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Criminal Intent and the Ruthless Risk-Taker

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Abstract

Senator Jana Stewart said, on 27 July 2022, that Australia's failure to cognise its genocides on First Nations people obstructs progress. The research objective is a critical analysis of criminal intention in genocide. A 'ruthless risk-taker' denotes a killer whose conduct was not directly calculated to kill, with callous disregard for human life, so as to label him or her as 'murderer'. Officials continuing genocidal acts are ruthless risk-takers. The question asks about the character of criminal intent. Argument proposes that, in the English law, criminal intent to commit murder has been truncated by judicial legislation. The research is legal doctrinal research, set out as a legal narrative analysis. Judicial labelling was a precursor to punishment by stigmatisation, and juries should infer intent only for rare cases. This is because proof of the defendant's foresight either of death or of grievous bodily harm, at minimum as a probable outcome of his or her actions was different from proof that he or she actually intended the consequence. Few ruthless risk-takers would have foreseen death or serious injury to the required degree. The cognitive approach to mens rea will never return a satisfactory answer to the ruthless risk-taker problem, without actual proof of intent. In consequence of these outcomes, genocidal acts in Australia must first be assessed as having been commissioned either by ruthless risk-takers, or not. If they were ruthless risk-takers, their intent must be proved at a very high degree of certainty. If not, their intent may be inferred from the natural consequences of their actions.

Keywords: genocidal history, criminal intention, ruthless risk-taker, punishment by stigmatisation, foresight.

A Introduction

Newly-elected Senator Jana Stewart said, on 27th July 2022, that Australia's failure to cognise its genocidal history was one of the nation's most significant obstructions to its progress as a community. In her maiden speech in the Federal Senate, this Mutthi Mutthi and Wamba Wamba woman spoke of the importance of both truth and a new Treaty, to build a better nation. Ms. Stewart said Australia was still unable to reconcile its past because it failed to be honest about the continuing genocide perpetrated on First Nations people. She said,

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> I use the word genocide because it is a hard truth about the history of this country … It is uncomfortable to read child death reports, it is uncomfortable to hear one woman dies every nine days from family violence in this country, it is uncomfortable to hear I, along with many other parents of colour, will have to teach our children the alphabet the same time as how to deal with racism in primary school.[1]

In the light of this statement of significance, pointing out an official failure of candour, this research has the general, but not specific, research objective of a critical analysis of the aspect of criminal intention inherent in acts of genocide, subject to the necessary delimitations of the research, as discussed below.

One of the more difficult problems in criminal law is the

> ruthless risk-taker, within the laws of homicide. The labelling of a person as a 'ruthless risk-taker' denotes a killer whose conduct was not directly calculated to kill, but that nevertheless manifested such callous disregard for human life as to imply the labelling of him or her as a 'murderer'.[2] Australian officials continuing genocidal acts, amid a failure of candour, might be characterised as ruthless risk takers, and where there acts and omissions result in death, the significant issue becomes murder. In the view of the English Law Commission, the label of murder is one of the 'highest moral and social significance … the public assumes that murder involves an intention to kill or its moral equivalent, namely a total disregard for human life'.[3]

In the Commonwealth of Australia, there is the *Genocide Convention Act 1949, No. 27*, 1949 (Australia), whose preamble states that it is "An Act to approve of Ratification by Australia of the Convention on the Prevention and Punishment of the Crime of Genocide, and for other purposes".[4] Australia ratified this Convention in 1949. It was the second country to so ratify it. However, it was not until the enactment of the *International Criminal Court (Consequential Amendments) Act 2002* (Australia),[5] that the Australian government legislated genocide to be a crime in Australia, but, effectively, it is impossible to prosecute an act of genocide without the express consent of the Australian Attorney-General. In light of this delimitation, acts of genocide causing death in Australia must still be treated as acts of murder and that, arguably, this form of the law may need no reform.

Considering the fact that First Nations people in Australia continue to be subject to genocidal acts, arguably perpetrated by both officials and their agents, arguably as ruthless risk-takers, and nobody has ever been prosecuted for genocide in Australia, the question arises as to what is the nature and character of criminal intent, as determined in a court of law, in respect of murder by a ruthless risk-taker.

1 T. Zaunmayr, 'Jana Stewart Delivers Hard Truths on Women's Rights, Criminal Age and Genocide in Maiden Speech', *National Indigenous Times*, 28 July 2022.
2 Law Commission, *Murder, Manslaughter and Infanticide*, Law Commission, no. 304, 2006, [2.19].
3 *Ibid*., [1.21].
4 *Genocide Convention Act 1949, No. 27*, 1949 (Australia), preamble.
5 *International Criminal Court (Consequential Amendments) Act 2002* (Australia).

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The argument seeks to sustain the proposition that, in English law, criminal intent to commit murder has been truncated by judicial legislation.

The research is legal doctrinal research, based on prominent English House of Lords' criminal intent decisions, because Australian officials committing genocidal murder in Australia are essentially acting on behalf of the British Crown. The research is therefore delimited to a critical investigation of criminal intent in cases of murder, as a full treatment of genocide has been shown, above, to be outside the scope of this research. The argument is set out as a legal narrative analysis, following the classical tradition of legal narrative.[6] This research consists of one main section, entitled 'Murder, Intention and the Inference of Intention'. This main section is divided into a legal narrative argument in the following subsection: Drawing the Inference of Intent; Problems with the *Moloney* Approach; Was foresight Ever Equivalent to Intention?; When Might the Inference Be Drawn?; *Moloney* and Section 8 of the Criminal Justice Act 1967; What Was Intention?; The Decision in *Woollin*; Intent and the Inference of Intent; Section 8 of the Criminal Justice Act 1967; Whether It Will Work; and, Two Conceptions of Criminal Fault.

The research will conclude that judicial denunciatory labelling was a doctrinal precursor to punishment by stigmatisation, while the courts suggest juries should infer intent, although for different reasons, and only for rare cases. This is because proof of the defendant's foresight either of death or of grievous bodily harm, at minimum as a probable outcome of his or her actions was different from proof that he or she actually intended the consequence. In such circumstances, few if any ruthless risk-takers could be proved to have foreseen death or serious injury to the required degree of probability, in that any foresight of consequences must not be equated with intent, it being only evidence from which intent might be inferred, and suggesting that foresight was twice removed from intent both by adjectival rules of evidence and a jury's view of the situation. The English law's cognitive approach to *mens rea* will never return a satisfactory answer to the ruthless-risk-taker problem, without actual proof of intent, to a high degree of certainty, while it deploys a cognitive procedure to resolve a normative substance. In consequence of these outcomes, genocidal acts in Australia must first be assessed as having been commissioned either by ruthless risk-takers, or not. If they were ruthless risk-takers, their intent must be proved with a high degree of certainty. If not, their intent may be inferred from the natural consequences of their actions.

B Murder, Intention and the Inference of Intention

I Drawing the Inference of Intent

Where a person could and did foresee that by its consequences his or her acts would breach a law, might he or she be judged responsible for violating the law? The precept that such a person is responsible, and therefore that foresight is enough for responsibility, has been accepted for a long time in legal and moral theories. Recently, however, philosophers and lawyers have expressed some concerns about

6 F.J. D'Angelo, *Composition in the Classical Tradition*, Boston, Allyn and Bacon, 2000, p. 23.

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the moral certainty of this principle,[7] raising the issue of whether the relationship between foresight and responsibility is sufficiently certain.

Argument begins with the 1985 House of Lords decision in *R v. Moloney*.[8] Although the doctrine allowing the inference of intent from the defendant's foresight of the act's consequences arose further back than *R v. Moloney*,[9,10] it was in this case that the doctrine was first reasoned by the House of Lords as the most appropriate technique for cases of the ruthless risk-taker. Doctrines emanating from higher courts function as procedural mechanisms for guiding and disciplining the behaviour of the lower courts. They are analogous to how Administrative Procedures Acts incentivise administrative agencies to follow the correct legislative norms,[11] thus exposing the moral uncertainty of a foresight-responsibility nexus as a mere administrative procedure for the judicature. One of the more difficult problems in criminal law is the 'ruthless risk-taker' within the laws of homicide. The labelling of a person as a 'ruthless risk-taker' denotes a killer whose conduct was not directly calculated to kill but which nevertheless manifested such callous disregard for human life as to imply the labelling of him or her as 'murderer',[12] suggesting that denunciatory labelling is a doctrinal precursor to punishment. For example, a terrorist bombs a crowded building without sufficient warning to those people inside it[13] or an arsonist pours an inflammable liquid into a family house and then sets it afire.[14]

In *R v. Moloney*,[15] the accused killed his father by shotgun after their drunken argument about which of them was the best shot. He was subsequently charged

7 GEM Anscombe, 'Modern Moral Philosophy', *Philosophy*, Vol. 33, No. 124, 1958, pp. 1-19; A. Kenny, 'Intention and Purpose in Law', *in* R. Summers (Ed.), *Essays in Legal Philosophy*, Oxford, Blackwell, 1968, p. 147; A. Kenny, *Will, Freedom and Power*, Oxford, Blackwell, 1975; A. Kenny, 'Intention and Mens Rea in Murder', *in* P. Hacker and J. Raz (Eds.), *Law, Morality and Society*, Oxford, Clarendon Press, 1977, pp. 167, 168.

8 [1985] AC 905.

9 *Ibid*.

10 Thus, there has long been a rebuttable presumption of evidence that the defendant foresees and intends the natural and probable consequences of his or her actions, and in *Hyam v. DPP*, Lord Hailsham expressed the opinion that a similar presumption applied where the consequences were actually foreseen by the defendant: [1975] AC 55, at p. 75.

11 M. McCubbins, R. Noll and B.R. Weingast, 'Administrative Procedures as Instruments of Political Control', *Journal of Law, Economics, & Organization*, Vol. 3, 1987, pp. 243-277; M. McCubbins, R. Noll and B.R. Weingast, 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies', *Virginia Law Review*, Vol. 75, 1989, pp. 431-482.

12 In the view of the English Law Commission, the label of murder is one of the 'highest moral and social significance'. See Law Commission, *Murder, Manslaughter and Infanticide*, Law. Com. No 304, 2006, [2.19]. See also [1.21] of the same source, where it is discussed, on the basis of the results of a programme of research carried out by Professor Barry Mitchell on behalf of the English Law Commission, that "[…]the public assumes that murder involves an intention to kill or its moral equivalent, namely a total disregard for human life".

13 *R v. London* [1980] NI 1 (CA).

14 *Hyam v. DPP* [1975] AC 55 (HL).

15 [1985] AC 905.

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with murder. While directing the jury, the trial judge used the following passage from *Archbold*,[16] the English criminal practitioner's most authoritative source:[17]

> In law 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, or (b) when he foresees that it will probably happen, whether he desires it or not.[18]

Grounding its deliberations in this direction, the jury convicted the defendant of murder, with this conviction upheld in the Court of Appeal. He thereafter appealed to the House of Lords, with the certified question formulated in the following terms:

> Is malice aforethought in the crime of murder established by proof that when doing the act which causes the death of another the accused either: (a) intends to kill or do serious harm; or (b) foresees that death or serious harm will probably occur, whether or not he desires either of those consequences?[19]

This certified question clearly equated intention with foresight of death or serious harm. The House of Lords held that the conviction could not be sustained, in allowing the appeal. However, in the House's dealing with the certified question, Lord Hailsham clearly distinguished between intent and plain foresight of the consequences. He concluded his remarks with these words:

> I conclude with the pious hope that your Lordships will not have to decide that foresight and foreseeability are not the same as intention though either may give rise to an irresistible inference of such, and that matters which are essentially to be treated as matters of inference for the jury as to a subjective state of mind will not once again be erected into a legal presumption. They should remain what they always should have been, part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not part of substantive law.[20]

Thus, Lord Hailsham linked intent and plain foresight of the consequences by a kind of parallel inference. Similarly, Lord Bridge, with the agreement of the other Law Lords, explicitly disapproved of the definition in *Archbold*, holding that it must no longer be stated while directing juries.[21] Later, he continued his observations by saying,

16 J.F. Archbold, *Archbold's Pleading and Evidence in Criminal Cases*, London, Sweet, 1867.
17 J.E. Stannard, 'Murder, Intention and the Inference of Intention', *Irish Jurist*, Vol. 34, 1999, pp. 202-222, p. 203 in particular.
18 J.F. Archbold, *Archbold's Pleading and Evidence in Criminal Cases*, Sweet, London, 1867, para. 17.13.
19 [1985] AC 905, at p. 908.
20 [1985] AC 905, at p. 913.
21 *Ibid*., at pp. 925-926.

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> Starting from the proposition ... that that the mental element in murder requires proof of an intention to kill or cause really serious injury, the first fundamental question to be answered is whether there is any rule of substantive law that foresight by the accused of one of these 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. I would answer this question in the negative.[22]

Although Lord Bridge appeared to eliminate the idea of direct inference, he suggested the inference of intent from mere procedural rules. Thus, it was evident that for Lords Bridge and Hailsham the correct approach in most cases of this kind was to ask the jury to infer intent,[23] although for different reasons, and only for rare case, as it appears in the following passage:

> In the rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Second, did the defendant foresee that consequence as being a natural consequence of his act? The jury should be told that if they answer Yes to both questions it is a proper inference to draw that he intended that consequence.[24]

So, whatever else may have been decided in *R v. Moloney*,[25] at least it was authority for the proposition that, generally, proof of the defendant's foresight either of death or of grievous bodily harm, at minimum as a probable outcome of his or her actions, was different from proof that he or she actually intended the consequence. Hinchcliffe J had said, in *R v. Vickers*,[26] that "malice will be implied, if the victim was killed by a voluntary act of the accused ... done with the intention either to kill or to do some grievous bodily harm".[27] In regard to the intent to do grievous bodily harm, the learned judge pointed out that

> the grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim.[28]

22 *Ibid*., at pp. 927-928.
23 Stannard, 1999, p. 204.
24 [1985] AC 905, at p. 929.
25 [1985] AC 905.
26 [1957] 3 WLR 326; [1957] 2 All ER 741.
27 [1957] 3 WLR 326, at p. 330; [1957] 2 All ER 741.
28 [1957] 3 WLR, at p. 330.

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Nevertheless, this kind of foresight functioned as evidence out of which necessary intent could be inferred. Thus, *R v. Moloney*[29] worked on foresight just as Section 8 of the English Criminal Justice Act 1967 had worked on foreseeability. In both cases, there was a presumed intent that could, but not necessarily, be drawn.

II Problems with the Moloney Approach

Therefore, the clear principle that *R v. Moloney*[30] established was that in matters where the defendant's intention was a problem, specifically in the 'ruthless risk-taker' cases, the correct way to achieve a conviction for murder was to provide proof that the defendant had foresight that either death or a serious injury was broadly likely to happen, and then invite the jury to infer the requisite intent. However, this *Moloney*[31] approach ultimately was no more successful than its predecessors as a method for dealing with ruthless risk-takers, as four major problems appeared in the years after *R v. Moloney*[32] was determined.[33]

III Was Foresight Ever Equivalent to Intention?

As discussed, the gist of the decision in *R v. Moloney*[34] was that when the defendant's foresight of consequences surpassed a certain degree, then the necessary intent was established. This is a solid philosophical position,[35] but is this what *R v. Moloney*[36] really sustained? Most certainly there were hints that suggested this. Thus, Lord Hailsham had stated that, whereas foresight and the foreseeing of consequences was not intention, either one could generate an 'irresistible' inference of intention.[37] Lord Bridge had said that "the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent".[38] He also had given his common example of 'the man going to Manchester' as follows:

29 [1985] AC 905.
30 *Ibid*.
31 *Ibid*.
32 *Ibid*.
33 Stannard, 1999, p. 205.
34 [1985] AC 905.
35 Both Bentham and Austin include within the concept of intention the situation where consequences are foreseen as likely or probable: J. Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, Oxford, Oxford University Press, 2010, p. 395; J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, London, Murray, 1885, p. 437. Duff would draw a distinction here between foreseen consequences that are logically connected to D' s main purpose and those which are merely contingently connected: R.A. Duff, 'Intentions Legal and Philosophical', *Oxford Journal of Legal Studies*, Vol. 9, 1989, pp. 76-94, p. 83. An example of the former would be where D intends to cut V's head off, knowing that V will die as a result; this would be an intention to kill, since to cut someone's head of is to kill them. An example of the latter is where D intends to drink a bottle of whiskey, knowing full well that it will give him a hangover, but not in any real sense intending to get a hangover: Duff, 1989, at p. 83. He conceded, however, that sometimes the distinction is not easy to draw.
36 [1985] AC 905.
37 *Ibid*., at p. 913.
38 [1985] AC 913, at p. 929.

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> 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. The possibility that the plane may have engine trouble and be diverted to Luton does not affect the matter. By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that there is where he will arrive.[39]

This appeared to infer that when the defendant foresaw some particular consequence of his or her conduct to a sufficient level of clarity of certainty, it did not merely indicate the drawing of an inference of intention, but rather, indeed, that intention was established. This respectable philosophical stance was also the position of Glanville Williams,[40] as will be discussed below, and also of the English Law Commission.[41] Did this imply two levels of the foresight of consequences contemplated in *R v. Moloney*,[42] namely, a 'high level' equivalent to intention, whenever such foresight was morally certain, or even something approaching it, and second, a 'low level' that was only evidence of intention, where such foresight subsisted with a smaller probability?

The problem with this proposed interpretation was that it was dissonant with the English courts' insistence, in cases following *R v. Moloney*,[43] that one could not even infer intent unless the defendant foresaw the consequences as probable, or even well-nigh certain. Thus, if this strict test was necessary, before even drawing the inference of intent, there was little residual room for any stricter test, in which foresight was equivalent to intent. Such a stricter test would require absolute rather than 'virtual', or in another word, 'moral' certainty.

If one desired to argue that the courts in the later cases misunderstood the reasoning in *R v. Moloney*,[44] there was still the problem with the words of Lord Bridge in *R v. Moloney*.[45] He had completely ruled out the existence of any substantive rule of law that the accused's foresight of death or serious injury as the probable consequence of his or her voluntary act might, where this probability could be defined so that it exceeded some benchmark degree, be considered as alternative or equivalent to intent.[46] To understand the nature of a voluntary act, Aristotle had identified what might affect the voluntary aspect of an act: these

39 *Ibid*., at p. 926.
40 [1987] CLJ 417.
41 English Draft Criminal Code Bill of 1989, clause 8; Stannard, 1999, p. 206.
42 [1985] AC 905.
43 [1985] AC 905.
44 *Ibid*..
45 *Ibid*..
46 *Ibid*., at pp. 927-928.

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included violence or coercion, fear, pleasure, or ignorance.[47] Compulsory actions were not willed by the human's own agency, and, therefore, they could not be voluntary.[48] Thus, voluntary actions must emanate from inside the agent,[49] while involuntary actions were sourced outside the human actor.[50] Thus, according to Lord Bridge, a voluntary act must be willed by the person's own agency, and even this kind of act was not part of any substantive rule of law as to intention.

These remarks of Lord Bridge were very difficult to reconcile with his narrative of the man travelling by air to Manchester. Thus, the truth of the case appears to be – not that the House of Lords in *R v. Moloney*[51] posited a 'two-level' test of foresight – one equivalent to intent and the other as evidence of intent; rather, there was a profound ambiguity in the judicial opinions articulated in that case.

IV When Might the Inference Be Drawn?

Although foresight of consequences could in principle create an inference of intent, *R v. Moloney*[52] and the later authorities clarified that it was not always, when this foresight was shown to exist, that the inference could be drawn. This was because the likelihood of consequences that the defendant would foresee must exceed some critical threshold. However, none of the cases made it clear how that threshold could be determined. As has been seen in *Moloney*,[53] Lord Bridge thought the jury could draw an inference of intent whenever death or serious injury was one 'natural' consequence of the voluntary act of the defendant and the defendant foresaw it as such.[54] Elaborating on the word 'natural', he opined that it

> conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. One might almost say that, if a consequence is natural, it is really otiose to speak of it as also being probable.[55]

47 Aristotle, *Nichomachean Ethics*, III, i, 1109b35-1110a8: "Those things, then, are thought-involuntary, which take place under compulsion or owing to ignorance … But with regard to the things that are done from fear of greater evils or for some noble object (e.g. if a tyrant were to order one to do something base, having one's parents and children in his power, and if one did the action they were to be saved, but otherwise would be put to death), it may be debated whether such actions are involuntary or voluntary."

48 Aristotle, *Nichomachean Ethics*, III, i, 1109b35-1110a4: "Those things, then, are thought-involuntary, which take place under compulsion or owing to ignorance; and that is compulsory of which the moving principle is outside, being a principle in which nothing is contributed by the person who is acting or is feeling the passion, e.g. if he were to be carried somewhere by a wind, or by men who had him in their power."

49 Aristotle, *Nichomachean Ethics*, III, i, 1111a22-1111a24: "Since that which is done under compulsion or by reason of ignorance is involuntary, the voluntary would seem to be that of which the moving principle is in the agent himself."

50 Aristotle, *Nichomachean Ethics*, III, i, 1109b35-1110a4.

51 [1985] AC 905.

52 *Ibid*.

53 *Ibid*., at p. 929.

54 Stannard, 1999, p. 207.

55 [1985] AC 905, at p. 929.

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In another ruthless-risk-taker matter, the 1986 case of *R v. Hancock and Shankland*,[56] decided in the following year, the House of Lords determined these guidelines to be ambiguous and possibly misleading juries into using too lenient a test. It was a case of two striking workers who threw a piece of concrete from a bridge down onto a convoy conveying a 'scab' or 'blackleg' colleague to work. The concrete struck a taxi driver causing him fatal injuries. The defence raised was that "no harm was meant, and that the intention was just to frighten him more than anything". This was a classic ruthless-risk-taker reaction.[57] According to Lord Scarman, delivering the unanimous view of the House of Lords, some kind of reference to probability was required. He also stated that the jury should be instructed,

> 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.[58]

Nevertheless, this formulation was one of compounded probability, not good in logic. In the 1986 case of *R v. Nedrick*,[59] in the same year, the Court of Appeal applied a much stricter test, holding that an inference of intent must not to be drawn, in murder cases, unless it was proved that the defendant had realised that either death or serious injury was virtually certain. Lord Lane CJ stated:

> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.[60]

This stricter test was based on the jury's feeling sure that death or serious bodily harm was a virtual certainty, somewhat remote from how the defendant might have felt. The 1990 case of *R v. Walker and Hayles*,[61] four years later, decided that it would not be a misdirection to the jury to require a 'very high degree of probability' and that the consensus of the English courts was that in such cases was a requirement, at minimum, for proof of foresight of the high probability of either death or serious injury.

This approach generated two obvious difficulties. First, it was a useless tool for convicting a ruthless risk-taker, because few if any ruthless risk-takers could be proved to have foreseen death or serious injury to the required degree of probability. Second, it interacted chaotically with the *Criminal Justice Act 1967*,[62] pursuant to

56 [1986] AC 455.
57 *Ibid*.
58 *Ibid*., at p. 474.
59 [1986] 1WLR 1025.
60 [1986] 1WLR 1025, at p. 1028.
61 [1990] 90 Cr App R 226.
62 *Criminal Justice Act 1967*, s. 8.

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which juries were permitted to infer that the defendant intended natural and probable outcomes of his or her acts. Thus, this point needs additional elaboration.[63]

V Moloney and Section 8 of the Criminal Justice Act 1967

Presuming that a person had intended the natural and probable consequences of his or her acts was a principle that arose in the times when the defendant was not permitted to testify, and where therefore it was almost impossible to adduce any direct oral evidence of his or her state of mind as at the time of the commission of the acts alleged.[64] The learned authorities also diverged as to whether this presumption was of fact or law and, indeed, if it was rebuttable.[65] Finally, the Court of Criminal Appeal made the position clear, in the 1961 case of *DPP v. Smith*,[66] in which Byrne J set out the law:

> The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.[67]

While clarifying that this presumption was not irrebuttable, *the Criminal Justice Act 1967*[68] assumed its subsistence in the English law. The same presumption was enacted into legislation in Ireland by Section 4(2) of the *Criminal Justice Act 1964* and Section 4 of the *Criminal Justice Act (NI) 1966*.[69]

> Proof of criminal intent.
>
> A court or jury, in determining whether a person has committed an offence, –
> a shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

63 Stannard, 1999, p. 208.
64 *Ibid*., p. 209.
65 *R v. Vamplew* (1862) 3 F & F 520; *R v. Doherty* (1887) 16 Cox CC 306; *R v. Lumley* (1911) 22 Cox CC 635; *R v. Philpot* (1912) 7 Cr App R 140; *R v. Hedley* (1945) 31 Cr App R 35; *R v. Steane* [1947] KB 997; *R v. Grant* (1954) 38 Cr App R 107; *R v. Lenchitsky* [1954] Crim LR 216; *R v. Ward* [1956] 1 QB 351; *R v. Vickers* [1957] 2 QB 664.
66 [1961] AC 290. The decision of the Court of Criminal Appeal in this case was, of course, overturned by the House of Lords, but the effect of s. 8 of the Criminal Justice Act 1967 was to restore the position: see the comments of Lord Bridge in *R v. Moloney* [1985] AC 905, at p. 929 and of Lord Lane LCJ in *R v. Hancock* [1986] AC 455, at p. 461.
67 [1961] AC 290, at p. 300.
68 *Criminal Justice Act 1967*, s. 8.
69 Stannard, 1999, p. 209.

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> b shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.[70]

The problem still remained in how to relate this presumption to the rules stated in *R v. Moloney*.[71] As discussed above, the courts prescribed the procedure that the jury be invited to draw an inference of intent only where the consequence was foreseen as a probability, if not a virtual certainty. This did not sit well with the presumption in Section 8 of the *Criminal Justice Act 1967*, which permitted intent to be inferred from the fact that the consequence was 'natural and probable', without any further proof that the defendant ever saw it at all. This had no sense to it.[72]

VI What Was Intention?

The *Moloney* principle lacked any coherent philosophical or legal conception of the import of intention. Smith noted in his various commentaries that *R v. Moloney*[73] and the following cases explained what intention was not, but did not explain what it was.[74] Thus, it was not the same as foresight of probable consequences, and that was the main direction of the decision. It was not the same as motive or desire, according to Lord Bridge's example of the flight to Manchester.[75] If the House of Lords was thinking of aim or purpose, this was nowhere expressly articulated.

Any attempt to define intention must be fatal to the *Moloney* principle, because the genre of those cases in which the principle might apply is one in which the defendant's rejoinder was 'I never intended to kill or do serious injury to anybody: I only intended to X,' and where it was proved that the defendant had realised that serious harm or death was either a likely or a probable consequence of X. Whether this defence made sense depended on whether intention was so defined to include the defendant's foresight of the consequences. If it was, the need to draw inferences would disappear, as the defendant had admitted he or she had intended death or serious harm. If not, proof of foresight of consequences could not imply proof of intent. Even with proof the defendant cognised the probable consequences, he or she could still argue

> Yes, I admit that I realised that death or serious harm was probably going to happen, but that was not my intent, and that is what you have to prove!

70 *Criminal Justice Act 1967*, s. 8.
71 [1985] AC 905.
72 Stannard, 1999, p. 209.
73 [1985] AC 905.
74 Sir J. Smith and B. Hogan, Criminal Law, London, Butterworths, 1996, p. 58.
75 [1985] AC 913, at p. 926.

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Thus, there is the proposition advanced by Card *et al*, that to draw an inference of intention where the likely consequence was not the defendant's purpose or aim would just be 'nonsense'.[76]

VII The Decision in Woollin

Argument now advances to the court's deliberations in the 1997 case of *R v. Woollin*.[77] This matter involved baby-battering, where the defendant admitted his loss of temper, and that he threw the child, causing the baby to hit his head hard. Later the child died, with police charging the defendant with murder. The prosecution's case was that although he had not set out to kill the child, or to do serious harm to him, he surely realised that his action was virtually certain to cause at minimum some serious injury, and accordingly the jury was entitled to the inference that the defendant intended that outcome.[78] In his summing up to the jury, the Recorder of Leeds instructed them as follows:

> If … you … are quite satisfied that he was aware of what he was doing and must have realised and appreciated when he threw that child that there was a substantial risk that he would cause serious injury to it, then it should be open to you to find that he intended to cause injury to the child and you should convict him of murder.[79]

Reasonably, after *R v. Nedrick*[80] and *R v. Walker and Hayles*,[81] the defendant appealed his conviction on the sole ground that the jury was misdirected to apply the test for recklessness rather than that for intention.[82] He argued that the jury ought not to have been permitted to draw an inference of intent unless they were satisfied he realised serious injury was virtually certain or at minimum highly probable. The Court of Appeal nevertheless thought this did not incorporate the requirements of Section 8 of the *Criminal Justice Act 1967*. Delivering the court's judgment, Roch LJ held that as *R v. Nedrick*[83] and *R v. Walker and Hayles*[84] were still good law and their principles were restricted to where the only evidence of intention before the court was of the defendant's actions, and as well, their consequences. In other cases, Section 8 had recognised that a jury could infer a defendant intended results of his actions because it was a natural and probable result of such actions. In so doing, the jury could take into account all evidence before the court, drawing any inferences from it as seemed proper.[85] Any insistence on proof the defendant could foresee the

76 R. Card, R. Cross and P.A. Jones, *Criminal Law*, Oxford, Oxford University Press, 2014, para. 6.36; Stannard, 1999, p. 210.
77 [1997] 1 Cr App R 97 (CA); [1998] 1 WLR 382 (HL).
78 [1997] 1 Cr App R 100.
79 *Ibid*., at p. 101.
80 [1986] 1WLR 1025.
81 [1990] 90 Cr App R 226.
82 [1997] 1 Cr App R 100, at p. 102.
83 [1986] 1WLR 1025.
84 [1990] 90 Cr App R 226.
85 [1997] 1 Cr App R 100, at p. 104.

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consequence as virtually certain before permitting an inference of intent would render Section 8 of no effect.[86] As Roch LJ stated,

> We respectfully suggest that the direction formulated in *Nedrick's* case prevents the jury from performing its task as Parliament intended if it is given in cases where there is admissible evidence from which inferences relevant to the defendant's intent can be drawn in addition to evidence of the defendant's actions and their consequences on the victim.[87]

He concluded as follows:

> In our judgment, although the use of the phrase 'a virtual certainty' may be desirable and may be necessary, it is only necessary where the evidence of intent is limited to the admitted actions of the accused and the consequences of those actions. It is not obligatory to use that phrase or one that means the same thing in cases such as the present where there is other evidence for the jury to consider.[88]

This was an unconvincing attempt to reconcile the *Nedrick*[89] view of Section 8, by distinguishing between evidence of the defendant's actions and consequences and other evidence from which inferences could be drawn. As Sir John Smith observed, there was nothing in the case law or in Section 8 to sustain the validity of any such distinction being drawn.[90] There are many cases where the only evidence of the defendant's was his or her actions and the consequences. Adapting the well-known words of Lord Sankey extracted from a different context, "it would be difficult to conceive of so bare and meagre a case".[91] It is difficult to discern how *R v. Hancock and Shankland*,[92] *R v. Nedrick*[93] or *R v. Walker and Hayles*[94] fit this category. It seemed that in *R v. Woollin*[95] the Court of Appeal tried to settle something irreconcilable.

In the defendant's appeal to the House of Lords, the certified question was first whether in cases of murder juries must be directed from the guidelines of *R v. Nedrick*[96] and, second, whether this direction was either always necessary or only in limited circumstances thought appropriate by the Court of Appeal.[97]

86 Stannard, 1999, p. 211.
87 [1997] 1 Cr App R 100, at p. 104.
88 *Ibid*., at p. 107.
89 [1986] 1WLR 1025.
90 [1997] *Criminal Law Review*, p. 520, where Smith calls it "a wholly artificial distinction, unjustified by any precedent or principle".
91 *Woolmington v. DPP* [1935] AC 462, at p. 480.
92 [1985] 3 WLR 1014.
93 [1986] 1WLR 1025.
94 [1990] 90 Cr App R 226.
95 [1998] 1 WLR 382.
96 [1986] 1WLR 1025.
97 Stannard, 1999, p. 212.

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Responding to the first point, the House of Lords held unanimously that the direction in *R v. Nedrick*[98] was the correct one, but with one caveat. Lord Steyn delivered the leading opinion,[99] making three relevant observations. First, he reasoned that, in articulating the phrase 'substantial risk', the trial judge blurred the interface between intention and recklessness and, from this, between murder and manslaughter.[100] Second, he generally approved of the direction given by Lord Lane CJ in *R v. Nedrick*[101] and specifically the following passage:

> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.[102]

Third, he agreed with Professors Glanville Williams, Sir John Smith and Andrew Ashworth, who observed that using the words 'to infer' derogated from the direction's clarity. He recommended these words be removed from the model direction and the words 'to find' be inserted instead.[103] This would act to simplify the law, aligning it with the positions of leading academics and the *Draft Criminal Code*.[104]

In the second section of the certified question, on the question of whether *R v. Nedrick*[105] ought to be used in all the cases of this kind or solely where the available evidence was about the defendant's actions and their consequences, Lord Steyn stated that the Court of Appeal's approach would complicate a branch of the criminal law in which simplicity was essential and, further, was not based in any principles regarding the mental aspect of murder.[106] In fact, no authority existed for such a distinction. In Lord Steyn's view, the Court of Appeal was wrong, the correct approach being to direct the jury in accordance with *R v. Nedrick*,[107] where the defendant did not desire the consequence of his act.[108]

98 [1986] 1WLR 1025.
99 Concurring opinions were delivered by Lord Browne Wilkinson, Lord Nolan, Lord Hope and Lord Hoffmann.
100 [1998] 1 WLR 382, at p. 392.
101 [1986] 1WLR 1025.
102 *Ibid*., at p. 1028.
103 [1998] 1 WLR 382, at p. 393.
104 [1998] 1 WLR 382, at p. 391. In this connection, Lord Steyn cites Sir John Smith's commentary on *R v. Nedrick* at J.C. Smith, 'Case and Comment: *R v. Nedrick*', *Criminal Law Review*, 1986, pp. 742-744, and his note at J.C. Smith, 'A Note on Intention', *Criminal Law Review*, Vol. 85, 1990, pp. 88-91; G. Williams, 'The Mens Rea for Murder: Leave It Alone', *Law Quarterly Review*, Vol. 105, 1989, pp. 387-397; A. Ashworth, *Principles of Criminal Law*, Oxford, Clarendon Press, 1995, p. 172.
105 [1986] 1WLR 1025.
106 [1998] 1 WLR 382, at p. 391.
107 [1986] 1WLR 1025.
108 [1998] 1 WLR 382, at p. 392.

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Although the Lords in *R v. Woollin*[109] professed merely to clarify the law, as had been stated in *R v. Nedrick*,[110] their approach marked a reversal in this area of the law, equally as radical as that in *DPP v. Smith*,[111] in *Hyam v. DPP*[112] and in *R v. Moloney*.[113] Whereas *R v. Moloney*,[114] and the cases following it, gave rise to much obscurity, the real outcome was that, generally, any foresight of consequences must not be equated with intent, it being only evidence from which intent might be inferred,[115] and suggesting that foresight was twice removed from intent both by adjectival rules of evidence and a jury's view of the situation. Now, the House of Lords say that, in ruthless-risk-taker cases of this kind, the jury ought to be directed that if the defendant foresaw death or grievous bodily harm as a matter of virtual certainty, the requisite intention was established,[116] implying that the court wanted to remove the aspect of the jury's view. Although this is simple, the approach of the House of Lords in *R v. Woollin*[117] has its own difficulties.

VIII Intent and the Inference of Intent

Lord Steyn and the other Law Lords in *R v. Woollin*[118] were unaware they were adopting any basic change of legal approach, as it appears clear for them that any difference between foresight as evidence of intent and foresight as intent is only one of words. Lord Steyn first quoted from Lord Lane's model direction in *R v. Nedrick*,[119] then observed that "[t]he effect of the critical direction is that a result foreseen as virtually certain is an intended result".[120] Similarly, his discussion of *DPP v. Smith*,[121] *Hyam v. DPP*,[122] *R v. Moloney*[123] and *R v. Nedrick*[124] said nothing about any difference between a finding of proven intention and inferring intention.[125] Yet despite this stance of the House of Lords in *R v. Woollin*,[126] there is a fundamental distinction. If foresight of specific consequences is no different to intent, any jury finding the defendant foresaw the consequences to the required

109 [1998] 1 WLR 382.
110 [1986] 1WLR 1025; citing [1998] 1 WLR 382, per Lord Steyn and Lord Hope, at p. 393.
111 [1961] AC 290. The decision of the Court of Criminal Appeal in this case was, of course, overturned by the House of Lords, but the effect of s. 8 of the Criminal Justice Act 1967 was to restore the position: see the comments of Lord Bridge in *R v. Moloney* [1985] AC 905, at p. 929 and of Lord Lane LCJ in *R v. Hancock* [1986] AC 455, at p. 461.
112 [1975] AC 55.
113 [1985] AC 905.
114 *Ibid*.
115 *R v. Moloney* [1985] AC 905, at p. 913, per Lord Hailsham and 929, per Lord Bridge; *R v. Hancock* [1986] AC 462, at pp. 471-472, per Lord Scarman.
116 Stannard, 1999, p. 213.
117 [1998] 1 WLR 382.
118 *Ibid*.
119 [1986] 1WLR 1025.
120 [1998] 1 WLR 382, at p. 390.
121 [1961] AC 290.
122 [1975] AC 55.
123 [1985] AC 905.
124 [1986] 1WLR 1025.
125 [1998] 1 WLR 382, at pp. 387-390.
126 [1998] 1 WLR 382.

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degree would have nothing more to determine, as intent will have been proved. However, where it is just a matter of inferences, there is still a choice. Byrne J stated, in a cognate context:

> The … presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. Although, however, that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts in a particular case it is not the correct inference, then it should not be drawn.[127]

In this way, inferring intent may not be done if the facts contradict the logic of the inference. By tending to ignore any difference between foresight as equated to intent and foresight as merely evidence of intent, the Lords in *R v. Woollin*[128] permitted the same ambiguity as in *R v. Moloney*.[129] Since intention might only be established by proving the defendant foresaw the consequences as virtually certain, the question arises as to whether an inference of intent can still be drawn when the level of probability of the consequences he or she foresaw fell short of this level. One may also ask how Section 8 of the Criminal Justice Act 1967 fits into this schema.[130]

IX Section 8 of the Criminal Justice Act 1967

The way in which the House of Lords decision in *R v. Woollin*[131] treated Section 8 of the *Criminal Justice Act 1967* and with the presumption that "a person intends the natural and probable consequences of his or her acts" is one arguably unsatisfactory. In the Court of Appeal, Roch LJ upheld the judge's summing up, explaining to the jury the foresight of a 'substantial risk', on the ground that to mandate the use of the *Nedrick* test in all matters would render Section 8 of no effect.[132] Lord Steyn rejected this argument and expressed three points. First, he said that the initial part of the section, providing that a court or jury shall not be bound to infer that the defendant intended the natural and probable consequences,[133] was only an instruction directed to the judge and, thus, did not impinge the issues in the current appeal.[134] While this may be true, Lord Steyn did not take into account that this provision is one of those kinds of exceptions which tend to prove the rule. If the jury is not bound to draw an inference, the statutory direction implies that they

127 *R v. Smith* [1961] AC 290, at p. 300.
128 [1998] 1 WLR 382.
129 [1985] AC 905.
130 Stannard, 1999, p. 214.
131 [1998] 1 WLR 382.
132 [1997] 1 Cr App R 100, at pp. 104, 107.
133 "A court or jury, in determining whether a person has committed an offence (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions." *Criminal Justice Act 1967*, s. 8(a).
134 [1998] 1 WLR 382, at p. 390.

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may do so if they want. As to the second part of the statutory section,[135] Lord Steyn stated it was "no more than a legislative instruction that in considering their findings on intention or foresight the jury must take into account all relevant evidence".[136] If this were so, the provision is pointless, apparently lacking Parliamentary intention. However, it tells the jury to "draw such inferences from the evidence as appear proper in the circumstances".[137] Last, Lord Steyn stated that Section 8 did not affect *R v. Nedrick*,[138] in that it

> does not prevent a jury from considering all the evidence: it merely stated what state of mind (in the absence of a purpose to kill or cause serious harm) is sufficient for murder.[139]

But while this is true of *R v. Nedrick*,[140] where Lord Lane CJ restricted his remarks to murder cases,[141] it is clear from the case law, both preceding and following *R v. Nedrick*,[142] that the doctrine is applicable generally to matters of specific intent[143] and, therefore, it cannot be isolated from the effects of Section 8.[144]

The interpretation of *R v. Nedrick*[145] by the House of Lords in their decision in *R v. Woollin*[146] made fitting Section 8 into the schema even harder than before. Before *R v. Woollin*,[147] these provisions allowed an inference of intent to be drawn, with a requirement to consult the cases to determine in what circumstances it could be drawn. The effects of *R v. Nedrick*[148] would then be that the inference could only be drawn where the defendant foresaw the result was virtually certain, but this logical formula would make nugatory the relevant statutory provision. But if *R v. Woollin*[149] was correct in saying that foresight of a specific consequence of one's actions was cognate to intent, this interpretation would fail, because then intent

135 "[…]but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances." *Criminal Justice Act 1967*, s. 8(b).
136 [1998] 1 WLR 382, at p. 390.
137 "[…]but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances." *Criminal Justice Act 1967*, s. 8(b).
138 [1986] 1WLR 1025.
139 [1998] 1 WLR 382, at p. 390.
140 [1986] 1WLR 1025.
141 *Ibid*., at p. 1028.
142 [1986] 1WLR 1025.
143 Thus, both Lord Bridge in *R v. Moloney* and Lord Scarman in *R v. Hancock* made it clear that inferences of intent could be drawn in relation to crimes of specific intent other than murder: *R v. Moloney* [1985] AC 905, at p. 926, per Lord Bridge; *R v. Hancock* [1986] AC 455, at p. 474, per Lord Scarman.
144 Stannard, 1999, p. 215.
145 [1986] 1WLR 1025.
146 [1998] 1 WLR 382.
147 *Ibid*.
148 [1986] 1WLR 1025.
149 [1998] 1 WLR 382.

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could only be inferred where it was proved to exist, and this would make no sense.[150] Only two possibilities remain. The first is that after *R v. Woollin*[151] there cannot be room to draw inferences at all, because intention is either proved or not proved. However, such a position cannot be reconciled with the prior authorities, none of them overruled by *R v. Woollin*[152] or by the relevant statutes. The second possibility, as also mentioned in *R v. Moloney*,[153] is that there remains room for drawing inferences of intent in matters where the probability of the consequence foreseen by the defendant is insufficiently high to prove intent.[154] Although this is a logical position, it would destroy the judicial effect of *R v. Woollin*,[155] by reintroducing all the complexities of the old laws, which the Lords may have desired to obliterate.[156]

X Whether It Will Work

The term 'stigma' comes from ancient Greek culture, where it was used in reference to bodily signs, expressly formulated to expose something remarkably bad about the possessor's moral status. Such significations were either cut or burnt into the subject's skin, as a permanent feature, allowing everyone to see that this person was morally blemished and therefore to be shunned in public, never to be rehabilitated.[157] The complexity in this part of the law is caused by the judiciary's desire to stigmatise as murderers all those killers who said their purpose was not to slay but who acted with an unacceptably high risk of death or serious injury, with little balancing social benefit, such as for example a terrorist bomber or an arsonist.[158] As Lord Scarman so perceptively declared as follows,

> crimes of violence where the purpose is by open violence to protest, demonstrate, obstruct or frighten are on the increase. Violence is used by some as a means of public communication. If death results, is the perpetrator of the violent act guilty of murder? It will depend on his intent. How is the specific intent to kill or to inflict serious harm proved? Did he foresee the result of his action? Did he foresee it as probable? Did he foresee it as highly probable? If he did, is he guilty of murder? How is a jury to weigh up the evidence and reach a proper conclusion amidst these perplexities?[159]

The issue remains as to whether a test for murder grounded in foresight of a virtual certainty of death or grievous bodily harm would be sufficiently broad to include many in this category of killers. Both Lord Steyn and Lord Hope alluded to this

150 As has been said, an evidential presumption or inference must surely involve a jump from fact A to fact B, not one from fact A to fact A.
151 [1998] 1 WLR 382.
152 *Ibid*.
153 [1985] AC 905.
154 [1987] CLJ 417.
155 [1998] 1 WLR 382.
156 Stannard, 1999, p. 216.
157 R. Persaud, 'Press: Knocking Bruno When He Is Down: How the Media Still Stigmatises People with Mental Illness', *British Medical Journal*, Vol. 327, No. 7418, 2003, p. 816.
158 G.P. Fletcher, *Rethinking Criminal Law*, Boston, Little Brown, 1978, p. 265.
159 *R v. Hancock and Shankland* [1986] AC 455, at p. 468.

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problematic issue, each addressing it in diverging ways. In reference to the example where a terrorist bomb explodes and kills the bomb disposal person, Lord Steyn agreed that this would be difficult to fit inside a test of virtual certainty instead of one of mere risk-taking. However, he stated that such matters could be handled with a life sentence for manslaughter.[160] He also confirmed the opinions of Lord Lane CJ, who argued in the House of Lords that framing a principle for specific difficult cases like terrorism would generate collateral injustices that would be very hard to eliminate.[161] Lord Hope's solution to this problem was to suggest the application of Lord Mustill's conception of 'indiscriminate malice',[162] where an intention is targeted at a class of likely victims, and of which class the actual victim is part, while the ultimate victim's identity was not yet fixed when the *actus reus* took place.[163] However, these approaches seem unconvincing.[164]

First, the example of the bomb disposal person carries a low risk of death or serious harm compared to many cases in this category. While acquitting the bomber of murder when the bomb disposal officer's death was a possible but unlikely consequence, it is quite different to permit a killer to escape conviction, knowing his or her actions would probably cause death or serious injury, on the ground the consequences were unforeseen as certain or, at a minimum, as 'virtually certain'. Also, while manslaughter carries a life sentence and, thus, a sufficiently heavy penalty for depraved ruthless risk-takers,[165] the problem is more about the label,[166] strongly suggesting that the courts were engaging in legislative debate as to the form of denunciation. With respect to Lord Hope's 'indiscriminate malice', it would be sufficient for a defendant whose chief purpose is either to kill or to cause serious harm to some unspecified person, but it would be useless for the killer whose purpose was never to kill or cause serious harm.[167] The test set out in *R v. Woollin*[168] must inevitably be held to be too narrow. If that eventuates in a high-profile case, the courts will be tempted to elongate the test or to discover exceptions to it. The final state of the law will be worse than its first form.

160 [1998] 1 WLR 382, at p. 391.

161 Hansard (HL Debates), November 6, 1989, col. 480.

162 *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, at p. 261. On Lord Mustill's account 'indiscriminate malice' – the mental state of a terrorist who hides a bomb on an aircraft, or of a gunman who fires at random into a crowd – conveniently turns out to satisfy the *mens rea* for murder. "The intention is already aimed directly at the class of potential victims of which the actual victim forms part. The intent and the actus reus completed by the explosion are joined from the start, even though the identity of the ultimate victim is not yet fixed. So also with the shots fired indiscriminately into a crowd." Per Lord Mustill [1997] 3 WLR 421, 434.

163 [1998] 1 WLR 382, at pp. 393-394.

164 Stannard, 1999, p. 217.

165 C. Fennell, 'Intention in Murder: Chaos, Confusion and Complexity', *Northern Ireland Law Quarterly*, Vol. 41, No. 4, 1990, pp. 325 et seq., p. 335.

166 R. Goff, 'The Mental Element in the Crime of Murder', *Law Quarterly Review*, Vol. 104, 1988, pp. 30-59, p. 31; A. Norrie, 'Oblique Intent and Legal Politics', *Criminal Law Review*, 1989, pp. 793-808; I. Grigg-Spall and P. Ireland (eds.), *The Critical Lawyer's Handbook*, London, Pluto Press, 1992, p. 80.

167 Compare the words of Lord Steyn: "[…in the absence of a purpose to kill or cause serious harm[…]]" [1998] 1 WLR 382, at p. 390.

168 [1998] 1 WLR 382.

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XI Two Conceptions of Criminal Fault

The chief reason why the courts find such difficulty with this area of the law is that it arises from a conflict between two opposing conceptions of criminal fault, or *mens rea*. The first is the normative, where norms, or standards, are derived solely from mental states and not from external facts,[169] and the second is the cognitive, where cognition may be summarised as 'understanding, reasoning, and the use of knowledge'.[170] The first conception, more aligned with the vernacular concept of fault, sees *mens rea* as culpability in a broad sense.[171] A person has *mens rea* if he or she is blameworthy for the subject conduct,[172] or, as Lord Russell of Killowen stated, he or she possesses 'guilt or moral turpitude'.[173] Moral turpitude has been defined as

> an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general, contrary to the accepted rule of right and duty between man and man.[174]

The second conception,[175] in contrast, views *mens rea* in the context of knowledge and foresight of the consequences or, as Turner et al. had put it, by demonstrating

> that the accused person realised at the time that his conduct would, or might produce results of a certain kind, in other words that he must have foreseen that certain consequences were likely to follow on his acts or omissions.[176]

It is this cognitive approach that is the basis of the classical English doctrine of *mens rea* as in the modern textbooks.

This opposition between *mens rea* seen as culpability and *mens rea* seen as foresight of consequences is reflected in the laws on murder. The first approach appears in the old institutional writers such as East, who quoted Sir Michael Foster's characterisation of murder as involving

169 A. Gibbard, *Meaning and Normativity*, Oxford, Oxford University Press, 2012, p. xi.

170 L. Bainbridge, 'The "Cognitive" in Cognitive Ergonomics', *Le Travail Humain*, Vol. 54, No. 4, 1991, pp. 337-343, p. 338.

171 The concept is used in this sense when it is said that crimes of strict liability 'do not require mens rea'.

172 Stannard, 1999, p. 218.

173 *DPP v. Majewski* [1977] AC 443, at p. 498. Majewski itself is a clear illustration of this conflict in a different context: according to the defence, D had no *mens rea* because his drunken state prevented him from realising the consequences of his actions (the cognitive view), but according to Lord Russell his drunken state, so far from being a defence, itself supplied the necessary *mens rea* (the normative view).

174 N.W.H., 'Violation of a Prohibition Law as a Crime Involving Moral Turpitude', *Virginia Law Review*, Vol. 17, No. 1, 1930, pp. 61-65, p. 61.

175 This theory of *mens rea*, the cognitive theory, which has become the classical theory set out in the textbooks, can be traced back to Bentham and Austin, and is perpetuated in the proposals of the Law Commission.

176 L. Radzinowicz and J.W.C. Turner (Eds.), *The Modern Approach to Criminal Law*, New York, MacMillan, 1945, p. 199.

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> an action flowing from a wicked and corrupt motive, a thing done malo animo [with evil or wrongful intent], where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief.[177]

In a similar way, according to Blackstone, malice aforethought connoted "…not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved and malignant heart".[178] However, at least from the 1975 case of *Hyam v. DPP*[179] up to and including the 1998 case of *R v. Woollin*,[180] this area of English law has followed the Republic of Ireland[181] in preferring the cognitive approach,[182] disregarding moral turpitude and instead judicially stigmatising foresight of the consequences, so that from 1975 ruthless risk-takers might more easily escape conviction for murder.

In England, there have been several variations on the cognitive strand: (a) a person carries guilty of murder if he or she intended to kill or commit grievous bodily harm; (b) or if he or she realised that such consequences were virtually certain or highly probable or probable; or (c) such foresight provides evidence out of which the jury can infer intent. Nevertheless, all these formulations have in common that they are morally neutral. The term 'morally neutral' means that the theory might not take a position on any specific moral or political matters, and neither is it associated with any moral or political assessments.[183] Specifically, motive has no relevance, and malice aforethought does not imply the accused has any level of ill will.[184]

Thus, the current state of the English law cannot deal with the problematic issue of the ruthless risk-taker, essentially a normative idea, the critical features of which are high probability of harm, indifference to human life and the absence of any redeeming social value to the subject's conduct.[185] This category of conduct might only be dealt with by normative concepts of *mens rea*, for example, the Scots doctrine of 'wicked recklessness'.[186] In the Scottish jurisdiction, to show 'wicked recklessness' as relevant to a person's death implies sufficient culpability for a murder verdict.[187] Nevertheless, the term 'wicked recklessness' is too imprecise to articulate an aggravated recklessness with equivalent intent to intentional

177 E.H. East, *East's Pleas of the Crown*, 1803, para. 5.2.
178 *Institutes* IV, ch. 14, at p. 199.
179 [1975] AC 55.
180 [1998] 1 WLR 382.
181 See s. 4(1) of the *Criminal Justice Act 1964*, which defines murder purely in terms of intention.
182 Stannard, 1999, p. 219.
183 A. Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral', *Oxford Journal of Legal Studies*, Vol. 26, No. 4, 2006, pp. 683-704, p. 683.
184 Smith and Hogan, 1996, p. 356.
185 Fletcher, 1978, p. 265.
186 J.H.A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland*, Edinburgh, Green, 1948, p. 89; G.H. Gordon, *The Criminal Law of Scotland*, Edinburgh, Green, 1978, p. 733; *Cawthorne v. H M Advocate* 1968 JC 32.
187 *Cawthorne* 1968 SLT 330.

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conduct.[188] The English law cognitive approach will never return a satisfactory answer to this problem, while it deploys a cognitive procedure to resolve a normative substance.

C Conclusion

Recently, philosophers and lawyers expressed some concerns about whether the relationship between foresight and responsibility was sufficiently certain, suggesting that judicial denunciatory labelling has been a mere doctrinal precursor to punishment. Lord Hailsham linked intent and plain foresight of the consequences by a kind of parallel inference. Although Lord Bridge appeared to eliminate the idea of direct inference, he suggested the inference of intent from mere procedural rules. The court thought the jury should rarely infer intent.

The case of *R v. Moloney* considered the issue of criminal intent carefully and proposed that proof of the defendant's foresight either of death or of grievous bodily harm, as a probable outcome of his or her actions, was different from proof that he or she intended the consequence. English courts held, after *R v. Moloney*, that one could not infer intent unless the defendant foresaw the consequences as probable or as almost certain. Lord Bridge said that a voluntary act must be willed by the person's own agency, and even this kind of act was not part of any substantive law of intention.

The likelihood of consequences that the defendant would foresee must exceed some threshold, with none of the cases clarifying that threshold. Thus, ordinarily, a certain act would lead to a certain consequence, unless something supervened. If a consequence was natural, it was really futile to speak of it as being probable.

Lord Scarman held that a reference to probability was required. He stated the jury should be instructed that the greater the probability of a consequence, the more likely the consequence was foreseen, and if that consequence was foreseen the greater the probability was that the consequence was intended, a compounded probability – not good in logic.

A stricter test was based on the jury's feeling sure that death or serious bodily harm was a virtual certainty, remote from the defendant's view. In *R v. Walker and Hayles*, there needed to be proof of foresight at high probability of death or serious injury. Few ruthless risk-takers could be proved to foresee death or serious injury to this degree of probability.

DPP v. Smith stated the current law as that the presumption of intention meant this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn.

188 The concept of wicked recklessness was rejected as being too vague by the House of Lords Select Committee on Murder and Life Imprisonment: (Session 1988-1989, HL Paper 78), para. 76; G.R. Sullivan, 'Intent, Subjective Recklessness and Culpability', *Oxford Journal of Legal Studies*, Vol. 12, No. 3, 1992, pp. 380-391, p. 390.

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Any attempt to define intention must be fatal to the *Moloney* principle, because the defendant's rejoinder was 'I never intended to kill or do serious injury to anybody: I only intended to X' and where it was proved that the defendant had realised that serious harm or death was either a likely or a probable consequence of X. Whether this defence made sense depended on whether intention was so defined to include the defendant's foresight of the consequences. The real outcome was that any foresight of consequences could not be equated with intent.

In this way, inferring intent may not be done if the facts contradicted the logic of the inference. In respect of Lord Hope's 'indiscriminate malice', it would be sufficient for a defendant whose chief purpose was either to kill or to cause serious harm to some unspecified person, but useless for the killer whose purpose was never to kill or cause serious harm.

The English conception of *mens rea* preferred the cognitive approach, disregarding moral turpitude and instead judicially stigmatising foresight of the consequences, so that from 1975 onwards, ruthless risk-takers might more easily escape conviction for murder. Thus, the current state of the English law cannot deal with the problematic issue of the ruthless risk-taker, essentially a normative idea. The English law cognitive approach to *mens rea* will never return a satisfactory answer to the ruthless-risk-taker problem, while it deploys a cognitive procedure to resolve a normative substance.

In the result, judicial denunciatory labelling was a doctrinal precursor to punishment by stigmatisation, while the courts suggest juries should infer intent, although for different reasons, and only for rare cases. This is because proof of the defendant's foresight either of death or of grievous bodily harm, at minimum as a probable outcome of his or her actions, was different from proof that he or she actually intended the consequence. In such circumstances, few if any ruthless risk-takers could be proved to have foreseen death or serious injury to the required degree of probability, in that any foresight of consequences must not be equated with intent, it being only evidence from which intent might be inferred, and suggesting that foresight was twice removed from intent both by adjectival rules of evidence and a jury's view of the situation. The English law cognitive approach to *mens rea* will never return a satisfactory answer to the ruthless-risk-taker problem, to a high degree of certainty, while it deploys a cognitive procedure to resolve a normative substance.

In consequence of these outcomes, genocidal acts in Australia must first be assessed as having been commissioned either by ruthless risk-takers, or not. If they were ruthless risk-takers, their intent must be proved to a very high degree of certainty. If not, their intent may be inferred from the natural consequences of their actions. In the light of this outcome, it is unlikely the law needs any kind of reform, since the court only has to perform a preliminary assessment of whether or not the defendant was a ruthless risk-taker, in order to guide its deliberations on intent.