive.

27. For a useful discussion on the mens rea in murder see Smith and Hogan 6th ed. at p.309ff. and Cross and Jones 10th ed. at p.154ff.

28. See s.9 of the Theft Act 1968.

29. S.8(2) of the Theft Act 1968.

30. see s.16(1) of the Sexual Offences Act 1956.

31. 6th ed. pp.473-4.

32. See generally Lankford, [1959] Criminal Law Review 209.

33. See s.1 of the Criminal Attempts Act 1981. There will be convictions for attempt concerning activity which (as the agent sees it) is generally capable of producing the harm aimed at but which in fact fails to bring that harm about. For example where D takes aim and fires at V aiming to kill him but the bullet misses its target

34. See Boyle and Boyle (1987) 84 Cr App Rep 270. See also Gullefer [1987] Criminal Law Review 195 CA (infra Chapter 7 p.272) concerning a future intention to obtain property by deception under s.15 of the Theft Act 1968.

35. Italics added.

36. However the agent may be said to have such a future effect as either his purpose or objective. For a general discussion on these concepts see chapter 4.

37. See Mohan supra note 18

38. See Sinnasamy Selvanayagam supra note 19.

39. see Bramwell B in Cox (1818) Russ and Ry 362.

40. For example Najewski [1977] AC 142.

41. 10th ed. at p.36.

42. Morgan [1976] AC 182.

43. See the dicta of Lord Simon in Morgan at p.363.

44. See Steane supra note 16.

45. Bayley and Easterbrook [1980] Criminal Law Review (503).

46. See infra Chapter 3.
47. e.g. Lemon [1978] AC 617..
48. See, for example, Lord Cross in Hyan infra p.76.
49. See, for example, Viscount Dilhorne in Hyan infra p.79.
50. e.g. Belfon [1976] 3 All ER 46.
51. 'Intent' as used in the current law.
52. Infra Chapter 4.
53. Supra p.23.
54. As I have pointed out (supra p.23) the mens rea element here is not clearly stated in the Act.
55. For an explanation of the proposed concept of purpose (and objective) see infra chapter 4.
56. Supra note 29.
57. Supra p.30.
58. See supra note 55.
59. Infra p.149ff.
60. See supra note 55.
61. See, for example assault with intent to rob, assault with intent to commit buggery and conspiracy supra pp.23-4.
62. See infra Chapter 9.
63. See supra p.1.
64. And, of course, for each substantive offence where he succeeds in bringing about the effect aimed at.
65. As per my definition of direct intention at the beginning of this chapter.
66. See Smith and Hogan, 5th ed. at p.51.
67. [1976] 2 All ER 569.
68. (1976) 63 Cr App Rep R.
69. [1983] QB 680.

70. As Williams points out (supra note 11 pp.417-8) this case was one involving 'wilfulness' and cannot thus be conclusive on intention since the courts extend the contours of the former concept into recklessness. The case does however provide an instance of conceptual certainty.
71. [1985] QB 509.
72. [1963] 2 QB 561.
73. Supra note 69.
74. Italics supplied.
75. In 'Intention, Mens Rea and the Law Commission Report'.
76. Supra note 49.
77. In 'Oblique Intent' supra note 11.
78. Italics supplied.
79. Clarkson and Keating, Criminal Law: Cases and Material (1984) at p.137.
80. Of course all those who would count as intended untoward harm which is, in some degree, a probable consequence of intentional activity would accept my contention here.
81. For a discussion on empirical certainty see chapter 3.
82. For which see chapter 1.
83. See infra p.265ff. Note here that the types of legally recognised factor which I have in mind would include (i) mental states, permanent or transient, such as schizophrenia, depression, exhaustion and panic, (ii) physical impairments (permanent or transient) such as severe colds which cause loss of the sense of smell and so forth and (iii) misperceptions concerning a fact or circumstance in relation to the untoward harm. The court or jury will decide whether or not the factor was present and to such a degree in the circumstances as to cause the defendant to fail to appreciate the risk of the untoward harm. I explain the appropriate test in chapter 7 at p.266.
84. [1983] 2 All ER 1005.
85. [1982] AC 341. For a more detailed account of Elliot v C and Caldwell see infra chapter 6.
86. Note that D in Elliot presumably intended to damage the carpet in setting fire to it and would thus be guilty of an offence under s.1(2) of the Criminal Damage Act in any event. A nice academic point arises if we juxtapose with Elliot the case of D, of the same age and in the same circumstance, who takes into the shed some twigs and sets fire to them causing damage to the shed, presumably we now have a case which equates

with **Stephenson** [1979] QB 695 (see infra p. 207 for the facts). However it is submitted that **Stephenson** would not fall within the proposed proviso since in his case the damage to the haystack was not a conceptually certain effect of his activity aimed at something else. But **Stephenson** would be free from liability in accordance with the proviso to gross negligence. See infra chapter 4 pp265-6.

87. Criminal Attempts Act 1981. I shall argue in chapter 5 that the threshold of attempts should be set at the point at which the agent's exertion is capable of producing the proscribed harm.

88. Supra p.15.

89. Supra p.16.

90. Supra p.18.

91. Supra p.18.

92. Supra p.29ff.

93. Supra p.32.

94. Supra p.33.

95. Particularly the offences of malice contained in the Malicious Damage Act 1861: most of those offences are now offences of recklessness under the Criminal Damage Act 1971. Professor Williams thinks that the term 'transferred malice' is now out of date and he talks generally in terms of transferred intention. See G. Williams, 'Convictions and Fair Labelling' [1983] Cambridge Law Journal at p.86.

96. Of course the mens rea in murder is malice aforethought but recent cases (e.g. **Moloney** ([1985] AC 905), **Hancock** ([1986] AC 455) and **Nedrick**) ([1986] 3 All ER 1)) at least suggest that the courts are looking for intention as the requisite mental state for murder.

97. For a general discussion on transferred intention see Smith and Hogan 6th ed. 73ff. Note the learned authors use the phrase transferred malice. see also Cross and Jones 10th ed. pp.45ff.

98. (1611) 9 Co. Rep 81.

99. (1866) 16 Cox 70.

100. Ashworth points out that Lord Coleridge added the phrase "because he is guilty of general malice", a phrase which confuses transferred malice with the doctrine that intention to harm anyone in the line of fire can support a charge of wounding or murdering a person who was in fact harmed. see A. J. Ashworth infra note 112 at p.79.

101. (1874) 12 Cox 607.

102. On this aspect of the case see G. Williams, 'Textbook of Criminal Law' 1978 at p.78.
103. Note that the secondary party will not be liable where the principal commits an act outside of the agreement or otherwise deviates from the course of the agreement. See Saunders v Archer (1576) 2 Plowd. 473.
104. In 'A Plea for Excuses' (1956-7) LV II Proceedings of the Aristotelian Society.
105. And perhaps out of context since we are involved in a discussion on direct intention. However it is convenient to deal with the point here.
106. For which see below chapter 6 p.1ff.
107. And would thus be guilty under s.18 of the Offences Against the Person Act 1861 had he struck his intended victim.
108. Which constitutes an offence under s.47 of the Offences Against the Person Act 1861.
109. Ritz (in Felony Murder, Transferred Intent, and the *Palsgraf* Doctrine in the Criminal law' (1959) 16 Wash and Lee L.R. 169) argues that an intention cannot be both transferred and untransferred and that there cannot thus be double criminalisation on the basis of transferred intention. He refers to State v Cogswell (1959) 339 P. 2d, 465, discussed in Ashworth supra note 112 at p.84, where D shot and killed his wife but the bullet passed through her body and injured the child, he considers that Cogswell could not be guilty of injury to his daughter on the doctrine of transferred intention since an intention cannot be applied to more than one crime.
110. Supra page 35.
111. The hypothetical does not seem to fall into the recognised exceptions to the requirement. Unlike Thabo Meli v R ([1954] 1 All ER 373) and Church ([1965] 2 All ER 72) it does not seem to fit in with the 'series of acts' category since the cases indicate that D believes that he has perpetrated the actus reus when he continues with the series of acts, whereas in our variant of Gore D is not aware of any actus reus. The hypothetical does not seem to fall into the 'continuing act' category (e.g. Fagan v Metropolitan Police Commissioner ([1968] 3 All ER 442) and Miller ([1983] 2 AC 161)) since in those cases D has realised an existence of danger or actual harm and has done nothing to eradicate or alleviate it, whereas in the variant of Gore D is not aware of the danger.
112. A. J. Ashworth, 'Transferred Malice and Punishment for Unforeseen Consequences in Reshaping the Criminal Law.
113. Ibid at p.85.
114. Supra p.35.

115. See s.38 of the Criminal Justice Act 1988 which renders criminal damage of less than £2000 a summary offence only.
116. E.g. neither D nor the ordinary person could have anticipated the harm caused.
117. G. Williams, 'Convictions and Fair Labelling' in the Cambridge Law Journal [1983] at p.87.
118. Ibid. Professor Williams' reluctance to deny the doctrine of transferred intention concerning non-fatal offences against the person is surprising since he seems to accept the doctrine concerning the offence of murder in Criminal Law - The General Part.
119. Supra p.39. It is conceded that charging the defendant with the substantive offence concerning the harm caused cannot apply where neither the defendant nor the ordinary person could have foreseen that harm.
120. Infra p.41.
121. See A. Ashworth, 'Sharpening the Subjective Element' for a more detailed discussion on this issue.
122. see G. Williams 'Convictions and Fair Labelling' below note 131.
123. See G. Williams, note 118 at p.135.
124. Smith and Hogan 6th ed. at p.75. Emphasis supplied.
125. see his comments supra p.43.
126. See below on cases of mistaken identity pp.31ff.
127. See supra p.41.
128. i.e. the person aimed at although he believes that person to be someone else.
129. Thus where D strikes out and seriously injures V₁ intending serious injury to V₂ we may convict D of causing grievous bodily harm to V₁ with intent under s.18 of the Offences Against the Person Act since D was directing his activity at a particular human being and his mistake as to identity is surely immaterial here.
130. Which states that criminal damage to property under £2,000 is to be tried as a summary offence.
131. Professor Williams comes to a similar conclusion in 'Convictions and Fair Labelling' at p. 91/2 although he would extend his comments to both property crimes and offences against the person. He says "... the courts should assume the power to order the conviction to be recorded in terms that, while properly representing the abstract offence, do not include details that give a misleading impression of its gravity. Where

the jury have not pronounced on an issue (for example, whether the defendant knew the value of the property he was damaging) the judge would have to decide it, as he has to decide issues of fact in relation to sentence. The discretion as to the wording of the conviction should be exercisable by the trial judge alone". Professor Williams thinks that there should be no appeal against the phrasing of the conviction.

132. Supra p.16.

133. C. f. Salmond, in 'Jurisprudence' 11th ed. (1947) at p.411.

134. Smith and Hogan, 'Criminal Law' 5th ed. at p.52.

135. Supra note 133.

CHAPTER 3.

CONCOMITANT INTENTION.

In chapter 3 I explicated the two species of the proposed concept of direct intention. In this chapter I put forward my proposed model of concomitant intention which completes the proposed structure of intention.

Where an agent contemplates that a contingent and empirically certain effect y may flow from his activity aimed at effect x, then he concomitantly intends y as he aims his activity at x. If the empirically certain effect y is brought about by the agent's activity aimed at x the agent may be charged with the substantive offence relating to y by way of concomitant intention and liable to the same sanction as that which may be awarded to the agent who has brought about the substantive offence with direct intention. If the agent fails to bring about the empirically certain effect y then he cannot be convicted of an attempt at the substantive offence concerning y. This proposed mental state has several features.

(i) it is not necessary that the agent be certain that his exertion will produce effect x directly intended by him. All that is necessary is that he believes his activity may bring about effect x.

(ii) the agent must have made a positive exertion concerning the effect aimed at. Thus where D wills a bodily movement at effect x but his body fails to respond to his mental act of willing we can say neither that he directly intends x nor that he concomitantly intends the contingent and empirically certain effect y.

(iii) it is irrelevant whether or not the agent desires that an empirically certain effect follow upon his activity directed at something else. This is discussed in detail below.

(iv) the empirically certain (or concomitant) effect must be untoward in that it does not figure as a reason for the agent's deciding to act as he does. If the concomitant effect plays some part in his deciding to act as he does then the agent directly intends both effects of his activity. We may illustrate the point by reference to my earlier

hypothetical of Daniel and the orchid.² Suppose that Daniel wishes to cool the room. There are two methods, namely opening a window or turning off the radiator. Daniel considers that if he opens the window his aunt Matilda's orchid will certainly³ be destroyed by the draught unless his aunt takes preventative action in time. The death of the orchid appeals to Daniel so he chooses the first alternative. The orchid dies. In this hypothetical the otherwise concomitant effect has figured as a reason for Daniel's deciding to act as he does and thus constitutes a directly intended effect of his activity.

(v) the empirically certain effect must be a contingent (and not a conceptual) effect of the agent's activity aimed at something else:⁴ i.e. a separate and distinct effect from that aimed at. It is because the two effects are separate and distinct that it is possible for the directly intended result to occur without the occurrence of the empirically certain result.

(vi) the agent must contemplate the empirically certain effect of his activity aimed at something else, but it is not necessary that he assess accurately the degree of probability. If he fails to allude to the empirically certain effect he will be liable on other grounds.⁵

(vii) it is necessary that the concomitant effect be brought about by the agent's activity before we may ascribe liability to him in relation to it. Thus where D aims at effect x in the knowledge that empirically certain effect y may follow, and is successful in bringing x about but y is prevented by extraneous agency,⁶ we ought not convict D with an attempt at y although we may convict him of bringing x about with direct intention. More on this below.⁶

(viii) a final and crucial feature of concomitant intention is that the untoward and empirically certain effect must be such that, in the nature of things, it must follow upon the effect at which the agent's activity is directed *subject to some difference or change in the existing facts or circumstances as the agent perceives them to be at the time of his activity.*⁷ For the purpose of discussion it would be convenient to apply shorthand to the proviso in italics and I shall use the phrase 'extraneous agency'. Empirical certainty is thus constituted by the formula "if x in c then y in c, subject to extraneous agency" (where c represents the facts and circumstances perceived by the agent as he

carries out his activity aimed at x). An illustration would be useful. Suppose that D, on board a plane in flight, shoots the pilot dead. There is no co-pilot aboard and the plane crashes killing most passengers and crew. D survives. Here D directly intends the pilot's death and he concomitantly intends the death of the rest of the crew and passengers since those deaths must occur subject to a change in circumstances from those perceived by him at the time of his activity.⁹ This feature of concomitant intention is important and deserves a detailed discussion.

Extraneous Agency.

The concept of 'extraneous agency' has been alluded to indirectly in the case law. In Moloney⁹ Lord Bridge insisted on the need for a 'moral certainty'¹⁰ for liability for an intention: a probability which is "little short of overwhelming" and an act that "will lead to a certain event *unless something unexpected supervenes to prevent it*".¹¹ Of course Lord Bridge is here defining the limits of intention at current law but my submission is that this dictum at least comes close to my concept of concomitant intention which is constituted by foresight of certainty subject to some change or difference in the existing facts or circumstances as the agent perceives them to be.

Professor Williams indirectly alludes to 'extraneous agency' when discussing 'certainty' generally.¹² He says that

"(w)hen one speaks of the unwanted consequence as being 'certain' one does not, of course, mean certain. 'Nothing is certain save death and taxes'. For example, a person who would otherwise have been the victim of the criminal's act may be warned in time or providentially happen to change his plans, and so escape what might have otherwise been his fate. Certainty in human affairs means certainty as a matter of common sense - certainty apart from unforeseen events or remote possibilities".¹³

Note that Professor Williams talks of unforeseen events and remote possibilities. My proposed concept of concomitant intention includes extraneous agency whether foreseen or not,¹⁴ or of any degree of

possibility. This is I think right. If an agent directs activity at x realising that empirically certain y may also be brought about and on the facts and in the circumstances extraneous agency is very likely, the fact that intervention is likely as opposed to remote does not change the fact that y is certain to follow x unless that very likely intervention does take place. Take my hypothetical of D who shoots the pilot as an illustration here. Suppose that at the time of his exertion which kills the pilot D is aware that the co-pilot is elsewhere on the plane and will take over control when made aware of the situation. Unfortunately the sudden downward thrust of the aircraft causes the co-pilot to bang his head against a bulkhead. He becomes unconscious and the plane crashes killing most members of crew and passengers. D survives. On my proposed model of intention D directly intends the death of the pilot and concomitantly intends the death of the passengers since a circumstance at the time of his activity (an aircraft in flight without a competent operator) must bring the deaths about unless there is a change in that circumstance which, on the facts, was likely although it did not in fact take place.

Note that it is sufficient for liability that the agent appreciates that the untoward and empirically certain effect may¹⁵ follow upon his activity. Thus if in our illustration of aunt Matilda's orchid Daniel considers the death of the orchid as a possible side-effect of his activity (as opposed to an objective certainty subject to extraneous agency) and he fails to allude to the fact that aunt might intervene we may hold him liable for the damage on the basis of concomitant intention.

But what is the position where the agent performs activity in the wrongful belief that the empirically certain effect will not be brought about, or does not allude to that effect, because he is mistaken concerning one or more facts or circumstances of the case? Suppose for example that a free-fall team are in an aircraft in flight. D pushes his friend V through the 'jump' exit before everything is ready, believing that V is wearing his parachute. In fact V is wearing a ruck sack which looks very much like a parachute pack. V falls to his death. It is

submitted here that D does not concomitantly intend V's death since there is no possibility of the empirically certain death on the facts or in the circumstances as D perceives them to be. I shall argue in chapter 7 that D is guilty of bringing about V's death by gross negligence unless he can successfully plead the excluding proviso (which on the facts is a fair possibility).

Extraneous agency is a crucial feature of the concept of concomitant intention since it sets the concept apart from direct intention¹⁶ and recklessness.¹⁷ The concept is distinct from direct intention since the minimum mental state for the latter is constituted by foresight of a conceptually certain effect, i.e. an indivisible effect which must follow upon the agent's activity aimed at something else without qualification. The concept is distinct from recklessness since the maximum mental state for the latter is constituted by foresight of a risk which is in fact virtually certain to occur.¹⁷ The concept of concomitant intention is thus a separate and distinct form of mens rea which provides a clear demarcation between direct intention and recklessness.

It would be useful to illustrate the distinction between concomitant intention and the most serious form of recklessness (foresight of virtual certainty). Suppose that D₁ throws a small explosive device into a crowd at a football match with the intention of publicising some cause. He does not intend to kill or injure any person but he realises that injury is virtually certain. Suppose also that D₂ throws a concrete post from a motorway bridge directly into the path of a fast approaching car. His plan is to merely frighten the driver but he realises that if the driver does not take evasive action there will be impact and the driver will be injured. The case of D₁ involves 'virtual certainty'. We cannot say that any supporter is going to be injured - the dangerous situation has been created and it is a matter of waiting to see the upshot. An injury may or may not be sustained. The case of D₂ involves my concept of concomitant intention. Here the injury must occur unless there is some change in the circumstances as he perceives them to be (e.g. the driver alters course in order to evade the impact or a tyre

bursts and the vehicle changes course). Unless that change in circumstance takes place then the anticipated effect will occur.

Where would Lord Hailsham's instance of the aircraft saboteur fit into the proposed model of intention? In Hyan v D.P.P.¹⁹ he says

"a man may desire to blow up an aircraft in flight in order to obtain insurance moneys. But if any passengers are killed he is guilty of murder as their death will be a *moral certainty* if he carries out his intention. There is no difference between the blowing up of the aircraft and intending the death of some or all of the passengers".

Two issues are worthy of note in deliberating upon the question. First one might say that whether D directly or concomitantly causes the deaths is dependant upon the event description we wish to apply to the saboteur's case. Would we wish to describe his act as the blowing up of an aircraft in flight or blowing up a plane load of people in flight? If we apply, and are right in applying, the latter description to his activity then we might say that he directly intends the destruction of the aircraft and the deaths of the passengers: on that reasoning the hypothetical represents a case of direct intention. Second, one should note that Lord Hailsham restricted the extension of direct intention to "the means as well as the end and *the inseparable consequences of the end as well as the means*".¹⁹ I think that the learned Law Lord's phrase 'moral certainty' in his former statement equates with empirical certainty; but his latter statement appears to restrict Lord Hailsham's view of the extended meaning of intention to cases of conceptual certainty. Lord Hailsham does not thus make a distinction between 'empirical' and 'conceptual certainty'.²⁰

I am inclined to the view that, provided D does not aim at the deaths of the passengers, Lord Hailsham's hypothetical is one of direct intention on the basis of conceptual certainty. Suppose that the terrorists who planted the bomb which exploded on board the 'Pan Am' jumbo jet which came to grief over Lockerbie claimed that they only intended the destruction of the plane and not the death of passengers. I would submit

that in such a case serious injury or death is indivisible from the directly intended effect of their activity and that to intend one is to intend the other.²¹

We may obtain instances of empirical certainty from the case law. In the case of Miss Christina Edmunds, heard at the Central Criminal Court on January 15th 1872,²² D fell in love with the family doctor and, she alleged, had an intimate relationship with him. She placed strychnine into some chocolates and handed one to the doctor's wife, V₁. She spat it out but became quite ill. She and her husband agreed that D had tried to poison V₁ and the doctor broke off all relations with her. In an attempt to prove to the doctor that she was innocent of criminal intent she claimed that poisoned chocolates from some other source were circulating in town. To back up her claim she obtained chocolates from shops, impregnated them with strychnine, and returned them to the shops on a particular pretext. A small child, V₂, ate a poisoned chocolate and died. D was charged with and, since the evidence against her was overwhelming,²³ she was convicted of murder. But D's intention was to (falsely) demonstrate her innocence and not to cause the death of any person. On the test of failure²⁴ it is clear that D did not directly intend the death of the child since she would have been at least indifferent as to his fate. Yet one might say that death or injury was an inevitable result of D's act unless some change in the circumstances as perceived by her had taken place, for example the retailer had spotted that the box had been tampered with and removed the box from sale. The case thus falls within my definition of 'empirical certainty'.

One should note that the mens rea of murder in 1872 included constructive malice so the task for the prosecution was more simple than that which is faced by the prosecution in murder trials today. What if Miss Edmunds had claimed that it had never crossed her mind that someone might buy and be injured or killed by eating the chocolates? In such a case the agent should be allowed to make the plea and if the jury are satisfied on the evidence that the thought had not crossed the defendant's mind then they ought to acquit of murder and convict of manslaughter on the basis of gross negligence.²⁵

In Mohan²⁶ D, in response to a police officer's signal to stop, slowed his vehicle down, but then accelerated and drove the car directly at the police officer who jumped aside thus avoiding certain impact. D's intention was simply to avoid detention but he must have contemplated death or injury as an inevitable accompaniment of his activity in the absence of some change in the circumstances (which in fact occurred). The case thus falls within the concept of empirical certainty.

Professor Jackson is prepared to set Mohan apart from Miss Edmunds on the ground that here it is the agent's own activity which is directly going to produce the consequence.²⁷ He does not think that anyone would possibly argue against the view that Mohan had the mens rea necessary for an attempt notwithstanding that an attempt always requires the highest degree of mens rea. Professor Jackson argues that if Mohan accelerated and drove his car directly at the police officer then how can one say that he had not decided to bring about the consequences? The learned author thinks that this is not a case of foresight of certainty at all: Mohan did not decide to bring about the mere acceleration of the car - he decided to bring about the injury to the officer. Professor Jackson thinks that extraneous agency (the possibility that the police officer may jump aside) is irrelevant to any decision as to whether Mohan had a direct intention to knock him down. He concludes that Mohan desired to injure the police officer and decided to do so even though in the abstract he would not normally either wish or decide to injure police officers.

There is support for Professor Jackson's contention in the case law. In Pearman²⁸ the court concluded that if an agent drives straight at a police officer at high speed, a jury is likely to conclude that he intended to injure a police officer and maybe cause him serious bodily harm. I would ask what form of intention the court in Pearman had in mind. I have pointed out²⁹ that the courts have applied several meanings to the concept of intention; the one used in Mohan involving

"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".

It is submitted that whilst a court or jury might conclude on the evidence that the defendant in the hypothetical posited in Pearman intended to cause injury to the police officers they are not obliged to do so on the facts. They are entitled to acquit if they are not satisfied that he was trying to injure them. If the defendant genuinely claims that he did not intend to injure the police officers but knew that they would be injured if they did not take evasive action then the case is one of foresight of certain injury subject to some change in the existing circumstances as the agent perceives them to be. I do not agree that Mohan either decided to or desired to injure the police officer. He decided to and desired to escape apprehension. Smith and Hogan allude to the dictum in Pearman and suggest that the problem remains that the notion of attempt requires an intended result.³⁰ If we apply the test of failure to Mohan's case I feel we would conclude that Mohan would not have felt that his enterprise had been in some way frustrated by the police officer's evading impact: on the contrary he would no doubt have been relieved to find that he had effected his escape without injury to another.

On my structure of intention we may say that Mohan had concomitant intention to injure a police officer since he anticipated some harm which, since he was driving towards his victim, was certain to flow from his activity subject to some change in the circumstances as he (rightly) perceived them to be. This enables us to charge him with the substantive offence on the basis of concomitant intention but to exclude him from liability for an attempt if we wish to restrict that offence to direct intention. As I point out below³¹ we may provide for liability where the concomitant effect is not brought about by charging the agent with a specific substantive offence in relation to the proscribed harm in issue (e.g. endangering life).

My proposed structure of intention thus comprises two distinct mental states, namely direct intention and concomitant intention. The separation of the two distinct mental states provides machinery for the legislature, when enacting new legislation, to restrict the notion of intention where it feels appropriate. For where the legislature feels

that liability should attach only in respect of harm which is aimed at or is a conceptually certain effect of the agent's activity, it may achieve its purpose by including only direct intention as the requisite mental state in the definition of the offence. Where, in addition, Parliament wishes to attribute blame for anticipated empirically certain side-effects it may include both species of intention in the definition of the offence. The concept of concomitant intention is thus equivalent to the current law concept of oblique intention, although much more narrow. One might ask why I do not simply use the phrase 'oblique intention' instead of concomitant intention. I would comment that oblique intention dates back to Bentham³² and his model includes foresight of likelihood and is thus too wide for the purpose. Also I think the judges and theorists have 'played the concertina' with that expression to the extent that its precise boundaries are far from clear. The newly created mental state of concomitant intention provides us with a definition which is precise.

Most if not all judges and commentators would accept the contours of concomitant intention as falling within intention but one might object that my notion of concomitant intention is markedly narrow; that its substance is too thin to justify its existence apart from direct intention and that there is thus no ground for the division of intention into the proposed two species for the purpose of ascribing mental states to the agent who has brought about proscribed harm. But I would uphold the distinction between direct and concomitant intention on four grounds.

First, whilst the concept is admittedly thin in substance it is conceptually distinct from both direct intention and recklessness and thus forms an effective boundary between the two major species of mens rea. The courts would thus no longer be able to extend the contours of intention to include the most serious types of recklessness.³³

Second, we may wish to mark the distinction between the two species in specific substantive offences. In order to illustrate the point let us take a variant of **Nohan**³⁴ in which D₁'s car strikes the police officer

and causes serious injury to him. On current law D_1 has brought about the injury with intention to do so. Now suppose that D_2 , driving in his car, sees a police officer on point duty and drives towards him at speed intending to cause him serious harm and in fact does so. On current law D_2 has brought about the injury with intention to do so. In both cases the agents ought to be guilty of the substantive offence under s.18 of the Offences Against the Person Act 1861 but, it is submitted, there is a significant difference in the moral culpability which obtains in each case. The proposed concept of concomitant intention enables us to draw out this significant moral distinction. We may convict D_2 of an offence under s.18 with direct intention to do so and D_1 with the same offence by way of concomitant intention. We thus indicate in the conviction that D_1 (unlike D_2) was not aiming at the proscribed concomitant harm but foresaw it as possible to some degree.

Third, I think that we ought to preserve the distinction between direct and concomitant intention in relation to attempts. For since an empirically certain consequence y is distinct from the directly intended consequence x aimed at by the agent, one cannot say that he attempts harm y as he attempts but fails to bring about harm x . My view is that in such a case the agent should be convicted of an attempt at x simpliciter. We may achieve this by restricting the mens rea of attempts to direct intention. The same argument may be put forward concerning the case where D succeeds in bringing x about but empirically certain consequence y is prevented by supervening agency.

A variant of a hypothetical case posited by Professor Williams³⁵ will serve to illustrate my point. Suppose that D_1 and V are walking together on a bridge over a road. They see a diamond ring lying on the floor half way across and close to the edge of the bridge at a point where there is no safety barrier, and, realising that the other might lay claim to it first, each runs forward. They are running side by side and D_1 realises that V will be pushed off the bridge and fall 150 feet to his death unless he (D_1) slows down. But in his determination to reach the ring first he decides to keep running. V is forced off the bridge but some recently erected scaffolding breaks his fall and he sustains only minor

injury.³⁶ In this case D_1 sees V 's death as an empirically certain effect of his activity which is aimed at reaching the ring before V does. Should we count D_1 as attempting to murder V ? Surely not; for although D_1 's activity is reprehensible in the light of his attitude to the safety of V he ought not to be equated in terms of moral status with the agent D_2 who, aiming to kill, shoots at V to stop him getting the ring but his shot misses. If the proscribed harm occurs we may mark the distinction in moral status by charging D_1 with the commission of the substantive offence with concomitant intention and D_2 with the substantive offence with direct intention. Where the proscribed harm does not ensue we mark the difference by charging D_2 with an attempt at the substantive offence and D_1 either with no offence or with a specific substantive offence concerning the risk to which he has exposed his victim.³⁷

One might object to this claim on the ground that if D_1 in the above illustration is to be excluded from liability for an attempt at the empirically certain consequence on the basis that he is not aiming at it then surely we must also excuse the agent D_3 whose activity has failed to bring about the directly intended effect and thus the *conceptually certain effect* of his activity since he, too, is not aiming at that effect. Two comments may be made on the objection. First, unlike an empirically certain effect which is quite distinct from the effect aimed at, a conceptually certain effect is indivisible from the effect which informs the agent's decision to act as he does. On this basis to intend one effect is to intend the other and the agent has direct intention in respect of each effect. D_3 is thus guilty of an attempt at the conceptually certain effect of his activity where his exertion fails to bring about the effect which informs his decision to act. Second, in punishing for attempts we are punishing the agent for what he is aiming to bring about by his activity. If we convict the agent of an attempt concerning untoward and empirically certain harm then we are treating his activity in relation to that harm as intended when it is not, and, as Clarkson and Keating properly point out

"if one wishes to punish for something less than intention, then one should name that 'something' and be explicit that it is rendering

the defendant liable to the same extent as if he had the requisite intention".³⁸

I am in agreement with the learned authors and would suggest the strategy to apply here is the creation of new offences to cover failure of concomitantly intended harm. Where, for example, the death of others is an empirically certain consequence of the agent's activity if his directly intended consequence is brought about then we may, for example, charge him with endangering life in relation to the empirically certain consequence of his activity.³⁹ This strategy maintains a central subjectivist notion that we ought to record the agent's criminality with precision since we charge him with an attempt at the directly intended consequence which he fails to bring about⁴⁰ and with a substantive offence which accurately reflects the failed empirically certain harm which he contemplated in some degree. The strategy would also maintain the objectivist notion that the agent who has done everything necessary to bring about the directly intended effect ought to be liable for an effect which would certainly have followed that effect had the agent been successful in his activity ~~subject~~^{but for} to extraneous agency.

A fourth use which we might wish to make of the separate concept of concomitant intention would be to mark the moral distinction between the agent who fails to allude to a conceptually certain effect of his activity and the agent who fails to allude to an empirically certain effect of his activity. One might wish to count the agent who has failed to allude to a conceptually certain effect of his activity as directly intending that effect on the ground that the two consequences are indivisible and that to intend one is to intend the other. However one might be prepared to hold the agent who fails to allude to an empirically certain effect of his activity as less culpable since that effect is distinct and separate from the effect directly intended and thus less conspicuous. I would accept that the distinction is marginal but the separate concept of concomitant intention would allow the distinction to be drawn. Of course, if we exclude the agent from liability for intention in relation to the unforeseen empirically

certain effect of his activity he will nonetheless be liable for that effect on other grounds.⁴¹

One crucial aspect of the proposed model of intention, whether direct or concomitant, is that it relates to an effect which, as he reads it, the agent's exertion may itself produce. This temporal dimension to the concept means that we cannot treat as intended any consequence towards which the agent directs preliminary activity but which is not itself capable of being produced by that activity. In the next chapter I offer two new models of mens rea which extend liability to prospective offences towards which a perpetrated actus reus is a necessary preliminary.⁴²

Given that concomitant intention represents indirect intention on my structure of intention, to what extent is it in harmony with the contours of indirect intention in the current criminal law? This question leads to a discussion of the case law as it relates to indirect intention.

Indirect (or oblique) intention at current law is constituted by contemplation of the possibility, in some degree, of a particular consequence of one's activity which is untoward in the sense that one is not aiming to bring that consequence about. There seems to be general consensus that some form of contemplation of untoward harm should count as having been brought about intentionally but there has been much judicial and academic discord concerning the boundaries of indirect intention. It would be useful to discuss the cases and material by way of headings.

1. Contemplation by the reasonable man of the natural consequences of the agent's activity.

There is authority to the effect that an agent intends the natural consequences of his activity. In R v Smith⁴³ Viscount Kilmuir, talking of intention in murder, concluded that

"the sole question is whether the unlawful act was of such a kind

that grievous bodily harm was a natural and probable result. The only test available for this is what the ordinary responsible man ... would have contemplated as the natural and probable result". Viscount Kilmuir was thus prepared to hold as intentional any result which is a natural consequence of an agent's act provided only that that consequence was foreseeable by the reasonable man. But what do we mean by the term 'natural consequence'? I think that there are two possible answers. First the expression may include those consequences which actually flow in an unbroken chain from the agent's initial activity. This definition includes consequences which do not normally flow from activity such as that carried out by the agent. The sole issue is then would the ordinary man have contemplated the consequence as a natural consequence generally. A second meaning is those consequences which, in the nature of things normally flow from the initial activity. This definition is more restricted than the first since it excludes those untoward consequences which the ordinary man might contemplate but not expect to flow from such activity. Thus if a consequence which has flowed from an unbroken chain from D's initial activity is not a consequence which one normally expects to follow such activity then it is not a natural consequence on the second definition and cannot thus rank as intended on Viscount Kilmuir's judgment. Either interpretation of 'natural consequences' involves 'foresight by the reasonable man'. The decision in Smith is thus objectionable since it brings into the realms of intention a large chunk of the concept of recklessness.⁴⁴ I have argued above that the minimum mental state for intention ought to be foresight of an empirically certain effect of one's activity. I shall argue below that contemplation of probability short of certainty belongs in the realm of recklessness.⁴⁴

The decision in Smith was the subject of much academic criticism which led to the passage of s.8 of the Criminal Justice Act 1967 which states that a court or jury in determining whether a person has committed an offence

"a) shall not be bound to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances".

Since the passage of s.8 there has been little support for the claim that an agent intends the natural consequences of his act whether he has foreseen such consequences or not. It is interesting to note that in **Moloney**⁴⁵ Lord Bridge, whilst insisting upon direct intention as the sole mens rea requirement of murder, suggested that foresight (by the defendant) of the natural consequences of his act may be taken by the jury as evidence of his intention in relation to those consequences. He used the phrase 'natural consequence' in the sense of probability little short of overwhelming. It should be noted that Lord Bridge uses the phrase in connection with evidence of intention and he does not thus take us back to the situation as defined in **Smith**. In **Hancock**⁴⁶ Lord Scarman agreed that the mental state in murder is intention and that foresight belongs to the realm of evidence. However he objected to the phrase 'natural consequence' as the criterion for evidence of intention since it does not take account of the accused's assessment of probability which, in cases of murder at least, is of critical importance. Lord Scarman went on to posit a test for evidence of intention couched in terms of probability and likelihood which was interpreted in **Nedrick**⁴⁷ to mean that the jury can infer intention where the proscribed harm in issue is known by the defendant to be a virtually certain consequence of his activity. It seems that for the present at least we have heard the last of contemplation of natural consequences as a species of intention.

2. Contemplation by the agent that his activity *might possibly* bring about the untoward harm.

There have been one or two authorities which regard such contemplation as a species of intention. In **Miller**⁴⁸ Lord Diplock thought that recognition of the existence of 'some risk' of the consequence occurring amounted to an intention in respect of that consequence. Lord Diplock thus admits a fairly low level of foresight into the structure of intention. Also in the Law of South Africa "legal intention in respect

of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with a recklessness as to whether it does or not".⁴⁹

3. Contemplation by the agent that his activity is likely to bring about the untoward consequence.

In Hardy v Motor Insurers' Bureau⁵⁰ the issue before the Court of Appeal was the meaning of 'intent to do grievous bodily harm' under s.18 of the Offences Against the Person Act 1861. Lord Denning considered that the question for the jury was

"(i)s the evidence so strong that we are satisfied that he, the accused man, must himself have been aware that *grievous bodily harm was likely to result?*"⁵¹

In Hyan⁵² Lord Diplock stated obiter that

"there is no distinction in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence and the state of mind of one who does an act knowing full well that it is *likely to produce that consequence*⁵³ although it was not the object he was seeking to achieve by doing that act. What is common to both states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement ... that in order to constitute the offence with which the accused is charged he must have acted with 'intent' to produce a particular evil consequence".⁵⁴

Lord Kilbrandon concurred with Lord Diplock stating that intention in murder includes knowledge by the accused that death was a "*likely consequence of the act*"⁵⁵ and was indifferent whether that consequence followed or not".

Theorists who accept contemplation of likelihood as a species of intention include Bentham,⁵⁶ and Cross.⁵⁷ Lord Denning accepted the view in his Lionel Cohen lecture.⁵⁸

There are, however, dicta which deny foresight of likelihood as a species of intention. In *Mohan*⁵⁹ D was charged on Count 2 with attempting by wanton driving to cause bodily harm to a police officer. The judge directed the jury that it was not necessary to prove an intention to cause bodily harm; it was sufficient that D drove wantonly, realising that such wanton driving would be *likely* to cause bodily harm. D was convicted and appealed. James L.J. considered the parameters of mens rea in relation to attempts and said

"(e)vidence of *knowledge of likely consequences, or from which knowledge of likely consequences can be inferred*,⁶⁰ is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. If the jury find such knowledge established they may and, using commonsense, they probably will find intent proved, but it is not the case that they must do so".

Most theorists reject likelihood of consequences as a species of intention.⁶¹ One reason for rejection concerns the difficulties for the jury in ascertaining the precise level of contemplation which amounts to likelihood. Professor Smith points out that Lord Reid, in a civil case,⁶² talked of the test for breach of contract as whether the loss was "not unlikely" to occur, explaining the phrase as "a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable".⁶³ Williams asks of the expression 'likely'

"(w)hat does (the word) imply? Some would feel that it is a stronger word than 'probable', implying say a 66 per cent chance. Others may feel that it is not so strong, and that it would be satisfied by a 33 per cent chance. If the word is used in a legal rule to refer to the degree of possibility, then surely we need to have some agreement upon the degree, at least upon its order of magnitude".⁶⁴

Austin takes the expression as any degree of probability in excess of even probability that the untoward harm will occur.⁶⁵ Austin's concept of intention is echoed by Lord Denning.⁶⁶ An interesting point here is that if 'likely' involves probability in excess of even probability and

'unlikely' means probability below even probability then just where does even probability stand in relation to the notion of likelihood?

4. Contemplation by the agent that his activity will *probably* bring about the untoward harm.

In Lang v Lang⁶⁷ the Privy Council considered whether the appellant had intended to cause his wife to leave the matrimonial home. Their Lordships decided that

"(i) if the husband knows *the probable result of his act*⁶⁸ and persists in them, in spite of warning that the wife will be compelled to leave the matrimonial home ... that is enough however passionately he may desire that she should remain".

In Chandler v D.P.P.⁶⁹ Lord Devlin considered the word 'purpose' and decided that

"(a) purpose must exist in the mind... The word can be used to designate either the main object which a man wants or hopes to achieve by the contemplated act, or it can be used to designate those objects which he knows *will probably be achieved by the act*⁷⁰ whether he wants them or not. I am satisfied that in the criminal law in general, and in this statute in particular⁷¹ its ordinary sense is the latter one".

Lord Reid, in interpreting 'purpose' said

"(t) he accused both *intended* and desired that the base should be immobilised for a time, and I cannot construe purpose in any sense that does not include that state of mind"

Lord Devlin concurred with parts of Lord Reid's speech and did not dissent on the meaning of purpose. One might thus argue that the House in Chandler accepted that intention includes foresight of probability.

In Hyan⁷² Lord Cross of Chelsea, in deciding upon whether foresight of high probability was a sufficient element for intention in murder concluded⁷³

"I think that the only criticism which can be directed against Ackner J's summing up is that by the insertion of the word 'highly'

before 'probable' it was unduly favourable to the appellant".⁷⁴

In Lynch v D.P.P. for Northern Ireland⁷⁵ Lord Simon, dealing with an appeal against a conviction for murder considered, obiter, the offence of wounding with intent to do grievous bodily harm and said that

"(t)he actus reus is the wounding and the ... mens rea ... is (inter alia) that the accused foresaw that the victim would as a result of the act *probably be wounded*⁷⁶ in such a way as to result in serious injury to him".

However in Belfon⁷⁷ the Court of Appeal, dealing with a case of wounding with intent, came to a contrary conclusion. In the instant case the trial judge directed the jury

"(a) person intends the consequences of his voluntary act in each of two quite separate cases ... secondly when he foresees that they are likely to follow from his act but he commits the act recklessly irrespective of appreciating that these results will follow".

Belfon appealed against his subsequent conviction and the Court of Appeal stated that

"(t)here is certainly no authority that recklessness can constitute an intention to do grievous bodily harm. Adding the concept of recklessness to foresight not only does not assist but will inevitably confuse the jury. Foresight and recklessness are evidence from which intent may be inferred but they cannot be equated either separately or in conjunction with intent to do grievous bodily harm".⁷⁸

The Court of Appeal thus denied that foresight of probability (or likelihood, the expression chosen by trial judge,) is an element of the concept of intention.

Judge Buzzard accepts that the concept of intention includes consequences which the agent foresees as a probable result of his activity, except for the inchoate offence which he accepts requires direct intention.⁷⁹

There has been some support for 'probability' as a constituent of 'intention' by the jurists. The minority of the Law Commission's Working Party⁸⁰ reported that "a person intends an event not only (a) when his purpose is to cause that event but also (b) when he foresees that the event will probably result from his conduct".

Austin is prepared to equate 'probability' with intention. He writes "when you shoot at Styles, I am talking with him and am standing close by him. And from the position in which I stand with regard to the person you aim at, you think it not unlikely that you may kill me in your attempt to kill him. You fire and kill me accordingly. Now here you intend my death without desiring it ... since you contemplate my death as a *probable consequence*⁸¹ of your act, you intend my death although you desire it not".⁸²

Lord Devlin has said that where a man has decided that certain consequences would probably happen, then "for the purposes of the law he intended them to happen".⁸³ But there are those who reject 'probability' as a species of intention. Williams points out the difficulty in specifying just what constitutes the notion. He writes

"(t)he word ... is generally taken to include something beyond bare possibility and less than certainty; I think that most people would say that it implies at least a 50 per cent chance".⁸⁴

In his review of the terms 'probable' and 'likely' he says

"(t)here is no agreed mathematical translation of 'probable', and all we can say about 'likely' is that it may cover a lower degree of probability than 'probable' (though dictionaries make them both the same). In statistics 'probability' means the whole range of possibility between impossibility and certainty ... 'Chance' is a non-technical synonym for probability, as also is 'risk' (the chance of the untoward event). Popular 'probability' means substantial chance, but no one knows whether this means a probability of at least

.34, .51 (more likely than not), .67, .80 or what. It could mean something less than those figures. Even if there were an Act of Parliament saying that probability in law means probability of (say)

.51, the jury would have great difficulty in adjudicating the issue unless evidence were presented of elaborate experiments to determine the probability".⁸⁵

With respect to Professor Williams I would argue against the view that we should not use 'probability' merely because we cannot determine its boundaries precisely. To accept the view would lead to difficulties in several other significant areas of criminal law. For example just what is 'grievous' in grievous bodily harm? I do not think that it is too vague to talk in terms of 'really serious harm' here. Nor do I think that it is too vague to talk of foreseeing a consequence as being "more likely than not".⁸⁶ I shall argue later that we can distinguish between 'gross' and 'simple' recklessness and that distinction may be drawn in terms of a consequence which is more likely than not to flow from the agent's activity.⁸⁷ However I would wish to dissociate myself from the view that 'probability' is a constituent part of intention for reasons stated below.⁸⁸

5. Contemplation by the agent of the high probability that his activity will bring about the untoward consequence.

Some judges are prepared to allow as a constituent part of intention foresight by the agent that a particular change in the world is a highly probable consequence of his activity. This particular mental state was the one at issue in Hyan.⁸⁹ In that case the point of law before the House of Lords was whether 'malice aforethought in the crime of murder (is) established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew it was highly probable that that act would result in death or serious bodily harm'. Viscount Dilhorne said that

"a man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result,⁹⁰ I think most people would say and be justified in saying, that whatever other intentions he may have as well, he at least intended grievous bodily harm".

Lord Kilbrandon agreed with Viscount Dilhorne. Lord Diplock was prepared to accept a lesser mental state as a requisite mental state for murder, namely foresight of 'likelihood'.⁹¹ Lord Cross of Chelsea was prepared to accept foresight of 'mere probability' as a requisite mental state for intention in murder. The House thus affirmed the question and, until Hyam was overruled, foresight of high probability formed a part of the concept of intention as it applied to murder.

I will argue against foresight of probability below⁹² but would comment on the decision on Hyam here. The question before the House concerned *malice aforethought* and not intention. Now malice is a special mental state quite distinct from intention and generally includes intention and subjective foresight of the risk of proscribed harm.⁹³ Stephen had in fact defined malice aforethought for the purpose of murder as *including* "knowledge that the act which causes death will probably cause the death".⁹⁴ It is submitted therefore that their Lordships' statements concerning probability and intention were obiter since the issue of just what constitutes intention was not before them. I would further submit that since the decisions in Moloney,⁹⁵ Hancock⁹⁶ and Nedrick⁹⁷ (which overrule Hyam) talk in terms of intention only the time is right to abolish the concept of malice aforethought in murder and replace it with intention.

In Hardy v Motor Insurer's Bureau⁹⁸ Pearson L.J. thought that a man who foresees that his act "*will in all probability*"⁹⁹ injure another person intends to injure that person".

However there have been dicta against the proposition that foresight of high probability is a constituent of intention. In Hyam¹⁰⁰ Lord Hailsham stated that

"I do not ... consider ... that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what was done is the same thing as the fact that the state of affairs is intended".

For the theorists Brett uses the phrase 'highly probable' when setting the limits of the concept of intention.¹⁰¹

6. Contemplation by the agent with no substantial doubt that a particular consequence will flow from his activity.¹⁰²

The proponent of this level of foresight as a minimum constituent of 'intention' insists that the agent must have foreseen as near certain the probability of the consequence of his activity before we may describe his activity as intentional. The Law Commission have offered this level of foresight as a species of intention. They suggest the following:

"2(1). The standard test of intention is - did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?"¹⁰³

The reasoning behind The Law Commission's proposal is presumably that in cases in which the agent has no substantial doubt that a particular untoward harm will flow from his activity the risk is so high that we may count the agent's activity as intentional in relation to the harm. I shall argue later that this level of foresight is not sufficiently distinct from recklessness to enable us to count it as a species of intention.¹⁰⁴ I would point out here that acceptance of this mental state as intention presents problems for the law on attempts. Consider the case of D who acts intending to bring about x having no substantial doubt that he will also bring about untoward harm y. He is successful in relation to x but y does not occur. Can we convict D of the substantive offence regarding x and also an attempt regarding y? My submission is that the mental requirement for attempts is direct intention, that is a resolve by the agent that he, by his activity, bring about a specific change in the world.¹⁰⁵ Now if we extend the concept of 'intention' to foresight of virtual certainty or 'no substantial doubt' then we must include D's foresight of y as intentional and hold him guilty of an attempt which seems wrong and is certainly not in accordance with current law on the subject.

If we would wish to count this category of foresight as intention and preclude it from the criminal law on attempts then we would need to distinguish between two separate categories of intention. This would enable us to distinguish between cases such as Cawthorne¹⁰⁶ from cases in which the agent aims unsuccessfully to bring about a particular proscribed harm.¹⁰⁷ It is worth noting here that the Law Commission has recognised that in some cases a more narrow definition of 'intention' might be appropriate and considers that attempts is an area in which the narrow definition should apply.¹⁰⁸

Glanville Williams restricts foresight in intention to cases where the consequence is virtually, practically or morally certain. He says

"a person can be taken to intend a consequence that follows under his nose from what he continues to do, and the law should be the same where he is aware that a consequence in the future is the certain or practically certain result of what he does ... A consequence should normally be taken as intended although it was not desired, if it is foreseen by the actor as *the virtually certain accompaniment* of what was intended ... Clearly, one cannot confine the notion of foresight of certainty in the most absolute sense. It is a question of human certainty, This is still not the same as speaking in terms of probability".¹⁰⁹

Hart, too, argues that only foresight of virtual certainty should be admitted as a species of intention. He puts forward the case of R v Desmond, Barrett and Others¹¹⁰ where the defendant Barrett dynamited a prison wall in order to effect the escape of two Irish Fenians imprisoned there. Though the plot failed the explosion killed some persons living nearby. It was no part of Barrett's purpose or aim to kill or injure anyone but he was convicted on the ground that he foresaw their death or serious injury. Hart argues that

"It is perhaps easy to understand why ... the law should neglect the difference between oblique and direct intention ... The reason is, I suggest, that both ... direct intention and ... oblique intention share one feature which any system of assigning responsibility for conduct must always regard as of crucial importance. This can be

seen if we compare the actual facts of the Desmond case with a case of direct intention. Suppose Barrett shot the prison guard to obtain from them (sic) the keys to release the prisoners. Both in the actual case and this imaginary variant, so far as Barrett had control over the alternative between the victim's dying or living his choice tipped the balance; in both cases he had control over and may be considered to have chosen the outcome since he consciously opted for a course leading to the victims' deaths. *Whether he sought to achieve this as an end or a means to his end, or merely foresaw it as an unwelcome consequence of his intention,*¹¹¹ is irrelevant at the stage of conviction where the question of control is crucial. However, when one comes to the question of sentence and the determination of the severity of the punishment it may be (though I am not sure that this is in fact the case)¹¹² that on both retributive and utilitarian theory of punishment the distinction between direct intention and oblique intention is relevant".¹¹³

The italicised phraseology indicates, I think, that Hart is prepared to accept foresight of near certainty in his model of intention. But one might question Hart's choice of illustration here. Were Desmond and Barrett certain that they would cause death? Professor Hogan points out that, assuming Barrett was implicated in the explosion, it may be questioned whether he foresaw (the jury were instructed to apply the subjective test) that life was likely to be endangered. Barrett certainly believed that the two Fenians imprisoned behind the wall would not be injured since they would no doubt have been taking precautions against the expected explosion (they were in fact still in their cells at the time of the explosion). Professor Hogan concludes that whilst Barrett ought to have been aware of the risk to inhabitants the question of whether he did so may be questioned.¹¹⁴

In 1985 a group of distinguished lawyers (the Code Team, hereafter referred to as the Team) was approached by the Law Commission to deliberate and report upon how the general principles of criminal law might be enacted in legislative form. The Team, chaired by Professor Smith, suggested that a greater number of fault terms be used for the

purpose of ascribing criminal responsibility.¹¹⁵ The suggested definition of intention is as follows:-

"a person acts 'intentionally' in respect of an element of an offence when he wants it to exist or occur, is aware that it exists or is almost certain that it exists or will exist or occur."¹¹⁶

The Team introduced the phrase 'almost certain' in place of the 'no substantial doubt' test suggested by the Law Commission¹¹⁷ on two grounds. First it is not inaccurate to claim that even one who has no state of mind in relation to a proscribed harm or state of affairs has no substantial doubt. Secondly difficulty might be had by the jury in considering whether they have *no reasonable doubt* that the defendant had *no substantial doubt* that something would occur or be the case.¹¹⁸

The Team's definition of intentional action brings into account intention as to circumstances. Thus if D attempts to have sexual intercourse with P, who does not consent, he is guilty of attempted rape only if he is aware, or is almost certain, that she does not consent.¹¹⁹ One should note that the team use Lord Hailsham's aircraft saboteur¹²⁰ as an illustration of their proposed structure of intention. It is submitted that the Team's definition of intention is to be preferred to the Law Commission's definition since it removes at least two objections to that definition.¹²¹ However one may object to the structure of intention proposed by the Team on the ground that the concept of 'want' has no role to play in any ascription of intentional activity. This objection is dealt with in detail below.¹²²

The six levels of foresight stated above are fairly representative of the positions taken by the various judges and jurists when setting the threshold between intention and recklessness. I should like to raise several objections to the inclusion of foresight of consequences to any degree short of certainty as a constituent element of the concept of intention.

1. If the function of the criminal law is to signal society's condemnation of particular conduct then the concepts of blame utilised

should reflect as much as is possible the ordinary meaning which society assigns to them. Duff argues that

"appeal to ordinary language should not be despised; not just because it may cause confusion if the law uses terms whose legal and extra-legal meanings differ radically; but because the term's ordinary usage reflects our moral understanding of its relevance to ascriptions of responsibility, and of those distinctions which we regard as morally significant. Thus if it is any part of the law's purpose to assign legal liability in accordance with moral responsibility, there must be a presumption in favour of preserving the ordinary meanings of the concepts through which responsibility is assigned".¹²³

On this point it should be noted that it is the ordinary man, as a juror, who must ultimately decide whether or not an agent intended a particular consequence of his activity. If intention is to bear a legal meaning markedly different from that recognised in ordinary discourse then the task of the jury is made that more difficult; a situation which was amply demonstrated by the proceedings at the trial of Hancock and Shankland.¹²⁴ It is just that confusion found by the jury in that case which the Court of Appeal had in mind when considering the appeal of Belfon.¹²⁵ In the latter case D was convicted under s.18 of the Offences Against the Person Act 1861 and appealed on the ground that the trial judge had misdirected the jury on the meaning of intent within the section. Wein J., in allowing the appeal, said that

"there is certainly no authority that recklessness can constitute an intent to do grievous bodily harm. Adding the concept of recklessness to foresight not only does not assist but will inevitably confuse the jury".

And in Beer¹²⁶ Lawton L.J. said that

"(t)he realities of the case were that he either intended to cause her really serious injury or he did not. There was no other issue for the jury to consider".

There are one or two criticisms concerning the plea for ordinary language. One obvious comment is that there is not necessarily any settled or ordinary usage of the notion of intention - that in any event ordinary usage tends to be less precise and consistent than some kind of stipulative legal usage. I would respond that it is open to the criminal law to create a legal definition of intention which complies with what is considered to be the general understanding of that word. It would then be possible to cement that definition into the criminal law so that it acquires a stipulative usage.

Professor Jackson questions the force of my contention that it is the ordinary man as a juror who must ultimately decide whether or not an agent intended a particular consequence of his activity. He claims that the legal system certainly pretends that it is true in the sense that it assumes that the ordinary person in the jury box, properly directed by a judge, actually goes through the analytical processes which the positive or dogmatic statements of the law require. Professor Jackson considers that intention is too abstract or philosophical a term to make it worthwhile to start asking what the ordinary usage of intention is. Drawing upon the psychological work of Bennet and Feldman,¹²⁷ he instead argues for an investigation into how the ordinary person would categorise a particular fact situation, for example murder. That becomes in one sense a question of the ordinary usage of the term murder which Professor Jackson thinks to be more reliable than the ordinary usage of the word intention. He distinguishes between narrative and conceptual models. He feels that the juror is far more likely to ask himself whether the story which has been constructed in the court room sounds like his typical stories of murder to justify labelling this story as murder or not.

I would make a few comments on this view.¹²⁸ First, if the juror is going to justify conviction for murder on the story itself then he must surely base his decision on the morality of the case. Several factors combine to make 'the morality of the case' including the extent to which the agent was able to exercise control over his activity, the causal connection between his activity and the proscribed harm, external influences upon his activity, his attitude towards the occurrence of the

proscribed harm and so forth. One major factor here is surely his attitude to the fact of death. If the agent had aimed to kill his victim then the juror in Professor Jackson's commentary would treat the case as the paradigm of murder. Where the agent's attitude towards the risk of death or grievous bodily harm becomes less reprehensible the juror will at some point decide that it is no longer a story of murder but one of some lesser wrong. This leads to a second difficulty. Just where will the juror draw the line and decide that a particular story falls into a less (or more) serious offence? Again there will be several factors which will lead him to a decision but surely the agent's attitude towards the risk will play a central role, and that factor must include the concepts of intention, recklessness and so forth. Third, would not the stories of murder not register differently - perhaps markedly differently - between the jurors, leading to a rise in the the cases where jury cannot agree? Would some direction from bench be necessary? If so would not 'direct aim' and 'degree of foresight' necessarily figure prominently? In any event it would seem strange that our criminal law should put out a very detailed account of the varying mental states that constitute mens rea and then accept (perhaps insist) that the jury simply decide on guilt, or at least upon the mental state, on their own perceptions about the story as it unfolds.

2. For the purpose of assessing criminal responsibility we use several distinct mental states which reflect differences in moral turpitude with which agents bring about proscribed harm. Sometimes we draw the line between distinct offences on the basis of these mental states (e.g. the offences under s.18 and s.20 of the Offences Against the Person Act 1861) and in so doing we mark out clearly the moral turpitude which accompanied the agent's activity which brought about the actus reus of the offence. Now if the mental states are based upon distinctions in moral turpitude then I think it is necessary to reserve the most moral blameworthy state of mind to the most severe form of moral blame; that is intention. Now if we include some degree of foresight of probability as a species of intention then we fail to distinguish between significantly different forms of moral turpitude. We would, for example, convict of murder both the systematic killer who has direct intention

and the agent who embarks upon a non-fatal criminal enterprise in which he foresees that death or grievous bodily harm is probable to some degree. It is submitted that if we paint the concept of intention with a broad brush we run the serious risk that the attitude of society to crime generally might be adversely affected thereby.¹²⁹ Two cases, one on probability and one on virtual certainty, are illustrative here.

In Cawthorne v H.M. Advocate¹³⁰ D fired randomly into an occupied room. He was convicted of attempted murder and his appeal was upheld on the ground ^{that} the mens rea of an attempt is the same as that of the completed crime, and his action exhibited that 'wicked recklessness as to consequences' which constitutes the mens rea of murder. Yet Cawthorne's intention was, in fact, to cause terror and not to cause death. To this extent he was entirely successful, his activity went according to plan exactly. Thus as Duff points out,

"(w)e may ascribe to him an 'intent' which would make him guilty of murder if he caused death; but that is not to ascribe to him the intention 'to commit murder'".¹³¹

In Lang¹³² D continued in his cruelty towards his wife in the knowledge that this would 'in all human probability' cause her to leave the matrimonial home. Constructive desertion was found against him on the ground that he *intended* to drive her out despite the fact that he desired and requested her not to leave. But if we apply the test of failure to Lang's case¹³³ we find that the decision that he intended to drive her out is not tenable since, had his wife remained against all reasonable expectation, Lang would not have felt that his activity had been frustrated: on the contrary he would have felt relieved and delighted that his fear about the untoward consequence of his activity had been ill-founded. Lang is thus morally less blameworthy than the agent who has perpetrated the same activity with the direct intention of driving his wife from the matrimonial home.

3. If we apply to a particular criminal offence a broad definition of intention which includes foresight of probability to some degree then we would not be able to apply a more restricted definition to those

offences which we might consider to require a more serious moral turpitude, unless we give to the concept of intention variable meanings which we apply to the spectrum of criminal offences as we think fit. This is the position which obtains at current law: the judges place a very narrow meaning on the concept of intention in some offences such as attempts, and extend the meaning to include probability to some degree in others. But it is submitted that it is a highly unsatisfactory state of affairs that this important element of our criminal law should have such flexible contours, particularly when one considers that the most heinous crime, murder, effectively admits only intention as a necessary mental state. The position stems from the fact that our criminal law uses so few concepts of mens rea to accommodate the entire spectrum (or possibly spectrums) of mental state - from direct intention to blameless inadvertence. My view is that we should have a structure of mens rea which enables Parliament to state more precisely the minimum mens rea requirement for each newly enacted offence. It is submitted that the proposed notions of direct and concomitant intention, together with purpose, objective, gross and simple recklessness and gross and simple negligence¹³⁴ enable us to construct relatively sharp forms of mental state for each new offence thus avoiding the need for the variable meanings which the courts have attributed to the concept of intention.

One might argue against this. After all what harm is actually done by the present state of the law in which generally speaking the definition of the mens rea of each individual offence is clear enough even if the terms used to describe it have inconsistent meanings across the spectrum of criminal offences? My submission here is that if we have variable meanings of the concept of intention then it simply cannot be clear just what are the parameters of intention in each case. Also when Parliament creates a new offence which admits only intention as the requisite mental state then just what version of intention is to be applied to the offence? I suggest that we ought to have a clear and universal definition of intention which is to be applied in all cases and that intention should be restricted to the most serious form of moral turpitude.

4. If we integrate direct intention and foresight of an untoward consequence as probable to some degree in our conception of intention then we have no means, at the conviction stage, of rewarding the agent who takes steps to avoid a known (and probable) untoward side effect. Suppose that Dominic is determined to bring about x. He foresees that y is a probable consequence of his enterprise. He appreciates that he can take some measures in order to reduce the possibility of bringing y about by his activity although not sufficient to reduce 'probability' below the minimum required for 'intention'. Dominic may feel inclined to take the available steps to reduce the risk in order to reduce the probability of being punished for its occurrence but I feel that it is right that we reward such efforts to reduce the risk of untoward harm at the conviction stage. After all the agent in such a case has not merely alluded to the risk of probability, and gone on to take it: he has acted upon that appreciation of risk in order to reduce it to a minimum in the context of his activity. We can reward the agent in such cases by making sharp divisions between the categories of mens rea. We can and should do much more to sharpen the various levels of mens rea so that we are able to more clearly indicate the moral turpitude of the offender at the conviction stage.

For the reasons I have stated I submit that foresight of probability short of certainty ought not to figure in any account of intention.

The Proposed and Current Law Models of Intention and Desire

In my definitions of direct and concomitant intention I expressly exclude 'desire' as a constituent. My view is that desire is a necessary element in neither the proposed model nor the current law model of intention. There has been much debate upon the issue and it would be useful to consider the arguments. In what follows I shall talk of intention as the concept is understood at current criminal law. As a useful starting point to discussion it is worth noting that in fact there is a clear distinction between the concepts of intention and desire. For an agent may desire that some change in the world occur without any intention of bringing that change about. Furthermore one may

desire something which is not in one's power to bring about intentionally or otherwise. As Lord Asquith pointed out "X cannot, with any due regard to English language, be said to 'intend' ... that it shall be a fine day tomorrow".¹³⁵ In the context of an agent's activity the same proposition holds. For, although an agent may intend such contemplated effects of his activity which he desires (in which case he both desires and intends those effects), he may desire an expected effect of his activity without acting in order to bring it about. Contrariwise an agent may aim at and bring about a particular change in the world which he regrets or toward which he is indifferent. For example in order to claim more than its value on my household insurance I destroy a family heirloom which I treasure. Intention and desire are thus free standing concepts.

Despite this clear distinction between them, however, there have been a number of cases in which the judges have been prepared to treat the notion of desire as an integral aspect of the concept of intention for the purpose of ascriptions of criminal liability.

In Hyan¹³⁶ Lord Diplock talked of the state of mind of one who does an act *because he desires it* to produce a particular evil consequence and considered that state of mind to be intention. In Moloney¹³⁷ the trial judge, in directing the jury on intention stated that a man intends the consequence of his voluntary act (inter alia) "*when he desires it to happen*". Some analyses of Steane¹³⁸ suggest that the court in that case had in mind the fact that desire might be equated with intention. Lord Denning thought that the case decided that *lack of desire proves lack of intent*,¹³⁹ and Lord Simon in Lynch v D.P.P.¹⁴⁰ considered that the court in Steane must have had in mind that intention was desire. White points out that such views of the decision in Steane seem to ignore the fact that the actual decision was based not on the absence of desire by Steane to assist the enemy but on the fact that the prosecution could not prove such intention other than by relying on the fact that such assistance was a probable result of his broadcasting as he did.¹⁴¹

Some theorists too are prepared to treat 'desire' as a necessary component part of the concept of direct intention. Professor Williams says that

"(except) in one type of case¹⁴² intention as to a consequence of what is done *requires desire of that consequence* ... With one exception¹⁴² an act is intentional as to a consequence if it is done with (motivated by) the wish, desire, purpose or aim (all synonyms in this context)¹⁴³ of producing the result in question".¹⁴⁴

The learned author points out that a contemplated effect of the agent's activity might be counted as intended although not desired but such instances fall within oblique intention¹⁴⁵ and not direct intention. Williams notes that some theorists refute the proposition that direct intention necessarily includes desire¹⁴⁶ on the main ground that one can intend to do an unpleasant thing such as visit a dentist and thus direct intention need not involve desire. He argues that the premise is true but the conclusion does not follow since a person visits the dentist in order to obtain specific benefits (e.g. relief from continuous pain or preservation of teeth) and the pain suffered at the hands of the dentist is accepted as a part of the total package which is desired.¹⁴⁷

Let us apply Williams' contention to a hypothetical involving criminal activity. Suppose that D poisons his grandmother in order to claim as beneficiary under her will. D adores his grandmother but, given his dire financial straits, he feels that the premature demise of grandmother (with the attendant acceleration of the benefit of her estate) is preferable to his being the subject of bankruptcy proceedings. In this case the death of grandmother is part of a package and the object of the package is desired by him but can we say that D desires his relative's death? Can we not say that D intends her death as an *undesired* means to a *desired* end?

My illustration involves a further consequence which follows upon the agent's initial activity but we may posit a hypothetical more akin to the 'dentist' illustration. Suppose that D had poisoned his grandmother

as an act of mercy given that she was in great pain and had only days to live. In this variant there is (as with the dentist case) no further consequence: the death of grandmother necessarily involves the effect which motivated D's activity, i.e. the relief from agonising pain. Must we agree with Williams that D desires his relative's death or can we say that although D intended her death he did not desire it? My response to the questions posed in this and the last paragraph is that we may say that D intends but does not desire the death of his grandmother. The reasons in support of my conclusion are stated below.¹⁴⁸

One might say of the variant illustration that the death of grandmother and her relief from pain are inseparable effects of the agent's activity. On this basis we may conclude that to intend one is to intend the other and that D intends both her death and her relief from pain although he only desires the latter. The same contention may be applied to the case of my visit to the dentist. The undesired pain suffered at the hands of the dentist is inseparable from the desired effect (say the preservation of my teeth) since the occurrence of the former necessarily includes the latter: we may thus say that I intend to suffer the pain, not because I desire it but because it is inseparable from the preservation of my teeth which I do desire and which motivated my visit to the dentist. This would explain Williams' view in cases in which the desired effect is inseparable from the undesired effect but, for the reasons set out below.¹⁴⁹ I think that he is wrong to insist that intention involves desire in all cases of direct intention.

Smith and Hogan state their position shortly. On their interpretation of the dicta by the Court of Appeal in Mohan¹⁴⁹ that intention involves "a decision to bring about ... the commission of the offence ... no matter whether the accused desired that consequence of his act or not" they say "it is difficult to envisage a person doing all in his power to bring about a certain end, yet not desiring it to occur".¹⁵⁰ They explain that the dictum was intended to prevent an agent from avoiding liability on the ground that he did not desire x (running down a policeman) for its own sake, but had brought it about in order to achieve some other object y (effecting an escape). They conclude that Mohan intended to escape and

injury to the police officer was, as he read it, a condition precedent to escape. But was the police officer's injury a condition precedent to Mohan's escape? The police officer may (as he did in the case) jump clear and the escape effected without injury. It might be argued that it was the officer's fear of injury, and his likely reaction to it, which was the condition precedent to Mohan's escape.¹⁵¹

Professor Kenny says that

"(a) man cannot intend to do a thing unless he desires to do it. It may well be a thing that he dislikes doing, but he dislikes still more the consequences of his not doing it. That is to say he desires the lesser of two evils and therefore has made up his mind to bring about that one".¹⁵²

I think that this welter of authority insisting upon desire as an element of intention has been matched by those opposed to the proposition. There have been several judgments denying the assimilation of desire into intention. In Hyan¹⁵³ Lord Kilbrandon decided that the agent who foresees a consequence as likely, and who *is indifferent whether or not it follows* upon his activity intends that consequence. In Lang v Lang¹⁵⁴ the Privy Council decided that the husband who foresees that his wife will probably leave the matrimonial home because of his persistent cruelty intends to drive her out "however passionately he may desire that she should remain".¹⁵⁵

In Mohan¹⁵⁶ intention was described as a decision to bring about, insofar as it lies within the accused's power, a proscribed change in the world *whether or not the accused desired the change*.¹⁵⁷ In Lynch v D.P.P.¹⁵⁸ it was held that *although the act committed under duress might not have been accompanied by a desire for the result*, that did not rule out the possibility that the act was intended.

In Moloney¹⁵⁹ Lord Bridge stated that intention is "something quite distinct from ... desire". He posits the case of the man who, in order to escape his pursuer, boards a plane bound for Manchester. For Lord Bridge the man "clearly intends to travel to Manchester, even though

Manchester is the last place he wants to be and his motive for boarding the plane is simply to avoid pursuit".

With the words 'the last place he wants to be' it is clear that Lord Bridge accepts that intention does not include desire. However in Nedrick¹⁵⁰ Lord Lane C.J. whilst saying that the appropriate direction to the jury is (inter alia) that a man may intend to achieve a certain result while at the same time not desiring it to come about, referred to Lord Bridge's illustration and said

"(t)he man who knowingly boards the Manchester aircraft wants to go there in the sense that boarding it is a voluntary act. His desire to leave London predominates over his desire not to go to Manchester".

It is submitted that the view of the learned Lord Chief Justice resolves itself into a question of preference over competing evils rather than conflicting desires. If, as Lord Bridge indicates in his illustration, Manchester is the last place where the man wants to be then the situation confronting him before he boards the plane might take this form.

"If I do not board this plane now I will be caught, charged with murder and will ultimately receive a sentence of life imprisonment. If I do board the plane I will be flown to Manchester which is the last place I want to be. I would much prefer that neither outcome take place: I desire neither to be in Manchester nor prison. But one place it must be so which shall I choose?"

If our man on the run weighs up the alternatives and boards the plane must we conclude that he wants to go to Manchester, or can we say that he prefers to suffer in Manchester rather than suffer in prison? In support of the latter contention we may argue that the alternative he has chosen (when he boards the plane) gives him the opportunity at the earliest convenient moment to rid himself of the undesired location in which he finds himself. The distinction between 'desire' and 'preference' here is thus this: if the agent wants x to occur for its own sake (whether or not x is also a means to y) then we may say that he

desires x. If the agent does not want x to occur for its own sake but sees x as a means of preventing y, or as a condition precedent to the occurrence of z, then we may say that he prefers x rather than y or not z.

Duff is prepared to accept the 'preference over alternatives' stance and illustrates his position with (inter alia) the case of the agent who claims "I did not want to give him the money, but he had a gun at my head", and concludes "(a)mongst our intended actions we distinguish what we want to do from what we have to do or ought to do or are forced to do ... we will do better to analyse 'intention' without reference to 'desires' or 'wants'".¹⁶¹

Halpin considers that 'desire' is an integral component of 'intention'.¹⁶² Of Duff's example he comments

"(t)he person who says, "I didn't want to give him the money, but he had a gun to my head", does not actually mean that he didn't want to give him the money; but rather that he *hadn't*¹⁶³ wanted to give him the money (before the gun was placed at his head), and that he *wouldn't*¹⁶⁴ have wanted to give him the money (if the gun had not been placed at his head).

Thus for Halpin the fugitive who boards a plane for Manchester does desire or want to go to Manchester since that city offers him a safe haven; and the man who hands over the money desires to hand over the money since this will avoid being killed. Duff, in his article¹⁶⁴ does note that there is a usage of 'want' or 'desire' such that I necessarily want whatever I intend; and he now thinks that he should have allowed more weight to this.¹⁶⁵ He would still argue, however, that a definition in terms of 'desire' will confuse rather than clarify, since juries will need to work out which usage is involved; and since, as I argue below, reference to desire is anyway otiose.

The conflicting views of Halpin and Duff concern a specific quality of an agent's mental state at the point at which he does act x which he does not want for its own sake but which is a necessary preliminary to

his preventing (or bringing about) the occurrence of y. Does the agent who brings about x as a necessary means to achieving y always want x as a first consequence of his activity? We could, perhaps, distinguish between the agent who brings about x for its own sake and the agent who brings about x as a means of achieving y by way of a twofold definition of desire. We might say, for example, that the agent who brings about x for its own sake has intrinsic desire in relation to x. Thus where D brings about x for the pleasure that x gives him we may say that at the time of his act D has the intrinsic desire to cause x. However where the agent brings about x in order to prevent y or in order that z is brought about we might say that he has extrinsic desire in relation to x to indicate that he does not want x for its own sake.¹⁵⁶ Thus where D boards a plane for Manchester in order to escape pursuit we might say he has extrinsic desire to travel to Manchester: he does not wish to go to Manchester for its own sake but for the sake of avoiding arrest and detention.

But is there any need for this twofold definition of desire? Is there any need for desire at all as a necessary aspect of direct intention? For if the agent acts in order to bring about consequence x, then he surely intends to bring about that consequence whether it is an end in itself or is a means to an end; and it seems otiose to insist that, as a necessary condition of intentional activity the agent must also desire to bring it about.

It seems that the main reason why judges and theorists insist on desire as a constituent of intention is that, for them, the presence of desire marks the distinction between intention and recklessness.¹⁵⁷ However it is submitted that if we use^{the} notion of desire as the threshold for the concept of intention then that concept would collapse into recklessness. For in a case in which D has brought about a foreseen side-effect y as a result of his activity aimed at x the jury will decide whether or not D desired y, and if so satisfied count him as having intended both x and y since he directly intended x and desired the side-effect y. This would inevitably lead to findings of direct intention in relation to effects which D contemplated as probable or even possible.¹⁵⁸

Proponents of desire as a constituent of direct intention may put forward two responses to this unsatisfactory effect of their definition of intention.

(i) They might respond that their insistence that desire is included in intention only applies to cases in which the agent acts as he does because he desires the effect of that act. This modified stance would avoid the collapse of intention into recklessness but would still present problems for the jury. Suppose for example that D, from a vantage point, shoots and kills his wife who is about to report to a police officer a recent murder committed by him. At his trial ample evidence is put forward to show that D aimed at the death of his wife; that he loved her and bitterly regretted the directly intended effect of his activity. If the jury decide that desire is absent in this case then D cannot be found guilty of murder on the 'intention includes desire' model; yet the case seems to be a paradigm of that offence. The only possible response for the proponents of that model, it seems, is that we should count as desired any effect which is aimed at by the agent. But if this is the response then just what purpose is 'desire' serving in the concept of direct intention? For the jury must first decide whether or not D is aiming at a particular effect and once satisfied of that they must simply state that he therefore desired it. What justification is there in insisting that the jury make this presumption? They have already established direct intention at this point.

(ii) They might respond that desire is only necessary in relation to effects which the agent contemplates as certain to flow from his activity. Professor Williams alludes to this view¹⁶⁹ when discussing the defendants in Noloney¹⁷⁰ and Hancock¹⁷¹ He says

"(e)ither the defendants ... foresaw that death or grievous bodily harm was the inevitable consequence of their acts (*in which case they clearly desired such consequence*,¹⁷² since no other interpretation of their conduct was reasonably possible), or they did not foresee this".

This view would again avoid a collapse of intention into recklessness but there are objections. First the jury would have the difficulty in deciding whether a particular defendant actually desired an inevitable consequence of his activity. Second, one might question a system of law which, at the conviction stage, distinguishes between agents who have foreseen inevitable consequences of their activity on the basis that they did or did not desire that consequence. I have already illustrated this point in cases such as Lord Hailsham's aircraft saboteur and the case of Miss Edmunds.¹⁷³

Williams (who espouses the notion of desire as a necessary element of direct intention) rejects this second contention. He says

"(t)he one type of case in which it is reasonable to say that an undesired consequence can be intended in law is in respect of known certainties. A person can be held ... to intend an undesired event that he knows for sure he is bringing about".¹⁷⁴

Now if, as we should, we reject (ii) above, and reserve discussion on desire to contention (i), which concerns cases of direct intention, there remains my submission that desire is strictly otiose in any consideration of criminal responsibility based upon direct intention since once the court or jury has established that the defendant acted with direct intention in the sense that he aimed at the particular effect of his activity then there is nothing left on which to deliberate. The decision that the agent also desired the effect is a presumption which (on the 'intention' includes 'desire' model) they are bound to infer. The notion of desire adds nothing either to the definition of direct intention or to the process in deciding whether direct intention is present in a given case. We should reject the notion that direct intention includes the notion of desire.

American case law seems to reject the notion that intention includes desire. In United States v United States Gypsum Company¹⁷⁵ Berger CJ said that a person intends a result of his activity where he "knows that the result is practically certain to follow from his conduct *whatever his desire may be as to that result*".

I conclude on intention and desire by applying the discussion to the proposed concepts. The proposed concept of direct intention does not incorporate desire as a necessary element: and since conceptual certainty fits into my model of direct intention, desire for the conceptually certain effect by the agent is irrelevant in ascribing liability to him for direct intent. I should point out that there is existing case law which supports my contention here. In D.P.P. v Luft¹⁷⁶ it was stated that an intention to prevent the election of one candidate necessarily involves an intention to improve the chances of success of the remaining ... candidates though the person so intending is *indifferent* which of them is successful.

From what has gone before it is quite clear that it is not necessary that an agent desire an empirically certain consequence of his activity. But given my model of concomitant intention, what is the position where the agent desires both the directly intended result and the empirically certain consequence which he contemplates? My view here is that desire is irrelevant unless it has somehow figured in the agent's deciding to act as he does. If the agent contemplates both consequences and acts in order that both consequences are brought about by his activity then he directly intends both.¹⁷⁷ But if his activity relates to consequence x and empirically certain side-effect y has played no part in his deciding to act as he does then D cannot be said to have directly intended y, even if its occurrence appeals to him, since its prospective manifestation has not figured in his deliberations which inform his decision to act as he does.

I conclude here with a summary of the proposed twofold model of intention by summarising its constituent parts.

1. An agent directly intends an effect when

- (i) he is aware that that effect may flow from his exertion and he makes that exertion because of that belief¹⁷⁸ or,
- (ii) that effect is indivisible from an exertion aimed at something else; subject to the proviso that he may avoid liability if he can prove

the presence of some legally recognised factor sufficient in the circumstances to prevent him from perceiving the indivisible effect of his activity.¹⁷⁹

2. An agent concomitantly intends an effect of his activity when he contemplates that a contingent and empirically certain effect y may¹⁸⁰ flow from his activity aimed at x. However the agent will incur no liability for his concomitant intention unless the empirically certain effect actually occurs. Thus where D aims at effect x but concomitant offence y is not brought about by his activity, D cannot be convicted ~~of~~^{of} with an attempt at concomitant offence y, whether or not effect x is brought about thereby. However where the concomitant offence y is brought about by his activity we may convict him of the substantive offence concerning y whether or not he brings about the directly intended effect x. If the agent fails to allude to the empirically certain effect of his activity we may not attribute concomitant intention to him although he may be liable on other grounds.¹⁸¹

In this and the last chapter I have stressed that the proposed model of intention is restricted to an effect which, as the agent reads it, is capable of being produced by his exertion. Where the agent brings about effect x which is a necessary preliminary to (but cannot bring about) effect y the agent does not directly intend y as he brings about x, although he directly intends x. My submission is that where an agent brings about effect x as a preliminary to effect y he directly intends to bring about x for the 'purpose' or with the 'objective' of bringing about y. It is to these two mental states which I now turn.

FOOTNOTES TO CHAPTER 3.

1. Infra p.90ff.
2. Supra p.17.
3. Or *might* be destroyed. See point (vi) below concerning empirical certainty.
4. If it is a conceptually certain effect then the agent directly intends both effects. See chapter 2.
5. I.e. gross negligence for which see chapter 7.
6. Infra p.60.
7. Note my illustration of the hijacker here, infra p.61.
8. E.g. the co-pilot enters the cabin and takes over control. What if the co-pilot was in his seat when D shot the pilot dead? It is submitted that D does not concomitantly intend the death of the other crew and passengers since, as he perceives it, his activity does not lead to the position in that they must die subject to extraneous agency.
9. [1985] AC 905.
10. See also Lord Hailsham infra p.63 on 'moral certainty'.
11. Supra note 9 at p.925.
12. See infra p.82 for Professor Williams' suggestion as to the parameters of intention.
13. G. Williams, 'Oblique Intent' in the Cambridge Law Journal [1987] at pp.417-8.
14. But the agent must contemplate the possibility of the empirically certain untoward harm.
15. See point (vi) above on concomitant intention, supra p.59.
16. Which involves effects aimed at and conceptually certain effects of activity aimed at something else. See generally chapter 3.
17. For which see generally chapters 6 and 7.
18. [1975] AC 55. See B. Hogan in Crim L.R. [1974] 387.
19. (1974) 2 All ER at p.74.
20. See supra chapter 2 p.27ff. for a discussion on conceptual certainty.

21. As a point of academic discussion it would be interesting to consider the terrorists' liability in respect of the deaths of the residents of Lockerbie. My view here is that the terrorists could not concomitantly intend the deaths of any resident since at most this is a case of virtual certainty, i.e. it is not a fact that some resident must die subject to extraneous agency but rather that, at most, death or injury is virtually certain.
22. Noted by Purpool, 'Comment' in 121 New Law Journal (1971) at p.780.
23. Purpool notes the evidence in his article.
24. Supra chapter 2 p.17.
25. For a general discussion on this issue see infra chapter 7 p.264ff. on gross negligence. It should be noted that the agent who has failed to see the empirically certain consequences cannot be said to concomitantly intend them. He may be charged with the offence on the basis of gross negligence but may plead the proviso explained infra p.266.
26. [1975] 2 All ER 193.
27. In conversation with me.
28. (1984) 80 Cr App Rep 259.
29. Supra Chapter 2.
30. Smith and Hogan 6th ed. at p.288.
31. Infra p.69.
32. J Bentham, 'Principles of Morals and Legislation' (ed. Burns and Hart) 1970.
33. For a general discussion on the court's tendency to conflate intention and recklessness see generally chapter 6.
34. See supra note 26.
35. In 'Oblique Intention' supra note 13.
36. This hypothetical provides an illustration in which the extraneous agency has been effective in excluding the occurrence of the empirically certain harm. On the circumstances as D perceives them V is falling over the bridge to his death, and death must occur subject to extraneous agency; in this case a difference in the circumstances as perceived by D, namely the existence in scaffolding on the side of the bridge.
37. Infra Chapter 6..
38. Clarkson and Keating at p.138.

39. Of course he is guilty of murder if empirically certain is brought about by his activity aimed at something else.
40. Or with the substantive offence concerning the directly intended effect if he brings it about. Current law applies this strategy on occasion. For example under s.1(2) of the Criminal Damage Act it is an offence to destroy or damage property (inter alia) intending to endanger life or being reckless as to whether life is endangered (part of the substantive offence concerning an effect which has not been brought about).
41. See, for example my concept of gross negligence, infra Chapter 7. I should point out that both the agent who has failed to allude to a conceptually certain harm and the agent who has failed to allude to an empirically certain harm would be able to avoid liability by way of the proviso. See supra p.32 and infra p.265.
- 42 See 'object' and 'purpose' infra chapter 4.
43. [1961] AC p.290.
44. Recklessness is discussed generally infra chapter 6.
45. Supra note 9.
46. (1986) All ER.
47. [1986] 3 All ER 1.
48. [1983] 1 All ER 978.
49. See Burchell and Hunt, 'South African Law' 1 at p.128.
50. [1964] 2 QB at p.745.
51. Italics added.
52. Supra note 18.
53. Italics added.
54. Lord Diplock reiterated his statement in R v Lemon [1979] AC 617.
55. Italics added.
56. J Bentham Principles of Morals and Legislation' (1869) ed. Harrison at p.202.
57. In 'The Mental Element in Crime' in the Law Quarterly Review 83 218-9.
58. Lord Denning, 'Responsibility Before the Law' Jerusalem (1961)
59. Supra note 26.

60. Italics added.
61. See, for example, G. Williams, 'The Mental Element in Crime' Jerusalem (1965) at p.20; Smith and Hogan, 5th ed. p.52; N Morris and C Howard, 'Studies in Criminal Law' (1964) at p.7 and Russell on Crime, 12th ed. (1964) 1 at p.43.
62. The Heron II [1969] AC 350.
63. See J. C. Smith, 'Intention in Criminal Law' in Current Legal Problems. [1974] 93.
64. G. Williams, supra note 61 at p. 29.
65. Austin, 'Jurisprudence' II (1885).
66. Lord Denning supra note 58
67. [1955] AC 402.
68. Italics added.
69. [1964] AC at p.763.
70. Italics added.
71. The Official Secrets Act 1911.
72. Supra note 18.
73. See the point of law at issue in Hyam infra p.79.
74. These are, of course, dicta since the question for the House was whether foresight of high probability is a requisite mental state for murder.
75. [1975] 1 All ER 913.
76. Italics added.
77. [1976] 3 All ER 46.
78. Perhaps cases such as Belfon (supra note 77) and Mohan (supra note x) indicate that the courts interpret intention in differing ways reading the concept in one way in cases in what is required is intention as to the consequence which actually occurred and in another in cases e.g. attempts and 'further intention' in which what is required is intention as to a consequence which may not occur.
79. J. H. Buzzard, ''Intent'' in the Criminal Law Review [1978].
80. Working Paper No.31 at p.30.
81. Italics added

82. Austin supra note 65 at p.437.
83. In 'Criminal Responsibility and Punishment: Functions of Judge and Jury' in the Criminal Law Review [1954] 667.
84. G. Williams, supra note 61 at pp.29-30. Parliament has, on occasion at least, accepted that 'probable' means more than a 50% chance (when debating the Bail Bill which became the Bail Act 1976. See Robin White, 'The Bail Act, Will it make any Difference?' in the Criminal Law Review [1977] 345.
85. G. Williams, 'Textbook on Criminal Law' 1978. In the *Heron II* ([1967] 1 AC 350 at p.383) Lord Reid thought that the phrase 'not unlikely' involved a degree of probability considerably less than even but nevertheless not unusual and easily foreseeable.
86. See R. Cross, 'The Mental Element in Crime' in the *Law Quarterly Review* 83. at p.215.
87. Infra chapter 7.
88. See infra p.84ff.
89. Supra note 18.
90. Italics added.
91. Supra p.74.
92. Infra p.84ff.
93. See Lord Diplock's comment on the mental state, infra chapter 6 p.244.
94. Stephen, 'Digest of Criminal Law' (1877) p.144 art. 223.
95. Supra note 9.
96. Supra note 46.
97. Supra note 47.
98. [1964] 2 QB at p.745.
99. Italics added.
100. Supra note 18.
101. P. Brett, 'An inquiry into Criminal Guilt' (1963).
102. I think that the phrase 'foresight with no substantial doubt' is equivalent to 'foresight of virtual certainty' and I thus deal with both species of foresight under the same heading.

103. Law Comm. No.89 'Report on the Mental Element in Crime' (1978) at p.56.
104. Infra chapter 6.
105. See infra Chapter 5.
106. Infra note 130. See p.88.
107. As stated above (supra p.x) we might for example convict Cawthorne with the substantive offence of endangering life which carries a lesser moral stigma than a conviction of attempted murder.
108. See Law Comm. No.102, 'Attempt, Impossibility in relation to Attempt' (1980) para 2.17. But it should be noted that the Draft Code does not follow the Commission's suggestion for attempts. see infra Chapter 5.
109. G. Williams, 'Textbook on Criminal law' pp.84-5. And see Smith and Hogan 5th ed. at p.51. C.f. R. M. Perkins, 'Criminal Law (1957) at p.658.
110. The Times, April 28, 1868.
111. Italics added.
112. parenthesis supplied.
113. H. L. A. Hart, 'Intention and Punishment' in Punishment and Responsibility (1968) pp.119-122.
114. B Hogan, 'Funeral in Dublin' in the Criminal law Review [1970] at p.455.
115. Law Comm. No.143 'Codification of the Criminal Law' 1985 at pp.183-4 in which the Team put forward seven fault elements.
116. The Team also introduce 'purpose' as a mental state which they define thus: "a person acts purposely in respect of an element of an offence when he wants it to exist or occur". I shall discuss this fault term when assessing 'purpose' generally infra chapter 4.
117. Supra p.81.
118. Supra note 115.
119. This presumes that the offence of attempted rape requires intention and not just recklessness. I consider the mental element in attempted rape in some detail later (infra chapter 7 p.279ff).
120. Supra p.63.
121. Law Comm. No.143 at p.66..

122. Infra p.90ff.
123. R. A. Duff, 'Intention, Mens Rea and the Law Commission Report' at p.47.
124. Supra note 46.
125. Supra note 77.
126. (1976) 63 Cr App Rep 222.
- 127 In 'Constructing Reality in the Courtroom'.
128. My comments here are made without having had the opportunity of reading Professor Jackson's recent work on the subject.
129. This argument becomes more persuasive as the definition of intention extends further into the realms of probability.
130. (1968) JC 32. See also G. Gordon 'The Criminal Law of Scotland (2nd. ed. 1978)
131. In 'Intention and the Law Commission Report' supra note 123.
132. Supra note 67.
133. Explained above supra p.17.
134. See infra concerning the proposed mental states of purpose and objective (Chapter 4), gross and simple recklessness and gross negligence (Chapter 7) and simple negligence (chapter 8).
135. Cunliffe v Goodman [1950] 2 QB 253.
136. Supra note 18.
137. Supra note 9.
138. [1947] KB 997.
139. Lord Denning supra note 58.
140. [1975] 1 All ER 913.
141. A. R. White, Grounds of Liability 1985 Clarendon Press Oxford 78.
142. Which he later calls the case of 'practical certainty'.
143. I shall argue later that there should be a distinction between 'purpose' and 'aim'. see chapter 4.
144. G. Williams, 'Oblique Intent' in the Cambridge Law Journal [1987] 417-8.

145. For which see supra p.418.

146. For example R. A. Duff, 'The Obscure Intentions of the House of Lords' in the Criminal Law Review [1986] 773; A. R. White, 'Intention, Purpose, Foresight and desire' in the Law Quarterly Review [1976] 578 and D. Stuart, 'Mens Rea, Negligence and Attempts' in the Criminal Law Review 649.

147. Supra note 13.

148. Infra pp.97ff.

149. Supra note 26.

150. Smith and Hogan 5th ed. 50.

151. For if the police officer had allowed himself to be struck in order to stop Mohan then, arguably, his escape has been impeded. It is interesting to note that the learned authors would accept lack of desire in cases of aiding. They say "(a) man has intent to aid in the commission of crime if he knows that his act will have that result though its occurrence is a matter of indifference to him (at p.51).

152. Kenny's Outlines of Criminal Law 19th ed. (1966) 38. Other theorists who insist upon desire as a constituent of intention include J. W. Turner, The Modern Approach to Criminal Law (1945) 207-8 and Russell in his Russell on Crime 12th ed. (1964) 43.

153. Supra note 18. I have argued that one ought to reject this definition of intention on the ground that foresight of probability or likelihood belongs to the concept of recklessness.

154. [1955] AC 402.

155. See also Koch v Koch [1899] P. 221 and Sickert v Sickert [1899] P. at 278, involving cases of constructive desertion which clearly show that one's intention may differ from one's desire and that therefore absence of desire does not imply absence of intention.

156. Supra note 26.

157. Smith and Hogan point out on this case that the reference to desire was intended to ensure that an agent may not claim that he did not intend a consequence of his activity on the ground that it was not desired for its own sake. they posit the case of D at the wheel of his car who finds that his escape route is blocked by a policeman, V. D means no harm to V but, being faced with the choice between being caught and harming V, chooses to run the risk of the latter. For the learned authors it is clear that he harms V intentionally since he intends to escape and harm to the policeman is, as he knows, a condition precedent to his escape (pp.51-2). The facts are, of course, very much like those in Mohan (supra note x). See also p.93-4 and supra note 151 for further discussion by the learned authors on this point.

158. Supra note 75.

159. Supra note 9.

160. [1986] 3 All ER.

161. Supra note 146 at pp. 771-81. Duff thus makes it clear that 'desire' or 'wanting' ought not to figure in any description of the concept of intention. The agent in his illustration is doing something which he does not desire to do.

162. A. K. W. Halpin, 'Good Intentions' in the New Law Journal [1987] at p.696.

163. Italics supplied.

164. Supra note 146.

165. In conversation with me.

166. c.f. Wayne A. Davies, 'A Causal Theory of Intending' in American Philosophical Quarterly Vol 21 (1) (1984). Professor Jackson favours a twofold interpretation of desire similar to that posited by Davies.

167. See, for example, Turner, 'The Mental Element in Crime at Common Law' in The Modern Approach to Criminal Law. London (1948). Also G. Williams, 'The Mental Element in Crime'. Jerusalem (1965) and Dias, 'Jurisprudence', 3rd. ed. London (1970).

168. Perhaps improbable if D has contemplated the remote possibility and desires that it will accompany his activity.

169. Supra note 13.

170. Supra note 9.

171. Supra note 46.

172. Italics added.

173. Supra p.64.

174. Supra note 13.

175. 438 U.S. 422.

176. [1976] 2 All ER 29,100.

177. Thus where Daniel has two methods of cooling the room and deliberately chooses that method which he contemplates will kill the orchid he directly intends the cooling of the room and the death of the plant since its death has figured as a reason for his acting as he does. see supra p.59.

178. See supra Chapter 2 p.1ff.

179. Supra p.27ff.

180. See note (vi) supra p.59.

181. See the proposed concept of gross negligence infra p.264ff.

Chapter 4.

PURPOSE AND OBJECTIVE.

In Chapters 2 and 3 I posited a structure of intention which is restricted temporarily to an effect which is capable of being produced by the agent's exertion. In this chapter I posit two further models of mens rea which are designed to incorporate within ascriptions of liability proscribed harm which the agent's exertion is not itself capable of producing but towards which that exertion is a necessary preliminary. There are two possibilities here. First where the agent perpetrates a preliminary effect which is itself a criminal offence and second, where the preliminary effect is not by itself contrary to the criminal law. The latter possibility is a topic for chapter 5. In this chapter we are concerned with a preliminary criminal effect and its relation to the proscribed effect towards which the preliminary criminal effect is directed.

1. Purpose.

Where an agent perpetrates a criminal offence x which is itself a necessary preliminary to a prospective criminal offence y which he believes he may bring about and towards which his activity (which brings about x) is directed then the agent directly intends' x *for the purpose* of committing y. Since 'purpose' involves a preliminary offence which is directed at some further offence the concept is concerned with causal chains of activity instigated by the agent and directed at some ultimate goal. The proposed model of 'purpose' has several features.

(i) 'Purpose' is a mental state. We might thus say that D 'purposes' y in the same way as we say that he directly intends x as he makes the exertion which he believes is capable of producing x. It is because purpose is a mental state that we may ascribe purpose to D in the conviction in every case in which the offence with which he has been convicted is a necessary preliminary to a prospective offence.

(ii) As with direct intention, the agent must believe that, by his activity which constitutes the causal chain, he can cause the proscribed

change in the world which constitutes his purpose. Provided that he has this belief it does not matter that he personally cannot cause that change or that the change cannot be brought about at all (e.g. the person he plans to kill is already dead).

(iii) The criminal offence committed must be a *necessary preliminary* to the prospective criminal offence further along the causal chain of activity. Thus where the agent plans to commit two independent criminal offences in relatively quick succession he does not purpose the later offence as he perpetrates the first.

(iv) The preliminary criminal offence must have been committed in fact before we may say that the agent purposes the offence further along the causal chain. This feature clearly excludes the agent who has made a firm decision to bring about a particular proscribed harm or state of affairs but has not yet taken any positive and necessary step towards achieving it.² Thus where an agent has determined to bring about a change in the world, has formulated the causal chain, but has not yet made any physical movement along it, then that causal chain constitutes his plan concerning future activity. I use the word 'plan' to connote that the agent's decision to bring about a proscribed harm at some future date has not been accompanied by any physical exertion in relation to the selected causal chain. The feature also excludes the agent who sets in motion the causal chain but has not yet reached the point at which he has perpetrated the preliminary criminal offence.

Suppose that Dudley plans to commit arson (contrary to s.1(3) of the Criminal Damage Act 1971) at his mother's home in order to submit a fraudulent insurance claim in connection with his personal effects. He purchases some petrol from a local garage with which to carry out the arson element of his plan. His (directly intended) act of purchasing petrol is a necessary preliminary to the commission of arson and a later offence under s.15 of the Theft Act 1968, but it is an innocent act and preliminary to the first criminal link in the planned causal chain, and we cannot thus say that Dudley purposes the offence under s.15. Whether or not Dudley is criminally liable in relation to planned arson (the

more immediate criminal offence) as he purchases the petrol is an issue which is discussed in chapter 5.

(v) When the agent has brought about the preliminary offence *x* we may charge him with that substantive offence on the basis of direct intention, and we may include in the charge his purpose for committing that offence. Thus if Dudley (above) pours petrol over the carpet and sets fire to it but is apprehended before he can complete the causal chain we may charge him with arson contrary to s.1(3) of the Criminal Damage Act *for the purpose of obtaining money by deception contrary to s.15 of the Theft Act 1968*. Of course if Dudley completes the causal chain then we may charge him with both offences on the basis of direct intention in each case. This feature draws out the point that in ascribing purpose to the agent in the conviction we do not in fact convict him of a separate offence: rather we describe more accurately the wickedness with which the agent has brought about the preliminary criminal offence. It may be the case however that a judge would wish to take the agent's purpose into account when assessing the sanction. If such a discretion were available to him it is suggested that it should be restricted to the maximum penalty which might be imposed for the offence committed.

Would the proposed model of purpose apply to attempts? Suppose that Dudley had poured the petrol on the carpet but was apprehended as he was about to strike a match. Would Dudley be guilty of attempted arson for the purpose of obtaining by deception? It is submitted that the agent should be charged with attempted arson only. The main argument which inclines me to this view is that we ought not to ascribe purpose concerning a future offence to an agent whose activity precedes the commission of a preliminary criminal offence.³

(vi) The exertion which is to forge the link in the causal chain which constitutes the agent's purpose may be made by some person or persons other than the agent. Suppose that D kidnaps V_1 and threatens V_2 that he will kill V_1 unless V_2 steals the day's takings from his place of employment and hands them over to D. Here D kidnaps⁴ V_1 for the purpose

of committing theft contrary to s.1(1) of the Theft Act 1968 even although it is someone else who commits the latter substantive offence. It is worth noting here that at the point in the causal chain at which the offence which is D's purpose is itself capable of being brought about by V₂ it is V₂, and not D, who directly intends that offence. However it is submitted that we may charge and convict D of the substantive offence through extraneous agency.⁶

A few periphery points pertaining to purpose are worthy of note. The causal chain may involve an isolated act. Suppose that Denise is in a confectioner's and decides to take a bar of chocolate whilst the retailer's back is turned. As she takes hold of the item is it Denise's direct intention that the retailer be permanently deprived of his stock or is that her purpose for her acting as she does? I think that it is clear on the proposed models that the taking of the chocolate is accompanied by direct intention, and, since there is no other prospective activity in relation to her plan (i.e. the chain of activity is completed with the taking) then there is no purpose in issue in this hypothetical.⁶

Professor Jackson disagrees with my contention here.⁷ He offers the argument that the taking of the bar is not capable itself of permanently depriving the owner of it: whether the owner would be permanently deprived of it will depend upon exertions or lack of exertions by people (such as whether the police intercept her before the chocolate is consumed). My response here is that if we give credence to the possibility that a stolen item may be restored to the true owner at some future time then cannot every person accused of theft say that permanent deprivation cannot be proved since it is recognised that the property may at some point be restored by supervening agency? In any event s.1 of the Theft Act does not state that the victim must be permanently deprived of his property but rather that the defendant must dishonestly appropriate the property with *the intention of permanently depriving the owner of it.*

Can an agent purpose the securement of a particular status quo? Steane⁸ highlights the substance of the question. On the proposed models may we say that a defendant such as Steane directly intends to make each broadcast *for the purpose* of preventing loss of liberty? My view here is that the concept of purpose does not extend to preservation of an existing state of affairs since the agent's directly intended exertion brings about the directly intended effect (the broadcast in our illustration) and also brings about the preservation of the existing state of affairs which figures as a reason for the agent's acting as he does. On my models of mens rea Steane made each broadcast (i) with the direct intention to make the broadcast, (ii) with the direct intention to assist the enemy and (iii) with the direct intention of preventing loss of liberty (since that loss is capable of being prevented by each broadcast). It is worth explaining why on the proposed structure of mens rea Steane would have direct intention concerning the assistance to the Germans. Steane's direct intention was to make the broadcast and since the broadcast and assistance to the enemy were indivisible effects of his activity, the assistance was a conceptually certain effect of that activity aimed at the broadcast. Steane thus directly intended that assistance and, on the proposed structure would have been guilty of the offence on the ground of appropriate mens rea. However I point out below that Steane ought to be excused from liability on the ground of duress.⁹

A final point to observe about the proposed concept of purpose is that an agent's planned causal chain may include several purposes which lead to the agent's ultimate purpose (when his plan is complete). In such a case we may designate the overall purpose at which the agent's causal chain is directed the agent's objective in acting as he does. This aspect is dealt with in detail below.¹⁰

As I have stated above the proposed definition of purpose relates to future activity and is thus quite distinct from my definition of intention which is concerned with present activity and the effects thereof. However in the current criminal law 'purpose' has been used as a synonym for intention.¹¹

In Ahlers¹² D, a German Consul, assisted German nationals to return home after the declaration of war in 1914. He was charged with aiding the King's enemies with the intention to do so. It was decided that D's intention was not in fact to aid the King's enemies but to do his duty as consul. Smith and Hogan¹³ suggest that the court is restricting the mens rea element of the offence to purpose and that Ahlers cannot thus be said to have intended to assist the King's enemies. But on the proposed model of intention Ahlers had direct intention to assist his fellow countrymen to leave Britain since, as a matter of conceptual certainty, assisting nationals of military age to leave the host country at a time of war between the two nations does assist the enemy. The two effects are indivisible. Thus on the proposed models Ahlers would be counted as having directly intended aiding the enemy even if the thought that his act was rendering such aid had not crossed his mind.¹⁴ Ahlers is thus not a case involving purpose on my proposed species of mens rea.

In Steane¹⁵ Lord Goddard LCJ, in quashing the conviction, considered that

"(t)he proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent and ... they would not be entitled to presume it if the circumstances showed that the act was ... equally consistent with an innocent intent as with a criminal intent. They should only convict if satisfied by the evidence that the act complained of was in fact done to assist the enemy and if there was any doubt about the matter the prisoner was entitled to be acquitted".

Lord Denning agrees with the dicta of Lord Goddard. He states that

"(t)his man Steane had *no desire or purpose to assist the enemy*. The Gestapo had said to him 'If you don't obey, your wife and children will be put in a concentration camp'. So he obeyed their commands. It would be very hard to convict him of 'intent to assist' the enemy if that was the last thing he desired to do".¹⁶

Lord Denning says that Steane had, inter alia, no purpose to assist the enemy which at least suggests that he would require purpose as an

element in the mens rea of the offence with which Steane was charged. On my analysis Steane had direct intention to make the broadcasts and since, as a matter of conceptual certainty,¹⁷ such broadcasts did assist the Germans then Steane directly intended to assist the enemy regardless of whether or not he alluded to that aspect of his activity. Note that the broadcasts and the assistance are indivisible and occur at the same time. Purpose thus does not figure in this case on my analysis since purpose is restricted to effects which may be brought about by some future exertion.

In Mohan¹⁸ James LJ said that a defendant intends a consequence if it is his purpose to achieve it. The definition of intention in Moloney,¹⁹ as modified by dicta in the cases of Hancock²⁰ and Nedrick²¹ seems to be that "a result is intended when it is the agent's purpose".²²

Some theorists, too, have been prepared to assimilate purpose with intention. Smith and Hogan consider that purpose is synonymous with intention. They say that "everyone agrees that a person intends to cause a result if he acts with the purpose of doing so".²³ In discussing the case of the agent who shoots at his victim they say "(i)t is sufficient that killing is his object or purpose".²⁴

Austin talks of intention as expectation, desire and purpose.²⁵ Salmond and Kenny talk of purpose as an essential ingredient of intention. Salmond states that "an intentional act is one done in order that the result may happen."²⁶ Kenny insists that "(t)o intend is to have in mind a fixed purpose to reach a desired objective".²⁷

Professor Williams is content to conflate the notions of intention and purpose. He says "an act is intentional as to a consequence if it is done with (motivated by)²⁸ the wish, desire, purpose or aim (all synonyms in this context)²⁸ of producing the result in question".²⁹ He points to an illustration by Professor White who distinguishes between the two concepts. A person may go to Australia with the intention of staying for not more than a year; this is his intention when he goes, but not his purpose for going. If he goes to Australia with the

intention of visiting his grandchildren, that is his purpose.³⁰ Professor Williams suggests that 'goes to Australia' is ambiguous. When the traveller embarks his intention (and purpose) is to travel to Australia (not necessarily his *only* purpose). When he arrives in Australia *that* intention is fulfilled.³¹

One reason why the judges and theorists admit purpose as an element of intention is the fact that often intention and purpose do coincide so that the agent's intention might also be said to be his purpose. Thus where D enters a premises as a trespasser in order to steal we might say either that it is D's further intention to steal or that the removal of the article is the purpose for which D enters the premises.

However it is not in every case that intention and purpose coincide. For example where an employee takes a valuable article from the shop with the intention³² of returning it next morning before the employer is aware of the situation one might say that it is the agent's further intention³² to return the article but one cannot say that the agent's purpose for taking the article was to return it the following morning. My view on such a case is that we should look to the overall objective of the agent's planned chain or chains of activity. It is submitted that in our instant illustration there are in fact two planned chains of activity both of which are quite distinct as regards the objective and time of execution. The agent's overall objective of the first chain of activity is the use of the valuable article at home that evening. That is thus the object or purpose for which he takes the article. The overall objective of the second chain of activity is to avoid any censure by his employer (or the law) in relation to the first chain of activity. He may achieve this by returning the article next morning before his employer arrives. He thus returns it for the purpose of escaping detection. His returning the valuable article is thus a link in a particular chain of activity which leads to a particular objective, namely evasion of detection in relation to the former chain of activity.

It is submitted that although 'intention' and 'purpose' coincide in specific cases the two concepts are quite distinct and separate. I put

forward several points in support of my submission.³³ First, an intention is what the agent has in mind at the time he brings about a particular proscribed harm or state of affairs, but he need have nothing else in mind at the time he brings that effect about. In such a case we might say that the agent has no purpose in mind in acting as he does. I think that the recent mass killing by Michael Ryan in Hungerford provides an illustration of this point.

Second, an agent's purpose for doing something is his reason for doing it. When an agent brings about a consequence we might ask two quite distinct questions; namely was it his aim that the particular consequence follow upon his activity (intention) and was there a reason for his bringing that consequence about (purpose). If we ask these two questions in each case we shall receive one of three answers,

- (i) it was his aim that a particular consequence follow upon his activity but he had no purpose for bringing that consequence about. The case of Michael Ryan above illustrates this response.
- (ii) it was both the agent's intention and purpose that a particular consequence follow upon his activity. An illustration here is the case of an agent who shoots V out of revenge.
- (iii) it was the agent's intention to bring about a particular consequence and his purpose for bringing about the consequence was to enable him to bring about a further consequence of his activity. An illustration here is the case of the agent who kills his mother in order to submit a fraudulent claim on her life assurers. In this case the killing of mother is a necessary and intentional step on the way to the realisation of the agent's purpose - the procurement of a sum of money from an assurance company by deception. When the agent sends in the claim form to the assurer he will have reached the same stage as the agent in case (ii) and it will now be both his intention and purpose to obtain by deception (contrary to s.15 of the Theft Act 1968) in acting as he does.

Third, on occasion a particular consequence might be described as both my intention and my purpose as where I attend a prize fight with the

intention and for the purpose of taking a full part as a spectator. Thus my intention and purpose are the same. Nonetheless the two concepts are distinct although they coincide. We can see this if we introduce a further element into the illustration. Suppose that I attend the prize fight with the intention of taking an active part as a spectator for the first two fights and also of leaving before the third and final fight. Now if 'intention' and 'purpose' are the same then I must have attended the prize fight with the purpose of leaving before the third fight which is clearly not the case since if that was my purpose I could have achieved it by not attending the prize fight at all.

Finally the common usage of purpose concerns some future effect which the agent has in mind with reference to his present activity. When we use the term 'purpose' we usually have in mind an object in view; an end or future aim, a design. If a bystander were to ask me why, by an imminent exertion, I am about to bring about a particular effect x I would not normally respond in terms of my purpose in bringing x about unless there were some further end towards which effect x is a necessary preliminary. I would normally rely on the term intention when talking about my attitude to an effect which I am about to bring about by my activity. This being the case then if purpose is to have a function as a mental element in criminal law then it must be at the expense of the 'future' dimension of intention.

Now if one accepts that the notions of intention and purpose are quite distinct then one may argue for the inclusion of purpose as a specific mental state in ascriptions of criminal responsibility. The Code Team³⁴ separates the notions of 'intention' and 'purpose'. The Team says that a person acts 'purposely' in respect of an element of an offence when he wants it to exist or occur.³⁵ They say that a person acts 'intentionally' in respect of an element of an offence when he wants it to exist or occur, is aware that it exists or is almost certain that it exists or will exist or occur. They say that for some offences 'intention' as they define it must be used in a narrower sense than others and they introduce 'purpose' in order to restrict the mental element to one of aiming at the proscribed harm.³⁶ They point out that

the Law Commission has canvassed a possible new offence which would invoke the fault element of purpose, namely sending a poison-pen letter for the purpose of causing needless anxiety or distress.³⁷

The Law Commission, in an earlier Working Paper,³⁸ indirectly alluded to the 'purpose/intention' model offered by the Team. In that Working Paper the Law Commission proposed the offence of insulting religious feelings³⁹ which requires an intent to wound such feelings, but the Law Commission proposed that "intent' should bear as restricted a meaning as possible". It is suggested that this restriction renders the Law Commission's proposed mental state more or less equivalent to the Team's definition of 'purpose'.

I think that the Code Team's definition of 'purpose' is useful since, being 'intention'⁴⁰ minus 'mere knowledge or foresight' it enables us to ascribe more precise mental states to offences and avoids to some extent the varying definitions of intention in the cases.⁴¹ However, I think that we may achieve that position without departing from the concept of intention. For we may apply the proposed twofold model of intention; designate as direct intention⁴² the particular mental state which the Team describe as purpose (i.e. aiming to bring about the effect) and bring the Team's definition of intention within the framework of concomitant intention.⁴³

The Proposed Concept of 'Purpose' and the Current Law Notion.

If one accepts the proposed temporal distinction between direct and concomitant intention and purpose, then we face the task of providing for those cases in which the current law has used purpose as a form of restricted intention. In Steane⁴⁴ for example the conviction was quashed on the ground that the defendant's purpose was to prevent his family being incarcerated in a concentration camp. But on the proposed structure of mens rea, Steane made the broadcasts for the Germans with the direct intention to do so and, since assisting the enemy is a conceptually certain effect of that activity,⁴⁵ he also directly intended to assist the enemy. We cannot thus excuse him on the ground

that the effect aimed at (the broadcasts) is done for a purpose⁴⁶ which is not illegal. The conceptually certain effect (assistance) is indivisible from the directly intended effect to intend one is to intend the other. It is submitted that this should have been the ratio in the case. I would comment here that there is a fair measure of academic opinion that Steane should have been held to have had the necessary mens rea for the offence but acquitted on the ground of duress.⁴⁷

This strategy removes an objection which may be voiced against the decision in Steane, namely that if we excuse Steane on the basis of his innocent purpose then we would have to excuse the agent who broadcasts because he has been promised a home in residential Berlin. In attributing to Steane the appropriate mens rea but excusing on the basis of an appropriate defence we distinguish between Steane and the agent who broadcasts for the purpose of obtaining a property advantage: the latter has committed the actus reus with the appropriate mens rea and has no defence.

Provisional Purpose and Conditional Intention.

In what has gone before we have discussed purpose as a specific mental state held by the agent in relation to future effect to be brought about by a specific future exertion. But what of the agent who has decided to bring about a specific future effect provided that a specific circumstance or factor obtains at the appropriate time. Suppose for example that D decides to have intercourse with V and to stab her to death if she offers any resistance. In the hypothetical the agent has formulated a plan to bring about a proscribed harm (rape) and, in addition, he has formulated another plan which he has decided to activate only if a necessary condition of his first plan is realised. On current law the agent is said to have a conditional intention concerning the latter scheme, and that intention ascends in status to direct intention from the point in time at which the agent decides to execute that plan. The theorists talk of this phenomenon in the same terms. It would be useful first to analyse the concept of conditional intention at

current law and then to see where the concept fits into the proposed models of mens rea outlined in this and the latter two chapters.

Conditional Intention.

We may begin an assessment of the current status of conditional intention by way of an analysis of the cases on theft. In **Easom**⁴⁸ Edmund Davies LJ decided that conditional intention (or conditional appropriation as he called it) is not sufficient as a requisite mental state in the criminal law. If an agent looks through the personal belongings of another intending to take anything valuable, finds nothing of value and returns it to the owner, he has not stolen. Edmund Davies posits the case of the dishonest postal sorter who "picks up a pile of letters intending to steal any that might be registered, but, on finding that none of them are, replaces them, he has stolen nothing".

The dictum of the learned Lord Justice (as he then was) has been criticised⁴⁹ mainly on the ground that insufficient emphasis was placed on Easom's state of mind at the time of the appropriation. Koffman contends that an intention remains an intention although it may be subject to a condition and that in nearly all cases the intention is in some degree at least conditional.⁵⁰ It is submitted that Koffman's contention is correct, for one might plausibly argue that where an agent puts his hands into another's pocket he intends to steal on the condition that there is something in the pocket, or that a burglar who enters a premises intends to steal on the condition that there is something in the building.

Jaques Parry provides an interesting discussion on the concept of conditional intention.⁵¹ He suggests that there are in fact two distinct categories of conditional intention.⁵² This distinction had been made earlier by Williams.⁵³ The first he calls conditional intention in the strict sense. He gives as an example here Edmund Davies' illustration of the postal sorter. He argues that this agent has made up his mind that he is going to steal if and when the appropriate state of affairs manifests itself. The second he calls 'suspended intention'. He gives as

an example of the second category the case of Eason itself. for Parry the agent who looks through a bag of another intends to steal if, and only if, he subsequently decides to steal. The distinction between the two categories is that in the former the agent has made up his mind that he is going to steal given the occurrence of a particular circumstance whilst in the latter category the agent has not made his mind up to steal; he may not do so, he will make his mind up once he has had the opportunity to weigh up the situation in the light of the circumstances as he finds them to be. Parry contends that whilst we may hold the agent in the first category guilty of theft (or attempted theft) we may not ascribe liability to the agent in the second category on the ground that he lacks mens rea since "to intend to decide whether to do something is not the same as intending to do it".⁵⁴

Parry's suggested distinction is open to at least two objections. First, one might argue that it would be difficult for the prosecution to prove beyond reasonable doubt that the defendant's mental state amounted to a conditional intention as opposed to a suspended intention. Parry's response to this would presumably be that the distinction between conditional intention in the strict sense and suspended intention is a practical distinction and is thus, for the purpose of criminal proceedings a question of proof which might suitably be left to the good sense of the court or jury. However on a matter of proof it would be difficult for an agent to plead that he was uncommitted at the time of his activity where that activity constitutes his being a trespasser or a person in possession of property of another without the consent of that other.

Second, the distinction may decriminalise certain activity which is at present regarded as contrary to the law. For example the agent who gains access to premises with a view to looking around in order to see if there is anything worth taking would fall into the concept of suspended intention and thus not be guilty of burglary.⁵⁵ Parry defends his theory against this objection on the basis that a person may have both suspended and conditional intention (i.e. he may have decided to take something and all that is left in the decision process is precisely what

to take). However an agent may have only suspended intention - namely the agent who has genuinely not made his mind up either way at the time he takes any physical step in order to weigh up the situation. An example here might be the case of D who enters a second hand store in order to browse. Seeing no-one present in the shop he thinks about taking something but does not know if there is anything of sufficient value to him. He looks around the stock but before he sees anything of interest to him the shopkeeper emerges from the rear of the premises. In this case D has made no physical exertion following his decision to weigh up the possibilities and my suggestion is that D does indeed fall within Parry's concept of suspended intention.

It is submitted that were an agent has made no physical step in preparation regarding his thoughts as to possible future activity then his mental state remains suspended intention. Parry admits this, implicitly at least, when he says that it is unlikely that an agent may successfully plead suspended intention when he has been caught in a house or place where he has no business to be or has his hand in somebody else's pocket or handbag.⁵⁶ Parry thus admits that **Eason** is a case of conditional intention in the strict sense and seemingly insists upon some physical movement which is a necessary step in preparation for a substantive offence (he talks of an unequivocal step which suggests that D was not merely contemplating theft but had decided upon it).⁵⁷

However Parry is prepared to excuse an agent who has taken, perhaps considerable, physical steps in preparation for the commission of a substantive offence provided that he is genuinely uncommitted as to whether he will execute the offence. He defends the decision in **Husseyn**⁵⁸ on the ground that the contents of the holdall in the van are much less likely to contain valuables than, say, a lady's handbag. He suggests that we might say of Husseyn that he genuinely had not made his mind up to steal; he was uncommitted, his activity was no more than a reconnaissance which enabled him to assess the situation and finally make a decision as to whether or not to commit a substantive offence.

Decisions by the courts show that current law does not accept the distinction between conditional and suspended intention; that either concept is sufficient for offences which admit the actus reus of theft. In Bayley and Easterbrook,⁵⁹ for example, the Court of Appeal dismissed the defendants' appeal against conviction on the ground that the trial judge had misdirected the jury in saying that it was sufficient if the defendant s took the box "with the already-formed intention of keeping its contents, whatever they might be, if of value to them". The contents of the box were valuable but the appellants did not want them. At the trial the jury were not directed on the distinction between conditional and suspended intention and the Court of Appeal was clearly of the opinion that the distinction was not important in the assessment of liability for theft.

Should we agree with Parry and distinguish between conditional and suspended intention? In deliberating on the question it should be borne in mind that the cases put forward by Parry involve an actual appropriation of property, i.e. the agent has perpetrated the actus reus of theft. The distinction is thus restricted to cases in which the agent has appropriated the property of another and the crux of the matter is his mental state at the time of the appropriation. If he is genuinely uncommitted as to whether he will keep all of any of the property (he has not yet decided to steal) then, for Parry, he should not be convicted of theft.

In my submission we ought not make the distinction for several reasons. First, Parry bases the distinction on the element of 'decision': if the agent has already formed the decision to steal before he takes hold of the property then he has conditional intention but not otherwise. But it is not always clear at what point in an agent's thinking he has reached the point of a firm decision. Hampshire and Hart say that "an action is often performed, voluntary and deliberately, without the agent's having stopped to wonder whether he would perform it or not, and without his having rehearsed in his mind the reasons for and against performing it".⁶⁰ Thus the agent in the 'second hand' store who realises that no-one is present may be forming some mental state as he picks up an item

to examine it but it may be that not even the agent himself can accurately state whether or not he had formed a decision to steal at the moment he picked up the item. The learned authors also point out that "as there are degrees of knowledge, ranging from complete certainty to complete uncertainty, so there are degrees of decision.⁶¹ If this contention is accepted then, in trying to maintain the distinction between conditional and suspended intention, we must in some way resolve the difficult question of the precise stage in the decision making process at which we may say that the agent has in fact made up his mind to steal.

Second, Parry suggests that the agent in such cases as Eason is forming a decision or has formed a decision as to what, if anything, he might take in relation to the property appropriated. But may we not equally say that in such a case an agent is forming or has formed a decision to leave behind that property which he does not want? Viewed in this way we may say that all agents who appropriate property with the intention of taking something, all or nothing, depending upon what they find, have formed a firm decision to steal and are allowing themselves the discretion whether or not to return or discard the property which is of no value to them. Also an agent in such a case might not have considered the possibility that there was nothing of value at the time of his appropriation. All of this suggests the difficulty for a jury in deciding on the evidence just which of the two distinct states of mind was held by the defendant at the appropriate time.

Third, Parry himself suggests that one distinction between conditional and suspended intention concerns the objective facts of each case. If the property appropriated ordinarily contains valuables (such as a lady's handbag) then, as Parry admits, we may properly count the agent's mental state as conditional intention: but if the property is of such a kind which, viewed objectively, does not necessarily contain valuables (e.g. a holdall or box) then, provided the agent has not made up his mind to steal, he has suspended intention. But this opens up the question of precisely what property ordinarily connotes that it or its contents are valuable and which property does not. Also we have the

problem of deciding whether value should be viewed subjectively or objectively. A particular defendant might claim that a sole copy of a doctoral thesis which is near completion is of no value to him but doubtless it would be extremely valuable to the student from whom it has been taken. These points indicate that Parry's thesis involves a very fine distinction which might well lead to uncertainty in this area of our criminal law.

Finally, it is crucial to Parry's distinction just what, if anything, the agent has *decided*, prior to the appropriation. In my view we should not give so much emphasis to a decision (of whatever type or degree) taken before the appropriation since it is intention (and not a decision) which is the necessary mental state for the theft or attempted theft. In Eason⁶² and Hussey⁶³ the defendants intended to steal at the time of their acts. In each case their intention was subject to a condition but that condition was in each case a collateral aspect of, and did not go to the root of, the mental state which remained intention. Viewed in this way we might plausibly argue that the defendants in Eason and Hussey perpetrated the actus reus of theft with the appropriate mens rea. However the courts have not interpreted the mental state in this way, presumably since the prosecution must specify the property stolen in order to secure a conviction. The Court of Appeal has applied a procedural solution in the charge of attempted theft of unspecified items.⁶⁴ My suggestion is that the agent in such cases should be charged with the substantive offence where he has in fact appropriated property, and with attempted theft where he has not, as, for example, where an agent puts his hand in someone else's pocket in order to steal but there is nothing there. However this would require a positive statement by the legislator to put the issue beyond doubt.

An interesting point by way of conclusion on conditional intention in cases of theft. The postal sorter posited by Edmund Davies (above) would not in fact be guilty of theft if there are no registered letters in the batch since he has authority to act as he does and cannot thus be said to have appropriated property belonging to another. One should note here the case of Poynton⁶⁵ which, it is submitted, is authority on this

issue. Presumably he is also not guilty of attempted theft since he has done nothing which is more than merely preparatory to the commission of the substantive offence.

What of conditional intention in cases other than theft? Illustrations include the burglar who takes along a cosh in order to render senseless anyone who interrupts his enterprise, or the paramour who carries a gun in order to kill V if she does not agree to divorce her husband and marry him.⁶⁶ Worthy of note is that in such cases the agent may perpetrate preliminary activity concerning his conditional intent at some point in time removed from the moment at which he makes his mind up whether or not to go through with it. Two points for discussion here are (i) whether or not the agent can be said to intend the object of a plan which is subject to a condition which may or may not obtain at the relevant time, and (ii) whether we may ascribe liability to the agent in relation to that conditional intention, and if so at just what point along the causal chain which may lead to the object of that conditional intention should we admit the agent to criminal liability for it?

Provisional Purpose.

Regarding (i) we cannot say that an agent intends a conditionally intended effect of his activity on my proposed model of direct intention since this excludes the effects of future activity (which a conditionally intended effect surely is). Any criminal offence which is the object of a future exertion constitutes an agent's purpose. I would thus call a planned future effect which is subject to a condition the agent's 'provisional purpose' or 'provisional objective' and the causal chain which leads to that purpose the 'provisional causal chain'. It is submitted that in such a case there are in fact two causal chains, one leading to the primary end which may or may not be criminal, and the other to a contingent illegal end which is subject to a condition which must be satisfied if the provisional chain is to be completed.

Regarding (ii) we would certainly ascribe liability to the agent who completes the provisional causal chain, or charge him with an attempt

where he decides to bring about the object of his conditional intention and has taken steps which are more than merely preparatory to bringing it about. I think too that we are entitled to and should record in the conviction a provisional purpose which accompanies the criminal offence and towards which the offence is a necessary preliminary. Suppose for example Dudley plans to break into a museum and steal a valuable exhibit. He appreciates that he might set off a 'silent' alarm which would, unknown to him, alert the police. He thus includes in his plan the possession of a gun to shoot dead any police officer who might interrupt him. He gains entry to the museum with a weapon and successfully completes his enterprise without interruption. It is submitted that when Dudley takes possession of the gun he commits an offence contrary to s.1(1) of the Firearms Act 1968 (and presumably an offence contrary to s.16 of that Act concerning his conditional intention to endanger life if that section admits conditional intention as a requisite mental state).

In the hypothetical Dudley embarks on two causal chains which are quite separate and distinct although they share preliminary links in the causal chain. Whether or not the provisional chain of activity will proceed to completion cannot be answered until the agent has actually brought about the earlier separate and concurrent links of the separate causal chains to the point at which he can determine the situation upon which his provisional purpose hangs. The situation may be such that the provisional chain of activity breaks down before that link at which the chain would change from provisional to resolute in character.

It is submitted that where the agent perpetrates a criminal offence which is a necessary preliminary to a further prospective criminal offence which is subject to a condition we are entitled to include that provisional purpose in the conviction for the preliminary offence. My view is based upon two grounds. First, it conforms with the criterion that, for the purpose of recording convictions we ought to mark an agent's moral culpability with sufficient specificity. Second, where the agent has actually perpetrated a preliminary criminal offence he provides us with fairly strong evidence of his resolve to carry out the

provisional purpose should it prove necessary for him to do so: for why else would he bring himself within the perview of the criminal law concerning that preliminary activity? However I think that there is a significant moral difference between provisional and unconditional purpose since, to the extent that my purpose is provisional I may be less committed to it and thus less culpable insofar as my purpose remains provisional. For example it is submitted that Donald who travels to the palace in order to persuade the King to desist from his cruelty towards the Queen with the plan of shooting him if he refuses is less culpable than Desmond who travels to the palace with the unconditional aim of killing the King. This moral distinction deserves legal recognition at the conviction stage. We may mark that distinction in the way in which we frame the conviction. We may, for example, convict Donald with an offence contrary to s.1 of the Firearms Act 1968 *with the provisional purpose* of committing assassination and convict Desmond with that substantive offence *with the direct purpose* of committing assassination. The forms of conviction show clearly that Desmond acts with the unconditional aim of killing the monarch whereas Donald's prospective act of assassination hangs upon a condition which, if unfulfilled, will exclude his attempt thereat.

I return to the hypothetical of Dudley to demonstrate that my proposals here draw a much sharper distinction in moral blameworthiness than does current criminal law. On the proposed concepts of purpose and objective Dudley would be convicted of burglary contrary to s.9 of the Theft Act 1968 and an offence under s.16 of the Firearms Act 1968 with the provisional purpose of committing murder. However suppose Douglas enters a museum to steal a valuable 18th Century pistol. He takes with him a loaded and fully working replica which he intends to put in the place of the valuable exhibit so that his enterprise will remain undetected. He has decided to flee should he be confronted by any person. He completes his enterprise without incident. On the proposed structure Douglas is guilty of burglary simpliciter. The significant moral distinction between Dudley and Douglas is thus drawn out in the conviction. However at current law both Dudley and Douglas would be guilty of aggravated

burglary contrary to s.10 of the Theft Act 1968 and Dudley's provisional purpose concerning his possession of the weapon is ignored.

An interesting point on provisional purpose emerges. What if the agent plans a particular harm and realises that there are options to achieve it depending upon circumstances prevailing at the time of execution, and sets about preparing for each option only one of which he will rely upon at the appropriate time? Suppose Daphne plans the untimely demise of her mother Veronica in order to bring forward her inheritance of mother's sizable estate. She considers that a shooting and a fake robbery would be the ideal method of disposal but if the neighbours are at home then the chances of detection are enhanced. She considers that the administration of poison would be a somewhat quieter expedient but the chance of detection would be greater than a shooting with the neighbours absent. All would then depend upon the presence or otherwise of the neighbours. Daphne steals some poison from a local store, takes her husband's shotgun and sets off to her mother's home to conclude her enterprise one way or the other. She is arrested before she reaches her mother's home and confesses all to the police. In this hypothetical D plans to set in motion two separate causal chains each of which is provisional although either will bring about the same object. Also D perpetrates a preliminary criminal offence concerning each provisional causal chain, namely theft and an offence under s.18 of the Firearms Act 1968 respectively. On the proposed models of intention and purpose Daphne would be guilty of the appropriate substantive offences each for the purpose of committing murder. We would not refer to provisional purpose in such a case since there is none: Deirdrie has a positive purpose and it is the means of securing it which are provisional.

An objection to the inclusion of provisional purpose in the framework of criminal law is that if the concept is to apply universally it might catch the agent who perhaps ought not to be accountable at criminal law concerning his provisional purpose. I have in mind here, for example, the agent who goes home armed with a knife intending to kill his wife if he finds her in the act of adultery with another man. If this agent has a defence to the substantive offence then one might exclude this case at

least from the parameters of the proposed model of purpose since in convicting him with the preliminary offence contrary to s.1(1) of the Prevention of Crime Act 1953 *for the provisional purpose* of committing murder we would be convicting him without reference to his possible defence. I would reject the argument. The agent has planned fully the form that his activity will take should he find his wife in the act of adultery and he has calmly prepared accordingly. He could not thus plead provocation under the provisions of s.3 of the Homicide Act 1957 concerning the substantive offence so why should we treat his case differently from any other concerning provisional purpose?

I would thus attribute provisional purpose to an agent who has perpetrated a preliminary criminal offence: I would not however extend the concept of provisional purpose to the agent whose preliminary activity towards an illegal end is otherwise innocent.⁶⁷ Suppose for example that D has been advised that his girl friend has been unfaithful to him. He places a sledge hammer in his car boot for the purpose of causing extensive damage at her flat if he finds that the allegation is true. My submission here is that we may not ascribe provisional purpose to D for his de facto innocent activity concerning the sledge hammer on the ground that the agent who makes an innocent preliminary exertion along a provisional causal chain does not exhibit the same commitment to his provisional purpose as that demonstrated by the agent who perpetrates a preliminary criminal offence. Whether D who perpetrates innocent activity towards a criminal end should be liable for that preliminary activity is a question for discussion in Chapter 5.⁶⁸

Objective.

The agent's objective is the ultimate purpose which completes the causal chain of activity chosen by him as the means with which to achieve it. An objective is thus a purpose like any earlier purpose in the causal chain, but the objective is the ultimate purpose at which the agent directs the selected causal chain. Since the objective is a purpose it has all the qualities which I pointed out in relation to my definition of the latter concept above.⁶⁹ It is thus possible for the agent to

bring about his objective with his first exertion⁷⁰ in which case the agent's intention, purpose and objective all coincide.⁷¹ In such a case it is submitted that the agent's objective and intention are conflated and it is thus proper to talk solely in terms of direct intention.⁷²

Where the planned causal chain comprises several purposes then they may be all legal or illegal in nature or there may be a combination of innocent and criminal purposes. An illustration will facilitate discussion here. Suppose Dominique wishes to go on a long holiday to America. Because she has insufficient funds to achieve her ambition she formulates a plan comprising the following stages:

- (i) breaking into the local supermarket and removing the money from the tills,
- (ii) purchasing a quantity of cannabis from a drug pedlar known by her,
- (iii) allowing persons into her home to buy and smoke the cannabis there,
- (iv) purchasing an airline ticket to America,
- (v) flying to America,
- (vi) spending the balance of the money received for drugs so that she enjoys a long and expensive holiday there.

Dominique thus plans to break into the store (i) for the purpose of stealing money, (ii) for the purpose of buying cannabis, (iii) for the purpose of selling and allowing it to be smoked on her premises, (iv) for the purpose of buying an airline ticket, (v) for the purpose of flying to America (vi) with the objective of having a long holiday there. Dominique thus has six purposes concerning her planned chain of activity the last of which constitutes her objective. Some of her purposes are legal whilst others constitute criminal offences at appropriate stages as her chain of activity proceeds.

The Status of the Proposed Concepts of 'Purpose' and 'Object'.

I have described the nature and substance of the proposed concepts of 'purpose' and 'objective'. It remains to state the relationship between

those concepts and the proposed structure of intention and to examine how the three models would fit into attributions of criminal responsibility. My submission is that in assessing criminal liability we are entitled to look to the entire causal chain and attribute liability for both the criminal link which has in fact been forged by the agent and the unattained prospective criminal link in the causal chain towards which the offence committed is a necessary preliminary. We would base liability for the preliminary offence committed on the concept of direct intention:⁷³ we would base liability for the unattained prospective offence on the concept of purpose or objective. In so doing we do not convict the agent with the unrealised offence: we simply record more accurately the moral culpability with which he brings about the preliminary criminal offence.

We may take the hypothetical of Dominique above as an illustration here. Suppose that Dominique is apprehended by the police as she is leaving the store with the money. On current law she is guilty of burglary contrary to s.9 of the Theft Act 1968, and perhaps criminal damage contrary to s.1 of the Criminal Damage Act 1971. On my proposed models of mens rea Dominique would suffer the same fate on the basis of direct intention. But suppose that Dominique later discloses to the police the full extent of her criminal enterprise. On current criminal law there is presumably no liability for the unrealised criminal links in the causal chain namely unauthorised possession of a drug contrary to s.1(1) of the Drugs (Prevention of Misuse) Act 1964, and being a occupier concerned in the management of premises knowingly permits or suffers the smoking of cannabis contrary to the Misuse of Drugs Act 1971. However on the proposed models of purpose and object we may convict Dominique of burglary (and perhaps criminal damage) for the purpose of possession of a controlled drug with the objective of 'knowingly permitting'.⁷⁴ Notice how the proposed strategy takes account of significantly different moral mental states concerning activity. Dominique's activity in taking the money is much more morally reprehensible than that of Doreen who simply takes the money in order to take as good a holiday as is possible with the money she has taken.

I should point out that it is not prospective activity which is the subject of liability here, it is the prospective proscribed harm. It is thus necessary that the prosecution prove beyond reasonable doubt that the agent had in mind an existing criminal offence as a specific prospective (and unrealised) link in the causal chain. The proposed models of purpose and objective do not thus give a judge any power to create new criminal offences: they are mental states which enable us to attribute liability for completed activity which constitutes a necessary preliminary to the perpetration of a prospective criminal offence.

Direct and Concomitant Intention, Purpose and Objective.

My submissions on direct and concomitant intention, purpose and objective would involve a significant restructuring of current law and thus stand in need of justification. There are several advantages for the proposed models. I have already alluded to several advantages for the two proposed concepts of intention,⁷⁵ but there are other advantages for the concepts of direct and concomitant intention, purpose and objective.

First the proposed models provide us with a more sophisticated set of terms in relation to mens rea which would enable Parliament to state more precisely the mental element required for each particular offence in a way which causes no confusion as to the parameters of the individual types of mens rea. We thus avoid all the present obfuscation concerning the notion of intention in current law.

Secondly my proposed structure would enable us to ascribe purpose to the agent for all prospective criminal harm towards which he has perpetrated preliminary criminal activity. This would make our structure of mens rea consistent across the spectrum of criminal offences. I have pointed out above⁷⁶ that our current criminal law only ascribes liability for prospective harm in some but not all offences and is thus inconsistent. That inconsistency leads to anomalies in the cases. We may illustrate the point with a particular substantive offence. In the offence of burglary the defendant is guilty if he enters a building as a trespasser

with the intention⁷⁷ of committing one of four specific offences⁷⁸ One of these is rape. But what of the agent who enters as a trespasser with the intention of subjecting a female to acts of the grossest indecency but he is apprehended before he reaches her bedroom? Just what offence has D committed on current law? It cannot be burglary since his further intention does not correspond to one of the four specific offences. It cannot be attempt since, presumably, he has not done something which is more than merely preparatory to the commission of the substantive offence.⁷⁹ Now if we subject my model of purpose to criminal liability then we are entitled to ascribe purpose to D in such a case since he has perpetrated a preliminary act of trespassory entry onto premises for the purpose of committing a (serious) crime therein. Of course this would mean the demise of burglary in its current form since that offence is restricted to one of four proscribed harms by the agent, whereas on my proposed model of purpose he is guilty of an offence when he enters any building as a trespasser, whatever the nature of the prospective proscribed harm purposed by him. I would however retain the name burglary in order to criminalise entry as a trespasser for the purpose of committing the particular offence. We would thus charge the agent above with burglary for the purpose of committing indecent assault.

Third, the proposed models are in accord with the criterion that criminal blame and punishment should accurately reflect the moral culpability with which the agent perpetrates a criminal offence. The hypotheticals of Dominique and Doreen illustrate the contention.

Current law does in fact accept my model of purpose as a freestanding mental state in some areas. For example the Official Secrets Act 1911 makes it an offence to enter a prohibited place for a "purpose prejudicial to the safety or interests of the state". In Chandler v D.P.P.⁸⁰ Radcliffe L.J. stated that the appellants had made their entry for two separate purposes: an immediate purpose of obstructing the airfield, and a further or long term purpose of inducing the government to abandon nuclear weapons in the true interests of the state. This reasoning fits into my pattern of purpose although I would call the latter purpose the appellant's objective.

Objections to the Proposed Models of Mens Rea.

There are objections to my proposed models of purpose and objective. First one might argue that the proposal goes too far since it extends criminal liability to both the agent who has been prevented from completing the causal chain but might well have desisted in any event and the agent who has in fact voluntarily desisted after perpetration of a preliminary criminal offence. In any event why should we punish an agent in relation to a prospective as opposed to an actual exertion? In response I would point out that it is not unusual for the criminal law to punish prospective harm. Burglary provides an instance here.⁸¹ Also in attempts we punish for a prospective harm towards which his activity is sufficiently proximate.⁸²

My more specific comment is that we ought not treat sympathetically either the agent who has been prevented from completing the prospective criminal offence but who might have desisted or the agent who actually desists before completing the criminal objective. I base my contention on the ground that there is no moral difference to be drawn between these two agents and the agent who has been prevented from but would have completed the criminal objective. For all three agents have the same mental state *at the time that the preliminary criminal offence is committed*: each perpetrates the preliminary offence with the same mental state concerning the objective and it is the mental state at the time of the actus reus of the preliminary offence which is crucial to ascriptions of liability and purpose. If any concession is to be granted to the agent for voluntary abandonment of the criminal objective (actual or supposed) it ought to be made at the point of sentence.

Objective, Purpose and Motive.

A second objection to the proposed models of purpose and objective is that it seems that the proposed concept of 'objective' is closer to the conventional usage of the word motive than to the concept of purpose. I would accept that this may be the case but would point out that the conventional usage of motive is vague. My own view is that motive should

be restricted to some inner mental state held by the agent concerning the consequences of his activity: that motive should be confined to emotions such as greed, hate, jealousy, compassion, fear, envy, distrust, and so forth. In this way we separate the proscribed harm^{from} the emotion which accompanies it. I accept that this proposal would not meet with judicial approbation. For example in Hyam³³ Ackner J directed the jury that D was guilty if she knew that it was highly probable that her act would cause at least serious bodily harm and it mattered not that her motive was to frighten Mrs. Booth. But in my view Mrs. Hyam's motive for her activity was jealousy. It is submitted that Mrs. Hyam ignited the petrol with the direct intention to cause some property damage for the purpose of frightening Mrs. Booth with the objective of causing her to leave the neighbourhood: her entire enterprise was motivated by her jealousy, and, perhaps, animosity towards Mrs. Booth.

A third objection to the proposed notions is that if we ascribe purpose and/or objective in every case in which the agent has perpetrated a criminal offence which constitutes a necessary preliminary towards a prospective criminal objective then how is Parliament to legislate for crimes based upon purpose: i.e. offences in which the purpose is central to liability and appropriate punishment as opposed to a secondary consideration in connection with the preliminary offence committed? We may take burglary as an illustration here. In that offence the agent perpetrates the actus reus when, inter alia, he enters a building as a trespasser.³⁴ The actus reus is in fact not itself criminal but Parliament has seen fit to criminalise and award severe penalties where trespassery entry is effected with the purpose of committing one of four specified offences whether or not the purpose is successfully achieved.³⁵ My response to the question is that it would be available to Parliament to pass legislation creating a specific offence of purpose within the proposed structure of mens rea where it wishes to subject purpose to specific liability and punishment. Where an agent is charged with such an offence the court^{or jury} would be able (as now) to decide upon guilt in accordance with the requisite mens rea requirement and the judge may (as now) take into account the maximum sentence for the statutory offence of purpose when deliberating upon appropriate

sanction. Statutory offences of purpose such as burglary would thus form a part of the proposed structure. It is envisaged that the specific offence of purpose would only be necessary where Parliament wishes to criminalise otherwise innocent activity.

One problem for the dual system concerning the offence of burglary would remain. I have pointed out ⁸⁶ that the offence of burglary is restricted in relation to the agent's aim as he enters the building as a trespasser. If he enters as a trespasser with the purpose of raping a woman but is prevented from doing so we may convict him of burglary contrary to s.9 of the Theft Act 1968 and award an appropriate sentence which reflects his purpose. But if he enters a building as a trespasser in order to commit acts of indecency on a woman we presumably cannot blame or punish him for his trespassery entry since that act is not itself criminal and he cannot thus fall into either a current crime of purpose or the proposed notion of purpose which rests upon a preliminary criminal offence. If we wish to ascribe liability to this agent we would have to criminalise entry as a trespasser for the purpose of committing a criminal offence which falls outside the current parameters of burglary.⁸⁷ There are two alternative strategies here. First we may retain burglary in its current form and include trespassery entry for the purpose of committing other offences in the proposed offence of peregration.⁸⁷ Alternatively we may extend the parameters of burglary to include all criminal purposes. I would argue for the second strategy on two grounds. First the four offences specified in s.9(2) cover most criminal harm and its extension to at least all indictable offences would not involve an undue extension of criminal responsibility. Second, the latter strategy would eradicate the incoherence of the offence of burglary which is best explained by way of illustration. Suppose that D₁ enters a building as a trespasser in order to steal some cigarettes. He is guilty of burglary but D₂ who enters as a trespasser in order to perform acts of indecency with the occupier is not. It is submitted that the restricted contours of burglary lead to incongruity in ascriptions of liability. The subjection of all criminal purposes to the offence of burglary would lead to a more consistent and coherent structure of criminal responsibility.

A fourth objection. One might say that if purpose and objective is to be used as a ground for the ascriptions of liability then this will create evidentiary problems of establishing ultimate purpose. For how could a jury conclude beyond reasonable doubt that x was the ultimate purpose of the accused if he is in the witness box saying that he had some other reason y for perpetrating a criminal offence?⁸⁸ The main thrust of this argument is that in creating such offences we would extend the crime of attempt into the sphere of really preliminary not to speak of preparatory activity.

I would comment here that difficulty in proving the precise prospective links of the causal chain should not be a bar to subjecting the agent to criminal liability in cases in which that proof is available. As to the suggestion that the proposed mental states would extend the crime of attempt to preliminary activity, I would point out that the agent would not be charged with an attempt on the proposed models: he would be charged with committing the substantive criminal offence for the purpose of committing the prospective criminal offence towards which the substantive offence is a necessary preliminary. We would thus convict the agent of the offence which completes a preliminary link in the causal chain and we would characterize the moral basis upon which that preliminary link was forged by stating in the conviction the criminal purpose or purposes at which the preliminary offence was directed.⁸⁹ This is not to bring into account the concept of double criminalisation: we are simply placing an accurate label on the agent's activity in terms of moral culpability. However it might be the case that his criminal purpose, when proved, might affect the sentence awarded to the agent for the preliminary substantive offence committed.⁹⁰

My comments above relating to attempts lead us to another objection to the proposed structure of mens rea. For if we restrict the notion of intention to an exertion which is itself capable of producing the actus reus of the offence then just what is left of the current law offence of attempts? It is to this issue that discussion turns in the next chapter.

FOOTNOTES TO CHAPTER 4.

1. For which see supra chapter 3.
2. See supra chapter at pp.18-19.
3. But I would charge D with the preliminary activity leading to the preliminary offence. see chapter 5 for a discussion on this point.
4. For a summary of the law on kidnapping see R v D [1984] AC 778.
5. Extraneous agency and not innocent agency since V perpetrates the offence with intention although it is likely that he has the defence of duress. But what if D incites P to commit an offence against V? Here P will be perpetrating the actus reus with intent and has no defence so what is D's liability. This issue is discussed infra chapter 5.
6. In fact purpose and direct intention are conflated at this point but since purpose on the proposed model involves some future exertion, we would talk simply in terms of direct intention here. If Denise had entered the shop with the intention of taking chocolate so that she could feed her hungry child then her chain of activity has a purpose beyond the retailer's premises and we may say that she directly intends to steal the chocolate for the purpose of feeding her child. Her exertion would certainly constitute an offence under s.1 of the Theft Act 1968 and may constitute an offence under s.9(1) of that Act (see Jones and Smith [1976] 3 All ER 54) since she has the necessary mens rea in relation to theft before she enters the building. Of course since her purpose (feeding the child) is not criminal in nature we would not include it in the charge: we would charge Denise with theft (or burglary) simpliciter.
7. In conversation with me.
8. [1947] KB 997. See supra p.x for facts.
9. Infra p.123.
10. Infra p.134ff.
- 11 i.e. intention as it is understood generally in current law.
12. [1915] 1 KB 616.
13. 6th ed. at p.58.
14. See supra chapter 2 at p.31.
15. Supra note 8.
16. In 'Responsibility Before the Law'. 1961 at p.27.
17. See supra p.116.

18. [1976] QB 1.
19. [1985] AC 905.
20. [1986] AC 455.
21. [1986] 3 All ER 1.
22. Smith and Hogan, 6th ed. at p.56.
23. Ibid at p.55.
24. Ibid. They also consider it sufficient as a condition of intention that he wants to kill or acts in order to kill.
25. J. Austin, 'Lectures on Jurisprudence' (1861) 5th ed. R. Campbell (London, 1911).
26. J. Salmond, 'Jurisprudence' 7th ed. 1947 ss.133-4.
27. C. S. Kenny, 'Outlines of Criminal Law' 17th ed. 1958 s.53. For a contrary view of intention see Lord Simon in R v Najewski [1976] 2 WLR 628.
28. Parenthesis supplied.
29. In 'Oblique Intent' in the Cambridge Law Journal (1987).
30. A. White, 'Intention, Purpose, Foresight and Desire' in the Law Quarterly Review 92 574.
31. G. Williams, 'Oblique Intent' in the Criminal Law Review p.418 footnote 5.
32. Intention in the sense used at current criminal law.
33. See generally A. White, 'Grounds for Liability', Chapter 6.
34. Headed by Professor Smith. See 'Codification of the Criminal Law Law Comm. No. 143.
35. At p.183.
36. Thus excluding mere knowledge of circumstances or foresight of consequences.
37. Law Commission Working Paper No. 84, 'Criminal Libel' (1982) para 9.13.
38. Law Commission Working Paper No. 79, 'Offences against Religion and Public Worship' (1981).
39. Ibid at para 8.11.

40. Intention as understood in Current criminal law.
41. My models of direct intention and concomitant intention serve the same purpose. Direct intention concerns effects aimed at by the agent and is thus equivalent to the Team's 'purpose'. Concomitant intention relates to an awareness of a particular consequence and is thus similar to the Team's 'intention' but differs as to the degree of probability of the effect.
42. Supra Chapter 2 p.1ff.
43. The Team does make brief reference to 'future purpose'. They allude to the 'future intention' aspect of burglary (and other offences) and state that their definition of intention includes purpose which will cover instances of 'future intention', i.e. intention not related to an element in the offence (see p.66 of the Report). They are not thus prepared to separate the temporal dimension of their 'purpose'.
44. Supra note 8.
45. In the circumstances of the case the assistance is indivisible from the broadcast. See also the argument in Ablers supra p.117.
46. i.e. to prevent incarceration.
47. For example G. Williams, Textbook of Criminal Law (1978) p.578 footnote 2.
48. [1971] 2 QB 315.
49. See for example Koffman in 'Conditional Intention to Steal' in the Criminal Law Review [1980].
50. Ibid at p.465.
51. In 'Conditional Intention - A Dissent' in the Criminal Law Review [1981] 6.
52. Ibid at p.7.
53. In 'Textbook of Criminal Law' 1978 at p.652 although he does not use the same terms.
54. Supra note 51 at p.8.
55. He may be guilty of some other offence e.g. criminal damage.
56. Supra note 51 at p.9.
57. Ibid at p.10.
58. (1977) 67 Cr App Rep 131.
59. [1980] Crim LR 503.

60. S. Hampshire and H. L. Hart, 'Decision, Intention and Certainty' in Mind (1958) 67 1 at p.3.
61. Ibid. See also J. Parry, *supra* note 51 at p.16.
62. *Supra* note 48.
63. *Supra* note 58.
64. See, for example, Bayley and Easterbrook, *supra* p.127.
- 65 (1862) Le and Ca 247.
66. The burglar's conditional intention renders his possession of the cash a criminal offence contrary to s.1(1) of the Prevention of Crime Act 1953. Note that the definitional section 1(4) has been amended by the Public Order Act 1986. The paramour's possession of the gun with the stated intention renders him guilty of an offence contrary to s.16 of the Firearms Act 1968.
67. See *infra* chapter 5 pp.169.
68. *Infra* p.156ff.
69. *Supra* p.1ff.
70. The hypothetical of Denise in the confectioner's *supra* p.115. is illustrative here.
71. Since there is only one purpose in such a case it is more accurate to talk of coincidence of intention and objective. See note 6 above.
72. See *supra* p.115.
73. See *supra* chapter 2. Of course if the agent brings about any concomitant effect of his activity concerning the causal chain we may attribute criminal responsibility to him on the basis of concomitant intention. see *supra* chapter 3.
74. Note that we include all the criminal purposes in the charge and that the last criminal purpose is the criminal object viz. selling the drug. Any further purpose or object which is not criminal is ignored in assessments of the causal chain.
75. see *supra* chapters 3 and 4.
76. *Supra* p.23.
77. As used at current law.
78. The Theft Act 1968 s.9.
79. See the Criminal Attempts Act 1981.

80. [1964] AC 763.

81. Supra p.23.

82 See also the Theft Act 1968 s.25. See also supra pp.xx for offences in which Parliament ascribes liability for prospective harm.

83. [1975] AC 55.

84. Theft Act 1968 s.9(1).

85. Ibid s.9(2).

86. Supra p.136.

87. We may wish to restrict this to indictable offences. I should point out here that the proposed offence of peregration would catch this agent (see chapter 5 p.156ff) but we may wish to make this particular type of activity the subject of a more serious substantive offence of purpose.

88. He might also claim that he had no criminal purpose or objective in mind when he committed the offence with which he is charged.

89. The hypothetical of Dominique (supra p.115) would serve to illustrate my point here.

90. Subject to the rule that punishment cannot exceed the maximum for the preliminary criminal offence.

In this chapter I consider a selection of inchoate offences in order to assess how the current parameters of those offences might be affected by the adoption of the proposed models of intention, purpose and objective. I begin with the inchoate offence of attempt.

1. Attempts.

One dispute between judges and theorists in this area of law is concerned with the precise boundaries of the inchoate offence of attempt. Two major issues of that dispute involve (i) the point along the chain of activity towards commission of the substantive offence which renders the agent guilty of attempting the substantive offence and (ii) the criminal status of the agent who attempts to bring about a proscribed harm which, on the facts of the case, is not capable of fruition. In order to facilitate discussion upon the competing views I divide attempts into six categories although, for reasons which will become apparent I shall deal with five only in this chapter.¹

(i) The Complete and Competent Attempt.

In this category of attempt the agent has completed all the steps necessary for the commission of the substantive offence, the offence is capable of fruition, and yet his attempt has failed. For example D₁ has shot at V and missed or D₂ has handed a poisoned drink to V but V has spilled it before drinking any of the mixture. Here there is no dispute between the judges and theorists; in each of the above examples both would hold the agent accountable for the state of affairs which violates the criminal law. Also both the ideal typical subjectivist and objectivist models would attribute liability to the agent in this category of attempt; the subjectivist model on the ground of both the dangerousness of the agent and his culpability, the objectivist model on the ground of dangerousness of the act.²

Current law holds the agent in this category guilty of an attempt: s.1(1) of the Criminal Attempts Act 1981 talks of acts which are more than merely preparatory to the commission of the substantive offence.

An interesting issue on the objectivist position emerges from an analysis of a variant of the shooting case above. Suppose that D₁ had in fact deliberately shot wide of V in order to frighten him. In each case the same state of affairs has been brought about (a bullet narrowly missing the victim) but the intention in each case is quite different. On the ideal typical subjectivist model D₁ is not guilty of an attempt in respect of injury since there is no intention to cause such.³ The ideal typical objectivist construction would also give intention a central role in the definition of attempts, but, viewed objectively, D's act is dangerous and, on the facts, not unlikely to cause injury. The objectivist model would thus be prepared to ascribe liability in some form to D in relation to the danger of injury to V. For the subjectivist, too, there is good reason to ascribe liability to D concerning the danger of injury for if we convict D with assault we do not accurately record his moral turpitude since he is subjecting his victim to some risk of injury. The proper strategy in such a case, which would satisfy both the subjectivist and the objectivist models, is the creation of an appropriate substantive offence (e.g. endangering life) which would reflect the dangerousness of both the act and the agent and inform the judge on his culpability for the purpose of sentencing.⁴

(ii) Breakdown in the Causal Chain before the Last Step in Execution.

In this category the agent has desisted at some point prior to the last step which is capable of producing the actus reus of the substantive offence. The abandonment might have been voluntary or the agent might have been prevented from completing his illegal enterprise. Both the subjectivist and objectivist are prepared to ascribe criminal responsibility for an attempt to the agent in this category provided that he has gone a considerable way towards commission of the substantive offence. Unfortunately the proponents of neither school have formulated adequate guidelines about the relative proximity of the

agent's activity to the commission of the offence sufficient for liability.

Early objectivist formulations on proximity may be found in cases such as Eagleton⁵ where the court spoke of "acts immediately connected with the commission of the offence". Objectivist thought thus latched onto the principle of 'last proximate step' towards the commission of the substantive offence as the watershed of criminal responsibility for attempts. I think that this formulation is open to two major objections: (i) conduct which might otherwise be considered 'in flagrante delicto' may be immune from early intervention and criminal responsibility on the ground that the agent has not arrived at the last proximate step. (ii) it is not always clear when an agent has brought himself to the point of the last proximate step. There is no difficulty in the case of the agent who shoots at his victim and misses but when has a would-be burglar arrived at the last proximate step of burglary? When he has brought a ladder to the scene of the crime? When he has placed it against a wall? When he climbs the ladder? When he fiddles with the latch?

Objectivists have accepted the existence of fundamental defects in the principle of 'the last proximate step' and are now prepared to shift the focus of criminal responsibility for attempts further back along the spectrum between conception and execution. They insist, however, that the act of attempting must be linked with the definition of the substantive offence so that the criminal law is certain and free from a discretionary system of justice. There seems to be no consensus between the theorists of that school about an alternative focal point to the 'last proximate step'. Three possibilities have been postulated by Fletcher,⁶ namely

(a) the stages of activity from conception to perpetration are ascertained and function as a gauge to criminal responsibility according to whether the agent has reached a stage in the chain of acts sufficiently proximate to the execution of the substantive offence. This viewpoint is as deficient as that of the 'last proximate step' since we

cannot determine the relevant degree of proximity sufficient for liability with any accuracy.

(b) the criterion of danger. This viewpoint admits to criminal liability those acts toward the commission of the substantive offence which are, per se, dangerous to legally protected interests. The dividing line between mere preparation and attempt is ascertained according to the "nearness of the danger, the greatness of the harm and the degree of apprehension felt".⁷ This approach is less certain than the concept of 'last proximate step' since one is left to speculate about just what otherwise preliminary step towards commission of the substantive offence is sufficiently dangerous to legally protected interests to bring it within the objectivist purview of criminal attempts. Perhaps we would need infinite degrees of 'nearness to the danger' between the substantive offences. Also this viewpoint would leave free from criminal responsibility the agent who has come very close to commission of the substantive offence but whose activity has not yet manifested itself as activity which is dangerous to legally protected social interests. This leads us to the third alternative objectivist standpoint,

(c) apprehension and unequivocal conduct. This approach is inextricably bound up with the concept of manifest criminality. Salmond J. alludes to this view when he says that a criminal attempt is "an act which shows criminal intent on the face of it",⁸ i.e. an act which unequivocally bespeaks criminality. This test for criminal attempts brings out clearly Fletcher's theory of shared imagery of criminal conduct. According to this view an agent has passed the preparation stage either when his act unequivocally shows criminal intent or, possibly, when it will be unequivocally interpreted as wrongful conduct by a third party observer. The essence here is that the act must be one which is *res ipsa loquitur*; an act which is innocent on its face is not a criminal attempt - "it cannot be brought within the scope of criminal attempts by evidence *aliunde* as to the criminal purpose with which it is done".⁹

It is submitted that this proposition is wrong since it emphasises the appearance of the agent's attempt and not its proximity to the commission of the substantive offence. Weinreb points out that "when we convict someone of attempted murder for administering an almost fatal

dose of poison it is not because she looks like a murderer, but because she came dangerously close to being one".¹⁰ Most of the early cases which adopted an objectivist position stressed proximity as the test for criminal liability for attempts. Furthermore one should note the more general stance of Salmond J. in R v Barker¹¹ which does not support the concept of unequivocal conduct. In a later passage in that case, dealing with impossible attempts, he said that "in determining whether he is guilty of a criminal attempt (the agent is not) to be judged by reference to the facts as they were (but) by reference to the facts as he believed them to be ... where a man puts sugar into his wife's tea ... if he believes that it was arsenic he is guilty of attempted murder".¹² This passage demonstrates that Salmond J. does not espouse the concept of unequivocal conduct as a legal principle although he is prepared to consider that conduct has an evidentiary role to play in the law of criminal attempts.¹³

One final point on the objectivist viewpoint. I think that it would be capricious to convict and punish the agent who tries and fails using a method which gives away his criminal purpose and ignore the agent who tries and fails but chooses a modus operandi which is innocent on its face.

Subjectivists insist on intention as the requisite mens rea requirement for this category of attempts. As regard actus reus they are prepared to set criminal responsibility at some point before the last act necessary and sufficient in order to bring about the proscribed harm, but unfortunately there is a lack of clarity in the subjectivist account about the precise point along the spectrum of activity from conception to execution which admits the agent to criminal responsibility for an attempt.

Current criminal law, which has tried to steer a middle course between the subjectivist and objectivist models, talks of acts which are more than merely preparatory to the commission of the substantive offence.¹⁴ This compromise approach inherits the problem of vagueness as to the precise threshold of criminal responsibility for attempts. Also the test

as to whether an accused's act was more than merely preparatory is to be left to the jury and this will undoubtedly lead to inconsistent decisions in the cases.

The vague boundaries set by the theorists and current law are unfortunate for several reasons. First, they cause problems for the magistrates or jury in the cases in deciding whether or not a particular defendant has in fact done sufficient in relation to his intended enterprise in order to impose liability upon him in respect of an attempt at the substantive offence. Second, it is at the link in the causal chain which admits the agent to liability for an attempt that responsibility at criminal law begins. It is therefore of major importance to the agent, to all concerned in the administration of the criminal process and to society in general that we have a sharp boundary between attempt and non-attempt. Third the vague boundaries have practical implications. Suppose that Brown, a police constable, is following Smith whom he believes is on his way to perpetrate an arrestable offence. At what point may Brown effect an arrest? Whilst Smith is driving to the designated target? When he parks his car? When he walks up the garden path? When he breaks a window? It is possible that a premature arrest might lead to an action by Smith against the police authority.¹⁵

Another problem area caused by the vague boundaries of attempts concerns the agent who has gone some distance toward commission of the substantive offence and decides to desist provided that, in terms of criminal liability, it is worth his while to do so. If the agent has crossed the threshold of criminal liability for an attempt he is guilty of an attempt and liable to some punishment. If he has not yet crossed the threshold he is not liable or punishable in relation to his activity up to the point at which he desists. But given the vague boundaries supplied by the theorists and current law how will this agent know if his activity has reached that link in the causal chain which makes him liable for an attempt?

One might respond that it is advisable for the defendant to desist at any point of his activity up to the last act which is capable of producing the substantive offence since generally he will receive punishment, if at all, depending upon the length he has travelled along the causal chain toward completion of the illegal enterprise aimed at by him.¹⁶ However it should be pointed out that more often than not at current law the threshold of criminal responsibility for an attempt occurs at an advanced stage of the causal chain. Robinson¹⁷ and Gullefer¹⁸ are ideal illustrations of this point. In such cases where the point of criminal liability occurs close to the last link in the causal chain which may bring about the proscribed harm the agent will either not be liable at all or liable to near maximum punishment depending upon whether or not he has reached that link in the causal chain which constitutes the threshold of responsibility. It is thus important that the agent who is embarked upon such a causal chain and who considers the possibility of desisting should be aware of his criminal status, if any, at the point of his deliberation. We should thus have some general formula set out in advance so that agents who set out on activity toward a criminal offence know precisely when they have reached a point in the chain of causal activity which admits them to criminal responsibility.

Duff¹⁹ asks here why we cannot say that one who embarks on a criminal enterprise must take the risk that at some uncertain point he will become liable to punishment? My response is that we ought to have a clear statement of just when activity becomes subject to criminal liability and the various points along a chain of activity at which the agent is subject to more serious blame and punishment first, in order to give the agent the maximum opportunity and encouragement to desist from criminal activity and second, to provide the court or jury with an appropriate yardstick for deciding upon criminal liability for an attempt in any particular case. My proposed structure of 'executive link' attempts/peregration²⁰ provides a clear boundary on the threshold of attempts: the agent attempts a substantive offence when he brings about the last link in the causal chain which is capable of producing the actus reus of that offence. However the agent would be liable for

all singularly necessary preliminary activity leading to the substantive offence but that liability (and appropriate sanction which increases as the agent proceeds along the causal chain) is less than that which we ascribe to him where he has completed that link in the causal chain which is itself capable of bringing about the proscribed harm.²¹ The agent is thus provided with a clear incentive to desist from his criminal activity at all points along the physical causal chain.

A final problem concerning the vague boundaries of the concept of attempt set by the theorists and the criminal law is that they may lead to the exclusion of agents who perhaps ought to be criminally responsible for their activity. In Robinson²² for example the jeweller had faked a robbery at his shop, had tied himself up and had called out the police. However he was found not guilty of attempting to obtain money by deception since he had not at that point contacted his insurers. But I would submit that Robinson should have been subject to some form of criminal responsibility in relation to his illegal enterprise given the amount of preparation he had put into it. He has reached and executed a link in the causal chain which has led to a drain on a public resource (police manpower in the investigation).²³ Also in Gullefer²⁴ the defendant had placed a bet at the track in a dog race. Realising that the dog he backed was about to lose the race he jumped onto the track in an effort to distract the dogs and have the race declared void so that he could obtain his stake money from the turf accountant. His efforts were only marginally successful and the race was not declared void. He was charged with attempting to obtain money by deception from the turf accountant but was held to be not guilty since his activity amounted to no more than mere preparation. But surely Gullefer should be liable to some form of criminal liability. He came close to spoiling a public event. I might add here that even if the race had been declared void (and the public event spoiled) Gullefer presumably would be not guilty of any offence since his exertion remains preparatory to his illegal objective.

My submission gains weight when we introduce the concept of participation into cases such as Robinson and Gullefer. Suppose, for

example, that Gullefer was with his friend X at the race meeting. Realising that his dog is losing Gullefer conspires with X to stop the race and thereby obtain money by deception. X helps Gullefer scramble onto the track. The story then unfolds as per the actual facts of Gullefer. In this variant the agent would be guilty of conspiracy in relation to the substantive offence and liable to the same punishment as the agent who completes the commission of the offence. Now if current law is prepared to ascribe some form of criminal liability to the agent in the variant of Gullefer on the basis of a 'team effort' why should it allow Gullefer to avoid liability in relation to the same causal chain which he has brought about by himself? Of course this contention would apply wherever one draws the line as to the actus reus in attempt. Professor Jackson thinks that this distinction between attempt and conspiracy is based upon the idea that if one communicates his intention to someone else, that act of communication and the securing of the agreement to it is incontrovertible evidence of the intention to carry through the criminal act whereas in the case of attempt the behaviour might be capable of interpretation in different ways up to a later stage.²⁵ But what if the police secure incontrovertible evidence that D is alone progressing along a causal chain towards commission of a criminal offence? What is the difference which renders the 'team' agent guilty and punishable as for the substantive offence but the 'solo' agent free from criminal liability?

The solution to the problems set out above lies in (i) a definition of attempts which provides a precise borderline between attempt and preparation and (ii) an assessment of whether preparatory activity should count as an appropriate actus reus in our criminal law.

In my submission it is the link in the causal chain which is itself capable²⁶ of producing the substantive offence aimed at (the 'executive causal link') which sets the boundary of criminal responsibility for attempts. Where the causal chain of activity breaks down before the executive causal link the agent would thus be excluded from the criminal law on attempts. I submit further that the agent who proceeds along the causal chain of activity but desists (voluntarily or involuntarily)

before the executive causal link has engaged in intentional activity necessary for the commission of that offence *with the purpose*²⁷ that that offence be brought about by his activity when complete and that activity should thus be subject to the scrutiny of the criminal law. This would involve the creation of a new preparatory crime which, for the purpose of discussion, I shall call 'peregration'.

My submission is that the agent who, with direct intention, brings about a singularly necessary link (or links) in a causal chain towards the commission of a substantive offence shall be guilty of peregration *for the purpose* of committing that substantive offence. 'Peregration' is derived from the word peregrination (meaning travel, especially abroad) but whereas peregrination involves an innocent excursion peregration is meant to describe the agent who is 'abroad' with the purpose of furthering an illegal end. The proposed preliminary offence of peregration has several features.

(i) The agent must have embarked upon a criminal chain of activity which will lead to at least one criminal offence. This feature excludes from liability the agent who has planned a particular causal chain leading to one or more criminal offences but has yet to set that causal chain in motion.²⁸

(ii) Nothing short of direct intention²⁹ will suffice as the *mens rea* for the peregratory effect itself. However when an agent commits peregration he does so with a view to committing the later substantive offence towards which his preliminary activity is directed; and the *mens rea* requirement for that later offence is 'purpose'.³⁰

Singularly Necessary Exertion.

(iii) A peregratory link in the causal chain is constituted by a singularly necessary exertion concerning a later criminal offence. By 'singularly necessary exertion' is meant an exertion which is made solely for the purpose of bringing about the later offence, and not jointly in connection with other purposes or objectives. Thus where an agent gets out of bed having in mind the commission of arson later that day he does not commit the preparatory offence of peregration since his

getting out of bed is not exclusively referable to the prospective harm. However when he purchases a gallon of petrol to use in the arson attack he commits peregration (with direct intention) for the purpose of committing arson since his activity in purchasing that petrol is restricted exclusively to his prospective activity concerning that offence.

(iv) The effect which has been brought about by the peregratory exertion must not be criminal in nature. If the preliminary effect is in fact criminal we may charge the agent with the substantive offence *for the purpose of committing the later offence.*³¹

(v) The peregratory exertion must not be capable of bringing about the proscribed harm or else the exertion constitutes the executive link in the causal chain and the agent is now guilty of an attempt at the substantive offence and not the preparatory offence of peregration.

(vi) It is sufficient that the agent believe that his peregratory exertion may lead to the later criminal offence. It thus does not matter that D is not certain of success or that his purpose is not capable of fruition (e.g. unknown to D the person he intends to kill is already dead).³²

(vii) It is not necessary that the agent desire the later criminal offence at which his preliminary activity is directed.³³

(viii) Liability for peregration does not extend beyond the first criminal offence in the causal chain. Thus where D plans the commission of several criminal offences each of which is a necessary preliminary to his criminal objective and he perpetrates activity which is preparatory to the first criminal offence he is guilty of peregration for the purpose of committing the first criminal offence in the causal chain. I introduce this restriction because where the causal chain breaks down short of the first criminal offence we ought only to ascribe liability to the agent concerning that first offence since, in my view, it is the commission of the first offence which is the signpost of the agent's resolve to proceed further along the causal chain towards his criminal objective. Of course when the agent brings about the first criminal offence which is preparatory to a later criminal offence we would charge

him with the substantive offence for the purpose³⁴ of committing the later offence or offences.³⁵

(ix) The maximum sentence for peregration (which will involve those cases in which the causal chain has broken down just short of the executive causal link) would be low in comparison with the maximum sentence for an 'executive link' attempt. This feature provides the agent with the maximum incentive to desist from his criminal activity in the preparation stages. In accordance with this feature of peregration the agent who aims a gun at his victim and desists would receive a much lesser sanction than the agent who fires and misses. More on this later.³⁶

(x) Although ideally the agent who is prevented from completing the causal chain should, for the purpose of conviction, be treated differently from the agent who desists voluntarily this would not be practicable. The offence of peregration would thus contain machinery to enable the judge to take the distinction into account when awarding sentence; applying a sentence nearer to the maximum for the offence of peregration where D has been prevented from completing his illegal enterprise. A variant of the case of the three I. R. A. terrorists killed by the S. A. S. in Gibraltar (30.8.88) would provide a useful illustration here. Suppose that the Hart brothers and Mullin had not in fact been killed but merely taken into custody. On my theory they would be guilty of peregration for the purpose of committing murder but surely they ought to be punished more severely for that preparation than the agent who freely desists in the preparation stages. The judge ought to be able to bring out the distinction by way of the sentence awarded. Of course there might be some other charge which could have been levelled at the defendants in the case in issue³⁷ in which case we may charge with the appropriate substantive offence *for the purpose of committing murder*.

The proposed models of peregration and 'executive link' attempts may be stated thus. The preliminary offence of peregration consists of any exertion perpetrated by an agent which, although incapable of producing the illegal end per se, is a singularly necessary act toward the completion of that end and is directly intended by the agent for the

purpose of bringing about that end which he knows or believes will eventuate.³⁸ Once the agent's activity has reached that link in the causal chain which is itself capable of bringing about the proscribed harm aimed at by him (the executive causal link) he is guilty of an attempt in relation to that substantive offence.

Let us call my model the 'executive link' theory of attempts. On this theory the agent is guilty of peregration for the purpose of committing the substantive offence aimed at by him at all singularly necessary points along the causal chain up to the executive causal link (the last act which is per se capable of producing the proscribed harm) at which point the agent is guilty of an attempt at the substantive offence.

Several advantages flow from the proposed model. First it offers a much more definitive account of the notion of attempts than that supplied by subjectivist or objectivist theory. For example I have already pointed out the difficulty in deciding at just what point a would-be burglar would be guilty of attempted burglary on the objectivist view of attempts. With the 'executive link' theory of attempts one is not concerned with an analysis of various links along the causal chain of activity between conception and perpetration: an agent is not guilty of attempted burglary on present theory until he has arrived at the point of competent execution although he will be guilty of the new lesser offence in relation to earlier singularly necessary activity along the causal chain.

Second, the theory enables one to distinguish at the conviction stage between the agent who desists before the stage of competent execution and the agent who proceeds to that point without success. One is thus able to record more accurately the moral status of the agent in relation to his activity. Consider the case of D who aims a gun at V and then decides not to go through with his evil design (killing V). Here the agent has voluntarily desisted from his course of action before the executive causal link and is thus not guilty of attempted murder. One may thus charge him with peregration for the purpose of committing murder and thus distinguish this agent from the more evil agent who actually

fires at his victim but misses.³⁹ One may thus describe more accurately the events which have taken place in the indictment. All of this is in accord with Bentham's statement that

(1) if the punishment of a preliminary, or an offence begun but not yet finished, were the same with that of the completed offence, without allowing anything for the possibility of repentance or a prudent stopping short, the delinquent perceiving that he had begun would feel himself at liberty to consummate the offence without incurring any further risk".⁴⁰

The proposed models would grant concession at the conviction stage to the agent who desists before his activity has reached the executive causal link since he would be charged with the lesser preliminary offence which would be subject to lesser sanction than that which is awarded for an attempt.⁴¹

A third advantage of my proposed conceptual models is that they bring within the bounds of criminal responsibility cases which perhaps deserve criminal censure but which do not fall within the current law notions of inchoate offences. I have already pointed out the case of Robinson⁴² on this point. In that case Lord Reading C.J. said

"the real difficulty lies in the fact that that there is no evidence of any act done by the appellant in the nature of the false attempt which ever reached the minds of the underwriters, though they were the persons who were induced to part with the money ... In truth what the appellant did was preparation for the commission of the crime ... We think the conviction must be quashed ... upon the ground that no communication of any kind of the false pretence was made to them".

On the proposed models an agent such as Robinson would not be guilty of an attempt since he is not at the point of competent execution (i.e. the executive causal link) since he is yet to contact his insurer. But he is guilty of peregration for the purpose of committing an offence under s.15 of the Theft Act 1968. In much the same way Gullefer⁴³ would be

guilty of peregration for the purpose of committing an offence under s.15.

Note how the proposed structure enables one to place a more precise label on the agent: in charging him with the new preparatory offence we ensure that he is subject to criminal liability for his singularly necessary preliminary activity whilst separating him from the agent who perpetrates the same activity with a much lesser moral turpitude, for example the hoax caller who sends the police out to a bogus traffic accident.

A further hypothetical is worthy of note here. Suppose that Dominic has borrowed Vincent's car and has agreed to return it to Vincent's house by 12 noon on a particular day. Whilst driving the vehicle to Vincent's home on the agreed day and time Dominic forms the plan not to return the car to Vincent but to drive on, past Vincent's home, to a motor dealer and sell the vehicle as his own. Before Dominic passes Vincent's home he is involved in a road traffic accident and the vehicle is damaged beyond economic repair. Dominic's scheme is thereby frustrated. Objectivists would not ascribe liability to Dominic since there is nothing in his activity which has been proscribed by criminal law. Subjectivists would be more willing to attribute liability to Dominic on the ground of culpability but might, perhaps reluctantly, concede that the causal chain of activity has not progressed sufficiently for Dominic to be admitted to criminal responsibility for an attempt. On current law Dominic is presumably not guilty of any crime. He is not guilty of theft since he has neither assumed the rights of owner nor usurped the rights of ownership⁴⁴ up to the point of the vehicular collision; he is merely doing that which he has agreed with Vincent i.e. driving along the road to Vincent's home. Also he cannot presumably be guilty of an attempt at law since, arguably, he has not reached the first step in preparation.

However I think that Dominic should be subject to liability since from the moment that he decides to breach the agreement with Vincent and travel to the motor dealer he is no longer driving the vehicle to Vincent's home: the character of his activity is altered by his

intention and we may say that he he is coincidentally driving towards Vincent's home whilst on his way to his chosen destination elsewhere. On this basis one might plausibly argue that Dominic ought to be guilty of the substantive offence of theft at the moment he decides to drive on to the dealer and sell the car as his own since, at that moment, he assumes ownership of the vehicle.⁴⁵ In any event he would be guilty of theft on current law at the time he passes Vincent's house since from that moment he usurps the right of ownership of the vehicle. My submission is that Dominic has started the causal chain in relation to both theft and obtaining a pecuniary advantage from a motor dealer by deception from the moment that he forms the decision to steal the car and carries on driving so why should the fact that the road accident occur at some time before Dominic reaches Vincent's home, as opposed to some time after that point, be the crucial factor in the assessment of his liability?

The proposed models would attribute liability to Dominic. I do not think that he has reached the executive causal link of theft at the time of the collision (and he has certainly not reached that link in relation to obtaining by deception) but he has nonetheless activated the causal chain in relation to each offence at the moment of his decision to drive on past Vincent's home. In continuing to drive following his decision to steal and sell the car Dominic instigates the first and singularly necessary link in the selected causal chain. We may thus charge Dominic with peregration for the purpose of committing theft.⁴⁶ It is submitted that when Dominic passes Victor's house he is guilty of theft and we may charge him with theft with the objective⁴⁷ of committing an offence under s.15 of the Theft Act 1968 since the theft is only a preliminary criminal link in a causal chain which leads to his criminal objective (obtaining property by deception).

One final advantage of my theory is that the new preparatory offence enables early intervention by police into what would amount to criminal activity.

I should point out that there are some jurisdictions which, in varying degrees, give support to my 'executive link/preparatory offence' theory

of attempts. For example the criminal law of Scotland,⁴⁸ Indian penal law⁴⁹ and Canadian criminal law. I should point out that Canadian criminal law is in fact quite different from my proposed models since the former admits to criminal responsibility for an attempt any agent who 'having the intent ... does ... anything for the purpose of carrying out his intention'.⁵⁰ However, as with the proposed model of peregration, the Criminal Code of Canada is prepared to ascribe liability to the agent who takes the first physical step which is physically necessary to bring about a particular proscribed harm where it is his purpose that his activity bring about that harm.

Also in America the Model Penal Code provides for specific offences of, for example, possessing instruments of crime and offensive weapons,⁵¹ criminal trespass,⁵² and many other offences relating to activity which is a preliminary to a more serious criminal offence.⁵³ These specific Code offences demonstrate that American criminal law is prepared to attribute liability to the agent who sets in motion a causal chain towards commission of the substantive offence but fails to reach the executive causal link.⁵⁴

In English law, too, there is authority supporting the proposed model of 'executive link' attempt.⁵⁵ In the law of theft the definition of the offence is such that the agent is required to have completed the executive causal link before he may be counted as having attempted the substantive offence. Lord Mansfield lends support to the proposed model of peregration. He states that

"so long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act done becomes punishable".⁵⁶

My view is that Lord Mansfield is advocating a system of criminal liability from the moment the agent sets out on criminal activity: from

the first link in the causal chain of activity towards commission of the substantive offence.

In addition there are numerous statutes, particularly the prevention statutes, which, like the Model Penal Code, render illegal various acts which are themselves preparatory to the commission of a more serious offence.⁵⁷ Of course in current law we would not charge the defendant with such an offence for the purpose of committing a later criminal offence: the offences are free standing: but the point I am making is that, albeit selectively, the current criminal law is prepared to ascribe liability for what is essentially preparatory activity for a later criminal offence.

All of the authorities cited above give support in varying degrees to my proposal for the introduction of a new preparatory offence which is committed at the first singularly necessary physical link in the causal chain which is directed at an illegal end and continues to the executive causal link at which the agent is guilty of attempting the substantive offence.

However the proposed models of peregration and 'executive link' attempts are not free from objection. Glazebrook⁵⁸ argues that in pushing the inchoate offence to the extreme end of the spectrum between conception and execution one narrows the concept of attempts to vanishing point. Three comments may be put forward concerning this objection. First, it may be noted that most offences are narrow with respect to the actus reus element. In the case of murder, for example, the actus reus (the death of the victim) is extremely narrow: no type of injury other than fatal will suffice and the death must have occurred in accordance with narrow legal rules of causation. On present theory the agent must have brought about the executive causal link with direct intent; no other link along the causal chain will suffice for conviction for an attempt. Second, and more important, the narrow offence of attempt created by current theory may be justified on the ground that it enables one to distinguish between significantly different moral turpitudes at the conviction stage. The theory sets apart the agent D₁ who aims a gun at

his victim, ^{whose back is turned,} fires and misses from D_2 who aims a gun at ^{such a} ~~his~~ victim but desists before pulling the trigger and this is surely right. On current theory D_1 is guilty of attempted murder whereas D_2 is guilty of peregration for the purpose of committing murder: the theory thus enables us to record the much lesser wickedness of D_2 . The definition of peregration does not differentiate between the agent who desists voluntarily and the agent who is prevented from completing the causal chain but, as I have mentioned⁵⁹ we may mark this moral distinction at the sentence stage. Third, in pushing the threshold of criminal responsibility for attempts to the executive causal link in the chain of activity, and providing for a much lesser maximum sentence for peregration,⁶⁰ we provide the agent with the maximum incentive to desist during the preparation stages of his activity since he is aware that he may abandon his enterprise at any point short of the executive causal link and incur liability and lesser punishment for the preliminary offence of peregration.⁶¹

In response to my second comment above one might object that if we are to distinguish between D_1 and D_2 at the conviction stage then we ought to distinguish between D_2 and D_3 who merely pulls a gun out in V's presence and then desists (both agents acting with the purpose of killing V). My reply is that there is a major distinction between the moral turpitudes of the agent who tries and fails and the agent who decides not to try at some point during his preparations. Any moral distinction between the agents who desist at different points in preparation pales into insignificance in the light of that major moral distinction. Also I am not sure that there is a significant moral distinction between agents who, desist at different points in preparation since both demonstrate that they do not wish to go (and have not gone) through with their criminal design. In any event the facts of the cases may enable us to distinguish between such agents for the purpose of attributions of liability. Suppose for example that D_4 places his hand in his pocket in order to pull out a gun and shoot V but changes his mind and does not expose the weapon. We would convict D_3 with an assault on V for the purpose of committing murder (since the assault is itself criminal⁶²) but we would convict D_4 (who has desisted

from committing murder at an earlier point in the causal chain) of peregration (and not assault) for the purpose of committing murder.⁶³

Glazebrook notes a second objection to the 'executive link' theory of attempts.⁶⁴ He states that it would not be so easy to apply as might first seem. He posits the case of an intending incendiary crouched by a haystack with a full box of matches, and strikes one which is blown out by the wind just as he puts it to the hay. Glazebrook asks whether the incendiary has attempted to set fire to the stack. Is there something more that he can do if the crime is to be committed - to wit, strike another - and another match? With respect to Glazebrook the question poses no difficulty for my proposal. At the moment when the incendiary puts the match to the haystack he has completed the executive causal link: that act which is itself capable of producing the actus reus aimed at by him, and he is guilty of attempted arson. This case is analogous to the case of an agent who fires a gun at his victim but misses. Some extraneous phenomenon has caused the first bullet to miss but one would not deny that the agent is guilty of an attempt on his victim's life with the first and each succeeding shot fired by him. Is it then unfair to convict the incendiary of attempted arson? My submission is that we should ignore reasons for failure and look exclusively to the act of the defendant: if that act is capable, ceteris paribus, of producing the illegal consequence then one may ascribe responsibility to him for an attempt. Glazebrook's comment that the agent may strike another and another match fits into the pattern of the proposal. At the point at which the agent decides to try again and sets his desire into physical motion (by opening the matchbox again) he sets in motion a new causal chain of activity quite distinct from, although identical to, the first and may be judged afresh in relation to this new activity. In short the incendiary is guilty of an attempt each time that he places a lighted match to the haystack since on each occasion he brings himself to the executive causal link of a separate and distinct causal chain.

A third objection to the proposal is that in assessing the entire conduct of an agent one might have difficulty in establishing just which acts of the agent amount to peregration. Implicit in this objection is

the truism that the agent who does an act x with intent y is to be distinguished from the agent who does act x whilst having intent y. The objection may be illustrated as follows. D decides to commit a burglary at 25 Acacia Avenue. He places some necessary tools in a bag and sets out to his designated target. En route he stops off at a restaurant for a meal. Are we to charge D with peregration with the purpose of committing burglary in respect of his act of eating a meal?

This objection provides no obstacle for my proposals which insist that an act of peregration occurs at each link of the causal chain, i.e. the effect of each exertion by the agent, which is a *singularly necessary* preliminary step toward a later criminal offence. As I have explained above⁶⁵ a 'singularly necessary exertion' is one which is exclusively preparatory to the later criminal offence: there is no other effect towards which that exertion is a necessary preliminary. Any exertion which is not a singularly necessary preliminary step towards the prospective offence cannot amount to peregration. When he sets off from home with the tool kit D is guilty of peregration since this is a singularly necessary preliminary step towards the commission of burglary.⁶⁶ As he eats (doing act x) in the restaurant his intention (while having intent y) remains, but his eating has nothing to do with his enterprise; it is thus not a singularly necessary link in the causal chain of activity⁶⁷ and attracts no criminal liability per se, although, as already stated, his liability for peregration has been established before he enters the restaurant.

One final criticism of the proposed model of peregration is that it significantly increases the scope of the criminal law and any such extension requires some justification. I would make one or two points in answer to this criticism. First, the theory would not in fact extend the the scope of the criminal law as much as might at first appear. We already have in our law a number of offences which are effectively preparatory to a further substantive offence. Examples include s.25 of the Theft Act 1968 ('going equipped') and s.4 of the Vagrancy Act 1824 (being found on enclosed premises). The proposed theory would thus extend the law to the extent that it would admit to criminal

responsibility preliminary acts towards commission of a substantive offence which are, in themselves, innocent. I think that this increase in the scope of criminal law is justified for the reasons which I have stated above,⁶⁸ the most noteworthy here being that my proposal enables us to distinguish between seemingly innocent acts which, given the reasons for commission, point to significant differences between the agents in terms of moral turpitude.⁶⁹

'Executive Link' Attempts, Peregration and Provisional Purpose.

In chapter 4 I proposed that the agent who commits a criminal offence which is a necessary preliminary to a prospective criminal offence which is subject to a condition should be guilty of the substantive offence *with the provisional purpose* of committing the prospective offence.⁷⁰ The issue here is whether or not we ought to attribute liability to an agent who has taken otherwise innocent activity along a causal chain which leads to a criminal objective which is subject to a condition. Suppose for example that D₁ decides to approach his ex-fiancee with a view to a reconciliation (the primary causal chain and not criminal per se). He plans to abduct her if she refuses (the provisional objective which is criminal in nature) and to this end he places a length of rope in the boot of his car (a singularly necessary exertion along the provisional causal chain selected by him). Should we ascribe liability to D₁ for his act in placing the rope in the car on the basis that that act is taken with a criminal offence in mind, albeit subject to a condition?

I submitted in chapter 4 that there is a significant moral difference between provisional and unconditional purpose since to the extent that my purpose is provisional I may be less committed to it.⁷⁰ I think also that within the area of preliminary activity concerning a prospective offence which is subject to a condition there is a significant moral difference between the agent who has and the agent who has not perpetrated a preliminary criminal offence, since the agent who has brought about a preliminary actus reus demonstrates that he is more committed to his provisional objective. That distinction deserves legal

recognition. We may achieve this by attributing provisional purpose only to criminal offences which constitute a necessary preliminary to a provisional criminal purpose or objective. On this basis the preliminary substantive offence of peregration could not apply to a provisional objective whilst it remains provisional. However when the agent takes a firm decision to bring about a ^{Singularly Necessary} preliminary criminal offence leading to his provisional objective and takes a physical step towards that preliminary offence he would be guilty of peregration. Suppose that D₂, like D₁, decides to ask his ex-fiancee for a reconciliation. In case she refuses he decides to abduct her. To this end he decides to enter a local chemist, distract the pharmacist and steal some ether. He arrives at the chemists just as the pharmacist is closing for the day. In this hypothetical D₂ has made a firm decision to bring about a preliminary criminal link in the provisional causal chain and has taken physical steps to achieve it. He is thus guilty of peregration for the purpose of committing theft. We would not extend D₂'s purpose to kidnapping since the offence of peregration is restricted to the most proximate substantive criminal offence. Had D₂ been successful in stealing ether then he would be guilty of theft with the provisional purpose of kidnapping.⁷¹

It is convenient at this point to summarise my proposals on breakdown of the causal chain. An agent who plans a specific substantive offence and sets in motion a chain of activity which, when complete, is capable of producing such, is subject to criminal liability in accordance with the following:-

(i) where he has taken an otherwise innocent singularly necessary exertion to bring about his criminal objective, there being no preliminary criminal offence in the causal chain, he is guilty of peregration for the purpose of committing the offence which is his objective.

(ii) where there is a preliminary criminal offence in the selected causal chain and he has taken an otherwise innocent singularly necessary exertion towards the preliminary offence he is guilty of peregration for the purpose of committing that preliminary offence: the criminal objective is ignored in the attribution of purpose.

(iii) where he makes an exertion which is capable of bringing about the preliminary criminal offence he is guilty of an attempt at that offence: the criminal objective is ignored in the attribution of purpose.

(iv) where the agent completes a preliminary criminal offence he is guilty of its commission for the purpose of committing any further preliminary offence in the selected causal chain with the objective of committing the criminal offence which is his objective.

(v) where the agent brings about the last link in the causal chain which leads to his objective he is guilty of an attempt at the criminal offence which constitutes that objective.

(vi) where that last link produces the actus reus the agent is guilty of the substantive offence which constitutes his objective.

(vii) where the agent plans a provisional causal chain (i.e. some criminal objective which is subject to the existence of some fact or circumstance at the appropriate future time) then

(a) if he has determined to bring about a criminal offence which is a necessary preliminary to the provisional objective and has made an otherwise innocent exertion towards that preliminary offence he is guilty of peregration for the purpose of committing that preliminary offence: the provisional purpose is ignored in the attribution of purpose.

(b) if he brings about that preliminary criminal offence he is guilty of its commission with the provisional purpose of committing the offence which is his provisional objective.

(c) if at some point along the causal chain the agent determines to bring about his provisional objective the causal chain would now apply to an unconditional objective and would be subject to (i) to (v) above.

The agent does not commit a further offence of peregration at each link of the preregratory causal chain since the activity which constitutes that causal chain is viewed as a whole for the purpose of ascriptions of criminal responsibility. However the distance which the agent travels along the peregratory chain towards commission of the substantive offence would be subject to consideration at the sentence stage.⁷²

I turn now to the third category of attempts.

3. Attempts in which the agent holds a mistaken belief about some fact or circumstance of his enterprise which either (a) effectively prevents his enterprise or (b) cannot prevent the object of his activity.

In order to discuss this category it would be useful to sub-categorise thus

(a) where the agent's mistake effectively frustrates his enterprise. Illustrations include the agent who puts sugar into his victim's tea believing it to be arsenic and the agent who shoots at a tree stump believing it to be his enemy. From the case law there is Shivpuri⁷³ where D purchased a harmless substance believing it to be heroin. The main feature of category 3(a) attempts is that the agent is aiming at a particular actus reus which, in the actual circumstances, is not capable of fruition and his enterprise is thereby frustrated.

The ideal typical subjectivist construction would hold the agent in category 3(a) guilty of an attempt at the substantive offence on two grounds. First the agent should be judged on the facts as he believed them to be. This reasoning follows that put forward by Sir Rupert Cross about defences to criminal liability generally.⁷⁴ Second, (and perhaps following upon the first) the agent is both dangerous, since he has demonstrated his resolve to bring about the proscribed harm, and culpable since, at the time of the exertion which would, as he reads it, bring about the proscribed harm, he believes that his act will bring it about and acts as he does because of that belief.

With regard to the first subjectivist ground for liability one might ask if the law would always wish to judge the accused on the actual state of his belief? There are qualitative gradations of belief and there is a point where one would judge the belief to be so unreasonable that one would regard it as evidence that the accused did not possess real moral responsibility and thus, perhaps, should be excused on the basis of involuntariness. For instance Derek may pick up an obviously plastic toy gun and 'fire' at his enemy in the belief that the toy is a real and loaded revolver. My view is that at the point where his belief in a

particular fact or circumstance becomes unreasonable the agent may be said to lack the capacity to appreciate physical reality and should thus be free from criminal responsibility although subject to the civil process in appropriate cases.⁷⁵ To this extent the subjectivist notion that the agent be judged in the light of the facts as he believes them to be stands in need of modification. I should point out here that Derek has committed the actus reus of an assault on his enemy with the intention of doing so and one is thus entitled to ascribe criminal liability to him for that substantive offence provided that his enemy believes the gun to be real and is thus put in fear of immediate and unlawful physical violence.⁷⁶

The ideal typical objectivist construction would apply a hybrid approach to this category of attempts and ascribe criminal responsibility to the agent whose act manifests a desire for the proscribed consequence whilst excusing from the criminal process the agent whose act does not manifest conduct proscribed by the criminal law. Thus the agent who takes an unloaded gun believing it to be loaded and fires at his enemy would accordingly be criminally liable for an attempt on his victim's life since his inapt action bears the hallmark of attempted murder whilst the agent who shoots at a tree stump believing it to be his enemy would be free from liability for attempted murder since his action is innocent on its face.⁷⁷ It seems to me that this logic is defective since both agents have the same mens rea (the intention to kill), and both believe that the act perpetrated will produce the actus reus at which they aim. The only difference between them seems to be that one agent has a mistaken perception about the efficacy of the means employed for the purpose whilst the other has a mistaken perception about the target. In my submission this distinction between the agents should be ignored for the purpose of attribution of criminal responsibility.

Galloway⁷⁸ provides a specific argument against such distinction. He says that an attempt to commit a crime is itself not criminal because of the likelihood of success, nor because of the dangerousness of the agent but because it amounts to an affront on the interests which the criminal law considers sufficiently worthy of protection. An affront on a person

is more than a physical intervention in his life since one can also attack a person's interests. Thus whilst the agent who shoots at a tree stump thinking it is his enemy is not physically interfering in his victim's life he is nonetheless attacking his victim's interests. Consider the case of V who has been advised by an independent observer that an attempt on his life has just been made by D who has fired at a tree stump believing it to be V. He would probably feel that there has been an affront on his interests and that affront should be subject to the criminal process.⁷⁹

Current criminal law has followed the ideal typical subjectivist construction.⁸⁰ I turn now to the second division of category 3 attempt.

(b) where the agent is mistaken as to some fact or circumstance which cannot thereby frustrate the object of his enterprise.

Examples here include the agent who has intercourse with a girl of sixteen believing her to be fifteen and the agent who purchases 'clean' goods in the belief that they are stolen. The main feature with category 3(b) attempts is that the agent is mistaken about a particular quality of some material fact or circumstance which cannot prevent the consequence although it may affect its legal character.

The ideal typical subjectivist construction would hold the agent in this sub-category guilty of an attempt at the substantive offence where his mistake causes him to believe he is committing a criminal offence on the main ground that the agent should be judged on the facts as he believes them to be. The objectivist model would excuse the agent here since the agent has not brought about any effect which signals danger to society. Current law follows the subjectivist model. In Anderton v Ryan⁸¹ D purchased a video recorder in the belief that it was stolen property. At the trial the prosecution conceded that the goods were not in fact stolen but contended that D was guilty of attempting to handle stolen goods on the basis of s.1(3) of the Criminal Attempts Act 1981. The House of Lords quashed the conviction on the ground that Mrs. Ryan's activity was objectively innocent. However the House reversed the

decision later in Shivpuri⁸² and it is clear that the criminal law interprets this category of attempt in accordance with the ideal typical construction of subjectivism.

There is a very clear distinction between the sub-divisions of category 3 attempts. In 3(a) the agent's plan is to commit a criminal offence. He is aware that the effect aimed at by him constitutes a criminal offence and if his plan is not successful (if the criminal offence is not in fact committed) then he would feel that his enterprise has in some way been frustrated. Thus in a case like Shivpuri the mistaken fact which eventuates in a breakdown in the planned causal chain leads the agent to the conclusion that his enterprise has been a failure - that there has been a mistake which has prevented his otherwise intended illegal goal. In category 3(b) attempts the agent's activity is entirely successful - there is nothing in the actual causal chain which he feels has frustrated his enterprise. Thus, no doubt, Mrs. Ryan did not feel that her planned causal chain had been in any way frustrated by the news that her belief that the video recorder was stolen was unfounded in fact. On the contrary her enterprise was successful in circumstances which, in terms of actus reus at least, did not breach any standard set by the criminal law.

Current law makes no distinction between the two sub-divisions of category 3 attempts. In Shivpuri⁸² the House of Lords specifically overruled the decision in Anderton v Ryan⁸³ so that the agent who purchases 'clean' goods believing them to be stolen is guilty of attempting to handle stolen goods on current law.⁸⁴ But in my view it is wrong that neither current law nor the theorists are prepared to make the distinction between the two divisions. My objection is based on two main grounds.

First, I would maintain the premise that in cases of consensual activity between parties which is de facto legal any duty imposed by criminal law on one party not to take part in the transaction in any given circumstance reduces, if not extinguishes, the right of the other party

to have legal relations with whom he chooses. I illustrate my objection with two hypotheticals.

(i) Daniel has been approached by Peter with a view to a prospective sale of Peter's watch. Daniel is suspicious about the legal status of the proposed contract since the 'asking' price is much below the market value. If Daniel forms the belief that the watch might be stolen property then he must, on peril of criminal sanction, refrain from entering into the consensual interaction and this deprives the true owner, Peter, of his right to have a particular legal relationship with the mistaken party. The basis of my objection is illustrated even more clearly if the object of the prospective sale is not a common item such as a watch but one for which there is a very restricted market. In this case the duty which the criminal law imposes upon Daniel not to enter into the de facto legal contract substantially reduces Peter's ability to sell his merchandise.

(ii) David wishes to have a sexual relationship with Vera, aged 16 although David believes her to be aged 15. One evening when they are alone together David has intercourse with Vera. Under current law David is presumably guilty of attempted unlawful sexual intercourse since, once he forms the mistaken belief that Vera is under 16 years of age he must, under peril of criminal sanction, refrain from sexual relations with her. This deprives Vera of her undoubted right to have intercourse with the mistaken David and since David is presumably the only male with whom Vera is prepared to have such a relationship current law, by way of the law on attempts, has effectively prevented Vera from entering into that kind of relationship altogether. This will certainly be so if David is convicted of attempting to have unlawful sexual intercourse with Vera and is awarded a prison sentence.

Second, the distinction between the two types of category 3 attempt for the purpose of ascriptions of criminal liability may be justified on grounds similar to those postulated by Galloway.⁸⁵ In the case of the agent who, on realisation of the true facts, feels that his mistaken belief has frustrated his enterprise we find that the agent is de facto attacking the interests of the person whom he believes he is harming. In the case in which the agent would not feel that his mistaken belief has

led to a failure of the enterprise we find that the agent is de facto contributing to the enhancement of the general wellbeing of the other party to the transaction.

In conclusion I submit that the category 3 attempts should be restricted to cases in which the agent has made a factual error concerning some fact or circumstance of his activity which effectively frustrates his enterprise. Since current law does not make the distinction between the cases it would be necessary to legislate in order to achieve it. There are two major strategies available. First, we may amend the substance of the Criminal Attempts Act 1981. I set out below the current provisions of s.1 relating to impossibility and add to s.1(3)(b) a proposed proviso (in italics) which marks the distinction between the two sub-divisions of category 3 attempts.

"(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where

a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then for the purposes of s.1(1) above he shall be regarded as having an intent to commit that offence *unless the defendant would have continued with his activity whether or not the facts had been as he believed them to be.*

The proposed proviso separates category 3 attempts into (a) cases in which the agent would cease all activity leading to the object of his enterprise when disabused of his mistaken belief and (b) cases in which the agent would continue with his enterprise even if disabused of his mistaken belief before the executive causal link. The proviso thus marks the distinction between the sub-divisions of category 3 attempts. Shivpuri would have desisted had he been aware of the true facts at the time of (as he saw it) the executive causal link and we may thus charge him with an attempt.^{ee} On the other hand Mrs. Ryan would have continued with the purchase of the video recorder even if disabused of her

mistaken belief just short of (as she saw it) the executive causal link. Mrs. Ryan would not be guilty of an attempt on the proposed definition of attempt.

One might object to this strategy on the ground that it leads to unjustified distinctions in the cases. We might take as an example the case of the tourist, Dudley, who is approached by a rogue and offered a brand name watch at a very low price. Dudley buys the watch in the belief that it is stolen when, in fact, the watch belongs to the rogue and bears a false brand name.⁸⁷ Whilst he would have continued with his transaction though disabused of his mistake about the possibility that the watch was stolen Dudley would certainly have abandoned his plan to buy the watch had he been made aware of the fact that the watch was a cheap imitation. On this reasoning it seems that one must conclude that Dudley would desist from his activity when in possession of the actual facts and is thus guilty of attempting to handle stolen goods. On this basis we are distinguishing between Dudley and Mrs. Ryan which seems wrong since both agents have performed the same activity with the same erroneous belief and thus ought to be subject to equal consideration in any assessment of criminal responsibility.

I share the objector's concern here but submit that the qualification does not lead to such distinctions between the cases. It will be noted that the net effect of s.1(2) and s.1(3) of the Criminal Attempts Act 1981⁸⁸ is that current law restricts liability for mistaken beliefs to facts which, as the agent sees it, brings him within the criminal law of attempts: current law thus refers to a mistake of facts which affects legal status. My proposed extension to s.1(3)(b) has the same effect: the question would be whether or not D would have desisted from his activity short of the executive causal link had he been aware of the true facts which affect his liability for an attempt? If the answer is no then he has not committed an attempt on my proposed category 3. In the illustration above Dudley is mistaken about a fact which, if true, would affect his legal status concerning the transaction with the rogue, and he would certainly have continued with the transaction if that were the only mistake he was making. However there is second factual

misperception made by Dudley, namely the belief that the brand name on the watch is genuine. Whilst the latter mistake would affect his decision in carrying on with the agreement it does not affect Dudley's legal status concerning the transaction and can be ignored for the purpose of assessing criminal responsibility. On this basis Dudley is in the same position as Mrs. Ryan; he has purchased property believing it to be stolen when it is not, a misperception which would not per se have affected his decision to go through with the contract. On the proposed category 3 attempt neither Dudley nor Mrs. Ryan is guilty of attempting to handle stolen goods.

A further possible objection to the qualification in category 3 attempts is that it is too sophisticated since we might arrive at the same legal position by simply excluding de facto innocent transactions from the category. I would make two comments here which I think indicate that this objection (and alternative qualification) is not well grounded. First, it is not always clear whether or not particular activity is in fact criminal in nature: for inevitably there will be activity which falls at the fringes of specific criminal offences. A particular example here would be the case of the agent who shoots at a tree stump believing it to be his enemy V. Can D not claim that his activity is de facto innocent and that he ought not thus incur any liability concerning his mistaken belief that he is killing V? Second, if we exclude innocent transactions from category 3 attempts then we automatically include all transactions which are criminal in character regardless of the source of criminality. This would render Dudley in the illustration above guilty of attempting to handle stolen goods since the transaction is criminal in nature because of the dishonest preparatory activity of the rogue which has led to at least attempted fraud. This proposed alternative qualification to category 3 would thus lead to a distinction between the cases of Dudley and Mrs. Ryan. Yet, as I have pointed out above, Dudley has the same mental state and perpetrates the same activity as Mrs. Ryan and should receive equal status in any assessment of liability. It is submitted that the proposed alternative qualification ought to be rejected.

A second strategy to mark the divisions of category 3 attempts is to insist upon my model of direct intention⁸⁹ as the only requisite mental state for the inchoate offence of attempt. This would bring into play the test of failure.⁹⁰ Thus we may say that the agent must be aiming to bring about the criminal enterprise and if, owing to a mistaken belief the enterprise is de facto innocent then he would feel his enterprise has failed and thus intended both the consequence and its criminal nature. On the other hand where the agent does not feel that his activity has been a failure where the supposed illegal quality is absent then D does not directly intend to commit a crime and does not thus commit an attempt. This strategy will have the same effect as the first. The agent who aims and shoots at a tree stump believing it to be his enemy directly intends his death and would feel that his enterprise has been frustrated when made aware of the true facts. On the other hand David who has intercourse with Vera, aged 16, believing her to be 15 does not directly intend unlawful sexual intercourse since he would not feel that his enterprise has been frustrated when made aware of the fact that she is 16. We may emphasise David's non-liability by juxtaposing with his case the hypothetical of Dennis, a paedophile, who has intercourse with Vanessa believing her to be 14 when she is in fact 18. There is I think a significant moral distinction between David and Dennis. Dennis is out to have unlawful sex with children - adults do not interest him. When he learns the true facts Dennis would no doubt feel that his otherwise criminal activity has been frustrated: he has not achieved his directly intended goal namely intercourse with a child under 16.

I am inclined to the the second strategy but whichever we adopt the case of Haughton v Smith⁹¹ presents problems if we wish to place agents such as Roger Smith into category 3(a) attempts and attribute liability to him for an attempt. In the case the police intercepted a van carrying stolen goods. In order to catch the receivers the police allowed the van to proceed to the rendezvous point with two policemen inside suitably disguised. Smith and another entered the van and the vehicle was driven to London under Smith's direction. At destination Smith played a leading role in the disposal of the van and its contents. The gang were then

arrested. Smith was convicted of attempting to handle stolen goods. The prosecution did not charge Smith with the full offence since they were of the opinion that by the time he joined the van the goods were no longer stolen since they were restored to lawful custody in accordance with s.24(3) of the Theft Act 1968.⁹² Smith successfully appealed against conviction and the prosecution appealed to the House of Lords.

Lord Hailsham questioned whether the prosecution were right to assume that the goods had in fact been restored to the rightful owner. But in any event on the assumption that lawful custody had been restored Lord Hailsham considered that a count of theft or attempted theft would have been appropriate and ought properly to have succeeded. He felt however that he was not able to substitute a verdict of theft since there was not an appropriate count in the indictment. He dismissed the appeal on the ground that for the purpose of s.22 of the Theft Act 1968 the goods must not only be believed to be stolen but actually continue to be stolen goods at the moment of handling.

The decision raises several problems. First, were the goods restored to lawful custody? Lord Hailsham (and Lord Reid) thought that the answer might be no but generally left the question open. If the answer is no then a charge of handling stolen goods would have been appropriate. Second, is Lord Hailsham right when he says that, on the assumption that the goods were restored to lawful custody, Smith could be charged with theft or attempted theft? It is submitted that this cannot be right since first, Smith did not have the intention to deprive the owner permanently of his property since he believed the property to be already stolen and second, the owner (the police as agent for the true owner) was present and allowed Smith to enter the vehicle, direct it to London and arrange disposal of van and contents. All of this suggests that it is by no means clear whether or not Smith's activity amounted to a criminal offence.

Where does Smith stand in relation to the alternative strategies for distinguishing category 3(a) and 3(b) attempts? Ignoring the police trap for a moment can we say that Smith would have desisted from his activity

had he been aware that the goods had been restored to lawful custody? One might argue that if Smith had been disabused of his mistake before the executive causal link he might have continued with his activity, thus committing a new act of theft. On this submission Smith would be free from criminal liability on the first strategy. Also it might be said that Smith would not have considered his enterprise a failure had he disposed of the goods and then realised that they were in fact back in lawful custody at the time of his activity. On this view Smith did not directly intend to handle stolen goods.³³ It is submitted that Haughton v Smith is a special case on its own facts for two reasons. First Lord Hailsham and Lord Reid seemed to think that lawful custody had not been restored and so Haughton v Smith is not a case of impossible attempt at all: it represents a case in which the agent perpetrates the substantive offence. Second, assuming that there was not restoration of lawful custody the case is one in which the police are in effect setting a trap for the receiver and his mistake about the fact that the goods are stolen at the time of his activity is intimately, perhaps conceptually connected with the fact that a trap has been set.³⁴ On this basis we might say that Smith falls into category 3(a) attempts on either strategy: he would have desisted on the true facts being made known to him before the executive link and he certainly would have considered his activity a failure when the arrest is made and the goods are returned to the true owner. The problem would be eradicated by a statement from the court (when the opportunity arises) that once goods are stolen they remain stolen until either they have been returned to their actual owner (no agency permissible) or otherwise legally disposed of where the actual owner cannot be traced.

Category 3 Attempts and Peregration.

(1) On the strategy that the agent is guilty of an attempt if he would desist from the executive causal link if disabused of his mistake before that point: if the agent would desist from his planned activity when informed of the true position then that activity falls within the parameters of category 3 attempts and he is thus guilty when he has completed the executive causal link which, in his view, is capable of

bringing about the proscribed harm aimed at by him. It follows that in such a case there is a peregratory causal chain leading up to that executive causal link and the agent is thus guilty of peregration if he abandons his enterprise before his activity reaches the executive causal link which, on his belief, is capable of bringing about the proscribed harm. On this basis the agent who takes aim at a tree stump believing it to be his enemy but desists before pulling the trigger is guilty of peregration for the purpose of committing murder since he has embarked upon the peregratory chain which he abandons short of the executive causal link. The same reasoning applies to the agent who aims a gun at his victim wrongly believing it to be loaded but desisting before pulling the trigger.

If the agent would continue with his planned activity though disabused of his misperception about some fact or circumstance then his activity falls outside the parameters of category 3 attempts and there can thus be no executive causal link. It follows that there can be no peregratory causal chain and the agent who desists from that activity in the preparation stages attracts no criminal responsibility notwithstanding that he believes his activity will lead to the proscribed harm aimed at by him. On this basis Mrs. Ryan would not be guilty of peregration if she decided at some point in her activity to decline the offer of sale and did in fact do so. Similarly if Dudley had decided not to buy the false brand name watch at some point in his activity and had gone no further he would not be guilty of peregration with the purpose of handling stolen goods since he had not embarked on a peregratory chain. The same reasoning applies to the agent who moves some way towards sexual intercourse with a girl whom he wrongly believes to be under 16 but who desists short of penetration.

(ii) On the strategy that the agent must directly intend the criminal aspect of his activity: if the court or jury is satisfied that the agent directly intends both the effect and its criminal character then they may convict of peregration for the purpose of committing the prospective criminal offence at the first link in the causal chain which is singularly necessary as a preliminary to that offence. Thus where D

decides to kill V and purchases some rope with which to commit the murder then D commits perjury even though at the time of the purchase V, unknown to D, is already dead.

If the court or jury are not satisfied that the agent directly intends the criminal character of his activity then the agent cannot be guilty of an attempt at the substantive offence nor of perjury for the purpose of attempting it. Thus where D takes £100 out of his bank account for the sole purpose of buying some property which he believes might be stolen when it is not he does not commit an act of perjury in taking out the cash if the court or jury are not satisfied that the fact that the goods were stolen was a sine qua non of D's objective in handling them.

4. Attempts which are Incompetent because the Agent is Mistaken about the Causal Properties of his Activity.

Illustrations of this category of attempt include the voodoo artist who pushes pins into an effigy believing that the victim will die as a consequence and the agent who puts sugar into his victim's tea believing that sugar can kill. In this category the agent makes no contingent or necessary mistake about what he is doing (he is knowingly pushing pins into an effigy or placing sugar, knowing it to be sugar, into his victim's tea). The mistake he has made concerns the efficacy of his act in relation to the consequence aimed at by him.

The general objectivist position is that the agent in this category is not criminally responsible for his attempt on the ground that the agent is hopelessly inadequate and he represents no danger to society.⁹⁵ The subjectivist is prepared to attribute criminal responsibility to this agent on the grounds that (i) he is both dangerous and culpable and it is right that he be subject to liability in the interests of the intended victim and society in general, and (ii) in all cases of impossible attempts the agent should be judged on the facts or circumstances as he believes them to be. Current law, adopting the second subjectivist standpoint,⁹⁶ holds the agent in this category

guilty of attempting the substantive offence at which his activity is directed.

Harris criticises the subjectivist approach to this category of attempts using the voodoo artist to illustrate his case.⁹⁷ He notes the subjectivist stance that the agent should be judged on the facts as he believes them to be and asks if the exponent of voodoo is to be blamed and punished to the same extent as the agent who sticks knives into his enemy with the same belief (that he is about to bring about the death of his victim). For Harris there is a moral difference in the quality of each agent's attempt. That moral difference has to do with the quality of the attempt and the quality of the beliefs of the agent about his capacity for bringing about the harm aimed at by him.

Underlying Harris' statement is the consequentialist theory that blame and punishment should be awarded only insofar as the benefits to be gained outweigh the costs involved. On this view punishment awarded to our voodoo practitioner would produce no (let alone proportional) benefit to the intended victim or to society. Should we accept this consequentialist notion and seek to modify the subjectivist approach?

A possible response which may be made by the subjectivist is that the voodoo artist has a guilty disposition but has chosen an inefficient method of demonstrating it. When he realises that his exertion has failed to produce the intended result this agent may resort to some other activity which might result in the more efficient dispatch of his victim. I am not sure that this response is tenable since one cannot be sure whether or not this agent would go beyond 'retributive' activity which is carried out in accordance with his spiritual beliefs. One cannot be sure that the voodoo artist is in fact dangerous and thus, on subjectivist philosophy, one who ought to be subjected to the overall objectives of the criminal system.

The reality of the voodoo case is that, as with the other cases in this category, the agent has done his act in the belief that the act will produce an adverse change in the world when, in fact, there is no causal

nexus between his act and the consequence which he believes he is bringing about. My submission is that an essential condition for criminal liability is that the agent must have some capacity to appreciate physical causality. If the agent's perception of 'causal nexus' is deficient so that he cannot produce the result which he is aiming to bring about he should not be guilty of an attempt. This approach may be justified on two grounds. First, an agent such as the voodoo man is not in any way dangerous whilst he confines himself to his ineffectual activity, and second, an agent who is so hopelessly out of touch with reality cannot be expected to resort to any efficient method of execution of his design: there is some fundamental defect in this man's reasoning power which, if it is to be the subject of legal assessment of any kind, might suitably be subjected to scrutiny by the civil process.

My submission is that the Criminal Attempts Act (and the ideal subjectivist position) should be suitably amended to exclude this class of agent from criminal responsibility. This may be done by a suitable proviso to s.1(3)(b) to the effect that in the cases of impossible attempts the agent should be judged on the facts as he believed them to be *'unless the accused's mistaken belief arises from incapacity to appreciate the causal properties of his exertion'*.

Although my proposal has objective overtones (the agent in this category has (i) done nothing which is prohibited by the definition of the offence, (ii) produces no state of affairs which violate the criminal law and (iii) is being kept distinct from the criminal process) I think that it conforms with the spirit of subjectivism for the agent in this category of attempts is neither dangerous nor culpable and there is no need to subject him to the criminal process in the interests of public safety.

My suggested reformulation of s.1(3)(b) would not only meet Harris' argument that the voodoo practitioner should receive less punishment than the agent who sticks knives in the back of his victim; it goes further and excludes him from criminal liability entirely. Of course one

might resort to the 'separate offence' strategy in this particular area and prohibit the practice of witchcraft by suitable legislative enactment.

One final point about the voodoo artist. In a proper assessment of criminal responsibility one must look at all the circumstances of his case. Interesting issues may be encountered. For example the voodoo man may claim that he was acting in self defence. In Nyuzi and Kudemera v Republic (Malawi)⁹⁸ young children in a village were dying shortly after birth. The first appellant, a witchdoctor, decided that there must be witches among the villagers. He believed that any witch who drank muabvi would die. He therefore prepared some muabvi and administered it to sixteen volunteers. Four died shortly after. A government analyst examined the mixture and was satisfied that it was not poisonous. Nyuzi was charged with agreeing to hold a trial by ordeal contrary to s.3(2) of the Witchcraft Ordinance. The trial judge said that Nyuzi's defence was self defence (in this case the defence of the person of others).

Category 4 Attempts and Peregration.

If one accepts my contention that category 4 attempts do not fall within the criminal law of attempts then it follows that there can be neither an executive causal link nor a peregratory chain of causal activity.

5. Activity which brings about a change in the world or a state of affairs which the agent believes to be contrary to law when it is not.

Here the agent is making a mistake about the current criminal law. An example would be the agent who has intercourse with a girl whom he knows to be 17 years old in the belief that it is unlawful to have intercourse with a female under the age of 18.

Objectivists would excuse the agent in this category from criminal responsibility and this would seem to be the correct view. There is no actual or possible act or circumstance which is contrary to law and the

criminal law should concern itself with conduct which has been proscribed thereby.

The ideal typical construction of subjectivism would not attribute liability to this agent since it insists that the agent should be judged on the facts as he believed them to be and not on the law as he believes it to be. This proposition is based upon the more general subjectivist argument that if the purpose of the criminal law is to signal society's condemnation of activity of a particular type then activity which is not subject to criminal law does not need be punished since the agent will have done nothing which society need condemn. On this view an agent who perpetrates innocent activity cannot be guilty of an offence (including an attempt) whatever the state of his mind as to the legal status of that activity. To ascribe liability in such a case would be tantamount to punishing a man for his thoughts. On a more practical point the ordinary man may create law neither by choice nor by belief. It is submitted that the agent in this category cannot be guilty of an attempt.

Whilst the phraseology of the 1981 legislation on attempts is not entirely clear it seems that in law the agent in this category is free from liability since s.1(3) talks in terms of mistake as to a fact and not a mistake as to law. Perhaps the matter ought to be put beyond doubt by express provision in the statute.

Category 5 Attempts and Peregration.

On my proposal (presumably accepted by the current law) category 5 attempts are not subject to criminal liability and it thus follows that there can be no executive causal link or peregratory causal chain.

6. Attempts in which the agent is reckless concerning a circumstance which is an integral component of the actus reus of the substantive offence in issue.

I include this category of attempts for completeness here. I deal with reckless attempts in detail in Chapter 8.⁹⁹ I now apply the proposed structure of mens rea to a second inchoate offence

2. Conspiracy.

The inchoate offence of conspiracy fits well into the proposed structure of intention, purpose and objective. At current law if a person agrees with another or others that one or more of them perpetrates a criminal offence they are guilty of conspiracy concerning that offence.¹⁰⁰ On the proposed structure of mens rea the agreement to commit a crime would be a preliminary criminal offence: the term conspiracy would be retained. The conviction against the agents would be conspiracy *for the purpose of committing* the offence which is their criminal objective. If the conspirators agree to commit a crime subject to a condition then they would be guilty of conspiracy *for the provisional purpose* of committing the offence which constitutes their provisional objective.¹⁰¹

The proposed structure would differ from the current law on conspiracy in two respects. First, where one of the parties has made some otherwise innocent exertion which is a singularly necessary preliminary to the making of the agreement then he would be guilty of peregration for the purpose of a conspiracy to commit the offence which constitutes the criminal objective. Where, for example, D makes a telephone call to P in order to negotiate the commission of a burglary but D is not at home D would be guilty of peregration for the purpose of a conspiracy to commit burglary. If P answers the phone and D proposes the crime but P does not hear or does not agree D would be guilty of attempted conspiracy to commit burglary since, as he reads it, his activity is itself capable of bringing about the conspiracy. At current law D cannot be guilty of attempted conspiracy.¹⁰² Second, if the conspiracy between D₁ and D₂ involves the commission of the offence by only D₂ who goes on to complete the offence, D₁ would be guilty of the substantive offence by way of extraneous agency. On current law D₁ would be convicted of conspiracy. It is submitted that it is right that D₁ should be convicted with the substantive offence since his aim is that the harm be brought

about and he acts as he does (conspires with D_2) in the belief that this will bring about the harm. This aspect is dealt with in a little more detail in the application of the proposed structure of mens rea to a third inchoate offence, but suffice it to say here that my submission would not affect the current legal position in relation to sanction since the maximum punishment for conspiracy is the same as that which might be awarded for the commission of the substantive offence.¹⁰³

3. Incitement.

At current law an agent is guilty of incitement where he persuades or encourages another to commit a crime. If the other commits the crime then the inciter will be an accessory and may be charged accordingly; but he may be charged with incitement whether or not the offence incited is committed. At common law one may attempt to incite. Giving assistance in the preparation stages which will lead to the offence is not incitement unless there is some encouragement also.

The proposed structure of mens rea would retain incitement as an inchoate offence: the conviction would be incitement for the purpose of committing the criminal offence *through extraneous agency*. Any preparatory activity by the agent towards the commission of incitement¹⁰⁴ would count as peregration for the purpose of inciting the commission of the offence through extraneous agency. I use the term 'extraneous agency' for two reasons. First we may not use the term 'innocent agency' since the person incited will usually be liable for his activity which leads to the offence.¹⁰⁵ Second the term is used in order to demonstrate that, on the proposed structure, the agent is liable for the offence itself as though he had committed the actus reus himself. This is very much in line with existing law which holds him to be an accessory and liable to the same punishment as the principal offender where the offence is committed.¹⁰⁶

FOOTNOTES TO CHAPTER 5

1. It is interesting to compare my six-fold classification of attempts with the six-fold classification posited by Turner J in R v Donnelly (1970) NZLR 980. He says that a man who sets out to commit a crime may fall short of commission for the following reasons;

(i) he may change his mind before he commits any act sufficiently overt to amount to an attempt.

(ii) he may change his mind, but too late to deny that he had got so far as an attempt.

(iii) he may be prevented by some outside agency from doing some act necessary to complete commission of the crime.

(iv) he may fail to complete the commission of the crime through ineptitude, inefficiency or insufficient means.

(v) he may find that what he is proposing to do is after all impossible for some physical reason, whatever the means adopted for the purpose.

(e.g. D enters a room to steal a particular item but it is not there).

(vi) he may do everything sufficient to bring about the effect aimed at and find that what he has done, contrary to his own belief at the time, does not after all amount in law to a crime.

2. There is some disagreement between the theorists about whether the punishment should be different for such attempts and for successes. See, for example, Ashworth in 'Sharpening the Subjectivist Element in Criminal Law' in Philosophy in the Criminal Law. Franz Steiner Verlag Weisbaden G.M.B.H. 1984.

3. There is presumably no substantive offence with which he could be charged but the ideal typical model would convict him of assault where D₁ points the gun at the victim who is aware of his activity.

4. Both for the offence with which he is convicted and when he is convicted on a subsequent occasion. One might argue that there cannot be a truly objectivist conception of attempt at all. Fletcher treats attempts as a paradigm case of subjectivist criminality. My own view is that, for the purpose of the complete and competent attempt at least, an objectivist model is possible since in such a case the agent has perpetrated activity which manifests the objective aimed at (as where D shoots at his victim but misses).

5. 6 Cox C.C. 559 (1855).

6. See G. P. Fletcher, 'Rethinking the Criminal Law' at pp.140-1.

7. Holmes, The Common Law (1881).

8. R v Barker (1924) NZLR at p.874.

9. Ibid.

10. Lloyd Weinreb, 'Manifest Criminality, Intent and the "Metemorphus of Larceny"', (1980) Yale LJ at 314.

11. Supra note 8.

12. Ibid at p.877.
13. See D. Galloway, 'Patterns of Trying: a Critique of Fletcher on Criminal Attempts' in QLR 1982 pp.233-252 at p.245.
14. See the Criminal Attempts Act 1981 s.1(1).
15. Unless Smith may be charged with a status offence e.g. carrying an offensive weapon contrary to s.1(1) of the Prevention of Crime Act 1968.
16. And on Ashworth's theory the punishment will be as for the substantive offence where the agent has performed the last act which is capable of producing the proscribed harm. See supra note 2.
17. (1915) 2 QB 342.
18. [1987] Crim LR 195. See infra p.8 for the facts of the case.
19. In conversation with me.
20. See infra p.157ff.
21. Which is the point of an attempt on my model of that inchoate offence. See infra p.160.
22. Supra note 17.
23. Perhaps an appropriate charge might be an obstruction of the course of justice.
24. Supra note 18.
25. In conversation with me.
26. Capable in the sense that in the nature of things that link will produce the proscribed effect although it might not actually produce that effect for some reason (for example the gun might have a faulty sighting mechanism or, unknown to D the gun might not be loaded).
27. 'Purpose' as defined supra chapter 4.
28. See supra chapter 2 p.18.
29. I say 'nothing short of direct intention' not because there is some significant difference between direct and oblique (or concomitant) intention but because there is no room for oblique intention in this context.
30. For which see supra chapter 4 p.112ff.
31. See supra chapter 4 for a discussion on purpose crimes.
32. For a fuller discussion on impossible attempts see infra p.172if.

33. See supra p.90ff for a discussion on intention and desire.
34. Or 'objective' if there is only one later offence in the causal chain of activity.
35. See supra Chapter 4.
36. See infra pp.160-1.
37. e.g. an offence contrary to s.1(1) of the Firearms Act 1968 or s.3 of the Explosive Substances Act 1883.
38. Compare my structure of peregration with Professor Williams' suggestions in 'Police control of Intending Criminals' in the The Criminal Law Review (1955) 66.
39. It might be useful to compare my comments on abandonment with the views of Wasik in (1980) Crim LR 785.
40. In 'Theory of Legislation' (1876) at p.426.
41. Which on current law equates with the substantive offence except for murder. The maximum sentence for attempted murder is 10 years imprisonment.
42. Supra note 17.
43. Supra note 18.
44. See Skipp (1975) Crim LR 385 and Peter Jackson Ltd. v Consolidated Insurance of Australia Ltd. (1975).
45. But for reasons explained in the last paragraph current law would not attribute liability to him for theft.
46. We cannot include at this point the prospective offence against the car dealer since peregration can only be charged in relation to the nearest prospective criminal offence. See supra p.158.
47. 'With the objective' since the obtaining by deception is the last criminal offence in the selected causal chain and is thus Dominic's criminal objective. See supra Chapter 4.
48. See G. H. Gordon, 'The Criminal Law of Scotland' (Edinburgh 1967) pp.167-76.
49. See P. R. Glazebrook, 'Should we have a Law of Attempted Crime?' LQR (January 1969) pp.28-49.
50. See Criminal Code of Canada s.24.
- 51 ss.5.06-5.07.
52. s.221.2

53. See particularly ss.224.2-224.9.
54. On this issue see Clarkson and Keating's discussion on 'precurser offences'.
55. Although that authority does not support generally the proposed lesser offence of peregration relating to effects which fall short of the last act which is sufficient for the purpose of bringing about the proscribed harm.
56. R v Schofield (1784) Cald 397.
57. E.g. s.1(1) of the Prevention of Crime Act 1953 which states that 'any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has in any public place any offensive weapon shall be guilty of an offence ... '.
58. Supra note 49 at p.39.
59. Supra p.159.
60. Ibid.
61. See the ninth feature of peregration, supra p.159.
62. See generally Smith and Hogan, 6th ed. at p.376ff..
63. The issue about the agent who desists voluntarily as opposed to being prevented is of importance here. See supra p.159.
64. supra note 49.
65. Supra p.157.
66. That activity has no other purpose or objective other than the commission of burglary.
67. Although it is a link in the causal chain.
68. Supra p.160ff.
69. Supra p.162.
70. See supra chapter 4 at pp.132.
71. For a summary account of the law on kidnapping see R v D [1984] AC 778. See also B. W. Napier, 'Detention Offences at Common Law' in Reshaping the Criminal Law (ed. Glazebrook) 1981.
72. Note that the maximum sentence for peregration will be much less than for an attempt at the substantive offence. This provides the agent with the maximum incentive to desist. See supra p.159.
73. [1987] AC 1.

74. R. Cross, 'Centenary Reflections on Prince's Case' in the Law Quarterly Review 9. 1. 540.

75. For example in accordance with the provisions of the Mental Health Act 1959.

76. For a general discussion on assault see Smith and Hogan 6th ed. at p.375ff.

77. See J. Harris, 'Overexertion and Under Achievement' in Philosophy and the Criminal Law. Franz Steiner Verlag Weisbaden G.M.B.H. 1984, and G. P. Fletcher, 'Rethinking the Criminal Law' (1978).

78. Supra note 13.

79. On Galloway's argument see I Dennis, 'Preliminary Crimes and Responsibility' in Current Legal Problems (1978) 31.

80. See Shivpuri supra note 73, and s.1 of the Criminal Attempts Act 1981.

81. [1985] 2 All ER 354

82. Supra note 73.

83. Supra note 81.

84. Shivpuri is clearly a case in which the agent would have felt that his enterprise had been in some way frustrated by the mistake of fact and thus falls within category 3(a).

85. Supra p.173.

86. On the test of whether the agent would desist see J. C. Smith, in (1957) 70 Harvard Law Review 422 and (1962) Crim L.R. 135 and 'Attempts, Impossibility and the Test of Rational Motivation' in Auckland Law School Centenary Lectures (1983) 25.

87. I take the example from Harris supra note 77.

88. See supra p.177.

89. For which see generally chapter 2

90., see supra p.117.

91. [1973] 3 All ER 1109.

92. Note that the prosecution also indicted him with conspiracy to handle stolen goods but they did not proceed with the charge.

93. I.e whether or not the goods remain stolen at the time of his activity was a matter of indifference to him.

94. The fact that police officers are in the van suitably disguised and allowing Smith to proceed with his activity is not otherwise explainable other than by the fact that the goods are now back in lawful custody.

95. see J. Harris, *supra* note 77.

96. See the Criminal Attempts Act 1981 s.1(3)(b).

97. *Supra* note 77.

98. Malawi (1967).

99 *Infra* pp.279.

100. Contrary to s.1(1) of the Criminal Law Act 1977 as amended by s.5 of the Criminal Attempts Act 1981 and s.12 of the Criminal Justice Act 1987. Note that there remains the common law offence of conspiracy to defraud. This is supposedly an interim situation until the Law Commission put forward proposals for a more detailed formulation of the offence of fraud. See Law Comm No. 76 1.113. See also Law Commission Working Paper No.50. S.12 of the 1987 Act provides that where there has been a conspiracy to defraud the prosecution has a choice as to the form of the indictment (i.e. to charge with a statutory conspiracy or conspiracy to defraud) The decision will be made in accordance with the guidelines laid down by the Director of Public Prosecutions which are contained in s.10(1) of the Prosecution of Offences Act 1985.

101. See **Reed** [1982] Crim L.R. 819 C.A. and **Jackson** [1985] Crim L.R. 442 C.A.

102. See s.5(7) of the Criminal Law Act 1977.

103. The Criminal Law Act 1977 s.3(3).

104. e.g. where D arranges to take a walk with P aiming to incite commission of an offence during the walk.

105. If he is an innocent agent the inciter will be liable as principal (e.g. where D incites P, a boy of 9, to take some money from a till and hand it over to him).

106. See s.8 Accessories and Abettors Act 1861.

Whilst some offences (murder and attempt for example) accept only intention as the mens rea constituent of the offence, the majority of criminal offences admit either recklessness or malice as a mental element. The ideal typical construction of subjectivism requires as an essential element of the concept of recklessness and malice an actual awareness by the agent that a particular harm is a possible outcome of his activity. Ideal objectivism is prepared to admit into either form of mens rea a mental state, akin to gross negligence,¹ which amounts to a failure by the agent to a substantial degree to measure up to the standards of the ordinary person.²

1. Recklessness.

Since recklessness figures as a mental state in some crimes but not in others, it is important, I think, that we have a definition of the concept which expresses its parameters with precision. However during this century there has been much movement between the two ideal typical constructions on the part of both judges and theorists so that there is some confusion as to the precise contours of the concept. The cases since 1957 provide a good illustration of the way in which judicial thought has wavered between the subjective and objective approaches to the concept of recklessness.

In R v Cunningham³ D ripped a gas meter from a wall in the cellar of the house in which he lived in order to steal the contents. A cloud of gas escaped and percolated through a porous wall which separated D from his neighbour, W. She inhaled the gas and was made ill by it. D was charged with unlawfully and maliciously causing W to take a noxious thing so as to endanger life contrary to s.23 of the Offences Against the Person Act 1861. The trial judge directed the jury that 'malicious' for the purpose of s.23 meant 'wicked' - something which the accused had no business to do and perfectly well knew it. He concluded that

"(a)s I have already told you, it is not necessary to prove that he

intended to do it; it is quite enough that what he did was done unlawfully and maliciously".

D was convicted and appealed. In the Court of Criminal Appeal Byrne J considered the following principle propounded by Professor Kenny⁴ that "...in any statutory definition of crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and has yet gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured".

Byrne J noted that the principle was repeated in Turner in his tenth edition of 'Russell on Crime', and that it had derived some support from the judgments of Lord Coleridge CJ and Blackburn J in Pembliton.⁵ He continued

"in our opinion the word 'maliciously' in a statutory crime postulates foresight of consequence ... With the upmost respect to the learned judge, we think that it is incorrect to say that the word 'malicious' in a statutory offence merely means wicked ... In our view it should have been left to the jury to decide whether, even if the appellant did not intend injury to (W), *he foresaw that the removal of the gas meter might cause injury to someone* but nevertheless removed it".⁶

The conviction was accordingly quashed. The decision of the Court of Criminal Appeal thus made it clear that the test for malice (and, it seems from the judgment, recklessness) in any assessment of criminal responsibility was to be construed in accordance with the ideal typical construction of subjectivism. However the view that recklessness and malice must be interpreted on a subjectivist basis was not subject to universal judicial approbation.

In Nowatt⁷ the defendant was charged with the offence of wounding contrary to s.20 of the Offences Against the Person Act 1861. The trial

judge directed the jury that if they were satisfied that the defendant did rain a series of blows upon his victim then clearly "*any ordinary man would realise that some physical harm would be sustained by the victim*". The defendant was convicted and appealed on the ground that the trial judge had misdirected the jury in that he did not direct on 'malicious' as the mens rea element of the offence.

In the Court of Appeal Criminal Division Diplock LJ, as he then was, pointed out that there may be cases where the accused's awareness of the possible consequences of his act is genuinely in issue and that the passage from Kenny might be appropriate in such cases. However he continued

"(b)ut where the evidence ... shows that the physical act of the accused ... was a direct assault (on another) *which any ordinary person would be bound to realise was likely to cause some physical harm to the other person* ... (then), in the absence of any evidence that the accused did not realise that it was a possible consequence of his act that some physical harm might be caused to the victim, the prosecution satisfy the relevant onus by proving the commission by the accused of an act which any ordinary person would realise was likely to have that consequence".⁸

The learned Lord Justice concluded that there was no need for the judge to give the jury any instructions on the meaning of the word 'maliciously' and dismissed the appeal.

Two major issues follow from the judgment of Lord Diplock in Howatt. The first is whether or not an agent can be convicted under s.20 if he did not foresee any physical harm at the time of his act. Lord Diplock observed that where the defence is something other than that the assault was accidental or that the defendant did not realise that it might cause some physical harm to the victim (for example the defence that he did not assault the alleged victim or that the assault was done in self defence), it is not necessary to deal specifically in the summing up with what is meant by the word 'maliciously' in the section.

Is Lord Diplock suggesting that, in such a case, the jury are entitled (or, perhaps, bound) to infer that the agent foresaw the result by reason of its being a natural and probable consequence of his activity? Glanville Williams and Smith and Hogan seem to accept this as Lord Diplock's view. Williams criticises this aspect of the decision in Nowatt on the ground that it is out of line with s.8 of the Criminal Justice Act 1967.⁹ Smith and Hogan point out that the decision in Nowatt was delivered before s.8 took effect¹⁰ and that this aspect of the decision must be regarded as suspect. However one ought to note that the dictum of Lord Diplock is confined to cases of assault where the defendant offers no evidence of lack of foresight, and his comments are meant to apply to the evidential burden of the prosecution in such cases. Lord Diplock does not thus apply an objectivist approach as a matter of law: he talks of "any ordinary man" as a standard of evidence for the prosecution in such a case. Where a defendant in fact pleads lack of foresight there would be need for the prosecution to prove that he did foresee the relevant result of his activity.

Smith and Hogan suggest that where the agent raises some defence other than lack of foresight he does not admit malice and the prosecution should be invited to prove malice in the usual way, and that the trial judge's due consideration in Nowatt that there is overwhelming evidence in relation to malice should not act as a bar to due consideration on the issue by the jury. One can see the logic in these comments in cases of recklessness generally but on the specific facts of Nowatt, where the prosecution offer evidence of the defendant's raining blows upon his victim and the defendant offers no evidence on lack of foresight, it is difficult to see what more evidence the prosecution need submit in order to establish the requisite mental state (foresight of injury).

To summarise on this first aspect of Nowatt. It is submitted that Lord Diplock's standard of "any ordinary person" was intended to constitute the kind and extent of evidence that the prosecution must produce for the actual foresight which conviction requires in cases in which the agent's defence is something other than 'lack of foresight'.

The second issue which flows from the judgment of Lord Diplock in Mowatt is whether or not foresight of some minor harm is sufficient for a conviction under s.20 where the agent has committed an assault on his victim? One might argue that Lord Diplock ruled that such foresight was sufficient¹¹ but there has been criticism of this view.¹² Smith and Hogan submit that a person who foresees harm which is less than really serious has the mens rea for the less serious offence of assault occasioning actual bodily harm under s.47 of the Offences Against the Person Act 1861, and that it is wrong that the mens rea of the less serious offence should suffice for liability for the greater. One might argue that, because the maximum sanction is the same for both offences, a shared mens rea produces no hardship since the agent who foresees only minor harm cannot receive a greater maximum sentence under s.20 in respect of the serious harm caused by him than he would have received under s.47 had actual bodily harm resulted.

It is submitted that this argument should be rejected. If we are to distinguish between the cases of actual bodily harm and grievous bodily harm for the purpose of conviction (as we should) then that distinction should apply to both the actus reus and mens rea in each case. In the offences of murder and manslaughter we have a common actus reus and it is the different levels of mens rea which provide the distinction for the purpose of conviction. This is, I think, the right approach since the agent who intends death or grievous bodily harm ought to be distinguished at the conviction stage from the agent who intends only to frighten, or the agent who has brought about death by gross negligence. The same principle should be applied to the non-fatal offences: the agent who foresees only minor harm but causes grievous bodily harm should be distinguished from the agent who foresees and causes grievous bodily harm. We may achieve this by providing each of the offences under sections 20 and 47 with a distinct mens rea which is restricted to foresight of the harm defined by the actus reus of the offence. Thus where the agent causes grievous bodily harm with foresight of such harm he may be charged under s.20, and where the agent causes grievous bodily harm with foresight of minor harm we may charge him with causing actual

bodily harm only. This is not illogical since actual bodily harm has been inflicted.

What of the agent who causes actual bodily harm with foresight of serious bodily harm? A preliminary point to note here is that this agent is reckless regarding grievous bodily harm which in fact he has not brought about. In my view the agent is not liable in respect of it. This reasoning follows the current legal position which insists upon the occurrence of the harm towards which the agent has been reckless. He should be charged with causing actual bodily harm simpliciter, that is to say we should discount the more substantial mental state held by the agent and count him as foreseeing actual bodily harm. This is not illogical since he foresees that lesser mental state as a part of his total mens rea regarding possible injury.¹³

An interesting point for discussion here revolves around the agent who *actually intends harm* of a particular type and degree and succeeds in inflicting harm of that type but not of that degree. Suppose that D_1 , who does not foresee grievous bodily harm, assaults his victim intending minor harm but in fact causes more serious harm, or that D_2 intends grievous bodily harm to V but in fact causes non-serious harm. The position with regard to the latter agent may be stated shortly. D_2 is guilty of an attempt under s.18 and also of the substantive offence under s.47 of the Offences Against the Person Act 1861. But what of D_1 ? May we count his intention to cause minor harm as recklessness as to the more serious harm of the same type? Duff alludes to this type of reasoning in relation to specific offences of homicide when he suggests that one may read the doctrine of implied malice in murder as holding that an intent to cause serious injury constitutes recklessness as to the death which in fact ensues.¹⁴ What Duff has in mind here, I think, is that the risk of death is such an integral aspect of the agent's activity (a really serious physical attack on his victim) that one ought to count the agent as responsible for the more serious harm of which he was unaware. We may do this by counting him as reckless in relation to that harm. I am not sure if Duff would accept this interpretation of his analysis but I think that it fits well with respect to cases in which

the agent brings about a greater (and unforeseen) non-fatal injury than that which he intended. I shall return to this issue when assessing the various interpretations of 'Caldwell recklessness'.¹⁵ Suffice it to conclude here that in cases in which the agent is making a physical attack upon another the court or jury will be likely to conclude that he must have foreseen the harm caused by him as a possible consequence of his intended activity.

It should be noted that the Criminal Law Revision Committee has proposed a reversal of the Nowatt view of what must be foreseen.

The decision by the Court of Appeal in Cato¹⁶ gave rise to some debate upon the position of the concept of recklessness in relation to the two ideal typical constructions of subjectivism and objectivism concerning the offences of manslaughter and s.23 of the Offences Against the Person Act 1861. In that case D and three friends decided to pair off and inject each other with heroin, the quantity of which was decided by the recipient. D and F continued this practice for several hours until they became unconscious. F subsequently died and D was charged with both manslaughter and maliciously administering a noxious thing contrary to s.23 of the Offences Against the Person Act 1861. In summing up on manslaughter the trial judge directed the jury

"(n)ow manslaughter in law is causing ... death ... quite inadvertently by doing an unlawful and dangerous act, or alternatively, *by doing a lawful act with gross negligence, that is to say, recklessly*".¹⁷

The judge went on to give the jury six questions to answer and told them that they were entitled to convict if they answered all questions positively. The sixth question took the form "was the conduct of (the appellant), in respect of the injection, *grossly negligent or, in other words, reckless*"?¹⁷ The phrases in italics indicate that for the trial judge recklessness, in cases of manslaughter at least, is equivalent to gross negligence and thus in line with ideal objectivism.

D was found guilty on both counts and appealed. In respect of the conviction for manslaughter counsel for D argued that he had admitted at his trial that he was aware that injecting heroin might give rise to addiction but he had no idea that it could give rise to death or serious bodily harm: that in deciding whether D had acted recklessly one would have to have regard to the fact (if accepted) that he did not know about the potentiality of the drug. The argument was that this crucial point had not been dealt with sufficiently by the judge in the summing up.

Lord Widgery CJ dismissed this argument on the ground that

"recklessness is a perfectly simple English word. Its meaning is well known and it is in common use. There is a limit to the extent to which the judge in summing up is expected to teach the jury the use of ordinary English words".¹⁸

With respect to the learned Lord Chief Justice the concept of 'recklessness' had taken on a distinctly legal meaning as a result of the dicta by the judges in the cases and if Lord Widgery was to uphold the meaning attributed to the concept by the trial judge then he ought to have justified his decision by reference to the case law. If he had looked to the case law he would have found that in very few if any had the concept of recklessness been equated with gross negligence. In any event there is a particular category of manslaughter based on gross negligence which covers a failure by the defendant to foresee an obvious risk of death or serious injury so there was no need for the trial judge to apply an extended interpretation to gross negligence in the case before him. However it is clear that Lord Widgery agreed with the definition of recklessness supplied by the trial judge which shifted the contours of the concept towards the typical ideal construction of objectivism.

In respect of the appeal against count 2 counsel for Cato, relying upon Byrne J's approbation of Kenny's definition of malice¹⁹ in Cunningham, argued, inter alia, that 'maliciously' requires some foresight as to the consequences. Lord Widgery considered the definition and said

"(n)o doubt this is correct in the Cunningham type of case where the

injury to the victim is done indirectly ... We think in this case where the act was entirely a direct one that the requirement of malice is satisfied if the syringe was deliberately inserted into the body of (the victim) as it undoubtedly was, and if the appellant at the time when he inserted the syringe knew that the syringe contained a noxious substance".²⁰

Two points may be made on this aspect of the decision in Cato. First, Lord Widgery bases his argument in part on the fact that D knew that the syringe contained a 'noxious substance', but is this not to say that he thus knew that it was likely to cause harm (that is what 'noxious' means)? Second, on Smith and Hogan's interpretation of the decision²¹ D was not counted reckless as to the risk of death or grievous bodily harm even though he did not realise that risk, but that the offence requires mens rea (malice) only as to the administration of the noxious thing - not as to the consequent risk; that the phrase "so as to thereby endanger life" concerns the actual effects of administering the substance, not the agent's intention or foresight. On the basis of this reasoning it would seem that Lord Widgery's judgment as regards the mental state concerning s.23 maintains the principles of ideal subjectivism.²²

One year later the Court of Appeal applied the ideal subjectivist approach regarding the concept of recklessness in respect of an offence under s.1 of the Criminal Damage Act 1971. In Briggs²³ D was charged with causing criminal damage to a car door belonging to a lady tenant. D was convicted and appealed on the ground that the trial judge had misdirected the jury on the meaning of 'recklessness' which he described as being an act done "not caring (or careless of) whether it happens", thus not distinguishing sufficiently between recklessness and inadvertence. The court allowed the appeal stating that a man

"is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act".

This view of the Court of Appeal gives an overriding precedence to awareness of the risk but in the same year that court came to a different conclusion when hearing an appeal against conviction under s.1 of the Criminal Damage Act 1971. In Parker (Daryl)²⁴ the appellant, in a fit of temper, had damaged a telephone when slamming it down. The question here concerned his recklessness as to an effect which was intimately connected with his activity. The Court had to consider whether the defendant, who had not thought about the risk because of his self induced temper, could be said to be reckless regarding the damage which he had caused. Lane LJ thought that a failure to allude to the risk in such a case could amount to recklessness and amended the definition of that concept in Briggs thus:

"A man is reckless in the sense required when he carries out a deliberate act knowing *or closing his mind to the obvious fact that there is some risk* of damage resulting from that act but nevertheless continuing in the performance of that act".²⁵

Lord Lane's definition of recklessness in Parker modifies the 'awareness' based model of recklessness offered by the Court of Appeal in Briggs. Supporters of the ideal typical construction of subjectivism have argued that the decision does not violate the subjectivist requirement of awareness since a 'certain amount of toughness' in interpreting subjectivist recklessness in cases such as Parker is permissible since the defendant has the relevant knowledge stored in his brain and the power to bring it to the forefront of his mind if he chooses to do so.²⁶ Viewed in this way we might say that the 'choice' element of subjective recklessness is retained: we might say that Parker had *chosen* not to consider a risk of which he would have been aware had he thought about it. However the phrase 'closed his mind' opens up interesting discussion. Just what does the phrase mean? Does it mean that the agent had a flash of awareness and closed the door on it so that his mind was free from it at the time of his activity? If this is the correct interpretation then how does it differ from the agent who has 'been blinded' concerning the risk for some reason. There seems to be a subtle distinction. In the former the agent had some form of momentary enlightenment of the risk: in the latter this was denied to

him - he was blinded to the fact that the risk existed. Is the distinction significant? If so how are we to distinguish between them for the purpose of ascriptions of criminal responsibility? I shall argue later that neither case constitutes recklessness: that both are a species of gross negligence and that the agent should be liable accordingly unless he can produce evidence of some legally recognised factor in sufficient degree to prevent him from appreciating the risk.²⁷

Briggs informs us that recklessness is to be construed in accordance with the subjectivist ideal: that the agent must be aware of the risk that he is taking regarding his activity. **Parker** modifies the definition of recklessness in **Briggs** in order to bring into account the agent who fails to foresee the risk of proscribed harm because he has closed his mind to that risk. But what of the agent who, owing to some incapacity at the time of his activity, does not have the relevant store of knowledge regarding the risk of harm and is thus *unable* to bring the risk to the forefront of his mind? The Court of Appeal was faced with this question in 1979.

In **Stephenson**²⁸ the defendant had crept into a hollow in the side of a large haystack and started a fire there in order to keep warm. The haystack caught fire and was damaged. Stephenson suffered from schizophrenia and might well have acted as he did whilst suffering from the complaint. The trial judge, in accordance with the decision in **Parker**, directed the jury that the accused was reckless if he had closed his mind to an obvious risk in relation to his act, and that schizophrenia might be a reason which made a person close his mind to the obvious risk. Stephenson was convicted and appealed on the ground of a misdirection as to what constituted recklessness for the purpose of the statutory offence.

Lord Lane referred to the irascible agent who has caused the actus reus of an offence whilst in a self induced state of annoyance and said

"(t)he fact that he may have been in a bad temper at the time would not normally deprive him of his knowledge or foresight of the risk.
If he had the necessary knowledge or foresight and his bad temper

*merely caused him to disregard it or put it to the back of his mind*²⁵ not caring whether the risk materialised, or if it merely deprived him of the self-control necessary to prevent him from taking the risk of which he is aware, then his bad temper will not avail him. This was the concept which the court in Parker was trying to express when it used the words "or closing his mind to the obvious fact that there is some risk of damage resulting from that act".

Lord Lane concluded that the test for recklessness remained subjective in character.

"The knowledge or appreciation of a risk of some damage must have entered the defendant's mind, even though he may have suppressed it or driven it out".²⁹

Lord Lane thus puts a gloss on his judgment in Parker, for he is saying here that the defendant must have had a momentary recall of knowledge³⁰ which he then suppresses so that he is in a state of unawareness at the time that he brings about the untoward harm of his activity. Subjectivists may plausibly argue here that Lord Lane's statement on the parameters of the concept of recklessness does not depart in any way from the ideal subjectivist approach since, in such a case, the agent has had a momentary recall of knowledge, a flash of awareness of the risk he is running and, in suppressing that knowledge, he is choosing to run the risk: that is to say the deliberate suppression of his knowledge of risk is of a piece with his deciding positively to run the risk. But is there not a distinction between the agent for whom the risk entered his mind and which he then suppressed or drove out and the agent who 'closed his mind' to the risk? Just what does the phrase mean if it does not involve a flash of awareness? How do these two cases differ, if at all, from the case in which the agent whose fit of temper has 'blinded him' to the risk? Or he whose temper causes him to 'disregard the risk', or he whose temper causes him to put the risk at the back of his mind? The dictum of Lord Lane in Stephenson³¹ suggests that there is no distinction to be made for the purpose of conviction.

I am in agreement with the learned Lord Chief Justice that where the agent does not appreciate the risk at the time of his act because he is in a state of self induced temper then there is no need to enter into a deliberation of precisely why, because of his temper, he is not aware of the risk. But I think that Lord Lane is wrong to make, by implication, no distinction between the agent who is not aware of the risk and the agent who is aware of the risk but whose self-induced temper leads him to take it anyway.³² First it produces conceptual incoherence since, it is argued, one is introducing a negative mental state into the concept of recklessness for the purpose of catching a morally reprehensible attitude concerning the risk of harm. Second, in amalgamating recklessness and gross negligence in this way we are unable to mark the significant moral distinction between the agent who is willing to take a risk with the person or property of another and the agent who is unaware of the risk. I shall argue later that the agent who, for whatever reason, does not appreciate at the time of his activity a risk of untoward harm should fall into an appropriate category of mens rea distinct from that which houses the agent who is aware of the risk.³³

Lord Lane concluded by looking at the facts of the case before him. Of the defendant's mental condition he said

"(t)he schizophrenia was on the evidence *something which might have prevented the idea of danger entering the appellant's mind at all.*³⁴ If that was the truth of the matter, then the appellant was entitled to be acquitted. That was something which was never left clearly to the jury to decide".

In his judgment Lord Lane is prepared first to excuse mental abnormalities, such as schizophrenia, which prevent the agent from appreciating the risk of specific harm and second, to count as reckless cases of self induced non-appreciation of the risk such as anger in assessing responsibility. Two points may be raised on the distinction drawn by Lord Lane. First, it is interesting to consider just what mental abnormalities which prevent the agent from appreciating an obvious risk Lord Lane would be willing to count as not reckless in relation to particular harm. I have in mind here mental states and

emotions such as tiredness, distress, panic, despair, shock, emotional distress or fatigue, pre-menstrual depression, post-natal depression and so forth.³⁵ Second, in ascribing some negative mental states to the concept of recklessness and excluding others Lord Lane brings conceptual incoherence to that concept. My view is that we should aim at conceptual clarity; that we should place negative mental states concerning an obvious risk into one concept of mens rea and provide for an excusing provision where we feel that such negative states have been brought about in circumstances in which the agent should be free from criminal responsibility.³⁵

At the turn of the decade two cases in the Court of Appeal, Flack v Hunt³⁶ and Sullivan,³⁷ affirmed the ideal subjectivist position concerning offences under s.20 of the Offences Against the Person Act 1861. The latter case is worth mentioning here since it deals with an intention to frighten as the mens rea of the offence under that statute.

In Sullivan D was driving his passenger home. They were both drunk. D was driving at about 30 miles per hour in a very narrow street. He mounted a pavement and struck V, a pedestrian. D was charged under ss.18 and 20 and contended that he had only intended to frighten V. He was convicted and appealed. The Appeal Court, in dismissing the appeal, noted that there were two schools of thought as to the burden of proof on the prosecution in relation to the mental element in an offence under s.20.³⁸ Professor Williams³⁹ represented one view with 'the particular kind of harm', meaning the wounding or grievous bodily harm mentioned in the section. D. W Elliot⁴⁰ represented the other school of thought that the person charged probably had the appropriate mens rea if he intended the victim to be frightened. The Court thought that s.8 of the Criminal Justice Act 1967 removed the whole basis of the argument that the intent to frighten was enough to constitute the necessary mens rea under s.20. However a jury might be convinced from the evidence relating to an intent to frighten that the person charged was aware that his act was likely to have the result of causing some sort of injury to the victim. Nevertheless since s.8 a mere intention to frighten without more was not sufficient; the person charged must be proved to have been aware that

the probable consequences of his voluntary act would be to cause some injury to his victim, but not necessarily grievous bodily harm. In the circumstances a properly directed jury could not have come to any other conclusion than that D must have been aware that what he was doing was likely to cause physical injury to the victim and the offence not being one of specific intent the proviso would apply.

Two questions might be raised in relation to the decision. First, the Court talked in terms of "*some sort of injury to the victim but not necessarily grievous bodily harm*" and "the defendant must have been aware that what he was doing was *likely to cause physical injury to the victim*". The type of harm perpetrated was not thus restricted to 'grievous bodily harm' and one might therefore ask whether or not foresight of non-serious harm is sufficient (or ought to be sufficient) as the mens rea for an offence under s.20 of the Offences Against the Person Act 1861. This raises an issue similar to that raised above⁴¹ regarding foresight and s.18 of that Act and my view is that the same considerations should apply here. Second, suppose that Sullivan had claimed at his trial that he had thought about the risk of injury to V and had decided that there was none since, say, his profession as a stunt man had left him in no doubt that he would stop the vehicle short of striking his victim. Sullivan would thus be claiming that he intended to frighten V but that he had neither intended nor was reckless in relation to actual injury to V since, at the time of his activity, he was convinced that no injury would result. Ought we to accept this claim and excuse Sullivan from criminal responsibility in relation to serious injury which he causes to his victim? An answer to this question must await an assessment of Shimmen.⁴²

A final general point on 'intention to frighten'. Is there any justification for counting an intention to frighten, regardless of foresight of harm, as recklessness in relation to that harm? There are two possible answers in favour which might be put forward. One is that an intention to frighten someone itself involves or constitutes recklessness as to the injury which is in fact caused. Second, an intention to frighten must be an intention to induce the belief in V

that he is likely to suffer injury; and it will be usually quite hard to do that other than by making it actually likely or possible that he will suffer injury; thus intention to frighten would include (subjective) recklessness as to the risk of injury.⁴³

One should note that whilst Flack v Hunt and Sullivan acknowledged the subjectivist approach to recklessness in relation to cases under s.20 of the Offences Against the Person Act 1861, two cases, which were heard in the same two year period, seemed to be pointing the path of recklessness towards the ideal objectivist position in relation to reckless driving and the wilful neglect of a child.

In Murphy⁴⁴ D was charged with causing death by driving recklessly contrary to s.1 of the Road Traffic Act 1972 (as amended by the Criminal Law Act 1977, s.50). In his summing up to the jury the recorder made no reference to the contours of the concept of 'reckless' since it was a word in the English language and "(y)ou know what it means as well as I do". D was convicted and appealed on the ground that the recorder had failed to direct the jury that proof was required that he had foreseen a risk of injury, or at least the risk of an accident, and had yet gone on to take that risk (i.e. that there must be proved a subjectivist mental element as indicated in the cases of Briggs, Parker and Stephenson).

At the appeal hearing counsel for the Crown argued that for the purpose of the legislation 'reckless' is used objectively and means 'heedlessly rash', that is to say indifferent to the risk in the sense of not caring whether there is a risk or not and that heedlessness or rashness may consist in the very failure to recognise obvious risks.⁴⁵

In delivering the judgment of the court Lord Eveleigh LJ stated that

"we have come to the conclusion that for an offence under s.50 there has to exist the mental element involved in the word 'recklessly'. However it does not follow from this that foresight of the risk of an accident must have existed in the accused's mind and then for him to have made a deliberate decision to take that risk".⁴⁶

The learned Lord Justice went on to say that knowledge might be interpreted either as something which is stored in the brain and available if called upon or as something which is actually present in the mind because it has been called upon. However he thought that such "philosophical quibbles" were not appropriate to motor cases in which "everyone knows that there is a risk if a vehicle is not driven with due care and attention".

Lord Eveleigh then distinguished between result crimes and conduct crimes. He thought that contemplation of the ultimate risk assumed greater importance with respect of the former but as regards conduct crimes

"we are concerned with an attitude of mind to the manner in which an act is performed or, more precisely, to the quality of the (agent's behaviour) ...

A driver is guilty of driving recklessly if he deliberately disregards the obligation to drive with due care and attention or is indifferent as to whether he does so (a matter of evidence for the jury on the facts) and thereby creates a risk of an accident which a driver driving with due care and attention would not create".⁴⁷

What is there in the judgment which conflicts or might conflict with subjectivism? I think that the agent who deliberately disregards the obligation to drive with due care and attention falls within orthodox subjectivism since he has made a conscious decision to drive in a manner which he knows creates a risk to other road users. However of the agent who "is indifferent as to whether he (drives without due care and attention) and thereby creates a risk" one might say that he is unaware that his driving falls short of that of the prudent and reasonable driver and thus does not fall within the 'awareness' based model of subjectivism. Lord Eveleigh described the latter agent in an alternative way a little earlier in his speech. He said

"(a) driver may regulate his driving as a result of contemplating a specific risk or as a result of a subconscious appreciation of risks in general but what he has to achieve, whether or not the question of risk is prominent or suppressed in his mind, is the standard of

driving which a prudent and careful driver would observe".

One might say from this that the indifferent agent does not have the subconscious appreciation of risks in general at the time of his activity which produces the untoward harm. But just what do we mean when we speak of the indifferent agent who does not have a subconscious appreciation of risks?

Duff undertakes an analysis of the question.⁴⁸ He alludes to Lord Eveleigh's distinction between two mental states, namely 'knowledge which is stored in the brain and available if called on' and 'knowledge which is actually present because it has been called on'.⁴⁹ But for Duff this distinction does not represent the whole picture since an agent with a general and latent store of knowledge about particular activity may act (i) with explicit knowledge, i.e. consciously contemplating the surroundings and circumstances in which he is driving and adjusting his actions or reactions in the light of that knowledge, or (ii) with tacit knowledge, i.e. he is using his store of knowledge in driving as he does without making any conscious reference to that knowledge, or (iii) with neither explicit nor tacit knowledge, i.e. he does not notice the surroundings or circumstances of his driving (e.g. that he is driving too fast with regard to the prevailing road conditions) or if he does notice them he simply fails to relate them to the manner in which he is driving.

As I understand Duff's submissions the following statements may be said to represent the position on recklessness. If the agent in (i) above drives with disregard to the surroundings or circumstances then he is paradigmatically reckless regarding the risk of which he is aware. The agent in (ii) is subjectively reckless concerning the risk since he has failed to apply his latent knowledge to the surroundings or circumstances of which he is aware. The agent in (iii) is objectively reckless in relation to the risk since he has failed to contemplate the surroundings and circumstances of his driving and thus cannot apply his latent knowledge to them. He would be aware of the risks which he creates (and thus that his driving is reckless) if he were attending to

his surroundings but, as he is not so doing, he cannot be said to be aware of the risks.

My view is that the judgment in **Murphy** adopts the third categorisation of reckless activity and that the case thus extends the concept of recklessness into the realms of ideal objectivism. My submission is borne out by the Court's statement that

"what he has to observe and achieve, whether or not the question of risk is prominent or suppressed in his mind, is the standard of driving which a prudent and careful driver would observe".⁵⁰

The positive duty contained in the dicta indicates, I think, that the defendant is not entitled to say in his defence that he has subjectively failed to contemplate a risk which a prudent and reasonable motorist would have noted and acted against. The defendant could not thus state, for example, that he was unaware that he was travelling at a speed which was excessive in relation to the circumstances in which he was driving: if he is so driving then he fails to reach the standard of driving which a prudent and careful driver would observe. Any subjective reason for that failure would thus seem irrelevant.⁵¹

But this extension of the concept of recklessness in cases of reckless driving creates the problem of drawing the distinction between reckless driving and the less serious offence of careless driving. The court in **Murphy** sought to resolve the problem by saying

"(w)hether or not a man is driving in defiance or with indifference to the proper standard will usually be a matter of inference for the jury on the evidence as to the manner in which the vehicle was actually driven and as to road conditions. But it will not always be so. There may be some other explanation: for example, a mechanical defect or an inadvertent failure to observe a traffic sign and so forth".⁵²

The court thus leaves the issue of whether the defendant is guilty of reckless driving (defiance or indifference to the proper standard), as distinct from careless driving (inattentiveness), for the jury to decide

having regard to the circumstances of the driving in relation to the surroundings in which it takes place. The jury may be satisfied by some explanation by the defendant about his failure to assess the risk that his activity did not manifest indifference or disregard and that his case thus amounts to the lesser offence of careless driving. The agent's plea that he was simply unaware of the risk which he was creating must lead to a conviction of reckless driving since, on his own admission, he has failed to observe and achieve the standard of driving which a prudent and careful driver would observe.

This specific issue on reckless driving leads to the question about the relationship between the concepts of recklessness and negligence in criminal law generally in areas in which the law extends the concept of recklessness so that it includes cases of what might be described as gross negligence. I shall return to this question when discussing Caldwell below.⁵³

One last point on Murphy. What if an agent who drives dangerously pleads that he was sure at the time that there was no risk in relation to his driving because he believed himself to be competent enough to cope with any emergency and thereby prevent injury or damage? Such an agent is unaware of the risk and should not thus be counted as reckless on subjectivist thinking. Duff points out⁵⁴ that we might catch such an agent in the subjectivist web on the ground that

"he knowingly takes *some*⁵⁵ risk (he must know that all driving involves some risk) which is objectively unreasonable for him to take, since it is created by an unreasonable manner of driving; or that he is aware of those aspects of his driving (his speed, his arm round his passenger's shoulders) which in fact conflict with the objective standard of careful driving, and that his ignorance of this conflict, being ignorance of the law not of fact, is no defence".

I agree with Duff's later comments that these arguments are not persuasive: they represent a dilution of orthodox subjectivism for the purpose of ascribing liability to an agent who deserves censure but who

would avoid such on the 'awareness' based model of recklessness. My own view is that we ought to introduce a new species of mens rea, confined to a negative mental state, with which we may attribute liability to the agent who brings about untoward harm without alluding to the risk thereof.⁵⁶

I introduced discussion on Murphy by saying that there were two cases which diverged from the more orthodox subjectivist approach adopted in Flack v Hunt and Sullivan at the beginning of the decade.

The second case was Sheppard.⁵⁷ In that case a child of sixteen months died as a result of hypothermia and malnutrition because his parents, who were both of low intelligence, did not realise that he was so ill that he required medical aid from a doctor. The defendants were charged with wilful neglect under s.1 of the Children and Young Persons Act 1933. Following a line of authority in relation to the statutory offence the trial judge treated the case as one of strict liability and directed the jury that the test was

"would a reasonable parent with knowledge of the facts that were known to the accused appreciate that failure to have the child examined was likely to cause him unnecessary suffering or injury to health"?

The parents were convicted and appealed on the ground that the phrase 'wilfully neglects' requires proof of a mental element on the part of an accused (i.e. intentionally and knowingly neglecting): that if the Crown proves the necessary degree of neglect there is a prima facie case which the defence may rebut by reasonable doubt as to the intention to neglect, for example ignorance of the child's need for medical aid.

Lord Diplock acknowledged the contention by counsel for the prosecution that the adverb 'wilfully' might be given a restricted interpretation, confined to the doing of the act itself even though the agent did not realise that the proscribed consequence might happen and might have acted positively in the light of that realisation. However for Lord

Diplock the restricted interpretation was not the natural one and indeed such an interpretation would render the adverb otiose.

The learned Law Lord thought that a parent could not properly be described as wilful

"unless (he) either (i) had directed his mind to the question whether there was some risk ... that the child's health might suffer if he were not examined by a doctor ... and he made a conscious decision for whatever reason to refrain from arranging for such medical examination; or (ii) had so refrained because he did not care whether the child might be in need of medical treatment or not.

As regards the second state of mind, this imports the concept of recklessness which is a common concept in mens rea in criminal law".

Lord Diplock agreed that the cases since Senior⁵⁹ had treated the offence of wilful neglect as one of strict liability⁵⁹ but decided that this was wrong and that the offence required one of the specific mental elements quoted above. He concluded that his definition of the required mental state

"would afford no defence to parents who do not bother to observe their children's health or having done so do not care whether their children are receiving the medical examination or treatment that they need; it would involve the acquittal of those parents only who through ignorance or lack of intelligence are genuinely unaware that their child's health may be at risk if not examined".⁶⁰

Lord Edmund-Davies came to much the same conclusion. He decided that a parent cannot be guilty of an offence under the legislation if he does not know that the child needs some kind of medical assistance. But

" a parent reckless about the state of his child's health, not caring whether or not he is at risk, cannot be heard to say that he never gave the matter a thought and was therefore not wilful in not calling a doctor. In such circumstances recklessness constitutes mens rea no less than positive awareness of the risk involved in failure to act".⁶¹

The House thus decided that a defendant must be at least reckless toward the risk to his victim which his failure creates for his neglect of his child to be wilful. To what extent, if at all, does the judgment in Sheppard provide an objective account of the concept of recklessness?

The subjectivist may put forward two submissions in support of the argument that the decision maintains the spirit of ideal subjectivism. First, to be guilty of the offence the parent must be aware of the fact that his failure to attend to the child's needs or symptoms might well lead to a deterioration in the child's health or welfare, otherwise how else can he be in a position not to care about the risk to the child? The parent is not caring about a risk of which he is aware. This argument resembles that used by the subjectivist to justify a subjectivist interpretation in Murphy⁶²; that a parent has a store of knowledge about the needs of a child which he could call upon if disposed to do so. Thus we may attenuate the subjectivist approach to incorporate the agent who is unaware of the risk because he fails to draw upon the knowledge possessed by him which would inform him of the risk he is taking. Support for the 'store of knowledge' argument may be drawn from the dictum of Lord Diplock who said his ruling

"would involve the acquittal of those parents only who through ignorance or lack of intelligence are genuinely unaware that their child's health may be at risk if it is not examined by a doctor to see if it needs medical treatment".⁶³

Lord Diplock is thus prepared to excuse from liability a parent who, for some subjective reason, does not possess the general store of information about child welfare which is generally held by parents. Thus, unless he can show that he genuinely lacked particular knowledge about child welfare, we may say that a parent is subjectively not caring about the welfare of his child where he fails to summon up the particular knowledge which he possesses. However it should be pointed out here that a parent will avoid liability where his failure to realise the danger stems from a genuine mistake as to the true physical status of the child which causes the parent to believe that the child is not at risk.

This is in line with Duff's criteria for recklessness.⁶⁴ For on his analysis a parent who is either expressly or tacitly aware at the time that his behaviour endangers his child is (on a subjectivist view freed from the idea that an 'awareness' of a risk must be explicit rather than implicit) reckless regarding that danger. A parent who never knew the relevant facts about children's needs and so on (who lacked the relevant store of latent knowledge) will not be counted reckless either by 'awareness plus tacit knowledge' subjectivism or by **Sheppard**. A parent who has the relevant latent knowledge may fail to realise a risk to the child in the particular case, either because he fails to notice the relevant facts, or because he fails to apply his latent knowledge to those facts. Is this a significant distinction for the purpose of criminal responsibility? My view is that these two ways of failing to realise a present risk are not significantly different: what is relevant is that we need to ask why he fails to realise the risk (to apply his latent knowledge or to notice the relevant facts); and to distinguish between the person whose failure expresses or flows from a lack of care and the person whose failure is explicable in some other way which does not ascribe to him a lack of concern for the child.

A second submission which ^{one} might put forward to substantiate the claim that **Sheppard** maintains the spirit of ideal subjectivism⁶⁵ concerns the time factor between the agent's alluding to the possible risk and his later failure to allude to it owing to his indifference. Suppose that D is aware at some early point in his neglect for his child that that neglect might put his child at risk. He then persists in that neglect putting the knowledge of risk out of his mind so that he is unaware of the risk at the time of the actus reus of the offence. The argument here is that we may attach the agent's previous awareness of the particular risk with his later actus reus (accompanied by a now negative state) and count him as consciously reckless. However this argument would have insuperable practical difficulties regarding contemporaneity of actus reus and mens rea and the task for the jury in deciding on the accused's mental state at some point in time prior to the actus reus. It is submitted that the argument should be rejected.

To conclude on **Murphy** and **Sheppard**. It seems that the cases extend the concept of recklessness beyond the orthodox subjectivist requirement of conscious risk-taking into the realms of 'indifference to the risk', an attitude of 'couldn't care less' and 'a failure to bring to the forefront of one's mind a store of knowledge pertaining to the risk which is stored in one's brain'. An assessment of this extended concept of recklessness must await an analysis of **Caldwell**⁶⁶ but it is worth noting here that the cases seem to point to a specific criterion for the argument for a distinction between those crimes which insist upon the 'awareness' model of recklessness and those which extend the 'awareness' model so as to include a failure to use tacit knowledge; that criterion being concerned with the direct relationship (or lack of it) between the risk and the agent's intended activity. **Mowatt**⁶⁷ involved a case of wounding which is clearly a crime in which the risk is directly related to the agent's intended activity. The same applies to the cases of **Cato**, **Parker**,⁶⁸ and **Murphy**. **Sheppard** might be taken as a 'negative act' equivalent of the cases cited. On the other hand, in cases such as **Cunningham**, which accept the 'awareness' definition of recklessness, the risk of harm is not intimately connected to that which the agent is doing.

The dicta in some of the cases suggest that we already have such a distinction in our current criminal law. In **Mowatt**⁶⁹ Lord Diplock expressly stated that the passage from Kenny confirming the 'awareness' model of recklessness⁷⁰ might be appropriate in cases in which the risk is not directly related to the agent's activity (e.g. **Cunningham**) but not to an offence concerning a direct attack on the victim. In **Cato** Lord Widgery said of count 2⁷¹ that Professor Kenny's meaning of the concept of 'malice' was no doubt correct for **Cunningham** type cases where the injury to the victim is done indirectly but not in respect of cases in which the injury is direct.

So should we adopt a concept of recklessness which is given a restricted meaning in cases in which the risk of untoward harm is indirect, but whose meaning is extended to include failure to allude to the risk in cases in which the risk of harm is intimately related to the agent's

activity? There are three reasons why I think we ought to accept neither that the distinction exists in our current law nor that it ought to be drawn. First, there are cases which indicate that there is not universal judicial consensus in favour of the distinction. In Sullivan,⁷² for example, the risk of injury was directly related to D's activity but the court came down in favour of the 'awareness' model of recklessness in that case. Second, it may not always^{be} clear whether a particular case is one in which the risk of harm is directly related to the agent's activity. Third, it is my submission that the concept of recklessness should have a universal definition across the spectrum of substantive criminal offences⁷³ and we should thus seek to reduce, and not extend, the number of situations in which different meanings are attached to the concept.

The contrasting views of the concept of recklessness expressed in the cases at the turn of the decade culminated in a case which is acknowledged as the leading case on the subject.

In Caldwell⁷⁴ D had done some work for the owner of a hotel which led to a quarrel between them. D later got drunk and set fire to the hotel out of spite. The fire was put out before any serious damage was done. D was charged, inter alia, with causing criminal damage to property with intent to endanger life or being reckless whether life would be endangered contrary to s.1(2) of the Criminal Damage Act 1971. He argued that he was so drunk that the thought of endangering lives had not crossed his mind at the time of his act. The trial judge directed the jury that drunkenness was not a defence to a charge under s.1(2) and D was convicted. D's appeal to the Court of Appeal was allowed but the Crown appealed to the House of Lords.

Lord Diplock's speech in the case has been the source of much academic and judicial debate. The speech is basically in two parts, the first dealing with the concept of recklessness, the second dealing with the defence of intoxication. It is necessary for present purposes to look at the first part of the speech in some detail. I shall quote and annotate shortly the major passages of the speech and go on to assess the various

commentaries on it. I shall enumerate the various passages for convenience.

Lord Diplock pointed out that the Criminal Damage Act 1971 virtually replaced the detailed provisions in the Malicious Damage Act 1861. The latter Act described the mens rea of the various offences defined therein as 'malicious', a word which Lord Diplock considered to be a technical expression, a term of art⁷⁵ the contours of which were described by the Court of Criminal Appeal in Cunningham⁷⁶ which approved as an accurate statement of the law the definition posited by Professor Kenny.⁷⁷ Lord Diplock considered that Kenny, in attempting to define 'malicious' for the benefit of students, had used several synonyms including the word 'recklessness',

1. "the noun derived from the adjective 'reckless' of which the popular or dictionary meaning is careless, regardless, or heedless, of the possible harmful consequences of one's acts. It presupposes that if thought were given to the matter by *the doer* before the act was done, it would have been *apparent to him* that there was a real risk of its having the relevant harmful consequences".⁷⁸

An important point here is that Lord Diplock seems to accept that the dictionary meaning of the concept of recklessness is objective only to the degree that the agent has failed to foresee a risk that he would have recognised had he given any thought to the matter. One might thus say that Lord Diplock is applying what Professor Williams calls a conditionally subjective interpretation to the concept of recklessness at this point in his speech.⁷⁹ He continued

2. "but granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences to recognising the existence of the risk and nevertheless deciding to ignore it".

Several observations may be made here. First the concession "but granted this" (which relates to passage 1 above) at least suggests that Lord Diplock is maintaining a conditionally subjectivist approach⁷⁹ to the concept of recklessness. Second one might ask just what states of mind

does Lord Diplock include in his range? Would he include, for example, the agent who foresees a risk and takes all possible measures to limit it, as opposed to ignoring the risk altogether? Also does his range include the agent who considers the possibility of a risk of harmful consequences and then concludes, wrongly, that the risk does not exist? The latter agent, at least, may be said to fall outside the range posited by the learned Law Lord and cannot thus be reckless in relation to his activity. My submission here is that if we are to have a range of mental states which fall within the concept of recklessness then we ought to know precisely what mental states constitute the range, otherwise we do not have a clear-cut model of the concept.

Lord Diplock thought that Kenny's phrase in parenthesis, "(i.e. the accused has foreseen the particular kind of harm, and has yet gone on to take the risk of it)",⁸⁰ was used to indicate the parameters of the word 'malicious'

3. "but it was not directed to and consequently has no bearing on the meaning of the adjective 'reckless' in section 1 of the Criminal Damage Act 1971".⁸¹

Lord Diplock thus admits that the concept 'malicious' is a term of art which has been given a legal meaning quite different from that as understood in ordinary language. However he contends that the concept 'recklessness' is an ordinary English word which has not acquired such a legal meaning and should be interpreted accordingly. He thus maintains his view in the earlier passage 2 above that the agent who fails to foresee a particular risk may be reckless in respect of it. He continued

4. "the restricted meaning that the Court of Appeal in R v Cunningham had placed upon the adverb 'maliciously' (insisting on foresight by the defendant) called for a meticulous analysis by the jury of the thoughts that passed through the mind of the accused at or before the time he did the act ... in order to see on which side of a narrow dividing line they fell ... If it had crossed his mind that there was a risk ... but because his mind was affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk ... this state of mind would amount to

(Cunningham) malice ... whereas *if for any of these reasons he did not even trouble to give his mind to the question whether there was any risk ... this state of mind would not suffice ... Neither state of mind seems to me to be less blameworthy than the other*".⁸²

One might ask why Lord Diplock is prepared to allow the 'meticulous analysis' by the jury regarding offences involving malice but is prepared to reject such an analysis in cases of recklessness. Also to be noted is the fact that the learned Law Lord confines this passage of his speech to the agent who is acting in one or other of three affective states of mind. He thus leaves out of account both the agent who fails to see the risk and the agent who fails to see the seriousness of the risk in those cases in which the failure has been caused by some affective state of mind other than rage, excitement or through intoxication, for example tiredness, emotional distress, senile dementia, ignorance, mental subnormality and so forth.

A third point on this part of Lord Diplock's speech. The learned Law Lord talks of the agent who does not trouble to give his mind to the question of whether there is any risk. What does he mean by this? Is it that the agent fails to call upon his general knowledge of physical causation in relation to the facts and circumstances in which he finds himself? Does it relate to a case in which the agent obtains a flash of awareness about the general possibilities in relation to his activity and then fails to deliberate upon the actual possibilities? Is Lord Diplock referring to the agent whose very attitude to the risk involved has caused his failure to allude to that risk?

Lord Diplock continued by stating that the distinction between the two mental states posited by him earlier in his speech⁸³

5. "would not be a practical distinction for use in a trial by jury.

The only person who knows what the accused's mental processes were is the accused himself - and probably not even he can recall them accurately when the rage or excitement under which he acted has passed, or he has sobered up if he were under the influence of drink at the relevant time".

A word or two on this passage. First Lord Diplock makes no reference here to the previous cases in which a jury had the task of making such a distinction for the purpose of assessing criminal liability (for example **Briggs**^{e4} and **Cunningham**.^{e5} Second note that Lord Diplock continues to restrict his speech to the affective states of mind which he notes in passage 4 above. He continued

6. "(m)y Lords, I can see no reason why Parliament when it decided to revise the law as to offences of damage to property should go out of its way to perpetuate fine and impracticable distinctions such as these, between one mental state and the other. One would think that the sooner they were got rid of, the better".

Lord Diplock thus maintains his view that there is no significant moral distinction between the two mental states which he posits in passage 2 above. Reference was then made to earlier cases on criminal damage. Lord Diplock noted that

7. "**R v Briggs** ... excludes that kind of recklessness that consists of acting without giving any thought at all to whether or not there is any risk of harmful consequences of one's act; *even though the risk is great* and would be obvious if any thought were given to the matter *by the doer of the act*".^{e6}

Lord Diplock reminds us of the ratio in Briggs but two points are worth noting here. First, when talking of failure to attend to a risk of harm he retains the phrase "if thought were given to the matter by the doer of the act". He thus maintains a conditionally subjectivist position on the matter. Second, when talking of a failure to foresee the risk Lord Diplock includes the phrase "even though the risk is great". He did not include this phrase in his summing up on recklessness but could he have meant to include that or a similar phrase to be included therein? Evidence that this may have been his intention is found in Lord Diplock's judgment in **Lawrence**^{e7} in which he talks of an 'obvious and serious' risk. However a subsequent passage by Lord Diplock indicates that the question must be answered in the negative.^{e8} The learned Law Lord continued

8. "R v Parker²⁹ opened the door a chink by adding as an alternative to the actual knowledge of the accused ... a mental state described as 'closing his mind to the obvious fact' that there is a risk.

R v Stephenson³⁰ slammed the door again upon any less restricted interpretation of 'reckless' ... The court ... made the assumption that although (Parliament replaced the word 'maliciously' with 'recklessly' in the Criminal Damage Act) it nevertheless intended the words to be interpreted in precisely the same sense as that in which the single adverb 'maliciously' had been construed by Professor Kenny ...

I see no warrant for making any such assumption ... 'Reckless' as used in the new statutory definition ... is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech - a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any risk in circumstances where, if any thought were given to the matter it would be obvious that there was".³¹

Lord Diplock might have noted that in Stephenson Lord Lane did in fact uphold Parker concerning the agent who has closed his mind to a prospective harm which might flow from his activity. One should note that in this section of his speech Lord Diplock omits two important factors which formed an integral part of his earlier analysis. First he makes no reference to the expression 'by the doer of the act' in talking of failure to foresee a risk. Second, he leaves out of account any reference to an affective state of mind. One might thus interpret this part of his speech as leaning heavily towards the ideal typical construction of objectivism concerning the concept of recklessness which includes a failure by the agent to foresee a risk which a reasonable person (free from rage, excitement or the effects of drink) would have foreseen. It is thus not surprising that this section of Lord Diplock's speech has received so much attention by the theorists.

Lord Diplock went on to deprecate the theorists' obsession with the terms 'subjectivism' and 'objectivism'. Of the two states of mind discussed by him in passage 2 above he said

9. "(i)f one is attaching labels the latter state of mind (failing to give thought to an obvious risk) is neither more nor less subjective than the first. But the label solves nothing. It is a statement of the obvious; mens rea is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the actus reus of the offence; it cannot be the mental state of some non-existent, hypothetical person.

Nevertheless to decide whether someone has been 'reckless' ... does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility ... the accused would not be described as 'reckless' ... for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual upon due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it".⁹²

The last section of this passage from Lord Diplock's speech refers to risk of harm of such a degree that it is unreasonable for the agent to run that risk. All commentators agree on the desirability for this constituent of 'recklessness' and that it is objective in character. Of the rest of the passage one is left to wonder as to just what Lord Diplock has in mind. He states clearly in the first paragraph that one is concerned with the state of mind of the defendant and not the reasonable man when assessing criminal liability. He makes much the same sort of statement in **Sheppard**⁹³ where he states

"(t)he concept of the reasonable man as providing the standard by which the liability of real persons for their actual conduct is to be determined is a concept of civil law ... the obtrusion into criminal law of conformity with the notional conduct of the

reasonable man ... though not unknown ... is exceptional and should not be lightly extended".⁹⁴

But if Lord Diplock is so concerned about any extension of 'the reasonable man' test in our criminal law then why does he introduce that test in the second paragraph of this passage in his speech in Caldwell as what he suggests at least as the basis of liability for recklessness? Of course Lord Diplock limits his speech to the agent who has failed to foresee what a reasonable man might be taken to have failed to have foreseen on the same facts and in the same circumstances but his purport is obvious; that if the agent fails to foresee an obvious risk then, provided the ordinary man would have foreseen it, the defendant is reckless as to that risk. It thus seems that Lord Diplock's passage here reduces itself into the statement that we must look to the state of mind of the defendant. If he has foreseen the risk and gone on to take it then he is reckless. If he is in a state of unawareness then that (negative) mental state amounts to recklessness if the risk is obvious in the sense that the reasonable man would have been aware of it. If this is the correct interpretation of the passage then it seems that Lord Diplock is introducing an orthodox objective test for recklessness under the cloak of allegiance to subjectivist principles.

Did Lord Diplock intend the phrase 'by the doer' to be added to the words "if any thought were given to the matter" in passage 9 above? The addition of the phrase would give sense to the passage as a whole since one might say that Lord Diplock is using the standard of the reasonable man as the criterion in deciding whether or not the agent would have foreseen the risk, and if he can produce evidence of subjective factors which, at the time of his activity, rendered his mental capacities less effective than those of the reasonable man (e.g. mental subnormality) then he is entitled to put that evidence to the jury who may acquit if they feel that his mental defect was such that he was unable to appreciate the risk of harm to the same extent as the reasonable man.

Lord Diplock concluded that a person charged with an offence under s.1(1) of the Criminal Damage Act 1971 is

10. "'reckless as to whether any such property would 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".

This is perhaps the most important passage in the first part of Lord Diplock's speech. One should note that Lord Diplock's earlier restrictions on foresight of an obvious risk to 'the doer of the act had he thought about it' and to the affective mental states of 'rage, excitement and drink' have both been omitted in the model direction. Thus on a straight interpretation of the passage recklessness includes failure to think about an obvious risk, i.e. a risk which the ordinary man would have recognised as existing at the time of the act which brings about the untoward harm, and the defendant is not entitled to put forward evidence relating to his own mental condition or capacity which may have brought about his failure to foresee the obvious risk.

One final point on passage 10. Lord Diplock states at (1) that there must in fact be an obvious risk. Then at (2), in relation to a positive mental state, he says that the agent must be aware that there is some risk. But what of the agent who concludes, rightly, that there is some risk which it is unreasonable for him to take but which is not an obvious risk? In this case the agent satisfies only condition (2) of Lord Diplock's test: he does not satisfy condition (1) which apparently is a sine qua non of Lord Diplock's definition of recklessness. It is submitted that Lord Diplock would hold such an agent reckless; that his definition does not accommodate such an agent, and to this extent at least his model direction is in need of modification.

What is one to make of this part of Lord Diplock's speech in Caldwell? My view is that it is open to several interpretations which might be chosen at random by the competing theorists in order to argue that the model definition accords with their particular viewpoint. The objectivist would presumably look no further than passage 10 and

attribute criminal responsibility to the agent who has failed to foresee a risk which would have been obvious to the reasonable man. The subjectivist might argue that we must look at Lord Diplock's speech as a whole and that, on its general tenor, we may restrict the negative mental component to the agent who has failed to appreciate a risk which he would have recognised had he thought about it, and that he may adduce evidence of a mental state other than rage, excitement and drunkenness to show good reason why he was not capable of alluding to the risk at the time of his activity which may lead to an acquittal.

Lord Edmund-Davies dissented. He referred to Lord Diplock's views on Professor Kenny's statement on recklessness approved in Cunningham⁹⁵ and observed that, over time, the legal meaning of words takes on a different quality from their extra legal meaning. For Lord Edmund-Davies Professor Kenny used lawyers' words in a lawyer's sense when putting forward the parameters of the concept of recklessness. He pointed out that Professor Kenny's statement on the law of recklessness is recognised in other common law countries⁹⁶ and that the Criminal Damage Act 1971 was the main work of the Law Commission who one year earlier⁹⁷ defined recklessness in the following way:

"A person is reckless if, (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk and (b) it is unreasonable for him to take it, having regard to the degree and nature of that risk which he knows to be present".

Lord Edmund Davies suggested that it was this definition and the much respected decision of R v Cunningham⁹⁸ which the draftsman had in mind when drafting the 1971 legislation and concluded

"it has therefore to be said that, unlike negligence, which has to be judged objectively, recklessness involves foresight of consequences combined with an objective judgment of the reasonableness of the risk taken. And recklessness in vacuo is an incomprehensible notion. It must relate to foresight of risk of the particular kind relevant to the charge preferred which, for the purpose of s.1(2), is the risk of endangering life and nothing other

than that".

The learned Law Lord pointed to s.8 of the Criminal Justice Act 1967 and Lord Lane LJ's exposition on recklessness in Stephenson⁹⁹ in support of his view.¹⁰⁰ His concluding remarks are important to present discussion. He said that¹⁰¹

"if a defendant says of a particular risk, 'it never crossed my mind', a jury could not on those words alone properly convict him of recklessness simply because they considered that the risk *ought*¹⁰² to have crossed his mind, though his words might well lead to a finding of negligence. But a defendant's admission that he 'closed his mind' to a particular risk could prove fatal, for, 'A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter'¹⁰³".

It is an interesting point that Lord Edmund-Davies makes here. For the learned Law Lord¹⁰⁴ the phrase 'closing one's mind to an obvious risk' involves at least a flash of awareness of the risks surrounding a, perhaps imminent, piece of activity followed by a decision by the agent to ignore, to suppress from his mind, the actual risk of harm at the time he performs that activity. I am not at all sure that this is in fact the proper interpretation of 'closing one's mind to a risk'. I think also that one ought not to apply such a mental state, whatever it means, to the concept of recklessness.¹⁰⁵

On the same day on which it delivered its judgment in Caldwell, the House delivered a further judgment on the parameters of recklessness as it relates to s.1 of the Road Traffic Act 1972.

In R v Lawrence¹⁰⁶ the defendant was convicted of causing death by driving a motor vehicle on a road recklessly contrary to s.1 of the Road Traffic Act 1972 and appealed ultimately to the House of Lords. Lord Diplock, who delivered the unanimous decision of the House, stated that

"(i)n my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of

two things:

First, that the defendant was in fact driving the vehicle in such a manner as to create *an obvious and serious risk* of causing physical injury to some other person who might happen to be using the road or of *doing substantial damage to property*;¹⁰⁷ and

Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk, or having recognised that there was some risk involved, had nonetheless gone on to take it".

Lord Diplock thus defines recklessness for the purpose of the Road Traffic legislation in much the same way as he did for the purpose of the Criminal Damage Act. However it is interesting to note that he talks here of an 'obvious and serious' risk of harm. Presumably he adds the word 'serious' for the purpose of s.1 of the Road Traffic Act since (i) drivers do (or ought to) attend to their activity at all times whereas the agent who perpetrates criminal damage is not in a constant mental state about the possible consequences of his activity and (ii) the motorist who fails to attend to a lesser risk is guilty of a lesser criminal offence (driving without due care and attention). It is suggested that if Lord Diplock had introduced the word 'serious' into his definition of recklessness for the purpose of offences of criminal damage he might have attracted less criticism from the subjectivists who might be prepared to attribute responsibility to an agent who fails to foresee the very serious risk.¹⁰⁸ Lord Diplock concluded

(i) if satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; *but regard must be given to any explanation he gives as to his state of mind which may displace the inference*".¹⁰⁹

The italicised phraseology merits comment. Just what does Lord Diplock have in mind as the substance of this proviso to his two mental states? Just what excusing factors should the jury be looking for? One reading of Lord Diplock's very opaque comment expressed by Duff¹¹⁰ is that he is

thinking of his own definition in terms not just of not giving thought to the risk, but of not doing so because he was indifferent (of not bothering to give thought) to it. On this view we might say that the proviso was designed to excuse the agent whose failure to appreciate the risk was due to some factor which indicates that he was not indifferent to the risk at the time of his activity. My own view is that Lord Diplock, by his rider, is prepared to allow evidence from the defendant as to his negative state of mind at the time of his activity which produces the proscribed harm and if the jury are satisfied that he *could not* advert to the obvious and serious risk then they are entitled to acquit. All of this suggests that here we have yet another area of the decision in Caldwell which is in need of clarification.

On the basis that he intended my view as the interpretation of his rider in Lawrence, one is left to speculate on why Lord Diplock did not include the rider in his dicta in Caldwell.¹¹² Had he done so then one might plausibly argue that Stephenson¹¹³ might avoid criminal responsibility after 1982 if the jury are satisfied that his schizophrenia rendered him at the time of his activity incapable of appreciating the consequences of his activity as opposed to merely failing to use his power of perception concerning them. Of course the learned Law Lord may have meant this qualification for motoring offences only (with, perhaps Hill v Baxter¹¹⁴ in mind) but he does not make this clear by expressly excluding the rider in Caldwell.

One final point on the rider. Generally courts are prepared to make the mens rea requirement for motoring offences far more strict than that required for non-traffic offences on the ground that driving a vehicle is inherently dangerous and the motorist should thus be judged in accordance with standards of the prudent individual. However in making the rider available to the motorist but not to the agent in a non-traffic offence Lord Diplock effectively makes the mens rea requirement for recklessness less strict concerning road traffic offences. This is certainly at odds with what is perceived to be the general position.

There is no doubt that the decisions in Caldwell and Lawrence have produced a definition of recklessness which leans towards the ideal typical construction of objectivism. It had been objected in Bashir¹¹⁵ that Lord Diplock's statement about 'any thought being given to an obvious risk' should be interpreted in Professor Williams' 'conditionally subjective' sense¹¹⁶ thus requiring that the risk would have been *obvious to the defendant* had he given any thought to the risk. However Archbold¹¹⁷ insists that the test is objective. His view was confirmed in Lawrence and Nadigan.¹¹⁸ It now seems clear that statutory recklessness must be construed objectively.¹¹⁹

To what extent does Caldwell recklessness apply in relation to offences which admit mental states which fall short of intention? In Seymour¹²⁰ the House of Lords declared that Caldwell recklessness was to apply to all statutory offences which admit recklessness as a requisite mental state. However one year later in Satnam and Kewal.¹²¹ Bristow J decided that Caldwell recklessness should not apply to s.1(1) of the Sexual Offences (Amendment) Act 1976 concerning rape (or (obiter) offences against the person) since, in such cases, the agent is reckless as regards circumstances and not as to the facts in relation to his activity. This judgment conflicts with that of the House of Lords in Pigg.¹²² It is submitted that Bristow J's general commentary in Satnam and Kewal does not represent the law although one should note that s.1(2) of the 1976 legislation, arguably at least,¹²³ applies the ideal typical construction of subjectivism to the concept of recklessness. It thus seems that in all statutory offences the concept of recklessness shall be construed in accordance with Lord Diplock's model direction in Caldwell unless the statute expressly provides to the contrary.

It had been thought that Caldwell recklessness did not apply to common law offences which can be committed recklessly. However in Seymour¹²⁴ Lord Roskill stated that "it would be quite wrong to give the adjective 'reckless' or the adverb 'recklessly' a different meaning according to whether the statutory or the common law offence is charged". Lord Roskill is thus prepared to apply a common definition of recklessness to common law and statutory offences.

It seems from the dicta of Lord Diplock in *Caldwell* that the model direction on recklessness should not apply to offences which are committed maliciously on the ground that the latter concept was a term of art whereas the former was not and should thus bear its ordinary meaning. In *W (a minor) v Dolbey*¹²⁵ the Divisional Court confirmed Lord Diplock's distinction between the two concepts holding that in order to establish that a defendant had acted maliciously it had to be shown that, on the facts known to him at the time, *he actually foresaw* that a particular kind of harm might be done to his victim. This view was confirmed by the Court of Criminal Appeal in *Morrison*¹²⁶. This leaves the law in an unsatisfactory state since where an offence requires 'malice' as an appropriate mental state the court or jury must decide whether or not the agent was aware of the risk at the time of his act whereas where the offence admits 'recklessness' as a relevant mental state the agent's actual mental state is not relevant.¹²⁷

Professor Smith has criticised the judgment¹²⁸ in *Caldwell* pointing out that Parliament has approved, at least implicitly, the views of the Law Commission¹²⁹ and the Criminal Law Revision Committee¹³⁰ both of which advocate a subjective approach to recklessness. He notes that Lord Diplock evades this 'overwhelming' evidence of Parliament's intentions by reference to the long title of the Criminal Damage Act which shows the purpose of the Act "to revise"¹³¹ the law".

Lord Diplock considered that there was no reason why Parliament, when revising the law, should go out of its way to perpetuate the "fine and impractical" distinctions between the agent who has considered a risk and has gone on to take it and the agent who has failed to consider an obvious and serious risk. But, as Professor Smith points out,¹³² the Criminal Damage Act made a considerable revision of the law generally, and Parliament may be taken to have accepted the then current legal position on the requisite mental element as the only part of the current law satisfactory in substance although not, perhaps, in form.¹³³ In any event if Parliament had some form of recklessness in mind, other than that which had been settled by the judges in their interpretation of statutory malice then surely that form of recklessness (which would have

amounted to a change in the current law) would have been made clear by way of definition in the Criminal Damage Act 1971.

A Possible Lacuna in 'Caldwell Recklessness'.

Griew¹³⁴ notes two types of agent who, he submits, fall outside the Caldwell criteria for recklessness.

"M does give thought to whether there is a risk of damage to another's property attending his proposed act and he mistakenly concludes that there is no risk; or he perceives only a risk such as would in the circumstances be treated as negligible by the ordinary prudent individual. He misses the obvious and substantial risk. N is indeed aware of the kind of risk that will attend his act if he does not take adequate precautions. He takes precautions that are intended and expected to eliminate the risk (or to reduce it to negligible proportions). But the precautions are plainly - though not plainly to him - inadequate for this purpose".

For Griew these cases appear not to be cases of recklessness since "evidence of conscientiousness displaces what would otherwise be an available inference of recklessness".¹³⁴

However in Chief Constable of Avon and Somerset Constabulary v Shimmen¹³⁵ Taylor J. referred to Griew's examples and rejected his submission in relation to the case of N. In Shimmen the defendant, who was an expert in the Oriental Art of Taikwan-Do, kicked out at a shop window in order to impress his friends on his ability to stop short of contact. However D did make contact and in fact broke the window. At his trial the justices decided that D had in fact created an obvious and serious risk but that the inference that he was in one or other of the states of mind to constitute the offence might be rebutted by virtue of his evidence relating to his expertise in Taikwan-Do; that he could be acquitted if he perceived there could be a risk and, after considering such risk, determined that no damage would result. They dismissed the charge.

On appeal the prosecution conceded that there might exist a lacuna in the Caldwell model of recklessness; that there may be a state of mind which fell into neither of the two categories enunciated by Lord Diplock, namely that where he creates an obvious risk that property will be destroyed the agent either (i) has not given any thought to the possibility of there being any such risk or (ii) has recognised that there was some risk involved and has nonetheless gone on to do it.¹³⁶ Taylor J. thought that the two examples posited by Griew (above) provide useful material with which to assess the issue. Taylor J. thought that M's case might fall outside the Caldwell criteria since, although he has given thought to the possibility, he has not recognised that there was some risk involved and may be said to fall outside the second state of mind referred to by Lord Diplock.¹³⁷

However Taylor thought that in N's case the agent falls within the second state of mind posed in Caldwell: he took precautions which he expected would eliminate the risk but the fact that he was conscientious to the degree of trying to minimize the risk does not mean that he falls outside the second limb since that limb is simply whether or not he realised that there was some risk. For Taylor J. the agent N certainly did recognise that there was some risk and went on to do the act and he thus falls within the second limb of Caldwell recklessness. Of the case before him Taylor J. decided that Shimmen did recognise that there was a risk; it was not a case of considering the possibility and deciding that there was no risk. Indeed Shimmen had admitted at his trial that "I weighed up the odds and thought I had eliminated as much of the risk as possible by missing by two inches instead of two millimeters". Taylor J. thus allowed the appeal. Watkins L.J. agreed and the case was remitted with the direction to convict.

With respect to Taylor J it is submitted that this reasoning is wrong. It seems that Griew's M is to be acquitted if he either believes there is no risk, or "*perceives only a risk such as would in the circumstances be treated as negligible by the ordinary prudent individual*". I take it that the point is that if he has given thought, and perceives only a risk which it would not be unreasonable to take (this is what it means

for a risk to be treated as negligible by the ordinary prudent individual), he is not reckless. But then one may argue that the same should apply to N who believes either that there is no risk pertaining to his activity, or that there is only a risk such as would in the circumstances be treated as negligible by the ordinary prudent individual. If this is accepted then to justify convicting Shimmen it needs to be shown (which may very well be true) that the risk which he believed himself to be taking was not just a risk but an unreasonable risk - that it would be not treated as negligible by the ordinary prudent individual.

What of the fictitious Shimmen₂ who claims that he had anticipated the possibility of damage to the window and that he believed that he had taken precautions which he thought (mistakenly) had eliminated that risk. Lord Diplock talked of realisation of a risk and *nonetheless* going on to do the intended act. I think that with the word 'nonetheless' Lord Diplock had in mind for the second state of mind realisation of some risk at the time of intended activity no matter how slight that risk might be (with the proviso that the risk be considered more than minimal by the ordinary prudent individual so that the agent is not justified in taking that risk). If this interpretation of Lord Diplock's dicta in Caldwell is correct then Shimmen₂ and Griew's N are not reckless. The case of N is thus no different from that of M at the time at which each act is perpetrated since both agents have considered a possible specific risk associated with their activity and both have ruled out that risk at the point at which they begin that activity.¹³⁸

But if we are to excuse Shimmen₂ and Griew's N, who believes that he has eliminated the risk entirely, but count as reckless the actual Shimmen, who believes he has reduced the risk to negligible proportions when the risk would not have been considered negligible by the ordinary prudent individual, is there not a lack of fit with peoples' views as to what are and what are not significant moral distinctions? My view is that we are right to convict Shimmen if we are satisfied that he has taken a known risk of harm which, is on the facts of the case, an unreasonable one for him to take. On this view one might say that we ought to convict

Shimmen₂ on the ground that there is no significant moral difference between the two agents. But if we are to ascribe liability to Shimmen₂ then, on my submission, we may not do so on the basis of recklessness since, by so doing, we make that species of mens rea conceptually incoherent since it would embody mental states with differing characteristics. If we want to ascribe liability to Shimmen₂ then we must, I think, rely on some other category of mens rea which admits negative mental states. Provided that Shimmen₂ has failed to foresee a risk which the ordinary prudent man would have regarded as high then he would fall within the rebuttable inference of gross negligence on my proposed twofold model of negligence and would be liable accordingly unless he could avail himself of the rebutting provision.¹³³

It is worth noting here that Taylor J, in his deliberation, made reference to a specific defence raised by Shimmen at his trial using the dicta in Lawrence that

"(i)f satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference".

Both Taylor J. and Watkins L.J. considered the defence put forward by Shimmen and, although the defence was turned down, it is interesting to note that neither judge denied the defence on the ground that the passage in Lawrence applied *only* to recklessness in motoring cases. Arguably at least the court was prepared to accept the passage as forming a part of the Caldwell test of recklessness. If this is the case then we may talk of an obvious *and serious* risk in cases of criminal damage and we may have regard to any explanation offered by the defendant which may displace the inference that he is one or other state of mind in such cases.

One final point on the possible lacuna. Duff thinks that Griew's M falls under the Morgan¹⁴⁰ doctrine: that the agent's honest mistake is

sufficient to excuse him from liability whether or not the mistake was reasonable in the circumstances.

'Caldwell Recklessness' and 'Conditional Subjectivism'.

Some debate has revolved around Lord Diplock's 'creation of an obvious risk'. Obvious to whom? Some commentators have insisted that the risk must be one which would be obvious to the defendant if he gave it some thought.¹⁴¹ They base their contention on specific passages from Caldwell on recklessness¹⁴² and Lord Diplock's comment on drunkenness that the defence is not available if the risk would have been obvious to the defendant had he been sober.¹⁴³ They also cite the case of Briggs¹⁴⁴ wherein Lord Diplock suggested that the concept of recklessness includes those cases in which if thought had been given to the matter by the doer before the act is done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences.

If we assess this dictum in isolation from the general commentary then we could argue that, in cases of subnormality or mental disorder at least,¹⁴⁵ the defendant cannot be reckless in relation to any harm which he causes since the risk would not have been apparent to him even if he had thought about the matter.

Glanville Williams has considered the subjective overtones put forward in the judgments and is prepared to amend his generally subjectivist stance in the light of them. He talks in terms of the agent who knows of a particular risk generally but does not think of it at the moment of his act since he is intent upon something else. For Williams the agent in such a case has general knowledge and can recall it given the will and ability to do so.¹⁴⁶ He argues that if the agent simply forgets to consider a risk of which he would otherwise have been aware then he is guilty of negligence, not recklessness. But in relation to cases in which the agent acts in a blind rage or whilst in a drunken state Williams would apply what he calls a 'conditionally subjective test' in any analysis of recklessness: we should ask whether the agent did in fact realise the risk and, if he did not, whether he would have realised

the risk if he had stopped to think, which includes waiting to be in a fit state to think where it is reasonable to include this requirement.¹⁴⁷ However Williams intends his 'conditionally subjective' test to apply only in cases in which the agent is unaware of the risk because he is drunk or in a blind rage; the test does not extend to cases in which the agent is unaware of the risk because he is excited and acts without an evil intent.¹⁴⁸ In applying this proviso Williams excuses from recklessness the agent who, in a state of annoyance, flings open his car door in order to remonstrate with a negligent motorist.

Note that Professor Williams is extending the pure subjective boundary of recklessness to catch the agent who is unaware of an obvious risk through rage or drink: he is not prepared to extend the concept of recklessness so as to include cases of 'gross negligence' generally.

Duff points out that Williams' qualification to his 'conditionally subjective' test might lead to anomalies in the cases.¹⁴⁹ He posits the case of the mugger who fails to notice that he is endangering his victim's life because he is in a state of excitement (short of rage), or is simply too callous to notice the risk. Duff contends that the assailant who brings about harm in a state of calm or excitement short of rage is no less culpable than the agent who brings about the same harm whilst in a drunken state or in a blind rage. Duff suggests that we need a more sophisticated mode of conditional subjectivism.

One might respond that Williams' proposal does in fact catch Duff's mugger since he excludes from the excusing provisions cases in which the agent has an evil intent.¹⁵⁰ However Professor Williams restricts this exclusion, in relation to drunkenness at least, to cases in which it can be said to be the agent's purpose to interfere with a person or property. For Williams the exclusion does not apply to cases of drunken clumsiness.¹⁵¹ Duff refers to this restriction and asks if we might extend it to cases of blind rage.

"Should we then say that what makes an agent reckless is not just the degree to which his state of unawareness is dangerous or reprehensible, but the quality of the *intent*¹⁵² which that state, or

getting into such a state, involves; that being or becoming absent minded need not involve "an evil", whereas being or becoming enraged does; that one who does not notice the risk he takes may still be held reckless *if his failure to notice it is due or related to an evil intent?*"¹⁵³

The words in italics are important. Duff is here canvassing the rather general claim that a causal relation between an evil intent and unawareness of risk is sufficient to make the agent reckless. He then goes on in the article to canvass the different and more limited view that the evil intent must be more intimately connected to the unawareness - either (i) that the risk be created by a course of activity which is itself motivated by the evil intent, and/or (ii) that the risk be integral to the evilly intended activity. To illustrate Duff's more limited suggestions. The agent D₁ who, through rage, is unaware of the physical danger to the victim attacked by him is blind to a risk of activity "which is motivated by, and which expresses, that rage".¹⁵⁴ The agent D₂ who, in a rage at his wife's confession of adultery, flings open his car door in a state of unawareness of the risk of injury to a passing cyclist is merely negligent in relation to that harm since "there is no motivational connection between the rage which makes him fail to notice the risk and the action, which creates the risk".¹⁵⁴ The distinction between the two more limited claims may be illustrated thus. Suppose D₃ has pulled up at the home of his wife's lover and is bent on causing grievous bodily harm to him. He flings open the car door in a state of unawareness concerning the danger to a passing cyclist who is injured thereby. Can we say that this agent is reckless in relation to the injury sustained to the cyclist? On Duff's motivational criterion D₃ would be convicted; on the 'integral' criterion he would not.

Duff asks if Professor Williams, by his proposed test of conditional subjectivism, compromises subjectivist principles for the sake of social utility. He points out the tension between individual justice on the one hand and practical and social purposes on the other has led to this qualification of the subjectivist principle that the agent must have

been aware of the risk; i.e. ideally we should count as reckless only the agent who is aware of the risk but on occasion it is necessary to sacrifice the principle to social utility. Williams restricts the compromise to cases in which the agent is unaware of the risk through drunkenness or rage. Duff goes further than Williams in one sense. He says

"the fact that an agent is unaware at the time of his act of a risk which that act creates should not preclude the judgment that he is reckless as to the risk, if his very unawareness of the risk itself manifests the kind of practical indifference which is central to the meaning of recklessness".

For Duff, then, an agent should be counted as reckless where he has failed to see a risk the causal genesis of which is his indifference to it. The fact that the risk is integral¹⁵⁵ to his intended action is one of the grounds which might justify this conclusion. However Duff would not go so far as Williams since he does not think that failure to notice a risk due to drunkenness is necessarily recklessness.¹⁵⁶

Professor Williams puts forward another criticism of the decision in Caldwell. He points out that Lord Diplock's model direction in Caldwell extends to the agent who is sober and calm but fails to apply his mind to the risk which bears upon his activity, and pleads for the acknowledgement of the distinction between this agent and the man who considers the risk and decides to ignore it. He cites the contrasting cases of an agent who opens his car door 'momentarily forgetful of the risk' to a passing cyclist and the agent who is aware of that risk but chooses to disregard it.¹⁵⁷ For Williams there is a significant distinction between the two agents sufficient to merit classification for the purpose of ascriptions of criminal responsibility.

Clarkson and Keating allude to Williams' contrasting cases and agree with him that there is some argument for distinguishing between them at the conviction stage.¹⁵⁸ The learned authors criticise the decision in Caldwell since Lord Diplock blurs the distinction between advertence and gross inadvertence. They also point out that since the dividing line

between gross inadvertence and simple inadvertence is extremely difficult to draw, Lord Diplock in fact blurs the distinction between recklessness and negligence.

Despite the arguments put forward by the learned authors it is clear that Lord Diplock meant his model direction to be objective in nature since, as Griew points out,¹⁵⁹ the arguments ^{are} ~~are~~ inconsistent with Lawrence in which Lord Diplock speaks only in terms of "the ordinary prudent individual". Griew also suggests that if their lordships were prepared to excuse ignorance of risk because of incapacity then they would certainly have raised the issue expressly in the course of their judgment.¹⁶⁰ The ideal objectivist view on 'foresight' was applied by the Divisional Court in Elliot v C (a minor).¹⁶¹ In that case a young girl of fourteen who was of low intelligence and who had not slept for twenty four hours, poured white spirit onto the floor and tried to light it. The shed was destroyed by fire. The magistrates found that, because of her age, understanding and lack of experience and exhaustion, the risk of damage to the shed would not have been obvious to her if she had given any thought to the matter. The Divisional Court held that a defendant was reckless if the risk was one that was obvious to a reasonably prudent person. In Stephen Malcolm R¹⁶² the Court of Appeal came to the same conclusion. In that case a boy of 15 threw petrol bombs into a girl's bedroom. He was convicted of arson contrary to s.1(2)(b) of the Criminal Damage Act 1971. The Court of Appeal rejected the argument that in deciding upon recklessness one should restrict the creation of an obvious risk to someone of the appellant's age and characteristics which might affect his appreciation of the risk.¹⁶³

It thus seems that the test concerning the 'obvious risk' relates to the reasonable man and not to the defendant's own ability to appreciate the risk had he thought about it. One point which emerges from the foregoing is that we perhaps ought not take particular phrases and view them in isolation from the overall context of a particular judgment.¹⁶⁴

Malice.

We may ascertain the contours of malice from the statement by Kenny¹⁶⁵ as expressed in the court in Cunningham.¹⁶⁶ Generally the agent must appreciate the risk associated with his activity and make a conscious decision to take that risk. However we ought to note the decisions in Cato¹⁶⁷ and Howatt¹⁶⁸ which at least suggest that the test for malice is objectivist in character where the agent's activity is constituted by a direct assault upon another. That the test for malice remains subjectivist can be seen from the decisions in two recent cases.

In Lynch¹⁶⁹ D amused himself by firing at bottles on a garage roof with an air pistol having made some inadequate precautions in order to prevent injury to others. A neighbour was struck by a pellet. D was convicted of malicious wounding contrary to, s.20 of the Offences Against the Person Act 1861 on the ground that whilst he was concerned to avoid harm *he had in fact appreciated the risk of that harm.*

In Morrison¹⁷⁰ D was convicted of wounding with intent to resist arrest contrary to s.18 of the Offences Against the Person Act 1861. The conviction was quashed by the Court of Appeal on the ground of misdirection. In his summing up the trial judge had said

"Recklessness presupposes something in the circumstances that would draw the attention of an ordinary, prudent and sober person to the possibility that the act that he is committing is capable of causing harm to (the victim), and that risk that he was going to take was more than just a possibility: it was a risk which he either took deliberately, or he closed his mind to the possibility of causing injury."

Lord Lane said that there were now two forms of recklessness in our criminal law. The first is that defined by Lord Diplock in Caldwell.¹⁷¹ The second type of recklessness is that defined by Byrne J in Cunningham.¹⁷² Lord Lane noted that Lord Diplock distinguished Cunningham in Caldwell so that the decision in the latter case stood and was binding on the Court of Appeal. The Lord Chief Justice concluded

that the statutory provision in issue involved 'malice' and that the Cunningham definition therefore applied in the present case. For Lord Lane the judge should have driven it home to the jury that what was going on in the defendant's mind, not in the ordinary, prudent observer's mind, was what they had to consider.

The two recent cases show quite clearly that the offences which admit foresight contained in the Offences Against the Person Act 1861 and other offences of malice must be construed subjectively.

To summarise the present law on recklessness. Caldwell and Lawrence inform us that

(i) an agent is reckless where he appreciates that there is a risk of a proscribed harm and goes on to take that risk. There is no distinction between low and high risk for the purpose of the concept except that a person will not be reckless in respect of a risk that he has considered and decided to ignore if the risk was slight enough to be treated as 'negligible' by the ordinary prudent individual. However the gravity of the probable consequences is an important factor in the assessment of this aspect of recklessness.

(ii) an agent is reckless where he fails to foresee a risk which is obvious (Caldwell and Lawrence) and serious (Lawrence).

(iii) Caldwell recklessness applies to all common law offences which admit recklessness as a mental element and to all statutory offences unless the statute expressly provides for some other form of recklessness.

(iv) the law remains unclear in relation to the agent who attends to the possibility of a risk and, after due deliberation, (wrongly) considers the risk to be absent.¹⁷³

(v) Caldwell informs us that the two concepts of recklessness and malice are mutually exclusive and that the mental state required for each is not the same.

FOOTNOTES TO CHAPTER 6.

1. For which see infra chapter 7.
2. See, for example, Andrews v D.P.P. [1937] AC 576.
3. [1957] 2 All ER 412.
4. In 'Outlines of Criminal Law' 1st ed. (1902). It is worth noting here that Professor Kenny is describing 'malice' and not 'recklessness'. However, as we shall see, judges in later cases took malice as an alternative for recklessness. This union of the concepts was terminated by Lord Diplock in Caldwell (infra note 74). See infra p.222ff.
5. [1874] All ER 1163.
6. Italics added.
7. [1967] 3 All ER 47.
8. Italics added.
9. In his Textbook of Criminal Law 3rd ed. 90.
10. Smith and Hogan, Criminal law 6th ed. at p.401..
11. See his dictum supra p.199.
12. See, for example, G. Williams, 'The Mental Element in Crime' (Jerusalem and Oxford Press).
13. I do not make reference to degrees of probability (as opposed to degrees of harm) here. This aspect is dealt with infra Chapter 7.
14. R. A. Duff, 'Implied and Constructive Malice in Murder' in the Law Quarterly Review [1979] 418.
15. See infra p.230ff.
16. 1 WLR [1976] 110.
17. Italics added.
18. Supra note 16. at p.119
19. Supra p.198.
20. Supra note 16 at p.120.
21. 6th ed. at p.381.
22. However I shall point out below that 'malice' now has a different type of foresight of probability than that required for recklessness. see infra p.246.

23. [1977] 1 WLR 605.
24. [1977] 1 WLR 600.
25. Italics added.
26. See G Syrota, 'A Radical change in the law of Recklessness' in the Criminal Law Review [1982] 100.
27. See infra chapter 7.
28. [1979] 1 QB 695.
29. Ibid at p.698.
30. Cross calls it a 'flash of awareness'. See 'The Mental Element in Crime' in the Law Quarterly Review (1967) 83 225.
31. See the speech of Lord Lane in Stephenson supra p.207.
32. See the dictum above p.207.
33. See gross negligence infra chapter 7.
34. Italics added.
35. This issue is discussed in detail infra p.265ff.
36. [1980] 70 Cr App Rep 51.
37. (1981) Crim LR 46
38. Of course the mental state under s.20 is 'malice' and not 'recklessness' and, as I point out below, Caldwell has separated malice from recklessness concerning foresight of probability.
39. Textbook of Criminal Law 3rd ed. 157.
40. (1974) Crim LR 13.
41. Supra p.202.
42. See Chief Constable of Avon and Somerset Constabulary v Shimmen (1986) 84 Cr App Rep 7. Infra p.237.
43. These statements are subject to cases such as Shimmen See infra pp.237-40.
44. [1980] QB 434.
45. R. A. Duff makes similar submissions concerning the concept of recklessness See 'Recklessness' in the Criminal Law Review [1980] 282.
46. Supra note 44. at p.439.

47. Ibid at p.440.
- 48 In 'Caldwell and Lawrence: the Retreat from Subjectivism' in the Oxford Journal of Legal Studies (1982) 77.
49. Supra pp.213-4.
50. Supra note 44 at p.440.
51. But note the caveat applied by Lord Eveleigh which appears immediately below.
52. Supra note 44 at 440-1.
53. Infra p.227ff.
54. Supra note 48 at p.79.
55. Italics added.
56. See for example gross negligence infra Chapter 7.
57. [1981] AC 394.
58. [1889] 1 QB 283
59. Supra note 57 at p.407.
60. Ibid at p.408.
61. Ibid at p.412. Contrast this statement with that given by Lord Edmund-Davies in Caldwell infra pp.231-2.
62. supra p.214ff.
63. Supra note 44.
64. See supra p.214.
65. Noted by Duff, supra note 48 at p.83.
66. See infra pp.244 and generally in 'Professor Williams and Conditional Subjectivism' infra note 149.
67. Supra note 7.
68. Supra note 24.
69. Supra note 7.
70. Supra p.198.
71. See supra p.203.

72. Supra note 37.
73. I discuss the issue in some detail infra chapter 7.
74. (1982) AC 341.
75. At p.351.
76. Supra note 3.
77. Supra p.198.
78. At p.351. Italics added.
79. This is discussed in detail infra p.241ff.
80. See supra p.198. for Professor Kenny's statement.
81. At p.351.
82. Italics added.
83. Supra passage 2 at p.223.
84. Supra note 23.
85. Supra note 3.
86. Italics added.
87. Infra note 106.
88. Infra p.233.
89. Supra note 24.
90. Supra note 28.
91. Supra note 74 pp.353-4.
92. Ibid p.354.
93. Supra note 57.
94. Ibid at p.404.
95. Supra note 3.
96. E.g. in Australia, Ledger v Hutchins (1961) WAR 99; and in the U.S.A., Jethro Brown's 'General Principles of Criminal law' (2nd ed. 1960 p.115).
97. In their Working Paper No. 31. 'Codification of the Criminal Law general Principles, The Mental Element in Crime'.

98. Supra note 3.

99. Ibid.

100. With respect to Lord Edmund-Davies I do not think that s.8 of the Criminal Justice Act 1967 supports his view on recklessness since s.8 relates to the concept of intention.

101. At p. 358.

102. Italics supplied.

103. From G. Williams, 'Textbook of Criminal Law' 1978 at p.79.

104. And Williams. See generally 'Divergent Interpretations on Recklessness' in the New Law Journal [1982].

105. I submit later that failure to allude to a risk falls within either gross or simple negligence. See infra chapters 7 and 8.

106 (1982) AC 510.

107. Italics added.

108. See Professor Glanville Williams infra note 104.

109. Italics added.

110. In conversation with me.

111. Not simply 'did not' since that would be radically inconsistent with Lord Diplock's central claim that one who fails to give any thought is reckless.

112. Supra p.233.

113. supra note 28.

114. [1958] 1 QB 277.

115. [1982] Crim LR 687.

116. Infra p.241ff.

117. In the second supplement to his 41st edition.

118. [1982] Crim LR 692.

119. See also Elliot v C [1983] 1 WLR 939; and R v R [1984] 79 Cr App Rep 334.

120. [1983] 3 WLR 349.

121. (1984) 78 Cr App Rep 149.

122. (1982) 74 Cr App Rep 352.

123. I say 'arguably' since one might contend that s.1(2) merely says that if the jury have to consider whether D believed the woman to be consenting, then ... ; it thus leaves open the issue of whether and when a jury have to consider this, and what its relevance should be.

124. Supra note 120.

125. [1983] Crim LR 681.

126. Times, 12th November 1988.

127. Unless, that is, the agent who considers whether there is a risk and decides there is none falls outside the Caldwell criteria, in which case this particular mental state will be relevant in cases of recklessness.

128. Criminal Law Review [1981] p.393.

129. See especially Law Comm. No.29 which specifically calls for the retention of Cunningham recklessness when making its provisional proposals in relation to a revised law on criminal damage. That view was confirmed in the final report, Law Comm. No.89.

130. Which expressly adopted the same meaning of recklessness in relation to offences against the person as that proposed by the Law Commission in Law Comm. No.89. (See Cmmd. 7844 Para 11).

131. Italics supplied.

132. Supra note 128 at p.394.

133. This contention is borne out in the Parliamentary debates on the proposed legislation which referred favourably to the draft bill put forward by the Law Commission.

134. E Griew, 'Reckless Driving: Living with Caldwell and Lawrence' in the Criminal Law Review [1981] 743. at p.749.

135. (1987) 84 Cr App Rep 7.

136. Supra p.230. Passage 10.

137. Passage 10 supra p.230.

138. M because he cannot see the risk; N because he thinks that he has eliminated the risk.

139. See my concept of gross recklessness infra chapter 7.

140. [1976] AC 182. Point made in conversation with me.

141. See G. Williams, 'Recklessness Redefined' in the Cambridge Law Journal [1981] 252; and G Syrota, 'A Radical Change in the Law of Recklessness' in the Criminal Law Review [1982] 97.
142. See passage 1 supra p.223 wherein Lord Diplock talks of a risk which would be obvious to the doer had he thought about it.
143. Supra note 74.
144. Supra note 84.
145. G Syrota would include also cases of excitement, rage, exhaustion and drowsiness without fault. see Criminal Law Review [1981] at 658.
146. G. Williams, 'Divergent Interpretations of recklessness' in the New Law Journal [1982] 289.
147. G. Williams, 'Recklessness Redefined' in the Cambridge Law Journal [1981] 252.
148. Ibid at p.260.
149. R. A. Duff, 'Professor Williams and Conditional Subjectivism' in the Cambridge Law Journal [1982] 273 at p.276.
150. Supra note 147 at p.260.
151. Supra note 146 at p.290.
152. Italics supplied.
153. Supra note 149 at p.279. Italics added.
154. Ibid at p.280.
155. For example where D is striking V not thinking that serious injury might be inflicted upon him but such occurs. The risk of serious injury is integral to D's activity.
156. Supra note 48 pp.96-7.
157. G. Williams, supra note 147 at p.260.
158. Clarkson and Keating, 'Cases and Materials' at p.50.
159. Supra note 134 at p.743.
160. Ibid at p.748. With respect to Griew Lord Diplock did expressly raise the issue of incapacity, at least indirectly, several times in Caldwell when he seemingly restricted objective foresight to cases of rage excitement and drunkenness. However it is conceded the restriction does not appear in Lord Diplock's summary of recklessness.
161. [1983] 2 All ER 1005.

162. (1984) 79 Cr App Rep 334.

163. See also Sangha (1988) Times 2nd February CA.

164. Much better that the judges refrain from inconsistencies in the judgments. A few comments on Caldwell and drunkenness by way of note. Caldwell informs us that intoxication would be no defence if that risk would have been obvious to him had he been sober (applying Majewski [1977] AC 433, and the American Law Institute's Model Penal Code 1K, §2.08(2)). Since the dicta in Caldwell talks of self induced intoxication it is presumably open to the defendant whose drunken state has been brought about by some other cause to plead that he cannot fall within the parameters of Caldwell recklessness. An interesting point here is that since Elliot (see note 161) applies a strictly objectivist reading of recklessness would it be no defence for D to show that his intoxication was not self induced? Second, the defendant who was drunk at the time of his act may be free from responsibility for criminal damage by virtue of s.5(2) of the Criminal Damage Act 1971 if he can show that he believed that he had (or would have had) the owner's permission to damage the property (Jaggard v Dickinson [1980] 3 All ER 716). However that section does not apply to the agent who believes the property he is damaging is his own (Smith (David) [1974] QB 354).

165. Supra p.8.

166. Supra note 3.

167. Supra note 16.

168. Supra note 7.

169. CA 6026/b1/83 January 14th 1987 (Lexis).

170. Times, November 12th 1988 C.A.

171. Supra note 74.

172. Supra note 3.

173. See Shimmen supra note 42.

In the last Chapter 1 pointed out that at current law the concept of recklessness is in a confused state. In the cases since Cunningham¹ we have differing statements as to the meaning of recklessness including "knowing that there is some risk ... but nevertheless continues in the performance of that act" (Briggs);² "heedlessly rash" (Murphy);³ "not caring whether or not ..." (Sheppard);⁴ "indifferent" (voiced indirectly by Lord Diplock in Sheppard);⁵ "do not bother to observe";⁶ "doing an unlawful act with gross negligence, that is to say recklessly" (the trial judge in Cato);⁷ "closing his mind to the obvious fact that there is some risk" (Lane LJ in Parker);⁸ "the knowledge or appreciation of risk (of some damage) must have entered the defendant's mind, even though he may have suppressed it or driven it out" (Stephenson);⁹ "'couldn't care less'. In law this is recklessness" (Kimber)¹⁰ and so forth.

The decisions in Caldwell¹¹ and Lawrence¹² have made a significant contribution to the confusion. As we have seen, Lord Diplock in Caldwell includes the phrase "does not trouble to give his mind to the question of whether there is any risk".¹³ He also introduces the negative mental state of failure to foresee an obvious risk. However in two passages he restricts this negative mental state to a risk which would be obvious to the doer had he thought about the risk although he omits this restriction in his final definition of recklessness. Did he mean to include the restriction in his model? If not why did he see fit to make express reference to the restriction in two separate passages in his speech? Lord Diplock also seemed prepared to restrict this negative mental state to certain affective states of mind in two separate passages in his speech¹⁴ but he left them out of account in his formulation of the concept of recklessness. Did he intend the restriction to his proposed negative state in his definition of recklessness? Lord Diplock also draws a distinction between 'malice' and 'recklessness' stating that 'malice' is a term of art which is

constituted only by a positive mental state in respect of the risk of harm.¹⁵ We thus have two quite different constructions of foresight depending upon the form of mens rea designated to the offence.

In Lawrence¹⁶ Lord Diplock adds 'serious' to the phrase 'obvious risk' in relation to the negative mental component of recklessness proffered by him in Caldwell and adds the rider that consideration must be had to any explanation which the accused gives as to his state of mind which may displace the inference. The proposed model of recklessness in reckless driving offences thus differs from that put forward in criminal damage cases in two important respects.¹⁷

This leads to a further point. Parliament is free to include a particular definition of recklessness in relation to each offence which it creates by legislation. An example of this is s.6 of the Public Order Act 1986 which uses 'awareness' as part of the mental element in respect of the statutory provision contained therein.¹⁸ We thus have the position whereby Parliament may define recklessness in varying ways and the courts interpreting statutory definitions of recklessness in varying ways. This inevitably leads to incoherence concerning the parameters of the concept. However, I think that it is important that we have a coherent and uniform definition of recklessness in our criminal law. The best if not only method of achieving this is a general statutory model of recklessness which would be applied to all offences which admit recklessness as a mental element. In this Chapter I offer six levels of foresight concerning untoward harm, postulate the various positions taken by the judges and theorists in relation to each and construct a model of recklessness and gross negligence which would replace the current concept of recklessness.

1. Foresight by the Agent of a High Risk of Untoward Harm.

By 'high' risk I mean a risk which is more likely than not to occur: i.e. there is a better than 50% chance of the untoward harm being brought about by the agent's activity aimed at something else. There is judicial and academic consensus that foresight of a high risk amounts to

recklessness in respect to it. That consensus in fact extends to foresight of any degree of risk, subject to the rule that the risk must not be so low that the agent would not be considered unjustified in taking it. Let us call the mental state for this head of foresight 'gross recklessness'. Thus where an agent, with the appropriate mental state, brings about particular untoward harm we may count him as grossly reckless concerning that harm. I should point out that the agent must be aware that there is a high risk of harm. If he fails to allude to the risk or is mistaken about the degree of risk (i.e. he thinks that it is low when it is in fact high) then he does not bring about the harm by gross recklessness.¹⁹

2. Foresight by the Agent of a Low Risk of Untoward Harm.

This head of foresight may be stated shortly. It involves awareness by the agent of the risk of untoward harm which, given my definition of 'high risk', is one which is not more likely than not to occur: that is the chances of the occurrence of the untoward harm are 50% or less. Let us call the mental state for this head of foresight 'simple recklessness'.

Gross and Simple Recklessness as Species of Mens Rea.

Whilst they are agreed that foresight of both a high risk and a low risk constitute recklessness,²⁰ few if any commentators say anything on whether the two levels of foresight should be distinguished for the purpose of attribution of criminal responsibility. It seems that most if not all commentators are happy to bracket together all cases of foresight for the purpose of conviction regardless of the degree of risk involved in each case.

My submission here is that for the purpose of conviction we are entitled to and ought to distinguish between the taking of a high risk and the taking of a low risk (a risk which is not more likely than not to occur): that for the purpose of ascriptions of liability we should distinguish between gross and simple recklessness. Of course the current

general view, which treats all degrees of foresight of risk as recklessness or malice simpliciter, has remained undisturbed for centuries and a significant restructuring of the concept of recklessness on the lines which I am suggesting will require some justification. I posit several reasons why my submission should have serious consideration.

First there is a significant moral distinction between the agent who knowingly takes an unjustified and high risk of harm and the agent who takes a significantly lesser risk. In the former case the agent is perhaps expecting the occurrence of the untoward harm whereas the latter agent may have good ground for expecting that the untoward harm will not occur. A second point within this first submission is that the latter agent may genuinely say that if the risk had been significantly higher then he would not have taken it, a claim which might not be made by the former agent who has demonstrated his willingness to expose a person or property to the high risk of harm.

Second the distinction between gross and simple recklessness at the conviction stage enables us to reward the agent who considers a risk and takes significant steps to prevent the harm from occurring. Consider the case of a bomber who plans to cause an explosion in a building in order to cause property damage. He realises that his initial plan involves a high risk of injury to people unless he takes substantial measures to prevent that injury. He thus rethinks the place, time and day of execution and type and size of device in order to reduce the risk of injury so that it is now not more likely than not to occur. However a person is injured in the ensuing explosion. If we wish to encourage such risk minimisation then we should reward at the conviction stage the agent who takes efforts to reduce the risk of untoward harm. We may do this on the proposed models of recklessness by charging him with causing injury²¹ through simple recklessness.

One might argue against this that, as a law and order matter, we do not want to make it easier for some criminals by giving them a lesser penalty because they have minimised the risk: that we may thereby be

encouraging them to commit the crime itself. I would comment that if the agent is prepared to commit the primary offence (the offence aimed at) whilst aware of a high risk of the commission of the secondary offence (the offence foreseen as more likely than not to flow from his activity) then we are not increasing the prospect of the primary offence by providing an incentive for the agent to take positive steps to reduce the risk of the secondary offence: we are encouraging the reduction of the risk of the secondary offence and thus crime generally.

Third the distinction would allow us to set more specific maximum sentences regarding the two distinct types of recklessness which would reduce the possibility of inconsistent sentencing patterns in the cases. Finally the proposed structure of recklessness excludes malice as a separate form of mens rea. We would thus eliminate the unsatisfactory state of affairs whereby the court or jury, when assessing guilt, must apply one or other mental state to an offence depending upon whether it is one of recklessness or malice.²²

There is one major difficulty for the proposed models of recklessness, namely the problem for the court or jury in deciding on which side of the dividing line between gross and simple recklessness a particular case falls. For there will be cases which fall within a short range along the spectrum of foresight around 'even probability' which might cause some difficulty for a court or jury when adjudicating upon the precise boundary in which the defendant's mental state falls. Whilst I accept this difficulty I see no problem for the practical application of the proposed distinction between gross and simple recklessness in the cases. Where a particular case falls within the penumbra between the two mental states the decision would go in favour of the defendant. This would not however excuse the agent from liability for we attribute to him the lesser mental state of simple recklessness (and perhaps lesser punishment). This practical measure would mean a lighter conviction and sentence than that which, ideally, the agent might have received in only a few cases and is a small concession to make in order to achieve my proposed objective, namely the separation of the much more from the much less moral turpitude in relation to foresight of untoward harm.

3. Failure By the Agent to Foresee a High Risk of Untoward Harm.

The term 'high risk' is unknown to current criminal law: the nearest we have is 'obvious and 'serious' risk enunciated in Caldwell²³ and Lawrence²⁴ and it is thus convenient to formulate discussion on the decisions in those cases. In both Caldwell and Lawrence it was decided that the agent's unawareness of the risk was irrelevant in determining liability for recklessness in relation to offences under s.1 of the Criminal Damage Act and s.1 of the Road Traffic Act 1972. Reference to the model definitions has been made in relation to other offences. In Seymour²⁵ the model definitions were applied to a case of motor manslaughter and in Kong Cheuk Kwan v R²⁶ they were applied to manslaughter generally.²⁷

Caldwell recklessness has been criticised on the general ground that it renders the concept of recklessness objective in character. The criticism has generally taken one of three forms.

(i) Outright rejection on the ground that recklessness is a mental state and thus nothing other than positive awareness of the risk is sufficient. The holder of this view maintains that there is a crucial moral distinction between advertence and gross inadvertence which should be recognised in any assessment of criminal responsibility but which Caldwell recklessness has ignored.²⁸

(ii) Acceptance of Caldwell recklessness with the proviso that unawareness of the risk is restricted to a risk of which the defendant would have been aware had he stopped to think about it.²⁹ The holder of this view would restrict the objective element of recklessness to cases in which the agent's failure to appreciate the risk has been brought about by a reprehensible affective state of mind (e.g. rage or drunkenness).

(iii) Acceptance of Caldwell recklessness provided the lack of foresight is due to indifference on the part of the agent.³⁰ Proponents of this qualified view of Caldwell recklessness would be prepared to excuse from liability the agent whose failure to anticipate a risk is due not to indifference toward it, but because his mental process has been impaired by some phenomenon which renders that failure non-culpable.

An exception to Caldwell recklessness, common to all three schools of thought, is lack of capacity, i.e. that the defendant himself was so far removed from the standards of the ordinary person that he was incapable of judging the situation as the ordinary person would. However in Elliot v C (A minor)³¹ the Divisional Court interpreted Caldwell recklessness in a way which positively rejected the views of the three schools of thought opposed to it. Robert Goff LJ held that the model direction was intended to express a purely objectivist test (thus rejecting the first and second school), and one which could not be qualified by the concept of indifference (thus rejecting the third school) since the concept was not specifically made a qualification to the model direction and no doubt would have been had Lord Diplock in Caldwell intended such qualification. It is interesting to note here that Goff LJ commented that he would not have regarded the appellant's conduct as reckless in the ordinary sense of the word.³²

One reason why the courts are so reluctant to modify Caldwell recklessness to include indifference is that the jury would have an additional and difficult task of deciding upon the mental state of the agent at some time prior to his activity which brings about the untoward harm and also the question of whether he would have gone through with that activity even if aware of the risk. The qualified model would thus make the law much more complicated than it was prior to the Caldwell decision. One can however point to parts of Lord Diplock's speech which indicate that he might have been prepared to accept indifference as a limitation to the model. For example he talks of a defendant who "did not even trouble to give his mind to" the risk.³³ In any event it is clear that the wholly objectivist interpretation of the model direction by Goff LJ excludes the defence of incapacity (which all three schools of thought above would accept) and a defence of 'non-indifferent thoughtlessness' due to reasons which make that thoughtlessness morally non-culpable. It is submitted that both pleas ought to afford a defence.

Birch³⁴ points out that one solution here is to slip in, alongside the summary definition in Caldwell, an instruction to the jury not to convict unless D's conduct was reckless in the ordinary sense of the

word. He puts forward the case of Scott³⁵ to show that the Court of Appeal has left room for this prospective development of the law on recklessness. In that case D threw a stone at V but it missed and damaged the window of a public house. Croom-Johnson L.J. decided that

" '(r)ecklessness' being an ordinary English word which has not acquired any specific legal meaning, it should be brought home to the jury that they should consider as a matter of fact and using the evidence as applied to the ordinary English word, the circumstances in which the event took place".

My own view is that the criticism of Caldwell has concentrated on the issue of just what constitutes recklessness and has largely ignored the more important issue, namely should the agent in this category be responsible at criminal law for the unforeseen harm which he brings about? If we start from the premise that the agent should thus be liable then we must decide into which relevant mental state he falls (or what mental state is required by the substantive offence). I think that the criticism of Caldwell is well grounded - that we ought to mark clearly the distinction between one who foresees and one who does not foresee a risk, but if we do so then how can we attribute criminal responsibility to the agent who brings about unforeseen harm in relation to an offence which admits recklessness as a minimum mental state (as in Caldwell and Lawrence)? The question provides a clue as to why the courts have pushed this category of mental state into recklessness; because the agent who fails to foresee an obvious and serious risk deserves blame and punishment and that, given the context of the Criminal Damage Act 1971 as presently drafted this is the only way of criminalising that kind of conduct. The courts thus compromise the concept of recklessness in order to ascribe liability in cases of unawareness which deserve criminal blame and punishment and in doing so obscure the boundaries of two distinct species of mens rea, namely recklessness and negligence. No doubt Lord Diplock had this obscuration in mind when he expressly confined the 'unawareness' element of Caldwell recklessness to an 'obvious risk': in this way he ensured that the concept of recklessness took in only the more serious cases of negligence.

But if our criminal law had a more sophisticated set of mens rea terms which expressly distinguished between gross and simple negligence, and if the criminal damage legislation expressly admitted gross negligence as a requisite mental state there would be no need for the judges to compromise recklessness in this way. My submission is that we need a distinct species of mens rea which will catch negative mental states in relation to a high risk of untoward harm whilst preserving the traditional view that recklessness is constituted by conscious risk taking. We ought thus to admit 'gross negligence' as a distinct form of mens rea in our criminal law.³⁶

The Proposed Concept of Gross Negligence.

The proposed concept of gross negligence is constituted by a failure on the part of the agent to appreciate a high risk of untoward harm which accompanies his activity but it shall be a defence to a charge based on gross negligence that at the time of his activity there existed some legally recognised factor or factors which operated upon his mental processes to prevent him from appreciating the high risk.

There are several features of the proposed concept of gross negligence.

(i) The agent must have failed to foresee the risk. Thus where the agent is aware of the risk at the time of his activity his mens rea is recklessness. There are three types of 'failure to appreciate' a ^{high} risk, namely

- (a) failure to allude to the risk altogether,
- (b) a consideration of the risk and a wrong conclusion that the risk does not exist, and
- (c) a consideration of the risk and a wrong conclusion that the risk is low when it is in fact high.

It will be noted that my definition of gross negligence talks of 'failure to appreciate' a high risk. The word 'appreciate' is meant to catch both a failure to allude to the risk and a failure to comprehend the existence or extent of the risk to which the agent has alluded.

(ii) The risk must be high. I have defined this particular concept above.²⁷ My submission is that a 'high risk' is a risk which is more likely than not to result in the occurrence of the untoward harm. All risks which involve a 50% chance or less (not more likely than not) of occurring should be designated low risks. I have pointed out elsewhere the difficulties in practice for the court or jury in deciding just what constitutes a 'high risk' in the marginal cases and the practical solutions to the problem.²⁸ Whether the risk in a particular case is high or low is a question for the court or jury who would apply the standard of the ordinary prudent man in the same circumstances as the defendant. I think that the proposed terminology is preferable to Lord Diplock's 'obvious and serious risk' on two major grounds. First, Lord Diplock's phrase used in Lawrence involves a double uncertainty, namely just what is the dividing line between 'obvious' and 'not obvious', and what is the dividing line between 'serious' and 'non-serious' risk. Second the word 'serious' is ambiguous in the context used by Lord Diplock. Does it mean serious in the sense of likelihood or in the sense of the degree of injury which is likely to flow should the risk manifest itself through the agent's activity? My formula removes these problems; 'high risk' relates simply to the chances of the harm occurring regardless of the degree of harm which may eventuate.

The Rebutting Provision.

(iii) There would be a presumption in law that an agent who fails to appreciate a high risk of untoward harm is grossly negligent in relation its occurrence. However he would have a defence to a charge of gross negligence that there was present in his case some legally recognised factor, of sufficient degree in the circumstances, which prevented him from appreciating the high risk of untoward harm at the time of his activity which brought that harm about. The legally recognised factors would be listed in the legislation which creates the proposed concept of gross negligence. Schizophrenia²⁹ and subnormality are obviously strong candidates for the list since both involve a lack of capacity to appreciate the high risk. Other factors affecting capacity ^{might} ~~would~~ include mental breakdown and senile dementia. But it is submitted that the list

of legally recognised factors should not be restricted to those which affect capacity generally. For other factors, both physical and mental, permanent and transient might suitably be included to exclude agents from liability in appropriate cases. Candidates here include shock, stress, panic, ignorance about causal properties, exhaustion, tiredness, distress, severe agitation, pre-menstrual tension, post-natal depression, physical inflictions such as a heavy head cold which reduce an agent's powers over his senses⁴⁰ and so forth.

When a plea in rebuttal is entered at the trial it would be for the judge to decide whether or not there is sufficient evidence that the alleged legally recognised factor existed at the time of the actus reus. If he decides that there is insufficient evidence then the plea would not be put to the jury and they would attribute gross negligence to him in accordance with the legal presumption. If the judge considers that there is sufficient evidence of the legally recognised factor then he would put the matter to the jury who would then decide whether or not the factor was present to such a degree in the circumstances that it prevented the agent from appreciating the high risk of untoward harm. If the jury are not so satisfied then they would attribute gross negligence to him in accordance with the legal inference. If they are satisfied that the factor was sufficient to cause the agent to fail to appreciate the high risk then they would not attribute gross negligence to him.

But how would the court or jury decide whether or not the legally recognised factor was present to such a degree that it effectively denied him the power to appreciate the high risk of harm? In deciding on this issue they would have regard to all the circumstances of the case, together with medical or other evidence. The central criterion would presumably be that the greater the risk of the untoward harm in the circumstances, the greater must be the degree of the legally recognised factor present and affecting the agent's mental or physical powers of appreciation of that risk.⁴¹

My proposal would effectively result in two categories of factors which tend to restrict the mental or physical processes; those factors which

may and those factors which may not rebut the inference of gross negligence. Once established the exculpatory list would constitute a matter of law in criminal proceedings. In those cases in which the alleged mental restriction falls within those on the non-exculpatory list the issue would not be put to the jury; the defendant would not rebut the general inference and would ^{be} guilty of the offence by reason of gross negligence.⁴² I would just add here that cases of drunkenness, rage and excitement ought to be placed on the 'non-rebutting' list of factors which may restrict the agent's mental or physical processes.

Several advantages flow from the creation of this category of mens rea. First, it allows the concept of recklessness to be restricted to positive appreciation of the risk, that is, we confine recklessness to a *positive* state of mind.⁴³ We thus preserve the distinction between recklessness and negligence, the latter being concerned not with the agent's mental state but with the dangerousness of his activity.⁴⁴ There is thus no obfuscation between advertence and gross inadvertence. One consequence of this diminution of the contours of recklessness is that agents such as Stephenson⁴⁵ would fall under the proposed concept of gross negligence and would be able to plead the rebutting provision. If the court or jury are satisfied that there existed a legally recognised factor which prevented D from appreciating the high risk then he would be free from criminal liability. A second advantage of the concept of gross negligence is that it goes a significant way in bringing together the three schools of thought mentioned above.⁴⁶ Since the concept retains for recklessness conscious risk taking simpliciter the concept satisfies the proponent of the distinction between advertence and gross inadvertence. Also the concept satisfies the subjectivist who is prepared to attribute criminal responsibility for a negative mental state to the agent who would have appreciated the risk had he thought about it; the concept of gross negligence catches such an agent without the need for "a certain toughness" on the part of the subjectivist in relation to the concept of recklessness.⁴⁷ For the proposed concept excuses the agent only where he is in fact prevented from thinking about the high risk because of some legally recognised factor operating upon his mental processes. Finally the concept satisfies the proponent of

blame and punishment for the agent whose failure to appreciate a risk has been caused by indifference to it; the concept of gross negligence catches such an agent whilst excusing the agent whose failure to foresee the high risk has been caused by some non-culpable legally recognised factor.

A third advantage of the concept of gross negligence is that we may make use of it to remove the somewhat artificial concepts of 'basic' and 'specific' intent which are used at present concerning the defence of intoxication (both drunkenness and drugs). On current law the intoxicated agent who is aware of and intends harm which is proscribed by law has no defence:⁴⁹ but if he is so intoxicated that he does not know what he is doing, or does not appreciate the risk, then on current law he will be acquitted or found guilty of the substantive offence according to whether it is one of basic⁴⁹ or specific⁵⁰ intent. It is argued that the two lists of criminal offences which fall into one or other category of basic or specific intention are arbitrary and the existence of the two species of intention add to the obfuscation of the boundaries of that mental state. With the proposed concept of gross negligence we may simply exclude as a legally recognised factor voluntary intoxication. If we do so then the the agent who is so intoxicated that he is unaware of a high risk of untoward harm is grossly negligent in relation to it and cannot avail himself of the rebuttal provision since intoxication would not be a legally recognised restriction on his mental process which may rebut the inference of gross negligence.

These submissions would not greatly affect the substance of the current law concerning intoxication for the intoxicated agent would continue to have a defence to a charge of an offence which admits only intention as a relevant mental state and, on my proposals, he would also have the defence where the minimum mental state requirement for the offence is recklessness⁵¹ since his intoxication has led to his failure to appreciate the risk of harm. Indeed on the proposed structure of mens rea intoxication would be of no avail to the agent only in relation to those offences which admit gross negligence as a requisite mental state.

No doubt Parliament would bear this in mind when allocating mental states to new offences.

There would be two strategies available to the legislature here. First, Parliament could create one offence concerning a specific actus reus and extend the mental element to include gross negligence where it wishes to blame and sanction self induced intoxication which renders the agent unable to appreciate the high risk of harm created by his activity. Second, Parliament could create two offences concerning a particular actus reus, one more serious than the other, and extend the mens rea of the less serious offence so that it includes gross negligence. An actual illustration of this is, perhaps ss.18 and 20 of the Offences Against the Person Act 1861. S.18 is the more serious offence and requires intention concerning the actus reus of grievous bodily harm: s.20 is the lesser offence and admits subjective recklessness as a constituent of malice. When re-enacting these offences in the light of the proposed structure of mens rea Parliament could extend the present s.20 to include gross negligence. Then if an agent, in a state of unawareness through intoxication wounds another he would not be guilty under s.18 (which would admit only intention as a requisite mental state) but he would be guilty under s.20 since the inference of gross negligence could not be rebutted by the claim that his unawareness was brought about by intoxication.

A fourth advantage of the concept of gross negligence is that it would enable us to distinguish between the foolish agent and the agent who knowingly takes a risk with the person or property of another. An illustration of this point would be the agent at a fancy dress party who sets fire to the grass skirt of a fellow reveller to add to the excitement of the moment not realising the high risk which his activity is creating. This agent is a fool and deserves blame and punishment for the injury he causes⁵² but we ought not attribute equal responsibility to this agent and the one (like, a perhaps sober, Caldwell) who knowingly runs a serious risk. We may mark the distinction by ascribing gross negligence to the former and gross recklessness to the latter agent.

Fifthly, the concept of gross negligence would significantly simplify the law on manslaughter since we may conflate the present heads of reckless manslaughter and gross negligence manslaughter.⁵³ A final advantage of the proposed concept of gross negligence is that it eliminates the confusing statements by the judges in cases of recklessness concerning lack of foresight. It would no longer be necessary for the judge to talk in terms of 'closing his mind' to an obvious risk.⁵⁴ For if the agent does not appreciate the high risk of harm at the time of his act he falls into the category of gross negligence: there is no need to make such confusing and artificial statements.

A difficulty for the concept of gross negligence concerns unforeseen harm which is intimately related to the harm intended. In the absence of a plea of rebuttal by the defendant there is no problem: if he intends minor harm x but fails to foresee intimately and more serious harm y he is grossly negligent concerning harm y. But what if the agent puts forward a plea in rebuttal, say tiredness, which was sufficient to cause him to miss the high risk of the more serious prospective harm y? My submission here is that in cases in which the risk caused is intimately related to the activity admittedly intended we ought not to excuse the agent since there is simply no room for such a defence. There are two strategies for dealing with the problem. First we could restrict the rebutting provision in the definition of gross negligence so that it includes contingent risks only (i.e. risks which are not intimately related to the intended activity). Second, we may count intention to cause harm x as itself recklessness in relation to the more serious and intimately related harm y. I am not sure that I would extend the concept of recklessness in this somewhat artificial way on the main ground that my proposed structure of mens rea is intended to restrict the concept of recklessness to conscious risk taking. I would thus face the difficulty by restricting the risks to which the rebutting provision relates to contingent risks of the agent's activity. This of course means that the agent who fails to foresee a high risk that his victim is not consenting to intercourse is grossly negligent concerning non-consensual intercourse and has no rebutting defence to a charge with the

substantive offence. We may mark the moral distinction between this agent and he who is aware of the high risk and runs it by noting the appropriate mental state in the conviction.⁵⁵

One final and significant advantage of my concept of gross negligence is that it makes provision for the mental state to which I now turn.

4. Alluding to the possibility of a particular risk of untoward harm and deciding (mistakenly) that there is no risk.

In their respective model definitions neither Caldwell nor Lawrence make any reference to this state of mind as a necessary constituent of the concept of recklessness. The reason is presumably because the facts of neither case made it necessary to do so: Caldwell and Lawrence failed to see an obvious and serious risk but there is nothing in the case reports to suggest that either had alluded to the risk and had decided (mistakenly) that there was none. However it has been suggested by several theorists that this mental state falls outside the scope of Caldwell recklessness and that we cannot thus count as reckless the agent who, having made such a mistake, brings about a particular proscribed harm.⁵⁶

Much of the philosophical debate here centres around Lord Diplock's statement that recklessness is a state of mind.⁵⁷ According to the argument, if recklessness is constituted by a state of mind then we cannot count as reckless the agent who is mistaken about the existence of a risk since he has no state of mind in relation to it; the agent is negligent in making his mistake and negligence is not the same thing as recklessness.⁵⁸

Caldwell recklessness makes no reference to this state of mind and it is not clear how the courts will react to a plea by the defendant that, at the time of his activity, he was mistaken as to the fact that the particular risk existed. However there have been one or two cases in which there has been express reference to this mental state. In M.J.J. (a minor) v Cooper⁵⁹ several youths were playing in a disused hut. They

placed a large quantity of combustible material into the fireplace and set fire to it. They did not think that damage would result from their activity at this stage. However they soon realised that the fire was getting out of control and fled. The hut was destroyed. The magistrates convicted the defendant on the ground that the risk of damage was 'obvious'. The Divisional Court decided that the prosecution must prove that the defendant's state of mind fell within one or other set by Lord Diplock in his model of recklessness in Caldwell and that the conviction would be quashed because little if any importance had been given at the trial to the defendant's plea that he thought that no damage would result from his activity. It seems from the dictum that the Divisional Court may be prepared to consider a plea of mistake as to the existence of a risk, following upon an assessment of that risk, as providing a defence to an accusation of recklessness.

In Chief Constable of Avon and Somerset Constabulary v Shimmen⁶⁰ D was convicted of criminal damage contrary to s.1 of the Criminal Damage Act 1971. On appeal he contended that he had considered the risk of damage to the window and had satisfied himself that he had reduced the risk to a minimum and that his conviction ought to be quashed. Taylor J thought that it may well be arguable that a lacuna exists in the parameters of Caldwell recklessness in relation to the agent who considers the risk and wrongly decides that there is none. However since the case before him did not involve such a mental state⁶¹ he did not explore the possibility any further, stating that the issue may need to be considered on another occasion.⁶²

The dicta of Taylor J in Shimmen informs us of the ^{possible} judicial acceptance of the lacuna in the model direction, viz. the agent who considers the possibility of risk and wrongly concludes that there is none. One should also note that the dictum of Taylor J implies that he might well have been disposed to uphold the decision of the magistrates had Shimmen's case fallen within the alleged lacuna.

In Lawrence⁶³ Lord Diplock himself implied, at least, that the agent who is mistaken about the existence of the risk might fall outside the model

direction with his qualifying statement that "regard must be had to any explanation the defendant gives as to his state of mind which may displace the inference". I have noted elsewhere the problem in deciding just what Lord Diplock had in mind in making the qualification.⁶⁴ In Griffiths⁶⁵ the Court of Appeal interpreted the qualification as a substitute for involuntariness. Thus where the driver's attention has been distracted by some external phenomena (e.g. a wasp or a loud bang or his course has been affected by a mechanical failure in the steering) one might say either that his activity is involuntary or that his case falls within the qualification which Lord Diplock made to his model direction. However in Bell⁶⁶ the same Court thought that such excuses related more to the question of whether or not there has been an actus reus rather than as to whether there has been a requisite state of mind. The Court did not need to go further since on the facts of the case there was no doubt that Bell fell within one or other state of mind set by the model direction (his plea that he had received his order to drive as he did from God did not disturb the fact that he perceived his driving to be dangerous). The precise ground of Lord Diplock's qualification thus awaits definition.

Should an agent who considers the possibility of a risk and mistakenly concludes that there is none be guilty at criminal law for his mistake? A straight interpretation of Lord Diplock's summary on recklessness in Caldwell would mean that this agent would be acquitted. But, as Birch⁶⁷ suggests, a full consideration of the merits ought to include the moral dimension. There seems to be general acceptance that the agent who makes a serious mistake as to the existence of a risk is less morally blameworthy than the agent who is aware of or does not advert to the risk on the ground that "moral obligation is determined not by the actual facts but by the agent's opinion regarding them".⁶⁸ On my submission this view is wrong since we have the right to expect others to act responsibly having given due and careful regard to the facts and circumstances surrounding their activity. This proposition has been well sign posted by the theorists in their consideration of the offence of rape: the agent must pay regard to the wishes and rights of the woman.⁶⁹ In my view the agent who proceeds with intercourse having mistaken the

woman's action or inaction as consent when it is not is as morally blameworthy as the agent who has not even bothered to think about whether or not she is consenting and should be punished accordingly although, it is submitted, neither is as blameworthy as the agent who is aware of the high risk that she might not be consenting but proceeds to have intercourse with her.

I thus agree with those who, like Hall, attribute lesser moral responsibility to the agent who is mistaken about risk than to the agent who knowingly runs a risk, but I submit that there is no moral distinction between the agent who is mistaken about a risk and the agent who simply fails to allude to it. The only possible moral distinction between the two agents would be that in the former case the agent has considered the risk and misperceives the position whilst in the latter case the agent has not thought about the risk at all. However closer analysis reveals that the former agent has both perceived a risk which is a possible consequence of his activity and failed to appreciate the risk of harm which is actually created by his activity. Viewed in this way I think that we are entitled to disregard the first aspect of his mental state and hold that he has, like the latter agent, failed to allude to the risk which accompanies his activity. On this thinking there is neither a moral nor practical distinction between the two agents.

I think that this reasoning would be in accord with the spirit of Caldwell recklessness. If Caldwell had pleaded that, against all evidence to the contrary, he was convinced that there was no one in the hotel at the time of his activity I am confident that Lord Diplock would have put out a model definition which would have brought him within the contours of recklessness. Similarly if Lawrence had pleaded that, against all the evidence to the contrary, he was convinced that there was no danger to other road users, Lord Diplock would no doubt have found him to have contravened the appropriate legislative enactment.

However, as I have pointed out, whilst there is no moral difference between the agent who mistakenly believes that there is no risk in

relation to his activity and the agent who fails to allude to a risk, there is a moral difference between these two agents and the agent who knowingly runs a risk in relation to person or property since the first two agents act in the belief that no untoward harm will result and might well have acted differently had they been aware of the attendant risk. But if this argument is accepted then how are we to mark the difference at the conviction stage? It is submitted that my concept of gross negligence enables us to make such a distinction. I have pointed out above that the agent who runs a known risk of untoward harm is reckless in relation to that harm.⁷⁰ I have also put forward the view that the agent who fails to allude to a high risk is grossly negligent with respect to it.⁷¹ My submission here is that the agent who mistakenly concludes that there is no risk of any untoward harm attaching to his activity is grossly negligent in relation to that harm, if the risk is high, since he has failed to appreciate *the actual risk* in the same way as the agent who has failed to think about a risk at all, and who thus does not appreciate it. In this way we preserve recklessness as a state of mind whilst attributing lesser liability to the agent who misperceives the risk and the agent who fails to allude to it.

Before leaving this category of mental state it is worth making two final observations of the dicta in Shimmen. First, it seems that the agent who perceives that there is a risk will be reckless in relation to it regardless of the measures he takes to reduce that risk even when the risk has been reduced to the point at which it is just about unreasonable for him to take it. I have argued⁷² that such an agent should be rewarded at the conviction stage for his positive activity carried out to reduce the risk of untoward harm. Second, and important, although the dictum of Lord Diplock that regard must be had to any explanation the defendant gives as to his state of mind⁷³ was acknowledged by the Court as raised in the original hearing, neither Taylor J nor Watkins LJ denied that the passage (from Lawrence) was inadmissible in cases of criminal damage. Does this mean that a defendant will be allowed to put forward evidence about his mental state at the time of his act which might satisfy the court or jury that he

ought to be acquitted? If this is the case then the decision in Caldwell might not be so severe as the subjectivists have made it out to be.

5. Alluding to a risk of untoward harm and deciding that it is slight when in fact the risk is high.

In this category of mental state the agent has decided that there is some risk but has misperceived the degree of risk involved. He has thus failed to appreciate a high risk of untoward harm and, it is submitted, the agent is grossly negligent in relation to it. One might object to this submission on the ground that, as the agent has perceived the risk he ought to be held reckless in relation to it. In response I would comment that he cannot be guilty of gross recklessness on my model since he has not in fact foreseen that the risk is high. Also he cannot be guilty of simple recklessness since the risk was in fact high. The natural home for this mental state on my model is gross negligence since his failure to appreciate the extent of the risk means that he has failed to appreciate the actual high risk of harm.

A second objection to my classification of the agent in this category is that such a model of gross negligence fails to distinguish between the agent who at least thinks about the possibilities in relation to risk (although he gets it wrong) and the agent who fails to think about the possibilities of risk altogether. One might argue that the latter agent is more morally blameworthy than the former. This argument is much the same as that put forward in the last section. My response is that there is no significant moral distinction between the two agents. If one is driven to choose between them one might argue that the agent who has considered the possibility of low risk (when the risk is high) is more morally blameworthy than the agent who fails to think about risk since the former is aware that his activity may cause harm whilst the latter is confident that his activity is 'risk free'. However the moral turpitude of the latter in failing to consider the risk at all must be taken into account. It is submitted that there is nothing to choose between them in terms of moral blameworthiness. My model of gross

negligence gives effect to this conclusion since it holds that both agents are guilty of the substantive offence by way of gross negligence.

Does the case of Shimmen⁷⁴ fall within this category? At first blush the answer would seem to be yes but I think that there are one or two special features of Shimmen which require consideration in assessing the category to which his case belongs. It will be recalled that Shimmen was an expert in the martial art of TaiKwan-Do which gave him a power of muscular control not present in the ordinary person. Also Shimmen, in kicking out, was genuinely trying to stop short of the window and in the majority of such attempts would have been expected to have done so. It is my view that whilst one would consider there to be a high risk when a novice attempts what Shimmen attempted to do a jury might plausibly conclude that in Shimmen's case the risk was low and that Shimmen thus brought about the damage to the window by way of simple negligence.⁷⁵ On this view Shimmen would not be guilty of causing criminal damage unless that offence were extended to include simple negligence.

6. Alluding to the possibility of untoward harm and deciding that the risk is high when it is in fact low.

The agent here cannot be guilty of gross negligence here since he has actually perceived the risk. Neither can he be guilty of gross recklessness since, on the facts, there is no high risk of harm. On my twofold model of recklessness the agent is guilty of causing the proscribed harm by way of simple recklessness since, on the facts and circumstances of the case, the risk was not more likely than not to occur. The agent's misperception of the extent of the risk is thus discounted for the purpose of ascriptions of criminal liability.

Gross Negligence, Simple Recklessness and Punishment.

I think that it would be generally accepted that gross recklessness should be punished more severely than simple recklessness and that gross negligence should be punished more severely than simple negligence.⁷⁶ But should gross negligence generally be punished more severely than

simple recklessness? The difficulty which underlies this question is that simple recklessness might not always be less serious than gross negligence. It might be that some cases within the two categories are of approximately equal moral culpability whilst other cases of simple recklessness are either more or less reprehensible than cases within gross negligence. My view here is that there would be a significant overlap in moral culpability between these two proposed species of mens rea in the cases and that for this reason we ought not to place the two concepts in a straight hierarchical order for the purpose of blame and punishment. I think that it would be a matter of judicial discretion as to which case in each category ought to receive the heavier penalty.

To summarise I offer my proposed models of recklessness and gross negligence.

1. A person commits an offence by way of gross recklessness where he foresees a high risk of untoward harm and continues regardless of the risk. His attitude concerning the occurrence of the risk is irrelevant. 'High risk' means a better than even chance that the untoward harm will occur.

2. A person commits an offence by way of simple recklessness where he foresees a low risk of harm and continues regardless of the risk. 'Low risk' means an even chance or less than even chance that the untoward harm will occur.

3. There is a rebuttable presumption that a person commits an offence by way of gross negligence where there is a high risk of untoward harm and

- (i) he fails to allude to the risk, or
- (ii) he considers the possibility of the risk and decides that there is none, or
- (iii) he perceives the possibility of the risk and wrongly decides that it is low.

since in each case the agent has failed to appreciate the existence of a high risk of untoward harm. The presumption may be rebutted by the agent where he can show that at the time of his activity there was present some legally recognised factor which was sufficient to cause him to fail to allude to, or appreciate the extent of, the high risk of proscribed harm.

The Proposed Structure of Recklessness and Attempts.

In chapter 5 I offered six categories of attempt. The sixth concerns reckless attempts and it is convenient to discuss that category here. It would be useful to start discussion on this category of attempts with two illustrations.

(i) David throws Valerie to the ground in order to have sexual intercourse with her. He knows that she is not consenting to what is about to be visited upon her. He is about to achieve penetration when he is disturbed by a third party who enters the room. David makes a swift departure without completing the actus reus of rape.

(ii) Duncan has been drinking with Verity at her home. She becomes semi-conscious through drink. Duncan decides and sets out to have intercourse with her but cannot be sure whether her movements are indicating that she is consenting. Verity is not in fact consenting at the time; her movements constitute an attempt to express physical objection. He is about to achieve penetration when Verity's mother walks into the room. Duncan desists before actual penetration.

In case (i) there is no doubt that David is guilty of attempted rape since he intends to have non-consensual intercourse with his victim. However in case (ii) Duncan does not intend to have sex without consent, nor does he know that his victim is not consenting. He is not sure about consent and may be counted as reckless in relation to it. Is Duncan guilty of attempted rape? More generally can an agent be guilty of a reckless attempt?

By way of an introduction to deliberation on this issue we may note that the criminal law has never entertained the attribution of criminal liability for an attempt concerning recklessness as to *consequences* since the risk of untoward harm cannot be said to be a part of the agent's aim or objective. Thus where D shoots at a bird and the bullet ricochettes off a branch and narrowly misses V, D cannot be guilty of an attempt in relation to any offence against V since he is, at most, reckless in relation to the danger to V.⁷⁷

But suggestions have been put forward that we may count as criminal attempts cases in which the agent has been reckless as to *circumstances*. To accept the proposition would be to accept a distinction between circumstances and consequences for the purpose of the criminal law on attempts. The Law Commission Working Party on codification did in fact accept the distinction between the two concepts and that an agent might be counted as having attempted a substantive offence where he has embarked upon activity leading to a specific end being reckless as to a crucial circumstance which, if present, would render that end a criminal offence.⁷⁸ However the Working Party's proposal was not accepted by the Law Commission which, in its Report, concluded that the distinction between circumstances and consequences would be "difficult and artificial".⁷⁹ The Law Commission pointed to a hypothetical posed by Buxton⁸⁰ in order to illustrate the difficulty. Buxton cites the case of a man who takes an unmarried female under sixteen out of the possession of her parents contrary to s.20 of the Sexual Offences Act 1956 and contends that the fact that the girl is in possession of a parent is both a circumstance and part of the consequence of his act (assuming he has completed the actus reus of the offence).

However Williams sees no difficulties in drawing a sharp distinction between consequences and circumstances.⁸¹ He points out the distinction between 'conduct-crimes' and 'result-crimes'. For Williams a conduct-crime does not involve any consequence; it amounts to the creation of a state of affairs. He uses rape as an illustration and suggests, implicitly at least, that in conduct-crimes it is the presence of the circumstance which produces the actus reus of the offence, the agent is not expecting or hoping for some change in the world to flow from his activity. Williams draws a temporal line between circumstances and consequences at bodily movement. Any change in the world which follows bodily movement would be a consequence and would thus need intention on the part of the agent if we are to charge him with an attempt in relation to the consequence.⁸²

If we relate Williams' commentary to Buxton's example we see that the agent who takes the unmarried girl under sixteen out of the possession

of her parents commits a conduct-crime since "you do not have to wait to see if anything happens as a result of what the defendant does".⁸²

To summarise discussion so far. If we accept that there is a distinction between circumstances and consequences then it is open for us to (i) draw the boundary of mens rea for result-crimes at direct intention, and (ii) charge with an attempt at a substantive offence the agent who embarks upon activity leading to a specific end being reckless about a necessary circumstance which, if present, renders that end a conduct-crime.

But there is a further problem for the suggestion that we subject conduct-crimes to the criminal law of attempts which was made apparent when the draft Bill submitted by the Law Commission was being processed⁸³ ready for debate in Parliament. The problem is that an agent may commit an impossible offence (which constitutes an attempt at current criminal law) whilst being reckless as to a circumstance relating to that attempt. Suppose for example that Duncan in our earlier illustration⁸⁴ attempts (unsuccessfully) to have intercourse with Verity not knowing whether or not she is consenting (thus being reckless as to her consent) when in fact Verity is consenting although her bodily motions do not make her consent clear. Here Duncan commits an impossible attempt recklessly. Williams posits the further example of D who attempts (unsuccessfully) to obtain money by making a representation not knowing whether his statement is true or false. The representation is in fact true. Williams thinks that we may be stretching the law a little too far in holding such an agent guilty of a criminal attempt.⁸⁵

The force of Williams' thought is made clear when we consider the case of Duncan who attempts intercourse with Verity being reckless as to her consent which she is in fact giving. One might properly question a model of criminal responsibility which holds such an agent guilty of attempted rape. Perhaps we could justify the exclusion of the impossible reckless attempt from the criminal process on ground similar to that raised in category 3 attempts above;⁸⁶ that in cases of consensual interaction between parties which is de facto legal any duty imposed by criminal law

on one party not to take part in the transaction in any given circumstance (more particularly here doubt as to whether a particular circumstance of the transaction is present) reduces, if not extinguishes, the right of the other party to have legal relations with whom he chooses.⁸⁷

Quite apart from the proposal contained in the last paragraph we might well argue that the agent who has attempted to have intercourse with his victim being reckless as to her consent which she is not giving ought to be subject to criminal liability. This is in fact possible by way of a charge of indecent assault but it is submitted that there is a distinction between this agent and one who indecently assaults his victim with the intention of stopping short of penetration. On the other hand there is a significant distinction between this agent and David in our earlier illustration⁸⁸ who attempts intercourse knowing that his victim is not consenting.

My suggestion is that we ought to mark clearly the criminality of the agent who attempts intercourse being reckless as to his victim's consent which in fact she is not giving whilst excluding from criminal liability the agent who believes that his victim is not consenting or is reckless as to that consent when, in each case, consent is in fact being given. In order to do that it is necessary to construct a legal provision to that effect. We might say that where a person attempts⁸⁹ a specific effect being reckless as to a circumstance which if present would render that effect a criminal offence then if that circumstance is present he is guilty of a reckless attempt at that offence.

Two aspects of the fairly rough proposal should be noted. First, it is necessary that the circumstance toward which the agent is reckless be actually present at the time of his act. Thus it is necessary that his victim is not consenting to intercourse or that the statement made by the agent in order to obtain money be untrue in fact. If the circumstance is not present then the agent is not guilty of any offence on the draft proposal. The proposed category of attempts thus excludes cases of attempted intercourse where the victim is in fact consenting.

Second, I have specifically called this category of attempts 'reckless attempts' so that it is clearly distinguished from cases of attempt in which the agent intends the consequence or state of affairs (i.e. intends but fails to achieve a conduct-crime). The proposed category thus distinguishes between David and Duncan in the illustrations which introduced discussion on this category of attempts: David is guilty of attempted rape whereas Duncan is guilty of a reckless attempt at rape. In this way we accurately record the distinction in moral culpability between the agents at the conviction stage but, more important, we subject Duncan to the law on attempted rape which seems more appropriate than a charge of indecent assault.

FOOTNOTES TO CHAPTER 7.

1. [1957] 2 QB 396.
2. [1977] 1 All ER 475.
3. [1980] CA 1 QB 435.
4. [1981] 395.
5. Ibid at p.401.
6. Ibid at p.408.
7. [1976] 1 WLR 114.
8. [1985] Crim L.R. 589 at 604.
9. [1979] QB 695 at 698.
10. [1983] 77 Cr App Rep 225.
11. [1982] AC 341.
12. [1982] AC 510.
13. Supra note 11 at p.352.
14. For which see supra chapter 6 p.224ff.
15. Confirmed in W (a Minor) v Dolbey [1983] Crim LR 681 and R v Morrison (Times, November 12th. 1988 CA).
16. Supra note 12.
17. see more specifically supra chapter 6 p.232ff.
18. See also s.1(2) of the Sexual Offences (Amendment) Act 1976 which makes it clear that recklessness concerning the offence of rape is to be construed subjectively.
19. He will, in fact, have brought about that harm by gross negligence for which see infra Chapter 7.
20. Provided that it is unreasonable for the agent to take the risk.
21. The precise charge depending upon the injury actually inflicted.
22. For a summary on malice see supra chapter 6 at p.246.
23. Supra note 11.
24. Supra note 12.

25. [1983] 2 AC 493.
26. (1986) 82 Cr App Rep 18.
27. See supra p.235 for cases which diverged from the definitions of recklessness in Caldwell and Lawrence.
28. Clarkson and Keating 'Cases and Materials'.
29. See G. Williams, 'Divergent Interpretations of Recklessness' in the New Law Journal [1982] 252. had he thought.
30. See Duff, 'Recklessness and Rape' in the Liverpool Law Review [1981] Vol.III(2) 49.
31. [1983] 1 WLR 939.
32. Ibid p.949.
33. Supra note 11 at p.352.
34. Infra note 66 at p.16.
35. Lexis January 23rd. 1987.
36. Of course gross negligence does appear as a mental state in our criminal law but its use is much restricted. My submission is that we ought to have a specific mens rea term and apply it to all criminal offences which admit gross negligence as a requisite mental state.
37. Supra p.257.
38. Supra p.79.
39. Thus an agent such as Stephenson (supra note 9) would be free from criminal liability where the mental state in issue is gross negligence.
40. Thus where D has lost his sense of smell due to a heavy cold and does not detect the presence of gas as he strikes a match, we could not attribute gross negligence to him for the damage to property brought about by his activity.
41. Thus in cases of conceptual certainty (see Chapter 2 p.32) the legally recognised factor present would require to be so overwhelming that it effectively destroys D's powers of appreciation of the empirically certain untoward harm.
42. This will be the case concerning intoxication if we exclude that restriction on the mental process as a legally recognised factor which may rebut the inference of gross negligence.
43. See Lord Diplock's comment in Caldwell supra note 11 at p.354.
44. See Lord Diplock's dicta in Sheppard [1981] AC 394 at 404.

45. Supra note 9.
46. Supra p.261.
47. See G. Williams supra chapter 6 at p.241.
48. Caldwell provides an illustration concerning s.1 of the Criminal Damage Act 1971 since in that case the appellant certainly intended to cause property damage.
49. Examples of basic intent include manslaughter (Beard [1920] AC 479, Gallagher [1963] AC 382, Bratty [1963] AC 413 and Lipman [1970] 1 QB 156), rape (Majewski [1976] AC 443), handling stolen goods (Durante [1972] 1 WLR 1612), maliciously wounding or causing grievous bodily harm (Majewski) and indecent assault (Burns (1973) 58 CAR 364)
50. Examples of specific intent include murder (Beard (supra note 49), attempts (Majewski (reference note 45), wounding with intent (Pordage [1975] Crim LR 575), criminal damage contrary to s.1(2) of the Criminal Damage Act (Caldwell (reference note 11) and aiding and abetting (Clarkson [1971] 1 WLR 1402).
51. 'Recklessness' on the proposed structure which insists upon appreciation of risk.
52. The factor which presumably causes his failure to appreciate the risk of injury is presumably excitement. We might bring this agent into the attribution of liability for gross negligence by excluding excitement as a legally recognised factor concerning the rebuttal of the presumption of gross negligence.
53. Goodfellow (1986) 83 Cr App Rep 23) already makes a move in this direction.
54. Stated recently by the Court of Appeal in Morrison (Times, November 12th. 1988 CA).
55. See infra Chapter 9.
56. See, for example, Smith and Hogan 5th ed. at p.55, Williams, Textbook of Criminal Law 2nd ed. at p.107, Griew, 'Reckless Damage and Reckless Driving: Living with Caldwell and Lawrence' in the Criminal Law Review [1981] 743 at 748. see also the interpretation placed on the speeches of Lord Diplock by Professor Smith in the Criminal Law Review [1981] at 394 and by Williams in 'Recklessness Redefined' in the Cambridge Law Journal [1981] 40 252 at 278.
57. Supra note 11 at p.354.
58. See, for example. Professor Smith [1986] Crim LR at 408 in his discussion on Crossman (1986) 130 Sol Jo 89.
59. CO/1551/ 84 July 2nd. 1987 Lexis.

60. (1987) 84 Cr App Rep 7. See Chapter 6 at p.237 for a discussion on the case.
61. Since Shimmen did not believe that he had eradicated the risk.
62. Supra note 60 at p.12.
63. Supra note 12.
64. Supra p.233ff.
65. 4997/C2/83 July 20th. 1984 Lexis.
66. [1984] 3 All ER 842.
67. D. J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' in the Criminal Law Review [1988] 4 16.
68. Hall. General Principles of Criminal Law (2nd ed.) at p.363.
69. See R. A. Duff in Liverpool Law Review (supra note 30, and Temkin, 'The Limits of Reckless Rape' in the Criminal Law Review [1983] at p.5.
70. Supra p.257ff.
71. Supra p.258.
72. Supra p.259.
73. Supra p.233.
74. Supra note 62.
75. For a discussion on simple negligence see infra chapter 8.
76. See infra chapter 8.
77. The legal position here was put clearly in **Mohan** [1976] QB 1.
78. The Home Office in modifying the final draft submitted by the Law Commission incorporated the views of the Working Party in the Draft Bill and can thus be said to have accepted the distinction and the proposal for a restricted area of reckless attempts.
79. Law Com. No.102 at p.9. See G. Williams, 'The Problem of Reckless Attempts' in the Criminal Law Review [1983] 367.
80. Buxton. Crim LR [1973] 662/3.
81. Supra G. Williams supra note 79 at p.369.
82. Ibid.
83. Supra p.79.

84. Supra p.279.

85. See G. Williams, supra note 79 at 371.

86. Supra chapter 5 p.172ff.

87. See ibid at p.176. for two illustrations which support the proposal.

88. Supra p.279.

89. Attempts on the proposed structure of mens rea, i.e. the agent has completed the executive causal link in the causal chain which, as he reads it, is capable of producing the specific offence. Of course in the particular area we are discussing the agent is not sure whether or not the victim is consenting. He is not thus sure that his activity will produce the proscribed harm, but he does believe that his activity may produce it and that is all that is necessary for an attempt on the proposed structure.

The proposed twofold model of recklessness involves a positive awareness by the agent of a risk of untoward harm which, on the facts of the case, is an unreasonable one for him to take. The proposed structure of mens rea contains a twofold model of negligence which is constituted by a failure by the agent to allude to or appreciate a particular risk of untoward harm. The contours of gross negligence are set out in Chapter 7.¹

The Proposed Concept of Simple Negligence

It is submitted that unawareness of a low² risk of proscribed harm constitutes the proposed concept of simple negligence. Offences of simple negligence would take two forms, namely specific offences of simple negligence and a general offence of criminal negligence.

(i) The Specific Offence of Simple Negligence.

Where Parliament wishes to criminalise an effect which has been brought about negligently by an agent whose conduct³ is otherwise innocent it may do so by the introduction of a specific offence of negligence. Perhaps an illustration of such at current law is the offence of driving without due care and attention: the activity itself is otherwise innocent but where the agent causes damage or injury because he has failed to allude to or appreciate the low risk of untoward harm he commits the offence. Where an agent has brought about a requisite untoward harm in the appropriate circumstances there would be a rebuttable inference that, by his conduct,³ he has brought about the proscribed harm by way of simple negligence. That inference may be rebutted where the agent can adduce evidence which satisfies the court or jury on the balance of probabilities that at the time of his activity or inactivity there existed a legally recognised factor which was in the circumstances, sufficient to cause him to fail to allude to or appreciate the low risk of proscribed harm. The rules here would be the same as those which I submitted in respect of the rebuttal of a charge of gross negligence.⁴ The rebutting provision would not apply where the

agent's conduct is otherwise criminal.⁵ I would just add here that Parliament should resort to 'specific offence' negligence sparingly since the requisite mental state is constituted by inattention which we all sometimes exhibit; and we cannot be expected to take such thorough care that we always notice all the risks which our activity may involve.

(ii) The General Offence of Criminal Negligence.

It is submitted that Parliament should enact legislation to criminalise all the consequences of negligence which have been brought about whilst the agent is involved in activity which itself constitutes a substantive criminal offence.⁶ Suppose that D is embarked upon a burglary. He is interrupted and makes a speedy exit. However in his haste he knocks over and damages an expensive ornament. Presumably D would not be liable for the damage on current law if his mental state concerning the damage falls short of recklessness. My submission is that D should be liable for the damage on the basis of criminal negligence provided that his ^{negative} mental state falls within the criteria for negligence stated below. It is further submitted that an agent who causes damage or injury negligently whilst embarked upon a substantive criminal offence⁶ should not be able to plead the rebutting provision which is available to the agent charged with a specific offence of negligence. For the provision is designed to excuse from liability the agent who lacks the capacity of the reasonable person or the agent who, through no fault of his, finds himself in circumstances which prevent him from appreciating that which would be apparent to the reasonable man. In any event when one talks of the ordinary prudent man it is usual to talk of the ordinary prudent man in the position of the defendant. But is there such a thing as a reasonable burglar, or robber or rapist?

My qualification concerning the rebuttal provision so that it does not apply to criminal negligence raises one or two issues. First, does it reintroduce the concept of constructive malice? I submit that it does not for the doctrine of constructive malice held the agent guilty of a substantive offence which could only be committed with intention where he was merely negligent concerning the actus reus whereas on the proposed concept the conviction would state that the harm had been

brought about by criminal negligence. Thus where D, a burglar, pushed V aside whilst escaping and V fell downstairs to his death D was guilty of murder on the doctrine of constructive malice, whereas on my proposal, assuming the risk of death to be low in the circumstances, D would be guilty of causing death by criminal negligence.

Second, if we are to qualify the rebutting provision of simple negligence so that it is denied to the agent whose voluntary conduct is criminal in nature, then should we not apply the same qualification to cases of gross negligence? My view is that we ought not qualify the rebutting provision of gross negligence in this way on the main ground that gross negligence is a more serious form of mens rea⁷ than simple negligence and the agent should thus have the opportunity of adducing evidence to show that his failure to allude to or appreciate the high risk was brought about by some legally recognised factor sufficient in the circumstances to cause him to fail to appreciate the risk. In other words, the more serious the crime charged (and that seriousness will be reflected, inter alia, by the level of mens rea required for the particular offence) the more subjective (or morally blameworthy) should be the mens rea requirement: we may achieve this by, inter alia, allowing the rebutting provision of gross negligence to the agent whether or not he is embarked upon activity aimed at some other offence whilst denying it to the agent who has brought about 'low risk' untoward harm whilst engaged on activity aimed at some other offence.

The following features of the proposed concept of simple negligence may be noted.

(i) There may be specific offences of negligence where Parliament wishes to criminalise otherwise innocent activity which brings about certain harm. There is also the general offence of criminal negligence which catches all harm brought about negligently by the agent who is engaged in the commission of a substantive offence.

(ii) The agent must have failed to allude to the de facto low risk of harm or have failed to appreciate that such a risk exists. The second part of the criterion catches the agent who actually alludes to the possibility of such a risk and wrongly concludes that there is none or

that the risk is so low that the ordinary man would not feel that he was unjustified in taking it. Let us take a hypothetical concerning the general offence of criminal negligence to illustrate the point. Suppose that D breaks into a laboratory in order to steal some sulphuric acid. He pours some into a container brought by him but some spills on the carpet causing damage. Assuming that the risk here is low then if D fails to allude to it he would be guilty of causing damage to property by criminal negligence. If he alludes to the risk and considers it to be so low that the ordinary man would feel justified in taking it then he fails to appreciate the degree of risk and is liable as above. If he appreciates the ^{low} degree of risk but takes it anyway he is guilty of causing criminal damage since his mental state amounts to simple recklessness.

(iii) The risk must be low, i.e. not more likely than not to occur as a result of the agent's activity or inactivity.⁹ There is a sharp and clear dividing line between gross and simple negligence which takes place at the point at which the risk changes from 'not more likely than not to occur' (simple negligence) to 'more likely than not to occur' (gross negligence). It may thus be noted that the distinction between gross and simple negligence is not a difference in mental state but a difference in that to which the agent's mental state has not been directed. As with failure to allude to or appreciate a 'high risk' of untoward harm⁹ the test for 'low risk' would be based upon the ordinary prudent individual's perception of the degree of risk on the facts and circumstances as those faced by the defendant.

(iv) The defendant who commits a specific offence of negligence whilst engaged upon otherwise innocent activity may rebut the inference of simple negligence in the same way as he may rebut the inference of gross negligence.¹⁰ The question for the court or jury is whether the ordinary person in the position of the defendant would consider the risk of harm to be low but an unjustified risk for the defendant to take. If this requirement is fulfilled then he will be guilty of the specific offence by way of simple negligence unless he can adduce evidence to the court of a legally recognised factor which was at the time of his activity sufficient in the circumstances to cause him to fail to allude to or appreciate the low risk of harm. Note that, for the reasons stated

above, this fourth criteria is restricted to offences of specific negligence and does not extend to the general offence of criminal negligence.

Several advantages flow from the proposed concept of simple negligence. First it is conceptually clear and consistent: the boundaries are stated with precision and there is no 'overlap' with either the proposed twofold model of recklessness or the concept of gross negligence. For gross and simple recklessness the agent *must have alluded* to the (respectively high or low) risk and appreciated the existence thereof. For gross negligence the agent must have failed to allude to a high risk or have failed to appreciate its degree; for simple negligence he must have failed to allude to or appreciate a *low risk*. The proposed concepts are thus separate and distinct and yet comprehensive in that they cover the entire range of mens rea concerning foresight or lack of foresight.

Second, the proposed rebutting provision excuses the agent who lacks the mental capacity possessed by the ordinary prudent individual. Thus where a latter-day Stephenson'' perpetrates activity which brings about untoward harm which, on the facts, is not more likely than not to occur we may excuse the agent since his schizophrenia would fall in the rebutting provision. On current law it seems that such an agent would be liable for the harm brought about. Third, the division between gross and simple negligence and the admission of the latter mental state as a recognised form of mens rea enables us to attribute liability for gross negligence without the need to artificially extend the boundaries of recklessness to catch the more serious forms of negligence. Because of this the term 'negligence' (and thus 'recklessness') becomes terminologically coherent since it is restricted in its definition so that it fits with peoples' perception of the meaning of the term.

A Comparison of the Proposed Structures of Recklessness and Negligence.

It will be noted that my definitions of gross and simple recklessness and gross and simple negligence contain variables relating to (i) allusion to the risk and (ii) the degree of risk actually present in the

cases. My qualification to simple negligence introduces a further variable namely whether or not the agent is engaged upon criminal activity at the time he brings about the 'low risk' harm. It would be useful to indicate the variables diagrammatically.

	Allusion to Risk.	Degree of Risk.
Gross Recklessness.	Agent alluded to risk and appreciated its extent.	High.
Simple Recklessness.	Agent alluded to risk and appreciated its extent.	Low.
Gross Negligence.	Agent failed to allude to the risk or failed to appreciate that the harm was more likely than not to occur subject to defence of legally recognised factor sufficient in the circumstances to cause lack of appreciation.	High.
Simple Negligence.	Agent failed to allude to the risk or failed to appreciate its extent subject to defence of legally recognised factor sufficient in the circumstances to cause lack of appreciation in those cases in which the agent's conduct is otherwise innocent.	Low

Negligence at Current Law.

A useful outline of the concept of negligence at current law is provided by Cross and Jones.¹² They say that a person is negligent if his conduct (positive or negative activity) in relation to a reasonably

ascertainable risk falls below the standard which would be expected of a reasonable person in the light of the risk. An agent may be negligent concerning a consequence of or a circumstance relevant to his conduct.

"(He) is negligent as to a *consequence* of an act or omission on his part if the risk of its occurring would have been foreseen by a reasonable person and the accused falls below the standard of conduct which would be expected of a reasonable person in the light of that risk. (He) is negligent as to a *circumstance* relevant to his conduct if he ought to have been aware of its existence because a reasonable person would have thought about the risk that it might exist and would have found out that it did".¹³

Notice the requirement by the learned authors that the agent "fall below the standard of conduct of the reasonable person" regarding foresight of a consequence, and that "he ought to have been aware" of a circumstance. In using this terminology they quite rightly include within the parameters of negligence the agent who has considered the possibility of a risk (of a circumstance or consequence) and decided wrongly that there is none. Generally, however, negligence is a state of unawareness of the risk.

At current law the term negligence is designed to cover all degrees of failure to comply with the standards of the ordinary prudent individual although sometimes the courts use the phrase 'gross negligence' in that area of law which is considered to be the paradigm case of liability for negligence, namely manslaughter. In R v Finney¹⁴ D, an attendant at a lunatic asylum, asked a patient to vacate the bath and, believing him to have responded to his request, turned on the hot tap. The patient, who had remained in the bath, was scalded to death. Lush J directed the jury

"to render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part ... (F)rom his own account (the defendant) had told the deceased to get out and he thought he had got out. If you think that indicates gross carelessness, then you should find the prisoner guilty of manslaughter".

In R v Bateman¹⁵ the Court of Criminal Appeal, in considering a case in which D, a doctor, had caused a patient's death, decided that

"(t)he prosecution must prove the matters necessary to establish civil liability and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment".

On the issue of 'gross' negligence Lord Atkin suggested that 'reckless' was the adjective that most nearly coincided with the very high degree of negligence required to prove 'gross' negligence.¹⁶

Illustrations of cases in which the courts talk in terms of negligence simpliciter include (i) as concerns consequences, offences under s.3 of the Road Traffic Act 1972 (e.g. driving without due care and attention) and (ii) as concerns circumstances s.25 of the Firearms Act 1968 which states that it is an offence for a person to sell a firearm or ammunition to another person whom he knows *or has reasonable cause for believing* to be drunk or of unsound mind. Regardless of whether the courts use the term 'gross' negligence in any given case the mental state requirement for negligence is unawareness of the risk. It seems that for those offences in which the courts insist upon gross negligence as the requisite mental state for a particular offence which admits negligence as a mental state they are looking for a more serious departure from the standards of the ordinary person.

It is submitted that the concept of negligence at current law is deficient on the following grounds. First the lack of legal recognition of the two distinct concepts of gross and simple negligence has led to artificial extensions of recklessness to take in the more serious forms of negligence. This has led to conceptual incoherence. Second the test for negligence rests on the perceptions of the ordinary prudent individual in the position of the defendant and no account is taken of any personal factor which denies the defendant the capacity or power of perception found in that ordinary individual.

Negligence and Criminal Responsibility.

Should simple negligence be a fault element in crime? It has been necessary to include negligence as a fault element at current law since the concept covers cases of gross negligence including 'gross negligence' manslaughter. But on the proposed twofold model of negligence cases of gross negligence at current law would be absorbed into the definitive concept of gross negligence so is there any need for the proposed lesser concept of simple negligence to figure in ascriptions of criminal responsibility? There has been much debate on whether negligence¹⁷ should be a fault element in criminal law and it is not necessary for me to rehearse the arguments here.¹⁸ Those who would exclude negligence as a fault element in criminal law point to the small number of offences which admit the concept as a minimum mens rea. My view is that given that the criminal law is concerned with activity which is itself criminal the number of specific offences of negligence brought about by otherwise innocent activity must necessarily be few. I would accept the notion of a specific offence of negligence on the ground that on occasion such a legal measure might be both proper and necessary. Also, as I have argued above, we ought to have a general offence of criminal negligence. The agent who, for the fun of it and seeing no further than the prank, sets fire to a newspaper which V is reading should be liable for an injury caused even where the risk of injury is low and thus presumably not subject to 'Caldwell' recklessness. In order to catch this agent it would be necessary to have some form of liability for negligence.

In summary on simple negligence. Where a particular offence admits the concept as a requisite mental state then there would be an inference that the agent has brought about 'low risk' untoward harm by way of simple negligence. That inference may be rebutted where the agent adduces evidence that satisfies the court or jury on the balance of probabilities that at the time of his conduct, there existed some legally recognised factor sufficient in degree in the circumstances to cause him to fail to appreciate the risk. The rebutting provision would

not be available to the agent whose conduct (which brings about the untoward harm) is aimed at some other substantive criminal offence.

Where, if at all, do road traffic offences fit into the proposed concept of simple negligence? Such offences which admit negligence as a minimum mens rea are few, the most important, perhaps, being driving without due care and attention. My view is that in motoring offences which admit negligence as a minimum requisite mental state, provided his activity in driving the car is otherwise legal, the agent ought to have the opportunity to adduce evidence of some legally recognised factor of sufficient degree in the circumstances to cause him to fail to allude to or appreciate that his driving is causing a low risk of harm. But suppose that D has stolen a vehicle and causes a road traffic accident whilst driving without due care and attention. On my proposal D would be guilty of that offence and he would not be able to introduce any evidence concerning the rebutting provision since his activity in driving the car is otherwise illegal. But what of road traffic offences which are designated ones of strict liability? I shall return to this issue later.¹⁹

The Proposed Structure of Mens Rea and 'Strict Liability'.

A crime of strict liability is one in which mens rea is not required for one or more elements of the actus reus²⁰ although mens rea will be required for at least one element of the offence.²¹ Although there are one or two instances of strict liability at common law I shall be concerned here with statutory offences of strict liability. The difference between strict liability and negligence at current law is that the former applies to blameless inadvertence on the part of the defendant: it does not matter that he is honest and has reasonable grounds for his belief that his act or omission is free from risk, or that he has exercised reasonable care in acting or failing to act as he does or does not know and had no means of knowing that, on the facts, he is in breach of a particular statutory provision. Should there be strict liability offences at current law?

The criteria applied by the adherents in support of the concept of strict liability include the following.

(i) Where the conduct or harm is one which the law should seek to prevent then the offence should be made one of strict liability. Lady Wootton has said that if the primary function of the courts is conceived as the prevention of forbidden acts then if the law says that certain things shall not be done, it is

"illogical to confine this prohibition to occasions on which they are done from malice aforethought ... for the reasons for prohibiting it are the same whether it is the result of (intention), negligence or of sheer accident".²²

It is this sort of reasoning which the court in Prince²³ had in mind when it considered that men should be deterred from taking young females out of the possession of their parents or guardian whatever their age. However, as Smith and Hogan suggest,²⁴ this reasoning is not appropriate to many offences of strict liability. For if a butcher has sold tainted meat despite having taken all reasonable precautions against doing so, and if the physical state of the meat is undiscoverable by any precaution that he can be expected to take we should not say that he ought not to have acted as he did for we want sellers of merchandise, having taken reasonable steps to ensure the soundness of their stock, to sell their merchandise. It is submitted that the criterion leads to an undue imbalance between criminal and moral blameworthiness since it brings into liability those who have taken all measures open to them to avoid harm and who have acted in the honest and reasonable belief that their activity will not cause harm to others. This is surely out of fit with people's ideas of what conduct ought to be subject to criminal liability. The agent himself would certainly feel aggrieved at being convicted of a criminal offence: that grievance would be magnified in those cases in which a conviction may have far reaching effects outside the courts.²⁵

(ii) Where the offence is 'quasi-criminal' or a regulatory offence it may be treated as one of strict liability since it is not considered criminal in any real sense and the sanction is not great. In Alphacell v Woodward²⁶ the House of Lords referred to cases which are not "criminal

in the real sense". However it is suggested that the criminal law ought to be reserved exclusively for conduct which is truly criminal in nature; i.e. vested with criminal content as regards actus reus and mens rea. Where the agent has done what is reasonable in order to prevent harm and (or) does not know, and has no way of knowing that specific conduct might bring about harm, then he lacks mens rea and an essential element of criminal conduct is missing. It is submitted that where a change in the world brought about by D can be said to be "not criminal in any real sense"²⁷ then it is a case where D lacks mens rea concerning a crucial element of the actus reus and should not be subject to criminal blame and punishment. In Varner v Metropolitan Police Commissioner²⁸ Lord Reid distinguished 'quasi-criminal' offences and offences involving the disgrace of criminality for the purpose of ascriptions of criminal liability. The learned Law Lord has a point: the criterion is surely that criminal law should be confined to acts or omissions which are truly criminal in nature.

(iii) Where the particular type of offence would require undue time or personnel to litigate the issue of the accused's culpability then the offence may be made one of strict liability.²⁹

But if we avoid the expenditure of such time and personnel by excluding discussion on mental state for the purpose of conviction, we will still need to consider the mental state which accompanied the actus reus for the purpose of sanction. For a judge is surely interested in discriminating between the butcher who sells unsound meat knowing full well that it is unsound and the butcher who sells such meat having no such knowledge and who, perhaps, is in possession of a veterinary certificate that the meat is sound.³⁰ At least two factors flow from this. First, the facts of the case relating to mens rea will have to be dealt with regardless of the status of the offence as one of strict liability. Second, the judge is deciding sanction on facts different from those on which the jury convicted, an unsatisfactory state of affairs. One might respond here that this is the case already in all sentencing for the jury does not take into account the fact that the accused had a criminal record: this is something only for sentencing. I would agree that the judge is entitled to look at facts relating to

previous offences at the sentencing stage but it is the current legal position that it is the court or jury and not the judge which is the arbiter of the facts of a particular case. It should thus be for the court or jury to decide upon the mental state of the accused at the time of his activity. One might also question whether the imposition of strict liability is the only alternative to cases in which proof of mens rea would be difficult and costly to attain. For there are other alternatives which preserve the moral status of the agent who has acted blamelessly - for example the application of a 'no negligence' proviso either by the court or by the legislature.³¹

(iv) Where difficulty in proving mens rea would lead to the acquittal of an undue number of guilty individuals the offence might suitably be made one of strict liability.³² This fourth criterion was used as a ground of the decision by the House of Lords in Alphacell.³³ In that case D owned settling tanks which had overflow channels leading into a river and pumps to prevent such overflow. The pumps ceased to operate due to obstruction by vegetation and the river was polluted. D was found guilty of causing pollution of the river contrary to s.2(1)(a) of the Rivers (Prevention of Pollution) Act 1951. In the appeal to the House of Lords it was stated that if mens rea were necessary with some regulatory offences which are harmful to the public the difficulty in proving mens rea would mean that D would often secure an acquittal which would render the legislation nugatory. With respect to the learned Law Lords the dictum poses problems. First just what is a regulatory offence? It is not always easy to classify offences in this way. Second, in the cases the judges have been disposed to use the phrase concerning offences which carry severe sanctions. Is it right to subject to possible heavy sentence the agent who is faultless as to the actus reus of a regulatory offence? Third would the requirement of a minimum mens rea of negligence have the effect which the House of Lords suggests? In any event is there not some alternative to denying D the right to an acquittal on the grounds of lack of mens rea which would preserve the force of the legislation - for example the provision of a 'no negligence' clause.³⁴

(v) Where the legislation requires high standards of care to ensure that social interests are protected the offence may be suitably be made one of strict liability.³⁵ The argument here is that the imposition of strict liability will lead to greater care by those who are involved with conduct which constitutes danger to society, for example drugs,³⁶ pollution³⁷ and road traffic offences.³⁸ The criterion assumes that the existence of strict liability does induce individuals and organisations to aim at higher standards.³⁹

But if our object is to make people more careful concerning specific risks of harm can we not ensure that by admitting negligence as the minimum relevant fault element - might not the prospect of a criminal conviction for negligence weigh just as heavy on the mind of a prospective offender? Smith and Hogan, who favour the 'minimum negligence' alternative to strict liability,⁴⁰ say that it is likely that people will not do more than is reasonable in any given case and it is unfair to require them to do so. In any event it is submitted that the claim that strict liability promotes higher standards of efficiency and care than those which result from the imposition of offences of negligence is not necessarily substantiated in fact. Suppose that the offence with which Alphacell⁴¹ was convicted was today an offence requiring negligence as a minimum form of mens rea. Would this relaxation in the mens rea requirement cause firms like Alphacell to relax their policies concerning minimisation of the risk?⁴² If it is conceded that the answer is no then we might equally claim the reverse: that an agent is not likely to take greater preventative measures than he considers to be reasonable to minimise the risk of an offence the minimum mens rea of which has been reduced from negligence to strict liability. A further criticism of the criterion is that in reducing the mens rea requirement to this level we attribute liability to the agent who is faultless with regard to the actus reus of the strict liability offence.

My view is that we ought not set the level of mens rea lower than that required for negligence. The grounds upon which my view rests are fivefold. First, the criminal law should be concerned with conduct which

is truly criminal in nature, both as to actus reus and mens rea. By 'truly criminal' I mean conduct which is such that we would consider it as sufficiently morally blameworthy to count as appropriate for attributions of criminal blame and punishment. Second, we should not seek to set criminal prohibitions at a level at which it is not possible for the agent reasonably to comply therewith. Third, the level of mens rea designated for any offence should not be set primarily for administrative convenience. Fourth, the minimum level of mens rea generally should not be lower than that which is efficient in attaining the legislator's purpose, i.e. ensuring that agents take all reasonable care in avoiding the commission of the actus reus of the offence. Finally, where a negative mental state is sufficient to ground liability the agent should have a fair opportunity to adduce evidence (or prove) that he lacked mens rea.⁴³

But if we are to exclude strict liability as a species of mens rea then how, if at all, are we to subject the existing corpus of strict liability offences to the scrutiny of the legal system? Several alternatives to the concept of strict liability have been proposed.⁴⁴ First, Lord Reid has suggested that an improvement on the concept of strict liability would be for the prosecution to prove gross negligence in appropriate cases.⁴⁵

Second, in Sweet v Parsley⁴⁶ Lord Diplock, who espoused the notion that mens rea should be read into a statutory provision when necessary, stated that the accused should *have the burden of adducing evidence* of lack of mens rea whereupon it would be for the prosecution to prove at least negligence. The Learned Law Lord thus proposes that in cases of strict liability the accused should have the opportunity to present evidence that he lacked mens rea concerning an essential element of the actus reus of the offence whereon the onus shifts to the prosecution. But why should the prosecution require a finding of at least negligence? Lord Diplock bases his suggestion on his interpretation of Proudman v Dayman⁴⁷ that the accused does not have to prove the existence of an honest and reasonably held mistaken belief on the balance of probabilities, but may merely raise a reasonable doubt as to its non-

existence: once such doubt is established it would be for the prosecution to establish negligence.

Third, Lord Reid has put forward the suggestion that "once the necessary facts are proved (the accused) must convince the jury that on the balance of probabilities he is innocent of any criminal intention".⁴⁸ The phrase 'innocent of any criminal intention' is not entirely clear but it is submitted that Lord Reid is saying that in strict liability cases the burden of proof is with the accused to show that he lacked mens rea concerning the crucial element of the actus reus of the offence. On this interpretation of Lord Reid's dictum this third alternative to strict liability differs from the second, proposed by Lord Diplock, in that with the former if the agent satisfies the court or jury that he lacks the necessary mens rea then that is an absolute defence whereas with the latter the prosecution may still secure a conviction by proving negligence. My interpretation of the third alternative to strict liability was favoured by Day J in Sherras v De Rutzen.⁴⁹ In Harding v Price⁵⁰ Singleton J considered that the absence of any word importing mens rea merely placed the burden of establishing the lack of mens rea on the accused. However the view is not generally accepted in the cases and goes against decision by the House of Lords in Woolmington v D.P.P.⁵¹ In that case Lord Sankey asserted that

"no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Strict Liability Subject to the Defence of 'No Negligence'.

One question on this third alternative to strict liability concerns whether D may prove that he lacked mens rea simpliciter or whether he must prove that he lacked mens rea and *was not negligent* in failing to appreciate the risk that a circumstance exists or a consequence may flow from his conduct. In Sweet v Parsley Lord Reid pointed out that the Australian case of Proudman v Dayman⁵² was precedent for the view that it is open for D to establish that he had an honest *and reasonable*

belief in a state of facts which, if they existed, would make D's act innocent. Thus for Lord Reid the agent must prove that he lacked *mens rea* and that he was not negligent in failing to appreciate the risk.

The decisions since Sweet v Parsley⁵³ indicate that the courts are generally not prepared to accept either of the modifications to the concept of strict liability suggested by Lords Reid and Diplock. However on the odd occasion, they have been prepared to read into a statute a 'no negligence'⁵⁴ defence in relation to what would otherwise be a strict liability offence. In accordance with this defence D would be acquitted if he can prove on the balance of probabilities that he lacked *mens rea* as to an essential element of the *actus reus* and was not negligent. In Warner v Metropolitan Police Commissioner⁵⁵ the House of Lords decided that the accused could effectively disprove the unauthorised possession of dangerous drugs in a container where he establishes that there were no circumstances which aroused his suspicions regarding the contents and that whilst he may have had the right to check the nature of the substance or substances in the container it would not have been reasonable for him to have done so.

Parliament too has been prepared to introduce 'no negligence' defences into statutory offences which might otherwise be construed as strict liability offences. For example by s.28(2) of the Misuse of Drugs Act 1971 it is a defence to a charge that D has a controlled drug in his possession, that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged. Also the Licencing Act 1988, which has removed the word 'knowingly' from the offence of serving alcohol to a person under age, provides that it will be a defence to the publican to show that the offence occurred despite due diligence on his part.⁵⁶

A fourth suggestion concerning alternatives or modifications to the concept of strict liability has been raised by the Law Commission which recommends that where a future offence makes no provision for fault or strict liability concerning a circumstance or consequence of particular

activity then, subject to three exceptions, it should be irrebuttably presumed that Parliament intends a minimum mental state of recklessness.⁵⁷ The three exceptions constitute examples by which Parliament expressly excludes the presumption (i.e. where Parliament expressly makes the offence one of (i) strict liability or (ii) negligence, or where Parliament has (iii) provided a 'no negligence' defence). Furthermore the Law Commission recommends that the accused should not be liable if at the time of the actus reus he believed *reasonably or not* that any circumstance existed which would have excused him from liability or allowed him a defence to the charge. The Law Commission is recommending that where a statute is silent as to the mens rea requirement concerning some aspect of the actus reus then the prosecution must prove that the accused was at least reckless and an honestly (even if unreasonably) held belief as to a circumstance or consequence will secure an acquittal.

The Proposed Structure of Mens Rea and Strict Liability.

My view is that the minimum fault element concerning mens rea at criminal law should be simple negligence. In accordance with that proposed concept where D has brought about a 'low risk' untoward harm the burden is with him to prove a legally recognised factor of sufficient degree in the circumstances to cause him to fail to allude to the risk. All current strict liability offences should be removed from the criminal law. There are two alternative strategies here.

(i) We could remove strict liability to a 'Regulatory Code'⁵⁸ to be administered in a special set of courts,⁵⁹ called regulatory courts with a separate set of procedures, evidence and sanctions. An objection to this strategy is that in effect we are preserving crimes of strict liability but simply giving them a different name. I would agree that the difference between the proposed regulatory breaches and criminal offences would indeed be largely symbolic but the proposed system would remove the stigma of criminal liability in relation to current strict liability offences.

(ii) We could modify current strict liability offences so that they include simple negligence as a minimum mens rea requirement. On this

submission it would be necessary for the court or jury to deliberate upon whether an accused, in bringing about the actus reus of an erstwhile strict liability offence,⁶⁰ he had failed to appreciate a low risk of untoward harm, and the defendant would have the rebutting provision of the proposed concept of simple negligence unless his conduct amounted to the commission of a substantive offence.⁶¹

My proposal that all criminal offences ought to have simple negligence as a minimum mens rea would create a problem concerning those road traffic offences which are subject to strict liability at current law (such as speeding, driving without a licence, insurance, tax and so forth), since it might be difficult for the prosecution to prove negligence thus leading to some unsatisfactory acquittals. It is this problem which persuades me that the strategy to be adopted is (i) above: to remove current strict liability cases from the criminal law and place them into the structure of a new 'Regulatory Code'. The Code would, inter alia, state the various road traffic breaches which require no mental state as a necessary prerequisite to civil liability and the penalty for breach. That penalty may be the same in substance (though not in status) as that imposed at present at criminal law, i.e. penalty points which may lead to temporary suspension and a pecuniary penalty.⁶² Of course those road traffic offences which require a minimum mental fault of negligence (e.g. driving without due care and attention) would remain within the criminal law, although, if my proposed twofold definition of negligence is accepted, the structure of such offences would require amendment. The same strategy may be applied to non-traffic offences. In current strict liability offences concerning business organisations, for example, we might incorporate the current strict offence into the Regulatory Code and apply penalty points and/or temporary loss of licence to trade together with a pecuniary sanction for breaches of the Code.

This is not to say that such road traffic and non-road traffic breaches of the Regulatory Code would be 'non-criminal' breaches regardless of the precise mental state accompanying the conduct which brings about the breach. For the agent who, say, deliberately drives without insurance

has committed the appropriate criminal offence with direct intention and would be subject to the criminal process accordingly. But where, say, D has been asked to drive and drives a vehicle belonging to P, having been advised by P and thus believing that the policy of insurance covers anyone driving the vehicle with P's permission when in fact P's policy is restricted to 'policyholder only driving' then, if he is to be subject to any legal sanction, D would be found in breach of the Regulatory Code and dealt with accordingly. My submission would require a significant reorganisation of the structure of criminal law relating to current strict liability offences. For we would need equivalent criminal offences to the current strict liability (now regulatory) offences to catch agents who perpetrate the actus reus of the current strict liability offences with a specific mens rea. For example if D knowingly drives a car without an M.O.T. certificate and we wish to ascribe criminal liability for that activity then we would need to create a new and appropriate criminal offence with a minimum negligence requirement.

There is an administrative problem here. Suppose that D is prosecuted for an alleged offence on the basis of intention concerning conduct which violated the Regulatory Code and the court or jury acquit. Is the accused now handed over to the Regulatory process? Will the two processes run independently and in any temporal order concerning a particular transaction? My submission here is that if the agent is charged with a criminal offence on the basis of the existence of a specified mental state then the judge or magistrates should have the power to administer the Regulatory Code and deal with the alleged breach of the Regulatory Code should the criminal charge fail. Presumably if the agent is convicted of the criminal offence a criminal sanction will be applied and the breach of Regulatory Code would not be proceeded with.

To summarise my proposals concerning simple negligence and strict liability offences. On the proposed model of mens rea the minimum fault element is simple negligence which is constituted by a failure by the agent to appreciate a low risk of untoward harm. However, provided that

his conduct which brings about the 'low risk' untoward harm does not itself constitute a substantive offence he may rebut the inference of simple negligence where he can establish some legally recognised factor of a sufficient degree in the circumstances to cause him to fail to appreciate the risk. All current strict liability offences would either be removed to a Regulatory Code or require at least simple negligence as a requisite mental state. Where offences have been removed to a Regulatory Code criminal offences which admit the same actus reus but which require a minimum mental state of simple negligence would be created to catch agents who perpetrate the actus reus with some form of mens rea. If the prosecution charge the agent with the criminal offence on ^{the} basis of a specific mens rea, for example that the accused brought about the actus reus with direct intention, the court or jury may convict on the higher mental state if so satisfied on the evidence. If the criminal charge fails then the Regulatory Code may be brought into effect and the alleged breach of the Code may be dealt with.

It is submitted that the legislation which codifies criminal law ought to contain a provision that where a statutory provision which creates a new criminal offence is silent on mens rea then that silence should be interpreted as implying the presence of the minimum recognised mental state, which on my proposed structure of mens rea would be simple negligence. Then when Parliament, in a later statute, wishes to create a strict liability offence it would have to do so expressly.⁶³ There would be no need to describe all the requisite mental states in the new statutory offence. Indeed only one need be mentioned, i.e. the minimum mental state required by law, since all higher mental states would automatically be included.

FOOTNOTES TO CHAPTER 8.

1. pp.257-8.
2. i.e. the risk is not more likely than not to occur.
3. Whether positive activity or an omission.
4. See supra chapter 7 p.265ff.
5. For which see below.
6. I say 'substantive' criminal offence because I would wish to exclude untoward harm which the agent has brought about negligently whilst in the course of peregration. Peregration involves otherwise innocent activity and it is the agent's purpose which brings his activity within the perview of the criminal law on the proposed structure of mens rea. It is submitted that preliminary or preparatory activity should not be subject to the criminal law on negligence.
7. Though not a more serious mental state since the mental state for gross and simple negligence is more or less the same, namely a failure to allude to or appreciate the actual extent of the risk.
8. See supra Chapter 7 p.258 for a discussion on low risk.
9. See supra Chapter 7 p.261ff for a discussion on failure to allude to a high risk.
10. See supra Chapter 7 p.265 for a discussion on the rebutting provision to negligence.
11. [1979] QB 695.
12. 10th ed. p.47ff
13. Ibid pp.47-8.
14. (1874) 12 Cox CC 625.
15. (1925) 94 L.J.K.B. 794.
16. See generally Scanlan and Ryan , 'An Introduction to Criminal Law' Kerry Press. Ltd. 1985.
17. Negligence as understood at current law.
18. See, for example, J. C. Smith, 'The Element of Chance in Criminal Law' in the Criminal law Review [1971] 63.
19. Infra p.302.

20. For a general discussion on the current law on strict liability see Cross and Jones 10th ed. p.75ff
21. For example in Gleeson v Hobson [1907] VLR 148 where D knew he was selling meat although he did not know that it was tainted.
22. Barbara Wooton, 'Crime and the Criminal Law' quoted in Smith and Hogan, Criminal Law Cases and Materials 2nd ed. at p.102.
23. (1875) LR 2 CCR 154.
24. 'Criminal Law' 6th ed. p.101.
25. See for example Sweet v Parsley [1970] AC 132 where D lost her job and suffered social stigma.
26. See infra p.301.
27. See Alphcell v Woodward infra p.301.
28. [1969] 2 AC 256. See also Sweet v Parsley supra note 25.
29. See Wechsler, 'The Model Penal Code' in Modern Advances in Criminology (ed., J. Ll. J. Edwards).
- 30 See Callow v Tilston (1900) Cox CC 576.
31. See infra p.304.
32. See Dickson J. in R v Sault Ste Marie (1978) In Scanlon and Ryan.
33. [1972] AC 824.
34. For which see infra p.304.
35. see supra note 32.
36. See, for example, Warner v Metropolitan Police Commissioner [1969] 2 AC 256.
37. For example see Alphcell supra p.301.
38. See, for example, Ball and Laughlin (1966) Cr App Rep 266.
39. See Smith and Pearson, 'The Value of Strict Liability' in the Criminal Law Review [1969] 5.
40. 6th ed. at p.104.
41. Supra note 33.
42. Particularly when one bears in mind that the second conviction means liability to a term of imprisonment.

43. On this aspect see S. R. Howard, 'Strict Responsibility' p.9ff.
44. See particularly Smith and Hogan 'Criminal Law' 6th ed. p.105ff.
45. See Sweet v Parsley supra note 25 at p.150.
46. Supra note 25.
47. (1941) 67 CLR 536.
48. In Sweet v Parsley supra note 25.
49. [1895] 1 QB 918.
50. [1948] KB 695.
51. [1935] AC 462.
52. Supra note 47.
53. Supra note 25.
54. See particularly Cross and Jones 10th ed. at p.85.
55. supra note 36.
56. See also s.113(1) of the Food and Drugs Act 1955 which allows D to lay information of fault by some other person (e.g. the manufacturer - see Lindley v G. W. Horner and Co. Ltd. [1950] 1 All ER 234. see also s.24. of the Trade Discriptions Act 1968 which allows D to avoid liability for the actus reus if he proves that the commission of the offence under the Act was due to a mistake or accident or some other cause beyond his control and that he exercised due diligence to avoid committing that actus reus.
57. In Law Comm No.89 'The Mental Element in Crime' 1978. See Professor Hogan, 'The Mental Element in Crime (2) Strict Liability' in the Criminal Law Review [1978] at p.593.
58. For which see below p.307.
59. Or by existing courts exercising a separate regulatory function.
60. On current proposals now an offence which requires a minimum mens rea of negligence.
61. For which see above p.290ff.
62. We would not perhaps use the term 'fine' which suggests a criminal sanction. Perhaps the term 'amercement' would suit our purpose here.
63. Unless Parliament saw fit to abrogate or amend the earlier general statutory provision.

In this Chapter I summarise the proposed structure of mens rea, state the criteria upon which the various concepts are based and indicate the advantages which they have over the existing legal concepts. I conclude by applying both the current and proposed structures of mens rea to a series of hypotheticals in order to test the strength of my arguments.

The proposed structure of mens rea is constituted by the following concepts.

1. **Direct Intention.** Where the agent believes that an effect x may flow from a particular exertion of his and he makes that exertion because of that belief then he brings about x with direct intention to do so. Where untoward effect y is conceptually certain to flow from his exertion aimed at x the agent directly intends effect y when he aims at x even if he fails to appreciate that effect y will flow from his exertion since x and y are effectively the same and to aim at one is to aim at the other.

2. **Concomitant Intention.** Where the agent foresees that a de facto empirically certain effect y may, or will, flow from his exertion aimed at x he concomitantly intends to bring y about as he makes his exertion which he believes may bring x about. An empirically certain effect is one which in the circumstances of the case must flow from the agent's activity subject to extraneous agency, i.e. some difference in, or intervening change in, the facts or circumstances perceived by the agent at the time of his exertion aimed at the effect directly intended by him.

3. **Purpose.** Where an agent makes an exertion which is not per se capable of bringing x about, but is a singularly necessary preliminary exertion in a selected causal chain which he believes will lead to x then, if x is not the last link in the causal chain, but represents a further link

(or means) towards the ultimate end then effect x is the purpose for which the agent makes his preliminary exertion.

4. **Objective.** Where the agent makes an exertion which is not itself capable of producing effect x but is a necessary preliminary exertion in the chain of activity leading to it, then, if effect x is the ultimate end of the agent's activity he makes his exertion with the objective of bringing x about.

5. **Gross Recklessness.** Where the agent foresees a high risk of the occurrence of untoward effect y in relation to an exertion aimed at effect x then he brings about y with gross recklessness.

6. **Gross Negligence.** Where the agent fails to appreciate the existence of an objectively high risk of untoward harm y which may flow from his activity aimed at x, or having alluded to the risk of y he wrongly concludes that the risk is low or does not exist, then he fails to appreciate a high risk of untoward effect y and brings it about with gross negligence. He may rebut the inference of gross negligence by proving the existence of some legally recognised factor which was present in sufficient degree to prevent him from appreciating the high risk of harm.

7. **Simple Recklessness.** Where the agent anticipates the objectively low risk of untoward effect y which may flow from his activity aimed at x, he brings y about with simple recklessness.

8. **Simple Negligence.** Where the agent fails to appreciate the objectively low risk of untoward effect y which may flow from his conduct he brings about y with simple negligence. There would be a general offence of criminal negligence whereby the agent who brings about y negligently whilst embarked upon criminal activity shall be liable for y on the basis of criminal negligence. In addition there would be specific offences of negligence where Parliament sees fit to attribute criminal liability for proscribed harm brought about by

otherwise innocent activity. In such offences the agent would have available the rebutting provision stated in 6 above.

The first four proposed concepts of mens rea form a congruous set of fault terms which would replace the current concept of intention and would be applied separately or in combination in accordance with the legislator's view of the specific mens rea requirement for each new offence. The four concepts are to be preferred to the current legal notion of intention on several grounds. First the greater number of fault terms allows us to extend or contract the mens rea requirement of each offence without the need to extend the contours of the specific fault terms. We may, for example, restrict the contours of the mens rea of attempts to direct intention whilst including concomitant intention for, say, the offence of causing grievous bodily harm contrary to s.18 of the offences Against the Person Act 1861. The proposed fault terms would thus be conceptually clear and consistent whereas the current legal concept of intention is conceptually unclear and inconsistent since its boundaries have been the subject of varying definitions by the judges in the cases in order to meet the needs of justice in a particular case. This has led to the confusing mutations of the concept which include direct intention, ulterior intention, further intention, specific intention, basic intention, dominant intention and so forth.

Second the proposed concepts, with their narrow definitions, allow us to place a more accurate label on the agent concerning his attitude to the proscribed harm brought about by him.

The fifth, sixth and seventh proposed concepts equate roughly with the the current legal concept of recklessness. Gross and simple recklessness are in accord with the current legal concept concerning positive awareness of risk. However the division of the positive mental state into gross and simple recklessness enables us to record the agent's mental state (and moral status) with greater specificity. For we clearly distinguish between the moral turpitudes of the agent who is prepared to take a very high risk of causing untoward harm and the agent who takes a small risk of such harm.

Gross negligence equates roughly with the negative mental state within the current legal concept of recklessness. It is submitted that this negative mental state is quite distinct from the equivalent positive mental state, i.e. foresight of a high risk of harm, and thus ought to be granted separate status within the framework of mens rea. The proposed concept of gross negligence provides the distinction and removes the conceptual incoherence of the current legal concept of recklessness, the contours of which confuse two quite distinct forms of mental state. The eighth proposed concept of mens rea, simple negligence, is constituted by a failure by the agent to allude to or appreciate the extent of a low risk of harm.

Identifying the Mental State in the Conviction.

A central feature of the proposed structure of mens rea is that the court or jury would be required to state the appropriate form of mens rea with which the agent has brought about the actus reus of a particular offence for the purpose of the conviction. If, for example, the offence in issue admits gross negligence as a minimum mental state the prosecutor would charge the agent with the commission of the offence without stating the form of mens rea which he believes accompanied the agent's activity which brought the harm about. At the trial evidence would be submitted by both sides in order to prove or disprove an alleged mental state as the case may be. In his summing up to the jury the judge would indicate to them the available forms of mens rea in accordance with the definition of the offence and invite them to consider which admissible mental state, if any, was held by the agent at the time he brought about the actus reus of the offence.

This provision in the proposed structure of mens rea provides us with the means of recording more precisely significant distinctions in moral turpitude with which agents do harm. Paradigm examples of this feature would be cases of strict liability. Suppose that D₁ sells tainted meat with the intention of so doing. D₂ sells tainted meat in the belief that it is sound because he has a veterinary certificate to that effect. The significant difference in moral status between the two agents would be

recorded in the conviction. D_1 would be convicted of selling unsound meat with direct intention whereas D_2 would be convicted of that offence by way of strict liability.¹

It is submitted that the eight proposed concepts form a mutually exclusive coherent and consistent model of mens rea which eradicates the conceptual incoherence and inconsistencies in the present legal structure which I have indicated throughout the preceding chapters. But more important, I think, the proposed structure provides a sophisticated set of fault terms which is better equipped to draw out significant distinctions in moral status with which agents commit criminal offences. We may test my contentions by applying the proposed and current legal structures to a series of hypotheticals.

1. Alan plans to kill his wife, V, using a specific poison which is stored in his garage. He later changes his mind and abandons his objective.

Alan has abandoned his enterprise before he has taken *any physical activity* which is a necessary preliminary to his objective. He is guilty of no criminal offence on current law since he has made no physical change in the world concerning the consequence which he has planned.² Nor is he guilty on the proposed model which insists upon some physical movement by the agent towards his intended objective.³ The ideal typical constructions of subjectivism and objectivism would also exclude him from criminal liability on the basis of lack of culpability and dangerousness respectively.

2. Brian plans to kill his wife V. He purchases rat poison for the purpose but later changes his mind and abandons his plan.

Here the agent formulates a plan to bring about a proscribed harm by particular activity and makes a physical, albeit innocent, exertion which brings about some change in the world which is a singularly necessary preliminary, but abandons his plan before he reaches that link in the chosen causal chain which is itself capable of causing the harm

planned by him. Brian is not guilty of any offence in relation to his wife's death on current law since presumably he is yet to do something which is more than merely preparatory to commission of the substantive offence.⁴ On the ideal constructions of subjectivism and objectivism he is guilty of no offence on the ground of lack of proximity between the preparatory activity and the prospective harm aimed at by him. However, on the proposed model Brian is guilty of peregration since he has made a physical change in the world which is a singularly necessary preliminary regarding his objective. I justify my departure from current law largely on grounds of moral status. Suppose that Benny buys the same poison for the purpose of ridding his premises of rats. There is no difference in the acts of Brian and Benny but there is a significant difference in the moral status with which each act was done which deserves recognition at law. We may mark that distinction by attributing liability to Brian on the basis of the wicked purpose for which he acquires the poison.⁵

3. Charles plans to kill his wife V. He buys some poison, places it in her coffee and hands the mixture to her. However, before she has taken any, V inadvertently knocks the cup over and the mixture spills onto the floor. Charles decides not to try again.

In this hypothetical the agent has taken all the physical steps necessary in order to bring about the change in the world which constitutes his plan but his activity has failed to bring that change about. Charles is guilty of attempted murder on current law since he has certainly done something which is more than merely preparatory to the commission of the substantive offence. On the proposed model Charles is guilty of an attempt since he has reached the executive causal link in the chain of activity which he has chosen regarding his wife's death. Current law, the proposed model and the ideal constructions of subjectivism and objectivism are as one here.

4. Don, from a vantage point, aims and fires at his wife V with the intention of killing her. She dies as a result of the injury inflicted.

Here we have what is for lawyers and academics the paradigm of the concept of intention. The agent has made a physical exertion which he believes may bring about the proscribed harm and he acts as he does because of that belief. His objective has been realised. Current law, the proposed model of mens rea and the ideal typical constructions would hold Don guilty of murder on the basis of intention.⁶

5. Eric creeps into V's bedroom, takes out a knife and stabs what he believes to be the sleeping V. In fact the 'victim' turns out to be some pillows.

This hypothetical brings into focus impossible attempts. On current law Eric is guilty of attempted murder. The proposed model follows law here⁷ as does the ideal typical construction of subjectivism.⁸ The ideal typical construction of objectivism would hold that Eric has attempted to kill V on the ground that his activity is objectively dangerous.⁹

6. Frank, who is aware of the minimum age of consent, has intercourse with V believing her to be 15 years old when, in fact, she is 17 years old.

Here the agent's mistake about a crucial circumstance of his activity causes him to misperceive the legal status of that activity. current law would hold Frank guilty of an attempt at unlawful intercourse on the ground that he should be judged on the facts as he believed them to be.¹⁰ The ideal typical construction of subjectivism would follow the law here.¹¹ The ideal typical construction of objectivism would excuse Frank from liability since his act is objectively legal and his activity is not dangerous. The proposed model would also excuse Frank from liability on the ground that only a direct intention to bring about a criminal offence is sufficient for a conviction for an attempt and the test to be applied is the test of failure. On that test we find that Frank would not have considered his activity a failure when disabused of his mistake and he thus does not directly intend unlawful intercourse. In Chapter 5 I put forward reasons why the case of Frank ought to be

distinguished from other cases of impossible attempts exemplified by the hypothetical concerning Eric.¹²

7. Graham, who is aware of the minimum legal age of consent, has sexual intercourse with V believing her to be 17 years when she is in fact 15 years old.

Here Graham, like Frank, has misperceived a crucial circumstance of the transaction with V and that misperception renders his activity (having an illegal relationship) quite different from that which he believes he is carrying out (having a legal consensual relationship with V). Neither the current law nor the ideal typical construction of subjectivism would attribute liability to Graham on the ground that he should be judged on the facts as he believed them to be. The ideal typical construction of objectivism would come to the same conclusion provided that Graham's mistake about V's age was a reasonable one to make in the circumstances. The proposed model would exclude Graham from liability on the same ground as that stated in the case of Frank.

8. Harold has intercourse with V knowing her to be 17 years of age but believing wrongly that it is a criminal offence to have sexual intercourse with a girl under 18 years of age.

This case involves a misperception of the current law by the agent. Current law, the two ideal typical constructions and the proposed model would exclude Harold from criminal liability.¹³

9. Ian plans a burglary at 25 Acacia Avenue. His scheme is that he will throw a brick through a rear downstairs window during the evening when no one is at home. He will then retreat and return later and effect a quiet entry. A neighbour, who knows him, sees Ian throw the brick through the window and make off. The police are informed and Ian is arrested.

Here the agent has perpetrated a criminal offence which is a singularly necessary preliminary to the commission of a prospective offence. At

current law Ian is guilty of criminal damage but not of attempted burglary since his activity has not gone beyond the preparatory stages concerning that offence. The same position obtains on the ideal typical constructions of subjectivism and objectivism. On the proposed structure Ian is guilty of causing criminal damage with direct intention with the objective of committing burglary. I submit that this is right, for in ascribing purpose to Ian we accurately record his moral culpability concerning his preliminary criminal activity: Ian's activity is far more morally reprehensible than that of Iris who throws a brick through a window in an act of sheer vandalism.

10. John, with the intention of causing it to fall therefrom, hurls a large stone at an ornamental cart wheel hanging on an outside wall at V's home. The wheel hangs directly above a cold frame in the garden. John does not intend any damage to the frame but knows that his activity, if successful, is certain to bring such about. The stone strikes the wheel and causes it to fall onto the frame causing extensive damage thereto.

In this hypothetical the agent anticipates that an untoward consequence is certain to flow from his activity which is aimed at something else. That untoward consequence plays no part in the agent's deciding to act as he does but he is prepared to allow that harm by his activity. At current law John is guilty of bringing about the damage to the cold frame with intention to do so.¹⁴ The ideal typical constructions of subjectivism and objectivism draw the same conclusion. Whether or not John can be said to directly intend the damage to the cold frame on the proposed model would depend upon whether or not the damage was an indivisible effect or a concomitant effect of his activity. If we draw the conclusion that the untoward harm is an inseparable effect of John's activity aimed at something else then we may attribute direct intention to him in relation to the damage to the frame. However if we consider that the untoward harm is a concomitant effect of his activity, i.e. it must occur subject to extraneous agency, then we may attribute concomitant intention to him. The distinction is, perhaps of little importance where the untoward harm is brought about but it is of vital

importance where the harm does not occur. Suppose, for example that the stone had missed the cart wheel and the cold frame had not been damaged. Could we charge John with an attempt concerning damage to the cold frame? If we are satisfied that such damage is a conceptually certain effect of his activity we may do so, but if we consider such damage to be a concomitant effect then we may not attribute liability to him for the harm which has failed to occur.

11. Joan alludes to the possibility of damage to the cold frame and wrongly concludes that such damage is unlikely to occur.

Here the agent has misperceived the degree of risk involved. On the ideal model of subjectivism she is reckless since she has appreciated that there is some risk and has nevertheless gone on to take it (the ideal construction of subjectivism would accept the objectivist requirement that in the circumstances the risk must be an unreasonable one for the defendant to take). The ideal typical construction of objectivism would count her as directly intending the damage on the basis that such damage is inevitable and her act is dangerous. Current law would probably follow the objectivist line here. It is not clear whether this is the case since for the purpose of a conviction for criminal damage at current law it is only necessary to show that the defendant was at least reckless regarding the damage to ensure a conviction: there is thus no distinction drawn between intention and recklessness in the cases on criminal damage. On the proposed structure of mens rea Joan brings about the untoward harm (i) with direct intention if the damage to the cold frame can be said to be a conceptually certain consequence of her activity aimed at the wheel, or (ii) with concomitant intention if it can be said that the damage to the frame was certain to flow from her exertion subject to extraneous agency. She would concomitantly intend the harm since she has foreseen that it may occur. As I have stated above I am inclined to the view that the damage to the frame is a conceptual certainty and that Joan directly intends the damage.

12. Julie alludes to the possibility of damage to the cold frame and wrongly concludes that there is no risk of damage to it.

Julie has made a similar mistake as Joan but her case differs in that she has come to a positive conclusion that there is no risk at all. The ideal typical construction of subjectivism would not ascribe recklessness to Julie on the ground that she was not aware of the risk at the time of her activity. Current law would presumably hold her guilty of recklessness but one must remember the argument that the Caldwell test might not cover the agent who has considered a risk and has decided that there is none.¹⁵ The ideal objectivist model would ascribe intention to Julie on the ground that the untoward harm is a certain consequence of her activity. The proposed structure of mens rea would ascribe gross negligence to Julie concerning the damage to the cold frame since she has failed to appreciate the high risk.¹⁶ The proposed structure is preferable here for two reasons. First, unlike current law and the ideal constructions, it enables us to record Julie's negative mental state concerning the untoward harm. Second, unlike current law, it enables us to draw out the distinction in moral status between Julie and the hitherto unmentioned agent Jean who deliberately aims at damage to the frame: for at current law both Julie and Jean are guilty of criminal damage simpliciter whereas on my proposals Jean would be guilty of causing criminal damage with direct intention.

13. Janet fails to consider the possibility of damage to the cold frame.

Much of the commentary relating to Julie above applies to Janet although at current law there is no doubt that she is reckless since her mental state concerning the damage falls into that of Caldwell. It seems that there is a possibility at current law that if D considers a risk and decides that there is none then he is to be treated differently from the agent who fails to consider the risk at all.¹⁷ On the proposed structure of mens rea Janet is guilty of causing criminal damage by gross negligence. Julie and Janet would thus be treated in the same way which is surely right since their moral culpability for their failure to appreciate the risk is about equal.¹⁸

14. Kevin takes a 'pot shot' at the alarm bell on a wall at his neighbour's house. He realises that there is a high risk of damage to the window situated near to the bell. The bullet damages the window. On the ideal constructions Kevin is guilty of causing damage recklessly. On current law he is guilty of causing criminal damage since his mental state falls within the mens rea requirements for the offence. However his precise mental state is ignored. On the proposed structure Kevin is guilty of causing criminal damage by gross recklessness. I have put forward my arguments in favour of a division of recklessness into gross and simple recklessness.¹⁹ In short the division enables us to place a more precise label on the agent in relation to his attitude towards the risk of harm. Another important point here. My proposal, unlike current law, enables us to mark off the distinction between the agent who is reckless toward the harm and the agent who directly intends it.

15. Lucy awakes just as the train on which she is travelling is pulling out of the station at which she ought to have disembarked. She considers pulling the communication cord and the risk of injury to fellow travellers which may be caused thereby. She comes to the conclusion that such injury is unlikely to occur. Given the speed at which the train is travelling and the circumstances of the case (newly embarked passengers looking for seats), there is an objectively high risk of injury. She pulls the cord and V, an elderly passenger returning to his seat, is thrown to the floor and is injured.

Here the agent has formed an opinion of the risk which is lower than that which obtains in relation to her activity. At current law Lucy will be liable for the injury on the basis of malice²⁰ since she is aware that there is some risk of such harm. The ideal constructions would reach the same conclusion. On the proposed structure Lucy has brought about the injury by gross negligence since she has failed to appreciate the high risk of injury. The solution adopted by my proposal is to be preferred since (i) we record more accurately the precise mental state of the agent and (ii) we draw a sharper picture of the particular moral status of the agent. It is possible that Lucy would not have taken the risk had she appreciated the true extent of the risk to passengers and

it is right that she is distinguished from the agent who takes a risk which he knows to be high. The current concept of malice is not able to draw this distinction between the agent who knowingly takes a high risk and the agent who misperceives the extent of the risk.

16. Mavis decides to dispose of her household refuse by throwing it out of the window of her flat on the third floor. She considers the risk of injury or damage to others and decides that there is none. Given that the block of flats in which she lives abuts a major thoroughfare Mavis has failed to appreciate an objectively high risk of harm to others. The defenestration causes damage to a passing car.

Here the agent has considered an objectively high risk of injury or damage and has mistakenly concluded that there is no risk concerning her prospective activity. The situation highlighted in the hypothetical has provided much griss for the academic writers concerning the contours of Caldwell recklessness²¹ since Lord Diplock's definition of that concept was silent on this mental state. If such a mistake does in fact fall within the Caldwell criteria then, it is submitted, the risk must be obvious and serious which is presumably the position in the case of Mavis. The ideal typical construction of objectivism would hold Mavis guilty of the substantive offence on the ground of recklessness since, being objectively high, the risk would have been apparent to the ordinary prudent individual. The ideal typical construction of subjectivism would not attribute recklessness to Mavis since she was unaware of the risk at the time of her activity.²² On the proposed structure of mens rea Mavis has brought about the injury by gross negligence. I justify the position taken by the proposed structure on the same grounds as those stated in the hypothetical concerning Lucy. It is interesting to note that if Mavis had in fact injured a pedestrian she would not be guilty of any offence contrary to the Offences Against the Person Act 1861 since there the mens rea requirement is malice which insists upon awareness of the risk as a prerequisite to liability. This division of 'foresight of the risk' into recklessness and malice and the different requirements for each category is unsatisfactory since frequently different results are reached on substantially similar

factual situations. the proposed structure eradicates the distinction since malice is excluded as a specific mental state.

17. Norman disposes of a worn tyre by throwing it from a bridge into a river which is privately owned by P who does not allow public access. Before acting Norman has considered the risk of possible damage or injury and decided (rightly on objective grounds) that it is unlikely that his activity will cause damage or injury. As the tyre falls V is passing under the bridge in his canoe. The tyre causes damage to the canoe.

The agent in this hypothetical has rightly perceived a low risk of injury or damage to others and has gone on to take it thus causing untoward harm. On the ideal constructions Norman is guilty of causing criminal damage on the basis of recklessness provided that in the circumstances the risk was such that he was unjustified in taking it. On current law Norman is guilty of causing criminal damage since his mental state falls within that required for the substantive offence.²³ No distinction is made between intention and recklessness here. On the proposed structure Norman is guilty of causing criminal damage by simple recklessness. I have stated the reasons in support of my division of this concept into gross and simple recklessness.²⁴ My proposal provides a more accurate picture of the agent's moral status at the time of his activity than that supplied by the current legal structure since the latter (i) fails to distinguish between Norman, who might not have been prepared to run a more substantial risk, and Kevin (above) who is prepared to do so and (ii) fails to distinguish between cases of intention and recklessness in cases of criminal damage and other offences which include both forms of mens rea.

18. Olive is smoking on a train. She flicks her cigarette and some sparks fly into the eye of a fellow passenger causing temporary, if painful, injury.

In this hypothetical the agent has failed to allude to an objectively low risk of harm and is presumably negligent concerning the harm which

her activity has brought about. The ideal typical construction of subjectivism would exclude Olive from criminal liability on the basis of 'unawareness of risk'. The ideal typical construction of objectivism would exclude her on the ground that the risk is not sufficiently serious to attract criminal liability. At current law she is not liable since the mental state in issue is malice which requires subjective foresight. On the proposed structure of mens rea agents such as Olive would not be liable unless Parliament saw fit to criminalise such negligence by a specific offence of negligence. As I have stated²⁵ my view is that negligence should figure only sparingly in the definition of any criminal offence and where it does so the penalties should be civil in character (e.g. loss of licence and so forth).

19. Peter is engaged in a burglary. He is disturbed by the householder and rushes for the door. He negligently knocks over and damages an expensive vase.

Here the agent negligently brings about harm whilst embarked upon criminal activity. The ideal typical constructions would not ascribe criminal liability to Peter. It seems that current law would follow the ideal typical constructions since the offence of criminal damage requires a minimum mens rea of recklessness (which includes failure to allude to an obvious and serious risk which is presumably not the case in the hypothetical). But, as I have argued²⁶ the agent who negligently brings about harm whilst engaged in criminal activity should be liable for that harm on the main ground that his moral culpability should extend to all harm caused by him. On the proposed general offence of criminal negligence Peter would be guilty of causing damage by criminal negligence.

It is submitted that the series of hypotheticals lend force to my contention that the current structure of mens rea is inadequate since the concepts which constitute that structure are conceptually incoherent and inconsistent and, in part, terminologically incoherent: that the current structure is not capable of marking off significant distinctions in moral status with which agents bring about particular harm, and that

the structure does not allow distinctions between the concepts in offences which admit more than one form of mens rea.

The proposed structure provides a set of mutually exclusive fault terms, conceptually clear and coherent, which would enable the legislature to (i) apply more precise mental states to specific criminal offences and (ii) provide for the precise classification of mental state by the court or jury when convicting agents of those offences which admit more than one requisite mental state. In this way we would be able to draw much sharper distinctions in moral turpitudes with which harm is done.

It is submitted that the law on actus reus has similar deficiencies to those which I have pointed out in the current concepts of mens rea since the definitions of actus reus in the offences often incorporate a substantial area of activity so that it is not possible to draw out significant distinctions between agents concerning the particular harm which they have brought about. Unfortunately discussion on this issue lies outside the current field of research.

FOOTNOTES TO CHAPTER 9

1. My proposed structure does not include strict liability. I use the example to show the merits of the theoretical concepts in the light of existing law. If my proposals were admitted into law then the maximum gap between the mental states would be direct intention and simple negligence. Of course where simple negligence is in issue the agent would be able to plead the rebutting provision in appropriate cases.
2. S.1(1) of the Criminal Damage Act 1981 sets the threshold of liability at an act which is more than merely preparatory to the commission of the substantive offence.
3. See the fourth feature of direct intention supra p.18.
4. See supra note 1.
5. See generally my account of peregration supra p.157ff.
6. 'Direct intention' on the proposed structure.
7. See supra p.177ff.
8. See supra p.172.
9. See supra p.173.
10. See s.1(3) of the Criminal Attempts Act 1981.
11. Supra p.174.
12. Supra p.175ff.
13. See supra pp.187-8.
14. Since he foresees the harm as certain
15. See supra Chapter 6 at p.237.
16. 'Certainty' would be classed as 'high risk' for the purpose of ascriptions of gross negligence.
17. See supra Chapter 6 at p. 237.
18. See supra Chapter 7 at p.276 for a more detailed account.
19. see supra Chapter 7 p.257ff.
20. See the Offences Against the Person Act 1861.
21. Supra Chapter 6 at p.237.

22. Perhaps worthy of note here is Professor Williams' concept of conditional subjectivism which extends the ideal subjectivist position to catch cases such as Mavis. See supra Chapter 6 p.241.

23. See supra note 1.

24. See supra Chapter 7 at p.258.

25. See generally Chapter 8.

26. Supra Chapter 8 at p.290.

APPENDIX

ON OBJECTIVISM AND SUBJECTIVISM

In this Appendix I set out the main arguments of the judges and theorists who have called themselves or have been labelled either subjectivists or objectivists. I shall point out the major points on which they differ, draw out the distinctions between them and construct ideal typical constructions of objectivism and subjectivism which will be useful in assessing the status of the current legal concepts of mens rea and indicating the extent to which the proposed structure of mens rea departs from and is preferable to the current legal concepts. I begin with objectivism.

On Objectivism.

The most extreme form of objectivism may be seen in two patterns of objectivism posited by Fletcher (In Reshaping the Criminal Law (Chapter 3)), namely 'harmful consequences' and 'manifest criminality'.

The pattern of 'harmful consequences' represents the most ancient and the most extreme form of objectivism: it ignores both the act of the agent and the mental state with which he perpetrates that act, and looks exclusively at the consequences of that act. The offence of murder provides an example of this type of objectivism in our early criminal law. For early English law, imbued with religious overtones, looked upon a killing as a desecration of the sacred order. The focal point was the fact that the agent had caused death: the act which caused the death and the accompanying mens rea were irrelevant factors (the agent who caused death was not merely responsible for the death, he was irrevocably tainted by that death (B. Jackson, 'Essays in Jewish Comparative Legal History (1975))).

By the twelfth century the law of homicide had been brought under the king's jurisdiction and the criminal law on murder began to move away from the objectivist pattern of harmful consequences. By the Statute of Gloucester the concepts of inevitable accident (per infortunium) and personal necessity (se defendendo) functioned as excuses to a charge of

murder, available by way of the royal pardon. By the fourteenth century excuses had been extended to include cases in which the agent who killed was suffering from insanity (in deverie). The law of homicide thus shifted its focus from the fact of death to the act which caused death. This enabled the excuses of inevitable accident and self defence to function as denials to the charge of murder, leading the way for the introduction of the gradation of homicide into murder and manslaughter.

Fletcher's pattern of 'manifest criminality' requires initially that the commission of the crime be objectively discernable at the time of its occurrence. Thus in Roman and Biblical law the manifest thief (fur manifestus) was subject to immediate execution whereas a thief caught after the event with goods in his possession was subject only to multiple damages. It thus rejects the criminalisation of 'furtum nec manifestum'. The paradigm instance of manifest criminality is the agent caught in 'flagrante delicto', but it includes instances which fall short of this ideal case (for example Gaius (Institutes 186-7) introduced the concept of 'furtum conceptum' which caught the thief found with stolen property on his premises). The pattern of manifest liability incorporates a mental state which is presupposed by the initial description of the act. The mental element thus provides the defendant with the means of demonstrating that appearances are different from those indicated by the factual description of his activity. Two major presuppositions are contained in the pattern of manifest criminality. First, the agent must have caused some physical and proscribed change in the world by his activity. If there is no actual proscribed change in the world then there is no point in making an enquiry into the state of an agent's mind. Second, the agent's activity must signal danger to the community (See G. P. Fletcher at p,117).

Several features of our modern criminal law indicate that the pattern of manifest criminality does not figure as a basis of attributions of criminal responsibility. In the case of receiving stolen goods, for example, the overt act of the purchase (or other physical handling) is not, per se, manifestly unnerving to the community. Some instances of theft and deception at current law would be free from criminal responsibility in a legal system which accepts the pattern of manifest criminality. Where, for

example, D calls on an elderly pensioner and tricks her into handing over her pension book to him on the doorstep, one cannot point to any specific act of his which is outwardly incriminating. Also with some theft offences it is extremely difficult to specify the precise moment when an appropriation occurs yet, for the purpose of manifest criminality, one must ascertain the precise moment in order to deliberate upon whether the criminal act which manifests the appropriation signals danger to society. Also the crime of burglary requires one of four manifested intents in addition to the act of entry into the building as a trespasser (the Theft Act 1968 s.9). Simple entry as a trespasser without more will not suffice. Manifest criminality, which is concerned exclusively with acts, is thus not equipped to accommodate sophisticated crimes such as burglary which require some ulterior mens rea.

Furthermore the pattern of manifest criminality cannot accommodate our current criminal law on attempts since it would presumably exclude cases in which the agent has done something which is more than merely preparatory to the commission of the offence (See the Criminal Attempts Act 1981) but desists (or is prevented from completing his enterprise) before his activity has reached the stage at which it signals danger to society. Also in cases of failed attempts where the agent's act is outwardly unincriminating he cannot fall within the pattern of manifest liability although he undoubtedly would be so liable at current law. J. Salmond who, at least in part (in Jurisprudence (7th ed) 1924), espouses the principle of manifest criminality describes an attempt as "an act that shows criminal intent on the face of it". Consider the following two cases. In an attempt to kill Vera, Arthur puts a non-lethal dose of cyanide into her drink believing the dose to be lethal. In an attempt to kill Violet, Brian puts sugar into her drink believing it to be a lethal dose of cyanide. Which, if either, agent is criminally liable for his activity on the pattern of manifest criminality? In order to answer the question we must decide upon the extent of knowledge we are to ascribe to the observer. An act of putting cyanide in V's drink is manifestly dangerous, but is an act of putting a harmless dose of cyanide in V's drink manifestly dangerous? Clearly everything depends upon whether the observer knows what and how much is being used by the agent in the two cases. This indicates a basic

problem concerning the pattern: does it rely solely upon what the ordinary by-stander observes or does it permit the attribution of particular knowledge to him in the cases?

I let G. Fletcher make a final objection to the pattern of manifest criminality as an element in criminal law. He says that one feature of manifest criminality is that the crime itself crystallises as the product of community experience rather than being imposed on the community by an act of legislative will. This, he argues, is foreign to the modern view that the criminal law is imposed on the community by the courts or by the legislature. I think that Fletcher's point holds weight. If we were to adopt a theory of crime based on what the community perceives to be outwardly incriminating then the criminal law might require to be conducted on a parochial basis since community perceptions of right and wrong may differ between regions temporally and geographically. For example during the national coal strike of 1984/5 certain mining communities in Yorkshire might well have viewed the removal of coal from pit heads by striking miners as in no way wrongful or unnerving. The principle of manifest criminality might also lead to bias and prejudice. In the coal strike illustration the same mining community might be enraged by the same act perpetrated by a strike breaking miner.

Of Fletcher's comment one might ask if we want a criminal law which is "imposed on the community by an act of legislative will"? My view here is that to the extent that the legislature reflects the moral standards of society as a whole it has a role to play in crystallising that morality in concrete rules binding upon society as a whole. Of course this suggests that we have a community with shared views on what is and what is not morally acceptable but this is not in fact the case. It is because we do not have such a community that I think it is right that we have a centrally imposed system of morality based upon what the legislature perceives to be the juste milieu of societal morality.

So much for the early patterns of objectivism. Just what constitutes the present pattern (or patterns) of objectivism in relation to ascriptions of criminal responsibility? There are several methodological choices available

to one setting out to ascertain the current pattern of objectivism: my choice is to take certain substantive views on mens rea aired by the judges in the cases and by academic writers, and take the sum total of those views as representing or exemplifying the present pattern or ideal typical construction of objectivism. On this approach I think that the contours of objectivism are captured in the claim that liability should be determined (inter alia) by the actual (as distinct from the intended or believed) character and consequences of the agent's activity and/or what a reasonable person would (as distinct from what the actual agent did) foresee, believe or intend. The agent must thus have orchestrated some activity which causes or comes demonstrably close to causing injury or damage to another: where an agent, by such activity, brings about (or comes close to bringing about) proscribed harm then his criminal responsibility shall be judged on the standards and perceptions of the ordinary man in society. This is, in my view, the ideal typical construction of objectivism. I should point out that perhaps no one judge or theorist accepts the construction without qualification but I think that it is representative of the the views of those who have been labelled objectivists in the literature. It would be useful here to discuss how the ideal construction relates to appropriate areas of our criminal law.

(i) Attempts.

The ideal typical construction of objectivism adopts a minimalist approach to criminal responsibility here since (a) it insists upon an act which is at least close to consummation of the substantive offence and (b) it admits impossibility as a bar to criminal responsibility only in those cases in which the agent's activity is not objectively dangerous. As regards (a) objectivism sets the threshold of criminal responsibility for attempts at some point close to the last physical act necessary for completion of the substantive offence. Rowlatt J typified this objectivist position in R v Osborne ((1920) 84 JP 63) when he said that there can be no liability for an attempt if the agent is "not on the job ... not on the thing itself at all". In R v Eagleton ((1855) Dears CC 515) Baron Park came down in favour of Rowlatt J's view. He said that "acts remotely leading towards the commission of an offence are not to be considered as an attempt to commit

it, but acts immediately connected with it are. In D.P.P. v Stonehouse ((1977) 2 All ER 909) Lord Diplock agreed with the dicta in R v Eagleton and added that "in other words the offender must have crossed the Rubicon and burnt his boats". One problem for pitching liability so close to actual consummation of the substantive offence is that it prevents early intervention into criminal activity.

As regards (b) the restricted stance of the ideal typical construction concerning impossible attempts is open to objection. For where the agent's activity is dangerous on the face of it (e.g. where D, takes a weapon and 'fires' at V but the gun is in fact unloaded) the objectivist would ascribe responsibility to him for his failed activity: but if the agent's activity is not on its face dangerous (e.g. where D, believing it to be his enemy V, fires at a tree stump) then the ideal typical construction of objectivism would not attribute liability to the failed attemptor. But when each agent realises that his attempt at a particular proscribed harm is, on the facts and in the circumstances impossible, is he not likely to repeat his exercise, making sure he does not repeat his mistake on his second mission? One might plausibly argue that we should subject both agents to the scrutiny of the criminal law if only by way of individual deterrence.

(ii) Intention.

In 1961 a judgment delivered by Viscount Kilmuir in D.P.P. v Smith ([1961] AC 290), a case of murder, brought out the ideal typical construction of objectivism concerning the concept of intent. He said that it must be proved that the defendant intended to do something unlawful to another.

"Once the jury are satisfied about that, it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions ... On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the

natural and probable result".

Note that the learned Law Lord insists upon intention by D concerning what he is voluntarily and unlawfully doing to his victim (whatever that unlawful act might be) and, initially at least, seems to be subjective in character. However once that intention is established then, on Lord Kilmuir's dictum, we must count D as intending death or grievous bodily harm (and thus be guilty of murder) if that is a natural consequence of his act, i.e. if that is what the reasonable man would foresee as a possible outcome of such voluntary activity. D is thus guilty of murder even if the thought of death or grievous bodily harm does not enter his head at the time he perpetrates the activity which brings about his victim's death. It is submitted that the dictum exemplifies the ideal typical construction of objectivism since it insists both that the agent should be judged in accordance with the actual character of his activity and that where foreseeability is a necessary element in criminal fault then it should be based upon the standards of the reasonable man.

(iii) Recklessness.

The ideal typical objectivist position here is that it is sufficient for the purpose of ascriptions of responsibility that the agent has failed to appreciate a risk of harm which, having regard to the facts and circumstances of the case, would have been apparent to the average man in society. The ideal construction is thus removed from the early objectivist patterns of 'harmful consequences' and 'manifest criminality' but applies a fairly broad approach to criminal responsibility for recklessness based upon the notion of reasonable foreseeability. It is submitted that the ideal objectivist view was taken by Lord Diplock in Caldwell ([1982] AC 341) when he said that a person charged with an offence under s.1(1) of the Criminal Damage Act 1971 is

"'reckless as to whether any such property would 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".

(iv) Beliefs.

The ideal typical construction of objectivism allows wrongful beliefs as an exculpatory factor in ascriptions of criminal responsibility but a necessary prerequisite is that the wrongful belief (mistake) be reasonably held by the agent. The test is thus what the ordinary prudent man would believe on the same facts and in the same circumstances as those in which the agent found himself at the time of his activity which has brought about the actus reus of the substantive offence.

Parliamentary legislation has coloured statutory defences of mistake with the objectivist brush. Under s.19 of the Sexual Offences Act 1956 it is an offence to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will with the intent that she shall unlawful sexual intercourse with men or with a particular man. However the defendant will have a defence if he can show that he believed her to be over eighteen years of age and he had *reasonable cause* for that belief. Again it is an offence for a person to go through a ceremony of marriage, believing wrongly but *without reasonable grounds* he or she is not married because his or her spouse is dead, or his or her marriage has been dissolved or annulled (See, for example King [1964] 1 QB 285).

(v) Defences other than those based on wrongly held beliefs.

The ideal typical construction of objectivism is also prepared to admit defences other than that of mistake (i.e. wrongly held belief) into the criminal law but insists that, at the time of his act or omission which caused the actus reus of the offence, the defendant acted in accordance with the standards of the ordinary and prudent man.

In Lesbini ([1914] 3 KB 1116) Avory J thought that the defence of provocation, which reduces murder to manslaughter, must be such as would affect the mind of the reasonable man. In Alexander ((1913) 9 Cr App Rep

139) the Court of Appeal decided that evidence of provocation could not be adduced by the defence where, although they may have caused the defendant to lose his self control, the acts of the victim would not have caused a normal person to lose his self control. In Bedder v D.P.P. Sellers J directed the jury that they must consider the effects that the acts of the victim (a prostitute) would have had on the ordinary person and not on a man who is sexually impotent, In Smith ((1914) 11 Cr App Rep 36) the court decided that the subjective fact that the defendant was seven months pregnant was irrelevant for the purpose of the defence of provocation. In McCarthy ([1954] 2 All ER 262) it was held that the fact that the defendant had been drinking was irrelevant in any plea of provocation. This array of case law prior to 1957 no doubt influenced Parliament's decision to apply the 'reasonable man' test to the statutory defence of provocation.

In the defence of duress this ideal objectivist view predominates. In Stratton (1779) 1 Doug KB 239) Lord Mansfield said that "if a man is forced to commit acts of high treason, if it appears really force, and such as human nature could not be expected to resist and the jury of that opinion, the man is not guilty of high treason". In A-G v Whelan ([1934] IR 518) the court talked of the defence of duress in terms of "threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance". In the defence of 'self defence' the defendant must use a *reasonable degree of force* in defending himself against an attack from his victim (s.3(2) Criminal Law Act 1967. See Cross and Jones 10th ed. at p.437).

With some offences too there is a measure of objectivism. In a case of blackmail, for example, the victim is expected to display *reasonable firmness against the defendant's threat* and not allow himself to be persuaded by some trivial minacity (See Clear [1968] 1 All ER 74).

On Subjectivism.

The subjectivist school of thought generally ascribes liability on what the agent intends or tries to do, or believes he is doing rather than by what actually happens or is the case. It would be useful to look at some of the

arguments put forward by the subjectivists in order to build up an ideal typical construction of subjectivism and assess how that construction would affect liability in specific areas of criminal law.

A central subjectivist tenet is that culpability should count as a factor in ascriptions of liability. One particular proposition by Ashworth is of interest here. He argues that for the purpose of recording criminality it is important that both the actus reus of a particular offence and the specified mens rea requirement should accurately reflect the moral turpitude of the agent. Ashworth is seeking here a precise description of the actus reus and quality of mental state with which the agent brings about a proscribed harm. He points out that if a particular criminal offence is defined too broadly either in terms of the actus reus or the mens rea then we attach to the perpetrator of the offence a label which does not accurately record his moral status or culpability in relation to his activity.

In his contribution to the memorial volume to Sir Rupert Cross, Ashworth insists that the relevant fault element (whether intention, recklessness, knowledge or negligence) must match the particulars of the offence stated in the conviction (in 'The Elasticity of Mens Rea'). In his essay Ashworth talks of the principle of 'representative labelling'. Glanville Williams (in 'Convictions and Unfair Labelling') thinks that the term 'fair labelling' more accurately reflects Ashworth's meaning and, anticipating Ashworth's deference to Williams, I shall use the latter term for the purpose of present discussion. Ashworth says that the principle would be trampled upon by, for example, a broad offence of causing personal harm to another which is committed whether the victim suffered death or a mere scratch. Moreover the agent may rightly feel a sense of injustice if his conviction does not reflect his actual guilt.

The principle applies to the converse situation of inadequate labelling. Thus, for Ashworth, where an agent, intending to destroy a priceless ming vase, throws a brick inaccurately and damages an adjacent flower pot it would be a violation of the 'fair labelling' principle to convict him only in respect of the damage to the relatively worthless item. In my submission

such inaccurate labelling could lead to inadequate sentencing in the event of a further offence committed by the agent since the judge in the subsequent trial will presumably rely on the 'unfair' label which is attached to the earlier conviction which inadequately records the agent's criminality. The judge may have access to the indictments on the basis of which the previous convictions were made. The indictments presumably would charge the particular facts. However it is perhaps doubtful that the judge would ask to see previous indictments at the sentence stage. They may not be available on occasion. Fair labelling at the conviction stage would ensure that a judge, at a later trial, has on hand at the sentence stage precise details of the mental state with which the defendant committed the previous offence.

Ashworth thus inveighs against criminal offences which are broad based either as to actus reus (e.g. causing criminal damage) or mens rea (e.g. conspiracy in respect of conduct which the agent believes will involve one of a possible number of offences, but he does not know which). He insists instead that the requirements of such offences ought to be defined with the appropriate specificity.

This proposition has much to commend it. The current tendency towards broad definitions and vague mental states regarding criminal offences leads to a criminal law which is incoherent concerning the moral culpability of the offender and leaves too much of the real decision making to the judge at the discretionary stage of sentencing. A more specific approach to the contours of the offences and the required mental state would or could have the effect of reducing the scope of judicial discretion at the sentencing stage. This could mean that our criminal law would be more coherent and would-be offenders could thus predict more accurately the seriousness of the offence with which they would be charged and the penalty which can be expected for particular breaches of the substantive criminal law. One final point here: morally, and sociologically, one might argue that there should be accurate criminal labelling, even if in its absence the law was sufficiently certain, and judicial discretion was not duly great.

Unfortunately Ashworth more or less restricts his analysis to broad based offences in relation to the actus reus and says virtually nothing about broad based offences in relation to the mens rea requirement (e.g. where the mens rea element comprises both intention and recklessness). Could it be that ideal typical subjectivism is not concerned with the distinction between the concepts of intention and recklessness in relation to convictions for offences which admit both mental states as the requisite mens rea requirement? Legislation is not prepared to make such a distinction between the various mental states at the conviction stage. In the cases too the distinction seems to be irrelevant. In the offence of assault, for example, it must be proved that the accused intended to cause the victim to apprehend the immediate application of force without his consent, or was subjectively reckless as to whether the victim might so apprehend such force. The mental element required is thus intention or recklessness in relation to the assault and juries convict the defendant without making any reference as to their opinion on whether he intended the assault or whether he merely foresaw the possibility that the his victim might apprehend such force. It seems too that the theorists are not prepared to make the distinction for the purpose of conviction, although there is evidence that they are generally prepared to argue for a distinction between the two mental states at the sentence stage.

However it is submitted that one might properly question a legal system which does not distinguish between these significantly different mental states for the purpose of recording a criminal conviction on the ground that it violates the fair labelling principle. Is it right to record the same criminality against the agent who takes a hammer to a public telephone in an act of sheer vandalism as that recorded against Parker ((1985) 83 Cr App Rep 69) who slams down and damages the receiver not thinking about damage because he is in a state of self-induced temper? Moreover a judge hearing a later case cannot accurately judge the mental state with which the agent perpetrated the earlier broad based offence. This might lead to a lighter or more severe sentence than might otherwise have been the case.

There are two alternative methods of structuring criminal law in order to accommodate the fair labelling principle as it applies to broad based

mental states. First we might create more offences in relation to a particular type of activity in an ascending order of seriousness according to the agent's mental state which accompanies his activity. We already have instances of this in the criminal law; for example, the different offences under ss.18 and 20 of the Offences Against the Person Act 1861. We may thus consider dividing rape into two distinct offences reserving the term 'rape' to cases where the agent has non-consensual intercourse knowing that his victim does not consent and reserving for one or more lesser offence(s) those cases in which the agent is not sure that the victim is consenting. Secondly we may retain our existing corpus of criminal offences together with the mens rea requirement for each, but specifically state at the point of conviction the precise mental state with which the agent commits the offence. In this way we have on record whether the agent brought about a particular harm intentionally, recklessly or negligently (where the offence allows the latter two concepts within its definition of mens rea).

It is submitted that the argument in favour of a more narrow specification of the mental state in crime for the purpose of conviction is one which deserves serious consideration in any analysis of criminal responsibility.

It would be useful to consider subjectivist thought in relation to specific concepts of criminal law.

(i) Attempts.

I select the points for discussion here in chronological order concerning the causal chain of activity leading to the substantive offence.

The first point relates to the question of liability concerning the agent who wills a bodily movement in order to bring about a proscribed harm but his body fails to respond. On this question Ashworth (accepted generally as a subjectivist) points out that no one can be certain when he acts that a particular result will occur and, for Ashworth, this justifies an analytical division of human action into the making of an exertion and the occurrence of an effect as a result of that exertion (in 'Sharpening the Subjectivist Element in Criminal Law'). Ashworth's central point here is

that "it is the agent's considered exertion (his intention coupled with his effort to implement it) that lies at the root of criminal responsibility". Ashworth rests his exposition on the volitional theory of Prichard and Ross. He prays in aid the words of Ross.

"If a man had, without knowing it, become paralysed since the last time he had tried to effect the given type of change; his self-exertion, though it would not produce the effect, would obviously be of exactly the same character as it would have been if he had remained unparalysed and it had therefore produced that effect. The exertion is all that is his and therefore all that he can morally be obliged to; whether the result follows is due to certain causal laws which he can perhaps know but certainly cannot control, and to a circumstance, viz his being paralysed which he cannot control, and cannot know until he performs the exertion".

(W. D. Ross, 'Foundations of Ethics' (1939)).

Note the word 'control' in Ross' account. His work fits into the ideal typical construction of subjectivism since the agent, when he wills the bodily movement, *believes* that he is in control of that bodily movement although, objectively, this is not so.

Ross was, in his work, referring to moral duty but Ashworth maintains that the same logic can be applied to moral and criminal responsibility (since criminal blame and punishment should equate with moral fault). For Ashworth all an agent should be blamed for is his exertion. He prefers 'exertion' to 'intention' since one does not always act upon one's intentions.

But what constitutes an exertion in Ashworth's theory? Is it some overt act which is sufficiently proximate to the actus reus or will some preceding mental activity which follows the decision to act but precedes the act itself suffice as a definition? Prichard sees an 'exertion' as an internal mental act of willing (in 'Acting, Willing, Desiring' in Philosophy in Action (ed. White)), separate from the agent's intention, which constitutes the originating of the change in the world. This exertion is just as capable of failing to produce the bodily movement as the overt bodily

movement itself may fail to produce the intended consequence. Suppose, for example, that Derek is behind Vera on a cliff face. He decides (forms the intention) to push Vera off the cliff. He sets his volitional machinery into gear (he wills his arms to push forward into Vera's back) but finds that his arms are too numb with cold to respond to his internal act of willing. If one applies the Prichardian account of volitions to moral fault and criminal responsibility to Derek, we may thus hold him guilty of attempted murder.

Ashworth uses Prichard's commentary in support of an analysis on attempts in which he cites as examples overt acts which fail to effect some change in the world intended by the agent. He does not make it clear whether he would ascribe criminal responsibility to the agent whose activity has been confined to volitional mental processes which directly precede the actus reus and which are intended by the agent to produce it. Yet he does not qualify the quote from Ross which he offers in support of his theory in general and it thus seems that he has adopted the Prichardian model in relation to his exposition on attempts at criminal law. He is thus presumably prepared to attribute criminal responsibility to Derek since Derek has the intention (to kill Vera) which has been accompanied by an exertion (willing the bodily movement) which is per se capable of bringing his intention to fruition. On this view Derek has completed all that is his in relation to the actus reus of the substantive offence.

Given that my presumption that Ashworth accepts the Prichardian model is right, would he restrict the attribution of liability to mental exertions which are per se capable of bringing about the actus reus of the offence? In Derek's case this is the position but consider the variant of the case in which Dillon is at the bottom of the cliff when he forms the intention to push Vera off the top. He wills his body to start up the cliff path but his body fails to respond for some physiological reason. Dillon's mental exertion thus relates to a physical act which is not sufficiently proximate to the actus reus of the substantive offence. In this variant would Ashworth ascribe responsibility to Dillon? My own view is that Dillon should attract no criminal responsibility since he has brought about no change in

the world which constitutes a link in the chain of causation which would lead to the execution of his intended enterprise.

In any event the Prichardian theory concerning duty does not reflect the current legal position for the criminal law insists upon some physical change in the external world before it is prepared to embark upon an examination into causation and responsibility. This raises interesting questions. Why, for instance, should the criminal law require an overt act as a starting point for the assessment of criminal guilt? In particular is it anything more than a pragmatic matter; that if one counted the agent who failed even to move his limbs as a criminal attempter, this would create insoluble problems of proof, even though he should ideally on principle count as guilty?

A second point on attempts. Assuming that it is right to insist upon some physical activity by the agent for the purpose of attributing criminal liability for the inchoate offence, at just what point in the agent's activity which leads to the substantive offence may convict him of an attempt? The material suggests that subjectivism admits liability for an attempt at some point in the causal chain before the link which is itself capable of bringing about the harm which is the object of the agent's activity. Perhaps a practical concern here is the provision of machinery in order that the administration can take effective action to prevent prospective crime. An early supporter of the view that the threshold of attempts should lie at some point prior to the last link of the causal chain was Stephen (in his Digest of Criminal Law) who states that an attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. One might ask if this viewpoint is basically a utilitarian argument: that from the subjectivist viewpoint, it is surely immaterial whether the intervention occurs early or late since the subjective basis of liability is present in both cases. Furthermore one may argue that early intervention derives from the perception of danger, which sounds closer to the ideal typical construction of objectivism which is concerned with the character of the agent's activity. From the material it seems that the theorists associate the dangerousness

of the agent with subjectivism and the dangerous character of his activity with objectivism. But one must accept that the dangerousness of the agent can be just as objective in character as it is subjective.

A third point on attempts concerns the liability of the offender who has done everything necessary to bring about the proscribed harm yet has failed to do so. Asworth argues for liability based upon the agent's exercise of choice and control. He says that when the agent completes the causal chain towards a particular proscribed harm he has done all that is his and the rest is chance since, whilst one's endeavours usually bring about one's objectives, it cannot be said that changes in the world or states of affairs are entirely within one's control. One cannot be sure that intended or expected outcomes will occur. They are contingencies which may or may not occur; they are subject to the element of chance. He urges us not to base criminal responsibility upon outcomes (chance) since criminal responsibility ought to be based upon choice. The agent should be criminally responsible for what he has chosen to bring about. He should thus be responsible for all intended and expected outcomes regardless of whether they actually occur, and he ought not to be responsible for any outcome of his exertion which he neither intended nor anticipated.

The objectivist, too, would attribute criminal responsibility to the agent who perpetrates the last act of the causal chain in the knowledge or expectation that it will bring about a proscribed harm: but a specific objection to Ashworth made by John Harris (in 'Overexertion and Under-achievement') is worthy of note. He points out that if we accept the choice principle for failed attempts at proscribed harm then we shall need to apply the same principle to failed attempts at praiseworthy activity. If this is so then we must, Harris supposes, praise and reward students who exert themselves to gain degrees quite as much as if they had actually obtained those qualifications. This, he claims, would require far-reaching changes not only in society but also in human psychology.

With respect to Harris he misses an important point here. There is a kind of praise that does not depend upon the results of an agent's efforts or exertions. A lecturer may not give the hard working student who does his

incompetent best a First, though he may give one to a brilliant but indifferent student, but he may still praise the former more than the latter as a dedicated and assiduous student. This praise is sometimes given for effort even where that effort does not result in success. In any event the particular and peculiar purposes of the criminal law require rather different criteria of responsibility than those used outside the law and we should not thus treat those different purposes as if they were the same.

A second objection to the choice principle, raised by Harris, is that if we claim that the agent's attempt is all that is his and the rest is chance then we fail to note for the purpose of ascriptions of criminal responsibility that some attempts are more realistic than others. An expert shot who shoots at his victim's legs may be confident of success whereas the agent who has not fired a gun before may aim at his victim's legs intending to hit them but in the belief that success in his enterprise is unlikely. Harris provides an analogy outside the criminal law of a football club which pays a large sum for a top class striker. The football club, he argues, is concerned with outcomes and not merely with attempts, and knows that triers are not worth the same as succeeders. He concludes "just as a football club has an interest in purchasing reliability and success in players so in society we have an interest in purchasing unreliability and failure in criminals. One rational way of trying to achieve this is by differential rewards and punishments for finishing, not merely starting".

Harris' argument has initial attraction: one might hold the expert more culpable on the ground that he knows exactly what he is about in his violent actions, whereas the novice might have little idea. Also an expert might in some cases be thought to act coldbloodedly rather than in the heat of the moment, the latter being more the preserve of the novice (e.g. the doctor who carefully selects a poison which cannot be traced and the novice who takes rat killer and places it in the victim's tea). However it is submitted that there are three grounds for denying differentiation between the agents on the basis of ability, skill and competence. First it would create the problem of deciding at what stage of the agent's development in a particular area of activity he ascends in status from novice to expert. This issue would involve us in considerations about degrees of skill with

which agents perpetrate particular criminal activity. Second, the criminal law would be the poorer for such a distinction since it would effectively encourage novices to try a particular crime at least once. Finally such differentiation between the two types of agent for the purpose of the criminal law opens up difficult questions about quantum of blame and punishment.

A fourth point on attempts concerns just what amounts to appropriate punishment. Ashworth uses the subjectivist choice principle to allow *equal blame and punishment* for the agent who tries and succeeds and the agent who tries and fails on the ground that both have made the same exertion with the same intention and there is thus nothing to choose between them in respect of culpability: to award lesser punishment to the agent whose exertion fails to produce the intended result is to base punishment on chance rather than choice.

Harris criticises Ashworth's submission on the ground that it takes no account of the agent who delopes. He instances the ritual and practice of duelling in which honour required that each party faced each other's shot and that each discharge his pistol. Often a party who wished to satisfy the demands of honour would delope, that is discharge the pistol away from his opponent.

But with respect to Harris, Ashworth does leave room for the agent to desist at any point in the preparation stages leading up to his exertion which is capable of bringing about the intended harm. For Ashworth it is at the point at which the agent has done 'all that is his' that he has crossed the Rubicon and is thus subject to the same punishment as the agent who tries and succeeds. Ashworth is thus prepared to award lesser punishment to the agent who desists from his illegal enterprise at some point short of that act which constitutes 'all that is his'. It is submitted that Harris' example which he uses to back his argument does not serve his purpose since the agent, when he decides to fire into the air, has reached his decision not to bring about the proscribed harm at some point before the stage at which he actually points (or rather fails to point) the weapon. He has thus desisted before the last act necessary for

completion of the substantive offence and is thus subject to lesser blame and punishment than if he had fired at his adversary and missed.

A final point on attempts. On the ideal typical construction of subjectivism the agent who is mistaken about one (or more) fact or circumstance relating to his activity which renders his attempt non-competent, ought to be judged on the facts or circumstances as he believed them to be. Thus where the agent believes that his activity has reached a point at which it is capable of producing a particular harm, then he is guilty of an attempt at that harm whether or not it is a possible effect of his activity.

This subjectivist proposition has much support from the theorists, Parliament and other bodies. The Criminal Attempts Act 1981, in dealing with cases in which the agent is mistaken about some material fact or circumstance, states that the accused shall be judged in accordance with the facts as he believed them to be. Ashworth (in *Sharpening the Subjectivist element in Criminal Law*) supports the proposition stating that

"just as an individual cannot absolutely control the outcome of his actions, so an individual cannot be absolutely certain in his knowledge of human affairs. (The agent) may believe that a fact or circumstance exists but he may be wrong: the believing is all that is his, and to judge him according to the accuracy or error of his belief is to found liability upon chance rather than choice".

For Ashworth the defendant who tries to do something with a wrongly held belief as to the facts or circumstances has done 'all that is his' in relation to the intended outcome and should be judged on the facts or circumstances as he believes them to be (the choice principle), whether those facts or circumstances relate to factual elements in the commission of an offence or to factual elements in a particular defence to criminal liability. Thus where D shoots at a tree stump believing it to be his enemy V ideal subjectivism dictates that we judge him on the facts as he believes them to be, convict him of attempted murder and award an

appropriate sanction which might prevent D from making a second and competent attempt on his victim's life.

2. Intention.

For the ideal subjectivist model the concept of intention involves a conscious decision by the agent to bring about a particular state of affairs by his activity; that is the agent acts as he does in order that a specific change in the world be brought about thereby. Nothing short of direct intention or foresight of certainty will suffice. I should mention that I include 'foresight of certainty' as an element of the concept of intention within the ideal typical construction of subjectivism since nearly all (if not all) judges and theorists who have been labelled subjectivists accept it as such.

3. Recklessness.

The ideal typical construction of subjectivism requires as a necessary element of the concept of recklessness foresight by the agent of the possibility of untoward harm which might flow from his activity. This insistence on awareness underlines the cognitive character of subjectivism. The question of whether the reasonable man would have foreseen the harm is a matter of evidence which might persuade the jury that the defendant foresaw the risk but, for the 'ideal' subjectivist, foresight by the defendant of the prospective proscribed harm is a sine qua non to a finding of recklessness. There is thus on the subjectivist construction a clear dividing line between recklessness and negligence: that dividing line concerns awareness (recklessness) and lack of awareness (negligence) by the agent in relation to the untoward harm which his activity produces.

4. Beliefs.

There are two aspects to this issue.

- (i) Where the agent acts in order to bring about a particular harm believing wrongly that his activity may bring that harm about.

I have explained the subjectivist view on this issue when discussing impossible attempts above. Involved here is the notion of choice, for the agent here has chosen to bring about the particular proscribed harm and believes that his activity may bring that harm about. He is thus to be blamed and punished for what he has chosen to (and what he believes he actually may) bring about by his activity.

Theorists who, arguably at least, accept the ideal subjectivist model include Sir Rupert Cross (in 'Centenary Reflections on Prince's Case) who argues that there is a "general principle of morality and the criminal law that people ought to be judged on the facts as they believed them to be". The Law Commission's draft 'Criminal Liability (Mental Element) Bill' adopts the view stating that 'if the provision creating such an offence specifies exempting circumstances, a person charged with the offence is not guilty if at the time of the conduct alleged to constitute the offence he believed that the exempting circumstances existed'. The orthodox subjectivist view has been largely adopted by our criminal law which holds generally that it is immaterial whether a belief is justified or not so long as it is honestly held.

Perhaps I should note here, in fairness to the authors, that they are offering an exculpatory rather than an inculpatory principle: granted that it can, and perhaps in consistency should, be extended as Ashworth extends it to an inculpatory version; but it is not clear that that is how, for example, Cross would want it to go.

An interesting question here is what the ideal subjectivist would make of the agent, D, who believes (wrongly) that his activity will (or may) bring about *an untoward harm* but proceeds with his activity regardless. Here D is not aiming to bring about the perceived harm and, presumably, would prefer that the harm does not occur (as it will not). Would the ideal subjectivist ascribe criminal responsibility to D? On the basis that the agent should be judged on what he has chosen to bring about or believes he is doing (creating a risk of particular harm) it would seem that the subjectivist would attribute criminal responsibility to D for the wrongful belief which accompanies his activity.

(ii) Where the agent wrongly believes that some fact or circumstance exists which renders his activity safe or legally justifiable.

For the subjectivist such an agent ought not to be blamed on the ground that liability should be determined by what the agent believes he is doing rather than what actually happens or is the case. Thus where D alludes to a particular risk and decides that there is none then he should not be accountable at criminal law if it turns out that the risk was present and the untoward harm occurs. Similarly if D believes, even if unreasonably, that V is attacking him with a knife and retaliates causing serious injury then D may claim self defence on the ground that he believed that his life was in danger.

5. Defences based on grounds other than wrongful beliefs.

In such cases ideal subjectivism insists that we look to the agent and the various subjective factors of the case to the exclusion of purely objective phenomena. In the case of provocation, for example the 'ideal' subjectivist will look to the personal attributes of the agent in deciding whether or not he was sufficiently provoked to fall within the statutory defence. In the defence of self defence a defendant "must demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal". Also the ideal typical construction of subjectivism would deny self defence to the agent who has deliberately brought about the attack by V with the intention of taking advantage of the situation.

In conclusion, the ideal typical construction of subjectivism revolves around knowledge, belief and choice. If D chooses to engage in activity which he knows or believes will produce a particular proscribed harm and that harm flows from that activity then the ideal subjectivist will hold him accountable at criminal law on the basis of recklessness or intention. But there are objections to the ideal typical subjectivist construction. First, if one insists that the defendant be aware of the risk at the time of his act then one has the problem of deciding just what was going through his mind at the time of his activity which has led to the occurrence of the

proscribed harm in order to see if he at least appreciated the risk at that time. To complicate the issue the defendant might claim that whilst he is aware of causal properties generally he was not aware of the particular causal properties of his activity (e.g. that this bomb would have this affect on surrounding property and people). Second, even if we were able to 'open the defendant's head' and look inside we might find that D was unaware of the risk at the time of his act because of some factor which renders his unawareness either culpable (e.g. rage or drink) or non-culpable (e.g. mental incapacity). We might wish to distinguish between the two types of factor at the conviction stage but the ideal subjectivist model cannot accommodate such a distinction.

Third, the ideal typical construction of subjectivism (and current law) insists that the prosecution prove mens rea, where appropriate, at the time of the actus reus (i.e. there must be a coincidence of actus reus and mens rea). However on occasion it might be the case that D adverted to the possible risk during the preparation stages but did not advert to the risk at the time of his activity which brings about the actus reus. D's non-advertence to a risk of which he had been previously aware might be evidence of his indifference to the risk but indifference is not the same as awareness on the cognitive theory of recklessness. In some cases D might lack capacity to advert to the risk at the precise moment of the actus reus although he had been adverting to it at previous stages. Suppose, for example, that D decides to cause damage to a local supermarket. He places explosives at strategic points and retreats to the detonator. However as he reaches the detonator he suffers an epileptic fit and his hand depresses the handle thus setting off the explosives. Although he was thinking about it during the preparation stages D certainly does not advert to the risk of death or injury at the instant of the actus reus since he is now effectively unconscious. This case provides fuel for discussion on whether orthodox subjectivism (and current law) is right to insist upon contemporaneity between actus reus and mens rea when attributing criminal liability.

Duff (in conversation with me) considers that my example is ill-chosen since it is not even clear that there is an actus reus (a "voluntary act"

of detonation) here. An analagous case posited by Smith and Hogan would suggest that he is right. They put forward the case of D who resolves to strangle his wife at midnight, drops off to sleep and, while still asleep, strangles her at midnight. They suggest that he is not guilty of murder though he may be guilty of manslaughter on the ground of negligence (5th ed. at p.198) It might be noted that in my example D has proceeded a substantial distance along a physical causal chain before his medical condition intervenes whilst the agent in Smith and Hogan's example has done nothing in preparation before he brings about the intended consequence in a state of automatism. But I think that it is wrong that D in my example should escape liability altogether (assuming his activity whilst conscious is not proximate to the intended effect) when he has done so much in preparation before epilepsy deprives him of the knowledge that he is actually bringing about the proscribed harm for which he has striven. Yet if we are to ascribe liability to him then we shall need to modify both the ideal subjectivist model and current law which insists upon contemporaneity between actus reus and mens rea.

In conclusion it would be useful to restate the ideal typical constructions of objectivism and subjectivism which have been formed from an analysis of the views of the exponents in this field of criminal law.

The ideal typical construction of objectivism, as it applies to criminal responsibility, is constituted by the following propositions, namely (i) an agent intends an effect of his activity where it is a natural consequence thereof, (ii) an agent is reckless concerning an effect of his activity when he knowingly runs the risk or he fails to notice a risk whci would have been obvious to the ordinary prudent individual, (iii) liability should be determined by the actual (as distinct from the intended or believed) character and consequences of the agent's activity and/or what a reasonable person would (as distinct from what the actual agent did) foresee, believe or intend.

The ideal typical construction of subjectivism, as it applies to criminal responsibility, is constituted by the following propositions, namely (i) an agent intends an effect of his activity when he aims to bring that effect

about or where he is certain that his activity (aimed at something else) will bring that effect about, (ii) an agent is reckless concerning an effect of his activity aimed at something else where he appreciates that there is a risk of that effect which, in the circumstances, render it unjustified for him to take that that risk, (iii) criminal liability should depend on choice and what the agent knows or believes to be within in his control concerning activity upon which he is embarked rather than what flows or fails to flow from that activity by chance, (iv) the form of the conviction should mark accurately the moral status of the agent who has brought about proscribed harm and (v) punishment should be awarded in accordance with what the agent has chosen to bring about by a particular exertion and not on what actually occurs or fails to occur.

I would conclude by way of footnote that the comment by Professor Williams (in *Divergent Interpretations of Recklessness*) that an agent should be counted as recklessness for his failure to foresee a risk of harm of which he would have been aware had he stopped to think about it seems to have received approbation from the leading subjectivists. However I would not include the qualification in the ideal typical construction of subjectivism which would count such a qualified mental state as one of negligence in some degree.