OBLIQUE INTENTION

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Why is it that intention, or intent, one of the basic concepts of the criminal law, remains so unclear? Judges decline to define it, and they appear to adjust it from one case to another.

Part of the trouble is the disagreement on the subject of intention among jurists generally. The philosophers who have lately arrived on the scene, hoping to help the lawyers to solve their legal problems, in fact give only limited assistance. Their philosophical interest stems from the fact that intention is an important ethical concept, but they do not relate their discussions to any particular ethical theory, and they do not sufficiently consider the specific requirements of the criminal law. Indeed, they mix up the ordinary meaning of the word "intention" with its desirable legal meaning. To be sure, the meaning of intention as a technical term of the law ought to be close to the literary and popular one, but there are sound reasons for saying that the two should not always be identical.

Added to the confusion of counsel is the fact that the judges sometimes wrap up excuses into the meaning of intention, though rationally excuses should have nothing to do with the matter.\(^1\)

Judges reject the proposition that the legal concept of intention in relation to the consequences of action necessarily involves desire of the consequence. This is quite right, and a useful beginning; but the recent pronouncements of the lords get no further. They do not acknowledge the truth that intention generally does involve desire, and they do not say when it does not.

What the courts ought to hold appears to me to be clear. (1) Except in one type of case, intention as to a consequence of what is done requires desire of the consequence.\(^2\) Of course, intention, for the

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1 An example is the statement that "wilfully" lets in a defence of claim of right: see my *Textbook of Criminal Law*, 2nd edn 140. Other examples are given later.

2 See the helpful analysis by the philosopher R. A. Duff in [1980] Crim. L. R. 149. This analysis is of what the author calls "intended action," by which he means "action with intent." Under the scheme of the Draft Code (see later) the analysis applies to acting "purposely"; the code uses the word "intentionally" more widely, to cover oblique intent as well.
lawyer, is not a bare wish, it is a combination of wish and act (or other external element). With one exception, an act is intentional as to a consequence if it is done with (motivated by) the wish, desire, purpose or aim (all synonyms in this context) of producing the result in question. (2) The one type of case in which it is reasonable to say that an undesired consequence can be intended in law is in respect of known certainties. A person can be held (but will not always be held) to intend an undesired event that he knows for sure he is bringing about.

(1) The first proposition is disputed by some writers, particularly the two philosophers, just mentioned, who have taken an interest in the English criminal law. Their principal argument is that one can intend to do various unpleasant things, e.g. visiting the dentist; therefore intention need not involve desire. I would have thought that the error in this is too obvious to need stating. The premise is true, but the conclusion does not follow. Obviously, people go to the dentist in order to get certain benefits (relief from pain or the preservation of the teeth). To get these benefits, the possibility of pain or discomfort is accepted. It is accepted not as an end in itself but as part of the package, and the package as a whole is desired—otherwise one would not go to the dentist. The pain taken by itself is not desired, but the proposition was not that the patient intends the pain but that he intends to visit (intentionally visits) the dentist.

The writers who deny the relevance of desire replace it with the word “purpose.” But does not purpose imply desire? One can have an undeclared purpose, but not an undesired purpose. “Undesired purpose” is a contradiction in terms.

(2) The second proposition seemed to be on its way to legal acceptance until recent pronouncements of the lords. Perhaps the lords intended to negative it. Or perhaps they did not. More of this later.

3 It would not be a misuse of language to assert that a person who is seriously planning a crime has an intention to commit the crime although he has not yet taken any step to that end. But the assertion would have little legal significance, since the law generally takes no notice of mere mental states. See, however, the following note.

4 But the external element may be a criminal omission; this can be intentional, in which case there is nothing but a non-event plus a state of mind.

5 Another philosopher, Professor Alan White, suggests a distinction (92 L.Q.R. 574): a person may go to Australia with the intention of staying for not more than a year; this is his intention when he goes, but not his purpose in going. If he goes to Australia with the intention of visiting his grandchildren, that is a purpose. I would suggest that “goes to Australia” is ambiguous. When the traveller embarks, his intention (and purpose) is to travel to Australia (not necessarily his only purpose). When he arrives in Australia that intention is fulfilled. At the same time, he intended (and purposed) to return within a year. Of course he may change his intention. I cannot think of any context in which the point would create a legal problem.

6 See Alan White in 92 L.Q.R. 576 and R. A. Duff in [1986] Crim.L.R. 773. For a lawyer’s opinion in support see Donald Stuart in [1968] Crim.L.R. 649. As will be shown, the judges seem to take the same view.
In one application, at least, the second proposition is accepted as almost universally true. Where the defendant desires result $x$, and anyone can see, by merely considering $x$, that another result, $y$ (forbidden by law), will also be involved, as the direct consequence of $x$ and almost as part and parcel of it, then the defendant will be taken to intend both $x$ and $y$.

Three men accidentally killed a girl in horseplay. Being frightened, they hid the body under a pile of stones. It was held that they were guilty of conspiracy to prevent the burial of a corpse. The Court of Appeal upheld a direction that "if the defendants agreed to conceal the body and the concealment in fact prevented burial, then the offence was made out, although prevention of burial was not the object of the agreement."

A result that is either witnessed or foreseen as certain is almost always regarded as sharing the intentional nature of an act where it is either the contemporaneous (concurrent) result or the immediate consequence of the act. A person will normally be taken to intend something that he is consciously doing, or that follows under his nose from what he is then doing.

Take *Hills v. Ellis*, where a concerned onlooker took hold of a policeman's arm in an effort to persuade him not to make an arrest. The onlooker's chief desire, object, purpose and motive was to prevent the constable from making, as he thought, a mistake; but he presumably knew that he was hindering him slightly; therefore he was, in law, guilty of wilfully obstructing him. As was said in another case, "if the defendant did an act which he realised would in fact have the effect of obstructing the police he would be guilty of having done so 'wilfully.'" 10

Decisions on the meaning of "wilfulness" in law, like *Hills v. Ellis*, are not conclusive on the legal meaning of intention, because the courts make "wilfulness" cover both intention and recklessness. Still, the decision accords with others turning specifically on intention.

Using the word "intention" in this way admittedly involves an extension beyond its normal meaning in the language. The normal meaning connotes desire. A philosopher writes: "What I do knowing I am doing it need not be done intentionally, as when I know that I am

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8 Mere knowledge is not, of course, enough to constitute intention if the defendant can do nothing about it. This proposition is particularly important in relation to offences of omission and situational offences. If a patient in hospital gets to know that his child at home is being neglected, he does not at that moment himself intentionally or wilfully neglect the child, if he cannot do anything to prevent the neglect continuing. See Glazebrook in *Reshaping the Criminal Law* (1978) 117–118. Similarly, where a person is non-culpably in possession of a contraband object the law allows him a reasonable time to surrender it to the police.
9 [1983] Q.B. 680
hurting your feelings but not doing so intentionally." The remark is true for ordinary speech, and true in law for offences involving the "hurting of feelings"; but the law is much more concerned with hurting bodies than with hurting feelings. If I drive over you because I am in a hurry and you will not get out of the way, I drive over you intentionally, and it would be no use my saying that my sole intention was to make progress. For legal purposes the meaning of intention has to be widened to this extent.

Similarly, a surgeon intentionally wounds his patient when he inserts the scalpel. He does not, of course, commit a crime of intention, but that is because he has the justification of consent. Lord Hailsham on one occasion denied this, and put the surgeon's defence on lack of intent; this is an example of the judicial tendency already mentioned, to bring in defences under the heading of lack of intention. In the unlikely case of a surgeon kidnapping his recalcitrant patient and making various incisions in him, entirely for the patient's benefit, the surgeon would be guilty of the offence of wounding with intent; yet his intention to make the incisions would be the same as in an ordinary medical operation.

The law should generally be the same where the defendant is aware that a consequence in the future is the certain (though undesired) result of what he does. He is liable for a crime of intention if the foreseen though undesired consequence is inseparably bound up with the desired consequence. This opinion has been supported by some writers, though not all. More importantly, it has been accepted by several of the major reform bodies of the common-law world. If such a variety of intention is accepted we need a name for it, the best being Bentham's coinage of "oblique intention" (though the meaning he attached to this phrase is not quite the one we now need). Direct

11 Alan White in 92 L.Q.R. 582.
12 Hyam [1975] A.C. at 77C.
13 Nevertheless, judges sometimes deny that the defendant intended a result when they wish to procure his acquittal and see no other way open. In Att.-Gen. for Northern Ireland's Reference [1977] A.C. 105 a soldier fired his SLR rifle at a fleeing suspect who was less than 20 yards away, after shouting "Halt"; the man was killed. Lord Diplock approved the ruling of the trial judge that "in the agony of the moment the accused may have acted intuitively or instinctively without foreseeing the likely consequences of his act beyond preventing the deceased from getting away." This is hard to accept. The proper ground of acquittal (though one that may be politically difficult) would be that shooting was or was believed to be the only way of preventing the escape of a person who, if the suspicion was well founded, was a dangerous criminal.
14 See Williams, Criminal Law: The General Part, 2nd edn 38ff.; Williams, The Mental Element in Crime (Jerusalem 1965) Chap. 1; Smith and Hogan, 5th edn 51; citations by Donald Stuart in 15 Crim.L.Q. 162 (Can.).
17 Bentham used the phrase to cover consequences foreseen as "likely," but this meaning of intention is now, rightly, rejected as being too wide. The alternative expression "indirect intent" is not so good as "oblique intent." If you intend to do $x$ in order to achieve $y$ you "indirectly" intend $y$, in a sense, but it is not oblique intent.
intention is where the consequence is what you are aiming at. Oblique intention is something you see clearly, but out of the corner of your eye. The consequence is (figuratively speaking) not in the straight line of your purpose, but a side-effect that you accept as an inevitable or “certain” accompaniment of your direct intent (desire-intent). There are twin consequences of the act, x and y; the doer wants x, and is prepared to accept its unwanted twin y. Oblique intent is, in other words, a kind of knowledge or realisation.

When one speaks of the unwanted consequence as being “certain”, one does not, of course, mean certain. “Nothing is certain save death and taxes.” For example, a person who would otherwise have been the victim of the criminal’s act may be warned in time, or providentially happen to change his plans, and so escape what would otherwise have been his fate. Certainty in human affairs means certainty as a matter of common sense—certainty apart from unforeseen events or remote possibilities. Realisation of practical certainty is something higher in the scale than appreciation of high probability.

The general acceptance of the doctrine of oblique intent

The notion of oblique intent has been accepted in some other countries, as for example Sweden, and the United States in the Model Penal Code (s.2.02(2)), which has been implemented in many of the States; also in the proposed new Canadian code. In England it has been accepted by the Law Commission, the Criminal Law Revision Committee, and more recently the framers of the Draft Code. The codification team realised that there is not a single concept of intention in law, but two: a wider concept bringing in knowledge without desire and a narrower concept confined to desire. To accommodate both concepts the Draft Code provides the lawgiver with two words, “intention” and “purpose.” “Intention” brings in oblique intent; “purpose” does not.

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, [or] is aware that it exists or is almost

19 Law Reform Commn of Canada, Report 30, cl. 2(4)(b). This proposal uses the single word “purposely” to cover both direct and oblique intention, which leaves a legislator no word to express direct intention alone. This, I think, is a mistake.
22 Cl. 22.
23 Duff in [1986] Crim. L. R. 773–774 criticises this for omitting to require that the actor must act as he does because he wants the element to exist or occur. But it seems to me that this requirement is fairly implied in the formula.
24 I propose the insertion of the word “or” for greater clarity.
certain that it exists or will exist or occur; "knowingly" when he is aware that it exists or is almost certain that it exists or will exist or occur.25

I incline to think that "almost certain" is too lax. A person who is almost certain of a result would better be said to think it highly probable than certain. He may be almost certain when he retains a small but appreciable doubt. Lord Hailsham expressed the notion of oblique intent more narrowly by saying that "intention" includes "the means as well as the end and the inseparable consequences of the end as well as the means."26 (What he presumably meant was "the consequences known to the defendant to be inseparable in ordinary human experience"). I would call it "virtual certainty,"27 though "practical certainty" (the expression chosen by the Model Penal Code) would be an acceptable alternative. The code should proceed to define virtual certainty as a certainty that in the ordinary course of events the consequence will follow unless something unexpected supervenes to prevent it.28

Illustrations of oblique intent

Examples of oblique intent in relation to future consequences are probably rare in situations of interest to the law, since almost always a person who foresees an illegal consequence as the virtually inevitable result of his act will desire it (if not as a final end, then as an instrumental end). In the two cases before the Appeal Committee in the last few years where the notion of intention was reassessed (Moloney29 and Hancock30), many remarks were uttered that may or may not have been meant to refer to oblique intent, but this doctrine was not (or need not have been) in issue. Either the defendants in those cases foresaw that death or grievous bodily harm was the inevitable consequence of their acts (in which case they clearly desired such consequence, since no other interpretation of their conduct was reasonably possible), or they did not foresee this (in which case no question of oblique intent arose).31 But a crux case of oblique intent had previously been put by Lord Hailsham when he made the

25 I would add the words "and could avoid such element by altering his conduct." See n.8 above.
26 Hyam [1975] A.C. at 74C.
27 The Law Reform Commission of Canada at one time favoured this phrase (Homicide, Working Paper No. 33 of 1984), but in its final Report (n.19 above) it avoids (or conceals) the issue by saying that "a person acts purposely as to a consequence if he acts in order to effect that consequence or another consequence which he knows involves that consequence." Knows for a certainty or knows for a probability? Would it not be better to bring the point out into the open?
28 This was the formulation of Lord Bridge in Moloney, but it is not clear whether he was speaking of oblique intent or direct intent. See text below at n.52.
31 This is convincingly demonstrated by R. A. Duff in [1986] Crim L.R. 774–775.
statement already quoted: \(^{32}\) suppose that a villain of the deepest dye blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. It is not his aim to cause the people on board to perish, but he knows that success in his scheme will inevitably involve their deaths as a side-effect. To say that the villain \textit{desired} or \textit{purposed} to kill the occupants of the plane would not be a statement of truth; but it is possible for the law to say that he is to be taken as having \textit{intended} their deaths. Lord Hailsham was prepared to hold this, which enabled him to come to the conclusion that "if any passengers are killed he is guilty of murder, as their death will be a moral certainty if he carries out his intention." \(^{33}\)

Common sense, I think, approves this way of looking at the matter; the case should not merely be regarded as one of manslaughter by recklessness. Public opinion would be outraged if the bomber got off a charge of murder for killing the plane-load of people, on the argument that he would not have minded if they had all survived, provided that he could obtain the sum insured. The outrage would be just as great if there were an acquittal of murder or of intentionally causing grievous bodily harm when a robber, escaping from the scene of his crime, drives very fast at a constable who is blocking the way, and kills or seriously injures him. The robber may admit that he knew the officer was bound to be seriously injured if not killed, but assert that he did not wish to injure or kill him—only to escape. \(^{34}\)

Consider, as another example, a case put by R. A. Duff. \(^{35}\) a terrorist sets a bomb, giving timely warning to the public and desiring only to cause alarm or damage to property, but knowing for certain that a bomb disposal expert will attempt to deal with it and will (because the bomb is unusually constructed) be killed in the process. If the expert is killed, the terrorist should obviously be guilty of murder. (Some may say that he should be guilty of murder if he knowingly subjected police officers to a terrible risk, without realisation of the certainty of causing death; but that is a different issue.)

\(^{32}\) Note 12 above. Lord Hailsham took the illustration from a Report of the Law Commission \textit{(Imputed Criminal Intent, Law Com. No. 10 para. 18); its unsung source was my book \textit{The Mental Element in Crime} (Jerusalem 1965) 34–35.

\(^{33}\) Lord Hailsham was giving judgment in a case \textit{(Hyam)} in which it was held that murder could be committed without intention, by knowingly running a risk of a certain degree of gravity. But his sentence previously quoted shows that he regarded his hypothetical not as an instance of risk-taking but as one of intention. The actual decision in \textit{Hyam} was set aside in \textit{Hancock} [1986] A.C. 462; see Duff in [1986] \textit{Crim.L.R.} 775–776.

\(^{34}\) If the robber thought that there was an appreciable possibility that the officer might be able to jump out of the way, the case would be one of extreme recklessness, not intention (even conditional intention). See below at n.69 as to the distinction between recklessness and conditional intention. Admittedly the distinction involves some subtlety, but any distinction between intention and recklessness involves subtlety. \(^{35}\) [1986] \textit{Crim.L.R.} 777–778. The author, who argues for the narrow definition of intention, recognises that the terrorist must as a practical matter be convicted of murder, and proposes that a new head of mental element for murder should be added.
Arguments for recognising oblique intent

That cases of the types mentioned should be treated in the same way as ordinary cases of intention is obvious, but opinions differ between two methods of carrying out the policy. One method would be that already proposed: to relax the definition of intent sufficiently to allow oblique intent as a kind of intent. The other would be to redefine all crimes of intention, when it is desired to bring in oblique intent, by making express provision for it.

The second alternative would involve defining murder, for example, as causing death (i) with intent to cause death or serious injury, or (ii) with knowledge that such death or injury is virtually certain. This would make the law perfectly clear, but the definitions of the relevant crimes would become slightly more cumbersome. There appears to be no possibility that Parliament would now revise the law of murder to make specific provision for this additional mental state (upon which the prosecution would rarely need to rely), and any attempt to do so would reopen the whole thorny issue of risk-taking and murder. And not only murder but also various other crimes requiring intention would need the extended definition.

The first alternative would avoid this drawback. As was shown before, there are solid reasons for saying that oblique intent is recognised in the law as it stands, and if the courts accept this opinion no legislative departures are needed.

The case for taking a broad view of intention is particularly strong where the desired consequence is inseparably bound up with the foreseen though undesired consequence. (i) Consider Arrowsmith v. Jenkins. A political campaigner commenced to address people on the highway, and continued to do so although she knew that she was causing the highway to be blocked, to a degree that (whether she knew it or not) the law regarded as unreasonable. She was convicted of wilfully obstructing the highway, even though her purpose was to hold a meeting, not to obstruct the highway. In the circumstances, holding the meeting was the same thing as obstructing the highway; they were simply two sides of the same coin. (ii) The following were the facts of a notorious Brighton case of 1871. A woman inserted strychnine into a chocolate and attempted to administer it to V. The chocolate she gave having been found to be poisoned, the woman said that she did not know it, and tried to prove her innocence by showing that poisoned chocolates were circulating in the locality. She did this by introducing strychnine into a confectioner’s stock of chocolates; and the buyer of

37 See 121 N.L.J. 780.
some chocolates died. The poisoner was held guilty of murder; yet her primary intent was to dispel the suspicion against her. She did not want anyone other than V to die, and would not have felt frustrated if, by chance, no one died. In those days the crime of murder was much wider than now; but if the poisoner felt sure that her poisoned chocolates would kill someone, would she not still be rightly convicted of murder on the ground that she intended to kill, notwithstanding that she did not desire to do so?

A peculiar group of cases are those where the law theoretically requires proof of fact $y$ but the courts regard it as readily satisfied by proof of $x$. A publisher may be convicted of conspiracy to corrupt public morals, obscenity, or blasphemy, on account of an assumed intent to commit these crimes, if he knowingly publishes matter which the jury find to have a tendency to corrupt public morals, to deprave and corrupt those to whom it is published, etc.; and no evidence is needed to support the jury's conclusion. Strict proof of the purported conclusion would be practically impossible, requiring a large sociological enquiry and a consensus on disputed values. The courts simplify the matter by making the equation $x = y$, $x$ being the physical event that the defendant intends (the publication) and $y$ being the jury's determination that it amounts to $y$.38

Objections to the doctrine of oblique intent

Two objections have been made. The first is that the doctrine expands the ordinary meaning of intention. Undesired consequences of action are not usually counted as intended. A person who intends to achieve $x$, while fully expecting $x$ (if he achieves it) to be accompanied by $y$, will not regard himself as having failed if he achieves $x$ but by some chance $y$ does not occur.39 So he does not intend $y$ in the sense of direct intention.

True, but the objection can be answered. To reject the doctrine of oblique intent would involve the law in fine distinctions, and would make it unduly lenient. Also, the enlargement of the legal meaning of intent to cover oblique intent, that is to say the known side-effect of a desired end, is quite small (much smaller than that involved in the

38 See Kneller (Publishing etc.) Ltd [1973] A.C. 435 at 462. Cp. Chandler [1964] A.C. 763, where the lords seemed in effect to create an unbreakable link between freedom from obstruction for air force machines and the "safety or interests of the State". However obvious the connection may be, should not the jury be left to decide it? They would, of course, be allowed to decide it as a matter of common sense or public knowledge, without evidence.

39 The point is pressed by Duff in [1980] Crim.L.R. 150–151; but he modifies his position by accepting that oblique intent can come within the notion of "intentional action," though not of "intended action." This is too subtle a distinction to be useful for legal purposes. Neither judge nor jury would see any difference of meaning between saying that a killing was intentional and that it was intended; between saying that D intentionally killed V and saying that D killed V by an act intended to kill V.
judges’ previous attempt, now abandoned, to make intention cover knowledge of mere probability). Generally speaking, the courts should attach ordinary meanings to the words of the law; certainly these words should not be wrenched far away from their ordinary meanings; but a small departure is sometimes permissible on grounds of policy. I do not think that any jury would have trouble in understanding and accepting the slight extension of “intention” here proposed. 40

Until recently Lord Diplock and others were saying, in effect, that the notion of intention covered recklessness. The courts have now given up the struggle to maintain this unreasonable and unjust position, but what will happen if they swing to the opposite extreme and renounce oblique intent as well? Cases of oblique intent will fall back into recklessness, but is that an appropriate category? Suppose some scandalous cases arise in which people who have brought others to coolly calculated (but not purposed) death or serious harm are acquitted of murder or of intentionally causing grievous bodily harm. Might that lead to a campaign to bring all recklessness back into intention? Be sensible, and accept the compromise that oblique intention, but not recklessness, is a kind of intention.

The second objection to a general doctrine of oblique intent is that its results may sometimes be out of accord with our feelings of justice, or perhaps of verbal fitness. Duff advances three types of case as possible illustrations. 41 He does not assert that the doctrine is inapplicable in these cases, but only that a conscious decision should be made on whether to apply it or not; nevertheless his discussion seems to imply his own inclination to say that it should not apply. Here are the three cases.

(1) **Implied malice in murder.** A person has knowingly caused serious injury, and so has brought about a death though it was not his purpose to do so. If he purposed to cause the injury he is guilty of murder. But should he be guilty of murder if he did not purpose it? I find it hard to imagine circumstances in which this could raise a practical problem; in the Draft Code it could perhaps be settled one way or the other by using either the concept of intention or that of purpose, according to the policy decision that has been made. (The draftsmen have in fact used that of intention, but added a requirement of awareness that the injury may kill; this seems to me to be perfectly satisfactory.)

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40 The opposite objection is also advanced: that the doctrine of oblique intent is unnecessary, since direct intent does not involve desire. Reasons for rejecting this position were given at n.6 above.

(2) Attempts. Duff seems to favour the view that these cannot be committed with an oblique intent. Like Smith and Hogan, and the code drafting team, I disagree. Certainty should be enough, when it is enough for the crime in view.

A hypothetical illustration may be based upon the Brighton case already mentioned. Assume that D knew she had inserted a fatal dose of poison into the confectioner’s chocolates, but that her activities were discovered before anyone consumed a chocolate from the poisoned stock. It is obvious to me that this should be attempted murder, even though D’s object was not to kill members of the public but merely to save herself from a charge of attempting to murder V.

The bomb-on-the-plane villain should be guilty of attempted murder if he is arrested the moment he puts the bomb on the plane. The robber who drives furiously to get away, and continues on his course without slackening speed when he sees a police officer standing in his path, believing that the officer has no chance of escape, should be guilty of attempted murder if the officer quite remarkably manages to avoid the vehicle. In practice, of course, proof of the oblique intent would often be problematic; and villains who behave like this are regularly (and scandalously) convicted merely of a driving offence.42

(3) “With intent” crimes. A number of crimes are worded in terms of doing \( x \) with intent to do or produce \( y \). Duff asks us to consider the possibility that the phrase should be read as referring to purpose, so as to exclude the doctrine of oblique intent.

One thing is clear: there can be no universal rule on offences of “with intent to” applicable to the law as it stands. Take section 18 of the Offences against the Person Act 1861, creating the crime of wounding or causing grievous bodily harm with intent (i) to do g.b.h. or (ii) to resist or prevent lawful apprehension. Intent (ii) is an intent to produce a further consequence, and may possibly be read as requiring a purpose to produce it. But intent (i) merely makes the crime one of intentionally wounding or causing g.b.h. No further consequence is involved, and the crime cannot reasonably be construed as one of purpose. The Draft Code (clause 74) proposes to reword it in a way that makes this clear.

There is another reason for denying that offences of doing an act “with intent to” something else require direct intent. Doing an act with intent to \( y \) involves the same intentionality as intentionally doing \( y \). If the latter can be committed with oblique intent, so, surely, can the former. For example, there should be no difference of meaning between (i) doing an act with intent to impede a prosecution and

(ii) intentionally impeding a prosecution, except that (i) covers preparatory acts as well as the completed act of impedance. Formula (i) therefore covers a wider class of cases than (ii), not a narrower one.

Certainly there are some odd decisions on "with intent to" crimes, which apparently support the idea that a praiseworthy or venial motive can negative the intent that would otherwise be found. But the decisions, when examined, will be found not to involve oblique intention.

Take the controversial case of Steane, where the charge was of doing an act likely to assist the enemy with intent to assist the enemy. It was held that although Steane (a British subject resident in Germany on the outbreak of war in 1939) knowingly assisted the enemy by broadcasting for them, the jury were entitled to find that he did not intend to assist the enemy, because his intent was to save himself and his family from persecution.

This ground of decision was plainly wrong. Steane intentionally assisted the enemy. As Lord Morris said on one occasion, when a person acts under duress his act is "done most unwillingly but yet intentionally". Steane intended to broadcast for the enemy and also intended to protect himself and his family from the terrifying pressures that the Nazis could exercise; the second intent did not negative the first. The first intent was, indeed, necessary to effect the second. So the decision, though sometimes discussed in connection with oblique intent, did not in fact involve this concept. Steane had two direct intents: to assist the enemy, and (thereby) to gain safety for himself and his family.

This criticism of the reasoning does not mean that the actual decision was wrong. Duress is a defence to a criminal charge; there was evidence of duress before the jury; and they should have been instructed upon it. Steane's conviction would have been properly quashed on account of this misdirection.

Then again there is the decision in Brindley, where the charge

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43 [1947] K.B. 997, commented upon in the N.I. C.A. in Lynch [1975] N.I. at 49F-H; Williams, C.L.G.P. 2nd edn 40; Williams, The Mental Element in Crime (Jerusalem 1965) 21-23. Lord Simon of Glaisdale in D.P.P. for Northern Ireland v. Lynch [1975] A.C. at 699, after expressing some discomfort with Steane, said: "I do not suggest that the actual decision was wrong; but I would support it on the alternative ground that, when a person is placed in an unusual and stressful situation, it is unsafe to assume, even prima facie, that he intends the natural and probable consequences of his acts; so that the direction to the jury was misleading and inadequate." This seems to me merely to restate the decision.

44 Lynch, last note, at 670B.

45 Although defence counsel mentioned the defence of duress, the Court of Criminal Appeal did not adjudicate upon it, saying that the burden of proof of duress was upon the defendant. This opinion was inconsistent with Woolmington [1935] A.C. 462 and is now rejected (Bone [1968] 1 W.L.R. 983, 2 All E.R. 644). Anyway, there was surely sufficient evidence of duress to take the defence to the jury. It is now recognised to be the duty of a trial judge to leave defences to the jury of which there is evidence even though they have not been relied upon by defence counsel.

was of doing an act with intent to impede the apprehension or prosecution of a person for an arrestable offence (Criminal Law Act 1967 s.4(1)). The defendant witnessed the offence being committed by an acquaintance, but denied to the police that he had seen it. On appeal against conviction, it was argued for the defendant that the jury ought to have been directed to consider whether he might have had some intent other than that of impeding arrest and prosecution. The appeal was dismissed, but only on the ground that there was no duty to give the proposed direction because no other intent had been suggested by the defence. A somewhat similar point had arisen in the earlier case of Jones, where the defendant had made untrue statements concerning articles found in his house, and was convicted as accessory after the fact to the theft of these articles by his wife (this type of complicity is now repealed). The conviction was quashed, one of the reasons being that the jury had not been directed on the point that the defendant might have given the answers he did to avoid prosecution himself, apart from any consideration for his wife. Were these decisions correct? Not, surely, on the ground that the offence required direct intent. It should be no defence to a charge under the section considered in Brindley for the defendant to say that he told the lies to carry out a promise he had made to his friend, or to get the police out of his house (where their presence was lawful), or because he did not want to contradict someone else who had told the same lies. As in Steane, such ulterior intents could not, in logic or on the usual view of the law, negative the primary illegal intent that was the basis of the charge.

It certainly seems from these cases on doing acts "with intent to" that the courts may hold that even a direct intent can be effaced by a venial motive. But if there is such a rule for these crimes, it must surely apply to all crimes of intention, for the reasons already stated. Moreover, if a requirement of intention lets in an open-ended list of excuses, this will greatly impair the certainty, and possibly the effectiveness, of the criminal law. Defences like private defence and duress have been laboriously circumscribed after centuries of consideration. Are these and other possible defences to be set wholly at large when the crime requires intention? Would the jury be free to allow a defence that a terroristic crime was carried out for political purposes? Or a defence by an animal-rights campaigner that he only burnt down a laboratory in order to prevent cruelty to animals? Are purposes like these to be accepted as negativing criminal intent?

The question before the court in Steane and Brindley was whether considerations of self-protection or the protection of others saved the...
defendant from conviction. The courts seem in effect to have answered yes, but placed their decision upon the concept of intention. If a purpose of protection (including, as in Brindley, avoidance of the consequences of breaking English law) excludes intention, why did it not exclude liability in the case of conspiracy to prevent burial? The object of the defendants in that case was obviously to protect themselves from some charge in respect of causing the girl’s death, yet they were not allowed a defence. The proper course would be either to allow self-protection as a specific defence to the charge, with such restrictions as may be thought proper, or to allow no defence but to expect the defendant’s dilemma to go in mitigation.

The obscurity of the lords’ opinions

Some judges have accepted the doctrine of oblique intent, as for example Lord Hailsham in the passage already cited. But others, and particularly the lords in some recent cases, show no understanding of it, or else express themselves so hazily that one is not quite sure what they think. The most remarkable feature of these decisions is the elaborate effort the judges make to avoid articulating a definition of the concept that they are talking about.

Even Lord Bridge, a judge of high esteem, has to be included in this criticism, on account of his judgment in Moloney (where he was delivering in effect the decision of the Appeal Committee). In making the following comments on his words I must (as on a previous occasion) trust to being able to draw upon his fund of forgiveness. My remarks should not be taken as lessening the appreciation due to him for the part he took in ridding the law of the confusion between probability and intention.

Some parts of his judgment were apt to express the notion of oblique intent (though he never used the expression). He said that a given intent is “established” when the actor foresees the “natural” consequence of his act, using this expression in the special sense that “in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent

48 Hunter, above n.7.
49 Hyam, above at n.12. But Lord Hailsham has now laid himself open to criticism on the point. Having accepted the notion of oblique intent in Hyam, he failed to provide for it in his remarks in Moloney [1985] A.C. at 913E, where he said: “Foresight and foreseeability are not the same thing as intention although either may give rise to an irresistible inference of such”. Foresight of a consequence as certain should generally be accounted “the same thing as intention”.

See also Jim Smith in the C.C.A., [1961] A.C. at 297ff., explained by J. C. Smith in [1986] Crim.L.R. 181–182. The C.A. was reversed by the lords; hinc ille lacrymae. In Moloney (as explained and corrected in Hancock) the lords reversed themselves and departed from Jim Smith, and the C.A. in Hancock consequently declared that the law was back to the situation in which it was when the C.C.A. decided Jim Smith: [1985] 3 W.L.R. at 1019A. This should mean that we have won back the rule for known certainties; but, as will be shown, the point is still unclear.
"it." Then he put the point in negative form, saying that "the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent." The use of the word "establish" in both sentences seems to indicate that he was advancing a proposition of law, that such foresight amounts in law to intention. Read in this way, both sentences are broadly acceptable on the subject of oblique intent, subject to comparatively minor qualifications.

The inference that in both sentences Lord Bridge was speaking of oblique intent is supported by the fact that he emphatically rejected the notion that intention involves desire. And he must have been thinking of oblique intent in the second sentence, for otherwise this sentence would be plainly wrong. If intention as to a consequence always requires (connotes) desire, then it is not true that knowledge of the overwhelming probability of the consequence invariably established intention. The doer may realise that there will be all sorts of undesired side-effects of his conduct, and selfishly or philosophically ignore them. That he goes ahead in spite of them does not show that he desires them. But it is equally untrue to say that the foreseen probability "must be little short of overwhelming before it will suffice to establish the necessary intent" if Lord Bridge was speaking of direct intent, desire-intent, because any degree of known possibility, if coupled with other adequate evidence, can establish direct intent.

One cannot help wondering whether the learned lord spoke in riddles because he was intimidated by history. To asseverate that the defendant's realisation of the certainty of the consequence is intention in law, irrespective of his purpose, might have been thought to put the

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50 [1985] A.C. at 929B.
51 Ibid. at 929H. See the discussion of Lord Bridge's propositions in the judgment of the C.A. in Hancock [1985] 3 W.L.R. at 1017H.
52 (1) It was unwise to introduce the word "natural." If, as appears, Lord Bridge meant it a synonym for "virtually certain," it was a poor choice, because the two expressions are not synonyms in ordinary speech. Lynn in 137 N.L.J. 871 gives an example: "Conception is a 'natural' consequence of sexual intercourse but it is not necessarily probable"—much less (we may add) certain. It was because they saw that "natural" does not even mean "probable" that the lords later, in Hancock [1986] A.C. 462, disapproved the use of this word, when standing by itself without the addition of "probable," in instructing juries; they evidently thought that it could convey too wide a meaning. It follows that they did not think that "natural" made a suitable synonym for "virtually certain" (though unfortunately they said nothing on virtual certainty, and nothing that could be read as an endorsement of the doctrine of oblique intention). (2) It was perhaps impolitic of Lord Bridge to refer to probability, even though qualified as "overwhelming probability," without again insisting that what is here in issue is virtual certainty. "Virtual certainty" has, to my mind, a greater degree of precision than "overwhelming probability." It starts from the clear notion of certainty and weakens it only slightly by the adjective "virtual," which is better than admitting the probability, however qualified, is sufficient. (3) If by the words "establish the necessary intent" Lord Bridge meant "justify a verdict of intent irrespective of desire, this being the one case where intent does not imply desire," then his words would be in substance acceptable, but he should have said that such knowledge is intention in law. It is a case not of x establishing y but of x being y.
clock back to *Jim Smith (D.D.P. v. Smith)* and the unhappy reign of the “natural and probable consequence” rule. Perhaps Lord Bridge thought, consciously or unconsciously, that the best way of achieving a satisfactory result while keeping clear of the troubles of the past was to adopt the course he did: to say that intention need not involve desire; to leave the word “intention” undefined; and to allow the jury to be told that they can regard the intention as established if they find that the consequence in question was certain in the ordinary course of events. The judge can then sit back with a fair assurance that the jury will find that the certain consequence was intended even though they know that the defendant did not desire it. If the jury return to court and ask precisely what intention means in law, the trial judge must fudge the matter as best he can.

A practical solution, perhaps, but is all this obfuscation necessary? Those of us who in the past have argued against the “natural and probable consequence” rule were directing ourselves specifically against equating knowledge of probability with intention. There is no objection, in general, to equating knowledge of certainty with intention.

Another unhappy aspect of Lord Bridge’s opinion is that he said more than once that results are not intended merely because they are known to be probable (in varying degrees); in these passages he made no reservation for cases where the probability is so high as to amount, in human terms, to certainty. For example, he declared, following Lord Reid, that the reason why probability does not amount to intention is because it has many degrees, and that “it is neither practicable nor reasonable to draw a line at extreme probability.” Why then (the innocent reader may enquire) did Lord Bridge in another part of his judgment propose a special rule for “overwhelming probability”? Is overwhelming probability, which produces a line, different from “extreme probability,” which does not? This seems to have been his meaning, but he did not make the point clear. Nor did he do so in another place, where he asked whether the defendant’s foresight of an eventuality “as a probable consequence of his voluntary act, where the probability can be defined as exceeding a certain degree, is equivalent or alternative to the necessary intention.” On this Lord Bridge said “I would answer this question in the negative.” In excluding a “probability defined as exceeding a certain degree” he could hardly have meant to exclude from the concept of intention what he elsewhere called foresight of an overwhelming probability, because he said that the latter can “establish” intention. In what sense does it

54 [1985] A.C. at 928E.
55 Ibid., at 928A.
establish intention? If the meaning is that foresight of overwhelming probability is conceptually the same thing as intention, then this would be very satisfactory; but in this case it must be “equivalent or alternative to the necessary intention”, which Lord Bridge comprehensively denied.

His treatment of the badly-reasoned decision in *Steane* creates another area of doubt as to his meaning. Lord Bridge quoted a dictum of Lord Goddard C.J. with approval, saying that he knew of “no clearer exposition of the law”; apparently he did not notice the fallacy in the judgment. He also failed to realise the conflict between his acceptance of *Steane* and a hypothetical he propounded in another part of his judgment. He said:

A man who, at London airport, boards a plane which he knows to be 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.”

This hypothetical was intended to demonstrate that “intention is something quite distinct from motive or desire”, but in this it evidently fails. How far is it true that the man did not want to go to Manchester? In a sense he did not (this was not a perfect solution of his problem), but in a sense he did (given the choice, he preferred to go to Manchester rather than remain where he was). And why did not Lord Bridge reflect that when Steane broadcast for the enemy he “conclusively demonstrated” his intention to help them?

These obscurities in the judgment in *Moloney* have meant that the lower courts may now be in somewhat of a muddle. The practice proposed in one case by the Court of Appeal, acting in the dim and delusive light of *Moloney*, was to tell the jury that a person may intend to achieve a certain result whilst at the same time not desiring it to come about; they must not find that he intended the result merely

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56 Above, n.43.
57 [1985] A.C. at 929D.
58 *Oblique Intention*, 433.
59 Duff in [1986] Crim.L.R. 777 points out that if the traveller were asked whether he intended to travel to Manchester, his answer might depend upon the context of the question. This is true. But lawyers are concerned only with legal contexts. To put the question in a context relevant to the criminal law one has to imagine such an offence as intentionally going to Manchester, or taking a plane ticket with intent to travel to Manchester. If the traveller in the hypothetical were charged with such an offence, he should not have any defence based on the concept of intention, even if intention be defined in terms of purposive action. The traveller should not be heard to say “It was not my purpose to go to Manchester, because my purpose was to escape from the police”: on the facts supposed the two purposes would be coherent, not contradictory.
60 *Nedrick* [1986] 1 W.L.R. 1025; see the critical editorial note in Crim.L.R. 742.
because he foresaw it as probable; and if he thought that the risk of its
happening was very slight, then it may be easy for them to conclude
that he did not intend it; they are not entitled to infer the necessary
intention unless they feel sure that the result was a virtual certainty
(barring some unforeseen intervention) and the defendant
appreciated this. Although this mode of instruction perhaps "works"
well enough, there are several objections to it.

(1) It unnecessarily mystifies the concept of intention (as Professor
J. C. Smith has pointed out). The instruction leaves the legal notion of
intention unexplained, telling the jury what the definition is not,
without telling them what it is. The jury are instructed that they may
infer this undefined and apparently unknowable entity from given
facts, without informing them what is the thing that they are supposed
to be inferring.

(2) This mystery-making occurs because the instruction fails to
state that intention normally involves desire (alternatively expressed
as purpose), the only exception being the case of realisation of virtual
certainty. This exception apart, the test is: would the defendant have
felt that he failed in his purpose if the expected result did not happen?

(3) The jury, having been told (i) that they "must not" find
intention merely because the defendant foresaw the result as probable,
will be puzzled when they are then told (ii) that if the defendant
foresaw a very slight risk of the result "it may be easy" for them to
conclude that he did not intend it. Proposition (ii) is merely a weaker
case of (i), and in the absence of other clues to intent proposition (ii)
should follow à fortiori from (i); they must not.

(4) The instruction misleadingly states that intention cannot be
inferred unless the defendant appreciated that the result would be a
virtual certainty. On the contrary, whenever it can be inferred from the
evidence as a whole that the defendant desired the result to follow
from his acts, this means that he intended it, whether he foresaw it as a
virtual certainty or as any degree of probability down to an outside
chance. The judges disable themselves from giving the jury this clear
instruction because for obscure reasons they balk at acknowledging
the significance of desire (or purpose) in the concept of intention.

Basically, the trouble arises because the judges are mixing up two
questions: the evidence that justifies a genuine inference of desire or
purpose, and the evidence that compels an automatic conclusion of
intention (irrespective of desire) as a matter of law (i.e. where the
result was foreseen as certain). On the first question, the Court of
Appeal has now proposed a model direction that should have been
adopted centuries ago.

You can only decide what [the defendant's] intention was by
considering all the relevant circumstances and in particular what he did and what he said about it.\textsuperscript{61}

This is perfectly adequate for desire-intent, and needs to be supplemented only in cases calling for an instruction on oblique intent.

\textbf{Limitations of the doctrine of oblique intent}

The doctrine of oblique intent does not always work satisfactorily. Three types of exception to it are suggested by the case-law: offences of producing mental stress; some instances of complicity; and treason.

(1) \textit{Offences of producing mental stress}. Duff suggests that the unintended though known or foreseen by-product of action should not be counted as part of intended action unless its expected occurrence should have figured in the deliberation that informed the action.\textsuperscript{62} This misty formulation seems to mean that the defendant is not to be taken to have intended the undesired consequence if he thought he was justified (morally? legally?) in bringing it about. The author gives an illustration based upon the civil case of \textit{Lang} v. \textit{Lang}:\textsuperscript{63} a man treats his wife in a certain way that is unwelcome to her, believing that he has a right as husband to do so, and wishing her to continue to live with him, but knowing that his conduct will cause her to leave (because she has plainly said so). If he continues with the conduct and she leaves, does he intentionally drive her out? The question arose under the law of constructive desertion as it was formerly understood (it would have little relevance under the present law). The husband does not drive his wife out with direct intent, obviously; and would it be fair to bring in oblique intent?\textsuperscript{64}

There is a general difficulty here which may be stated as follows. A doctrine of oblique intention is acceptable in cases involving physical injury to other people; we are all expected to avoid acts that, as we know, cause such injury. But laws against causing affront or other mental stress to others are more problematic. Many things that we do, and perhaps quite justifiably do, may cause affront in varying degree. We may know this, and yet refuse to change our behaviour, because we think that we have a right to act as we do. Are we then to be regarded as having intended to cause the affront?

The question rarely arises in our criminal law, which does not create a general offence of affronting or annoying other people. But

\textsuperscript{61} O'Neill (1986) \textit{The Times}, 17 October.

\textsuperscript{62} [1980] Crim L.R. 152. Duff also makes the point that side-effects should not be counted as intentional if they are insignificant; but this consideration cannot arise in legal matters, where the side-effect is the \textit{actus reus} of a crime.

\textsuperscript{63} (1955) A.C. 402 (P.C.); but see \textit{Gollins} v. \textit{Gollins} [1964] A.C. 644.

\textsuperscript{64} Duff would apparently agree that the husband in the case put "acted intentionally" in causing his wife to leave; he questions only whether the husband intentionally caused her to leave. This shows the thinness of the verbal line that Duff would have us draw.
consider Sinnasamy Selvanayagam,\textsuperscript{65} which went to the Judicial Committee of the Privy Council on appeal from the courts of Ceylon. The board expressed the opinion that a person who unlawfully occupied a house by remaining after notice to quit could not be convicted of the statutory offence of remaining in occupation with intent to annoy the owner if his dominant intention was to retain his home, even if he knew that the owner was annoyed.

The opinion was just, and was a proper interpretation of the statutory offence. The statute, as worded, applied only to those who occupied other peoples' houses with spiteful motives. It did not apply to squatters who occupied or retained occupation without intent to annoy. If the intent to annoy were construed to include oblique intent it would have virtually no limit, because all squatting in dwelling houses annoys the owner as soon as he comes to know of it. If the legislature did not mean to confine the offence to spiteful squatters, it should have used other wording. The interpretation of the statute should not be widened merely because purely spiteful squatters in houses are an unknown species. (Squatters may be spiteful, but will have other motives besides spite.)

My conclusion from Duff's example and from the Judicial Committee case is that offences of causing stress, annoyance etc. are in a special position. It will probably be easy to find an intention in the statute creating such an offence not to cover oblique intent. In the proposed code, the matter could be dealt with by wording such offences in terms of purpose.

\textbf{(2) Questions of accessoryship.} The doctrine of oblique intent should not invariably be allowed to fix a person with intentional participation in the misbehaviour of other people merely because he foresees such misbehaviour. For example, it should not apply on facts like those in the Salvation Army case, \textit{Beatty v. Gillbanks}.\textsuperscript{66}

\textbf{(3) Treason.} The doctrine of oblique intent was in effect rejected in \textit{Ahlers}.\textsuperscript{67} The defendant was a German consul in Britain who the day after the outbreak of war in 1914 helped Germans of military age to return to Germany. Ahlers was charged with treason in the form of "adhering to the King's enemies." His defence was that what he did

\textsuperscript{65} [1951] A.C. 83.
\textsuperscript{66} (1882) 9 Q.B.D. 308. To provide for this case, the Law Commission Working Party on Codification recommended that the extended meaning of intention to include oblique intent should be declared not to apply to the illegal conduct of other persons (Law Com. No. 89 (1978) 56). The Commission silently dropped this proposal in its own recommendations: see Williams in [1978] Crim.L.R. 588.
\textsuperscript{67} [1915] 1 K.B. 616.
\textsuperscript{68} German in origin, he was a naturalised British subject, but would in any case have been subject to our law of treason by reason of his residence here.
was lawful, or anyway that he believed it to be lawful. Both defences were rejected but his conviction was quashed for misdirection on the point of intention, since on a proper direction the jury might not have found that his acts “were necessarily hostile to this country in intention and purpose.”

The case is reminiscent of Steane, but differs from it in an important way. Steane, notwithstanding the court’s denial of the fact, intended to assist the enemy; this intention was direct, even though instrumental. It could not be inferred that Ahlers directly intended to assist the enemy, either as an instrumental or as a final end. His aim may not have been to assist Germany’s war effort but only to do his duty as consul in repatriating German citizens. Any intent that might be debited to him could only be oblique.

The court’s refusal to find a treasonable intent was in effect a denial of oblique intent in the circumstances; and it was a humane decision, because if the defendant’s conviction of treason had stood he could have been hanged. (The prosecution of Ahlers was far less defensible than the German charge against Edith Cavell, our national heroine, who helped Allied soldiers who were prisoners of war to escape from German-occupied territory.) Quite apart from this, the decision was proper, because otherwise too large an extension would have been given to the crime of treason. On the principle argued for by the prosecution, British business men living abroad who went on with their businesses during the war could be convicted of treason if they knew their activities helped the enemy, even though that was not their purpose. The lesson from Ahlers is that treason (at least in the form of adhering to the Sovereign’s enemies) as the gravest crime must be limited to acts done purposely, so excluding oblique intent.

In these three types of case—offences of causing stress etc., some (but not all) cases involving questions of complicity as accessory, and treason—I would hope that the code uses the notion of purpose. Pending the enactment of a code, the courts should interpret a requirement of intent in general to include oblique intent, but exceptionally, where justice so requires, to exclude it.

But the word “purpose” is not powerful enough to keep judges to the strait and narrow path of logic. The courts may still say (though they should not say) that purposed consequence $x$ is the equivalent of, or to be bracketed with, foreseen consequence $y$, so that $y$ is to be treated as purposed along with $x$. Ahlers, it might be said, must have known that helping men of military age to return to Germany increased Germany’s military strength, so that his intent to do the first necessarily involved an intent to do the second. But the argument would be flawed. Ahlers had a strong case for saying that by the contemporary custom of nations people were allowed a short period
after the outbreak of war to repatriate themselves; and this was recognised as part of English law in an Order in Council. The court dismissed the argument, and got rid of the Order in Council by saying that it was *ultra vires* in this respect. The decision was questionable, but the court was surely right in accepting Ahlers's second line of defence, that he did not intend to give aid to the enemy. He acted as he did because he reasonably believed himself to be acting lawfully in performance of his consular duty.

However, confining liability by reference to purpose should not save the person who intends to achieve purpose $y$ by means of an instrumental purpose $x$. "There are few ways," said Dr. Johnson, "in which a man can be more innocently employed than in getting money." But a man who is hired to produce a criminal result would not be allowed to say (even on a charge of purposing) that he cared nothing about the criminal objective and was concerned only to get payment for what he did.

**Conditional oblique intent**

It may sometimes seem difficult to distinguish conditional oblique intent from recklessness, but I think that the difficulty can be resolved by asking the right questions.

We are considering an act having two consequences: the desired consequence ($x$) and the consequence not desired but known to be inevitable ($y$). Where the defendant knew that $x$ could be achieved only on a certain condition, and that on the same condition $y$ would also follow, the case is clearly one of oblique intention in respect of $y$, although the intention was conditional. (It could of course be charged as recklessness if the prosecution were prepared to mitigate the charge.) Where on the other hand the defendant expected to be able to achieve $x$ unconditionally, or on a condition not applicable to $y$, so that he may succeed in $x$ without involving $y$, it follows that he does not foresee $y$ as a certainty (i.e. as a certain accompaniment of success in his primary intention), and is not guilty of oblique intention in respect of $y$, but only, at most, of recklessness.69

69 See J. C. Smith in [1974] Current Legal Problems 116-119, commenting upon a previous discussion of my own. I would follow Smith's opinion, apart from his final reservation, which suggests that the notion of conditional intention should be applied only to conditional desire. I do not see any reason of policy for such a rule, and a distinction between oblique intent and primary intent in this single particular would look esoteric in a criminal code. (Professor Smith and his team did not venture to incorporate it in their Draft Code!)