

INTENTION, AGENCY AND CRIMINAL LIABILITY:

*Philosophy of Action and
the Criminal Law*

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To HGM and VJM

Part I
Intention and Agency

Legal Conceptions of Intention

2.1 The Meaning of Intention

Despite (or perhaps partly because of) the central role which the concept of intention plays in the criminal law, we still lack a clear or agreed account of its meaning. Controversy persists concerning the relationship between intention, desire and foresight of consequences; between intending something, wanting it and realizing that my action will or might bring it about: does intention involve a 'desire' for that which is intended; does an agent intend what she foresees as the certain, probable or likely consequences of her actions?

The dominant themes in the controversy can be captured by a brief look at some of the highlights of the last fifteen years.¹

Hyam Revisited

We can begin by re-examining some of the Law Lords' views in *Hyam* about the meaning of 'intention'. Lord Diplock took

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 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 . . . [that] he must have acted with 'intent' to produce a particular evil consequence. (p. 86)

¹ See generally, *S&H*, pp. 55–61; *TCL*, pp. 74–87; *C&K*, pp. 124–40; *E&W*, pp. 47–50, 63–8; *Gordon*, pp. 220–33; R. Buxton, 'Some simple thoughts on intention'; J.H. Buzzard, 'Intent'; J.C. Smith, "'Intent': a reply"; J.E. Stannard, '*Mens rea* in the melting pot'; G. Williams, 'Oblique intention'.

Lord Diplock seems to be concerned, not with the ordinary extra-legal meaning of 'intention', but with the conditions under which a person should be convicted of a crime such as murder: what matters is that these two 'states of mind' do not differ in culpable responsibility.

Lord Cross did discuss the ordinary meaning of 'intention'. The 'ordinary man', he thought, might well count as intended consequences which were foreseen as being 'probable': if someone planted a bomb in a crowded street, knowing 'that it was likely that some people would be injured', though 'it was a matter of indifference to him whether they were injured or not', the ordinary man might well argue that he 'did not injure these people unintentionally; he injured them intentionally. So he can fairly be said to have intentionally injured them – that is to say, to have intended to injure them'. But, he recognized,

a logician might object that the ordinary man was using the word 'intentionally' with two different shades of meaning, and I am prepared to assume that as a matter of the correct use of language the man in question did not intend to injure those who were in fact injured. (p. 96)

His concern, however, was not with 'a problem of linguistics': again, what mattered was that someone who acted with such foresight of the relevant consequence was guilty of murder, whether or not he strictly intended that consequence.

Lord Hailsham took a different view: foresight 'of a high degree of probability' is not 'at all the same thing as intention'; and 'it is not foresight but intention which constitutes the mental element in murder' (p. 77). One reason for denying that foresight of probable consequences constitutes intention was the impossibility of defining the appropriate degree of foreseen probability; as Lord Reid put it,

Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility etc. It is neither practicable nor reasonable to draw a line at extreme probability. (*Southern Portland Cement v Cooper*, p. 160)

(This remark gains force from the way in which the other Law Lords in *Hyam* talked of consequences which were foreseen as 'highly probable', or 'probable' or 'likely'.) Another reason against identifying such foresight with intention was that it might require us to say that a surgeon who knows that there is 'a high degree of probability' that the operation she is performing will kill her patient intends to kill the patient – which is absurd (p. 74).

Intention, Lord Hailsham argued, 'is clearly to be distinguished alike

from "desire" and from foresight of the probable consequences' (p. 74): to explain what it is, he cited Lord Asquith's definition in the civil case of *Cunliffe v Goodman*.

The issue in *Cunliffe v Goodman* was whether a landlord 'intended' to demolish a building which she owned (if she did the tenant was not liable for certain repairs). She had applied for the licences needed to demolish the building and replace it by another, but it was by no means certain that they would be granted, or that the project would turn out to be financially viable: so did she, at that stage, 'intend' to demolish the building; or was she as yet only 'contemplating' its demolition or 'hoping' to demolish it? (Thus whereas discussions of intention in the criminal law usually concern what it is to intend some consequence of an action which is actually done, *Cunliffe v Goodman* concerned what it is to intend some *future* action; when does mere hope or contemplation become intention?) Lord Asquith said,

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. (*Cunliffe v Goodman*, p. 253)

I 'intend' what I have decided to bring about: but I cannot intend a result which is 'wholly beyond' my control, or dependent on so many other factors that my 'volition will have been no more than a minor agency collaborating with' those other factors. I cannot intend (I can only hope or pray) that the sun will shine tomorrow; likewise, if the demolition of the building depended on the grant of licences by committees over whom the landlord had little or no control, she could not intend to demolish it in advance of obtaining those licences.

Lord Hailsham knew of 'no better judicial interpretation' than this of intention, so long as 'it is held to include the means as well as the end and the inseparable consequences of the end as well as the means' (p. 74). As to the first of these qualifications, Mrs Hyam's 'end' was to frighten Mrs Booth into leaving town, to separate her from Mr Jones: but she intended to expose those in the house to a risk of death or injury as a means to that end. Lord Hailsham illustrated the second qualification by a man who plants a bomb on an aircraft, intending it to explode and destroy the aircraft in mid-flight: his 'end' is to collect the insurance on its cargo; but he knows that if the bomb explodes as he intends, the aircraft's passengers will inevitably be killed. He could not evade a murder conviction by claiming that he did not intend to kill the passengers (that their deaths were

neither his end nor a means to it): for their deaths are so 'inseparable' from his intended destruction of the aircraft that we take him to have intended them too.

Hyam exemplifies two strands of judicial thought about the legal meaning of 'intention'. One analyses intention in terms of desire and foresight; an agent intends both those consequences which he wants to come about, and those which he foresees as being to some appropriate degree likely or probable. The other explains intention not in terms of desire or foresight, but of what the agent 'decides' to do.

Neither kind of account is as yet adequately clear, since each involves concepts which are themselves not yet clear. What is it to 'desire' a consequence, or to 'decide' to bring it about? If we are to count as 'intended' consequences which are foreseen as probable or likely, how can we specify the appropriate degree of probability, or distinguish intention clearly from recklessness (which may be defined in terms of the agent's awareness that her action 'might' bring about the relevant consequence)? What is it for a consequence to be so 'inseparable' from my intended end that I must be taken to intend it along with that end?

The case of a reckless driver, who drives in a way which he knows might well cause death or serious injury, illustrates these problems. Does he foresee death or serious injury as a 'likely' consequence of his action? If so, Lord Diplock and Lord Cross might have to say that he *intends* to cause death or serious injury, and convict him of murder if he causes death: but is this acceptable? Lord Hailsham can deny that he intends to cause death or injury: but he knows that his driving creates a serious risk of death or serious injury; so should we say that he *decides* to expose others to that risk, or that it is an 'inseparable consequence' of his intended manner of driving – and thus that he intends to expose others to that risk, and is guilty of murder if he causes death? (Lord Hailsham would acquit him of murder; for his action is not 'aimed at' anyone, as a murderer's action must be (*Hyam*, p. 79; see *Moloney*, pp. 912–3): but what is it to 'aim' my action at someone?).

After *Hyam*

Courts since *Hyam* have moved away from the view that intention in the law includes foresight of probable consequences. Two years later, the Court of Appeal held in *Mohan* and *Belfon* that, even if foresight of grievous bodily harm as a probable consequence of my action could constitute an intention to cause grievous bodily harm in the case of murder, it could not constitute the 'specific intent' required for an attempt to cause bodily harm, or for wounding 'with intent to do some grievous bodily harm': a specific intent must involve (following Lord Asquith again)

a 'decision' to bring about the relevant consequence, 'no matter whether the accused desired that consequence of his act or not' (*Mohan*, p. 11). The concept of intention is thus, it seems, not univocal in the criminal law: it carries a narrower meaning when what is required is a 'specific intent', and a broader meaning, which includes foresight of probable consequences, in other contexts.

But how can I 'decide' to bring about what I do not 'desire'? Do I perhaps 'desire' the end at which my action aims, but 'decide' to bring about the means to that end and the 'inseparable consequences' of the end?

One case in which an agent might be said to intend what she does not desire is that in which she acts under duress, in order to save herself or others from some threat: 'I did not want to do it', she might say, 'but I was forced to'. This point came up in *Lynch*, a year after *Hyam*. Mr Lynch drove members of the IRA to and from a place where they killed a policeman. He was charged with murder, as having aided and abetted the killing; his defence was that though his action did assist the killing, he acted thus only because he would have been shot if he disobeyed the killers.

The main issue for the Law Lords was whether duress could ever be a defence to a charge of murder: but they also made clear that though Mr Lynch helped the killers under duress, he still intended to assist the commission of the murder, and thus had the 'intent' required for a charge of aiding and abetting. Lord Morris, echoing Lord Asquith and Lord Hailsham, argued that one who acts under duress

may have a moment of time . . . within which he decides whether he will or will not submit to a threat. There may consciously or subconsciously be a hurried process of balancing the consequences of disobedience against the gravity or wickedness of the action that is required. The result will be that what is done will be done most unwillingly but yet intentionally. (p. 670)

The idea that intention involves decision is elaborated here; and it appears that a decision involves some process of deliberation (which may, however, be 'subconscious').

But we must ask more carefully both whether an intentional action always involves or flows from a 'decision'; and just what it is that the agent decides or intends to do – what it is, in a case of duress, that he does 'most unwillingly but yet intentionally'. Mr Lynch did decide, and intend, to drive the IRA men to and from a certain place, and knew that this would assist the commission of a murder: but does it follow from this that he intended to assist that murder; or could he argue that that assistance was a foreseen but not intended effect of his intended action? Similarly, a doctor who intends to prescribe contraceptives to a girl of fifteen may know that this will assist the commission of unlawful sexual intercourse: for the

provision of contraceptives will remove one factor (the fear of pregnancy) which might have dissuaded the girl from sexual intercourse; and it is an offence (under s. 6 of the Sexual Offences Act 1956) for a man to have sexual intercourse with a girl who is under sixteen. But in *Gillick* the House of Lords thought that the doctor could deny *intending* to assist the commission of that offence (see pp. 61–2 below).

Moloney (1985)

The House of Lords tried again to explain the legal meaning of 'intention', and the relation of intention to desire and foresight, in 1985.

Mr Moloney had a drunken contest with his stepfather to see who could load a shotgun faster: he won the contest, fired his gun and shot his stepfather dead. He pulled the trigger, he claimed, because his stepfather challenged him to do so: but he did not, he insisted, aim the gun towards his stepfather or intend to shoot him; he 'never conceived that what I was doing might cause injury to anybody. It was just a lark' (p. 917). The case thus did not really depend on the meaning of 'intention'. If Mr Moloney's account was true he did not even foresee death or injury as a likely consequence of firing the gun, and thus did not 'intend' to cause death or injury even in the widest sense of the term canvassed in *Hyam*. If, however, he did realize that his gun was pointing towards his stepfather (at a range of six feet), 'the inference was inescapable, using words in their ordinary, everyday meaning, that he intended to kill his stepfather' (p. 920, Lord Bridge): for why else would he then have fired the gun?

But the trial judge raised the question of what 'intention' means when (following the majority view in *Hyam*) he directed that

a man intends the consequences of his voluntary act (a) when he desires it to happen, whether or not he foresees that it probably will happen, and (b) when he foresees that it probably will happen, whether he desires it or not. (p. 917)

Mr Moloney was convicted of murder, but appealed on the grounds that this was a misdirection on the meaning of 'intention'. The Court of Appeal found against him: though in ordinary usage intention involves a 'decision ... to attempt to achieve the intended result' (p. 919), foresight of the relevant consequence as being probable constitutes, if not intention strictly speaking, sufficient *mens rea* for murder. The House of Lords, however, allowed Mr Moloney's appeal; made clear that the case did not depend on the meaning of 'intention'; but tried to correct the lower courts' errors on the concept's meaning, and to explain how juries should be directed when intention was at issue.

On this occasion the Law Lords did speak with one voice, that of Lord Bridge; that voice was, however, neither clear nor unambiguous.

Two points were made clear: murder requires a 'specific intent' to kill or cause really serious injury; and foresight of death or injury as a probable consequence of my action does not constitute the necessary intention, though it is evidence from which that intention may be inferred. If the foreseen probability is overwhelming, that inference may be 'irresistible': but intention must still be inferred from, not identified with, such foresight. (The description of murder as a crime of 'specific intent' denies the distinction drawn by the Court of Appeal between *Hyam* and *Belfon* (p. 18 above).)

What then is intention? Lord Bridge cited Lord Asquith again, but argued that juries would not usually need direction on the meaning of 'intention'; they can simply apply the term in its 'ordinary everyday meaning'. It might sometimes be necessary, however, to explain 'that intention is something quite distinct from motive or desire'; thus a man who boards a plane which he knows is bound for Manchester

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 escape pursuit. ... By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that that is where he will arrive. (p. 926)

When juries do need direction on the relation between intention and foresight, they should simply be invited to ask whether the relevant consequence was, and was foreseen by the defendant as, 'a natural consequence of his act': if it was, 'it is a proper inference for them to draw that he intended that consequence' (p. 929).

But Lord Bridge's comments leave a crucial question unanswered; or, more precisely, we can draw from them two incompatible answers to that question. Foresight of a consequence as being merely probable does not constitute intention: but what if it is foreseen as being a 'moral certainty'? Does foresight of a morally certain consequence *constitute* an intention to bring it about (as Lord Hailsham implied in *Hyam*; the man who blows up the aircraft intends the passengers' deaths 'as their death will be a moral certainty if he carries out his intention' (p. 74)); or it is still only (even if overwhelming) evidence from which intention must be *inferred*?

The latter view, distinguishing intention from foresight even of morally certain consequences, is implied by Lord Bridge's insistence (shared by Lord Hailsham) that 'foresight of consequences ... belongs not to the substantive law but to the law of evidence' (p. 928; see *Hyam*, p. 65); and by his comment that 'if this fact [that his gun was pointing directly at his stepfather] and its inevitable consequence were present to the appellant's mind ... the inference was inescapable ... that he intended to kill his stepfather' (p. 920): for these imply that foresight even of an 'inevitable

consequence' is only evidence from which intention must be *inferred*, as something distinct from such foresight. It is also suggested by his citation of *Steane* (p. 929; see pp. 92–5 below), in which the Court of Appeal held that a man who did (under duress) what he knew would assist the enemy need not be taken to have acted 'with intent' to assist the enemy.

But the former view, which takes foresight of a morally certain consequence to *constitute* intention, is implied by his comments on the Manchester-bound traveller, and on the terrorist who plants a bomb in the knowledge that it is morally certain to cause death or serious injury if it explodes as he intends it to. For it seems that the traveller intends to go to Manchester just because 'it is a moral certainty that that is where he will arrive'; and that the terrorist is guilty of murder if he causes death (i.e. that he intends to cause death or serious injury) simply because he foresees death or serious injury as a morally certain consequence of his action (pp. 926–7). There seems to be no room in these cases for even an 'irresistible' *inference* from foresight to intention; their implication is rather that foresight of a moral certainty *constitutes* intention.

The unclarity of *Moloney* is aggravated by the Court's comments on *Hyam*. Lord Bridge's account both of intention, and of the *mens rea* of murder, implies that Mrs Hyam was wrongly convicted. For her admitted foresight of death or serious injury as a likely consequence of her action cannot now constitute the intention to cause death or serious injury which murder requires; nor, surely, can we in this case safely infer such an intention from that foresight. She did intend, as Lord Hailsham noted, 'to expose those who were in the house to danger to their lives' (p. 913): but that intention is not now sufficient *mens rea* for murder. So why was *Hyam* not overruled; why did Lord Bridge think that 'if the issue of intent had been left without elaboration, no reasonable jury could have failed to convict' Mrs Hyam (p. 926)?

Explaining Moloney

The following year, in *Hancock and Shankland*, the House of Lords tried to clarify and improve on Lord Bridge's comments in *Moloney*.

The defendants were striking miners who pushed lumps of concrete off a bridge onto a road along which a working miner was being driven to work. A block of concrete hit the car's windscreen and the driver was killed in the ensuing crash. They were convicted of murder, after the trial judge (following Lord Bridge's advice) had said that their intentions must be inferred from the available evidence, and invited the jury to ask whether they had foreseen death or serious injury as a 'natural consequence' of their actions. The Court of Appeal quashed their convictions, since the trial judge had not adequately explained the idea of a 'natural consequence', or made clear that intention can be safely inferred only when the consequence

is foreseen as being at least 'highly likely' (p. 456). The House of Lords was asked to decide whether Lord Bridge's suggested guidance to juries was adequate.

The Law Lords agreed that it was unhelpful just to ask juries to consider whether the defendant foresaw the relevant consequence as a 'natural consequence' of his action. While Lord Bridge had made clear that a 'natural consequence' was one whose probability was 'little short of overwhelming' (*Moloney*, p. 925), juries might not understand the bare notion of a 'natural consequence' in that way; they must be told that the safety of any inference from foresight to intention depends crucially on the degree of foreseen probability involved.

It is still unclear, however, whether foresight of a consequence as being 'morally certain' constitutes intention, or is only evidence from which intention must be inferred; partly because it is not clear just what the 'inference' from foresight to intention involves.

The defendants in *Hancock and Shankland* intended, they said, to drop the concrete onto the middle lane of the carriageway (not onto the inside lane along which the car was travelling), in order simply to frighten the miner and his driver. If this was true, they did not intend to cause death or injury; they did not even foresee death or injury as a likely consequence of their action. But suppose they had intended to drop the concrete onto the inside lane: could the jury then have concluded that they foresaw death or serious injury as a highly probable or morally certain consequence of their action, and thence inferred that they intended to cause death or serious injury?

But *what* would the jury be inferring? Not necessarily a desire to cause death or injury: for intention is 'quite distinct' from desire. Not foresight of a moral certainty of death or injury: for we cannot infer foresight of moral certainty from foresight of probability; and if foresight of moral certainty was initially proved, there would then be no room for any further *inference*. Lord Scarman thought that

the prosecution case could be compressed into one question and answer, the question being 'what else could a person who pushed or threw such objects have intended but to cause really serious bodily harm to the occupants of the car?' (p. 469)

If the defendants foresaw that their action would very probably cause death or serious injury, a claim that they intended only to frighten those in the car would be simply incredible. Similarly, if Mr Moloney realized that his gun was pointing at close range at his stepfather, the inference that he intended to kill him would be 'inescapable'; we would find any other claim about his intentions (for instance, that he intended only to show that he dared to fire the gun) unbelievable.

This seems right. But to see *why* it is right, we need a clearer account

than the Law Lords have offered of what intention is, if it is distinct 'alike from "desire" and from foresight of the probable consequences' (*Hyam*, p. 74, Lord Hailsham); and we still need to know whether intention includes foresight of morally certain consequences.

The Court of Appeal tried to clarify matters again in *Nedrick*. Mr Nedrick had a grudge against Ms Foreshaw, and set fire to her house; the fire killed one of her children. He 'didn't want anyone to die,' he said; he started the fire 'just to wake her up and frighten her' (p. 1026). He was convicted of murder, after the trial judge had said that foresight of serious injury as a highly probable consequence of one's action was sufficient *mens rea* for murder. The Court of Appeal, following *Moloney* and *Hancock and Shankland*, to help judges in cases in which someone causes death by a 'manifestly dangerous act', but without the 'primary desire or motive' of harming anyone (p. 1027).

In cases involving a 'direct attack' on a victim, juries need no direction on the meaning of 'intention': there is 'direct and clear' evidence of the defendant's 'desire or motive'; and 'his intent will have been the same as his desire or motive' (p. 1027; see *Moloney*, p. 926). In the more problematic kind of case, the jury may need to be told that 'a man may intend to achieve a certain result whilst at the same time not desiring it to come about'; in Lord Bridge's example,

The man who knowingly boards the Manchester aircraft wants to go there in the sense that boarding is a voluntary act. His desire to leave London predominates over his desire not to go to Manchester. When he decides to board the aircraft, if not before, he forms the intention to travel to Manchester. (pp. 1027-8, Lord Lane)

But, first, unless the Court is distinguishing 'want' from 'desire', the attempt to explain how intention need not involve desire has become the claim that intention *does*, in a sense, always involve desire; the traveller does 'want' to go to Manchester. Second, the Court apparently supposed that foresight of even a morally certain consequence does not constitute intention.

Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. (p. 1028, Lord Lane)

Intention must be inferred, and is thus distinct, from foresight even of an inevitable consequence: but it is utterly unclear just what is to be inferred from such foresight.

Are we to infer that the agent 'wants' that consequence? But, and apart from the Court's renewed insistence that intention need involve no desire

for what is intended, to say that the traveller 'wants' to go to Manchester seems to be to say no more than that he boards the plane in the knowledge that it is going there; in which case I 'want' every consequence which I am certain my action will bring about, and foresight of such certain consequences is identical with (not a basis for an inference to) intention. Are we to infer that he 'decided' to bring that consequence about? But to say that the traveller 'decided' to go to Manchester seems again to be to say only that he decided to board the plane in the knowledge that it was going there; foresight of a certain consequence of what I decide to do is thus again taken to *constitute* an intention to bring that consequence about. We still lack any clear idea of what intention is, if it is distinct both from 'desire' and from foresight of morally certain consequences (but see n. 3a below).

Some might say that the courts have bred confusion by talking of 'inferring' intention from foresight. If foresight of even a morally certain consequence is only evidence from which intention must be inferred, intention must be a 'state of mind' distinct from any such foresight: but what is this state of mind, if it consists neither in desire nor in foresight? Should we not rather, and more simply, say that a person intends something if she *either* desires it *or* foresees it as a morally certain consequence of her action? This would involve rejecting as a confusion the idea that we must infer intention from foresight of a moral certainty: but it would give 'intention' a clear meaning, and distinguish it both from desire and from foresight of merely probable consequences; and it would still allow for inferences to intention from foresight of probable consequences.²

This is indeed the view favoured by some commentators.

Proposals for Codification

While the courts puzzled over what 'intention' means, the Law Commission was busy on the project of codifying the criminal law, including 'the mental element in crime'. The Commission recommended a statutory definition of 'intention' in 1978:

[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. (Law Commission no. 89, para. 44)

The Commission thought it unnecessary 'to define or paraphrase actual "intention"' (para. 42). The second clause of the definition extends that core concept of 'actual intention', but the Commission rejected the sugges-

² See J.C. Smith, 'Comment on *Moloney*', 'Comment on *Hancock and Shankland*'; also E. Griew, 'States of mind, presumptions and inferences'.

tion (matching some of the opinions in *Hyam*) that a person should also be taken to intend an event if he foresees that it 'will probably result from his conduct': such a definition would 'extend intention into the field of recklessness and even some way beyond it', and would 'push the legal meaning of "intention" far beyond the ordinary meaning of the word' (para. 43).

The Commission saw no need to draw any formal distinction between the narrower notion of 'actual intention' and the broader notion of intention which this definition specifies. A later report, however, recommended that a criminal attempt should require 'an actual intent to commit the offence attempted'; the broader notion of intention was thought to be inappropriate in the context of attempted crimes (Law Commission No. 102, para. 2.17).

The Commission's proposals were never legislated, and the 1985 Draft Code took a different approach: for in its definitions of the various 'fault elements' (its authors preferred not to talk of '*mens rea*') which might be required for criminal liability it divided the Commission's notion of intention into 'purpose' and 'intention'.

[A] person acts in respect of an element of an offence –
 'purposely' when he wants it to exist or occur;
 'intentionally' 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. (cl. 22(a))³

Purpose and intention were thus to be analysed in terms of the simple notions of 'wanting' and of being 'almost certain'. It is not clear, however, what role the codifiers saw for the concept of purpose: for though they cited two minor offences proposed by the Law Commission which would be defined in terms of 'purpose' (para. 8.12), no offence in the Draft Code itself was defined as requiring purpose rather than intention; in particular, both murder (cl. 56) and criminal attempts (cl. 53) were defined as requiring only intention, not purpose.

The 1989 Code, however, abandoned the distinction between purpose and intention, and the reference to 'wanting': a person acts

'intentionally' with respect to
 (i) a circumstance when he hopes or knows that it exists or will exist;
 (ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events. (cl. 18(b))^{3a}

3 See also *TCL*: '[a] consequence is said to be intended when the actor desires that it shall follow from his conduct' (p. 74); but in law he is also taken to intend what he realizes will be 'the certain or practically certain result of what he does' (p. 84).

3a See J.C. Smith, 'A note on "intention"'. Lord Lane has now said that this clause makes clear what the Court of Appeal 'failed properly to explain' in *Nedrick* (House of Lords Debates, vol. 512 (1989) col. 480).

Both the issue of intention as to circumstances, and the idea of acting 'in order to' bring a result about, will require detailed discussion later.

Where does this leave us? There is, courts and commentators seem to agree, a central notion of 'actual' (or 'specific') intention or 'purpose': but they differ on whether that notion need be defined at all; and on whether, if it needs defining, it should be defined in terms of 'desire' (or 'want'), or of 'decision', or of acting 'in order' to bring a result about. That core notion may also include consequences that are 'inseparable' from the agent's end – though it is not clear what it is for a consequence to be thus 'inseparable'. There is also, many would say, a broader notion of intention which encompasses consequences of whose occurrence the agent is 'almost certain' or 'has no substantial doubt'. But while it is clear since *Moloney* that the law does not count as intended consequences which are foreseen only as likely or probable, it is not clear whether the law takes foresight of a morally certain consequence to amount to a 'specific intention'; nor whether the law *should* count as intended consequences which are foreseen as being either certain or probable; nor whether or when, if some kinds of foresight should be counted as intention, the law should distinguish the narrower from the broader notion of intention, and require the narrower kind of 'specific intention' for criminal liability.

I shall argue that intention does have 'two different shades of meaning' (*Hyam*, p. 96, Lord Cross). There is a central notion of intention which is distinct both from 'desire' (in a common sense of that term) and from foresight even of certain consequences; and that notion is best explained in terms of acting 'in order to' bring about the intended result. There is also a broader notion of intention which includes foresight of morally certain (and perhaps even of probable) consequences: but the question of whether, and when, criminal liability should depend on the broader or on the narrower notion of intention will be a deep and difficult one.

There is, however, another aspect of the treatment of intention in the criminal law to which we shall need to attend.

2.2 Proving Intention

Courts are concerned, not just with what 'intention' means, but with how intention is proved: what counts as relevant or conclusive evidence that a defendant intended a particular result? The issue of proof is closely related to that of meaning, since any account of *how* intention can be proved depends on an account of *what* must be proved; and legal accounts of how

intention can be proved reveal significant assumptions about the nature of intention as a 'state of mind'.

The courts in *Moloney* and *Hancock and Shankland* talked of how we may infer an agent's intentions from his foresight of the 'natural' consequences of his actions. But lawyers agree more generally that we must *always* infer an agent's mental states, what he foresees as well as what he intends, from the 'external' evidence which is all that is available to us: for, it is thought, we can have no *direct* knowledge of another's states of mind.

The Dualist Assumption

This widespread belief about how intention, or any other 'mental state', can be proved reflects the philosophical doctrine of Dualism, which sharply distinguishes mind from body. In its classical form (as developed by Descartes in the seventeenth century), Dualism holds that human beings are composed of two distinct elements: physical bodies and non-physical minds. Bodies are public, observable by others: I can directly perceive your body and its movements. Minds, however, are essentially private: I am directly and immediately aware of my own mental states – my thoughts, feelings and intentions; but I can have no such direct knowledge of your mind. I can *directly* perceive only your body and its external behaviour: I must *infer* your mental states (what you think, feel or intend) from such evidence as is directly available to me; that is, primarily, from your external behaviour.

The dualist view of minds as private entities, hidden from direct observation by others, and of intentions as private states of mind, which others can only infer from external evidence, can be discerned in the following samples of judicial and juristic thought from the last three decades. Thus Barry J in *Charlson*:

The intention of the accused can of course only be inferred from all the circumstances which have been proved before you. Neither you nor I can ever look into the mind of an accused person and say, with positive certainty, what his intention was at any particular time. A jury is entitled to infer a man's intentions from his acts. . . . [U]nder normal circumstances a man is presumed to intend the normal and usual consequences of his acts. (pp. 320–1)

So too Lord Reid in *Gollins v Gollins*:

Intention is a state of mind. You cannot see into other people's minds, but ordinary people have little difficulty in inferring intention from what a man does and says. (p. 663)

Ackner J put the same thought more vividly to the jury in *Hyam*:

There is no scientific measurement or yardstick for gauging a person's intention. Unfortunately, there is no form of meter which one can fix to an accused person, like an amp meter or something of that kind, in order to

ascertain what the intention is, no X-ray machine which will produce a useful picture. (quoted in *C&K*, p. 191)

So too thought Stephen Brown J, the trial judge in *Moloney*:

[Y]ou cannot take the top of a man's head off and look into his mind and actually see what his intent was at any given moment. You have to decide it by reference to what he did, what he said and all the circumstances of the case. (p. 918)

Professor Smith, commenting on *Hancock and Shankland*, agreed:

Of course a process of inference is always involved in determining whether a person had a particular state of mind because this can be proved only by circumstantial evidence. ([1986] *Crim.L.R.* p. 183)

What is striking about these comments is precisely that they are not seen as striking or controversial; they are clearly intended simply as reminders of familiar facts.

If intentions, and other relevant 'mental elements' such as knowledge or awareness, are essentially private mental states, then to determine whether an agent intended to act in a particular way, or foresaw a particular effect of her action, must involve determining whether a particular mental process or event of deciding, intending or realizing occurred in her mind at the relevant time. Thus Lord Morris suggested in *Lynch* that an intention to do something involves or flows from an occurrent (possibly subconscious) mental process of deliberation and decision (p. 19 above). Lord Denning took a similar view of what it is to foresee serious injury as a likely effect of one's action.

If the thought flashed through his mind 'I am determined to escape and will run him down if he does not get out of the way'; and in consequence the man is killed, the driver is guilty of murder. (*Hardy v Motor Insurers' Bureau*, p. 759)

So too Lord Diplock, criticizing the view that recklessness requires an actual realization by the agent of the risk which he creates, on the grounds that it calls 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 that caused the damage, in order to see on which side of a narrow dividing line they fell. (*Caldwell*, pp. 351–2)

This view of recklessness, Lord Diplock thought, presents juries with the impossible task of deciding whether the thought of the damage he might cause 'crossed the defendant's mind'.

Such comments as these express a natural implication of Dualism: if an agent's intentions, and her foresight of the consequences of her actions, are private mental states, quite distinct from her external behaviour, it is natural to suppose that they consist in mental occurrences which precede or accompany her actions.

Presuming Intention

This view about the essentially private nature of intentions and other mental states explains the importance of the 'presumption' that an agent intends the 'natural and probable' consequences of his acts. If the prosecution can show that death or serious injury to another person was a 'natural and probable consequence' of the defendant's action (i.e. that any 'reasonable man' would have realized that that action would probably cause death or injury), the jury is entitled to presume (to infer) that the defendant himself foresaw that his action would probably cause death or injury; and if foresight of a probable consequence is taken, as it used to be, to amount to intending that consequence, the jury can therefore presume that he intended to cause death or injury (though if intention is distinct from such foresight, a further step will be needed to infer an intention to cause death or serious injury from such foresight).⁴

This is an evidential presumption, specifying a type of evidence from which inferences can properly be made to the defendant's mental states of foresight or intention. Other kinds of evidence will also, of course, be relevant: the jury must attend to 'what he did, what he said, and all the circumstances of the case' (*Moloney*, p. 918). Nor is the presumption irrebuttable: the jury

- (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 (*Criminal Justice Act 1967*, s. 8);

and it is open to the defendant to claim that he did not foresee what was indeed a natural and probable consequence of his action (because, perhaps, he was distracted or in a panic). But the courts none the less regard this presumption as being central to the proof of intention.

Now such a rebuttable evidential presumption reflects in part the common-sense point that if it was obvious that an action would have a particular consequence, we are entitled to assume that the agent of that action herself foresaw that consequence, unless she can offer evidence that she failed to notice what was thus obvious: for to say that a consequence is obvious (or 'natural and probable') is just to say that any normal person would foresee it; and the onus is then on the agent to show that she was

⁴ On the presumption see *Moloney*, pp. 921, 928–9; *S&H*, pp. 85–6; *TCL*, pp. 79–82; G. Williams, *Criminal Law: The General Part*, s. 35; E. Griew, 'States of mind, presumptions and inferences'.

not, at least at that time and with respect to that consequence, a normal person. But the prominent role which this presumption plays in the courts also reflects the deeper assumption that we must always infer what someone intends or foresees from 'external' or 'circumstantial' evidence. If, as Dualism insists, we lack 'direct access' to the mental states even of someone whose behaviour we can directly observe, we must infer what she intends or knows from such evidence (her behaviour and its consequences) as 'is directly available to us; and the presumption that she foresees the natural and probable consequences of her acts will then play a vital role in mediating our inferences from what we can observe (that, for instance, her conduct is obviously likely to bring about a particular consequence) to her unobserved mental state of intending or knowing.

If, as Dualism holds, discerning intentions involves inferring the existence of a private mental state, the jury's task is indeed, as we shall see, an impossible one: but this view of the character of intentions and other 'states of mind' is, I shall argue, profoundly mistaken. We may contrast the views quoted above with more robust view expressed by Lord Justice Bowen in 1891: 'So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him' (*Angus v Clifford*, p. 471). We cannot, of course, gain 'direct access' to another's necessarily private mental states: but Lord Justice Bowen was right to insist that we can in a perfectly ordinary sense observe, or look into, the mind of another; for we can see his mind *in* his actions.

We must first, however, return to the meaning of 'intention'.

2.3 Why Define Intention?

One might be puzzled by the fact that controversy persists over the meaning of intention: if the concept plays such a crucial role in the determination of criminal liability, it should surely by now have a clear and agreed meaning. This puzzlement might then provoke one of two further responses.

Do We Need a Definition?

The first response is to suggest that it is unnecessary to try to define intention. For 'intention' is an ordinary English term: so why should it not simply be left to juries, as competent speakers of the language, to apply the concept in its 'ordinary, everyday meaning' (*Moloney*, p. 920); why should judges or jurists feel any need to offer definitions of the concept?

The fact that jurists and philosophers cannot agree on an account of the concept's meaning should not surprise us, since this is true of many

ordinary language concepts. Their meanings, and our grasp of their meanings, are shown in our *use* of them in ordinary discourse: our inability to articulate *definitions* of those meanings shows, not that they lack clear meanings, nor that we do not understand them, but only that we cannot easily articulate that which we can grasp in practice. Philosophers have argued interminably about what time is: but their, and our, inability to articulate a formal account of the concept does not cast doubt on our ability, as ordinary language users, to use temporal concepts; to know what time it is, or how long ago something happened, or whether X happened before Y.⁵ We show our understanding of the concept of time in our competent and consistent use of temporal concepts; and the same is surely true of the concept of intention. So why not abandon the futile, and unnecessary, attempt to define intention (or set it aside as a merely academic enterprise for those who find such matters interesting), and leave juries, as competent language-users, to apply the concept for themselves?

Now courts have indeed, as in *Moloney* and *Hancock and Shankland*, sometimes suggested that juries do not usually need formal directions on the meaning of 'intention'. But even if juries *never* needed such direction, even if 'intention' and its cognates have clear and agreed ordinary meanings which should also be their legal meanings, we must still try to articulate those meanings. For if we are to understand the criminal law, and subject it to critical examination, we need to understand the principles by which criminal liability is ascribed; and to do this we must explain the meanings of the concepts in terms of which those principles are formulated. We must understand *why* an agent's criminal liability should depend on her intentions – and ask whether intention *should* be thus crucial to the determination of liability: but to do this we must be able to explain the meaning of the concept of intention, even if that concept is one which we, and courts and juries, can ordinarily use without any such explanation.

But it is anyway, for several reasons, not clear that courts and juries should simply be left to use the concept of intention with its 'ordinary, everyday meaning'.

First, we cannot just *assume* that the concept does have a clear, consistent and agreed use in ordinary language. Perhaps its ordinary usage is to some degree indeterminate or variable; perhaps it carries 'different shades of meaning' (*Hyam*, p. 96, Lord Cross) for different people, or in different

5 See St Augustine, *Confessions*, XI. 14, p. 264: 'I know well enough what [time] is, provided that nobody asks me; but if I am asked what it is and try to explain, I am baffled.' See H.L.A. Hart, *The Concept of Law*, pp. 13–14; A.R. White, *Grounds of Liability*, pp. 12–13.

contexts. Ordinary language can tolerate such vagaries: but a concept whose legal applications determine something as significant as a defendant's liability to punishment must, surely, have a clear, unambiguous and consistent legal meaning.⁶

Notice too the various cognates of 'intention' which are used in ordinary language. We talk of intending to do something, of doing something intentionally, of doing something with the intention of bringing about some further result; and we cannot simply assume that the concept is univocal across these different uses. But if it does have 'different shades of meaning' in different contexts or different uses, it becomes crucial to determine which of these 'shades' is (or are) relevant to its legal usage.

Second, we cannot assume in advance that 'intention' should carry the same meaning in law as in ordinary language. It serves a specific function in the law – to determine criminal liability: thus we need to ensure that its legal meaning is appropriate to that purpose – that it will enable us to make the kinds of ascription and discrimination of criminal liability which should be made. Now I shall argue that the concept's extra-legal usage in ascriptions and discriminations of moral responsibility and culpability is relevant to its legal usage in ascribing criminal liability; and that there is thus good reason for the concept's legal meaning to match its ordinary meaning. But this must be argued, not just assumed; and in extra-legal language the concept also serves other roles, for instance in explaining past actions or projecting future actions, when issues of responsibility or culpability are not apparently involved: there may thus be aspects of its ordinary usage which are irrelevant to the law's purposes, and which should therefore play no part in the concept's legal meaning.⁷

For instance, we shall see that ordinary language distinguishes intending a result from foreseeing it even as a certain effect of my action: but this does not show that the criminal law should draw the same distinction. In ordinary language I 'attempt' to bring a result about only if my action is aimed at that result, and not if I merely foresee it even as a certain effect of my action. But this feature of ordinary usage does not by itself show that the law should require a 'specific intent' for a criminal 'attempt': we must ask whether, *in ascribing criminal liability*, we should distinguish intention as thus narrowly defined from foresight of certain consequences; and a simple appeal to ordinary language cannot settle *that* question (see pp. 195–7 below).

6 See 1985 Code, paras 1.4–9; E. Griew, 'Consistency, communication and codification': compare R. Tur, 'Dishonesty and the jury'.

7 See G. Williams, 'Oblique intention'; and Lord Cross in *Hyam*, p. 96.

The law also operates under practical constraints which may make ordinary concepts unsuitable for legal purposes: legal concepts must be applicable in the context of a criminal trial; and criminal trials are subject to constraints which do not obtain in non-legal contexts. The trial concerns events that occurred sometime in the past (and a key witness to those events, the defendant, may have a motive to lie about them); the rules of evidence constrain both prosecution and defence; juries must be able to reach firm and (nearly) unanimous verdicts; conviction requires proof of the defendant's guilt 'beyond reasonable doubt' – and while the criminal process should not make the innocent liable to an unreasonable risk of mistaken conviction, it should not make it impossibly hard to convict the guilty. A concept's ordinary meaning might be *in principle* apt to the law's purposes: but if its use, with that meaning, in the context of a criminal trial would make the jury's task impossible (requiring them, for instance, to draw 'fine and impracticable distinctions . . . between one mental state and another' (Caldwell, p. 352, Lord Diplock)), we may need *in practice* to give it a somewhat different legal meaning.

Thus we cannot avoid the need to explain the meaning of a concept as central to the criminal law as that of intention. It may turn out that juries can often, if not always, be left to apply the concept in its 'ordinary, everyday meaning', without any formal direction: but we need to *show* this to be so, by showing that the concept does have a sufficiently determinate ordinary meaning which is appropriate to the law's purposes; and this requires us to investigate both what it *does* mean in ordinary language, and what it *should* mean in the law. We may (and shall) begin with its ordinary meaning, since it is from that ordinary meaning that its legal meaning must be derived (even if the derivation involves some revision): but we must then ask whether that ordinary meaning is appropriate to the law's special purposes, and practicable in the law's special contexts; and if we find that its ordinary usage exhibits 'different shades of meaning', we must ask which of them are relevant to its legal usage.

Why Bother about Intention?

A second response to the persisting controversy over 'intention' might now suggest itself. What matters in a criminal trial is whether the defendant should be convicted: should Mrs Hyam be convicted of murder, for instance? We should, therefore, focus our attention on that question, and not allow ourselves to be distracted from it by abstract (and ultimately irrelevant) discussions of the meaning of 'intention'.

Indeed, it might be said, judicial discussions of the meaning of 'intention' are often (whether consciously or not) nothing more than spurious rationalizations for judgments which are made for altogether different reasons, as

can be seen in some of the cases noted earlier. The judges in *Hyam* and *Moloney*, for instance, approached their task with firm, intuitive preconceptions about the guilt or innocence of various actual or possible defendants: that, for example, Mrs Hyam should (or should not) be convicted of murder; that a terrorist who knows that his bomb is almost certain to cause death, or the man who blew up the aircraft, should be convicted of murder; that a reckless driver who causes death should not be convicted of murder, even if he realized that his conduct might well cause death.

But the conventions of judicial practice required them to express those intuitions in terms of established legal concepts, notably that of intention (though in *Hyam* some of them made clear that the meaning of 'intention' was not the main issue: see pp. 15–16 above). The orthodox doctrine has it that murder requires an intention to cause death or serious injury: they thus had to claim that those whom they wished to convict did intend to cause death or serious injury, and that those whom they wished to acquit did not; they had to provide an account of the concept of intention which would (seem to) render their intuitive judgments consistent with the official definition of the *mens rea* of murder. Lord Bridge did not *found* his belief that the terrorist is guilty of murder on an independently justified account of the meaning of 'intention': he *began* with the belief that the terrorist is guilty of murder, and had then to offer an account of intention which would seem to justify that belief by showing that the terrorist intends to cause death or serious injury. Similarly, in *Hyam*, Lord Hailsham had to find an account of intention which would allow him to convict Mrs Hyam and the man who planted a bomb in the aircraft, while acquitting the reckless driver and the surgeon whose operation might well cause death: he had to do this, however, not because those judgments really depended on the meaning of 'intention', but because he had to express his judgments in terms of orthodox legal doctrine.

The courts' failure to agree on the meaning of 'intention' shows, however, that this concept cannot provide a justificatory foundation for the intuitive judgments which they have wanted to make: we should therefore abandon the vain attempt to find an account of its meaning which will fit those intuitions, and instead ask more directly, and honestly, which defendants we should convict of which crimes.

Now courts are no doubt sometimes simply trying to express (and be seen to justify) their prior intuitions in terms of orthodox legal doctrines; and we must recognize the possibility that concepts which have traditionally played a central role in the law are in fact not appropriate for the law's purposes. But we need not yet abandon the attempt to explicate the concept of intention as a concept which is, and should be, central to the determination of criminal liability.

Intuitions, our immediate and pre-reflective judgements, do indeed play an important role in both moral and legal thought: we 'see', or feel, immediately that this person is a murderer while that person is not; and we may then look for an account of legal rules, and of the meanings of the concepts in terms of which those rules are expressed, which will fit our intuitive judgement. But our account of those rules and concepts need not, and should not, be merely a spurious attempt to rationalize our non-rational intuitions. For our intuitions do not lack reason: they reflect our (perhaps inarticulate) understanding of the situations which we judge, and of the concepts in terms of which they are expressed; and they must, if they are to carry any weight, be articulated and justified. We must be able to show *why* we judge this case thus, by indicating the features which ground our judgement; we must be able to show that our judgements are *consistent* as between different cases, by indicating the relevant similarities between the cases which we judge similarly, and the relevant differences between cases which we judge differently.

We thus need a range of concepts which can mediate our judgements: concepts whose application to a case determines our judgement on that case; concepts which distinguish from each other cases which we judge differently, and which identify the relevant similarities between the cases which we judge the same. In the case of murder, for example, we might begin with a general category of homicide or wrongful killing: but we must then try to identify those kinds of homicide which should count as murder – as the most culpable sort of homicide; we thus need concepts which will pick out the features of a killing which make it particularly serious or culpable. Now in this and in other contexts the concept of intention is in fact used, both in morality and in the law, to identify and discriminate different kinds and degrees of culpable responsibility. This creates at least a presumption that it is appropriate to that purpose; that we can hope to articulate and justify (or correct) our intuitive judgements about certain kinds of killing by means of that concept.

This is, of course, no more than a presumption, which needs to be justified if it is to be sustained: my point is only that we should take seriously the fact that principles of criminal liability are in fact expressed and applied in terms of the concept of intention. We shall see later that there are indeed good reasons for this; that we can provide an account of the meaning of that concept which will show why it should be central to the determination of criminal liability.

I shall begin by examining the ordinary extra-legal concept of intention. That concept is, we shall see, appropriate to the legal purpose of determining criminal liability, because it is essentially concerned with the agent's responsibility for the results which she is said to intend or to bring about

intentionally: but the persisting legal controversy about the meaning of 'intention' reflects a lack of adequate attention to the different aspects of the ordinary concept of intention; in particular to the difference between *intending* a result and bringing a result about *intentionally*.

The paradigm of intention involves bringing about a result which I *intend*, or act *with the intention* of bringing about; and the legal notions of 'actual' or 'specific intent', or 'purpose', aim to capture this paradigm. But the concept of intentional action extends beyond this paradigm, to include results which I bring about not 'with intent', but *intentionally*; and the wider legal definitions of 'intention' try to capture this broader notion. This distinction between intended and intentional agency renders futile any attempt to provide a *unitary* account of intention, since any such account will be either too wide for the notion of intending a result or too narrow for that of bringing a result about intentionally; and the lasting confusion over whether foreseen consequences are 'intended' reflects a failure to grasp these two aspects of the concept of intention.

We shall also need to recognize, however, that these two aspects of the concept of intention are related to two different, conflicting, *moral* conceptions of responsible agency: if we are to decide what 'intention' should mean in the law, and whether the broader or the narrower species of intention should be required for various criminal offences, we must face not just the linguistic question of what 'intention' means, but the moral question of how we should conceive responsible agency.