SOME QUESTIONS AND COMMENTS ON WHAT IS CALLED “THE MENTAL ELEMENT OF THE OFFENCE”

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In this paper, I shall address three problems: the question of content and limits of the “mens rea” elements (part II), the controversy over the correct concept of negligence (part III), as well as the problem of “divergence from the intended causal chain” (part IV). In doing so, I will compare the regulations of the Israeli draft Code (the “Israeli Draft”) not only with German law, but also with English and American law. Of course, within the scope of this paper I can neither probe deeply into the subject matter nor address all the important questions related to it.

I. Introductory Remarks

Before starting with my questions and comments, I would like to make two introductory remarks:

1. First, I have to admit that I am unsure whether I understand correctly the regulations of the Israeli Draft (sec. 19-21, 22, 54). At least three sources of potential misunderstanding exist: first, the English version of the Israeli Draft is a preliminary translation of the Hebrew text. Any translation may shift the meaning of the original and binding Hebrew text. Second, misunderstanding may also result from my rather modest knowledge of the English language. Finally, and above all, I was unable to obtain information neither on the Israeli Criminal Code as a whole nor on individual code offences and their conceptual contents, in particular, and consequently, I have not been able to fully clarify the legal consequences of terminological differentiations within the Israeli Draft. This poses a serious problem: it is hardly possible to assess

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whether the conceptual notions of the Israeli Draft are adequate and justified without knowing the involved consequences.

2. In order to render my comments on the content of the mens rea elements clearer, and to facilitate the subsequent discussion, as well as to eliminate or reduce problems of comprehension, I have elaborated a diagram (see appendix 1) that juxtaposes three different draft Codes: the Israeli Draft, the draft Code for England and Wales of 1989 (the “English Draft”) and the German draft of 1962 (the “E 1962”, appendix 2).

I decided to include in the diagram the English Draft instead of the Model Penal Code (the “MPC”) as the English Draft is 30 years younger and perhaps not yet as propagated as the MPC. In any event, it seemed important to me to compare the Israeli Draft not only with German law.

I deliberately chose and incorporated the E 1962 into the diagram, for it contains — in contrast to the contemporary German Criminal Code as amended on March 10, 1987 — a statutory definition of intent (wilfulness, Vorsatz) and negligence. It is true that the legislature rejected this definition (just like the corresponding stipulations of the Alternative Draft [AE] proposed at that time during the Criminal Law reform in 1975). Nonetheless, German jurisprudence (with certain reservations) can be said to be in accord with the definitions of the E 1962. In other words: the incorporation of these definitions would probably not have brought about any change in the application of the law. Even the notorious problems the courts must struggle with (e.g. the dividing line between intent and negligence) would have remained the same.

In my opinion, the decision of the legislature not to incorporate the E 1962’s definitions of intent and negligence into law. was correct. My opinion regarding the Israeli Draft will depend upon the adequateness of those definitions and the possibility to make the mental elements of the offence the subject of statutory interpretation clauses. Statutory definitions not only bring about new problems and difficulties, but may also stand in the way of further evolution of the law.

But enough of introduction. I shall now present my questions and comments.
II. Content and Limits of the Mens Rea Elements [sec. 20, 54 (a)].

1. Distinction between Consequences and Circumstances

The Israeli and English Drafts, as well as the MPC, distinguish between the consequences and the circumstances of an act.¹ Does this distinction, not incorporated in the E 1962, make sense, and is it necessary? Some authors maintain that intention can only refer to the result to be effected, whereas one can only speak of belief in the existence of circumstances independent of the offender’s intent.² However, this position fails to take into account the possibility that a circumstance may well be a necessary part of a person’s intention.³ Moreover, arguments of this type fail to recognize that the legally relevant consequences of an act are always specified by the legally relevant circumstances, i.e., that these circumstances form an integrated whole with the consequences.⁴ From this point of view, there is no reason to distinguish between consequences and circumstances that are parts of the same offence.

2. The blue-bordered Area (Intention and Knowledge)

All three draft Codes distinguish between intention and knowledge on the one hand and conscious creation of risk on the other. First, I shall deal with the area of intention and knowledge:

a) The Concept of Intention

aa) The E 1962 defines “Absicht” (intention) in a narrow (restrictive, strict) sense: “A person acts intentionally if it is his purpose to bring about that circumstance for which intention is statutorily required”. It seems doubtful whether this definition is useful, for it frequently fails to clearly answer the question whether a person acted intentionally.⁵ Furthermore, the expression “Absicht” is not applied consistently

¹ Cf. also Duff 1990, 87; Ashworth 1991, 161 ff; Norrie 1989, 796.
³ Cf. examples mentioned by Duff 1990, 88 ff; besides, the English Draft uses a different language and refers to acting intentionally with respect to a circumstance.
throughout the German Criminal Code, especially not in the above mentioned narrow sense. With respect to this, a statutory definition of the concept “Absicht” does not make sense. As such, it was perfectly right not to incorporate the definition into the code.

bb) The English Draft defines “intention” in a broader sense: A person also acts intentionally when knowing that the result of an act will occur in the ordinary course of events. But this definition is merely a definition fiction and thus a means of legal technique. An analogous fiction can be found in the Israeli Draft: “Foreseeing the consequences as almost certain to occur” is to be classified as intention. Finnis calls this a “Pseudo-Masochist Theory of Intention — for it holds that those who foresee that their actions will have painful effects upon themselves intend those effects”. The purpose of this fiction is to transfer those legal consequences applicable in cases of intentional action (in a narrow sense) to cases of consequences being merely foreseen. Is the use of such a fiction an appropriate legal technique? Is the resulting equivalence justified? Such an equivalence could have been achieved just as well by formulating the mental elements of the individual criminal offences disjunctively as was partly done in the German Criminal Code (§ 258 dStGB). Alternatively, equivalence might be achieved by only requiring “recklessness” (or conditional intent) with regard to individual criminal offences from the start and — as in sec. 19 (2) of the English Draft (see also sec 2.02 [5] MPC) — by making clear that this prerequisite is also met in the case of intention and knowledge.

The more important question yet remains: is it always correct to equate intention and knowledge? It is not possible within the framework of this paper to properly address this question by systematically analyzing the individual criminal offences. However, there is no hierarchy in the relation between intention and knowledge; that is to say, bringing about an intended (main) effect (intention) does not ceteris paribus entail a more serious culpability than bringing about merely foreseen side-effects (knowledge), because the offender may have a legally less rejectable reason to bring about a main consequence than to perform an act despite its foreseen side-effects. On the other hand, according to the prevailing

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7 Larenz 1991, 263.
opinion the German Criminal Code describes criminal offences that are determined by a particular intention;\(^{11}\) in this respect, knowledge is not sufficient “because the object of legal protection is only protected on condition that the offender has a particular motivation”.\(^{12}\)

Neither the English nor the Israeli Draft clarify whether intention (and/or oblique intention, knowledge) is given also with regard to the foreseen side-effects whose occurrence is uncertain on the one hand, but are necessarily linked to the main consequence, on the other. As pointed out by Smith & Hogan,\(^{13}\) such a clarification, if desired, might easily be made. This exemplifies a problem common to all statutory interpretation clauses. Its definition may prove to be insufficient and, as a consequence, thereby do more harm than good.

The dividing line between intention (in the weak sense) and conscious risk-creation is not very distinct: the ambiguity is caused by the phrase “as almost certain”. This phrase, however, only conveys that the highest degrees of probability are equal to certainty, a position also maintained in the German literature on criminal law.\(^{14}\) Such a treatment of highest probability as certainty is appropriate, since absolute certainty is rare in human life.\(^{15}\)

Does the dividing line between the red- and blue-bordered areas in my diagram in Appendix I make sense in terms of value? Should we categorize foresight of probable effects as intention?\(^{16}\) These questions point to a problem that was already discussed intensively during the last century: whether conscious risk-creation (and/or conditional intent [indirect intention], dolus eventualis, knowledge of the risk, recklessness) should be categorized as intent or as negligence, as in German law, or whether it should be set at the side of intent and negligence as a new form of culpability,\(^ {17}\) as in English, American and probably Israeli law. The issue is thus one of an intermediate position between dolus and

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11 Cf. Roxin 1994, § 12 Rn 13; also La Fave/Scott 1986, 218 ff.
12 Loc cit. Rn 16.
13 1993, 76, 80; cf. also Williams 1987, 438.
16 Duff 1990, 25f, 95 ff, 97; cf. also Ashworth 1991, 149, 151: pointing out (the leading case) Hyam v. DPP ([1975] A.C. 55), which suggested that a person could be held to intend a result which he had foreseen as probable [or highly probable] to occur [also p. 153, n. 90].
17 Klee 1906, 40; cf. also Gessler 1860, 157.
culpa, and one has to ask for the necessity of such an intermediate position. In terms of value theory is there an axiological difference between “certain knowledge” and “knowledge of a risk”? I cannot answer this question comprehensively here (an issue, by the way, that in my opinion has not yet been solved). It should be enough to state the following: (1) Some authors claim there is no axiological reason to differentiate between knowledge of a massive risk and certain knowledge of its realization. Since there is no logically compelling relationship between the state of mind, on one hand, and the legal treatment of the different mental states, on the other, they argue that one cannot reach an axiologically convincing/coherent differentiation of the criteria of attribution through further differentiations between various states of mind.18 (2) Yet one cannot deny (and this is emphasized even by Jakobs) that acting on the basis of risk and acting on the basis of certainty are incomparable in terms of decision theory;19 and finally (3) “Whether we should say that an agent brings such effects about intentionally depends on several normative factors: the seriousness of the expected effects, the character of the action which causes such effects, and the adequacy of the precautions taken. Insofar as we think the action unjustified, or the precautions quite inadequate, we may hold the agent fully responsible for those effects as their intentional agent”.20 This seems to come close to the German solution.

b) Awareness of the Existence of a Circumstance

In both the English and the Israeli Draft the element of awareness of the existence of a circumstance is considerably expanded, and is usually mentioned under the catchword “wilful blindness”. By way of a statutory fiction the accused is assumed to have knowledge if he suspects the possibility of the existence of certain facts but consciously avoids clarifying the matter, in accordance with the motto “what the eye does not see the heart cannot grieve over”.21

The following is striking:

18 Cf. Jakobs 1991, 8/22 n. 44.
19 Jakobs, loc. cit. 8/27; cf. also Duff 1990, 97 ff.
20 Duff, loc cit. 98.
aa) Under which conditions is it justified to equate qualified (intentional) ignorance with knowledge and to treat it as actual knowledge? Opinions apparently differ widely in this respect. The MPC holds a very narrow understanding of the category of “wilful blindness”, the Washington Code, an extremely broad one. The English Draft and the Israeli Draft adopt an intermediate position, though the Israeli Draft clearly shows a broader understanding of the issue than the English Draft. The latter comes closer to the MPC.

bb) The Israeli Draft sees wilful blindness as an intentional state (state of mind) that may be described as “awareness of risk not related to the effects of an act”. Examples thereof are the offender who is not sure whether a woman consents to have sexual intercourse and nonetheless proceeds, or the child molester who realizes the possibility that the child may be under 14 years of age and yet is not stopped in his action by this possibility. These are fact patterns which disclose conditional intent under German law (indirect intention, dolus eventualis), sufficient for a conviction of (attempted) rape or sexual abuse of children under fourteen. As a consequence, the category “wilful blindness” as formulated in the Israeli Draft transgresses or dissolves the boundaries of German conditional intent (indirect intention, dolus eventualis): in regard to circumstances, the Israeli Draft would equate recognizing certain possibilities with knowing them.

Some further questions suggest themselves:

• Why is the Israeli Draft not more similar to the Washington Code?
• What happens should an offender assume that certain circumstances of an act which are part of an offence are present, but he is unable to clarify the state of affairs?
• Does this mean that the three-part division is being abandoned?

“A person knows or acts knowingly or with knowledge when
(i) he is aware of a fact, facts or circumstances described by a statute defining an offence, or
(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offence.”

23 The term “intentional state” is used in the sense John R. Searle (Intentionality, Cambridge 1983) uses it.

24 Frisch 1983, 345 ff.


26 BGH NJW 1953, 152.
3. The red-bordered area (advertent risk-taking, recklessness, indifference)

My comments regarding the category of wilful blindness have already exceeded the boundaries to the red-bordered area. The German E 1962 divides this area into conscious negligence (bewusste Fahrlässigkeit, § 18 II) on the one hand, and conditional intent (indirect intention, dolus eventualis, §16) on the other. Together, conscious negligence and conditional intent cover approximately what has been described as (criminal) recklessness by the English Draft and the MPC,27 or more precisely: the sector of common law recklessness as conscious risk-creation.28 The Law Commission retained this narrow definition of “recklessness”, which requires conscious awareness by the offender of the risk, and which does not regard a lack of attention as sufficient, even had the risk been obvious. How does the Israeli Draft paraphrase, divide and limit this area? I have to admit that, in this respect, I still have some problems of comprehension:

a) The Israeli Draft does not use the term “recklessness”. Why? The reason might be that “recklessness”, for example in contemporary English law, has become a rather vague concept. In an analysis of this problem, Duff29 concludes that English law offers three paraphrases of the term “recklessness”. I shall cite these three paraphrases, as they reveal problems that neither the German E 1962 nor the Israeli Draft have clarified:

   aa) The MPC and the English Draft stick to a narrow understanding of “recklessness”. In this regard, one may speak of common law recklessness, requiring conscious risk-creation.30 Thus, “recklessness” describes an intentional state and/or an “attitude of mind”.

   bb) Apparently, this narrow concept of “recklessness” has lead to results considered unsatisfactory, for recent House of Lords’ decisions have extended the concept of “recklessness” to cases where the offender was unaware of the risk or — to be more precise — where there was qualified unawareness and/or wilful blindness on the part of the offender.

29 Ibid., at 149.
In this regard, the *Caldwell* decision\(^\text{31}\) should be mentioned. According to *Caldwell* a person who creates an obvious and serious risk acts recklessly except when he has given thought to the possibility of there being any such risk and has concluded that there was none. A characteristic feature of recklessness under *Caldwell* is thus the creation of an obvious and serious risk. The requirement of obviousness reveals that such recklessness includes cases of blindness of facts regardless of the reasons for this blindness. White\(^\text{32}\) also understood *Caldwell* that way: It concerns cases where the offender “had he stopped to think would have been aware of” the risk.

cc) A third paraphrase is to be found in the *Pigg* decision,\(^\text{33}\) which holds that recklessness does not require conscious risk-creation. A prerequisite, however, is that unawareness can be attributed to a certain attitude, i.e., *indifference*: “An agent can be reckless as to a risk of which she is unaware if she is indifferent to it”.\(^\text{34}\)

The extension of common law recklessness to cases of unconscious risk-creation is interesting, as it points to a problem that neither the German law nor the Israeli Draft solves satisfactorily, and perhaps may not be solved satisfactorily at all, namely, the problem of “blindness for incriminating reasons”. We must ask whether the mental state of awareness of risk-creation should in each and every case be the decisive criterion for the distinction between punishing for an intentional offence and negligence.

A fact pattern\(^\text{35}\) that has frequently occupied the courts — probably not only in Germany — exemplifies the problem: should an intoxicated driver speed towards a policeman blocking the road in order to force his way through, intent to kill is assumed under German law only if the driver had at least given thought to the possibility that the policeman might not manage to jump aside in time. Should the driver not care about the policeman’s life, and for this reason not even consider the possibility of endangering it, he could only be charged with negligence at best.\(^\text{36}\) The difference in the range of punishment (§ 222 dStGB on the one side, and § 212 dStGB on the other) cannot be justified in the


\(^{32}\) 1985, 105/7.

\(^{33}\) [1982] 1 W.L.R. 762.

\(^{34}\) Duff 1990, 149.

\(^{35}\) BGH NSZ 1983, 407.

\(^{36}\) Jakobs 1991, 8/5a, 21; see also Duff 1990, 160, 162.
special case of blindness for incriminating reasons in terms of culpability. If unawareness is based on a lack of interest and/or on indifference, there is no significant difference at all regarding merits and demerits to the offender who gives thought to the risk and acts nonetheless. As mentioned above, this reveals once again that there is no compelling relationship between the psychic finding, on the one hand, and the evaluation of the psyche, on the other. German law attempts to defuse this problem by way of the so-called “offences qualified by specific effects”.37 Those offences may be partly interpreted historico-genetically as aiming at covering wilful blindness with reference to the consequences.38 Thus, intentional causing of bodily harm with the result of death through negligence (§ 226 dStGB) is, as far as punishment is concerned, to a very great degree equated with intentional killing (§ 212 dStGB).

I have some difficulty understanding how the Israeli Draft deals with these questions:

b) The Israeli Draft replaces recklessness with a multipart concept. Its scope and the relation of its parts to one another seem rather unclear to me. Furthermore, it remains difficult to tell whether the Israeli concept comprises three parts or whether only two.

   aa) What are the components of this multipart concept? First, mens rea is, as far as the consequences are concerned, defined as “awareness of the possibility of the consequences” (sec. 20 (a)). Then it continues, again referring to the consequences of an act, that mens rea means “intention”, “indifference” and “rashness” (“irrational confidence” precipitation, conscious negligence).

   bb) What is the content of these notions and how are they related to one another?

   (1) The “awareness of the possibility of the consequences” seems almost congruent with the area of common law recklessness as stipulated in sec. 18 (c) (ii) of the English Draft (“a person acts recklessly with respect to a result when he is aware of a risk that it will occur . . .”). This is very broad considering that we are dealing with more than mere negligence here.39 It exceeds the realm of conditional intent (indirect

37 § 22 E 1962.
38 Jakobs 1991, 8/5a, 9/33 ff.
39 Also in comparison with sec. 2.02(2) (c) MPC.
intention, *dolus eventualis*) known under German law (E 1962). But its extent remains unclear. What exactly does “awareness of the possibility of consequences” mean? Is a mere “giving thought” (*Daran-Denken*) sufficient? Shall any knowledge of possibility suffice for *mens rea*? Is the occurrence of some thought such as “this might kill someone” a sufficient condition of realizing that I am creating a risk of death (awareness of the possibility of death)? Duff\(^\text{40}\) is perfectly right to answer in the negative: “It is not sufficient, since it could be just an idle thought, not one that manifests knowledge or awareness”. Jakobs\(^\text{41}\) expresses the same, stating that merely thinking of the possibility is not enough.\(^\text{42}\)

(2) What the Israeli Draft describes as “rashness” is in a high degree congruent with the paraphrased definition of “*bewusste Fahrlässigkeit*” (conscious negligence) stated in § 18 II E 1962. But is “rashness” really meant like that? Which constellations fit in here? What about the motorist who, while violating traffic rules, thinks briefly that another motorist might come towards him and, as a consequence of the offender’s own action, could be severely injured or even killed, but who assumes that everything will turn out fine?\(^\text{43}\) Is the “rashness” rule meant to clarify that such types of cases are to be qualified not just as “negligence”? What other meaning might the regulation have? Is it, above all, meant to expand the area “awareness of possibility of the consequences”? In any event, “rashness” is an expression that is neither included in the MPC nor in the English Draft.

(3) “Indifference” (*Gleichgültigkeit*) is the third part of the multipart concept that has replaced recklessness in the Israeli Draft. Its meaning is not only unclear in borderline cases, but also with regard to its very substance.

As mentioned above, the concept of indifference played a role with regard to the extension of common law recklessness under English law. Conscious risk-creation has thus been equated with blindness as to the facts on the basis of indifference. Thus indifference has, *inter alia*, been interpreted as a case of qualified unawareness, as “inadvertent recklessness”. However, this extension has also been criticized. Among

\(^{40}\) 1990, 159.

\(^{41}\) 1991, 833.

\(^{42}\) Cf. also Binding 1919, 130 ff.

\(^{43}\) For further examples see Frisch 1983, 219.
others, J. C. Smith raised the question how one can be indifferent towards an incident or a circumstance which one is not aware of in the first place? I believe the expressions “indifference” and “Gleichgültigkeit” are ambiguous, in the English as well as in the German language.

What is meant by indifference in the Israeli Draft?

- Does “indifference” indicate “awareness of a risk”, i.e., an intentional state of mind? Does it refer to the offender to whom it is immaterial whether he is aware of the possibility of producing the results? If so, would it not be necessary to speak of “indifference” whenever an offender, when making his decision, realizes there is a possibility that certain circumstances may be given or that certain consequences may result and acts nonetheless.

- Or does it refer to an attitude which can manifest itself either in (i) someone deciding to create an unjustified risk, (ii) someone failing to notice an obvious risk, or, finally, (iii) someone acting on the unreasonable conviction that there is no risk. Indifference as an attitude may be the reason that an offender does not even think of the possibility of certain consequences. Especially with regard to certain sexual offences, the Reich Supreme Court (Reichsgericht) therefore held offenders liable for intentional offences even in such cases in which offenders did not even think of the relevant element of the offence. English appeal courts proceed likewise; they convict on the basis of inadvertent recklessness.

In my opinion, the Israeli Draft does not make it sufficiently clear what is meant by “indifference”. Specifically, clarification regarding the ambiguity outlined above, discussed both in England and Germany, is imperative. In addition, whatever the result of such a clarification might be, one must ask whether the extension or the limitation of common law recklessness through the criterion of “indifference” is appropriate. However, this can only be decided on the basis of the particular nature of each criminal offence.

48 RGSt 75, 127 f; RG HRR 128 Nr. 791, differently however BGH NJW 1953, 152.
III. Negligence — Subjective or Objective?

Section 21 of the Israeli Draft contains two versions of the definition of negligence. These versions differ in only one aspect: The first, objective version asks whether a reasonable person could have realized the risk. The second, subjective version replaces the reasonable person with the actual offender. In my opinion, the second version should be preferred although even this version is problematic.

1. The arguments in favour of a subjective definition and against an objective definition are well known and need not be repeated at length in front of such an illustrious circle. Therefore let me only reiterate that the “objective” version is a form of strict or absolute liability acceptable only to those who generally accept that liability may be imposed without reference to agent conditions. It contravenes the principle of culpability that is part of the German Criminal law, for it holds responsible for certain consequences of their conduct even those persons who are — unlike the reasonable person — not able to foresee and to avoid these consequences.

2. The second version asks whether the offender was capable of foreseeing the relevant risk that flowed from his conduct. This version can be brought into accord with the principle of culpability without difficulty, and for this reason alone, this version is preferable. However, even this version should be improved twofold:

a) The claim that negligence involves unreasonable risk-creation is misleading and unnecessary. Every offence, defined in terms of a mental state, act or omission, and a certain bad result, and therefore also an offence for which recklessness, knowledge or intention is demanded, requires such an unjustified risk-creation. A famous example: The nephew who sends his rich uncle on an ordinary flight or adventure trip in order to inherit his estate is not punishable for intentional killing even if the uncle, according to the intentions of his nephew, dies during this journey. This is only because the nephew has not created an unjustified risk to the life of his uncle.

Accordingly, the condition of unjustified risk-creation does not limit the concept of negligence or intent, but only the legal relevance of negligence.

b) The second, subjective version of the Israeli Draft asks whether the offender, in the circumstances of the case, “could have been aware of the possibility of consequences of the act being brought about”. What is the meaning of “could have been aware”? Are only individual abilities and possibilities of the offender relevant here, or do normative standards play a part, too?

If the offender really did not foresee (know) what was going to happen, but could have foreseen (known) it, this can only mean that his ignorance is based on a lack of attention, care, effort and interest, that he did not consider his act with the necessary intensity. From this arises the question to what extent a person is obliged to consider the consequences of his conduct. As an example: Do I have to check the brake lines of my car each time before I drive, or is it sufficient if my car is regularly checked by an expert?

Quite obviously, this is a normative problem about which I can only say here that there is no unlimited duty of consideration, and the standards of concentration and attention must not be too high. On the contrary, only that which can be foreseen with a generally reasonable effort will be regarded as foreseeable (and avoidable) in a normative sense.52 In other words: Negligence means unawareness (misapprehension of the risk inherent in one’s action) because of a failure to exercise capacities of thought and attention which the offender not only could but also should have exercised.

This normative limitation of negligence is not made clear in the Israeli Draft, but it is expressed in § 18 I E 1962 and in § 6 I ÖStGB (Austrian Criminal Code). Both norms concur to a great extent. § 6 I ÖStGB in the Austrian Criminal Code reads as follows:

A person acts negligently who neglects the (standard of) care which he is, in the circumstances (of the case) obliged to, and, according to his mental and physical condition able to, observe, and which can be reasonably expected of him to observe, and therefore does not foresee that he may cause a result which is an ingredient of the offence.

IV. The Object of Intent and Problems of Divergence

I now turn to the third and last part of this paper, namely the problems of disparity and incongruity between mens rea and the

referential point of \textit{mens rea} (the content of \textit{mens rea}, i.e., a proposition, and the objects of \textit{mens rea}, i.e., ordinary objects). In this respect, different types of cases can be distinguished. In my opinion, the most important divergences are: unintended manner (unforeseen mode) of bringing about the same result, unintended victim (or bad-aim) situation \textit{(aberratio ictus)}, mistaken-identity (object) situation \textit{(error in persona vel in objecto)} and mistake-as-to-death-cases (unintentional follow-up acts) also known under the catchword \textit{"dolus generalis"}. Finally, problems of divergence can also arise in the field of accessory participation if the principal makes a mistake (principal’s-mistake cases).

All these types of cases show the same basic structure. The factual and mental elements of the offence are all given, yet there is no congruence between the offender’s contemplation and the actual events. Strictly speaking, this is not a problem of intent,\footnote{Samson 1985, 93 ff.} but a question of the realization of the intent. Thus, if there is no congruence between the factual and the mental, the question is whether the offender can be convicted for an accomplished crime or only for attempt. Is congruence imperative? If yes, why? And how exactly — if at all — must contemplation and reality be congruent?

1. The German Criminal Code does not answer this question. E 1962 does not provide any regulation, either. Within the science of criminal justice, this problem has been discussed controversially for more than a hundred years. In contrast to the English and the Anglo-American doctrine, the German courts as well as the prevailing legal opinion insist on requiring a congruence between the factual and mental elements of an offence. Nonetheless, there is fierce dispute how exactly contemplation and reality must correspond to each other, and where the dividing line between a substantial and an insignificant divergence lies. I cannot delineate this matter in more detail in this context; I want, however, to at least exemplify the controversy for the sake of clarification with the help of the case of an “unintended-victim (or bad-aim) situation” (appendix 3, 4th type of case). A minority claims that, in all these cases, the agent should be convicted, not merely for attempt, but for accomplishment of the crime. This corresponds to the prevailing opinion as held by English and Anglo-American jurists. On the other hand, the prevailing legal opinion in Germany maintains that case type No. 4a (appendix 3) represents only an attempted (intentional) killing of B and that with
regard to C only death through negligence can be considered. The German Supreme Court in Criminal Matters shares this view. In contrast, the solution of case type No. 4b (appendix 3) is highly disputed.

2. Both the MPC and the English Draft contain a regulation that diverges from the prevailing doctrine in Germany and qualifies divergences in a broad sector as being insignificant. If I understand it rightly, the English Draft holds a broader understanding than the MPC in this respect.

a) Cl. 24 (1) of the English Draft states: “In determining whether a person is guilty of an offence, his intention to cause, or his recklessness whether he causes, a result in relation to a person or thing capable of being the victim or subject-matter of the offence shall be treated as an intention to cause or, as the case may be, recklessness whether he causes that result in relation to any other person or thing affected by his conduct”. Thus the English Draft enacts a traditional position known in English and Anglo-American law as “doctrinae of transfered intent (fault, mens rea”).

b) MPC sec 2.03 (2) (a) deals with the situation in terms of causation rather than transferred intent, providing that if causing purposely or knowingly a particular result is an element of an offence, that element is not established if the actual result is not within the purpose or contemplation of the actor. Certain exceptions are listed, one of which being that the actual result differs only in the fact that a different person or a different property is injured or affected. However, this does not mean that the diverging result is attributed in every case. It may be that the additional requirement in sec 2.03 (2) (b) stating that the actual result must not be “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offence” might be utilized to impose a limitation.

3. The Israeli Draft deals with the problem of divergence in a rather peculiar, or at least unusual, context, namely in section 20 (c), subsequent to the regulation of “wilful blindness”. Compared to the English and American provisions on the problem of divergence, the Israeli provision is quite short, stating only: “It is immaterial whether the act is done in respect of a person or property other than that in respect of which it was meant to be done”.

54 Cf. furthermore cl. 27 [5].
55 Cf. La Fave/Scott 1986, 284 f.
At first reading, I could not make out whether this wording only refers to the “mistaken-identity (object) situation” or whether it also includes, and is meant to include, the “unintended-victim (bad-aim) situation”. The latter would, however, seem more logical, since, as far as I can see, there is no disagreement as to the judicial treatment of the “mistaken-identity situation” and there would hence be hardly any necessity for statutory regulation. Therefore, I conclude that the Israeli Draft regards the divergence in cases of the “bad-aim situation” as insignificant and is thus congruent with the English Draft and the MPC as far as that matter is concerned.

4. Should this pragmatic standpoint be preferred to the prevailing doctrine in Germany? Would it not be better to analyse some of these cases in terms of an unfulfilled intention, combined with an accidental negligent or perhaps reckless causing of harm? It is impossible to thoroughly answer these questions within the framework of this paper, but let me make three short remarks:

a) No abstract solution independent of a specific Criminal Code can be preferred, as the matter depends upon whether and to what extent attempt and negligence are punishable offences. The report on the English Draft states this clearly.

b) However, I myself — though this is more a confession than an argument — prefer the more differentiating solution of the prevailing doctrine in Germany. The actual result — without the exceptions stipulated by the MPC — should only be imputed to intent and the offender should only be punished for an accomplished intentional crime if he is aware of precisely that risk which finds its realization in the actual result, i.e., if the risk-creation perceived by the actor and the risk actually created and finding its realization in the actual result are normatively congruent, or if the diverging course of events must under normative aspects “still be considered the realization of the actor’s plans”.

59 Cf. formulation in sec. 2.03 MPC.
60 Frisch 1983, 588 f.
61 Roxin 1994, § 12 Rn 139. Some renowned English authors, e.g., Glanville Williams, also take this position. It was given further support by famous American philosophers, e.g. John R. Searle (1983, 61, 135-140).
c) Independent of all this, we have to ask whether it is at all advisable to try to resolve problems of divergence by statute. I have my doubts about that and would like to point out in this context that the provision contained in the Israeli Draft is not very clear in its extent nor does it provide for an exhaustive regulation of the problem of divergence. It lacks, for example, a regulation of the “principal’s-mistake-cases”, in contrast to cl. 27 (4) and (5) of the English Draft. It also remains unclear how the “mistake-as-to-death-cases” should be solved under the Israeli Draft. Considering such shortcomings, it seems preferable not to attempt to resolve the problems of divergence by statute at all.

V. Conclusion

I doubt whether subjective elements of offences can be the objects of precise legislative definition. Any such definition curtails the opportunity of an evolution and adaption of the law through jurisprudence and legal science.

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### MENTAL ELEMENT OF THE OFFENCE

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<tr>
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<tr>
<td>Intention to bring about</td>
<td>Intention to bring about (sec. 20 (a)(1)) includes foreseeing as almost certain (sec. 20 (b))</td>
<td>Intention (sec. 17 (b)(iii)) Knowledge that it exists (sec. 18 (a)(ii))</td>
<td>Absicht i.e. S. (purpose, aim, intention [strictly defined])</td>
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<tr>
<td>Awareness of the existence</td>
<td>Awareness of the existence (sec. 20 (a)(i)) includes suspecting the possibility of their existence and refraining from clarifying the matter (sec. 20 (c) = &quot;wilful blindness&quot;)</td>
<td>Intention = Negligence or knowing that it exists (sec. 18 (b)(ii))</td>
<td>§ 17 Abs. 1</td>
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<tr>
<td>Inference from</td>
<td>Circumstances</td>
<td>Circumstances</td>
<td>Wissentlichkeit (knowledge)</td>
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<td>Intention</td>
<td>Intention (= Negligence) or knowing that it exists (sec. 18 (b)(ii))</td>
<td>Knowledge that it exists including &quot;wilful blindness&quot; (sec. 18 (a)(ii))</td>
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<td>Acting in order to bring about</td>
<td>Awareness of a risk (sec. 18 (c)(i))</td>
<td>Awareness of a risk (sec. 18 (c)(ii))</td>
<td>§ 18 Abs. 2</td>
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<tr>
<td>Knowledge</td>
<td>Wissen um die Möglichkeit und Sich-Ablinden mit der Realisierung (being reconciled with the result as a possible cost)</td>
<td>Wissen um die Möglichkeit und Vertrauen auf die Niehtrealisierung</td>
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<td>Malice</td>
<td>Calwell recklessness [needlessness]</td>
<td>Tatsachenblindheit (qualifiziertes Unwissen)</td>
<td>§ 18 Abs. 1: individuelle Erkenbarkeit [possibility of the awareness of a risk]</td>
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<tr>
<td>Weakness</td>
<td>Negligence</td>
<td>(draft criminal code 1985 Law Com No. 143 cl 22(b): &quot;a very serious deviation from the standard of care to be expected of a reasonable person&quot;)</td>
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### APPENDIX 1

Threshold of availability

1. strict liability [sec. 22]
2. absolute liability

[Available at: https://www.cambridge.org/core/terms. https://doi.org/10.1017/S0021223700014965. Downloaded from https://www.cambridge.org/core. IP address: 54.70.40.11, on 25 Aug 2019 at 22:54:17, subject to the Cambridge Core terms of use]
APPENDIX 2
E 1962

§ 15 Vorsätzliches und fahrlässiges Handeln

_Strafbar ist nur vorsätzliches Handeln, außer wenn das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht._

§ 15 Wilful [intentional] and negligent acts

Only intentionally committed acts shall be punishable, unless the statute expressly makes negligence a punishable offence.

§ 16 Vorsatz

_Vorsätzlich handelt, wem es darauf ankommt, den gesetzlichen Tatbestand zu verwirklichen, wer weiß oder als sicher voraussieht, daß er den gesetzlichen Tatbestand verwirklicht, oder wer die Verwirklichung für möglich hält und sich mit ihr abfindet._

§ 16 Wilfulness [intent]

A person acts wilfully if it is his purpose to bring about those circumstances which correspond to the elements of the definition of the offence, if he knows or foresees as certain that he will bring about those circumstances, or if he is reconciled with bringing about those circumstances as a possible cost.

§ 17 Absicht und Wissentlichkeit

(1) _Absichtlich handelt, wem es darauf ankommt, den Umstand zu verwirklichen, für den das Gesetz absichtliches Handeln voraussetzt._

(2) _Wissentlich handelt, wer weiß oder als sicher voraussieht, daß der Umstand gegeben ist oder eintreten wird, für den das Gesetz wissentliches Handeln voraussetzt._

§ 17 Intention and knowledge

(1) A person acts intentionally if it is his purpose to bring about that circumstance for which intention is statutorily required.

(2) A person acts knowingly if he knows or foresees as certain that that circumstance exists or will come to exist for which knowledge is statutorily required.

§ 18 Fahrlässigkeit und Leichtfertigkeit

(1) _Fahrlässig handelt, wer die Sorgfalt ausser acht läßt, zu der er nach den Umständen und seinen persönlichen Verhältnissen verpflichtet und fähig ist, und deshalb nicht erkennt, daß er den gesetzlichen Tatbestand verwirklicht._

(2) _Fahrlässig handelt auch, wer es für möglich hält, daß er den gesetzlichen Tatbestand verwirklicht, jedoch pflichtwidrig und_
vorwerfbar im Vertrauen darauf handelt, daß er ihn nicht verwirklichen werde.

(3) (...) 

§ 18 Negligence
(1) A person acts negligently if he neglects the (standard of) care which he is, in the circumstances of the case and according to his mental and physical condition, obliged and able to observe, and therefore does not foresee that he may cause a result which is part of the statutorily defined constituent elements of a crime.
(2) A person acts negligently too, if he foresees that he may cause a result which is part of the statutorily defined constituent elements of a crime, but yet acts in the unjustified and culpable confidence that he will not cause this result.
(3) (...) 

§ 19 Irrtum über Tatumstände
(1) Wer bei Begehung der Tat einen Umstand nicht kennt, der zum gesetzlichen Tatbestand gehört, handelt nicht vorsätzlich. Die Strafbarkeit wegen fahrlässiger Begehung bleibt unberührt.
(2) Wer bei Begehung der Tat irrig Umstände annimmt, welche den Tatbestand eines minderer Gesetzes verwirklichen würden, kann wegen vorsätzlicher Begehung nur nach dem minderer Gesetz bestraft werden.

§ 19 Mistake of fact
(1) Whoever in committing an act is mistaken about the existence of facts which are part of the statutorily defined constituent elements of a crime does not act wilfully [intentionally]. The possibility of imposing criminal punishment for negligence remains unaffected.
(2) Whoever in committing an act mistakenly assumes the existence of circumstances which could form part of the statutorily defined constituent elements of a lesser offence can only be punished for wilful [intentional] conduct in accordance with the statute defining the lesser offence.

§ 22 Schwerere Strafe bei besonderen Tatfolgen
Knüpft das Gesetz an eine besondere Folge der Tat eine schwerere Strafe, so trifft sie den Täter oder den Teilnehmer nur, wenn ihm hinsichtlich dieser Folge Fahrlässigkeit zur Last fällt.

§ 22 Aggravated punishment as a result of special consequences If a statute stipulates an aggravated punishment for a particular consequence of the act, this provision would apply as against the
actor or an accessory only if the particular person was chargeable with negligence relative to the special consequence.

APPENDIX 3
CASES AND EXAMPLES

The Problem of Divergence: Typical Categories of Cases

(1) Unintended Manner (unforeseen mode)
   (a) A shoots B with intent to kill, but only wounds him; however, B catches scarlet fever from a fellow patient in the hospital and dies.
   (b) D intended to kill V; he chose to shoot him, but the shot missed; it hit a nearby heavy object, which fell on V's head and caused his death (Ashworth 1991, 175).

(2) Mistake-as-to-death cases
   A, with intent to kill B, strikes B and renders him unconscious, and then, mistakenly believing B to be dead, hangs B to give the appearance of suicide; B actually dies of strangulation (La Fave/Scott 1986, 291 ff).

(3) Mistaken-identity (object) situation
   In the semi-darkness, A shoots, with intent to kill, at a vague form he supposes to be his enemy B, but who is actually another person C; his well-aimed bullet kills C. (La Fave/Scott 1986, 285).

(4) Unintended victim (or bad-aim) situation — Transferred Intent
   (a) A aims his gun at his enemy B with the intent to kill B but, missing, hits and kills A's friend C instead (La Fave/Scott 1986, 220, 283 ff).
   (b) A put poison in B's whiskey bottle with intent to kill B. B gave the bottle to C who, not knowing of the poison, handed a drink to D, who drunk and died of the poison (La Fave/Scott 1986, 283).

(5) Principal's-mistake cases
   A intentionally procures P to murder A's wife.
   (a) P makes a mistake of identity and commits the offence against V. (Ashworth 1991, 381).
   (b) P aims at A’s wife with a murderous intent to kill, but because of a bad aim he hits and kills V.
The Differentiation between Intention and Recklessness

(6) A robber, escaping from the scene of his crime, drives very fast at a constable who is blocking the way. The robber thinks that there is an appreciable possibility that the officer might be able to jump out of the way. But the officer fails to do so and is seriously injured (or killed). (Williams 1987, 423).

(7) D plants a bomb in a plane, timed to explode in mid-Atlantic and destroy the cargo in order to enable him to obtain the insurance monies. D knows that this particular type of bomb has a 50% failure rate. D wishes the crew no ill — he would be delighted if they should, by some miracle, escape — but he knows that, if his plan succeeds, their deaths are, for all practical purposes, inevitable. (Smith & Hogan 1993, 76).

Negligence

(8) D is in the business of demolishing buildings through the use of explosives. He arrives at a demolition site one morning to make the final safety check of the building, and because he is running a bit late, he only walks through five of ten floors. At the fifth floor landing, he shouts a warning up the stairwell. But the homeless persons who came into the building during the night for shelter cannot hear D’s shouts. They are killed when the building collapses. (Sistare 1989, 134).

(9) Mr. Caldwell quarrelled with a hotel owner for whom he had been working; one night, when he was drunk, he set fire to the hotel in revenge. The fire was extinguished without serious damage to the hotel or any injury to the hotel guests: but he was charged with intentionally or recklessly damaging property (under s. 1 [1] of the Criminal Damage Act 1971), and with the more serious offence of damaging property with intent to endanger life or being reckless as to whether life would be endangered (under s. 1 [2] of the Act). He pleaded guilty to the first offence, but not guilty to the second: he did not intend to endanger life; and since he was so drunk at the time that it did not occur to him that he might be endangering the lives of those in the hotel, he was not, he argued, reckless as to whether life would be endangered. (Caldwell [1982] A.C. 341).