The mental element in the crime of murder

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Subject
Criminal law

Keywords
Mens rea; Murder

R v. Vickers (1957):
Established that intention to cause grievous bodily harm (GBH) is sufficient to satisfy mens rea for murder.
Criticized for allowing murder charges even when the offender did not intend to kill.

DPP v. Smith (1961):
Introduced an objective standard for mens rea, allowing a conviction if a "reasonable person" would foresee harm.
Criticized heavily for undermining the subjective nature of intent, later reversed by statute.

R v. Hyam (1975):
Involved a woman setting a house on fire, leading to two children's deaths. The court held that knowledge of a high probability of death or serious harm was sufficient for intent.
Criticized for conflating foresight of harm with intent, causing legal confusion.

R v. Moloney (1985):
Addressed intention directly. The court ruled that foresight of a probable consequence does not equal intent but is evidence from which a jury might infer intent.
Helped clarify the distinction between intent and foresight.

R v. Hancock and Shankland (1986):
Miners dropped a concrete block from a bridge, killing a taxi driver. It affirmed that the greater the probability of a consequence, the more likely it was foreseen and potentially intended.
Highlighted challenges in distinguishing recklessness from intent.

Cawthorne (Scottish Case):
Established "wicked recklessness" as an alternative mental element for murder in Scots law, emphasizing actions showing utter disregard for human life.

Legal Principles and Critiques:
Intention to Kill vs. Intention to Cause GBH:
Goff critiques the inclusion of GBH as sufficient for murder, arguing it broadens the scope unnecessarily and can lead to disproportionate outcomes (e.g., the "glassing" cases).

Foresight of Consequences:
Explored through cases like Hyam and Moloney, Goff emphasizes that foresight should not automatically imply intent but can support a jury's inference of intent.

Wicked Recklessness (Scots Law):
Recognizes indifference to whether a victim lives or dies as sufficient for murder, offering a broader alternative to intent. Goff sees this as a practical model for English law to consider.

Recklessness and Risk-Taking:
Goff differentiates between conscious risk-taking (subjective recklessness) and actions with indifference to consequences, favoring the latter as a potential mental element for murder.

Scholarly Arguments:
1. Robert Goff:
Advocates for narrowing the mental element in murder to cases of intention to kill or "indifference to death" (similar to Scots law).
Critiques the expansion of mens rea to include foresight or recklessness, arguing it distorts the crime's moral culpability.

2. Glanville Williams:
Supports the concept of "oblique intent," where consequences that are virtually certain and known to the actor should count as intended.
Goff disagrees, stating that this stretches the meaning of intention.

3. Baron Hume (Scottish Jurist):
Defended Scots law's focus on recklessness, arguing it reflects a disregard for life comparable to direct intent.

4. Criminal Law Revision Committee (1980):
Recommended including intent to cause serious injury with knowledge of the risk of death as part of the mental element for murder.
Goff finds this formulation too narrow and overly focused on injury.

L.Q.R. 30 THIS is a murder story. But it is not quite like the murder stories which you and I sometimes read in our spare time. True, we are in search of the solution to a mystery; but the mystery is not--who killed the victim? The mystery is--how do we identify the killing as murder rather than as any other form of unlawful homicide, which in the common law is called manslaughter? But, like all the best authors of murder stories, I am going to give you a clue. And my clue, like all the best clues, will only reveal its importance as the story unfolds. However, I will depart from tradition by promising you, at this stage, that my clue is not a red herring; it does not lead to a false trail. So it is worth keeping your eyes on it.

The clue is this. There is in England a distinguished Jewish society, called the Maccabaean Society. In 1956, to celebrate the tercentenary of Cromwell's admission of the Jews to England in 1656, the Society founded a series of lectures called the Maccabaean Lectures in Jurisprudence. I was privileged to give the Maccabaean Lecture in 1983. My lecture was entitled "The Search for Principle." [1] In my lecture, I dwelt upon the different but complementary roles of judge and jurist in the development of the law, and upon their different strengths and weaknesses. Of judges I had this to say [2]:

"Judges have to decide particular cases. In one case, a judge may have to consider a particular point of law. If so, he examines it in minute detail; he considers it in relation to a particular set of facts; he is assisted by counsel, each of whom has considered the law with care and will advance an argument designed to persuade the court to state the law, even to develop or qualify it, in a way which fits his own client's case. There are at least three effects of this exercise: the judge's vision of the law tends to be fragmented; so far as it extends, his vision is intense; and it is likely to be strongly influenced by the facts of the particular case. In terms of principle, the fragmented vision is of itself undesirable, except that it permits, even requires, an intensive examination; but the factual influence is almost wholly beneficial. If I were asked what is ***L.Q.R. 31*** the most potent influence upon a court in formulating a statement of legal principle, I would answer that in the generality of instances it is the desired result in the particular case before the court."

Indeed, I have since epitomised the judicial function as being "an educated reflex to facts." [3] Of jurists, however, I had this to say [4]:

"Jurists, on the other hand, do not share the fragmented approach of the judges. They adopt a much broader approach, concerned not so much with the decision of a particular case, but rather with the place of each decision in the law as a whole. They do not share our intense view of the particular; they have rather a diffused view of the general. This is both their weakness and their strength. On the one hand, a point of law which is debated for days in the law courts may end up as one line, or even a fragment of a footnote, in a legal textbook. Furthermore the adversary system, in which opposing theories are propounded and debated by advocates on behalf of real clients in whose interests they act, is more likely to reveal the strengths and weaknesses of conflicting arguments than the solitary ruminations of a scholar in the quietness of his study. But in the courts, single points of law are placed under the microscope; the broader view tends to be forgotten. Here lies the greater strength of the jurist … Certainly, the prime influence upon jurists is not so much facts as ideas: and just as fragmentation presents a danger for practising lawyers, who tend to adopt an unsystematic approach to their work, so jurists are subject to danger from preconceived ideas, and may regard too inhospitably a judicial decision which does not accord with their own preconceptions."

Now, herein lies my clue. Do not forget these two things. First, that though the judge may not at first identify the principle correctly, nevertheless his reaction to the facts may be sound; and second, that though the jurist may perceive the error into which the judge has fallen, nevertheless he may become too attached to his own theory to pay sufficient attention to the judge's reaction and so may not appreciate his own error or identify the way in which the law may best develop.

Now let me turn to my subject, and let me first make clear what this talk is not about. It is not about the question whether we should have a crime called murder at all. It presupposes that we should have such a crime, and that we therefore have to identify ***L.Q.R. 32*** the criteria by which we distinguish murder from manslaughter.[5] In England, we still distinguish murder from manslaughter because, in particular, although the death penalty was abolished many years ago, murder carries a mandatory sentence of imprisonment for life.[6] Again, this talk is not about such factors as may, as we call it, "reduce" what would otherwise be murder to manslaughter: for example, provocation, or, arguably, duress. Nor is it about such factors as may make the killing lawful, which the common law calls "justifiable homicide," of which the classic example is killing in self defence. All these things I put on one side; because I am going to consider only what distinguishes murder from manslaughter, and that means that I am going to attempt, as best I can, to identify the mental element in the crime of murder.

Next, I am not going to explore the rich history of murder in the common law--I am not going to indulge in what an Australian counsel appearing before the Privy Council last year called "legal archaeology." I shall not do so, because I do not think that it would be of particular interest to an audience in Israel. But another reason is that in this talk I intend to consider, perhaps boldly, what *should be* the mental element in the crime of murder. To consider that question, I shall of course have to rely upon concrete examples. These I shall take from the English cases, partly because they are familiar to me; partly because I find that the (often extraordinary) facts of these cases provide startling and vivid examples; and partly because the reactions of the English judges, and the criticisms of the English jurists of those reactions, ***L.Q.R. 33*** are to me most illuminating, even when I find myself unable to agree with them.

To set in their context the English cases to which I am going to refer, I must however explain to you what has been regarded, historically, as the mental element in the crime of murder in English law. I must emphasise that murder is a crime at common law; and that the definition of the mental element is therefore a common law, and not a statutory, definition. I shall describe the historical understanding of the mental element as briefly as possible, and so I may be guilty of some oversimplification; but I do not think that this matters in the present context. The mental element in the crime of murder used to be called "malice aforethought."[7] This is, of course, thoroughly misleading; since neither premeditation nor malice towards the victim were necessary.[8] Furthermore, there were three kinds of malice aforethought; express malice, implied malice, and constructive malice.[9] Express malice was simple; that existed when the defendant actually intended to kill his victim. Implied malice existed when he intended to cause "grievous bodily harm" to his victim and, by so doing, killed him.[10] Constructive malice existed in two circumstances: first, when the defendant killed his victim in the course of, or in furtherance of, committing a felony (as a serious crime was then called); and second, when the defendant killed his victim in the course of, or for the purpose of, resisting an officer of justice, or resisting or avoiding or preventing a lawful arrest, or effecting or assisting an escape or rescue from legal custody.[11] However, we need spend little time on constructive malice, because in English law this category of murder was abolished by section 1 of the Homicide Act 1957.[12]

L.Q.R. 34 After the coming into force of the Homicide Act 1957 it became settled that a judge, when directing a jury in a case of murder, could properly direct them that, if they were sure that, when the defendant killed the victim, he either intended to kill him or intended to inflict grievous bodily harm upon him which caused his death, they should convict him of murder.

This was laid down in an authoritative judgment of the Court of Criminal Appeal in *R.* v. *Vickers*. [13] It followed that there were two possible alternative mental elements in the crime of murder: (1) an intention to kill, or (2) an intention to cause grievous bodily harm. As to the former, there never has been any doubt that this can constitute the requisite intent; but I shall have a good deal to say about the latter alternative later on in this talk. At all events the law then became relatively clear and straightforward. There was no difficulty in directing juries on this basis; and no doubt innumerable juries were so directed.

There then followed a series of four cases which created serious problems but have nevertheless caused us all to think more deeply about the mental element in the crime of murder. These cases are *D.P.P.* v. *Smith* [14]; *R.* v. *Hyam* [15]; *R.* v. *Moloney* [16]; and *R.* v. *Hancock and Shankland.* [17] I must ask you to bear with me while I look briefly at these cases, not only because they provide vivid illustrations for my thesis, but also because the reactions of the judges in these cases are in themselves of considerable interest.

Let us look at these cases in order of time, and so let us turn first to *Smith*. [18] Smith was driving a car through Woolwich in south-east London. In the back of the car were some sacks containing scaffolding clips which he, and a man who was with him, had just stolen. The car was stopped in the ordinary way by a police officer on point duty, and another police officer, who knew Smith, came up to speak to him. He obviously saw the sacks in the back of the car, and told Smith to draw into the kerb. Smith began to do so, and then he accelerated away: the police officer ran alongside the car and then succeeded in hanging on to it, until he was thrown off it in the face of oncoming traffic, and was killed. There was evidence that, before the police officer was thrown off ***L.Q.R. 35*** the car, it suddenly accelerated, zig-zagging all the time; that the right hand of someone in the car was seen trying to punch the officer off, while the car was travelling at between 30 and 60 m.p.h.; and that three other cars were struck violently, probably by the body of the unfortunate police officer, still hanging on to the car. He was killed when he was run over by a fourth car. The driver said that Smith's car was going very fast and swerving. He saw something coming towards him; there was a terrific crash, he stopped and the police officer was underneath his car. Smith's car went tearing off up the road. After he was arrested, Smith said: "I didn't mean to kill him, but I didn't want him to find the gear." [19]

At the trial, the judge directed the jury as follows [20]:

"If you are satisfied that … [the defendant] must *as a reasonable man* [21] have contemplated that grievious bodily harm was likely to result to that officer … and that such harm did happen and the officer died in consequence, then the accused is guilty of … murder."

Smith was convicted of murder. The House of Lords (reversing the Court of Criminal Appeal) held that there was no misdirection on the part of the trial judge. The Appellate Committee consisted of the Lord Chancellor (Viscount Kilmuir), a previous Lord Chief Justice (Lord Goddard), the then Lord Chief Justice (Lord Parker), Lord Denning and Lord Tucker. There was one speech, delivered by Viscount Kilmuir; it is believed to have been prepared by Lord Parker. Viscount Kilmuir said [22]:

"The Court of Criminal Appeal … were saying that it was for the jury to decide whether, having regard to the panic in which he said he was, the respondent in fact at the time contemplated that grievous bodily harm would result from his actions or, indeed, whether he contemplated anything at all. Unless the jury were satisfied that he in fact had such contemplation, the necessary intent to constitute malice would not, in their view, have been proved. This purely subjective approach involved this, that if an accused said that he did not in fact think of the consequences, and the jury considered that that might well be true, he would be entitled to be acquitted of murder.

My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that upon which the courts have always acted. The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily ***L.Q.R. 36*** doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions … On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result."

This decision was very much criticised, by judge and jurist alike. [23] What they disliked about it was that it imposed an objective instead of a subjective test for ascertaining the existence of the relevant mental element for the crime of murder. In due course,

it was reversed by statute [24]; later, on an appeal from a jurisdiction where that statute did not apply at the relevant time, *Smith* was, in effect, held by the Judicial Committee of the Privy Council to have been wrongly decided (see *Frankland and Moore* v. *R.)*. [25] So the objective test was never part of the common law, properly understood; and we can now forget about it. [26] But for present purposes the important feature of the case, for me, is this: that a very distinguished and experienced group of judges *felt* that Smith *could* be held guilty of the crime of murder, even if he did not in fact intend to kill his victim or to cause him grievous bodily harm. Such a judicial reaction is not lightly to be disregarded.

L.Q.R. 37 I turn next to *Hyam.* [27] The defendant, Mrs. Hyam, had a lover, Mr. Jones. He abandoned her, and became engaged to be married to another lady, Mrs. Booth. Mrs. Hyam went to Mrs. Booth's home at night. She made certain that Mr. Jones was not in the house. She then poured about half-a-gallon of petrol through the letter-box, and set it alight by means of newspaper and a match. In the house were Mrs. Booth and her three children, a boy and two young girls. The house caught fire. Mrs. Booth and her son escaped by climbing through a window. The two young girls were asphyxiated by fumes from the fire, and died. Mrs. Hyam was charged with murdering them.

The judge directed the jury as follows [28]:

"The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs. Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she *knew that it was highly probable* [29] that this would cause (death or) serious bodily harm, then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs. Booth."

Mrs. Hyam was convicted of murder. The House of Lords, by a majority of three to two, upheld the conviction. The Lord Chancellor, Lord Hailsham of St. Marylebone, considered that, apart from an intention to cause grievous bodily harm, it was enough that, where the defendant knew that there was a serious risk that death or grievous bodily harm would ensue from his acts, he intended to expose a potential victim to that risk as a result of his acts. [30] Viscount Dilhorne, a former Lord Chancellor, inclined to the opinion that the judge was correct. He said [31] that if a man does an act:

"deliberately and intentionally, *knowing when he does it that it is highly probable* [32] that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm."

Lord Cross of Chelsea said [33]:

"*If* it is the law that an intention to cause grievous bodily harm--using intention in the strict sense of the word--is ***L.Q.R. 38*** "malice aforethought," whether or not one realises that one's act may endanger life, then I think that it is right that the doing of an act which one realises *may well* [34] cause grievous bodily harm should also constitute malice aforethought whether or not one realises that one's act may endanger life."

He therefore thought that the only criticism which could be directed against the judge's summing-up was that, by inserting the word "highly" before the word "probable", it was unduly favourable to Mrs. Hyam. [35]

That decision, too, was subjected to much criticism. It was criticised principally because it confused two things: (1) intention, and (2) foresight of consequences: because, although foresight of consequences can provide material from which an intention *may be* inferred, it cannot of itself amount to intention or lead to an inevitable inference of intention. *Hyam* has never been expressly overruled. But it is really impossible to reconcile it with the next case to which I shall refer, *Moloney.* [36] However, once again I wish to point out that here is a case in which the judges *felt* that the defendant might properly be convicted of murder, even if she did not in fact intend to kill or to cause grievous bodily harm.

I turn then to *Moloney.* [37] Even by the standards of murder cases, the facts of this case are bizarre in the extreme. The defendant had been drinking heavily with his stepfather, to whom he was deeply attached. In the early hours of the morning, the stepfather claimed that he could "outshoot", "outload" and "outdraw" [38] his stepson, and asked him to take out two shotguns which were

in the house so that he could put him to the test. The defendant did as he was asked. He got the guns and some cartridges out of the cupboard. In a statement to the police, the defendant said [39]:

"I inserted a cartridge in the *right-hand* [40] barrel, closed the gun, took off the safety catch and pulled the trigger of the *left-hand* [41] barrel, and told him he'd lost … He looked at me and said: "I didn't think you'd got the guts, but if you have pull the trigger.' I didn't aim the gun. I just pulled the trigger and he was dead. I then went and called the police and told the operator I had just murdered my father, and that's the story."

In the course of his summing-up, the judge directed the jury on the basis of the law as stated in *Hyam.* He said [42]:

L.Q.R. 39 "When the law requires that something must be proved to have been done with a particular intent, it means this: a man intends the consequence of his voluntary act (a) when he desires it to happen, whether or not he foresees that it probably will happen and (b) when he foresees that it will probably happen, whether he desires it or not."

The defendant was convicted of murder, and his conviction was upheld by the Court of Appeal. [43] But the House of Lords reversed that decision. The leading speech was delivered by Lord Bridge of Harwich. He said [44]:

"The fact that, when the appellant fired the gun, the gun was pointing directly at his stepfather's head at a range of about six feet was not, and could not be, disputed. The sole issue was whether, when he pressed the trigger, this fact and its inevitable consequence were present to the appellant's mind. If they were, the inference was inescapable, using words in their ordinary, everyday meaning, that he intended to kill his stepfather. … If, on the other hand, as the appellant was in substance asserting, it never crossed his mind, in his more or less intoxicated condition and when suddenly confronted by his stepfather's absurd challenge, that by pulling the trigger he might injure, let alone kill, his stepfather, no question of foresight of consequences arose for consideration. Whatever his state of mind, the appellant was undoubtedly guilty of a high degree of recklessness. But, so far as I know, no one has yet suggested that recklessness can furnish the necessary element in the crime of murder."

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He asked himself the following question [45]:

"Whether there is any rule of substantive law that foresight by the accused of one of those eventualities 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."

That question he answered in the negative. His opinion was that [46]:

"Foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence."

In other words, any such foresight, if found to exist, can amount to no more than evidence from which the jury may infer that the accused did have the intent necessary for the crime of murder, *i.e.* ***L.Q.R. 40*** intent to kill or to cause grievous bodily harm. Of course, foresight of consequences, whether regarded objectively or subjectively, is, like intent, itself a matter of inference from the evidence; and I feel that, in this passage, Lord Bridge must have been using the word "evidence" not in its strict sense but in the sense of "material" from which the relevant inference may be drawn. But in any event I wish to comment that, in the case of *Moloney,* the trial judge and the members of the Court of Appeal appear to have *felt* that the defendant could properly be found guilty of murder, even if he did not have an actual intention to kill his stepfather, or to cause him grievous bodily harm.

I turn finally to *Hancock,* [47] the last of the four cases to which I wish to refer you. That case arose out of the coal miners' strike, which took place in the United Kingdom in 1984 and 1985. A miner, who was not on strike, was being taken to work by taxi with a substantial police escort. The defendants, Hancock and Shankland, were two miners on strike. As the convoy passed under a bridge on a motorway, the two defendants pushed from the bridge a concrete block weighing 46 lbs. and a concrete post weighing about 65 lbs. The block struck the taxi's windscreen and killed the taxi driver. The post fell on to the inside lane of the carriageway and hit the taxi a glancing blow. Both defendants had placed the post on the parapet rail of the bridge early that morning; and one of them had placed the block on the rail. They had then awaited the convoy. Hancock admitted that he had pushed the block over which had killed the taxi driver: Shankland admitted that he had "flipped" the post over the rail with his fingers. [48] Both admitted that they were guilty of manslaughter. The question was, however, whether they were guilty of

murder. Their defence was that neither of them had any intention to kill or to inflict harm on the occupants of the taxi or anybody else. Their intention was to block the road or to frighten the members of the convoy.

The judge directed the jury in accordance with certain guidelines given by Lord Bridge in *Moloney,* [49] and the jury convicted both men of murder. However, on examination, Lord Bridge's guidelines were considered to be unsatisfactory and the Court of Appeal allowed an appeal against conviction, on the ground of misdirection. [50] The House of Lords affirmed the decision of the Court of Appeal. The point on Lord Bridge's guidelines is not directly ***L.Q.R. 41*** relevant to my present theme, and I do not wish to trouble you with it. But I would like to quote to you certain observations of Lord Scarman in the House of Lords on the relevance of probability and foresight of consequences. He said (with reference to guidelines for directing juries) [51] :

"They require a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence."

Later he added [52] :

"In a case where foresight of a consequence is part of the evidence supporting a prosecution submission that the accused intended the consequence, the judge, if he thinks some general observations would help the jury, could well … emphasise that the probability, however high, of a consequence is only a factor, though it may in some cases be a very significant factor, to be considered with all the other evidence in determining whether the accused intended to bring it about."

So, after the journey through *Smith, Hyam, Moloney* and *Hancock,* the law is really back where it was in *Vickers.* [53] The mental element in the crime of murder is either (1) an intent to kill or (2) an intent to cause grievous bodily harm. Foresight of consequences is not the same as intent, but is material from which the jury may, having regard to all the circumstances of the case, infer that the defendant actually had the relevant intent.

There is however one qualification to be made to these simple propositions. In *Moloney,* Lord Bridge concluded from the decided cases that [54] :

"The probability of a consequence taken to have been foreseen must be little short of overwhelming before it will suffice to *establish* [55] the necessary intent."

I shall refer again to this observation later in this paper.

Both strands in the mental element in the crime of murder as it now stands in the common law involve the notion of intent or intention--intention to kill, or intention to cause grievous bodily harm. It is, I think, important that we should know what we are ***L.Q.R. 42*** talking about when we use the word "intention." It is obvious that it is to be differentiated from *motive.* If I kill you for your money, my intention is to kill you but my motive is to lay my hands on your money. So also, if I kill you from the motive of compassion (so-called mercy killing) I nevertheless intend to kill you and the crime is one of murder. [56] In *Moloney* Lord Bridge gave this example [57] :

"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."

So in the same way, it is clear that intention must also be distinguished from *desire,* although they frequently coincide. A schoolboy summoned to the headmaster's study, may not in the least desire to answer the summons; but if he does so, he is plainly acting in accordance with his intention--just as when you or I go to the dentist, we may not want to do so, but obviously we intend to do so. [58] It follows that, although intent and desire frequently coincide, we must not use the expressions "intending to kill" and "wanting to kill" as if they were interchangeable (a mistake made, I fear, by the English Criminal Law Revision Committee in their 14th Report, [59] in which they made proposals for the redefinition of the crime of murder to which I shall refer in a moment). There is really no doubt what "intention" means in this context. If we look for a synonym, the best word in

the present context is, perhaps, purpose.[60] This is at least a dictionary meaning of the word. Thus, ***L.Q.R. 43*** in *Chambers 20th Century Dictionary* (1983), we find that the following meanings (putting on one side obsolete and special meanings) are ascribed to the word intention:

Design; purpose; application of thought to an object; a concept;

And in the *Shorter Oxford English Dictionary* (3rd Edition), the relevant meaning of intent appears to be:

5. That which is intended; a purpose, design.

But even "purpose" is not altogether satisfactory.[61] For we sometimes use the word "purpose" as meaning a man's immediate purpose--"my purpose was to kill him"--and sometimes as meaning his ulterior purpose--"my purpose in killing him was to get his money." But this does not really matter. Because, when we come to direct a jury, we can concentrate on the immediate purpose of the defendant by directing the jury to consider the simple question: did the defendant *mean* to kill?[62]

At all events, so understood, it is plain that, just as intention can exist without desire, although they frequently coincide, so also intention can exist without foresight of the relevant consequence, although again they frequently coincide. Let us not forget that there can be intention to achieve the relevant result even though that is most unlikely to occur and so cannot be said to have been foreseen. To take an example from the Bible,[63] the man who drew a bow as a venture must have been astonished when he found that ***L.Q.R. 44*** he had killed King Ahab; yet, if there had been no war, he would have been guilty of murder. The idea that intention and foresight of consequences, or probability, necessarily coexist was, if not hit for six, at least hit into the rough by Lord Reid when he said (in *Gollins* v. *Gollins*)[64]:

"In fact people often intend something quite different from what they know to be the natural and probable result of what they are doing. To take a trivial example, if I say I intend to reach the green, people will believe me although we all know that the odds are ten to one against my succeeding; and no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker because that was the natural and probable result of my shot."

因此，可能存在沒有遠見的意圖，即相關後果可能會發生。

So there can be intention without foresight that the relevant consequence was likely to occur. Conversely, there can be foresight of consequences without intention. To take an example given to me by a friend: when Field Marshal Montgomery invaded France on D-Day, he foresaw that many of the troops under his command would be killed on that very day. Obviously, however, he did not intend that any of them should be killed. But, of course, frequently intention to kill and foresight of consequences do go hand-in-hand. If I shoot at you from point-blank range, with the intention (purpose) of killing you, I do indeed foresee that my act of shooting will cause your death. That is why foresight of the consequence of death, or of grievous bodily harm, may be *material* from which the inference of intention to kill or to cause grievous bodily harm can properly be drawn; but I cannot emphasise too strongly that, because foresight of the consequence of death resulting from your act does not necessarily connote an intention on your part to kill, it cannot, in my opinion, be right for a jury to be told that the former will, as a matter of law, *of itself establish* the necessary intent, however overwhelming the probability of the consequence may be--as witness the example of Field Marshal Montgomery and D-Day. Conversely, however, I do not see why foresight of the consequence of death should not be material upon which the jury may rely in deciding whether to draw the inference, from all the facts of the case, that the defendant had the necessary intent (purpose) to kill; and I do not see why such foresight should not be *capable* of constituting such material even though the consequence of death is not "virtually certain" to occur,[65] although, ***L.Q.R. 45*** as Lord Scarman pointed out in *Hancock,*[66] the greater the degree of probability of the consequence, the more likely it is that the consequence was foreseen, and if that consequence was foreseen, the greater the probability that that consequence was also intended. In expressing these views, I have to recognise that I may be differing, with all respect, from the observation of Lord Bridge in *Moloney*[67] which I have quoted earlier in this talk.

The narrowing down of the mental element in murder to the concept of "intention" has generally been welcomed by jurists.[68] But they are discovering that some cases, which they *feel* ought to be embraced within the crime of murder, do not quite fit within the concept of intention; and so they are embarking on the enterprise of illegitimately expanding the concept of intention to include these cases. The classic example of this technique is to be found in the idea of "oblique" intent as expounded by Professor Glanville Williams in his *Textbook of Criminal Law.*[69] I quote:

"Clearly, a person can be taken to intend a consequence that follows under his nose from what he continues to do, and the law should be the same where he is aware that a consequence in the future is the certain or practically certain result of what he does. As Lord Hailsham said in *Hyam*, "intention' includes "the means as well as the end and the inseparable consequences of the end as well as the means.' (What he evidently meant was the consequences known to the defendant to be inseparable). It is arguable that everyone would understand "intention' in this extended meaning; at any rate, the extension is not sufficiently great to depart seriously from ordinary ideas, while not to allow it would in some contexts make the concept of intention notably defective for practical purposes.

To take a hypothetical case: suppose that a villain of the deepest dye sends an insured parcel on an aircraft, and includes in it a time-bomb by which he intends to bring down the plane and consequently to destroy the parcel. His immediate intention is merely to collect on the insurance. He does not care whether the people on board live or die, but he knows that success in his scheme will inevitably involve their deaths as a side-effect. On the theoretical point, common sense suggests that the notion of intention should be extended to this situation; it should not merely be regarded as a case of recklessness. A consequence should normally be taken as intended although it was not desired, if it was foreseen by the actor as the *virtually certain* accompaniment of what he ***L.Q.R. 46*** intended. This is not the same as saying that any consequence foreseen as *probable* is intended."

Now I have to confess that, as soon as somebody starts using an expression like "oblique intention," I become suspicious; because I suspect that it is only necessary to use the rather mysterious adjective "oblique" to bring within "intention" something which is not intention at all. [70] And that is exactly what is happening here. For the trouble with this kind of approach is that it has distorted the plain meaning of the word. To the question--did the defendant mean to destroy the parcel? The answer is, of course, yes, he did. But to the question--did the defendant mean to kill the pilot? The answer is, no, he didn't. Indeed, if he saw the pilot safely descending by parachute, he would no doubt be delighted; and so it is absurd to say that he meant to kill him. Of course, if the pilot is killed by the explosion, I share Professor Glanville Williams' *feeling* that the defendant can properly be called a murderer; but I do not think that that result can be achieved by artificially expanding the meaning of the word "intention." Quite apart from anything else, it can only lead to difficulties in directing juries. In a jury system, it is far better, if you can, to use a word in its plain and ordinary meaning. And you do not intend something merely because you know that it is virtually certain to happen [71] ; see the example of Field Marshal Montgomery and D-Day. [72] The clue to the problem lies, I suspect, in Professor Glanville Williams' comment that the defendant "does not care whether the people on board live or die." [73] But that is something to which I will return later in this talk. I would, however, like to make a rather refined distinction at this stage. Suppose that my victim is sitting in a room, behind a closed window. I am outside with a gun. I mean to shoot him. I know that the window is closed. I fire the gun; the ***L.Q.R. 47*** bullet breaks the glass and kills my victim. In such circumstances, it is sensible to say that I intend to break the window. So if, when Colonel Sebastian Moran attempted to shoot Sherlock Holmes sitting in his study at 221B Baker Street, he knew that, in order to hit Holmes, the bullet had to pass through a pane of glass in the window of the study which he knew to be closed, Colonel Moran would have intended to break the pane of glass. [74] That is because, in order to achieve his purpose of killing Holmes, he knew that he had to break the pane of glass. But if, on the other hand, my objective is to destroy a parcel in an aircraft with a time-bomb, I do not have to kill the pilot in order to achieve my objective. I simply do not care whether he lives or dies. And that is different. Of course, it may be right that, if I kill him, I should be convicted of murder; but that must be on the basis of some criterion other than *intention* to kill.

I turn from intention to kill to intention to cause grievous bodily harm. In *Hyam* [75] Lord Diplock, in a dissenting speech, suggested that the historical basis for the existence of this alternative form of the mental element in murder was unsound [76] ; he considered that, if the defendant did not intend to kill, he "must have intended or foreseen as a likely consequence of his act that human life would be endangered." [77] But Lord Diplock's historical interpretation was emphatically rejected by the House of Lords in the later case of *Cunningham*. [78] It is now settled by that case, for the time being at least, that this alternative form of the mental element, *i.e.* intention to cause grievous bodily harm, does indeed exist in English law, and further that (following a statement to the like effect by Viscount Kilmuir in *Smith*) [79] grievous bodily harm means, quite simply, really serious bodily harm. [80]

L.Q.R. 48 But the most serious objections exist to this as a form of the mental element in the crime of murder. [81] The most fundamental objection is that the crime of murder is concerned with unlawful killing of a particularly serious kind; and it seems very strange that a man should be called a murderer even though not only did he not intend to kill the victim, but he may even have intended that he should not die. There are cases known to occur where the defendant does indeed intend not to kill but only to cause serious injury--as, for example, in the case of terrorists who punish traitors from their ranks by "knee-capping"

them--shooting them in the knee with a gun. This they do with a positive intent *not* to kill but to leave the victim maimed, *pour encourager les autres*. If a man so injured were to die in consequence, perhaps because he contracted an infection from his wound, the man who "kneecapped" him would, in English law, be held to have murdered him, even though he positively intended *not* to kill him.

In case the point may be thought to be fanciful, let me give an example from my own practical experience. In certain areas of England there is a horrible practice called "glassing." A man takes a pint-size beer glass, knocks the top off on the edge of a table leaving a jagged edge, and then rams the jagged edge into the face of his victim--obviously causing dreadful cuts and scarring to his face. I found myself trying a young man for murder at Nottingham. He had gone out to a local public house with his uncle. They both had too much to drink. Another young man was there, who was regarded as an enemy. "Glass him!" said the uncle to his nephew, and the boy proceeded to do so. But for some reason--perhaps the victim moved slightly--he caught not his face but the side of his neck, and severed his jugular vein. The victim staggered outside, covered with blood, and died shortly afterwards. The assailant and his uncle were both charged with murder. The facts were beyond dispute. The two defendants were ready to plead guilty to ***L.Q.R. 49*** manslaughter; but the prosecution was not prepared to accept the plea, and the trial proceeded on the charge of murder. I summed up to the jury, as was my duty, on the basis that, if the jury were sure that the assailant had intended to kill his victim, or to cause him really serious bodily harm, then they should convict him of murder. The jury acquitted the defendants of murder but convicted them of manslaughter, and I sentenced them accordingly. Now it was plain to me, and must have been plain to the jury, that the assailant did indeed intend to cause the victim really serious bodily harm; yet they could not bring themselves to call him a murderer. This was a feeling with which I entirely sympathised, for the simple reason that, not merely could it never have crossed the assailant's mind that there was any risk of causing death to his victim, but he was horrified when he died. It may interest you to know that a colleague of mine on the English Bench had exactly the same experience in another case involving glassing.

The truth is that, for the reasons I have given, an intent to cause really serious harm should not be of itself sufficient to constitute the mental element in the crime of murder. Considerations such as these have led some law reformers to propose that a gloss should be placed upon this form of mental element. Such was the recommendation of the Criminal Law Revision Committee in its 14th Report (1980), to which I have already referred. [82] I think it right that I should at this stage set out their recommendation in full:

"We therefore conclude that it should be murder:

(a) if a person, with intent to kill, causes death and

(b) if a person causes death by an unlawful act intended to cause serious injury and known by him to involve a risk of causing death." [83]

In addition, the Committee proposed a third possible category (to meet fears expressed about terrorism) as follows [84]:

"That it should be murder if a person causes death by an unlawful act intended to cause fear (of death or serious injury) and known to the defendant to involve a risk of causing death."

It is of course with recommendation (b) that we are at present concerned. To me there are two serious objections to this ***L.Q.R. 50*** formulation. The first is that it is restricted to cases where there is an intention to cause serious injury. But why is it so limited? If a defendant does an unlawful act known by him to involve the risk of causing death, it would appear that (on this formulation) it is the knowledge of that risk which renders him a murderer. So what of the case where he only intends to cause a slight injury, or indeed no injury at all, but knows that his action involves a risk of causing death? [85] Why should that be any different? For example, a nick in the skin of a haemophiliac could be as dangerous to life as a more serious wound to a normal man. [86] Again, a man may project some missile in the vicinity of another, not intending harm but realising that there is a risk that, if it strikes some vital part, the other man may die; on the Committee's approach, if the victim was so struck, and died, that could not be murder. The formulation reeks, therefore, of a gloss upon an old but objectionable formula, rather than being a reformulation of the requisite intent. But there is a second objection, that as well as being too narrow (in the sense I have indicated) it is also, in another sense, too wide. [87] The criterion chosen is that the defendant's act is known by him to involve a risk of causing death. But is that enough? For one may recognise a risk, and discount it as unrealistic; one may recognise a risk, and hope to avoid it. If a man does so, should he be called a murderer? For myself, I doubt it. Something more is, I think, required. [88]

The additional suggestion, chosen to meet fears about terrorism, appears to me to be subject to the same objections. Indeed, it leads to the startling consequence that if a terrorist, not intending to cause fear of death or serious injury, but realising that his action involves a risk of causing death, blows up a national monument in order to publicise his cause and thereby kills the night watchman, then that cannot be murder. But I feel that this proposed category should not in any event constitute a separate category; and I also ***L.Q.R. 51*** feel that, if one could look deep under the skin of category (b), it might be possible to discern a reformulation which would, on a more satisfactory basis, embrace both category (b) and the additional category designed to deal with terrorists.

This brings me to the topic of so-called recklessness. We can see in the cases, notably in *Hyam,* [89] an anxiety not to extend the concept of murder too far for fear that it might embrace certain cases which should not be regarded as murder. The typical example given is that of the motorist who recklessly overtakes on a blind corner and kills the driver of an oncoming car. Fear of categorising reckless motorists as murderers led Lord Hailsham to say in *Hyam* that, before an act can be murder, it must be "aimed at someone." [90] But that requirement was later abandoned by Lord Bridge in *Moloney* where he referred to the example of the terrorist's bomb which cannot be said to be aimed at anybody. [91] Even so, Lord Bridge went out of his way to state in the same case that, so far as he knew, no one had yet suggested that recklessness could furnish the necessary mental element in the crime of murder. [92] This may perhaps be true of English law (at least since *Hyam* has been treated as no longer authoritative); but it is not true of Scots law, as I shall shortly explain. [93]

What is recklessness? There is no doubt that the word is open to many interpretations. An admirable account is to be found in Professor Glanville Williams' *Textbook of Criminal Law.* [94] I have no time in this paper to indulge in any analysis of this difficult and controversial subject. The meaning of recklessness favoured by Professor Glanville Williams is conscious and unreasonable risk-taking. [95] This is, of course, a subjective interpretation of the word; ***L.Q.R. 52*** and Professor Glanville Williams is a convinced subjectivist. But other interpretations are possible. For example, in a case of reckless driving, it would be perfectly legitimate to interpret the word "reckless" in an objective sense as no more than extreme negligence--as a woeful failure to comply with an objective standard. [96] But in cases of murder, if recklessness is relevant at all, it can only be in a subjective sense; and, if we adopt the approach of Professor Glanville Williams, that means conscious and unreasonable risk-taking.

But is it right that a person who consciously and unreasonably risks another man's life, and so kills him, should necessarily be a murderer? I do not think so, for the very reason that this could embrace many situations which frequently occur in ordinary life, such as the reckless driver who overtakes on a blind corner, realising that his action may result in a head-on collision and the death of the driver of the on-coming car, but optimistically hoping that no such thing will happen--which none of us would regard as a case of murder. Recklessness, even in the subjective sense of consciously and unreasonably incurring a risk of death, cannot of itself constitute the mental element in murder. [97] And yet there are cases, where it cannot be said that the defendant intended to kill his victim or even to cause him really serious bodily harm, which experienced and distinguished lawyers have *felt* should be regarded as cases of murder--such as Professor Glanville Williams' example of the man who puts a parcel with a time-bomb in it on an aeroplane. [98] Can we identify an appropriate mental element, extending beyond intention, but falling short of recklessness in the sense of conscious and unreasonable risk-taking, which accommodates such cases?

It is at this point that I turn to Scots law. Among the topics on which Scots and English law differ is the mental element in the crime of murder. Let us not forget that, pragmatic though the English common law is, and rightly is, Scots law tends to be even more pragmatic. So, in the leading book on *Scottish Criminal Law* by Sheriff Gordon, we find this statement in the section on Murder [99]:

"The principles are vague and flexible, or perhaps one should say commonsense and non-technical, and their application has tended to be very much an *ad hoc* matter."

L.Q.R. 53 However, Macdonald introduces the topic of murder in the following words [100]:

"Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

On this approach, the possible mental elements in the crime of murder could be reduced to two: (1) intention to kill, and (2) wicked recklessness. But there is authority for the recognition of a third alternative, equivalent to implied malice in English law, *i.e.* intention to do grave personal injury. Thus, in a subsequent passage from Macdonald,[101] we find the following:

"When death results from the perpetration of any serious or dangerous crime, murder may have been committed, although the specific intent to kill be absent. This is so where the crime perpetrated involves either wilful intent to do grave personal injury, or the wilful use of dangerous means implying wicked disregard of consequences to life."

要麼故意造成嚴重人身傷害，要麼故意使用危險手段，暗示對生命的後果漠視。”

This was the view adopted in the case of *Cawthorne,* [102] in which the trial judge, Lord Avonside, charged the jury as follows:

> "The crime of murder is committed when the person who brings about the death of another acted deliberately with intent to kill, or acted with intent to do bodily harm; or, and this is the third leg, acted with utter and wicked recklessness as to the consequences of his act upon his victim."

This approach was accepted on appeal, though Lord Guthrie considered that the word "grievous" should be inserted before the words "bodily harm." [103] Moreover the approach is not without support in writings of jurists [104]; though one of the most authoritative of them all, Baron Hume, was prepared to accept the fact that Scottish practice "does not distinguish between an absolute purpose ***L.Q.R. 54*** to kill, and a purpose to do any excessive and grievous injury to the person" on the ground, *inter alia,* that:

"In committing any such desperate outrage to the body the [accused] shows an utter contempt of the safety and the life of his neighbour, and if not a determination to kill him, at least an absolute indifference whether he live or die." [105]

At present, however, it seems that the law on the topic in Scotland must be taken to be that accepted in *Cawthorne,* and that the mental element in the crime of murder consists of three alternatives, including an intent to cause grievous bodily harm.

At all events, it is on the element commonly known as "wicked recklessness" that I now wish to concentrate. Sheriff Gordon comments [106]:

"Recklessness is … not so much a question of gross negligence as of wickedness. Wicked recklessness is recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer."

A very clear statement of "wicked recklessness" is to be found in Lord Thomson's charge to the jury in the unreported case of *H.M. Advocate* v. *Byfield* (1976), when he said [107]:

"… you have got to be satisfied that the accused showed such wicked recklessness, as I put to you, totally regardless of the consequences, whether the victim lived or died."

Now we may not be too happy about the use of the word "wicked", which is perhaps rather emotive [108]; but the concept is clear enough--it is the fact that the accused did not care whether the victim lived or died--which can be epitomised as indifference to death. [109]

L.Q.R. 55 I think it important to observe that the principle so stated does not necessarily involve a conscious appreciation of the risk of death at the relevant time. This is of importance, because we can think of many cases in which it can be said that the accused acted regardless of the consequences, not caring whether the victim lived or died, and yet did not consciously appreciate the risk of death in his mind at the time--for example, when a man acts in the heat of the moment, as when he lashes out with a knife in the heat of a fight; or when a man acts in panic, or in blind rage. These circumstances may explain why the man has gone to the extent of acting as he did, not caring whether the victim lived or died; but I cannot see that the fact that, in consequence, he did not have the risk of death in his mind at the time should prevent him from being held guilty of murder, and this indeed appears to be the position in Scots law. [110] I think it also right to add that a similar concept to so-called wicked recklessness has not been unknown to English law. For in the English law of rape, the defendant must either know that the woman did not consent to intercourse, or be reckless whether she consented; and recklessness has here been interpreted as meaning that the man was indifferent and gave no thought to the possibility that the woman might not be consenting. [111]

Now, in considering the Scottish principle, it may be helpful if we look back at some of the English examples previously mentioned, to see what might have happened if the concept of "wicked recklessness" had formed part of English law. Let us take them one by one.

(1) *Smith*. [112] This was the case of the thief who, in a state of panic, violently forced the policeman off his car. No doubt, as he said, he did not mean to kill him; but it appears to be a classic case of a man acting totally regardless of consequences, not caring whether the victim lived or died. If the jury had so concluded, he would, in Scots law, have been guilty of murder--as the House of Lords felt that he should be.

(2) *Hyam*. [113] This was the case of the lady who set fire to the house of her former lover's new fiancee, killing two of her children. ***L.Q.R. 56** It would have been for the jury to decide whether she acted totally regardless of the consequences, indifferent whether any of the people in the house died or not--a conclusion they might have reached, having regard to the fact that she carefully ascertained beforehand that her former lover was not in the house. [114]

(3) *Moloney*. [115] This was the case of the man who blew his stepfather's head off with a shotgun. The jury could have been asked: did he mean to kill his stepfather? Or, if not, did he act regardless of the consequences, not caring whether his stepfather died or not? It would have been open to the jury to convict on the latter basis.

(4) *Hancock*. [116] This was the case of the striking miners. Again, the jury could have been directed to consider the case on the two alternative bases, *i.e.,* intention to kill or "wicked recklessness;" and again it would have been open to them to convict on the basis of "wicked recklessness."

(5) *Cases of intention to cause grievous bodily harm*. As I see it, adoption of the concept of "wicked recklessness" provides a far more just solution than does this form of intent, and indeed renders it surplus to requirements. [117] Take the case of the man who stabs another man in a fight. The test whether he intended to cause really serious bodily harm does not, for the reasons I have already given, appear to provide a satisfactory answer--whereas the test whether he acted regardless of the consequences, not caring whether the victim died or not, introduces the element of indifference to death which, as I see it, provides an appropriate hallmark of murder in cases such as this. Likewise, in the case of "glassing" which I have described to you: again, "wicked recklessness" provides a far more appropriate criterion and, on the facts of the case which I tried in Nottingham, would have produced a basis upon which the jury could, legitimately, have acquitted the accused of murder while, of course, convicting him of manslaughter.

(6) *Professor Glanville Williams' case* of the time-bomb in the aeroplane. Plainly, although the accused did not mean to kill anybody, he should be convicted of murder on the basis of wicked recklessness. [118]

***L.Q.R. 57** (7) *Terrorists*. Take the case of a terrorist who leaves a time-bomb in a dustbin in a street, and it goes off later and kills somebody. He can well say that he did not *mean* to kill anybody or even to cause grievous bodily harm to anybody: but it is a classic case of wicked recklessness. Then take the case of a terrorist who leaves a time-bomb in a busy store, and telephones to say that it will go off in half-an-hour's time. The store is evacuated, but somebody gets left behind and is killed when the bomb goes off, or a bomb disposal expert is killed trying to defuse the bomb. It will be for the jury to decide, on the evidence, whether the terrorist was indifferent whether anybody was killed or not, or whether he merely intended to terrify people. This seems to me to be a legitimate question to be put to a jury, though the inherently dangerous nature of a bomb is likely to persuade them to convict. Please do not forget my example of the terrorist who blows up a national monument and kills the night watchman. His *intention* is only to damage property, though he is indifferent to death resulting from his act. On the present state of the law--and indeed on the proposed formulation of the Criminal Law Revision Committee--he would not be guilty of murder. Plainly he should be; this again is a straightforward case of wicked recklessness. Such a case is by no means fanciful. It could well occur.

(8) *Reckless motorists*. Obviously, they will not be guilty of wicked recklessness in all but the most extraordinary cases; the ordinary reckless motorist is a foolish optimist, who hopes and believes that neither he himself nor anybody else will be killed, or even hurt.

So it looks as though the concept of "wicked recklessness" works well in practice. Moreover, having regard to the reactions of judges and juries in some of the decided cases, it appears to produce results which conform to their feelings. It has another advantage, because, with this as an alternative, intention to kill can be confined to its ordinary meaning--did the defendant mean

to kill the victim? We do not have to try to expand intention by artificial concepts such as oblique intention. [119] Furthermore, in directing juries on intention to kill, judges should not have to embark on complicated dissertations about foresight of consequences and such like. With the alternative of "wicked recklessness" open to them, the jury in *Hancock* (the case of the striking miners) should not have been puzzled if they had been told to ask themselves the ***L.Q.R. 58*** simple questions--did the defendants mean to kill? Or did they act totally regardless of the consequences, indifferent whether anybody in the convoy died or not? But for me, the most important point is this. I am not talking simply about some theory, dreamed up by some theoretician. I am talking about a principle which has for long been applied in a sister jurisdiction in the United Kingdom. Innumerable Scottish juries have been charged on this basis, and no doubt many people convicted of murder upon it. [120] So far as I know, in Scotland neither judge, nor jury, nor jurist, sees any objection to it. [121] What greater recommendation can there be for a principle than that it has been successfully applied in practice?

If this approach is right, then both English and Scots law should abandon intention to cause grievous bodily harm or grave personal injury as constituting of itself a sufficient mental element for the crime of murder, if indeed this be Scots law. I hesitate to make any suggestion about Scots law; because it is well known that Scottish lawyers are very resistant to anything English, and no doubt particularly resistant to suggestions by English judges. But since (a) I was born in Scotland; (b) I had a Scottish mother, who ensured that (a) occurred; and (c) I served for nearly four years in a Scottish regiment, perhaps they will on this occasion overlook the defects inherent in my being an English lawyer, especially as I am making the same recommendation for English law, and further urging that English law should adopt the Scottish concept of wicked recklessness. I must confess however that, having regard to the emotional content of the adjective "wicked", [122] and the ambiguity inherent in "recklessness", I would prefer to describe the concept as indifference to death. But that is just a matter of words. Let me however add this, that it must in any event be inherently desirable that the crime of murder should be the same both north and south of the River Tweed.

In the end, it is perhaps of interest to recall the clue which I gave to you at the beginning of this talk. The reactions of the judges and juries in many of the cases I have cited to you demonstrate, I think, a strong feeling that the mental element in murder, restricted to intention--whether to kill or to cause grievous bodily harm--is too closely confined to do justice in all cases. But the solutions which the judges produced to solve this problem-- ***L.Q.R. 59*** notably in *Smith* and in *Hyam*--were not satisfactory. The jurists reacted adversely to these cases; but they have become imprisoned within their own favourite concept of intention, to such an extent that they have tried, illegitimately, to expand it to include other cases. By adopting the solution that the mental element of murder consists of either (1) an intention to kill, or (2) indifference to death, we can, I suggest, both satisfy the general sense of justice as evidenced in the cases, and avoid the trap of using words otherwise than in their ordinary meaning--a trap which it is especially important to avoid in systems in which judges have to direct juries.

And now the jurists, many of them close personal friends for whom I entertain great respect, can amuse themselves in tearing this paper to pieces!

<FNTI> This is the text of the Lionel Cohen Lecture delivered at the Hebrew University of Jerusalem on May 19, 1987. The Editor of the *Law Quarterly Review* wishes to express his gratitude to the Dean of the Faculty of Law at the Hebrew University of Jerusalem and to the Editor of the Israel Law Review for their agreement to the publication of Lord Goff's lecture in this *Review.* </FNTI>

ROBERT GOFF.

Footnotes

1 The Maccabaean Lecture, *The Search for Principle,* (1983) 69 *Proceedings of the British Academy* 169.

2 *Ibid.,* at pp.182-183.

3 *Smith* v. *Littlewood's Organisation Ltd.* [1987] A.C. 241 at p.280.

4 *Ibid.,* at pp.184-185.

5 The emergence of murder and manslaughter as distinct offences occurred in the late sixteenth century: see Kaye, "The Early History of Murder and Manslaughter" Pt. II, (1967) 83 L.Q.R. 569 at pp.587-601, and Green, "The Jury and the English Law of Homicide" (1976) 74 Michigan Law Rev. 414 at pp.484-487.

The re-establishment of a single homicide offence was considered and rejected by the Criminal Law Revision Committee in its 14th Report on Offences against the Person (1980), Cmnd. 7844, paragraph 15. Such a change had been suggested by Lord Kilbrandon in *Hyam* [1975] A.C. 55 at p.98. The New Zealand Criminal Law Reform Committee in its *Report on Culpable Homicide* (1976), pp.3-4, also recommended the creation of single offence of "unlawful killing." This proposal has not been implemented.

6 See Murder (Abolition of Death Penalty) Act 1965, s.1(1) and the discussion in Williams, *Textbook of Criminal Law* (2nd ed., 1983) at pp.245-249. In Britain, recommendations have been made by the Butler Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244 at paragraphs 19.14-19.16, and the Advisory Council on the Penal System, in *Sentences of Imprisonment: A Review of Maximum Penalties* (1978) at paragraph 256, that the mandatory life sentence should be abolished and a discretionary sentence, with a maximum of life imprisonment, introduced. However the Criminal Law Revision Committee in its 14th Report on Offences against the Person (1980), Cmnd. 7844, at paragraphs 42-61, found themselves "deeply and almost evenly divided" on the issue and therefore felt unable to recommend any change. In Scotland similar suggestions were rejected by the *Committee on Penalties for Homicide* (1972), Cmnd. 5137. However in New South Wales, the Crimes (Homicide) Amendment Act 1982 introduced a *maximum* life sentence, and the mandatory life sentence has recently been abolished in Victoria, following recommendations of the Victorian Law Commission (Report No. 1, *The Law of Homicide in Victoria: The Sentence for Murder,* (1985) p.3). Similar proposals have been made later by reform agencies in Canada (Law Reform Commission, Report No. 30 *Recodifying Criminal Law* (1987), p.55); and New Zealand (Criminal Law Reform Committee, see above n.5, pp.10-11).

7 For a fuller discussion of the history of the term "malice aforethought," see Fitzjames Stephen, *A History of the Criminal Law of England* (1883) vol. 3, pp.41-46; Perkins, "A Re-examination of Malice Aforethought" (1934) 43 Yale L.J. 537; Kaye, "The Early History of Murder and Manslaughter" (1967) 83 L.Q.R. at pp.365-395 and 569-601 (parts 1 and 2); Green, "The Jury and the English Law of Homicide" (1976) 74 Michigan Law Rev. 414; Fletcher, *Rethinking Criminal Law* (1978) at pp.276-285; *The Reports of Sir John Spelman,* ed. Baker, Selden Society (1978) vol. 94, pp.303-305.

8 See Fitzjames Stephen, above n.7, at p.70; Perkins, above n.7, pp.537-539.

9 *Vickers* [1957] 2 Q.B. 664 at pp.670-671 *per* Lord Goddard; *Hyam* [1975] A.C. 55 at pp.67-68 *per* Lord Hailsham; *Cunningham* [1982] A.C. 566 at p.576 *per* Lord Hailsham.

10 The old writers had a wider view of the scope of implied malice. See, for example, *Coke's Institutes,* Pt. III (1797 ed.) p.52; *Hale's Pleas of the Crown* (1778 ed.) vol. 1, p.455. (chap. 37); and *Blackstone's Commentaries* 4th ed. (1876) vol. 4, p.200. See n.11 below.

11 Prior to the Homicide Act 1957, "… it had for very many years been believed that "implied malice' and "constructive malice' were alternative terms for the same legal concept" (J. W. Cecil Turner, "Malice Implied and Constructive," [1958] Crim.L.R. 15).

12 "Constructive malice" is abolished by s.1 of the 1957 Act, whilst "malice aforethought (express or implied)" is retained in s.1(1). For the modern distinction see further *Kenny's Outlines of Criminal Law* (19th ed., 1966), p.155, and cases cited above, n.9. Complex felonymurder rules continue to exist in Australia, Canada and New Zealand, although the abolition of "constructive malice" has been recommended by the South Australian Criminal Law and Penal Methods Reform Committee, Report No. 4, *The Substantive Criminal Law* (1977) p.19; the Victorian Law Reform Commissioner, Working Paper No. 8, *Murder: Mental Element and Punishment* (1984) pp.10-13; and the Canadian Law Reform Commission, Report No. 30 *Recodifying Criminal Law* (1987) p.54.

13 [1957] 2 Q.B. 664 at p.672. The appeal was heard by three judges of the Court of Criminal Appeal but, after they could not agree, a full court (Lord Goddard C.J., Hilbery, Byrne, Slade and Devlin JJ.) heard the case and unanimously dismissed the appeal. This direction was approved in *Hyam* [1975] A.C. 55 at p.68, *per* Lord Hailsham, and *Cunningham* [1982] A.C. 566 at p.581, *per* Lord Hailsham (see below).

14 [1961] A.C. 290.

15 [1975] A.C. 55.

16 [1985] A.C. 905.

17 [1986] A.C. 455.

18 [1961] A.C. 290.

19 *Ibid.,* at pp.293-294.

20 *Ibid.,* at p.323 (Donovan J.).

21 Emphasis added.

22 [1961] A.C. 290 at pp.326-327.

23 See references in Smith and Hogan, *Criminal Law* (5th ed., 1983), p.295, n.16. Buxton in "Retreat from Smith," [1966] Crim.L.R. 195 showed that *Smith* [1961] A.C. 290 was being ignored in practice by first instance judges, even prior to the Criminal Justice Act 1967. In Australia, the High Court in *Parker* (1963) 111 C.L.R. 610 at p.632 broke with a tradition of according precedence to decisions of the House of Lords to declare the propositions laid down in *Smith* to be "misconceived and wrong." In New Zealand, the legislature removed the phrase "or ought to have known" from section 167(*d*) of the Crimes Act 1961 to ensure that an objectively tested mental state would have no place in their law of murder (see Garrow and Caldwell, *Criminal Law in New Zealand* (6th ed., 1981), p.140).

24 The Criminal Justice Act 1967, s.8, provides that:"A court or jury, in determining whether a person has committed an offence:

25 [1987] 2 W.L.R. 1251. It was held that an objective test of intention for the crime of murder had no place in the law of the Isle of Man, even before such a test was abolished by the Isle of Man Evidence Act 1983, s.6 (which effectively incorporated s.8 of the Criminal Justice Act 1967).

26 But *cf.* section 212(c) of the Canadian Code (derived from Stephen's 1879 codification of the common law) which provides that culpable homicide is murder, "where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being …", effectively establishing an objectively determinable mental element. For criticism of this objective standard see Stuart, *Canadian Criminal Law: A Treatise* (1982), pp.208-214 and references cited at n.413.

27 [1975] A.C. 55.

28 *Ibid.,* at p.65 (Ackner J.).

29 Emphasis added.

30 [1975] A.C. 55 at p.79, *per* Lord Hailsham. But see Lord Bridge in *Moloney* [1985] A.C. 905 at p.927 for criticism of this test.

31 [1975] A.C. 55 at p.82.

32 Emphasis added.

33 [1975] A.C. 55 at p.96.

34 Emphasis added.

35 [1975] A.C. 55 at p.97.

36 [1985] A.C. 905.

37 *Ibid.*

38 *Ibid.* at p.906.

39 *Ibid.* at p.916.

40 Emphases added.

41 Emphases added.

42 [1985] A.C. 905 at p.917.

43 *The Times,* December 22, 1983 (C.A.)

44 [1985] A.C. 905 at p.920.

45 *Ibid.* at pp.927-928.

46 *Ibid.* at p.928.

47 [1986] A.C. 455.

48 *Ibid.* at p.458.

49 [1985] A.C. 905 at p.929.

50 *Hancock* [1985] 3 W.L.R. 1014. Verdicts of manslaughter were substituted and the accused were sentenced accordingly.

51 [1986] A.C. 455 at p.473.

52 *Ibid.* at p.474.

53 [1957] 2 Q.B. 664.

54 [1985] A.C. 905 at p.925.

55 Emphasis added.

56 The Criminal Law Revision Committee in its 14th Report, (1980) Cmnd. 7844, paragraph 115, rejected the proposals of the 1976 Working Paper on Offences against the Person to create a new offence of mercy killing subject to a maximum sentence of 2 years' imprisonment, regarding it as too controversial for its programme of law reform. Two law reform agencies in Australia have also declined to intervene in this area (see Law Reform Commissioner of Victoria, Working Paper No. 8 (1984), p.30, and Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report (1977), p.58). In Canada

"planned and deliberate" mercy killings constitute first degree (aggravated) murder under section 214(2) of the Code. However the Canadian Law Reform Commission recently proposed that, whilst the distinction between first and second degree murder should be retained, "mercy killing" should only constitute the non-aggravated offence (1987 Draft Code (Report No. 30) clause 6(4)(*g*)). If the Commission's recommendations are followed, first degree murder will continue to be punishable by a fixed penalty of life imprisonment with a minimum 25 year non-parole period, but ordinary murder will carry no fixed or minimum penalty.

57 [1985] A.C. 905 at p.926.

58 An example given by Stannard in "Mens Rea in the Melting Pot", (1986) 37 N.I.L.Q. 61 at p.69, which is also discussed in Dennis "The Mental Element for Accessories", in *Criminal Law: Essays in Honour of J. C. Smith* (London, 1987) at pages 54-55.

59 Criminal Law Revision Committee, 14th Report on Offences against the Person (1980), Cmnd. 7844, paragraph 25, p.11.

60 The American Law Institute's Draft Model Penal Code states in section 210.2(1)(*a*) that criminal homicide is murder if it is committed "purposely" or "knowingly", with "purposely" defined in terms of the defendant's "conscious object" (section 2.02(2)(*a*)(i)). Similarly, section 15.05(1) of the New York Penal Law 1967 (which was derived from the Model Penal Code) defines "intentionally" in terms of the defendant's "conscious objective."

61 The argument that "intention" is also synonomous with "purpose" also arose, in the context of accessory liability, in the House of Lords' case of *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112. The case concerned the legality of a circular issued to doctors by the defendants, in which they gave advice on the provision of contraceptive counselling and treatment to girls *under* 16 years. It was argued that a doctor giving such treatment to a girl of this age would be liable for aiding and abetting the offence of unlawful sexual intercourse. However the trial judge (Woolf J.) distinguished the case of the doctor who *intends* to encourage sexual intercourse and is therefore liable as an accessory, from the case in which the doctor, while knowing that the offence is likely to be committed, acts solely for the purpose of preserving the girl's health. The meaning of "intention" in this case, as in *Moloney* and *Hancock,* would seem to involve an investigation of the defendant's purpose, in the sense of the result which, when he acted, he was seeking to achieve. For a fuller discussion of this point see Dennis, "The Mental Element for Accessories," in *Criminal Law: Essays in Honour of J. C. Smith* (London, 1987) at pp.53-55; Stannard "Mens Rea in the Melting Pot" (1986) 37 N.I.L.Q. 61 esp. at pp.69-70; Duff "The Obscure Intentions of the House of Lords" [1986] Crim.L.R. 771; and Halpin, "Intended Consequences and Unintentional Fallacies" (1987) 7 O.J.L.S. 104.

62 In 1967 the Law Commission recommended that the mental element in murder should be statutorily defined as an "intent to kill". A person would have this intention, "… if he means his actions to kill, or if he is willing for his actions, though meant for another purpose, to kill in accomplishing that purpose." Law Com. No. 10, *Imputed Criminal Intent (Director of Public Prosecutions* v. *Smith*) (1967), Draft Clause 2(2). This recommendation was never implemented. Stephen's Draft Code of 1879, s.174, provided that an actor is guilty of murder if he (a) means to cause the death of the victim or if he (b) means to cause the victim any bodily injury which he knows is likely to cause death, being reckless as to whether death ensues or not. This formulation was substantially adopted in Canada (s.212(*a*)(i) and (ii) of the Criminal Code) and New Zealand (s.167(*a*) and (*b*) of the Crimes Act 1961). See further Stuart, above n.26, pp.123-130; Garrow and Caldwell, above n.23, pp.139-140.

63 First Book of Kings, Chap. 22 v.34.

64 [1964] A.C. 644 at p.664.

65 However, if there is no other evidence from which the jury may infer that the defendant intended to kill the deceased than the inference from his foresight of the consequences of his act, it may be unsafe for the jury to draw that inference, unless satisfied that the defendant was virtually certain that death would result from his act; (see *Nedrick* [1986] 1 W.L.R. 1025 at p.1028 *per* Lord Lane C.J.). Cases where there is no other material which may assist the jury in deciding whether the necessary intent has been proved are likely to be rare.

66 [1986] A.C. 455 at p.473.

67 See the text at n.53 above.

68 See for example Prof. J. C. Smith's commentary on *Moloney* at [1985] Crim.L.R. 378 at p.379; Duff, "The Obscure Intentions of the House of Lords" [1986] Crim.L.R. 771.

69 Williams, *Textbook of Criminal Law* (2nd ed., 1983), pp.84-85 (footnotes omitted).

70 *Cf.* however, the meaning given to "intent to kill" by the Law Commission, above n.61. Canada, Australia and New Zealand, whose murder provisions derive from the common law, accept a wider definition of intent. The Canadian Law Reform Commission in cl. 2(4)(*b*)(ii)(B) of the 1987 Draft Code (Report No. 30), p.20, defined "purposely" to include situations (such as Prof. Williams' aircraft example cited above) where "D causes V's death which he does not desire, as a necessary step to some other objective, which he does desire" (at p.54). In the Australian States, there is some controversy as to whether consequences foreseen as *certain* to result are synonomous with intended consequences, or merely evidence from which intent can be inferred (see Howard, *Criminal Law* (4th ed., 1982), p.41 and Campbell, "Recklessness in Intentional Murder under the Australian Codes", (1986) 10 Crim.L.J. 3 at p.14). See also Garrow and Caldwell, *Criminal Law in New Zealand* (6th ed., 1981), p.475. Under the U.S. Model Penal Code, s.210.2(1)(*a*), criminal homicide is murder when it is committed purposely or knowingly, with "knowingly" defined in s.2.02(2)(*b*)(ii) to include results known by the accused to be the "practically certain" outcome of his conduct.

71 *Cf. Nedrick* [1986] 1 W.L.R. 1025 at p.1028, *per* Lord Lane C.J., who said that, where the accused recognises that death or serious harm would be *virtually certain* to result from his act, the jury might find it easy to infer that he intended that result, even if he did not desire it.

72 See above.

73 See text at n.68 above.

74 Colonel Sebastian Moran, formerly 1st Bengalore Pioneers (described by Sherlock Holmes as "the second most dangerous man in London"), attempted to kill Holmes in his rooms by shooting him with an air rifle from the other side of Baker Street. However, unknown to Colonel Moran, the target was actually a waxwork of the great detective who, at the time of the shot, was standing with Dr. Watson behind the Colonel waiting to make the arrest. (See *The Adventure of the Empty House* by Sir Arthur Conan Doyle, reprinted from the Strand Magazine (1903) in *The Return of Sherlock Holmes* (1905)).

75 [1975] A.C. 55 at p.86.

76 Lord Diplock considered (*ibid.,* pp.87-89) that this form of malice aforethought arose from Lord Ellenborough's Act 1803 (43 Geo. 3, c.58) which had made the intentional infliction of grievous bodily harm resulting in death a felony-murder under the doctrine of constructive malice and had therefore been abolished by the Homicide Act 1957, s.1. See further J. W. Cecil Turner, "Malice Implied and Constructive" [1958] Crim.L.R. 15 and references at n.7 above.

77 [1975] A.C. 55 at p.93.

78 [1982] A.C. 566 at pp.577-578, *per* Lord Hailsham.

79 [1961] A.C. 290 at p.334.

80 See [1982] A.C. 566 at p.574, *per* Lord Hailsham, and similar statements in *Hyam* [1975] A.C. 55 at pp.68-69, *per* Lord Hailsham, and at p.85, *per* Viscount Dilhorne; *Belfon* [1976] 1 W.L.R. 741 at p.743, *per* Wien J. See generally Smith and Hogan, *Criminal Law* (5th ed., 1983), p.293. Similar statements are to be found in the Australian common law states: see *Hallett* [1969] S.A.S.R. 141; *Sergi* [1976] V.R. 1; but *cf.* Howard *Criminal Law* (4th ed., 1982), at p.50, who argues that the meaning may be narrower, encompassing only those injuries likely to cause death.

81 See the arguments of Lord Diplock in *Hyam* [1975] A.C. 55 at pp.90-91, and of Lord Edmund-Davies in *Cunningham* [1982] A.C. 566 at pp.582-583. See also *Russell on Crime* (12th ed., 1964), vol. 1 at p.489; Glanville Williams, *The Mental Element in Crime,* Jerusalem 1965 (compilation of a series of Lionel Cohen Lectures delivered in 1957-1958), pp.80-84; Glanville Williams, *Textbook of Criminal Law* (2nd ed., 1983), pp.250-251. Many of these arguments are reflected in the recommendations for abolition of this head of culpability by the law reform agencies of Victoria and South Australia. Instead they propose limiting the mental element in murder to an "intention" or "purpose" to kill, or situations where the defendant knows that there is "a substantial risk of causing death" (Victoria, Working Paper No. 8 (1984), p.21) or a "high likelihood that his actions will cause death" (South Australia, Fourth Report, page 8). *cf.* R. S. Wright's Code of Criminal Law and Procedure 1877 (Draft Criminal Code for Jamaica), in which the intent to do grievous bodily harm is excluded from the murder provisions, with the offence being defined simply as "intentionally causing the death of another person by any unlawful harm." For further discussion of Wright's Code see Friedland "R. S. Wright's Model Criminal Code: A forgotten Chapter in the History of the Criminal Law" (1981) 1 O.J.L.S. 307, and Linden "Toward a New Criminal Code for Canada" in Fitzgerald ed., *Crime, Justice and Codification* (1986), p.167.

82 See text at n.58 above.

83 Criminal Law Revision Committee, Fourteenth Report on Offences against the Person (1980) Cmnd. 7844, at p.129. Similarly, in both Canada and New Zealand, killing by intentionally causing bodily harm is murder only if the actor knows that his act is likely to cause death, and is also reckless as to whether death ensues or not (see section 212(*a*)(ii), Canadian Code, and section 167(*b*), New Zealand Crimes Act 1961).

84 Criminal Law Revision Committee, 14th Report (1980) at p.129.

85 *Cf.* Tasmanian Criminal Code 1924, s.157(*c*) which states that culpable homicide is murder where it is committed:"… by means of any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances, although he had no wish to cause death or bodily harm to any person."

86 See Gordon, *The Criminal Law of Scotland* (2nd ed., 1978), p.739, who stresses the importance of the accused's knowledge of his victim's infirmity in establishing culpability for murder. See also the Indian Penal Code, s.300(2), which provides that culpable homicide is murder--"if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused."

87 See also Fletcher, *Rethinking Criminal Law* (1978), at pp.267-268.

88 See n.96 below.

89 [1975] A.C. 55.

90 [1975] A.C. 55 at pp.77 and 79. See also *Smith* [1961] A.C. 290 at p.327, *per* Viscount Kilmuir.

91 [1985] A.C. 905 at p.927.

92 *Ibid.,* at p.920. See also Criminal Law Revision Committee, 14th Report on Offences against the Person (1980), Cmnd. 7844, at paragraph 26, which argued that recklessness, of whatever degree, should not be a sufficient mental element for murder.

93 See below. In the Australian common law jurisdictions of South Australia and Victoria, the High Court of Australia has accepted that recklessness constitutes part of malice aforethought for the mental element of murder (see *Crabbe* (1985) 59 A.L.J.R. 417). A more limited form of reckless murder exists in New South Wales under the Crimes Act 1900, s.18(1)(*a*). For a detailed discussion of reckless murder under the Australian Codes, see Elliott, "Recklessness in Murder" (1981) 5 Crim.L.J. 84 and Campbell, "Recklessness in Intentional Murder Under the Australian Codes" (1986) 10 Crim.L.J. 3. For the position in Canada and New Zealand see n.82 above.

94 Williams, Chap. 5, p.96.

95 *Ibid.* The House of Lords has recently adopted a more objective meaning of "recklessness": see *Caldwell* [1982] A.C. 341 and *Seymour* [1983] 2 A.C. 493. These decisions have not escaped criticism; see, *e.g.* Glanville Williams, "Recklessness Redefined" [1981] C.L.J. 252, and "Divergent Interpretations of Recklessness" in (1982) 132 N.L.J. at pp.289, 313 and 336; Griew, "Reckless Damage and Reckless Driving: Living with *Caldwell* and *Lawrence*" [1981] Crim.L.R. 743; Syrota "A Radical Change in the Law of Recklessness" [1982] Crim.L.R. 97. For the purposes of many crimes in the Offences against the Person Act 1861 the required mental element is "maliciously". This was explained in *Cunningham* [1957] 2 Q.B. 396 as including recklessness, but in a subjective sense. It seems that *Caldwell* and *Seymour* do not contain any redefinition of "maliciously," which remains a subjective concept.

96 *cf. Lawrence* [1982] A.C. 510. For similar Scots law see *Allan* v. *Patterson* 1980 S.L.T. 77, which was approved in *Lawrence.*

97 The American Law Institute's Model Penal Code also provides that reckless homicide is only manslaughter (s.210.3(1)(*a*)). But see n.9 below.

98 See text at n.68 above.

99 Gordon, *The Criminal Law of Scotland* (2nd ed., 1978), p.732. See also Scottish Law Commission, Report No. 80 (1983), paragraphs 2.14-2.15.

100 Macdonald *Criminal Law,* 5th ed., p.89.

101 *Ibid.* p.91.

102 1968 S.L.T. 330.

103 *Ibid.* at p.332. But *cf.* p.331 *per* Lord Justice-General Clyde, and p.333 *per* Lord Cameron.

104 Burnett, *Criminal Law of Scotland* (1811), p.4; Alison, *Criminal Law* (1832), vol. I, p.1; Anderson, *Criminal Law of Scotland* (1892), p.70. Suggestions have been made in the past that it will *always* be murder when the accused kills, either using a dangerous weapon or during the commission of another serious offence, particularly robbery. See, *e.g. Miller* v. *Denovan* (1960) High Court (unrep.--transcript of judge's charge, pages 30-31); *H.M.A.* v. *McGuinness* 1937 J.C. 37 at p.40 *per* Aitchison L.J.-C.--"If people resort to the use of deadly weapons of this kind, they are guilty of murder, whether or not they intended

to kill"; *Kennedy* v. *H.M.A.* 1944 J.C. 171 at p.174 *per* Lord Carmont. However, the better view seems to be that such cases are merely examples of fact situations from which wicked recklessness can easily be inferred and do not introduce any separate and distinct rules into the Scots crime of murder. See generally Gordon at pp.737-747, and the Scottish Law Commission, Consultative Memorandum No. 61, *Attempted Homicide* (1984), paragraphs 3, 5 and 3.7-3.9.

105 Hume, *Commentaries on the Law of Scotland* (4th ed., 1844), vol. I, p.257. See also Gordon, *The Criminal Law of Scotland* (2nd ed., 1978), at p.738, and 1968 S.L.T. (News) 41 at pp.43-44.

106 Gordon, *ibid.,* at pp.735-736.

107 Glasgow High Court, January 1976 (Transcript of Judge's charge).

108 Gordon, *ibid.,* at pp.214 and 737-738 stresses that the concept of "wickedness" is concerned more with moral judgments than defining technically the mental elements for specific offences.

109 See Hume, vol. 1, p.256; Alison, *Criminal Law* (1832) vol. 1, p.1. In *H.M.A.* v. *Rutherford,* 1947 S.L.T. 3 at p.4, Cooper L.J.-C. said: "The essence of murder is that the accused should have acted deliberately with intent to kill, or at least with reckless indifference as to the consequences of his violence upon his victim"--a statement of the law which avoids the use of the term "wicked."Under the American Law Institute's Model Penal Code, criminal homicide does constitute murder when it is, "… committed recklessly under circumstances manifesting extreme indifference to the value of human life." (s.210.2(1)(*b*)). According to the Commentary to the Code (at p.21):

110 But the courts in Canada and New Zealand, in interpreting their reckless murder provisions, have insisted that the defendant's knowledge of the risk of death must coincide with the performance of the fatal act (see *Ramsey* [1967] N.Z.L.R. 1005; *Nathan* [1981] 2 N.Z.L.R. 473; *Simpson* (1981) 20 O.R. (3d) 36).

111 See, *e.g. Pigg* [1983] 1 W.L.R. 6. "Indifference" in this context is a subjective concept, and in *Kimber* [1983] 1 W.L.R. 1118 at p.1123 Lawton L.J. explained it by the colloquial expression "couldn't care less". In *Satnam and Kewal* (1983) 78 Cr.App.R. 149 it was pointed out by the Court of Appeal (Criminal Division) that the word "indifferent" without further explanation may be ambiguous in that it can be understood objectively. So far as rape was concerned, the Court held that the statutory definition required a subjective test. (For further discussion of "indifferent" see Professor J. C. Smith's commentary in [1977] Crim.L.R. 166 on *Stone and Dobinson* [1977] 1 Q.B. 354).

112 [1961] A.C. 290.

113 [1975] A.C. 55.

114 Supported in *Moloney* [1985] A.C. 905 at p.913 by Lord Hailsham. But *cf.* Duff, "The Obscure Intentions of the House of Lords" [1986] Crim.L.R. 771 at pp.775-776.

115 [1985] A.C. 905.

116 [1986] A.C. 455.

117 Under the U.S. Model Penal Code, the intention to do grievous bodily harm has no express significance, but is subsumed within the wider categories of "extreme indifference" murder (s.210.2(1)(*b*)) or reckless manslaughter (s.210.3(1)(*a*)) (The American Law Institute, Model Penal Code and Commentaries (1980) at pp.28-29). In New York, an "intent to cause serious physical injury", under section 125.20(1) of the Penal Law 1967, only creates liability for first degree manslaughter (see Gegan, "A Case of Depraved Mind Murder" (1975) 49 St. John's Law Rev. 417 esp. at pp.438-440).

118 Gordon *ibid.* at pp.223-224, approves this conclusion.

119 See Stannard, "Mens Rea in the Melting Pot" (1986) 37 N.I.L.Q. 61 at pp.70-71; Duff, "The Obscure Intentions of the House of Lords" [1986] Crim.L.R. 771 at p.778; Halpin "Intended Consequences and Unintentional Fallacies" (1987) 7 O.J.L.S. 104 at p.114; which support the argument that the mens rea of murder should be widened but without artificially extending the meaning of "intention."

120 See Gordon, 1968 S.L.T. (News) 41.

121 See Scottish Law Commission, Report No. 80, *The Mental Element in Crime,* paragraphs 2.34-2.36, and Consultative Memorandum No. 61 on *Attempted Homicide* (1984) at paragraph 3.4, which highlight the small number of appeals concerning the mental element in murder under Scots law, when compared to the rest of Britain. But *cf.* "Forensis" [1986] J.L.S.S. 354 at p.355.

122 See n.8 (second) above.

