INTENT IN ENGLISH LAW

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1. PROGRAMME OF THE STUDY

It may appear rather strange that a person who has not had the opportunity through residence in England to familiarize himself with the peculiarities and archaic forms of Anglo-Saxon criminal law and who, moreover, has not had time and strength to study at first hand the judicial material available in our libraries should attempt to give a picture of English doctrine on intent in theory and practice in order to establish how far the legal position is in harmony with the hypothesis which forms the basis of this study, cf. footnote below. If nevertheless I embark on this seemingly foolhardy enterprise it is because my investigations have convinced me that even on the basis of these secondary sources it is possible to arrive at conclusions which are not without interest. Here an accident which in view of my interests may be considered fortunate has played a part. Within the last few decades there have been pronounced judgments, including some by the House of Lords, which have been closely concerned with problems of intent and have furthermore evoked a number of legal writings on the doctrine of intent. The resulting discussion was of such intensity and aroused such wide interest that the Law Commission took the matter up and issued a report in which it recommended legislation to carry through certain changes in the doctrine of intent laid down by the House of Lords. One—and only one—of these proposed amendments has become law, with the passing of the Criminal Justice Act 1967. Further, in 1978 the Law Commission submitted to Parliament a general *Report on the Mental Elements in Crime* (Law Com. no. 89). In this way there has emerged a body of easily available material which has thrown light on the problems and to some extent has cleared them up.

Nevertheless the difficulties are great. English criminal law has never been codified, either officially in legislation or privately in a *restatement*

This study on intent in English law is part of a more comprehensive investigation of intent in theory and practice in the legal systems of different countries. The aim of these inquiries is to test the hypothesis that, despite differences in doctrinal dress, it is in practice the actor's *awareness* of the probable consequences of his action when they make out the *actus reus* of a crime that justifies the judges in imposing punishment for *intent* (Danish *forsæt*).—This paper has been written by a Scandinavian and for the information of Scandinavians, but it may possibly be of interest to others also.

(such as the American *Model Penal Code* prepared by the American Law Institute). There is scattered legislation on *statutory crimes*, but the treatment of other offences and the development of general concepts and principles of penal law have been left to the *common law*; that is to say they have evolved through the practice of the courts, bound to precedents which often date back hundreds of years. "Our system of precedents", writes *Kenny–Turner*, "has led to the preservation of old cases, decided on principles now obsolete, which are from time to time cited without appreciation of their ancient meaning or modern inapplicability. In the results, the law of homicide now resembles a heap of interesting but mostly useless objects jumbled together in a curiosity shop."[1]

Codification has always been a child of academic learning, conceptualization and systematics. But contrary to what has been the case on the Continent, especially in Germany, in England the universities and their professors have never played any part in legal development. In recent times there have been attempts at summary systematic presentations; but lawyers who have grown up with Continental systematics and conceptual analyses may find these attempts deficient and clumsy and feel that coherence and clarity have been lost in a hopeless struggle with the wilderness of singularities furnished by the precedents. This state of affairs is reflected by the language. It is characteristic that in English there is no word or concept corresponding to the Continental expression *Rechtwissenschaft*.[2]

The difficulty of finding one's way around in the curiosity shop is increased, especially for a foreigner, by an involved terminology, often bearing the stamp of long-abandoned modes of thought. The general expression for the "mental elements" of a crime is *mens rea*, but what exactly is required in this respect varies from crime to crime and is often described through the use of historically derived expressions which, however, in the course of time have lost their original meaning. Thus *mens rea* in murder is called *malice aforethought*—but has nothing to do with malicious premeditation. In statutory offences varying expressions are used to describe the necessary *mens rea*, e.g. "malice", "maliciously", "wilfully", "calculated", expressions which often give rise to interpretational uncertainties.[3]

[1] *Kenny's Outlines of Criminal Law* (19th ed. 1966 by J. W. Cecil Turner), § 93. Cited in what follows as *Kenny–Turner*.

[2] The expression *science of law* according to English linguistic usage covers sociology of law and similar empirical studies of psychological and social phenomena of law but not the doctrinal presentation of valid law. In the English translation of my work *Om Ret og Retfærdighed* I therefore used the rather circumstantial expression "the doctrinal study of law".

[3] The uncertainty with regard to these and similar expressions is dealt with at length in the Law Commission, *Report on the Mental Elements in Crime* (Law Com. no. 89) 1978, paras. 10–24.

It may be a source of conceptual confusion and misunderstanding that although the two nouns *intent* and *intention* are not synonymous the users do not always seem to be aware of the difference in meaning. The matter is complicated by the fact that in the use of the verb *to intend,* the adjective *intentional* and the adverb *intentionally* there is no linguistic sign to indicate whether these words are used in a meaning derived from one of these nouns rather than from the other. I have not come across any explanation of the distinction, but from the use that is actually made of the two terms it is my impression that *intention* is used for the description of a certain psychological state corresponding mostly to what in Danish we would call "hensigt" (Swedish *syfte,* German *Absicht*). In the discussion from the psychological point of view of how *mens rea* can manifest itself, *intention* is opposed to *recklessness. Intent,* on the other hand, is not a psychological concept; it does not denote a definite mental state but is the juridical concept of the *mens rea* requisite for a certain offence and corresponds most closely to what in Danish is called "forsæt" (Swedish *uppsåt,* German *Vorsatz*) without reference to what is required for it to be present. It is therefore possible that the intent which is required as *mens rea* in a certain crime may comprise both the mental state which is denoted by the expression intention and that which is called recklessness. But it should certainly be added that the expressions are often used without any clear difference of meaning.[4]

It is interesting to discover that despite the considerable differences in systematics, conceptualization and terminology it is after all the same problems, circumstances and distinctions that occur alike in the Anglo-Saxon and the Continental doctrine of intent. But precisely because of this it is regrettable that there is so little mutual contact between the criminal-law research on the two sides of the North Sea. While the usual Continental textbooks contain some—admittedly sparse—references to and information about Anglo-American theory and practice, the English standard works, on the other hand, seem to show a lack of contact with European scholarship.

The programme set for the present paper is first to give, on the basis of two leading standard works and some recent conclusive decisions, a picture of the general doctrine of intent; and then to deal with the special modifications which occur under the names *constructive intent, implied intent,* and *presumed intent.*

[4] Cf. section 3 *infra* on Williams's criticism of Lord Denning as being partly due to a terminological obscurity on this point.

2. INTENT IN ENGLISH LAW AS CONCEIVED BY KENNY–TURNER IS IDENTICAL WITH *FORSÆT* IN DANISH LAW

One of the most recent comprehensive accounts of English criminal law is *Kenny's Outlines of Criminal Law,* 19th ed. 1966 by J. W. Cecil Turner. The first edition of this standard work appeared in 1902 and Kenny himself was responsible for the later editions up to and including the 13th, which appeared in 1929. The subsequent editions have all been edited by Turner. No attempt has been made to distinguish the later editor's contributions in relation to the original text, but it is easy to establish that the textbook's presentation of the *mens rea* doctrine is in close agreement with Turner's special treatise "The Mental Element in Crimes at Common Law" (1945).[5] In what follows, page numbers given without further specification refer to the textbook, while Turner's treatise will be cited as *M.E.*

Kenny–Turner's presentation of the *mens rea* doctrine is historically constructed. It tells us how criminal liability was originally "absolute" or "strict", i.e. it was not dependent on blameworthiness on the part of the actor. So long as the penalty consisted only of economic compensation (*bøt, wer, wite*) this system was not felt to be unreasonable. But in time that came to be the case when the fining system was superseded by non-economic punishments which often were cruel and barbaric. In addition there was the influence of the Church. The priesthood was, so to speak, professionally concerned to sift people's minds and thoughts and to link punishment to guilt and ill will. The influence of the Roman-law distinction between *dolus, culpa* and *casus* worked in the same direction.

Against this background there arose the fundamental distinction in English criminal-law doctrine between the *actus reus,* i.e. the harm caused by the act (in manslaughter, for example, the victim's death) and the *mens rea*, i.e. the mental circumstances determining the actor's guilt. The two expressions are derived from Coke's celebrated maxim: *Et actus non facit reum nisi mens sit rea.*[6]

The first and most elementary component of *mens rea* is the requirement of *voluntary conduct* (29 f.). What is said on this topic corresponds essentially to the requirement in Continental law that the act must be the outcome of an act of will.

The second and more important component of the *mens rea* doctrine is

[5] In *The Modern Approach to Criminal Law,* ed. by L. Radzinowicz and J. W. C. Turner (1945), pp. 195–261.

[6] Sir Edward Coke, *Institutes of the Laws of England,* 1797, vol. III, p. 6.

the requirement that the act not only must be voluntary but must also be capable of being laid to the actor's charge, i.e. it must have been undertaken under such mental conditions that according to moral standards the actor is found to be guilty. On this matter there has since the end of the Middle Ages developed a doctrine the leading idea of which is summed up by *Kenny–Turner* as follows:

> Accordingly there has developed in the common law a principle that a man should not be punished unless he had been aware that what he was doing might lead to mischievous results; he must have had foresight of the consequences of his conduct. The nature of the precise circumstances, the foresight of which attracts criminal guilt, is fixed by law and varies from crime to crime. But whatever they may be for the particular crime, foresight of them is the common requirement for all, and it is this subjective element of foresight which nowadays constitutes *mens rea*. (§ 19)

It could hardly be stated more clearly that intent in English law implies *awareness*—the foreseeing of the consequences of the act is, of course, the same as awareness of the capability of the act to cause harm.[7]

In support of this interpretation of the *mens rea* requirement *Kenny–Turner* points out that the principle is clearly expressed in a report issued by a commission set up at the beginning of the 19th century to inquire into the reform of penal law; and that it has been accepted by courts of law in their practice over a long period (§§ 19 and 20).

The idea is further developed that the foresight which implies guilt may exist either in combination with or separately from a desire on the part of the actor to cause the harm. In the first case intent is referred to as *intention*, in the latter as *recklessness* (§§ 23 and 24).

Now, the word "desire" is scarcely suitable for describing the form of intent here in view. It may appear misleading to say that a person who from political fanaticism, but with sorrow in his heart, kills a friend, *desires* that friend's death.[8] Nevertheless there can scarcely be any doubt that the intent which is called intention and which is said to be combined with evil

[7] Although it is not expressly stated, it is clearly presupposed that *mens rea* also involves that the actor had a knowledge of the factual circumstances of the act which constitute the crime, see, e.g., on *mens rea* in receiving, § 361.

[8] *Kenny–Turner*, § 23, attempts to refute this objection with the following argument. "Again, 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." But this defence does not hold water. Understood in this way, "desire" is not the designation of a certain mental attitude which is the basis of certain acts, but not of others. For irrespective of what a person decides to do, the decision is an expression of the fact that he desires to do what he does.

desire is identical to what in Continental law is called in German *Absicht* (Danish *hensigt,* Swedish *avsikt, syfte*).[9]

However much this doctrine of intent reminds one of the Danish doctrine of *sandsynlighedsforsæt* ("probability intent"), there is, however, one respect in which for a Danish reader—at any rate at first—it may seem surprisingly imprecise and defective. According to Danish theory the criminal consequence must not only be foreseen, but foreseen as probable, indeed to be more precise as preponderantly (*overvejende*) probable. On this there is not a single word in the above-cited definition of *mens rea* in *Kenny–Turner.* This speaks simply of "foresight of consequences" without further qualification. The omission cannot be explained by saying that what we have here is a provisional definition couched in general terms, for the question is not taken up for closer definition later on in the text. Moreover, an unqualified definition is repeated in the detailed discussion of *mens rea* in the crime which more than any other has influenced the formulation of the concept. On this *Kenny–Turner* says:

> ... the mental ingredient in the crime of murder to which the name "malice aforethought" might, in deference to antiquity, still be applied could be defined simply as the freely formed intention of a man to pursue a course of conduct which he realizes *will or may bring about the death* of some person. (§ 107)

The words "will or may" occur in the passage italicized by *Kenny–Turner.* "Will" covers a case where no question of probability arose at all for the actor, inasmuch as he considered the occurrence of the consequence to be self-evident. "May" covers the case where the occurrence of the consequence is seen as a possibility, and it would seem that it may embrace all degrees of probability from the limit of the allowable risk up to practical certainty.

But can it really be meant by *Kenny–Turner* that a man is to be hanged (until recently the inevitable penalty) for murder if he has foreseen another person's death only as a distant possibility? No, it is not. For a closer study of the text shows that the meaning is that the consequence must have been foreseen as "likely". In the ensuing more specific account of cases where *malice aforethought* is present, that word is used twice. It would also be unthinkable if the consequence were not to be foreseen as probable. The word "likely" is a term regularly used by courts in referring to the kind of foresight which is *mens rea.*

Thus it may perhaps be supposed that there is at any rate a curious

[9] The word "purpose" is used interchangeably with "desire" to denote intention.

looseness and lack of precision in *Kenny–Turner*'s language, in that he disregards the difference between the unqualified expression "to foresee something" and the qualified expression "to foresee something as likely to happen". Turner himself at any rate does not think there is any distinction. In his treatise *Mental Elements in Crimes* the *mens rea* requirement is defined as follows:

> It must be proved that the accused person realised at the time that his conduct would, or might produce results of a certain kind, *in other words* that he must have foreseen that certain consequences were *likely* to follow on his acts or omissions. (*M.E.*, 199)

The expressions italicized by me show that in Turner's conception and terminology the requirement that the consequence must have been foreseen as likely contains nothing new beyond what is already inherent in the expression that the consequence must have been foreseen. To foresee something is therefore in his terminology identical with foreseeing it as likely.

I think Turner is right. Let us consider the following imaginary conversations:

(1) *A:* I foresee that it will rain later today.
B: Then you'll be taking your umbrella with you, I suppose?
A: No, for I foresee it only with a probability of 1:20.

(2) *Doctor:* I foresee that the operation will be unsuccessful.
Scared patient: But that's terrible!
Doctor: Not at all; the risk is only one in a hundred.

These examples show, I think, that the unqualified use of "to foresee something" is identical with foreseeing it as probable. This use of language does not, however, mean that a person cannot expressly qualify his foreseeing as being related to the pure possibility. One can, for example, say: "I foresee that it can go wrong, but nevertheless I do not consider the risk very great" or "As I foresee the possibility of a plane crash during my journey, I have taken out an insurance".

The expressed qualification that the consequence must have been foreseen as probable is therefore in itself superfluous, for this is already inherent in the unqualified "to foresee". Nevertheless from a pedagogical point of view one may be well advised to make the addition, as it is desirable to emphasize that it is not sufficient that the consequence is foreseen as a mere possibility.

There remains, it is perhaps contended, at any rate this difference between English and Danish doctrine on intent, that whereas under the

former it is sufficient that the consequence shall have been foreseen (as probable), in the Danish doctrine it is required that the consequence shall have been foreseen as preponderantly (*overvejende*) probable. But in my opinion this distinction, too, is not real. In current linguistic usage, to foresee something as preponderantly probable presumably means only to foresee it as probable.

It is true that in the mathematical language used in probability calculations it is possible to say that a certain consequence is probable with a probability coefficient of, e.g., 0.01. But in ordinary everyday language one would not designate such a consequence as probable but on the contrary as improbable. As far as I can understand, a consequence is described in ordinary speech as probable when without there being any certainty that it will happen it is nevertheless considered that there are good grounds (*overvejende grunde*) for supposing that it will take place, i.e. grounds which are considered of greater weight than those that can be adduced for affirming that the consequence will not take place. With this the extreme positions are excluded from the area of probability. At one end there are the cases where the consequence is considered to be certain (something self-evident, something which is assumed without further ado). For example, if we swing a heavy hammer against a thin glass we do not say that it is probable that the glass will be shattered. And at the other end there are the cases where one knows of no ground for predicting one outcome rather than the other.

To consider something to be probable therefore means (in ordinary speech) that there are good grounds (*overvejende grunde*) for asserting that this "something" will occur. It is then difficult to see what it would mean to assert that something is preponderantly probable. The idea is presumably that the mathematical probability (which seldom has any bearing on the cases that courts concern themselves with) must be a step above 50 %, e.g. around 60 %. I find myself unwilling to entertain this way of thinking, as in my opinion such references to percentages are in the nature of misleading figures of speech which can only make it more difficult to grasp what is really expressed in the statements concerning probability. When we have excluded both the wholly uncertain and the wholly certain there can only remain within the zone of the probable the possibility of a rough distinction between what is stated without qualification to be probable and what is qualified as *extremely* probable, *highly* probable or the like—the latter description being reserved for cases where the "good grounds" are considered to be decidedly preponderant.

Nowhere in *Kenny–Turner* have I been able to find any indication that the accused could be convicted only by virtue of the desire to bring about

the consequence where this was not foreseen (as probable). A purpose is therefore not in itself intent.

As it is stated to be irrelevant whether the person who acts recklessly would prefer that the harm should not occur or is indifferent in this respect, *dolus eventualis*[10] constructions are hereby excluded (§ 24, cf. *M.E.*, 206).[11]

The provisional conclusion can be summed up as follows: As far as intent is concerned, English law seems to be in agreement with Danish doctrine and practice.[12] Intent exists when the actor has assumed or has foreseen that the criminal consequence will occur. Intent solely by virtue of purpose is not known. Nor is intent as *dolus eventualis*.

3. FORESIGHT OF CONSEQUENCES (*SANDSYNLIGHEDSFORSÆT*) IS UNEQUIVOCALLY ACCEPTED BY THE HOUSE OF LORDS IN *DIRECTOR OF PUBLIC PROSECUTIONS* V. *SMITH* (1961) AND *REG.* V. *HYAM* (1974)

I now turn to another major English work, Glanville Williams, *Criminal Law. The General Part* (2nd ed. 1961). The terminology of this author diverges to some extent from *Kenny-Turner*'s but the conclusions he reaches seem to be identical.

Williams, too, defines intention as the attitude on the part of an actor that he desires to bring about the criminal consequence: "Intention is that species of desire on the part of a person that is coupled with his own actual or proposed conduct to achieve satisfaction" (36). Williams is also in agreement with his colleagues in so far as he takes it for granted that the desire

[10] *Dolus eventualis* is said to be present when the actor has foreseen the criminal consequence as possible and when in the light of the circumstances it may be assumed that he would have acted as he did even if he had foreseen the occurrence of the consequence as being certain. The doctrine is of German origin and nowadays is generally accepted in Swedish law.

[11] *Kenny-Turner*, § 37, is quite clear that recklessness, which presumes awareness of the risk, is not a qualified form of negligence and laments the confusion produced by a non-realization of this fact. This is in agreement with the criticism of the Danish expression "bevidst uagtsomhed" (German: *bewüsste Fahrlässigkeit*) which I have made in my *Forbrydelser of Straf*, 1974, pp. 25 f.

[12] Concerning the terminology, it is to be noted that recklessness, as it emerges from the text above, denotes the liability which exists when the consequence, without being intended, is foreseen as (preponderantly—Danish *overvejende*) probable. It is a form of intent. It is therefore not identical with the Danish expression "hensynsløshed" as I have used it (*Forbrydelse of Straf*, pp. 24 f.). In my terminology "hensynsløshed" corresponds to what has been misleadingly called "bevidst uagtsomhed". It embraces those cases in which the consequence has been foreseen but only as an unlikely possibility, and therefore falls outside the bounds of intent.

to bring about the consequence (purpose) cannot exist without there being at the same time *foresight of consequences* (53, 64). Any notion of intent as mere purpose is therefore excluded. The divergence from *Kenny–Turner*'s approach consists in the fact that Williams also wants to assign to intention cases where desire is not present but where the consequence is nevertheless foreseen as *certain.*[13] By way of illustration he mentions the case of a surgeon who for reasons of scientific interest removes the heart from a patient's body. He has no desire that the patient shall die but foresees with certainty that this will be the case (38–40). Under recklessness Williams then ranks those cases where the actor neither desires the consequence nor foresees it as inevitable, but nevertheless does foresee it (53 f.).[14]

This extension of the concept of intention is apparently undertaken because when in statutory offences the law requires that intention shall be present it is reasonable to interpret this in such a way that *mens rea* is also present when the consequence, without any desire that it should occur, has been foreseen as certain. The extension is, however, without relevance for the general determination of the *mens rea* concept. For when there is no clear legal authority for the contrary—i.e. in common-law offences and also in general in statutory offences—*mens rea* according to Williams comprises both intention and recklessness, and it is therefore of no importance where the boundary between these two concepts is drawn. What is decisive is that which is common to intention and recklessness, namely *foresight of consequences*:

> It is a general, though not a universal, principle that recklessness is classed with intention for legal purposes. The thing that usually matters is not desire of consequences but merely foresight of consequence, which is the factor common to intention and recklessness. It is the foresight of consequence that, it is submitted, constitutes mens rea. (64)

The author proceeds to examine a number of statutory offences and shows that as a general rule it holds true that the statute irrespective of its wording may be interpreted as meaning that it can only concern violations which have been committed intentionally or recklessly: "Generally, then, the intentional or reckless violation of the words of a statute constitutes a crime." (84)

[13] The extension is very limited. Elsewhere Williams says that the harm must have been foreseen with such certainty "that one can say that nothing short of a 'miracle' can prevent it", *The Mental Element in Crime*, 1965, p. 35, cf. pp. 53 f.

[14] Williams regards recklessness as a qualified case of negligence: advertent as opposed to inadvertent negligence, cf. notes 11 and 12 *infra*.

It can be seen from this that in *Criminal Law* Williams is in close agreement with *Kenny-Turner*: it is foresight of consequences that constitutes *mens rea* and consequently both intention and recklessness fall under that heading. It is therefore surprising that Williams should subsequently have published a treatise in which he puts forward views which are in decided conflict with those in his textbook. In the treatise it is stated without change that so far as "statutory malice" is concerned *mens rea* comprises both intention and recklessness (61 ff., especially 62, 69, 73). But with regard to common-law offences, and quite particularly murder, we are now taught that the *mens rea* necessary for the crime only comprises intention in the above-mentioned meaning as embracing both what has been desired (aimed at), and what is foreseen as inevitable.

Williams's new doctrine is set forth in a little book, *The Mental Elements in Crime,* published in 1965. The foreword tells us that the book is based on some lectures delivered by the author in 1957–58 at the University of Jerusalem, but that the text has been considerably expanded and recast in the light of Lord Denning's essay *Responsibility before the Law,* which appeared in 1961 and reproduces a lecture likewise delivered at the University of Jerusalem. Lord Denning was one of the five Law Lords who in the House of Lords in 1960 rendered judgment in the case *Director of Public Prosecutions* v. *Smith*[15] in which the question of *mens rea* as malice aforethought in murder was dealt with in detail. In the lecture Lord Denning defends the presupposition made in the judgment that malice aforethought comprises both intention and recklessness and maintains as a general doctrine that *mens rea,* where there is no clear legal authority for the contrary, is to be understood as comprising both these forms of liability. He cites a number of judgments to show that "intent" (the *mens rea* necessary for a crime) cannot be identified either with "desire" or with "purpose" (11, 13). "But nevertheless it always imports *knowledge* of the facts together with their probable consequences" (15–16, original italics). And particularly with regard to murder: "If a man did an act ... not with the purpose of taking life, but with the *knowledge or belief that life was likely to be sacrificed by it,* that was not only murder by the law of England, but by the law of probably every other country" (19, original italics). As will be seen, Lord Denning uses the expression "likely" to characterize the degree of certainty (probability) with which the consequence must have been foreseen.[16]

This background is presumably the reason why Williams's treatise is

[15] [1961] A.C. 290, cf. section 5 *infra.*

[16] The same expression is also used on pages 11, 14, 15, 17, 18 and 23. On pages 16 and 28 the word "probable" is used.

aimed against Lord Denning and the decision in *Smith*—and not, as might have been expected, against Turner.

In part Williams's reasoning is only terminological and an outcome of the confusion which an imprecise use of the words "intent" and "intention" can cause, cf. section 1 above. He ascribes to Denning the meaning "that the concept of intention includes recklessness, unless a statutory context makes it plain that recklessness is excluded" (26). And he calls this a curious use of language, tantamount indeed to murder of the English tongue (26, 29, 39, 87). But in fact Denning did not speak of "intention" but of "intent" and there is nothing remarkable in saying that "intent" (as expression for the necessary *mens rea*) comprises both "intention" and "recklessness".

Williams's main argument, based on considerations of legal policy, is that to place recklessness on a par with intention is to disregard the fact that there is an essential moral difference between a person who aims at another's death and a person who only foresees it as a possibility (29, 88). A risk, he says, may cover the whole gamut from practical certainty down to complete improbability. "The law should not dub a man an intentional murderer when he only runs what he thinks is a rather remote risk of causing a death." This last statement is, of course, quite off the point, since Lord Denning made it quite clear that the consequence (death) must have been foreseen as "likely". But according to Williams this qualification in itself does not make things any better. He holds (29–31) that the word "likely" has no fixed meaning. Some people may think that it implies a risk of 66 % while others will be content with 33 %. This difficulty, Williams says, will disappear if we place "recklessness" under the heading of "negligence" and make the concept cover every risk down to the limits of what is permissible.[17] And in that case it is clear that *mens rea* cannot include recklessness.

This reasoning seems to me strangely contorted. The word "likely" is used in numerous English judgments in description of *mens rea* and its meaning is (cf. the analysis above in section 2) that the consequence must have been foreseen as probable. This sets a clear limit to the cases in which the strongest grounds are assumed to indicate that the consequence will not occur.[18]

[17] Cf. note 14 *supra*.

[18] Williams also (p. 33) puts forward the argument that intent in case of attempt must necessarily have the character of intention. This is hardly correct, and in any case no general conclusion can possibly be drawn from this special case. On the basis of the assumption that it is primarily evidential considerations that lie behind the inclusion of recklessness in *mens rea*, he argues (p. 95, cf. pp. 76, 82) that the difficulties of proving intention are not so great as one might be inclined to believe.

Behind Williams's unwillingness to lump recklessness and intention together lies the special consideration that right up to 1957 the obligatory penalty for murder was death. By the Homicide Act 1957 this penalty was reserved for cases which were designated *capital murder*, and in other cases was replaced by obligatory imprisonment for life; and by the Abolition of Death Penalty Act 1965 the death penalty in these cases, too, was replaced by life imprisonment. But it was thus still a matter of a compulsory, very severe punishment, and it is this that Williams finds incompatible with allowing murder to comprise even recklessness, i.e. cases where the death[19] has been foreseen as a consequence characterized by a certain degree of probability:

> A man should not be hanged upon a consideration of questions of degree, "the little less" and "the little more" ... These questions of degree are surely more appropriate to manslaughter, with its elastic scale of possible punishment, than to murder. (90, 91)

In this we must certainly allow that Williams is right. But the conclusion must then be that the fault lies in the system of sanctions, involving as it does the unconditional penalty of imprisonment for life, and there are no grounds for concluding that the concept of intent should be generally restricted in an inappropriate way.

Whatever one thinks of these considerations of legal policy it must be acknowledged—and indeed Williams does so without reservation (85)—that the *House of Lords* in *Smith* (1961) *took up an unequivocal attitude on the problem and laid down that the foreseeing of death as a probable consequence is sufficient to constitute malice aforethought in murder.*[20] The judgment will be discussed at length in another context in section 5 below. Later this conception was confirmed by the House of Lords in a decision in which the appeal concerned precisely this and only this question, namely *Reg.* v. *Hyam* (1974) 2.W.L.R. 607; (1974) 2 All E.R. 41, H.L.

The appellant (Hyam, a woman) was accused of having caused the death of two persons at about 2 a.m. on July 15, 1972, by setting a house on fire. On November 22, 1972, in the lower court (Ackner, J., with jury) she was found guilty of murder. The Court of Appeal (Criminal Division) on June 18, 1973, confirmed this verdict "not without some reluctance" and gave

[19] Or even only grievous bodily harm, cf. the comments on implied intent in section 4 *infra*.

[20] It can further be mentioned that the Law Commission in a report issued in 1967 (*Imputed Criminal Intent. Director of Public Prosecutions* v. *Smith*) clearly assumes that current English law is as laid down in *Smith*, i.e. that intent means that the consequence has been foreseen as a natural and probable result of the action. It is another matter that the Commission proposes that the rules on evidence in this connection shall be amended by the abolition of the so-called objective test (presumed intent); on this see section 5 *infra*.

permission for appeal to the House of Lords, confirming that the case involved a legal question of "general public importance", namely:

> Is malice aforethought in the crime of murder established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew that it was highly probable that the act would result in death or serious bodily harm? (W.L.R. p. 610)

By three votes to two the appeal in the House of Lords was dismissed on March 21, 1974, and the question posed was answered in the affirmative.

The facts of the case were simple. The appellant had had sexual relations with an unmarried man, J, over a long period. Owing to some gynaecological complications the relationship ended in 1968. After a time the appellant became suspicious that J had become intimate with B, a married woman. She became very jealous of B and tried to break up her liaison with J by sending anonymous letters, but without success. In May 1972 B obtained a decree of divorce which at the end of July would make her free to marry J. On the night of July 15 the appellant drove by car to the house where B lived with a son and two daughters aged 17 and 11. On the way she passed J's house and noticed that there was a light in it, from which she concluded that J was not in B's house. Having arrived at the latter the appellant poured through the letterbox in the door about one gallon of petrol from a can which she had brought with her. After that she stuffed some paper inside and set light to it. After having seen that the fire had started she left the place without alerting anyone. She said that she was aware that what she had done was extremely dangerous for any person living in the house. B and her son managed to escape but the two daughters were trapped inside and burnt to death. In her defence the appellant said that the purpose of her action had only been to frighten B into leaving the neighbourhood.

The judgment of the lower court was appealed on the ground of *misdirection of the jury*. The judge in that court had told the jury that the decisive point in the case was the question whether the accused had acted with the necessary intent for incurring conviction for murder. He had written a note of guidance on this matter and this was handed to the jury. It read as follows:

> The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm then the prosecution will have established the necessary intent. It matters not if her motive was, as the says, to frighten Mrs Booth (p. 623).

In the House of Lords the appellant pleaded that this note of guidance was faulty in two respects. In the first place, it was faulty because knowledge that another person's death was a highly probable consequence of the act undertaken is not sufficient to establish the intent (malice aforethought) necessary for murder—which is the same thing as maintaining that the question put by the Court of Appeal must be answered in the negative. Secondly, it was faulty because intent to cause serious bodily harm is not sufficient as an objective of intent in murder, where the intent must be directed to killing another person or endangering his life—which is the same thing as rejecting the doctrine which has been handed down in English law concerning *implied intent,* on which see below in section 4.

It was the last point which gave rise to a disagreement in the House of Lords' judgment. The majority considered (with Viscount Dilhorne, W.L.R. pp. 627–8) that the doctrine of implied intent is firmly rooted in English common law, having been most recently established in *Smith* (1961) A.C. 290, and that it could not be the task of the House of Lords to alter this state of affairs, though Parliament might do so if it thought fit. On the other hand, Lord Diplock maintained on the basis of a lengthy historical survey (pp. 629–37) that the House of Lords was constitutionally entitled to reject the doctrine and in fact ought to do so (p. 629 E–F, p. 636 G–H). He said that the doctrine was a relic of an antiquated legal tenet which it would be unreasonable to preserve after Parliament in the Homicide Act 1957 had done away with the doctrine on *constructive intent* (see below in section 4) with which it had always been closely connected. In particular he stressed the development which had taken place within medicine and surgery. When the doctrine assumed definite form at the beginning of the 19th century it was, especially in view of the danger of infection, not unreasonable to assume that grievous bodily harm would as a rule also involve a serious risk to life, whereas this no longer applied at the present time. It was therefore unreasonable to hold that intent to cause grievous bodily harm implied intent to cause a person's death.

Lord Kilbrandon concurred in this opinion (pp. 639–40) and these two judges voted on these grounds for accepting the appeal and for changing the judgment to conviction for *manslaughter.*

On the other hand—and in the connection in which the matter is here discussed this is what is decisive—all five judges were agreed that the question raised by the Court of Appeal, in so far as the first objection is concerned, should be answered in the affirmative: Awareness that it is highly probable that the act undertaken will result in death (or grievous bodily harm) for another person is sufficient to establish malice

aforethought for murder—that is to say, irrespective of whether the actor aimed (desired, had as his intention) to bring about these effects.

Four of the five judges expressed themselves in clear and uncompromising terms which give no occasion for comment. Thus, for example, Lord Diplock stated:

> On the first question I do not desire to say more than that I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn 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 the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these 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, whether imposed by statute or existing at common law, 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 or, in the ancient phrase which still survives in crimes of homicide, with "malice aforethought". (P. 629.)

Similarly Viscount Dilhorne (p. 625 C–D), Lord Cross (p. 638 E–G) and Lord Kilbrandon (pp. 639–40).

The fifth judge, Lord Hailsham, agreed with his colleagues in the result but formulated his opinion in a more complicated way. In principle, he said, he must hold that awareness of the probability of the consequence is not sufficient to establish malice aforethought for murder (pp. 609 C, 617 H, 620 E–F). If nevertheless he agreed that the question posed was to be answered in the affirmative it was because the awareness of the probability of the consequence might provide the basis for a conclusion as to the occurrence of a certain *intention*—not to kill (or cause grievous bodily harm), it was true, but to expose the other party to serious risk of one of these consequences. And this kind of *intention* was considered by Lord Hailsham to be sufficient to constitute an alternative type of malice aforethought in murder (pp. 618 G, 620 F–H, 622 B–E).

This construction appears to me as strange as it is complicated and inconsistent. I find it impossible to imagine how a person can be aware of exposing another to a serious risk of death or grievous bodily harm *without* at the same time having an intention to expose the potential victim to this risk (as is expressly assumed by Lord Hailsham, p. 622 E). For even if the risk was not produced with an intention to kill or injure B, it must nevertheless have been produced with another intention—in the present case that of frightening her. But in that case the situation of danger was intended as a *means* to that end. The appellant's behaviour was deliberately aimed at causing the danger and to that extent she had acted with *intention*.

In my opinion it is not a matter of a conclusion which can be drawn or not drawn according to the circumstances, but of a paraphrase intended to uphold a dogma, the belief that intent is in its nature intention. As Lord Hailsham himself says: "In my view, it is not foresight but intention which constitutes the mental element in murder" (620 D–E). A further contributory factor has probably been a fallacious evaluation of the situation where a surgeon, in order to save a patient's life, undertakes a difficult heart transplantation well knowing that there is a high degree of probability that the operation will fail and the patient will die. Lord Hailsham takes this as evidence that awareness of the dangerousness of the action does not in itself prove intent to commit murder:

> It is the absence of intention to kill or cause grievous bodily harm which absolves the heart surgeon in the case of the transplant, notwithstanding that he foresees as a matter of high probability that his action will probably actually kill the patient (p. 620 E, cf. p. 618 A).

Where the operation is necessary in order to save the patient's life, that is to say is medically indicated, the act is objectively lawful and there can be no talk of liability (intent). Moreover, it would seem that Lord Hailsham's formulation could not absolve the surgeon in question from liability. For the latter has not only acted with awareness of the danger to the patient's life but has knowingly and deliberately, i.e. with *intention,* produced this risk.

It would be wrong to attach importance to the fact that in the question answered by the House of Lords the occurrence of the criminal consequence is described as "highly probable" (see the quotation above from p. 610) and from this to conclude conversely that intent does not exist if the consequence is indeed foreseen as "probable" but not as "highly probable". The reason why the Court of Appeal's question is formulated in this way is that the judge in the lower court has used the term "highly probable" in his note to the jury (see quotation above from p. 623). As the appellant based her appeal on the plea that this direction was wrong and to her disfavour the question had necessarily to be drafted in agreement therewith and the House of Lords had no occasion to make a pronouncement on anything else. Lord Cross points to this in saying:

> In the result, therefore, I think that the only criticism that 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 Mrs Hyam (p. 639).

There can be no doubt that the doctrine of intent which the House of Lords has approved in this judgment is based on the view that intent exists

when the consequence has been foreseen as likely (probable, etc.), cf. the quotation from Lord Diplock's pronouncement p. 629. Also in agreement with this is the material derived from precedents, legal writing and commission reports upon which the doctrine is supported.[21]

The judgment establishes that foresight of consequences is *sufficient* to establish intent but does not deal with the question whether foresight is a *necessary* condition, that is to say with the question whether intention in itself, i.e. without accompanying foresight of the probability of the consequence, can be the basis for intent. This question did not arise in the case. It is therefore a clear *obiter dictum* when Lord Hailsham states:

> It is the presence of an actual intention to kill or cause grievous bodily harm which convicts the murderer who takes a very long shot at his victim and kills him notwithstanding that he thinks correctly as he takes his aim that the odds are very much against his hitting him at all (p. 620 F).

I have never heard of any English judgment where a conviction for murder was based on this ground.

4. ON CONSTRUCTIVE INTENT, ABOLISHED BY THE HOMICIDE ACT 1957, AND IMPLIED INTENT, THE ABOLITION OF WHICH HAS BEEN PROPOSED BY THE LAW COMMISSION

As explained above in section 2, the *mens rea* doctrine does not rest on statute but has been developed in common law in the course of centuries in supersession of the original rule on objective (absolute, strict) liability. This is the explanation of the fact that right up to our own days well-consolidated doctrines on objective liability have been able to hold their own, doctrines which by virtue of the age and strength of the precedents continue to be respected by the courts until removed from the scene by an act of Parliament. These relics raise the question of liability without guilt in

[21] In *MLR* vol. 39 (1976), pp. 420ff., M. D. Farrier has put forward a criticism of the court's *mens rea* doctrine, a criticism with which I am unable to agree. Like so many others, he takes the view that a definition of intent which is based on the actor's awareness of the probability of the consequence will lead to an unacceptable sliding scale (cf. what has been said above in section 2 *in fine* about the few practically possible qualifications of probability statements). In order to obviate this he recommends that *mens rea* in murder should be defined as recklessness balanced against conditions which can justify acting notwithstanding the risk (pp. 424f.). With this meaning, *mens rea* will embrace every foreseen risk which cannot be objectively justified, that is to say right down to the limits of the permitted risk. This is quite unacceptable.

conflict with the principle of limiting the state's penal authority out of consideration for the individual's claim not to be made a scapegoat merely because this may serve the interests of administration of justice. In conformity with the customary legal technique these survivals of the thinking of past times do not appear in all their nakedness, but are camouflaged through legal fictions or presumptions. They go under the names of *constructive intent* (in murder), now abolished by the Homicide Act 1957, sec. 1; *implied intent* (in murder); and *presumed intent*[22] (in all offences), now abolished by the Criminal Justice Act 1967, sec. 8. Thus today there remains only the doctrine on implied intent (in murder) meaning that intent to inflict grievous bodily harm implies intent to kill. But in the first place there are proposals from the Law Commission for its abolition; secondly, in most cases in which this construction has been applied the implication has not been fictitious because intent (in the form of recklessness: death foreseen as probable) has in fact existed; and, finally, it may be recalled that two of the judges in the case *Reg.* v. *Hyam* referred to in section 3 advocated that the House of Lords in setting aside earlier decisions should abolish the doctrine of implied intent as being incompatible with present-day conceptions of justice.

Constructive intent comprised two categories of murder in connection with which there had been especially strong pressure for penal reaction. These were: (1) death caused by a person resisting lawful arrest by an authorized officer of the law; and (2) death caused by a person in committing a felony of violence.[23] In both situations the consequence of the doctrine was that if the person concerned happened to kill someone by mischance he would be considered guilty of murder (and sentenced to death). The purpose of the first of these cases of constructive intent was obviously to give the police (and other authorities concerned with the execution of the law) a special protection in the exercise of their duty to combat crime. And the reasoning behind the second exception was probably based on vague ideas that when a person commits with intent a crime of violence then his intent to exercise violence is so to speak transferred to the death as an accidental consequence. A person who sets out to commit a serious offence involving violence must answer for everything he causes by violence during the commission of the crime. The doctrine has for example been applied to an offender who raped a 13-year-old girl and who in order to overcome her resistance treated her in a way which caused her

[22] The expression is taken from Williams, *op. cit.* § 35, where he speaks of presumption of *intention*. There are otherwise variations in the terminology used for this situation as well as the other two situations, see *Kenny–Turner*, § 108 a.

[23] See further *Kenny–Turner*, §§ 108–16.

death although he could not be held to have had intent to kill. He was nevertheless found guilty of murder.[24]

Both these exceptions were abolished by the Homicide Act 1957, sec. 1(1) and (2). Sec. 1(1) reads as follows:

> Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

In sec. 1(2) it is provided that the same rule shall also apply to manslaughter committed in the course of resistance to lawful arrest and in similar situations.

In this way constructive malice (or intent) was abolished; but as can be seen from the text quoted it was still presumed that intent to commit murder (malice aforethought) can exist as *implied malice* (or intent).

This expression refers to a well-established doctrine, confirmed recently by the House of Lords in *Reg.* v. *Hyam* and in *D.P.P.* v. *Smith,*[25] according to which intent to murder need not necessarily involve intent to kill but can also take the alternative form of intent to cause *grievous bodily harm.*[26] It was further established in *Smith* that the last-mentioned expression is to be understood in the same way as in sec. 18 of the Offences Against the Person Act 1861—which means that grievous bodily harm is not confined to covering such grievous bodily harm as will probably lead to the victim's death.[27] From this it follows that a person can be sentenced to an appropriate term of imprisonment for murder even though he did not foresee the death as a probable consequence of his act and consequently did not have intent to kill. But, as *Kenny-Turner* (§ 116a) points out, if the judgments in which the accused has been sentenced for murder on the ground of intent to cause grievous bodily harm are studied it will be found that in most cases this intent also contained within itself intent to commit murder in the form of recklessness:

> that is to say, although it was not the man's desire and intention to cause death yet he was well aware that what he was doing might have fatal consequences, and none the less went on to take that risk.

[24] *D.P.P.* v. *Beard (1920) A.C. 479.* On this see *Kenny-Turner,* § 112, and Turner in *The Modern Approach to Criminal Law* (ed. by L. Radzinowics and J. W. C. Turner 1945), pp. 254 ff.

[25] [1974] 2 W.L.R. 607; [1961] A.C. 290.

[26] The terminology is not fixed. Lord Denning, *Responsibility before the Law,* 1961, p. 25, defines the expression in this way.

[27] The judgment, *op. cit.,* pp. 334 and 335, cf. the Law Commission's report *Imputed Criminal Intent* (1967), sec. 15(c).

The Law Commission in its report on *Imputed Criminal Intent* (1967) dealt with the question whether the rule on implicit intent to commit murder should be abolished or amended. In considering this matter the Commission consulted a considerable number of experts and institutions. It turned out that opinions on this subject were greatly divided and also that those who wanted to see a change in the existing legal situation put forward different proposals as to the form the amendment should take. The Commission for its part came to the conclusion that it would best accord with the ethical considerations underlying criminal law if intent to commit murder was determined as intent to kill. In agreement with this the Commission proposed the enactment of the following provision:

> Where a person kills another, the killing shall not amount to murder unless done with an intent to kill.

So far as I know there has not up to the present been any attempt to put this proposal into effect.

5. ON PRESUMED INTENT (OBJECTIVE TEST OF INTENT) WHICH WAS RECOGNIZED IN *D.P.P.* V. *SMITH* BUT ABOLISHED BY THE CRIMINAL JUSTICE ACT 1967 SEC. 8

According to the principle of guilt it is an automatic consequence that the awareness (foresight) which constitutes intent must exist in the mind of the offender at the moment of committing the crime. If this subjective-individual evaluation is replaced by an objective measuring rod in that the determining factor is said to be what a reasonable man would have foreseen if he had been in the situation of the offender, there is opened up the possibility of an objective liability, i.e. a liability without guilt. For this will be the case if the offender for one reason or another—e.g. because he was equipped with only a limited ability to understand and judge or because he was in a state of shock or panic—did not in fact realize or foresee what the normal type of person, "the reasonable man", would have realized or foreseen.

In common law, on the other hand, it has of old been held that the criterion of whether the necessary "intent" exists is objective, i.e. its point of reference is the ordinary intelligent human being. This doctrine is often expressed in the form of a presumption: *A man is presumed to intend the*

natural and probable consequences of his action. And the test of what consequences are natural and probable is precisely whether a responsible and reasonable person would foresee them. If this presumption is made irrebuttable it is only a veiled formulatin of the objective judgment. If the presumption is considered rebuttable this means a shifting of the burden of proof in conflict with otherwise acknowledged principles.

The objective test for criminal liability has been defended by some eminent legal scholars, including Oliver Wendell Holmes in his book *The Common Law* (1881). As the ideas are alien to Nordic and Continental lawyers I consider it appropriate to reproduce some of the central pronouncements in this book in elucidation of the doctrine of *presumed intent*:

> It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness ... It is only intended to point out that, when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions. The conclusion follows directly from the nature of the standards to which conformity is required. These are not only external, as was shown above, but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are the most dangerous.
>
> The reconciliation of the doctrine that liability is founded on blameworthiness with the existence of liability where the party is not to blame, will be worked out more fully in the next Lecture. It is found in the conception of the average man, the man of ordinary intelligence and reasonable prudence. Liability is said to arise out of such conduct as would be blameworthy in him. But he is an ideal being, represented by the jury when they are appealed to, and his conduct is an external or objective standard when applied to any given individual. That individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness (pp. 50 f.).

Holmes then proceeds to refer to the requirement of intent especially in murder, asserting, in agreement with Sir James Stephen, that intent means "foresight of consequences", and adds:

> The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen (p. 54).

His justification for the objective criterion is the community's need for effective protection against attack. Regard for righteous retribution must give way to regard for efficacy:

> ... our law exceeds the limits of retribution, and subordinates consideration of the individual to that of the public well-being (p. 47). Public policy sacrifices the individual to the general good (p. 48).

It is nearly a hundred years since Holmes wrote in this way. There can be no doubt that the general sense of justice as it prevails today would oppose this idea of making the individual the scapegoat of the community. The requirement of guilt is the safeguard against this. And it must of course mean genuine, acute awareness on the part of the actor of the nature and consequence of the act at the moment of performance.

Leading English lawyers were in agreement with this inclined to regard the doctrine of the objective test for intent as an archaic relic of legal conceptions of former times. Great then was the surprise and hot was the anger and indignation when in 1960 the House of Lords handed down a judgment which in clear and unequivocal terms established the objective test as the criterion which prevails in English law in determining whether intent has existed in a given case. This occurred in the case *Director of Public Prosecutions* v. *Smith* (1961) A.C. 290. As this case aroused much attention, was intensively discussed, was made the subject of a special report issued by the Law Commission and ultimately, in 1967, resulted in a statutory provision which abolished presumed intent (the objective test), it is appropriate to deal with it at some length.

Smith was accused of having murdered O, a policeman, on March 2, 1960. In a sentence pronounced on April 7 by the Central Criminal Court he was found guilty of this crime. The killing of a policeman in performance of his duties was among the cases which pursuant to the Homicide Act 1957, sec. 5, was capital murder, the mandatory penalty for which was death. In accordance with this Smith was sentenced to death. He appealed, pleading that the judge had misdirected the jury. In a judgment of May 10 the Court of Criminal Appeal upheld this appeal. He was acquitted of the charge of murder and was sentenced to 10 years' imprisonment for manslaughter. The Director of Public Prosecutions appealed the Court of Appeal's decision to the House of Lords which on July 28, 1960, approved the appeal, quashed the Court of Appeal's decision and reestablished the lower court's sentence for capital murder. The sentence was, however, commuted to imprisonment for life.

Thus less than five months had elapsed from the date when the act was committed to the decision in the third instance.

The case history was given as follows:[28]

At about 7.30 p.m. on March 2, 1960, Smith was driving his car along a busy street in London. At the back of the car there were sacks containing metal parts which he had stolen a short time previously. When he reached a cross-roads the police officer on point duty stopped the traffic in the direction in which Smith was approaching, and Smith's car happened to be the first in the line of vehicles held up. While it was standing there, another police officer, O, who was on friendly terms with Smith, went up to the car and spoke to Smith through the lowered window. While doing so O noticed what lay in the back seat and ordered Smith to pull in slowly to the kerb. At the same time he asked the other officer to notify the police station. Smith began to obey the order to pull in while O walked alongside the car. Suddenly Smith accelerated and drove off at increasing speed down the street. Although the car had no running board O managed to hold on to the car, half hanging on to the bonnet and with one arm in at the open window. In this way the car covered a distance estimated at 100–130 yards in about 10 seconds. Smith continued to accelerate and reached a speed estimated at 30–60 miles an hour. He drove a zig-zag course. Three times the car collided with vehicles proceeding in the opposite direction. The last time the impact was so strong that the bumper of the approaching vehicle was dented. As a result O was dislodged from the car and fell under a fourth oncoming vehicle which ran over him, causing his death. Smith drove on for a few hundred yards and then turned off to the right to a place where he unloaded the stolen goods. After that he turned back to the scene of the accident. When he heard that O was dead he said something to the effect that: "I would not have done that for the world. I only wanted to shake him off."

The Director of Public Prosecutions did not submit that Smith had had intent to kill O but only that he had had intent to cause him grievous bodily harm, which according to the doctrine of implied intent is sufficient to constitute malice aforethought in murder. During the appeal the case turned only on the question whether the judge's summing up had been erroneous and misleading with regard to what is required for such intent. The summing up was attacked on several points. In the context in which the case is here discussed the relevant passage read as follows:

> The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts ... therefore, to sum up the matter as between murder and

[28] The judgment, *op. cit.*, pp. 292 f., 297 f.

> manslaughter, if you are satisfied that when he drove his car erratically up the street, close to the traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder, and you should not shrink from such a verdict because of its possible consequences. On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter. (Pp. 325 f.)

The main objection raised against this direction was that the judge had instructed the jury that in considering whether the accused had acted with intent the so-called objective test should be applied, whereas the correct course must be to apply a subjective test, that is to say therefore that the question is what that man in the given situation, regard being paid to all circumstances including subjective ones (his anxiety, excitement and panic), in fact realized and foresaw (294 f., 312, 326). Here the Court of Appeal upheld the appeal and therefore changed the conviction for murder to conviction for manslaughter. But the House of Lords did not follow the Court of Appeal. Lord Kilmuir, who pronounced the decision, said, after having referred to the defence's demand for a subjective evaluation of the intent requirement:

> This purely subjective approach involves this, that, if an accused said that he did not in fact think of the consequences, and the jury considered that that might well be true, he would be entitled to be acquitted of murder.
>
> My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that on which the courts have always acted ... 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, i.e. was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. 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 harm 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. (Pp. 326 f.)

The defence had also made the objection that the judge had said that according to law there is a presumption that "a man intends the natural and probable consequences of his act" without adding that the presumption is rebuttable. This, however, is only another formulatation of the

objection to the objective test and is therefore also rejected by Lord Kilmuir (p. 331).

The other four Lords who took part in the adjudication of the case all concurred unconditionally with Lord Kilmuir.

The result was therefore that the accused was condemned to death despite the fact that it was not stated that he had had intent to kill, only that he had had intent to cause grievous bodily harm (implied intent); and, moreover, despite the fact that it was not stated that such an intent had existed on the part of the accused at the moment of the act, only that it would have been present in an ordinary responsible person in the same external circumstances. That is to say that in the evaluation of intent no regard had been paid to the panic in which the accused, out of fear of being apprehended for theft, had acted.

As will be clear from the report above, the appeal in *Smith* turned exclusively on whether the requirement as to intent relates to the actor's mental state at the time of the act, or to the mental conditions that would have existed in a reasonable person in the same situation. On the other hand, the judgment of the lower court was not attacked with regard to the judge's direction as to the psychological content of the intent requirement. In the direction, see quotation above from pages 325–6, it is stated:

> If you are satisfied that ... he must as a reasonable man have contemplated that grievous bodily harm *was likely to result* to that officer ... then the accused is guilty of capital murder (my italics).

Similar expressions are also found in Lord Kilmuir's pronouncement cited above (pp. 326 f.). That intent also comprises recklessness—that intent is probability intent—is the unquestioned presumption of the judgment, cf. section 3 above.

The judgment provoked criticism from many quarters with regard to its acceptance of the objective test[29] for intent and this criticism was expressed in terms which are rather unusual in criticisms of English courts. *Kenny–Turner* writes that for many lawyers it came as a startling surprise that the House of Lords could uphold so archaic a standard, and adds:

> As previously suggested criminal policy rests upon an ethical basis and in matters of ethics the judiciary can claim no monopoly of decision; the House

[29] For the sake of clarity it may be well to mention that whereas Turner and the other critics mentioned were in agreement with Williams in the criticism of *Smith* so far as the question of subjective or objective tests of intent was concerned, Williams, on the other hand, (so far as I am aware) stands alone in his criticism of the judgment for laying down that intent comprises recklessness, cf. above in section 3. The judgment is a confirmation of *Kenny–Turner*'s doctrine on intent.

> of Lords can lay down the law but they have no power to dictate the moral conclusions to be reached by free people. It is therefore not a matter of wonder that this judgement has attracted an impressive mass of criticism. (§ 107 *in fine*, cf. § 20, § 110 and § 116 b.)

R. J. Buxton pointed out that the courts of the first instance (whose judgments do not figure in the regular reports series) simply ignored the precedent in *Smith* in so far as the doctrine on objective test for *mens rea* in murder is concerned.[30] Criticism was also implied in the decisions of the Courts of Appeal inasmuch as attempts were made to restrict the scope of the precedent as far as possible.[31] The Australian High Court, the highest instance of the Commonwealth, took the somewhat unusual step of simply waving aside the decision and declaring that *D.P.P.* v. *Smith* was not to be regarded as a precedent in Australia.[32] [33]

The situation was not improved by the fact that one of the judges who took part in rendering the disputed decision, Lord Denning, attempted, in the lecture at Jerusalem University to which reference has already been made (*Responsibility before the Law,* 1961), to gloss over the matter by maintaining that the judgment must be understood as not being intended to make an objective test determinative. The question of intent is purely subjective. But in answering this question the jury is entitled (though not obliged) to use the presumption as to what a reasonable person would have realized, as a means and a point of departure for a conclusion as to what the accused actually realized. Even if statements in the decision can be adduced in support of such an interpretation, it must nevertheless appear strained. In particular it is surprising that Lord Denning makes no reference at all to the above-cited central part of the judgment where Lord Kilmuir declares in unequivocal terms that the test is and must be objective. In his treatise on mental elements in crime Williams says flatly that Lord Denning's thesis can scarcely be regarded as "conforming to academic standards of intellectual rigour" (p. 102).

The large volume of criticism evoked was no doubt among the reasons why the Law Commission took up the problems of the *Smith* judgment for special investigation in a report entitled *Imputed Criminal Intent* (*Director of Public Prosecutions* v. *Smith*),[34] published in 1967. The Commission consid-

[30] "The Retreat from Smith", *Crim. L.R.* 1966, pp. 195 f.

[31] *Kenny–Turner*, § 116 b.

[32] In the case *Parker* v. *The Queen* (1963) 111 C.L.R. 610 referred to in the Law Commission's report on imputed intent, sec. 9.

[33] Williams had criticized the judgment in *The Times,* Oct. 12, 1960, cf. *Criminal Law,* § 35. See further Rupert Cross, "The Need for a Re-definition of Murder", *Crim. L.R.* 1960, p. 728; J. C. Smith's commentary, *op. cit.*, pp. 766 f., and Peter Brett, *An Inquiry into Criminal Guilt,* 1963, pp. 137 f. See also references in *Reg.* v. *Hyam* [1974] 2 W.L.R. 607, p. 614.

[34] Referred to in section 4 *supra* so far as the question of implied intent is concerned.

ers that the judgment must be understood as meaning that in murder there exists an irrebuttable presumption that "a man intends the natural and probable consequences of his actions". Against this doctrine, the Commission states, there can be levelled the same objection which caused the legislature to abolish "constructive malice", namely that it is unsatisfactory that there should be a legal rule linking the requirement of intent to factors which may be contrary to the actual conditions in the accused's mind. Even a rebuttable presumption must be rejected, inasmuch as in a legally unacceptable way it shifts the burden of proof over to the accused. The Commission acknowledges that common sense and experience will in many cases mean that a conclusion from the natural and probable consequences of the act to the actor's intent will be well founded. In such cases it should be open to the judge to direct the jury accordingly. In other words it should according to circumstances be *permissible,* but never *obligatory* to draw the conclusion referred to (secs. 6–8). In line with this the Commission submitted the following draft of a statutory provision concerning evidence for criminal intent:

> A court or jury, in determining whether a person has committed an offence,
> (a) shall not be bound in law 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.

A provision in these identical terms was incorporated in the Criminal Justice Act 1967 (1967 c. 80), sec. 8. Through the enactment of this provision an end was put to presumed intent[35] and English law was brought into line with the views adopted by Danish courts. In section 4 above it is mentioned that the Homicide Act 1957 had abolished constructive intent. There still remains, as a construction which *may* involve objective liability, implied intent in murder (grievous bodily harm); on this see section 4 above.

This study is concerned with the doctrine of intent in existing English law. However, I should like to add a few words with a view to the law of the future. In 1978 the Law Commission, set up in pursuance of sec. 1 of the

[35] Just as the presumption only applied to intent provided this was determined by the fact that the actor *foresaw* the *consequences* of his act, sec. 8 of the Criminal Justice Act 1967 is also limited in this way. A corresponding problem arises in so far as intent is determined by the actor's *knowledge* of the *circumstances,* e.g. his knowledge that the person he attacked was a police officer. For one specific offence, namely rape, there is in sec. 1 of the Sexual Offences (Amendment) Act 1976 a corresponding provision regarding the question whether the offender assumed that the women had consented to the sexual intercourse.

Law Commissions Act 1965 for the purpose of promoting the reform of the law, submitted to Parliament a *Report on the Mental Elements in Crime* (Law Com. no. 89), which may be assumed to be of importance for the future development of the law. The report does not take up a position on the question of legal policy concerning what requirements, if any, may be made concerning mental elements in the different offences. It will be for Parliament to decide on these questions. The aim of the report is to create the necessary preconditions for making it easy for legislators in the future to draw up precise provisions concerning these questions. This is done by recommendations to the following effect:

(i) that in the creation of new offences it should be expressly stated by the legislator whether liability shall be conditional on the existence of a certain mental state; or of recklessness (which is not regarded as a mental state, but as an objective standard of conduct); or shall be strict (paras. 73–75);

(ii) that in doing so the legislator should make use of and only of the expressions defined in the report ("intention", "knowledge" and "recklessness"), these expressions being apprehended in the meaning which is defined in the report unless expressly stated otherwise (paras. 70–72); and

(iii) that if the statute is silent on the matter it shall be presumed that liability is conditional on intention or recklessness in relation to some consequence of the act and knowledge or recklessness in relation to some circumstance in connection with the act (paras. 78–89).

The definitions referred to are as follows (para. 99):

> (i) a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result;
>
> (ii) a person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists;
>
> (iii) a person should be regarded as being reckless as to a particular result of his conduct if, but only if,—
>
> (a) he foresees at the time of that conduct that it might have that result, and
>
> (b) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take the risk of that result occurring; and
>
> (iv) where the enactment makes it an offence for a person to conduct himself in a specified way, being reckless as to whether a particular circumstance exists, he should be regarded as being reckless as to that circumstance if, but only if,—
>
> (a) he realises at the time of that conduct that there is a risk of that circumstance existing and,
>
> (b) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take it.

It is not my task to criticize these proposals put forward by the Law Commission, but I think it may be appropriate to point to one essential point where the proposed definition of the mental element which is normally required as a condition of liability diverges from the formulations which hitherto have been generally used both in court judgments and by writers. It will be clear from what has been said in this chapter that the necessary and sufficient mental condition to establish liability is foresight of consequences, meaning that the actor must have foreseen that certain consequences were *likely* to follow on his acts or omissions. Thus this is customarily expressed by saying that *mens rea*, in all cases where there is no clear warrant for the contrary, is to be understood as comprising both intention and recklessness.[36] In contrast to this, the key word "likely" does not occur in the Law Commission's recommendations. True, it is maintained that intention and recklessness are always to be presumed to apply as the normal mental conditions for liability. But recklessness is now defined in a way which extends far beyond the limit which is fixed with the probability criterion. Now the decisive consideration is to be whether, having regard to the offender's apprehension of the degree of risk, it may be objectively considered as *unreasonable* for him to take that risk.

Here what the Commission seems to have in mind is the limit which in Continental legal science is described as the limit for the objective lawfulness of the act—whether one uses for this limit expressions such as *retsstridighed* (German: *Rechtswidrigkeit)* or *tilladt risiko* (German: *erlaubtes Risiko*). This is confirmed by what is further said in the report in elucidation of the meaning of the formulation used:

> We agree that liability in criminal law for reckless conduct in relation to a particular conduct should not solely depend on whether the defendant foresaw that that result might occur. Many human activities involve some risk of injury to the person or damage to property and most people in undertaking these activities foresee that they might happen. A golfer on Wimbledon Common may foresee that he may hit a bystander, but he would not be liable even civilly for negligence unless in all the circumstances it was unreasonable for him to make the stroke which in fact resulted in injury to the bystander; it would be strange if he could nevertheless be liable under section 20 of the Offences against the Person Act 1861. (Paragraph 55.)

If this interpretation is correct, it would mean that recklessness will comprise what is otherwise designated as negligence, with the sole difference that for recklessness it is required that the actor must have realized that his action involved a risk of causing harm and that the judgment of the

[36] See, e.g., on *Kenny-Turner* p. 183 *supra* and on Lord Denning p. 189 *supra*.

reasonableness of the act is to be made on the assumption that any judgment by the offender of the degree of that risk is correct. Such a determination of what is normally required with regard to mental state as a condition of liability will extend the area of what is punishable far beyond its limits according to existing English law and may, in so far as the more serious crimes are concerned, prove unacceptable.

As a result of the investigations in this study, it can be established that intent in English law is in close agreement with the working hypothesis set out in the footnote at the beginning of this study.