Cambridge Law Journal, **76(2)**, July 2017, pp. 311–336
doi:10.1017/S000819731700040X

UNDERSTANDING ULTERIOR MENS REA: FUTURE CONDUCT INTENTION *IS* CONDITIONAL INTENTION

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ABSTRACT. *Where criminal offences such as attempt and conspiracy require a defendant (D) to intend future conduct, D's intention will always be conditional. D's intention may be explicitly conditional (e.g. D intends to rob the shop, but only if unable to pay her rent), or implicitly conditional (e.g. D intends to rob the shop, but if asked, would not do so if she found it surrounded by police). Rather than interpreting and defining conditional intention as synonymous with all future conduct intention, however, courts and commentators have too often approached it as unique, separate and problematic. This has led to problems of inconsistency in application, and simple incoherence. This article sets out and defends a model of conditional intention as future conduct intention, and as the key to understanding and applying ulterior mens rea.*

KEYWORDS: *conditional intention, future intention, ulterior intention, mens rea.*

I. INTRODUCTION

A large and varied set of criminal offences include ulterior mens rea requirements (i.e. mens rea as to elements outside the actus reus).[1] Such ulterior mens rea can focus on the potential outcomes of a defendant's (D's) present conduct (e.g. aggravated criminal damage, where D causes damage intending or being reckless as to the endangerment of life[2]). However, ulterior mens rea will often alternatively focus on future conduct. For example, the offence of conspiracy does not simply require a present

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I would like to thank Antony Duff, Jeremy Horder, Heather Keating, Amir Paz-Fuchs, Scarlett Gaebler and Andrew Sanders for useful comments on drafts of this article, and the peer reviewers at CLJ. Thanks also to the Max Planck Institute for Foreign and International Criminal Law where much of the work was completed, and associated funding from the Fritz Thyssen Foundation. Particular thanks finally to Professor Bob Sullivan for early work on the article. The usual disclaimer applies.

[1] See J. Horder, "Crimes of Ulterior Intent" in A.P. Simester and A.T.H. Smith (eds.), *Harm and Culpability* (Oxford 1996), 153; J.J. Child, "The Structure, Coherence and Limits of Inchoate Liability: The New Ulterior Element" (2014) L.S. 537. R.A. Duff refers to this as "further intentions" in *Intention, Agency and Criminal Liability* (Oxford 1990), 38.

[2] Criminal Damage Act 1971, s. 1(2).

https://doi.org/10.1017/S000819731700040X Published online by Cambridge University Press

(non-ulterior) intention to agree on a criminal course of conduct, but also a future (ulterior) intention that this conduct be carried out.[3] To understand and apply offences of this kind, it is therefore essential to appreciate what it means to "intend" in the context of both present and future conduct.

Across legal systems, however, fine-grained debates about the definition of mens rea terms have rarely ventured beyond a non-ulterior setting, with the implicit assumption that the same terms can be applied similarly to future ulterior events as well. And on a basic level, this seems to make sense. For example, if we understand "intention" in terms of trying to bring about a result,[4] or foreseeing a result as a virtually certain consequence of our conduct,[5] this seems like a definition that can be applied to future results in the same way it applies to present ones.[6] However, the assumption runs into problems where D's intention is conditional (e.g. D intends to kill V *if* V does not pay her debt). Unlike our non-ulterior definitions of intention, as D is not yet set on killing V (i.e. the condition is not yet satisfied), we do not appear to have the "trying" or "foreseen certainty" essential to our non-ulterior definition; it seems like something new. Faced with this problem case, courts and commentators have set their minds to defining conditional intention as a *separate* form of criminal intent,[7] debating its unique boundaries, and even whether it is required within the law.

The primary aim of this article is to demonstrate that such debates are misconceived and, moreover, that they are a symptom of a wider misunderstanding of ulterior mens rea. This begins with the claim that non-ulterior mens rea terms can *never* be applied to future ulterior events in the same way they are applied to present events. When asking if D acted with intention to kill in the future, for example, her "intention" will not necessarily motivate her present conduct; it simply coincides with it. Rather, the relevant motivated conduct will be D's intended future conduct (i.e. when killing), and it is the anticipation of this future conduct that marks the major difference between non-ulterior and ulterior future-focused mens rea. Despite the importance of this difference, however, it remains hidden within the current law. Only where D explicitly considers conditions as to this future conduct is the law forced to acknowledge the difference, and even then, as stated above, conditional intention is presented and defined as a special case. It is argued in this article that what we currently label as conditional intention is in fact synonymous with all future conduct intentions, and provides the key to understanding ulterior mens rea more generally.

[3] Criminal Law Act 1977, s. 1.
[4] *Hyam* [1975] A.C. 55.
[5] *Woollin* [1999] A.C. 82.
[6] On the definition of present conduct intention, see generally Duff, *Intention, Agency and Criminal Liability*; Duff, "Intention Revisited" in D.J. Baker and J. Horder (eds.), *The Sanctity of Life and the Criminal Law* (Cambridge 2013), 148; G. Yaffe, *Attempts* (Oxford 2010), Part 2.
[7] Useful cases include, among others, *O'Hadhmaill* [1996] Crim.L.R. 509, *Saik* [2006] UKHL 18, *Jogee* [2016] UKSC 7.

https://doi.org/10.1017/S000819731700040X Published online by Cambridge University Press

Once we accept conditional intention as a synonym of future conduct intention, the task for the law becomes clear. Defining conditional intention is not a process that should begin from a blank canvas. It is not a proxy for re-debating the definition of non-ulterior terms, but rather it is an opportunity to identify and articulate the difference between present and future-focused mens rea. Essentially, we need to understand how non-ulterior mens rea terms can and should be translated into a future conduct context.

Within the article, I approach this task over two parts. Part II discusses the application of conditional intention in the current law. The aim here is not necessarily to challenge the outcome of cases, but to expose the problems of analysing conditional intention outside the wider context of future-focused mens rea, and the associated risks of inconsistency and incoherence. Having exposed problems within the current law, Part III identifies a viable approach to conditional intention, and future-focused mens rea more generally. Accepting current definitions of mens rea terms (in their non-ulterior context), this part identifies and defines the additional links required when those terms are applied to future events.

II. Conditional Intention and the Current Law

Conditional intention is generally recognised as a form of criminal intent within the current law, but it has not developed (or been recognised) as a label for all future conduct intentions. Rather, definitions of conditional intention have been developed as piecemeal responses to specific issues arising in relation to specific offences. Perhaps inevitably, this has led to uncertainty, incoherence and misapplication.

The difficulties of defining and applying conditional intention in England and Wales first gained prominence in the 1970s, in relation to property offences such as burglary and attempted theft (not surprisingly, offences requiring intention as to future conduct).[8] The issue at this point was foundational: should conditional intention ever be accepted as criminal intent?

In the case of *Husseyn*,[9] D was convicted of an attempted theft of sub-aqua equipment, having been spotted by police trying to break into a van containing such goods, and intending to steal from the van *if* he found something valuable. On appeal, however, D's conviction was quashed, and the application of conditional intention rejected: "it cannot be said that one who has it in mind to steal only if what he finds is worth stealing has a present intention to steal".[10] This conclusion seems legally correct: D did not intend to steal by his present conduct of trying to open the door of the van, this was not a completed attempt; and the court had no tools for

[8] For useful summary and analysis of early cases, see K. Campbell, "Conditional Intention" [1982] L.S. 77, at 78–82; and L. Koffman, "Conditional Intention to Steal" [1980] Crim.L.R. 463.
[9] (1978) 67 Cr. App. R. 131.
[10] This decision was in line with the previous case of *Easom* [1975] A.C. 476.

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understanding intention as to future conduct when inside the van. However, the conclusion was clearly unacceptable on the facts, provoking immediate academic criticism. Williams, for example, highlighted that a finding of "no intention" was tantamount to the creation of a "rogue's charter": allowing would-be burglars to search another's property at their leisure, only triggering liability if and when they find something to their (unconditional) liking.[11]

The courts responded to the criticism of *Husseyn* by accepting the possibility of conditional intention.[12] However, still grappling with non-ulterior definitions of intention, and a focus on present conduct, the court was only able to accept the application of conditional intention where a carefully worded indictment was produced that omitted any specifics about the content of that intention. This fix was described early on as a "desperate expedient",[13] and even now as "absurd and unworthy",[14] as it seems to avoid rather than resolve the problems of applying intention in this context. However, the mechanism is able to reach the desired outcome liability, and it has been applied since.[15]

As conditional intention has gained greater acceptance within the law, it has arisen in several new areas. Arguably the most settled area of application has been the offence of conspiracy. This should be no surprise: whereas courts have conflated D's present and future conduct intentions when considering attempts, if we accept conditional intention as to conspiracy at all then we are essentially forced to recognise the difference.[16] For example, in *Reed*,[17] D agreed with another to visit individuals contemplating suicide and either to discourage them, *or* actively assist them, depending on D's assessment. Finding liability for conspiracy to aid and abet suicide, the courts focus was clearly on D's commitment to aiding and abetting as future conditionally intended conduct. Indeed, most conspiracy cases adopt a similar focus on future conduct intention.[18]

Despite an appropriate focus on D's future conduct intention within conspiracy cases, however, the label of "conditional intention" has continued to

[11] G. Williams, "The Three Rogues Charter" [1980] Crim.L.R. 263.
[12] *AG's Reference (Nos 1 and 2 of 1979)* [1980] Q.B. 180.
[13] Campbell, "Conditional Intention", p. 82.
[14] D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th ed. (London 2015), 468.
[15] The application of conditional intention in these cases has also been aided by the Criminal Attempts Act 1981, and the criminalisation of impossible attempts. This is because, even if the bag was empty, D's intention to steal its potential contents would be sufficient for liability.
[16] Criminal Law Act 1977, s. 1. Conspiracy is a particularly useful offence because, as it requires an agreement between parties that will "necessarily amount to or involve the commission of any offence", and both parties must intend that this offence should be completed, the issue of conditionality can arise both within actus reus (i.e. parties agree to offend under certain conditions) and mens rea (i.e. parties intend to offend under certain conditions). Additionally, as conspiracy does not require temporal proximity to the agreed future offence, the potential for facts involving conditional agreements and intentions is also increased.
[17] [1982] Crim.L.R. 819.
[18] See e.g. *O'Hadhmaill* [1996] Crim.L.R. 509; and *Saik* [2006] UKHL 18.

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cause problems of interpretation. Without recognising conditional intention as synonymous with all future conduct intentions, courts and commentators have been willing to interpret the term as if it could be tied to just a few unique cases, and as if unconnected to non-ulterior definitions of intention. Two examples will suffice, both of which we return to in Part III. First, in *Reed*, the following hypothetical was advanced:

"[D] and [D2] agree to drive from London to Edinburgh in a time which can be achieved without exceeding the speed limit, but only if the traffic they encounter is exceptionally light."

The court stated that D and D2 do not have a criminal intention to exceed the speed limit, because the conditioned intention to do so is peripheral to their central agreement and intention to meet at the prescribed location. This claim is important, but problematic. It is important because it gets to the heart of the difference between intention as to present and future conduct, with only the latter requiring us to engage with D's commitment to intentional conduct that is not yet performed. However, it is problematic because having raised an issue of such importance, the court's guidance must be wrong. For example, if D and D2 agreed to rob a bank, and further agreed to kill any guards attempting to raise an alarm, surely courts would not want to discount the conditional intention to kill as peripheral.[19]

The second conspiracy example exposing problems of interpretation is *Saik*.[20] Saik was charged with conspiracy to launder the proceeds of crime,[21] having begun taking large amounts of money into his bureau de change, suspicious as to its criminal origin. For the principal offence of money laundering, a mens rea of suspicion would be sufficient. However, crucial to D's conspiracy liability was whether he intended or knew that he would launder the proceeds of crime. Employing conditional intention, Baroness Hale (dissenting) claimed that this was possible. The majority presented D's ulterior mens rea as a future intention to change money, with a separate suspicion as to the criminal origin of the money. However, for Hale, D's mens rea could be interpreted as a conditional intention to change the money *even if* it turned out to be criminal.[22] As we explore further in Part III, this interpretation is deeply problematic, effectively subsuming ulterior suspicion within the concept of conditional intention. Although a dissenting judgment,[23] its tentative rejection by the Lords (and acceptance elsewhere[24]) demonstrates the vulnerability of conditional intention to (I will argue) serious misapplication.

[19] Indeed, this was clearly the intention of the Supreme Court in *Jogee* [2016] UKSC 7, at [92]–[94].
[20] *Saik* [2006] UKHL 18.
[21] Contrary to the Criminal Justice Act 1998, s. 93C(2); now an offence under the Proceeds of Crime Act 2002, s. 340.
[22] *Saik* [2006] UKHL 18, at [97]–[102].
[23] Ibid., at para. [5].
[24] D. Ormerod, "Making Sense of Mens Rea in Statutory Conspiracies" [2006] C.L.P. 185. Ormerod highlights potential support for a similar approach in *Singh* [2003] EWCA Crim 3712.

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Most recently, and perhaps most seriously, the vulnerability of conditional intention has been exposed in the landmark complicity case *Jogee*.[25] *Jogee* did not raise issues of conditional intention, but in abolishing the common law doctrine of joint enterprise (which had based liability on mere foresight) the Supreme Court made much of the future role of conditional intention in ensuring the continued reach of complicity liability.[26] Introducing such an uncertain concept to an area of law fraught with appeal litigation is concerning, particularly (as others have highlighted[27]) because conditional intention is discussed by the court using vague language such as "tacit agreement" and "scope of the venture".[28] However, much more concerning for present purposes is the fact that the court referred to D's conditional intention to assist or encourage by her *present* conduct. As I have introduced, and will discuss in Part III, it is contended here that conditional intention can never apply in these circumstances.

These various lines of confused and problematic authority provide illustration of the current difficulties with the law as to conditional intention; difficulties, interestingly, that are shared across many other jurisdictions.[29] These problems may partially explain why the thesis advocated in this article, that conditional intention is synonymous with all future conduct intention, is also only hinted at in other works.[30] After all, to accept the thesis is also to accept the scale of the potential problem across the full range of offences that require ulterior mens rea. However, it is my view that coherence can only be brought to the law if we accept this thesis, and refocus on what (and only what) novel elements are required to translate current conduct intention into a future conduct context.

III. Conditional Intention and the Search for Coherence

I have criticised the current law in Part II for its failure to interpret conditional intention as synonymous with all future conduct intentions, but I

[25] *Jogee* [2016] UKSC 7. D and P went to V's house and began a violent confrontation. P took a knife from the kitchen and killed V. D intended P to confront V with violence, and foresaw the possibility of serious harm being caused, but did not intend serious harm to be caused. The Supreme Court held that foresight of P's offence was no longer sufficient for complicity liability, and that intention should be required.

[26] Ibid., at paras. [92]–[95].

[27] D. Ormerod and K. Laird, "Not the End of a Legal Saga but the Start of a New One?" [2016] Crim.L.R. 539; J. Horder, *Ashworth's Principles of Criminal Law*, 8th ed. (Oxford 2016), 453–56. See also D. Ormerod and W. Wilson, "Simply Harsh to Fairly Simple: Joint Enterprise Reform" [2015] Crim. L.R. 3.

[28] *Jogee* [2016] UKSC 7, at [93].

[29] For related problems in America: see US MPC §2.02(6); *Holloway v United States* 119 S.Ct. 966 (1998); and G. Yaffe, "Conditional Intent and Mens Rea" (2004) L.T. 273; for Australia: see *Christopher Garven v Constable David Quilty* [1998] ACTSC 137; *Sharp v McCormick* [1986] V.R. 869; for Germany: see M. Bohlander, *Principles of German Criminal Law* (Oxford 2009), 65–66; J. Blomsma and D. Roef, "Forms and Aspects of Mens Rea" in J. Keiler and D. Roef (eds.), *Comparative Concepts of Criminal Law* (Cambridge 2016), 103, 108–09.

[30] Leading textbooks on criminal law, for example, tend to discuss the term "conditional intention" as it relates to specific offences such as attempted theft and conspiracy, and not in more general mens rea chapters.

https://doi.org/10.1017/S000819731700040X Published online by Cambridge University Press

have not yet substantiated or defended that premise in detail. It is therefore essential to provide that analysis in the first section of this Part; explaining why conditional intentions only apply to future conduct, and why it is vital to separate present and future conduct intentions within legal analysis.

Having established and defended this core premise, we are then able to expand discussion in two important areas. First, it is important to provide some additional detail on the definition of future conduct intention (i.e. conditional intention) as opposed to present conduct intention, highlighting essential and largely unresolved debates. Second, I explain how a clear conception of future conduct intention is the key to unlocking our understanding and application of future-focused mens rea in general, exploring ulterior mens rea beyond D's future conduct. For example, where D forms a conspiracy to murder V in the future *if* certain conditions arise, we must also understand and apply D's ulterior mens rea as to causing death (ulterior result element) and as to V's personhood (ulterior circumstance element).

A. Conditional Intention Is Future Conduct Intention

It is contended that conditional intention and future conduct intention are synonymous, both describing D's intention at time 1 (t1) to perform future conduct at time 2 (t2) if certain conditions arise. Four factors are central to this claim, and each is explored in this section. These are: (1) intention at t1 as to present conduct and results is never conditional; (2) intention at t1 as to the future conduct of another is never conditional; (3) intention at t1 as to D's own future conduct at t2 is always conditional; and (4) intention at t1 as to future conduct at t2 is relevant to the criminal law.

1. Intention at t1 as to present conduct is never conditional

Where we discuss D's intentions as to her present conduct (i.e. volitional movements at t1) it does not make sense to speak of conditional intention. Where D acts with a present intention (e.g. to shoot a gun), that intention may have previously existed in conditional form (e.g. to shoot only *if* V does not pay-up), but at the moment of action such conditions are resolved and D is acting unconditionally. In this manner, historical conditions become more aptly described as reasons for action.[31]

It is also impossible to conditionally intend the results of present conduct. As introduced above, non-ulterior intention is defined in relation to D's conduct: D intends a result (e.g. causing death) if she acts as she does because she believes that this action might have that result, or when she recognises the result to be a virtually certain consequence of this

[31] J.C. Smith, "Intention in Criminal Law" [1974] C.L.P. 93, at 115–16; D. Davidson, *Essays on Actions and Events* (Oxford 2001), 99, 102; L. Alexander and K. Kessler, "Mens Rea and Inchoate Crimes" [1997] Journal of Criminal Law & Criminology 1142.

https://doi.org/10.1017/S000819731700040X Published online by Cambridge University Press

action.[32] To say that D's present action was *conditionally* motivated by an anticipated outcome is illogical; D's completed conduct demonstrates that any previous conditions as to movement must have been resolved.[33] D's intention as to results may be specified in any number of ways, and D may know that the outcome is unlikely, but as long as those outcomes motivated her conduct then they were intended.

Despite the irrationality of applying conditional intention to present conduct and results, confusions have emerged in both theory and in practice. Kugler, for example, contends that a species of conditional intention can apply to present conduct results as it would to future conduct results.[34] For Kugler, this arises where D acts to cause a certain result X (e.g. the explosion of a passenger plane for insurance reasons), knowing that if X happens it is virtually certain to cause an undesired result Y (e.g. the death of passengers), but also knowing that the desired result X is unlikely. With regard to the undesired result Y, Kugler maintains that this can only be understood using present conditional intention: whilst killing is not directly intended or foreseen as virtually certain when taken as a whole, it is foreseen as virtually certain *if* the plane explodes.[35] Contrary to Kugler, however, this is not an issue of conditional intention. D is not conditioning anything in her control (i.e. present or future conduct) on the outcome of an event. Rather, she is acting presently (i.e. unconditionally), setting the bomb, foreseeing a range of outcomes.[36]

The rejection of conditional intention as to present conduct and results is central to the problems identified in Part II with the complicity case *Jogee*.[37] In this case, the Supreme Court highlighted conditional intention as a route to complicity liability where D helps P with a particular criminal enterprise (e.g. robbing a bank), and tacitly agrees that P should complete a collateral offence if necessary (e.g. murdering security guards).[38] For the court, this will amount to a conditional intention to aid and abet murder, required for complicity liability should P kill a security guard in fact: D intends to aid or abet murder *if* P is challenged by a guard. But again, this cannot be right. D's intention to aid or abet murder at t1 cannot be conditioned by an event that happens later at t2. D's intention may be specific to a certain future view of the world (i.e. to encourage killing on specific

[32] See *Woollin* [1999] A.C. 82; *Hyam* [1975] A.C. 55; Duff, *Intention, Agency and Criminal Liability*; Yaffe, *Attempts*, Part 2.

[33] D may choose to act even though a certain condition is not yet resolved, for example, choosing to kill V before being sure of her identity where such knowledge may have motivated her conduct. However, all this shows is that D's intention to kill V was not conditional on knowing V's identity.

[34] I. Kugler, "Conditional Oblique Intention" [2004] Crim.L.R. 284, 284.

[35] I.e. result Y is obliquely intended on condition of result X.

[36] For discussion, see Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com. No. 218, 1993), 10.

[37] *Jogee* [2016] UKSC 7.

[38] Ibid., at paras. [92]–[95].

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terms), but once it has motivated conduct which provides that encouraging effect, it can no longer be conditional.

2. Intention at t1 as to the future conduct of another is never conditional

Before considering D's intentions as to her own future conduct, it is important to recognise that several offences also require D to act at t1 with mens rea as to the future conduct of another party (P). These include, for example, complicity, inchoate assisting or encouraging and certain conspiracies.

As D's intention is focused on future conduct in these cases, it is perhaps even easier to confuse and misrepresent D's intentions as (at least potentially) conditional. For example, where D encourages P to kill security guards if they intervene, we may accept that her intentional encouragement is unconditional as discussed at (1) above, but it looks like her intention that P should complete the killing is conditioned on V's behaviour. However, again, such an interpretation would be mistaken. D is not considering conditions as to her own future conduct; D's only contribution will start and end with her encouraging acts at t1. Thus, as with the discussion at (1) above, we are still dealing with D's present conduct intention, and any conditions as to that conduct must be logically resolved when the conduct is performed. In our example, we can say that D acts with a specific intention as to the future conduct of P (i.e. she intends P to kill the security guards if they intervene), but the specific nature of this intention does not make it conditional. D's completed conduct cannot be conditionally motivated, though it may be motivated by a very precise view of the future.[39]

3. Intention at t1 as to future conduct at t2 is always conditional

Present conduct and result intention is never conditional because D's choice to act marks the resolution of those conditions. D cannot be conditionally motivated in present action. However, where D forms an intention at t1 as to future conduct at t2, the conditions relating to that intention are not necessarily resolved until D completes the *future* conduct. This is vital, as, in my view, it marks the defining characteristic of future conduct intention (i.e. conditional intention). Although D's future conduct intention must coincide with her present conduct at t1, the conditions within that intention can remain unresolved. D's intention at t1 marks a commitment or

[39] There is a separate debate here about whether it is *ever* possible to intend the voluntary actions of another, but this does not impact the rejection of conditional intention. Rather, this debate questions whether D's knowledge of P autonomous choices at t2 break any intentionally causal chain, meaning that D may desire P's future acts but not intend them. See Duff, *Intention, Agency and Criminal Liability*, pp. 63–66. See also the rather vague comment in A.P. Simester, J.R. Spencer, F. Stark, G. R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law*, 6th ed. (London 2016), 324, with regard to conspiracy, that such a party's intent is "constituted by the knowledge that his co-conspirator intend[s]" to complete the offence.

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judgment of reasons, a decision to act in a certain way in the future.[40] But D also recognises her own future agency, her future choice in conduct, and this is the essential distinction from present conduct intention. It is also the basis for the claim that *all* future conduct intention is conditional intention.[41]

Future conduct intentions may be explicitly conditional, for example, where D decides to rob a bank *if* she cannot pay her rent. However, even where D's intention is not explicitly conditional, D's awareness of her future agency at t2 means that it will always be at least implicitly conditional. For example, D decides to rob the bank regardless of her financial situation or any other factor. Although this looks like an unconditional future conduct intention, it is inevitably qualified by a variety of implicit conditions that D would accept if she were asked to consider them (e.g. would you still intend robbery *if* you found the bank surrounded by police, *if* you won the lottery in the meantime, *if* you were in police custody at the time of the planned robbery, and so on). Indeed, to consider D's intention as to future conduct as unconditional and *fully* resolved at t1 would be to deny future agency: D may be committed at t1, but she is not caused.[42]

Commitment at t1, however, is essential. Where D is not committed at t1 to future conduct, then she cannot have formed a conditional intention. This point is fundamental, but has been misinterpreted in the literature. Cartwright, for example, distinguishes between what he terms internal and external conditional intention: "a condition is internal when it is part of the content of the intent, and it is external when it is a condition of the formation of the intent."[43] Cartwright contends that so-called external conditional intention should not be accepted as a valid form of criminal intention (i.e. because D has not yet committed to any conduct), and presents this as a category of invalid conditional intention applicable to both present and future conduct intention.[44] The problem here is that although Cartwright is correct to rule out the use of so-called external conditional intention as valid criminal intention, he is wrong to present it as a potential form of intention at all. What Cartwright is actually describing in these cases is nothing more than the conditions/beliefs/reasons active within D's practical reasoning that *might* give rise to a future intention. Where D is considering forming an intention in the future, it is inaccurate and

[40] Davidson, *Essays on Actions and Events*, p. 102; Duff, *Intention, Agency and Criminal Liability*, p. 71.
[41] This conclusion (though not necessarily the reasoning) is reflected in L. Alexander and K. Ferzan, *Crime and Culpability* (Cambridge 2009), 203; *Saik* [2006] UKHL 18, [5]; Koffman, "Conditional Intention to Steal", p. 465; Smith, "Intention in Criminal Law", p. 115.
[42] Implicit conditionality can seem unintuitive, and has attracted criticism. See e.g. J.P.W. Cartwright, "Conditional Intention" (1990) Philosophical Studies 233, at 237–41; Campbell, "Conditional Intention", pp. 90–91. However, such criticism does not undermine the essential logic of the proposition. I return to this in the next section.
[43] Cartwright, "Conditional Intention", p. 235.
[44] Ibid., at p. 244.

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misleading to describe this as a form of intention (conditional or otherwise). Essentially, there is an important distinction to be maintained between conditional intention, and conditions as to intention.[45]

Future conduct intention (i.e. conditional intention) therefore arises whenever D commits at t1 to future conduct at t2, whether such commitment is explicitly conditional or not. The definition is simple, but requires further explanation and defence.

4. Intention at t1 as to future conduct at t2 is relevant to the criminal law

Having demonstrated the fundamental distinction between intentions as to present conduct and results (which are never conditional), and intentions as to future conduct (which are always conditional), it is important to ask what difference this makes in legal application. According to one suggestion, for example, if this second form of intention is not causally related to D's conduct at t1, perhaps it is mislabelled as intention, and perhaps we should question its application within offences. This view has been advanced by Gardner and Jung.[46]

Gardner and Jung do not reject offences such as attempt that require D to intend a future principal offence, but they do reject the current application of conditional intention in this context. When discussing conditional intention, Gardner and Jung argue that we should distinguish two types of condition: "enabling conditions", which allow D to proceed with a criminal plan (e.g. D intends to steal *if* she finds something worth stealing); and "reason-giving conditions", where D decides to act in a certain way only if a contingency arises (e.g. D intends to steal *if* she runs out of money).[47] This distinction is important, the authors maintain, because enabling conditions can attach to present conduct intentions, whereas reason-giving conditions can only attach to bare intentions (i.e. intentions unrelated to present conduct): "One can act right now with the intention of stealing-if-there-is-anything-worth-stealing. One need not wait for any contingency to arise before one's intention to do so is activated."[48]

It is on this basis that Gardner and Jung contend that conditional intention is not relevant to the criminal law: enabling conditional intention should simply be interpreted as standard intention (i.e. because it relates to present conduct in the same way), and reason-giving conditional

[45] Davidson puts this point particularly well, remarking that "The intention is not conditional in form; rather, the existence of the intention is conditioned by my beliefs": *Essays on Actions and Events*, p. 100. See also M. Moore, *Placing Blame* (Oxford 1997), 407; M.S. Moore, "Intention as a Marker of Moral Culpability and Legal Punishment" in S. Green and A. Duff (eds.), *Philosophical Foundations of the Criminal Law* (Oxford 2011), 179, 200.

[46] J. Gardner and H. Jung, "Making Sense of Mens Rea: Antony Duff's Account" (1991) 11 O.J.L.S. 560.

[47] Ibid., at pp. 567–68.

[48] Ibid., at p. 568.

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intention should not be accepted as a valid form of criminal intent (i.e. because it relates to bare intentions only).

Despite some intuitive appeal, it is contended that Gardner and Jung's distinction between enabling and reason-giving conditions should be questioned, and their approach ultimately rejected. This is because, even in the context of enabling conditions, it seems that D cannot "act now" with the required intention. If D forms an ulterior intention at t1 to steal *if* there is anything worth stealing at t2, then she can act now to try and discover whether the condition applies (e.g. she can search for something worth stealing), but her future conduct intention to steal remains contingent on the appropriate discovery. This applies in the same way to reason-giving conditions where, again, D can continue to act in various ways at t1 before the contingency arises, including acts which speed up the contingency or make it more or less likely, but future acts of intentional stealing can only come at t2, after the condition is satisfied.[49] Therefore, contrary to Gardner and Jung, it seems that both sets of conditions remain "reason-giving" in the sense that they must be satisfied before D can fulfil the conduct element of the principal offence attempted.

If both categories of conditional intention remain reason-giving, as I contend, then Gardener and Jung's approach would reject the use of both within the criminal law. This would be obviously unacceptable, as it would undermine current offences that include ulterior mens rea as to future conduct (e.g. attempt, conspiracy and so on). However, the fact that we *need* a definition of future conduct intention to make sense of these offences is not to justify any particular preferred conception. Rather, in view of Gardener and Jung's critique, it remains essential to justify why the term "intention" can be used in relation to a future event that does not necessarily motivate current conduct.

The answer requires us to recognise *two* points of conduct within D's contemplation when committing offences such as attempt. It must be acknowledged that when D acts intentionally at t1, she does not necessarily do so in the belief that this action will constitute the conduct required for the principal offence attempted. Rather, D's ulterior mens rea will generally focus on a second point of future conduct, when the principal offence will be completed.[50] In this way, although D's future conduct intention (i.e. conditional intention) does not necessarily relate to her present conduct, it remains appropriately labelled as intention (e.g. as opposed to desire)

[49] It is interesting to note that Duff's partial endorsement of the Gardner and Jung approach avoids this problem by focusing on a completed attempt example (D attempting to steal from an empty pocket) where D's current actions are directly motivated by her intention. However, this example only engages with a small proportion of cases involving ulterior mens rea of this kind (i.e. completed attempts). A. Duff, *Criminal Attempts* (Oxford 1996), 214.

[50] The only exception will be complete attempts, where D completes the conduct element of the principal offence but (for whatever reason) fails to cause the result, e.g. where D shoots at V, but misses.

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because it is still anchored by D's physical agency in a comparable way. Just as D acts now because of her intention to cause outcomes by that action, so she may commit herself now to future action because of her intention to cause outcomes by that future action.

B. Understanding the Boundaries of Future Conduct Intention

Despite important similarities between present and future conduct intention, any full conceptualisation of future conduct intention (i.e. conditional intention) must also highlight and explore the differences. In both cases, as discussed in the previous section, D's intentions are only understood as they relate to her conduct. However, crucially, for future conduct intention, this is not conduct performed at t1, but conduct D intends to perform at t2. This is the unique element within future conduct intention: D's foresight of a future point of conduct at t2, and her commitment at t1 to performing that conduct if certain conditions arise.

Unique to future conduct intention, the requirement of non-actioned commitment at t1 to future conduct at t2 requires some unpacking. In this vein, we explore three important debates which question the nature of this commitment, and even suggest a carving out of certain "invalid categories" of future conduct intention. These are: (5) Must D have a pro-attitude at t1 to the conditions of future conduct at t2? (6) Must D believe at t1 that the conditions leading to future conduct at t2 are probable? (7) Must the conditions within D's future conduct intention be objective? I answer each in the negative.

5. Must D have a pro-attitude at t1 to the conditions of future conduct at t2?

Often central to the academic critique of conditional intention is the claim that D must have a certain attitude towards a condition at t1 before conditional intention can/should be found. Indeed, this seems to underlay the hypothetical in *Reed*, discussed in Part II. However, as with the *Reed* hypothetical, theories based on this proposition can be problematic, both in the complexity of their construction and in the dubious merit of their application.

One of the simplest versions is the "awareness thesis", which contends that the term conditional intention should only be used where D consciously considers a condition to her intention at t1, holding the term inappropriate where D's condition is unconsidered or implicit. Cartwright adopts this thesis for what he calls "internal conditions", highlighting that unconsidered internal conditions operate within D's reasoning as nothing more than an "if I can" qualification, and not as a true condition.[51] The awareness thesis has a surface appeal, as one would think that considered

[51] Cartwright, "Conditional Intention". Similar approaches are advanced elsewhere by Campbell, "Conditional Intention", pp. 89–90; and J.W. Meiland, *The Nature of Intention* (London 1970), 20.

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conditions have more impact on our intentions than unconsidered conditions. However, this is not necessarily the case. As Klass highlights, D's awareness of a weak or unlikely condition will not always equate with an impact on D's choices, and where this is the case the condition "belongs to the domain of theoretical, not practical, reason".[52] For example, D may reflect upon the fact that she will not rob the bank if she finds it surrounded by police, or if she wins the lottery, but the fact of conscious reflection tells us very little about an impact (or lack of impact) on D's intention. Thus, if our focus is on the role of a condition within D's practical reasoning, D's explicit awareness of the condition does not seem to be the crucial factor.

Still centring on the role of conditions within practical reasoning, but building upon the awareness thesis, commentators have now begun to focus on how impactful a condition is within the reasoning process. This approach can be termed the "impact thesis". The question here is whether D's awareness of the condition shapes her reasoning and behaviour at t1 (true conditional intention), or whether it is simply a background consideration (not a true conditional intention). Following this separation, those advocating versions of the impact thesis will often further subdivide the category of true conditional intention, using the detail of the condition to claim that certain conditional intentions should not be accepted as valid forms of criminal intent.

There are several versions of the impact thesis,[53] the most nuanced of which has come from Gideon Yaffe.[54] Yaffe begins with an accepted premise on intention: intentions must guide reasoning and action, and so whereas desires can conflict, to have conflicting intentions would be "criticizably irrational".[55] For example, D may desire to go to the cinema on Saturday at 12:00, and desire to play football on Saturday at 12:00, but she cannot intend to do both. Equally, once a decision is made and an intention is formed (e.g. to play football), holding this intention is incompatible with serious ongoing deliberations about alternatives (e.g. the cinema).[56]

Applying this premise to conditional intention reveals a point of complication. As Yaffe highlights, whilst it is irrational for D to form an intention at t1 that conflicts with all or part of a distinct conditional intention, it is not irrational for D to deliberate the alternative actions within that conditional

[52] G. Klass, "Conditional Intent to Perform" (2009) L.T. 107, at 113.

[53] One option would be to focus on whether D desired the condition to arise or not, only finding valid intention where such desire is present. See the dissenting judgment of Scalia J., in *Holloway* 119 S.Ct. 966 (1998), 973. Duff also offers some support for this approach in *Criminal Attempts*, p. 214.

[54] Yaffe, "Conditional Intent and Mens Rea".

[55] Moore, *Placing Blame*, p. 407. This derives, in large part, from M. Bratman, *Intention, Plans and Practical Reason* (Cambridge, MA 1987), 15. See also Yaffe, *Attempts*, pp. 82–102.

[56] In most cases D knows that she is able to revisit a decision of this kind, and so some tentative deliberation about alternatives may be acceptable. However, serious consideration of alternative options suggests that a decision has not been made, and D therefore lacks intention.

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intention.[57] For example, D unconditionally intends at t1 to rob a local shop on Monday, and conditionally to rob a local bank on Tuesday (t2) *if* she does not gain at least £10,000 from the shop.[58] In relation to D's unconditional intention to rob the shop, conflicting intentions to do other things on Monday become irrational, as does the deliberation of such alternatives.[59] However, D's conditional intention to rob the bank is different. In this case, a conflicting unconditional intention to do something else (e.g. to leave the country on Monday evening) would be irrational: D cannot conditionally intend to rob the bank and unconditionally intend to leave the country at the same time. But deliberation and planning of different (conflicting) options within a conditional intention is not irrational (e.g. D knows that she may gain sufficient funds from the shop, so deliberates about leaving the country if she does so). From this, Yaffe explains that much of the intuitive struggle with categorising conditional intention comes from our tendency either to focus on D stopping conflicting intentions (conditional intention is the same as unconditional intention), or to focus on D stopping conflicting deliberations (conditional intention is different from unconditional intention).[60]

For Yaffe, the potential deliberative conflict within conditional intention is key to distinguishing what he would classify as valid or invalid conditional intentions. This is based on a question of fact: despite D's conditional intention including a non-criminal potential outcome, does D's intention to pursue the criminal outcome (i.e. her focus on this condition potentially arising) dominate her practical reasoning at t1? In other words, does the conditionality of D's intention have any impact, such as to undermine criminal blame, or does her reasoning look more like an unconditional intention to commit the crime? Applied to our example, if D's conduct leading up to robbing the shop is also guided by the criminal condition (preparing to rob the bank) then she holds a valid intention to rob the bank. Whereas, if D's conduct is guided by the non-criminal condition (preparing to leave the country on Monday evening) then she does not hold a valid intention to rob the bank.[61]

More difficult cases, within this view, are those that do not present a clear deliberative dominance for either side of D's conditional intention. Where this arises, Yaffe contends that we should weigh in the balance which condition (criminal or non-criminal) had the greater impact on D's conduct.[62] Thus, in the US carjacking case *Holloway*,[63] Yaffe contends that the

[57] Yaffe, "Conditional Intent and Mens Rea", Part 3.
[58] We are assuming, for the sake of this discussion, that it is possible to intend unconditionally. This was discussed across factors 2 and 3.
[59] Either would make us doubt the validity of D's intention.
[60] Yaffe, "Conditional Intent and Mens Rea", p. 298.
[61] Ibid., at pp. 300–03.
[62] Ibid., at p. 304.
[63] *Holloway*, 119 S.Ct. 966 (1998).

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Supreme Court was wrong to find a conditional intention to harm where D threatened to harm V *if* she did not give up her car. Although D's plan included the potential of harming V, his conduct in not harming V after she gave up her keys demonstrated that the non-criminal condition played a more determinative role in D's reasoning.[64] Yaffe's approach has formed the basis of other scholarship,[65] and been endorsed by the Law Commission of England and Wales.[66]

Despite Yaffe's insights, it is contended that the impact thesis should be rejected. There are two central reasons for this. First, Yaffe's test for identifying a dominant condition in deliberation is flawed. In many cases (such as *Holloway*) it will not be possible to identify a dominant condition from D's conduct at t1, either because little pre-planning is required (e.g. D intends to hit V tomorrow *if* she plays the same song on the radio, but D does nothing in advance of this), or because D plans for both eventualities (e.g. employing our previous example, D buys supplies to rob the bank and books flight tickets). For Yaffe, in regard to *Holloway*, the solution was to look at D's conduct at t2, after the condition was decided: D let his victim go when she gave up her car, so his conditional intention at t1 to hurt her *if* she did not must have been inferior. But this is unacceptable. D's conduct at t2 tells us little about her intention at the relevant time for liability (i.e. t1), and may demonstrate no more than that the condition was real. Secondly, even where one condition guides D's pre-planning more than another, this will not necessarily demonstrate a dominant deliberative intention. Using our example above, if D believes that the same equipment can be used to rob the bank as will be used for the shop, this condition will require less pre-planning than the other possibility of leaving the county. Alternatively, D's planning may simply reflect which condition she thinks is more likely to arise (e.g. more time planning her flights if she thinks the shop is likely to have £10,000 on site). These considerations will impact on D's pre-planning, but tell us little about her commitment at t1 to either condition.

I have rejected the impact thesis because D's pro-attitude or focus on particular conditions does not seem to tell us anything useful about her future conduct intention. It is surely correct that D must have committed herself at t1 to a future criminal act *if* certain conditions arise, but the role of those conditions within D's practical reasoning (beyond the question of commitment) is problematic to discover, and tells us little.

[64] Yaffe, "Conditional Intent and Mens Rea", p. 306.
[65] E.g. Klass, "Conditional Intent to Perform".
[66] Law Commission, *Conspiracy and Attempt* (Consultation 183, 2007), §5.5.

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6. Must D believe at t1 that the conditions leading to future conduct at t2 are probable?

When committing to a conditional intention at t1, as to future conduct at t2, the content and likelihood of the conditions involved can vary greatly. In view of this, we may question whether future conduct intention should be found where D's commitment at t1 is premised on an improbable and/or unwanted condition. For example, taking a variation of the *Reed* hypothetical, if D agrees to meet D2 in Edinburgh at a set time, including a conditional intention to exceed the speed limit in case of delay, but knowing that even the worst traffic congestion is very unlikely to cause such a delay, can we say that both parties intend to exceed the speed limit? Indeed, where probabilities become more extreme (e.g. D intends to commit a crime only *if* she wins the lottery multiple times), a finding of valid mens rea seems even less plausible. This argument traces a similar logic to the impact thesis discussed above, questioning the impact of low probability commitments within D's reasoning. However, unlike the impact thesis, a test based on probability and/or desire has the merit of relative simplicity in application.

But does this line of reasoning carve out an invalid category of conditional intention? I think not. Although certain intentions based on low probability and/or unwanted conditions can appear implausible, we must be careful to identify what makes them so. It is contended here that, in most cases at least, intentions of this kind seem implausible because we do not believe they are *genuinely* committed to, we believe that D is lying.

Undesired and/or low probability intention is conceptually coherent. Just as D may unconditionally intend the unlikely or undesired in her present conduct (e.g. D tries to shoot and kill V from a long distance, knowing that she has only a 0.1% chance of success and knowing that she might be better off if she fails), there is no obvious reason why conditional intention should be treated differently.[67] However, conceptual coherence does not tell us whether D holds a *genuine* intention (conditional or otherwise). Here we may focus on D's lack of desire and/or the improbability of the criminal condition as being evidence that D does not, in fact, plan to go through with the criminal act even if the relevant conditions arise.[68] For example, if D agrees to kill V only if she wins the lottery twice in a row, do we believe that she really intends to go through with it if those

[67] Alexander and Kessler, "Mens Rea and Inchoate Crimes", pp. 1144–45; Alexander and Ferzan, *Crime and Culpability*, pp. 204–05. For a useful discussion of the conceptual coherence of intention as to unlikely and/or undesired outcomes, see J. Horder, "Varieties of Intention, Criminal Attempts and Endangerment" [1994] L.S. 335.

[68] For useful discussion, see Alexander and Ferzan, *Crime and Culpability*, pp. 203–06; Alexander and Kessler, "Mens Rea and Inchoate Crimes", pp. 1143–45; Law Commission, *Conspiracy and Attempts*, §2.108.

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conditions arise? If yes, then D has a genuine criminal intention[69]; but if no, then she does not.[70] The issue of genuineness is vital, but it does not mark an exception to the validity of conditional intention, it simply reminds us that all intentions require D to have made a genuine commitment.

7. Must the conditions within D's future conduct intention be objective?

Accepting that D has conditionally committed herself at t1 to certain conduct at t2, the question here is whether the conditions of that commitment must be objective for intention to be found (i.e. not requiring further subjective judgment by D at t2). At an extreme, D cannot be said to have formed a conditional intention to commit a crime if she has simply delayed the decision (e.g. D intends at t1 to *think about* stealing from a shop at t2 *if* she runs out of money). In this example, D's intention is simply to consider committing a future crime, it is not a conditional intention/commitment. But does this logic, and finding of no intention, apply to all subjective conditions that require some later evaluation from D?

For Parry, the answer is "yes": objective conditional intention will suffice as a valid form of intention, but any form of subjective conditional intention should not.[71] Following this approach, D's intention to "steal a laptop *if* I find one", for example, would amount to an ulterior intention to steal. However, an intention to "steal something *if* I find something worth stealing" would not, as D would still have to subjectively decide at t2 whether what she finds is worth stealing. This view challenges the current approach taken to attempted property offences, discussed in Part II, where conditional intention has been found in both cases. Parry's approach, however, is highly problematic, and has received cogent criticism from several sources. Koffman, for example, has pointed out that fully objective conditions will be extremely rare, and so the species of valid intentions within Parry's approach will be overly narrow.[72] The Law Commission reached a similar conclusion, highlighting that most conditions will include an evaluative (subjective) element, but this does not undermine the validity of D's intention/commitment at t1.[73] Such criticisms are well founded. For example, if D conspires and intends to rob a bank *if* she can obtain the equipment to do so, the fact that she will have to decide later (subjectively) when the equipment threshold is reached, should not undermine the finding of a valid

[69] After all, were D to be arrested after winning the lottery twice and then killing V, we would not look back to the unlikely series of events as any form of mitigation. Where the conditions do not come about, of course, and D is potentially liable for an inchoate offence only, the use of prosecutorial discretion may be important: Campbell, "Conditional Intention", p. 96.

[70] D's mens rea must be settled and genuine to be valid in law.

[71] Parry refers to this as "suspended intention". J. Parry, "Conditional Intention (1) A Dissent" [1981] Crim. L.R. 6. See also brief discussion in G. Williams, *Textbook of Criminal Law* (London 1978), 652.

[72] L. Koffman, "(2) A reply" [1981] Crim.L.R.14.

[73] Law Commission, *Conspiracy and Attempt* (Consultation 183, 2007), §§ 5.8, 5.9–5.13, (Law Com. No. 318, 2009), §§ 2.111–2.112.

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intention to rob at t1. Therefore, although a delayed decision should be carefully distinguished from an intention, the fact that D's future conduct intention includes some form of subjective conditionality should not undermine its validity.

The debates across factors (5), (6) and (7) are important in that they focus on unique elements within future conduct intention, distinct from present conduct intention. Within each, the aim is to understand what it means for D to "conditionally commit" to future conduct; with authors questioning the limits of such commitment and/or conditionality. Although I have rejected the more extreme arguments within each debate, each discussion has usefully forced us to clarify what this kind of non-actioned commitment should require.

C. Future Conduct Intention Is Key to Understanding Future Event Mens Rea

We are now in a position to demonstrate the benefits of a coherent conception of conditional intention as future conduct intention, defined in line with the previous two sections. In this final section of Part III, the aim is to show how future conduct intention provides the key to understanding and applying all offences that require ulterior mens rea as to a future criminal event. This is housed within two final factors for discussion: (8) future conduct intention marks a second point of coincidence; and (9) future event mens rea must be applied consistently.

8. Future conduct intention marks a second point of coincidence

Where D's offence requires mens rea, including ulterior mens rea, this must be present at the time D completes the conduct element of the offence at t1.[74] This is referred to as the coincidence principle. For example, D only commits conspiracy to murder if she agrees to commit murder (conduct) with intention to agree (mens rea as to present conduct), and with intention that the agreed principal offence should be committed by one of the conspirators (ulterior mens rea).[75] Nothing in this article seeks to challenge this approach. However, in addition to this primary point of coincidence at t1, offences requiring ulterior mens rea as to a future criminal event (such as conspiracy, attempts, complicity, etc) also include a secondary point of coincidence. This secondary point of coincidence exists within D's ulterior mens rea, ensuring that D's ulterior mens rea maps appropriately to a future offence. Thus, for D to have committed conspiracy to murder in our example, D's mens rea must coincide with her conduct at t1

[74] E.g. D will not be liable for murder where she plans to kill V and later causes death by accident; or accidentally kills V and then subsequently revels in the mistake. Rather, the conduct that causes V's death must be accompanied with a present intention to kill or cause serious harm by those acts.

[75] Conspiracy also requires D2 (the party agreeing with D) to share D's intentions.

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(primary point of coincidence). Additionally, within that mens rea at t1, D must hold an ulterior intention for murder to be committed by one of the conspirators, intending a future event where the actus reus and mens rea of murder will coincide (secondary point of coincidence). Where D's ulterior mens rea does not focus on a complete (and coinciding) principal offence of this kind, there is no conspiracy.

Recognising a secondary point of coincidence is essential in order to understand and apply all offences that include ulterior mens rea as to a future principal offence. As with the primary point of coincidence, detecting this secondary point begins with the conduct element: in this case, identifying D's ulterior mens rea as to the conduct element of the future principal offence. This includes offences where D's ulterior mens rea relates to a principal offence to be committed by another party (e.g. assisting or encouraging, complicity, certain conspiracies, etc), even though such cases will not involve conditional intention.[76] However, it is especially important for offences where D's ulterior mens rea relates to a principal offence to be committed by D herself (e.g. attempts, s. 9(1)(a) burglaries, certain conspiracies, etc), as it is here that D's conditional intention as to her future conduct has led to particular confusion.

Much of this confusion has been discussed earlier in the article, tied to our (mis)understanding of what it means for D to conditionally intent future conduct. However, this is not the end of the story. Having identified D's conditional intention as to future conduct, offences requiring ulterior mens rea as to a full future principal offence also require us to examine the *content* of D's commitment to that future conduct: in which circumstances and in anticipation of which results has D conditionally committed to act? In other words, assuming that the conditions of D's intention are satisfied as to future conduct, what other offence elements will coincide with that conduct (the secondary point of coincidence)? In answering this question, the full range of mens rea terms can apply. For example, where D conditionally intends to shoot a gun in the future, she may intend to do so in order to kill V (directly intending an ulterior result); knowing that it will inevitably kill V (obliquely intending an ulterior result[77]); thinking this is likely to kill V (believing an ulterior result[78]); foreseeing that this might kill V (reckless as to an ulterior result); and so on. Each offence must be analysed on its own merits to see what ulterior mens rea is required of D as to each element of the principal offence.

[76] See discussion at factor 2 above.

[77] This should be compared to Kugler's view of conditional oblique intention criticised above. Kugler, "Conditional Oblique Intention". See also discussion in Smith, "Intention in Criminal Law", pp. 117, 119.

[78] This should be distinguished from conditional intention, and yet it is occasionally presented as equivalent. See e.g. Wilson and Ormerod, "Simply Harsh to Fairly Simple", p. 9, who discuss a conditional belief in the context of complicity.

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When exploring the content of D's ulterior mens rea and the secondary point of coincidence it is important to be precise about exactly what future event D has conditionally committed herself to. Without such care, it is easy to be misled. Take the example of D who conspires with D2, intending to explode a plane for insurance reasons, but *only* on the unlikely condition that their latest business venture fails. If charged with conspiracy to murder the pilot of the plane, D's liability requires her to have intended at t1 (i.e. when agreeing) to commit the future murder.[79] Following the approach within this article, we can say that D conditionally intended her future conduct, but did she also intend to cause death (i.e. the ulterior result)? It is here that the two points of coincidence become vital. If we (incorrectly) focus on the primary point of coincidence only, asking if D intended to cause death at t1, then this may lead to confusion: D did not try to cause death at t1, and (due to the unlikely condition) she would not have foreseen death as a virtual certainty either, so it appears difficult to find intention as to the ulterior result. However, recognising the secondary point of coincidence brings clarity. D knows that her conditionally intended actions at t2 will cause death as a virtual certainty; so her commitment to those actions (and coinciding mens rea) at t1 means that she intends murder as a future ulterior offence. D commits herself at t1 to a future event in which murder will be committed.

Although the examples above have focused on ulterior results, the same issues arise in relation to ulterior circumstances, and (again) we must take care to recognise the two points of coincidence within D's offence. Take the conspiracy example where D and D2 agree that D will shoot and kill something they see in the bushes, neither sure if it is a person. The question here is whether D has conspired to commit murder, whether D has ulterior intention to murder at t1? In an effort to find liability in examples of this kind, several commentators have contended that D has a conditional intention at t1 sufficient for conspiracy: D intends to kill, and this amounts to a conditional intention to kill a person *if* it turns out to be a person, or some other creature *if* it is not a person.[80] However, this view is only sustainable if we ignore the secondary point of coincidence described above. The offence of conspiracy to murder requires D and D2 to form an agreement with mens rea (primary point of coincidence), and for them to intend a future event in which all the elements of murder are satisfied (secondary point of coincidence). In this example, the secondary point of coincidence is not satisfied. D and D2 intend a future event, they intend D to shoot and kill the object in the bushes, but they realise that at t2 they will still be unaware whether D is

[79] Our assumption here is that D has agreed with D2 that she (D) will commit the principal offence.

[80] Examples of this line of reasoning, albeit applied to different offences, can be seen in G. Williams, "Intents in the Alternative" [1991] C.L.J. 120; Baroness Hale's dissenting judgment in *Saik* [2006] UKHL 18; Ormerod, "Making Sense of Mens Rea". For a similar line argument in German law, applied to reckless HIV transmission cases, see Bohlander, *Principles of German Criminal Law*, p. 66.

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killing a person (i.e. they know D will lack part of the required mens rea for murder[81]). What is described in this example is not a conditional intention from D to commit murder, therefore, but an intention to kill being reckless whether V is a person.[82]

Rejecting the presence of conditional intention to murder in the previous hypothetical does not mean that the concept has no role in such cases, just that we must be careful to apply it appropriately. Thus, D did not commit conspiracy to murder in our previous hypothetical because she did not conditionally intend conduct where murder would be committed. However, with slight variation on the facts, liability could be found. For example, let's say that when agreeing to shoot the object in the bushes, the parties acknowledged the possibility that D would discover that V was a person before she shot. In this case, if they agreed to shoot *even if* this fact became apparent, then they conspired to murder. This is because D would have committed herself to future action in which she would intentionally kill V at t2 with knowledge that she was killing a person, she would have committed herself (on certain conditions) to a future event where all the elements of murder coincide.

9. Future event mens rea must be applied consistently

Having established that D intended at t1 to perform certain future conduct at t2, the elements of D's future ulterior offence should be identified and analysed in coincidence with that future conduct. This process was set out within the previous factor discussion. However, an interesting inconsistency has arisen in the literature between the analysis of ulterior circumstances and ulterior results. Such inconsistency is perhaps understandable in the context of current uncertainties within this area of law, but cannot be justified.

In relation to future ulterior results, a majority of courts and commentators have adopted the correct approach: analysing the detail of the future event D commits to at t1. In particular, commentators have not conflated conditional intention as to future conduct with conditional intention as to future results, but identified them separately. Williams provides a useful hypothetical:

"D throws stones at [V's] window, trying to break it but knowing the risk that [V] is in the room and may be hit by the stone .... If he injures [V] he is guilty of recklessly doing so .... But if he does not injure [V] he is not guilty of attempting to assault."[83]

[81] The mens rea of murder requires D to intend or know that what she is killing is a person.
[82] A point acknowledged in Smith, "Intention in Criminal Law", pp. 113–14.
[83] Williams, "Intents in the Alternative", p. 124. Williams's example is commonly cited and agreed with across the literature.

https://doi.org/10.1017/S000819731700040X Published online by Cambridge University Press

Attempted assault requires D to act at t1 with an ulterior intention to commit assault, including an intention to cause harm. As Williams rightly points out, intention as to this ulterior result is missing in the hypothetical. D is committed to the conduct (future conduct for incomplete attempts) of throwing stones, but an intention to cause harm to V does not (and will not) coincide with this conduct. Rather, D's mens rea as to the ulterior result (i.e. harm to V) is recklessness.

In contrast, where D's ulterior mens rea relates to the circumstance element of a future offence (as opposed to the result element) there is little consensus in the literature, and views have diverged from the approach in this article. Much of this debate has focused on a particularly problematic example:

D and D2 agree to have sexual intercourse with V. Both parties foresee a significant risk that V will not consent.

Liability for conspiracy to rape requires D to intend or know that V will not consent to the future sexual penetration; recklessness is not sufficient. In an effort to find such intention on the facts, therefore, commentators have turned to conditional intention: D and D2 intend sexual penetration with consent *or* without consent, so D conditionally intends penetration without consent.[84] However, this analysis is faulty, and ignores the detail of the ulterior event D is intending (i.e. the secondary point of coincidence within D's ulterior mens rea). D commits himself at t1 to future conduct at t2, sexual penetration, but he does not commit himself to performing that conduct with coinciding intention or knowledge as to V's consent. Rather, the ulterior event D has committed to involves sexual penetration whilst reckless as to consent.

Two cases must be carefully distinguished:

(a) D and D2 agree to have sexual intercourse with V. Both parties foresee a significant risk that V will not consent.
(b) D and D2 agree to have sexual intercourse with V. Both parties foresee a significant risk that V will not consent, and agree to continue even if they discover this is the case.

In the first case (a), as we have said, D intends sexual intercourse whilst reckless as to consent. However, (b) is quite different. This time, because the parties agree to continue *even if* they discover V is not consenting, then D is committed to (i.e. conditionally intending) an event in which he has sexual intercourse with knowledge of V's non-consent.

The distinction between (a) and (b) is therefore crucial, but it is also a source of confusion in reference to the problematic example of conspiracy to rape. This is because, where D and D2 agree to have sex with V reckless

[84] E.g. ibid.

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as to consent, it is overwhelmingly likely that prior to the future action (i.e. penile penetration) the parties will know if V is consenting or not. Therefore, even in the context of the first example (a), it is tempting to read in the extra information in the second example (b). It is tempting, in other words, to assume that the parties are committed to act *even if* they discover that V is not consenting before penetration. In practice, such commitment is very likely in cases of this kind, and so a conditional intention to act with knowledge of non-consent will likely be found. However, as an analytical example of conditional intention, we must take care with the facts we are presenting.

Legal commentators have not been consistent in their analysis of the conspiracy to rape example, with examples (a) and (b) presented without distinction.[85] It is correct to find an intention to rape in (b). However, contending that (a) also demonstrates an intention to each element of rape is wrong. Just like the stone thrower who is reckless as to the results of their conduct, the parties in (a) do not commit themselves to future conduct in which they intend or know that the relevant circumstance element will be present. Therefore, to equate their mens rea with intention would be to collapse ulterior intention into ulterior recklessness,[86] a criticism even sometimes acknowledged by the advocates of this approach.[87] Even if we suspect that the parties in examples of this kind would have carried on if they discovered a lack of consent, such suspicions are not the same as demonstrating that the parties did foresee the possibility of discovering V's non-consent in advance, and did commit themselves to continue in those circumstances.[88]

There is no burden on the concept of conditional intention to provide a solution to the problematic conspiracy to rape example discussed here. Interestingly, however, a clear definition of ulterior mens rea does provide a potential way forward. There are two facets to this. Firstly, as I explained above, real cases of conspiracy to rape or attempted rape are very likely to involve a commitment sufficient for liability: it is very likely that D will foresee knowing whether V consents before he achieves penetration, and a decision to go ahead even *if* this arises constitutes an intention to rape.

[85] See e.g. ibid.; Ormerod, "Making Sense of Mens Rea", pp. 224–26; Baroness Hale's dissenting judgment in *Saik* [2006] UKHL 18, 56–57; Ormerod and Laird, *Smith and Hogan's Criminal Law*, 14th ed., pp. 498–99.

[86] Similar criticisms are made in Duff, *Criminal Attempts*, pp. 15–16; R.A. Duff, "Recklessness in Attempts (Again)" (1995) 15 O.J.L.S. 309, at 312–13; G.R. Sullivan, "Intent, Subjective Recklessness and Culpability" (1992) 12 O.J.L.S. 380, at 385; Smith, "Intention in Criminal Law", pp. 113–14.

[87] G. Williams, *The Mental Element in Crime* (Jerusalem 1965), 52; G. Williams, "The Problem of Reckless Attempts" [1983] Crim.L.R. 365, at 373.

[88] The Law Commission has criticised approaches to conditional intention that require speculation of this kind. See Law Commission, *Conspiracy and Attempts* (No. 318, 2009), §§ 2.99–2.101 and Appendix B.

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Secondly, even in cases where D plans to avoid knowledge of V's non-consent, another course becomes available. It is arguable that active avoidance could be interpreted as a form of ulterior wilful blindness, satisfying an intention/knowledge requirement. Something similar to this has been mooted by Sullivan, though not in the context of conditionality.[89]

IV. Conclusion

The position of conditional intention currently epitomises the worst aspects of the common law, developing inconsistently and non-specifically as a fix in cases where "standard" mens rea terms appear strained. This has been tolerated, perhaps, on the basis that conditional intention is perceived to apply in just a few specific areas. However, as these areas of application have expanded, including most recently into complicity liability, current uncertainties are surely no longer tolerable. Indeed, the primary contention of this article is that so-called conditional intention is synonymous with all future conduct intention, a core element of multiple general and bespoke offences across the criminal law. Clarity in our understanding and application of this concept is therefore essential.

Whilst recognising the inevitable complexity of unpacking mens rea as to future events, this article has demonstrated that conceptual clarity is possible. Such clarity works over two levels. First, it has been important to identify and explain certain bright lines within the definition of future conduct intention (ie conditional intention). Most importantly, this includes the fact that intention as to present conduct and results is always unconditional, and that intention as to future conduct is always conditional. This allows us to understand offences which require ulterior mens rea as to future events, to identify the two relevant points of coincidence within such offences, and to correct some of the many points of confusion within the current law and associated commentary. Second, it has also been important to identify the unique aspects of future conduct intention, and engage with some of the relevant debates. Chiefly, this focused on what it means for D to "commit" at t1 to future actions at t2; whether D requires a pro-attitude to such commitment; whether the conditions within D's commitment must be likely; whether they must be objective. If we accept the role of mens rea as to future events at all,[90] then these are debates that we need to engage with and resolve.

[89] Sullivan, "Intent, Subjective Recklessness and Culpability". Sullivan's approach goes considerably further than that which I would recommend (e.g. finding knowledge where D *could have* discovered a fact relevant to the offence), but the potential use of wilful blindness is an interesting prospect. Cf. Horder, "Varieties of Intention", pp. 341–43.

[90] Certain academics have argued, in effect, for the abolition of such mens rea. See e.g. Alexander and Ferzan, *Crime and Culpability*, p. 206; Alexander and Kessler, "Mens Rea and Inchoate Crimes".

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Conceptual clarity does not, however, justify unnecessary complexity within the law. As acknowledged above, offences requiring D to possess mens rea as to a future criminal offence will always involve some complexity; but it is important that such complexity is limited to what is essential. Despite the detail of some of the discussion within this article, it is contended that the conception of future conduct intention set out is one that is also capable of practical application. Essentially a jury should be instructed to consider D's ulterior mens rea, asking whether D committed herself (under whatever conditions) to a future event in which she would complete the relevant offence. Did she commit to a future event in which she would act to cause the relevant results, in the relevant circumstances and with the relevant mens rea? If "yes", the jury should be instructed to ask whether D possessed this ulterior mens rea at the time she completed the conduct element of her offence at t1. In this way, despite complex underpinnings, the application of future conduct intention (and ulterior mens rea more generally) does not need to cause problems for the court.

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