The Law Commission's Proposed Restructuring of Homicide

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Abstract This article overviews the Law Commission's proposed reforms of homicide with a critical but constructive eye. First and foremost, the article supports the proposed restructuring, recommending only that concrete suggestions be made for the situation when jurors agree upon second degree murder for different reasons. But the Commission's reasons for not considering whether consent to be killed should reduce first degree murder to second degree murder do not stand up to scrutiny and a possible formulation of such a partial defence is examined. Further, the Commission's definition of 'reckless indifference' needs to be clarified and suggestions are offered for consideration.

This article is inspired by the Law Commission's provisional proposals in its recent Consultation Paper, *A New Homicide Act for England and Wales?*[1] The Consultation Paper is admirable in many respects, not least in its length and breadth of discussion. As one might expect, intention and partial defences tend to steal the limelight, but complicity in murder, duress and infanticide each claim a separate Part of the Paper for themselves, and there is some welcome attention to the definition of grievous bodily harm[2] (for it would be hard to imagine a structure of homicide offences which did not invoke some such phrase at some point).

But in this short article, I do not seek to summarise all of the Commission's myriad recommendations.[3] Indeed, my purpose is to raise some issues which are under-discussed in the Consultation Paper, and which perhaps ought to have been the subject of consultation questions. Section 1 of this article presents a supportive overview of the Commission's recommendations, but in so doing emphasises that some further thought might usefully be given to the difficulties in asking the juries to agree upon one from many different possible verdicts. Section 2 criticises the Commission for having opted not to examine the mitigating

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1 Law Commission, *A New Homicide Act for England and Wales*, Consultation Paper No. 177 (2005) (hereafter 'the Consultation Paper'). The Consultation Paper is accessible via *www.lawcom.gov.uk*, accessed 6 March 2006.

2 See paras 3.65–3.120 in Part Three of the Consultation Paper.

3 Thus, I shall say nothing about complicity and infanticide, and little about the reformulated provocation partial defence, on which the Commission repeats its recent proposals in Law Commission *Partial Defences to Murder*, Law Com No. 290 (2004). Nor shall I discuss the recommendation that duress can act only as a partial excuse where the defendant actually intended to kill, though this recommendation (which reflects a belief that intentional killing is never wholly excusable) is perhaps the most telling indication of the special seriousness which the Commission attaches to intended death. See too the earlier work by J. Horder, 'Occupying the Moral High Ground? The Law Commission on Duress' [1994] Crim LR 334 at 335–6.

force of the consent of a dying person to be killed.[4] Section 3 examines further the proposed definition of reckless indifference to death, and argues that there are certain common issues between the mental elements of oblique intention, reckless indifference and gross negligence which ought to be explored together.

The good news is that both of these latter points can be addressed by the Commission without its needing to abandon its key proposal that we should distinguish between first degree and second degree murder. This brings us to the Commission's proposed restructuring of the general[5] offences of homicide.

1. The Law Commission's proposed restructuring on homicide

The differences between the present law and the proposals of the Law Commission is summarised below (Table 1). The most important difference is that instead of having two general offences of murder and manslaughter, the Commission proposes three such offences: first degree murder, second degree murder and manslaughter. Only those convicted of first degree murder will receive the mandatory life sentence, and those convicted of manslaughter would face a fixed maximum penalty of perhaps 14 years' imprisonment. In the middle, however, second degree murder allows the sentencing judge the full range of options up to life imprisonment.

Three general offences

There are two compelling reasons for extending two offences into three. The first, inevitably, relates to the mandatory sentence for murder, which the Commission was asked to assume[6] and indeed effectively to work its way around when proposing reform to the substantive law itself. Thus the Commission wished to create a form of murder that is both as narrow and as serious as possible. In turn, having a very narrow offence to which the mandatory life sentence would be attached rather inevitably means that there would be too much left over into a second general offence, if we were to persist with just two general offences. So,

4 The Commission was asked to only consider euthanasia and assisted suicide 'inasmuch as they form part of the law of murder, [and] not the more fundamental issues involved which would need separate debate'. See *www.lawcom.gov.uk/docs/Terms_of_Reference.doc*, accessed 6 March 2006. But as the Commission itself acknowledges (paras 8.3–8.6), this limitation need not have prevented it from considering whether (for example) voluntary euthanasia ought to mitigate the defendant's liability in a restructured set of homicide offences. This is discussed further below n. 55 and accompanying text.

5 The Commission does not address most of the 'specific' homicide offences, such as causing death by careless driving. Besides infanticide, the other 'specific' homicide offence which receives consideration on account of its close relationship with murder is the offence of assisting suicide, which the Commission considers should be left to the jury as an alternative verdict to first degree murder where the killing occurred during a suicide pact (since the Commission recommends the abolition of the specific partial defence of suicide pact killing in s. 4 of the Homicide Act 1957): see paras 8.95–8.102.

6 See Consultation Paper, para. 1.1.

Table 1. Existing general homicide offences and the Law Commission's proposals

Existing law	*Law Commission proposals*
Murder (mandatory life sentence)	*First degree murder (mandatory life sentence)*
Any killing done with intent to cause death or gbh (unless done under suicide pact, provocation or diminished responsibility, which reduce offence to manslaughter)	Killing done with intention to cause death (nothing less) but any of provocation, diminished responsibility, or duress would reduce killing to second degree murder
	Second degree murder (maximum life sentence)
	Intent to kill in mitigating circumstances (listed above)
	All cases of intention to cause gbh (regardless of any of the above mitigation)
	Killings with (advertent) recklessness coupled with indifference to risk of causing death (again regardless of mitigation)
Manslaughter (maximum life sentence)	*Manslaughter (fixed maximum penalty)*
Killings done with intent to cause death or gbh, but under provocation or diminished responsibility, or a suicide pact	Death caused by gross negligence
Death caused by gross negligence	Death caused by unlawful injury which D intended or to which he was advertently reckless
Death caused by unlawful and dangerous act (NB no sound authority for any residual doctrine of 'reckless manslaughter')	

there is a link between the mandatory life sentence and the proposed expansion to three general offences. The Commission proposes that this narrow offence (first degree murder) should require proof that the defendant intended *to kill*. The Commission recognises that it might be thought to be hard to establish this intention.[7] Perhaps only in cases where D had a vendetta against V, or perhaps needed him out of the way for some pressing reason (most likely, if he was a witness to a previous offence, but perhaps also if this other was thought to present a long-term threat to his own welfare) or where D was a contract killer (and thus needed to kill in order to receive his bounty) would an intention to kill be relatively easy to prove. But many barristers thought there would

7 See Consultation Paper, para. 3.6.

nonetheless be considerable public pressure to prosecute for first degree murder where there was any evidence of intention to kill,[8] and so it might be alarmist to anticipate very many generous plea bargains to second degree murder.[9] Moreover, as the Commission points out,[10] some 80 or more persons are convicted of attempted murder every year, where nothing less than an intention specifically to kill must be proven.[11] If it is possible to persuade juries of this intention in cases where in fact the victim escaped, possibly even quite unharmed, it must be all the easier to do so when the forensic evidence of how the deceased victim was killed is available.

The second reason for having three offences relates to the principles of fair and representative labelling. The present labels of murder and manslaughter are each much too broad and lose their core meaning on account of their breadth. The law of murder at present equates the paedophile who kills his victim to ensure his silence with the man who intends to cause grievous bodily harm because he is getting carried away in an argument, or perhaps in defending his property. That, as we have seen, would no be longer the case because only the paedophile, who specifically intends to kill, would be guilty of first degree murder. The law of involuntary manslaughter is also too broad insofar as it currently equates cases which are not far short of murder, such as those defendants who firebomb houses in order to scare rather than necessarily to seriously harm the residents,[12] with cases which (absent the misfortune of death) would ordinarily be nothing more than assaults and would not attract a prison sentence, if indeed any one could be concerned to prosecute at all.[13] Again, the Commission's structure deals with this by promoting 'reckless killing' to the category of second degree murder, so that the former defendant is liable for the more serious offence. Nor will we have to struggle with the labels of 'voluntary' and 'involuntary' manslaughter anymore; since the only partial defences which exist will reduce first degree murder to second degree murder (and not to 'voluntary manslaughter'), it follows that all manslaughter will be what we currently refer to as 'involuntary' manslaughter, and so we could drop the prefix 'involuntary' altogether.

So, killings done with an intention to do serious harm are 'demoted' to second degree murder, since a maximum (rather than a mandatory) life sentence is *sufficient* to deal with such cases, and reckless killings are 'promoted' to second degree murder, since a maximum life sentence might be *needed* to punish some such offences suitably. The question arises whether too much is squeezed into second degree murder from the fringes of these other offences. It encompasses killings done with an

8 Some barristers made the point that the accused would be likely to be charged with first degree murder at the first instance: see Appendix B.91.
9 See other views expressed by members of the Bar, expressed in Appendix B.86–93.
10 Consultation Paper, para. 3.08.
11 *R* v *Walker and Hayles* (1989) 90 Cr App R 226.
12 The sentence imposed for manslaughter in *R* v *Nedrick* [1986] 1 WLR 1025 (15 years) was not far short of the likely tariff in a mandatory life sentence at the time.
13 Cp. the minor assault which led to death in *R* v *Mallett* [1972] Crim LR 260 (suspended sentence of 18 months' imprisonment).

intention to cause serious harm, reckless killing, and those intended killings where a partial defence applies (but note that the existing partial defences, to which the Commission would add a partial defence of duress, would only now be relevant where the defendant intended to kill: they would not operate to reduce what would otherwise be second degree murder to manslaughter). The Commission would, I think, note that there is liable to be a large (though not a complete) overlap between cases of intention to cause serious harm and reckless indifference to death.[14] It would also say that insofar as the categories are distinct, there may be broad moral equivalence in the relative culpability of the defendants. As the Commission puts it, it is applying the correspondence principle[15] alongside the subjective principle; that is to say, what the defendant intends or foresees is important as well as the difference between whether he intends it or merely foresees it. Thus, intended gbh may be comparable with acts done with conscious foresight of death; and reckless murder, insofar as it requires foresight of death, is not an upgrading of the much vaunted 'reckless manslaughter'.[16] So it is only the cases of 'mitigated first degree murder' which arguably look out of place in second degree murder. But even here, the culpability of the defendants may be broadly equivalent with the other categories, since the most serious form of culpability in homicide (intention to kill) is compensated for by mitigating factors (i.e. the partial defences of provocation, diminished responsibility and duress) which need not be present in the other varieties of second degree murder.

We should note that we only need to say that these three species of second degree murder are broadly comparable. It is probably true that the very worst cases of reckless murder (as in terrorist or similar atrocities) will be the most likely candidates for the maximum life sentence. But they are not the only such candidates. Dangerous persons who intended to kill but acted under diminished responsibility should also continue to be eligible for the same sentence, and many who intend 'only' to cause gbh, perhaps during another criminal enterprise or aggravated through such base motives as racism, are likely at least to

14 See the Consultation Paper at paras 3.57, 3.172–3.173. In para. 3.174 the Commission notes that it is quite normal for offences to have intention and recklessness as alternative states of mind, and so the only difference is that in second degree murder the recklessness must relate to a risk of death whereas the intention need 'only' be to cause gbh: thus the two are arguably morally comparable, rather than constituting a greater and a less culpable state of mind.

15 The theme recurs throughout Part Three of the Consultation Paper, e.g. at paras 3.15, 3.20, 3.175. See too J. Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759, 'Questioning the Correspondence Principle—A Reply' [1999] Crim LR 206.

16 The Law Commission seems to assume that a doctrine of reckless manslaughter currently exists and is awaiting application where the defendant foresaw death or serious bodily harm: see para. 1.10. In the light of their Lordship's opinion in *R* v *Adomako* [1995] 1 AC 171 however, such a statement needs firm authority, and *R* v *Lidar* (an unreported case, but the only one cited in textbooks) is surely not quite it. On the facts, there was a strong case of gross negligence manslaughter, and the Court of Appeal was clearly anxious to uphold the conviction notwithstanding the trial judge's failure to direct the jury in terms of gross negligence.

come close to the maximum sentence as well.[17] It is also possible to imagine cases at the other end of the scale, where killers in all three categories should receive only a short prison sentence at the most.[18] Thus we might think of the battered woman who succeeds in provocation or diminished responsibility, *a fortiori* the person who intended 'only' gbh but who was also provoked, and finally, to pick an example in reckless murder, the juvenile who, through peer pressure, puts a large obstacle on a railway line (or perhaps on the highway at night-time) even though he entertains some misgivings about the risk of death which he knows he is creating and hopes that some independent third party will find and remove it before any accident occurs.[19] In any event, assessments of the seriousness of different types of offences seem to vary among criminal practitioners,[20] and presumably among commentators and law reformers too. The codifier might be satisfied then to note both that there is no obvious reason why any of the three species of second degree murder should necessarily, in the general run of all cases, be widely regarded as much more serious than the other two, and that a fully flexible sentencing regime is needed for all three types of second degree murder.

Alternative verdicts arising from restructuring

So far, I have argued that the restructuring of homicide allows for appropriate sentencing levels, and also for more representative labelling. Perhaps the latter benefit is particularly evident in the case of manslaughter, which will now be restricted to persons whose *mens rea* did not go beyond the intention to cause some (non-serious) injury, and which will no longer encompass any degree of 'mitigated murder'. But there is a pragmatic side to the Commission's proposals too. It does not want to create more than three general offences of homicide because:

> the need to label different kinds of homicide in the 'right' way must be balanced against the need to keep the options before the jury simple, especially as murder cases may well involve a number of defendants all making different, and perhaps inter-dependent or conflicting, claims in the alternative.[21]

The Commission here is evidently thinking in particular of cases involving accomplices, but even where there is just one defendant, there is reason enough to be concerned. The danger here is rather one of 'splitting' the jury by offering it too many verdicts, although confusing

17 The Commission suggests that the Sentencing Guidelines Council would make recommendations about suitable starting points for various typical cases which fall under 'second degree murder': para. 2.65.

18 Provided that such cases are relatively uncommon, this is not a fault. Lawyers have been campaigning for years against the mandatory life sentence precisely on the basis that any redefinition of murder will inevitably include cases of widely different degrees of seriousness

19 I assume here that the juvenile is nonetheless 'indifferent' to the risk, but see the later discussion at n. 69 and accompanying text.

20 See M. Cavadino and P. Wiles, 'Seriousness of Offences: The Perceptions of Practitioners' [1994] Crim LR 489.

21 Consultation Paper, para. 2.53. See too paras 2.61–2.62.

the jury remains a potential problem too, as does encouraging it to reach (improperly) a compromise verdict which none of its members truly believes in. Retrials (in the event of a split jury) are very much a matter of regret. Not only do they involve extra expense (and the prolonged suffering caused to the family of the deceased is not lightly to be dismissed) but further problems may arise in the event of another split jury. At present, this seems to happen only rarely in cases where the defendant's causal responsibility for the death is established. Such cases are likely to involve a choice between only two verdicts (murder or manslaughter), and at the most three (where the defendant raises a complete defence such as private defence, and is thus hoping for an outright acquittal). But would there be many more split juries if there were a choice between up to *four* plausible verdicts (again, all in a case where the defendant's causal responsibility for the death is established)? The Commission seems to be anxious to avoid this, and indeed under its restructuring, this could only happen rarely. Most borderline cases will rather involve just a plausible dispute on the borderline between first degree murder and second degree murder, or between second degree murder and manslaughter.

But exactly how much weight should be given to the practical problems in leaving multiple verdicts to the jury? The Commission does not present its thinking as fully as it might have done. Thus, on the one hand, the partial defences of duress and provocation (to a charge of first degree murder) would amount to second degree murder, as we have seen. Yet these partial defences would be so restricted by the Commission as to make one wonder whether a judge would ever come close to passing a life sentence upon anyone who satisfies the elements of the defence.[22] Perhaps the maximum sentence provided for by manslaughter would suffice for such cases. But besides its labelling concerns which relate to manslaughter, the Commission is concerned about the practical implications of this. Many defendants may simultaneously plead diminished responsibility and provocation, and if the reformulated provocation doctrine were to reduce the offence to manslaughter, then juries would have to decide upon three different verdicts. If the jury could not reach agreement between diminished responsibility and provocation, then it could not agree upon a verdict at all and the case would need to be retried.[23] The Commission regards this as a good reason for proposing that all partial defences should reduce first degree

22 Admittedly, this is contentious: perhaps there still needs to be some subjective element of provocation, even though it should not be the present 'sudden and temporary loss of self-control' formula. See J. Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25 OJLS 123. But I shall leave the pursuit of this debate to others.

23 Although the jury could acquit on first degree murder, since it would all agree upon that result; but it would only wish to do that if second degree murder had been expressly charged on the indictment, so that a retrial on that count would still be possible. This problem could arise under the current law: as noted by D. Clarke, 'Jury Unanimity—A Practitioner's Problem' [2001] Crim LR 301, in such cases the prosecutor should be sure to add manslaughter as an alternative charge on the indictment. The Commission notes this problem at Appendix H.26, though the problem is not highlighted in the main text of the Consultation Paper.

murder to the same offence of second degree murder.[24] However, just a few paragraphs later, the Commission invites its consultees to consider whether those who already have the partial defence of diminished responsibility should be able to seek a manslaughter verdict where *additionally* their victims consented to the death (i.e. a mercy killing).[25] The Commission does indicate its provisional view that this would not be wise because it would require the jury to consider three verdicts (first degree murder, second degree murder and manslaughter) which (in the event of disagreement) would seem to cause more potential for confusion than is justified by the need to recognise the full extent of the defendant's mitigation.[26] But nonetheless the matter is left open for consultation. Presumably, there is a possible concern that a jury might wish to express the view that the victim consented, but that, if it is denied the chance to do so, the judge (after holding a *Newton* hearing on the matter[27]) may consider the death to have been non-consensual and thus still pass a substantial prison sentence.[28] This brings us to the nub of the issue. Deciding upon the range of possible verdicts it is not just a matter of balancing the principle of representative labelling with the practical ease of reaching agreement upon one verdict. There is a third factor in the equation, namely whether we are content for the judge to sentence the defendant on the basis of certain facts which the jury has not had the chance to determine.

The problem of split juries becomes ever more pressing when one adds this ingredient of the judge sentencing inconsistently with the split jury's finding of facts. We should recall that it is not enough that a jury agrees upon an overall verdict. It must also agree upon some set of facts which would legitimate that verdict, and which is not inconsistent with the alternative facts which different jurors accept.[29] Let us imagine then that the Commission's proposals are accepted, and that a case arises where all jurors agree that the defendant intended to kill—but, needless to say, this fact had not been meekly conceded by the defendant at trial. One-half of the jury is satisfied that the defendant received gross provocation but had no abnormality of mind (both of which issues had been left to them), whereas the other half of the jury is satisfied that he

24 See Consultation Paper, para. 6.142.

25 Consultation Paper, para. 2.70. This is particularly surprising because it also contradicts its concern that manslaughter is not an appropriate label for those who kill intentionally.

26 Ibid. at para. 2.71.

27 A *Newton* hearing should be held following a contested trial if evidence relating to an important issue to sentencing had not already been properly aired on account of its irrelevance to liability: *R* v *Finch* (1993) 14 Cr App R (S) 226.

28 The judge would have to reach his own decision on this, if the element of consent were legally irrelevant. Even if all of the evidence of consent were benignly to have been admitted for other purposes, he should not ask the jury to retire to consider diminished responsibility *and*, in the event that they should find it, to then consider whether the killing were consensual. That would complicate the jury's task unduly, and would run the risk that juries would mistakenly think that consent were an element of diminished responsibility itself.

29 See *R* v *Boreham* [2001] 1 All ER 307, as discussed by R. Taylor 'Jury Unanimity in Homicide' [2001] Crim LR 283, and summarised by the Commission in its Appendix H.

suffered from diminished responsibility but received only trivial provocation (if any). In such a case, the only point which all jurors would agree upon, which would in itself legitimate a verdict of second degree murder and which is not inconsistent with the further alternative facts found by the jurors, would be that the defendant *intended to cause serious bodily harm* (which would presumably be true in all cases where the defendant actually intended to kill[30]).

But it would be something of a travesty if second degree murder were to be returned on that basis, if all jurors were in fact agreed that the defendant did intend to kill. Since the issue of intention had been live, then the judge can only assume that the jury truly did reach their decision on the basis that there was no intention to kill. Moreover (under the Commission's proposals) that conclusion would mean that the jury would not have needed to consider provocation or diminished responsibility, and so for sentencing purposes, the judge must reach his own conclusions from the evidence which the court has heard. But whatever he decides now will be inconsistent with what the jury found. He might find that there was no mitigation at all (which was not the jury's view) and sentence more harshly than he would have done had he known that the jury agreed that at least one partial defence applies. Or he might be satisfied that there was provocation or diminished responsibility, but not only would that still be inconsistent with the view of one-half of the jury, it would mean that he would now be sentencing unduly leniently—because he would sentence the accused on the basis of a mitigated intention to cause *serious bodily harm*, whereas even that half of the jury who agreed with him on the mitigation had thought there to be the more serious mitigated intention *to kill*. Of course, it is not the judge's fault that he has to reach one inconsistent basis for sentencing or other: the cause of the difficulty is that the jury was only able to agree a compromise verdict on a basis which did not truly reflect its reasoning.

More attention to this problem would have been welcome, because it is a problem which comes with the territory of partial defences. Probably there is no self-evident solution, but even so, it is worth agreeing upon the 'least bad' solution, because it will pre-empt different Crown Courts from applying different solutions, including the worst ones. It is submitted that the problem of compromise verdicts is caused by having partial defences, which in turn are caused by the mandatory life sentence, which all lawyers seem to agree to be fundamentally unjust to defendants. This being so, we should err towards solutions to 'compromise verdict problems' which favour the defendant. In the above example, the judge should be bound by the jury's finding that the defendant intended at least gbh (but not necessarily death), fictitious

30 Even if not, one could always say that second degree murder should apply where the jury thinks that the defendant intended to cause at least gbh, which would be preferable in terms of allowing split juries to agree upon second degree murder in cases where only the intended result is in issue. The Commission notes itself that it is wise to add the words 'at least' when defining states of mind in relation to lesser results which are directly down the ladder from the same state of mind but in relation to more serious results (Appendix H.34–H.35).

though it is, and he should also be free to come to his own decision on the presence of any mitigating factors (the evidence of which he has already heard, of course). The only way in which the defendant might lose out here is where the judge finds that neither partial defence applies, but we should not lose so much sleep over this: the jury itself was not agreed on either defence in particular, after all.[31] We should be satisfied that under the Commission's proposals, the jury at least still has the *opportunity* to agree upon the facts relating to partial defences before accepting that the judge might nonetheless have to resolve them for himself in the end.

An accompanying proposal might be that the new Homicide Act should *require* a jury which is able to agree that more than one partial defence is made out on the facts of the case to say so, for example 'second degree murder due to both provocation *and* diminished responsibility', which verdict would assist the judge in sentencing.[32] This would mean that after having agreed that one partial defence exists, the jury would know that it must stay in session to discuss whether it can agree[33] upon another: otherwise, there might be a temptation for it to deliver its verdict as soon as it has agreed upon just one. Only if it does not agree upon any second partial defence will it announce its verdict of second degree murder on account of the one partial defence upon which it originally agreed. This would also go some way to solving the problem identified by the Law Commission of the mercy killer who both suffered from diminished responsibility and had the consent of his victim. Instead of allowing this combination to amount to manslaughter (which would necessitate retrials where the jury is split if some jurors only accept that there was diminished responsibility, but if others think that the victim consented too), we should allow the consent of the victim to be a further but separate partial defence reducing first degree murder to second degree murder. Then, where the jury agrees that this partial defence obtains *alongside* diminished responsibility, this can (and should) be communicated to the judge. Again, we should be happy for the judge to decide whether or not there was consent if the jury has not agreed on the matter, but at least the jury should have had the *opportunity* to agree upon and communicate its findings on such an important point. This suggestion of a partial defence for the mercy killer who had the consent of his victim leads us directly to the problems identified in Section 2 of this article.

31 The case for sympathy is weaker still if the prosecution were to bear the burden of disproving both defences. Curiously, however (since the issue is discussed in the context of duress) the Commission makes no comment on the reverse burden of proof in diminished responsibility and is silent upon the issue when it proposes a redefinition of the partial defence.

32 We should recall of course that the jury would only have this problem when the judge has decided that there is sufficient evidence of each partial defence for it to consider.

33 The jury should find out whether it can reach agreement on all partial defence left for it to consider, one way or the other. If, after accepting diminished responsibility, it finds itself also able to agree that there was no consent from the victim, then that finding too is useful and should equally bind the judge in sentencing.

2. Mercy killing

I shall argue below that the Commission should have taken a closer look at recognising consent of the victim to be killed as a fourth partial defence which reduces first degree murder to second degree murder. I am thinking here of cases where death is directly intended by the killer, so there is no need to discuss cases where doctors legitimately inject large doses of pain-killing drugs *without* the primary object of accelerating death (the Commission accepts that this ought to be lawful, but it leaves (complete) justificatory defences to another day[34]).

Consent to be killed

It may be simpler to start with the reasons why a partial defence relating to consent to death should be recognised before turning to the Commission's reluctance to consider it. But let us start with a proposed definition of such a partial defence.

My starting proposal would be that where the defendant can persuade the court that a terminally ill person gave de facto consent to be killed in order *primarily* that he or she should not continue to suffer from the illness, and that the defendant acted with the primary intention of relieving that other from unbearable suffering,[35] then the killing should be second degree murder only. We might already note some inherent safeguards in such a proposal. First, since the defendant will bear the burden of persuasion on the issue, he will be required to persuade the court that the victim was imminently dying, which might in practice require him to call the victim's general practitioner to testify to the illness. He will also be required to persuade the court of his primary intention to relieve suffering, and also of the victim's consent, both of which should require him to testify.[36] Moreover, we would have in mind that the victim must have given 'consent' as the term is generally used in legal literature. Thus, the victim must have both understood the terminal nature of the act,[37] and have been 'free' to agree to it. Thus, the

34 Consultation Paper, paras 4.90–4.91.

35 This is not to be confused with requiring an element of compassion, though that may well be the effect. Instead, we are just focusing upon whether the defendant pursued an end which (disregarding the means to that end) is a good end in itself (the relief of pain). A jury ought to be able to use common sense in deciding whether this was the defendant's 'primary' intention in a case where the prosecution suggests a more powerful motive.

36 In many cases, only the defendant will be able to give evidence of the victim's agreement to die, and so he will be forced to testify. But evidence of the victim's agreement may also come from anyone else to whom she has indulged the secret, and the evidence from that third party may be admissible notwithstanding the hearsay rule: see Criminal Justice Act 2003, s. 118(4). Similarly, evidence of the defendant's intention to relieve suffering might conceivably be admissible in this way. If we wish to ensure that the defendant faces cross-examination in order for this particular partial defence to be put to the jury, there should be an explicit statutory requirement to that effect. It would be the first example of a direct legal compulsion to testify, but insofar as it would only affect cases where the jury is sure that the defendant killed a dying (and probably helpless) person intentionally, it should be tolerable.

37 This may entail agreement on the method of killing. Thus, e.g. an agreement that the husband injects a lethal substance has no presumptive validity if the husband smothers her with a pillow instead.

victim's competence and the existence of any pressure could be explored in cross-examination.[38] We should note moreover that as well as the defendant acting in order to relieve pain and suffering, this ought to be the primary reason for the consent to have been given *by the victim*. The Law Commission hints at concerns that most mercy killers are men and that the partners of some of these men may agree to be killed because they feel that the burden of caring is too great for their husbands.[39] But if, for example, the victim was thought to be religious and vehemently opposed to euthanasia,[40] a jury might think that other factors are likely to have been of *primary* influence upon her decision, and if so, it should convict of first degree murder under my proposed definition.[41] Since the defendant should bear the risk of non-persuasion, there is no obvious reason why such a partial defence (which would still be second degree murder) should be open to abuse. Indeed, presumably the Commission is prepared to concede that consent to be killed is capable of resolution by the jury, since it invites consultees to discuss whether the mercy killer with diminished responsibility should be able to seek a manslaughter verdict where he also had the consent of his victim.[42]

So the defence should be workable; but why should it be recognised? It is submitted that the de facto consent of the terminally ill victim, combined with the primary motivation (of both parties) to relieve pain, should be sufficiently mitigating. We might note that in the leading cases of offences against the person where the consent of the victim to serious harm was undoubtedly given, but is legally invalid, a much lower

38 If necessary, one could enact that any medical practitioner who has attended the victim within one year of the death is rebuttably presumed to be competent to act as an expert witness on the patient's competence at the relevant time

39 See Consultation Paper, paras 8.68–8.83, although the discussion seems to mix issues of the emotions of the dying victim with broader issues relating to the leading part played by males in domestic relationships. The Commission's root concern is that: 'the decision [to kill] . . . simply seems to come more easily to him than it would do his spouse were she in his position' (para. 8.79) and its conclusion seems to be that men with no mental abnormalities who do kill in bona fide cases can 'be made to carry the can for the ills of a society in which relationships tend to be unequal' (para. 8.83).

But one wonders whether the Commission is making too ready a comparison with provocation here. The difficulty in provocation is not that more provoked killers are men, because most killers and most criminals altogether are men; rather, the trouble is that provocation is defined by the notion of sudden loss of self-control, which is more likely to relate to a man's emotional reaction. But the proposed partial defence in the text is founded upon an imperfect justificatory motive of pain relief, and this is a gender-neutral concept. Provided that a woman who does commit a mercy killing on her husband has an equal chance of being partially acquitted as would her husband, then the partial defence is not discriminatory. The greater concern should be that a jury might be less likely to accept the partial defence from the wife because it might somehow find it 'unfeminine' for a woman to kill a loved one, and might thus be more inclined to question her primary motives.

40 Such evidence would be admissible, again in spite of the hearsay rule, by virtue of s. 116(2) of the Criminal Justice Act 2003.

41 At this point, one might wonder whether the partial defence should be available if the defendant made a (reasonable) mistake about the motive for the victim's consent. But this need not necessarily be so. Mistakes do not have the same exculpatory force in relation to partial defences as they do for complete defences, and so this matter can be debated without preconceptions.

42 See above n. 26 and accompanying text.

sentence was given than could have been contemplated if there had been no de facto agreement from the victim at all.[43] In fact, one can argue that punishment for mercy killing of a partner at home engages Article 8 of the European Convention on Human Rights, and if one is successful in that, one would then argue that a mandatory life sentence for first degree murder would violate the defendant's right to privacy. Note that we would have to concede that criminalisation itself is justified under Article 8(2) in order to protect the safety of vulnerable people everywhere,[44] but the argument would be that the punishment in individual cases must be proportionate to that aim. So, a statute which required a judge to pass a mandatory life sentence even where he is convinced that the killing was a genuine act of mercy of a family member would be incompatible with Article 8 of the Convention because it would require disproportionate punishment.[45] Even if Article 8 is not engaged where a person kills a family member at her request at home,[46] attention should be paid to the possibility that Article 3 of the Convention is engaged where a sentence is so disproportionate to the seriousness of the offence as to amount to 'inhuman treatment'.[47] It must be conceded that it is not certain that either Article is engaged, but even if not, one might hope that a broader culture of human rights should instil in us a sense of intolerance that the mercy killer who can establish his facts must still bear the mandatory life sentence for murder.[48]

One may counter-argue that the European Court of Human Rights, in deciding that some punishment for euthanasia does not violate the Convention, attaches importance to the Member State having in place a system of prosecutorial discretion as well as discretion in sentencing.[49] Perhaps then the wise use of prosecutorial discretion would ensure compatibility with any Convention rights which might be engaged. But

43 In both *R* v *Brown and Others* [1993] 2 All ER 75 and *R* v *Emmett, The Times* (15 October 1999), the various defendants were sentenced to no more than six months in prison for their offences against the person (albeit the trial judge in *Brown* had originally passed higher sentences). It need hardly be said that all of these sentences would have been more severe had there been no factual consent from the 'victims'. Moreover, the mercy killer is at least acting for a good purpose (pain relief), albeit taking inappropriate measures, and the existence of his good motive should provide further mitigation.

44 *Pretty* v *United Kingdom* (2002) 35 EHRR 1.

45 See generally J. Rogers, 'Prosecutors, Courts and Conduct of the Accused which Engages a Qualified Convention Right' (2005) 58 *Current Legal Problems* 101.

46 It is unclear whether Article 8 is engaged in the case of a trial of one who assists the suicide of a loved one: in *R* v *United Kingdom* (1983) 33 DR 270 the European Commission of Human Rights though that it was not. The *Pretty* litigation in this respect does not assist because, whatever Mr Pretty's position was, the rights of the (still living) Mrs Pretty were certainly engaged.

47 See A. Ashworth and D. van Zyl Smit, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 MLR 541.

48 The Commission notes (at para. 2.96) that even the murderer who is released early is still on licence for the rest of his life. Note that the argument about disproportionate punishment need not apply to a doctor who kills a dying patient. That might constitute such a breach of trust and whole disregard for the ethics of the medical profession as to aggravate the offence to such an extent that the mandatory life sentence would not necessarily be disproportionate.

49 See *Pretty* v *United Kingdom* (2002) 35 EHRR 1 at para. 74: for further comments on the case, see generally Rogers, above n. 45 at 122ff.

although prosecutorial discretion may be an effective remedy in 'one-off' events (the Commission relates the example of a compassionate man shooting a person who is burning to death and who requests to be shot[50]) it would be wrong for prosecutors routinely to 'decriminalise' parts of first degree murder by finding some other offence with which to prosecute the mercy killer. In this particular respect, prosecutorial discretion raises the same issues as those which relate to the competence of the judiciary to develop new justificatory defences: one should only seek ways around apparent injustices which arise in the substantive law on 'one-off' occasions, i.e. the law should be applied in cases for better or for worse where the compelling facts in a case are such that they are likely to be of a more general occurrence.[51] The difference between the victim dying from an illness and the victim who is unexpectedly caught in a fireball is a good illustration of the difference between a set of facts of general occurrence and a genuine one-off emergency.

The Commission's objections to mercy killing

It is not easy to pinpoint the Commission's objections to considering a partial defence for the mercy killer. It assumes that in the most sympathetic of cases, the family member will have an abnormality of mind which ought to constitute diminished responsibility; and it proposes a suitable extension to this partial defence which would allow it to be founded where the killer's depression (or other abnormality) has been brought about by the suffering of the victim.[52] But, an abnormality of mind will not always have been present,[53] and in such cases, a yawning chasm will still exist between the person who helps his loved one to kill herself (maximum of 14 years' imprisonment for assisting suicide,[54] with the possibility of no imprisonment at all) and the person who causes death of his loved one by his own hand, possibly because the victim is no longer capable of doing so (which would be first degree

50 See Consultation Paper, para. 8.43.

51 The point on justificatory defences is well made in J. Horder, 'On the Irrelevance of Motive in Criminal Law' in J. Horder (ed.), *Oxford Essays in Jurisprudence*, 4th series (Oxford University Press: Oxford, 2000).

52 The Commission notes the difficulty which a 'mercy killer' might have in raising the partial defence where his depression has been caused by the illness of his loved one (in which case, his abnormality of mind does not stem from any of the permitted causes in s. 2 of the Homicide Act 1957): see paras 8.85–8.86. This is one reason why it recommends that the 'abnormality' may be caused by an 'underlying condition', which is a wider test (see paras 6.56ff.).

53 As in *R* v *Cocker* [1989] Crim LR 740.

54 As acknowledged by the Court of Appeal, the boundaries between murder and assisted suicide would in fact become quite blurred if the wide interpretation given to causation in the unlawful act manslaughter case *R* v *Kennedy* [2005] 1 WLR 2159 were to become fashionable. The Commission notes that the intention of the suicidal victim to kill herself might suffice to break the chain of causation (at para. 8.27), but if *Kennedy* is correct, then the fact of encouragement to commit suicide immediately would mean that the foreseen suicide would not break the chain of causation as a matter of law.

We should probably not panic (yet) about such a wider application of *Kennedy*, but of course if those who are currently liable for assisting suicide do become murderers, then that is all the more reason to allow for a partial defence where the victim was a willing and competent participant.

murder and thus lead to life imprisonment). The Commission's primary objection seems to rest upon a conflation of a version of voluntary euthanasia as a complete defence and a similar partial defence: that is, it seems to think that the fact that the former is outside its terms of references is a telling point against detailed consideration of the latter. At least, that is what it seems to mean when it says that:

> The same extensive range of issues that crop up in any attempt to address the question whether killing with consent or 'mercy' killing should be legalised also crops up when the question is whether these factors should by themselves reduce 'first degree murder' to a lesser offence.[55]

But this reason is not compelling. In fact it misses the crucial point that any *complete* defence of voluntary euthanasia would be concerned with legitimising acts of mercy committed *by medical personnel,* whereas the case for a partial defence is primarily concerned with the family member who has promised his loved one that he would have the courage to act according to her wishes if her pain became too much for her to bear. Indeed, the same provision which enacts a partial defence of consent to be killed might also state that consent may *not* be relied upon 'by a medical practitioner purporting to act in his capacity as such'.[56] Thus, the Commission's reference to an 'extensive range of issues' is beguiling in the extreme. These issues which relate to full legalisation typically refer to euthanasia by doctors in respect of which there would need to be all sorts of safety checks in this event (the medical diagnosis would perhaps need to be confirmed by one or more doctors from another practice or from another area, and the administration of a fatal injection should perhaps be videotaped: the patient might need to sign various forms and see various counsellors, etc.). But these issues do not crop up in the context of a partial euthanasia defence, precisely because we are not intending this defence for doctors. Of course the partial defence would have legal elements, but these would be founded upon a strict definition of consent, as articulated above, and would not require consultation with the medical profession. Further, to recognise consent of the victim as a separate partial defence from diminished responsibility would be the best way of ensuring that the killer who can plead both should have the appropriate mitigation (see my recommendation above[57] that juries should indicate when more than one partial defence has been successful, though the verdict should always be second degree murder whenever at least one partial defence succeeds).

55 Consultation Paper, para. 8.4.

56 It would be quite possible to say that the partial defence would not be open to 'medical practitioners acting in his or her capacity as such'. Both the term 'medical practitioner' (in s. 1 of the Abortion Act 1967) and the concept of a person acting in a capacity 'as such', as opposed to acting in a private capacity (as in s. 548 of the Education Act 1996) are already familiar in the law. Moreover, neither phrase has caused a great deal of uncertainty in interpretation, there being just one leading case in each field (see *DHSS* v *Royal College of Nursing* [1981] AC 800 and *R* v *Secretary of State for Education and Employment and Others, ex p. Williamson* [2005] UKHL 15 respectively).

57 See above n. 32 and accompanying text.

3. Undesired deaths

The most dramatic innovation in the Commission's proposals is surely its proposal that reckless killers who perceive a risk of causing death but who nonetheless take it because they are 'indifferent' to the possibility of causing death should be guilty of second degree murder. We should note the defendant himself must have foreseen the risk of death in all cases; where he did not, for whatever reason, but foremost through what the Commission calls 'reckless stupidity',[58] then he should not be liable for more than gross negligence manslaughter. But the prosecution would not need to prove that the defendant foresaw a *substantial* risk of death. As we shall see, in cases where the defendant does not consider himself to have been taking a justified risk, foresight of a very small risk of death might suffice. I will suggest ways in which the notion of 'reckless indifference' might be tightened and will then submit that the Commission ought to commit itself on the matter of jury discretion which permeates throughout the present law in cases of undesired death or undesired serious bodily harm.

With recklessness to death so firmly entrenched as second degree murder, we can see two separate ladders of culpability in the Commission's Report. One ladder deals with *desired* consequences. Thus, assuming causation of death in all cases, to desire to cause death is to be guilty of first degree murder; to have desired to cause at least grievous bodily harm is second degree murder; and to have desired to cause lesser injury is the equivalent of unlawful act manslaughter. We shall say no more of this particular ladder. The second ladder of culpability deals with *undesired* consequences. If we think just in terms of foresight of death to begin with, then again we see first degree murder at the top of the ladder, because oblique intention (where the defendant does not desire or need to cause death but foresees that he is virtually certain to cause death) is to continue to amount to sufficient intention to kill.[59] Next down the ladder is reckless indifference to death, which is second degree murder. Finally, there is gross negligence manslaughter for the person who should have[60] foreseen a risk of death but did not. There may too be manslaughter where the defendant was reckless as to causing injury.

58 See Consultation Paper, paras 3.21–3.25, 3.158.

59 See Consultation Paper, paras 4.13–4.71.

60 At paras 3.185–3.187, the Commission suggests that personal incapacities which might have prevented the accused from foreseeing the risk of death should potentially negate a charge of criminal negligence. We can readily agree with this, though we might question the Commission's assertion that they are presently irrelevant. In the most recent case cited by the Commission, namely *R* v *C* [2001] Crim LR 845, the Court of Appeal reached that conclusion explicitly by construction of the relevant statute. It did not pretend to say anything about the general validity, or not, of Hart's classical essays on criminal negligence and incapacity. The Commission's citation of the early cases of *Caldwell* recklessness in criminal damage is even more unconvincing, since the House of Lords eventually abolished *Caldwell* recklessness altogether when asked to consider the case of two 11-year-old boys who were incapable of seeing the obvious risk: *R* v *G and R* [2003] UKHL 50.

The Commission notes that in the new offence of negligently preventing to save a vulnerable person from violence at the hands of another, in s. 5 of the Domestic Violence, Crimes and Victims Act 2004 there is room to consider incapacities,

Ideally, we want any ladder of offence to be broadest at its base (i.e. the lesser offences). This is because we want a jury which agrees upon some criminal wrongdoing (but which is not satisfied that the most serious form of culpability is proven) to be able to descend the ladder and to convict of the lesser offence with as little ado as possible. This means that rules which might exist in order to keep faith with requirements of fair labelling belong in the more serious offences; they may have to disappear when we descend the ladder to the least serious offences. The Commission appears to be well aware of this. It rightly suggests that the person who actually wishes to save his victim, such as the father who throws his child from the roof of a burning building in the hope of a miracle, cannot be said to have an oblique intention to kill him.[61] But that is because the intention to kill B is contradictory with an intention to save B; the same contradiction does not arise when no intention to kill is alleged. So the Commission suggests no such 'saving rule' for second degree murder. Similarly, second degree murder is less broad than manslaughter. The Commission envisages reckless murder to be a 'specific intent' offence, such that a person who did not foresee any risk of death should evade liability even if his lack of foresight was caused by voluntary intoxication. Pure subjectivism is thought to be essential for any label of murder.[62] But, although the issue is overlooked in the Consultation Paper, we can be sure that the recklessness *as to injury* which suffices as *mens rea* for manslaughter is to be characterised as 'basic intent', so that the defendant cannot rely upon intoxication to deny that particular foresight.[63]

There is a further example, which is left unexplained by the Commission, but is very important. The Commission suggests that reckless indifference should be required for second degree murder, but mere recklessness as to injury should suffice for manslaughter.[64] It is not just that the foreseen consequence (injury) is less serious, but the type of 'recklessness' itself differs. The difference between these degrees of recklessness merits some exploration. It has nothing to do with the difference between the old '*Cunningham*' and '*Caldwell*' theories of recklessness, because the difference between reckless indifference and 'ordinary' recklessness presupposes actual foresight of the risk in both cases.

Definition of indifference

In all cases of recklessness, there is assumed to be a saving in two distinct scenarios. This first is where the degree of foreseen risk is so low that all

because the inquiry focuses upon what the defendant could reasonably have been expected to have done: at para. 3.186. But the Commission has little good reason to suppose that this is anomalous in the context of the rest of criminal negligence.

61 See Consultation Paper, paras 4.42–4.44.

62 The Commission actually overlooked this point: the present author was alerted to it in a chance conversation with Jeremy Horder in January 2006.

63 That is to say, *DPP* v *Majewski* [1977] AC 443 should continue to apply to recklessness as to injury. It would be useful if, while we are about it, legislation could spell out the precise implications of this rule, which is presumably that recklessness is to be regarded as proven when the jury considers that the defendant would have foreseen the risk of injury had he not been drunk.

64 Consultation Paper, para. 3.161.

ordinary people would take it, because we do not live in isolation from our neighbours, and recognise that several innocent activities present some risks to others. Provided that these risks stay within the low statistical category, we are not reckless in taking them. Otherwise, the motorist who drives safely might nonetheless be guilty of reckless murder in the event of an accident, provided that he just had in mind the statistically small risk of death which all drivers present. The second, and the more contentious, way of denying recklessness when the risk has admittedly been foreseen, arises in relation to justifiable risks. The person who does not desire a consequence, but who nonetheless risks it in the pursuit of some justifiable purpose, is not reckless provided that the degree of risk was taken was justifiable to meet that purpose, for example driving at high speed in order to escape from seemingly aggressive pursuers.[65] It is worth distinguishing this second way of denying recklessness, because considerably greater risks may be taken if a justifiable purpose is pursued, though the other side of the coin is that it will be the court to say *ex post* whether the risks taken were justifiable. In such cases, there is a complete overlap between recklessness and the relevant law of any exculpatory defence (because if no relevant exculpatory defence can be found to exist, not even with judicial creativity, then nor is there any 'justifiable purpose' which may affect the analysis of recklessness). This is not a problem: exculpatory defences exist as separate entities from elements of *mens rea* primarily because they are needed for those cases where the prohibited results were *intended*.

The above is an account of 'ordinary' recklessness. In this account, it is for the court to say what the true level of risk was, and whether an ordinary person would have taken it; or, in the case of a justifiable risk, it is for the court to say whether the defendant took a reasonable risk in the circumstances. This is the broad version of recklessness which the Commission thinks appropriate for many offences, including its proposed reform of unlawful and dangerous act manslaughter. But what it has in mind when it speaks of 'reckless indifference' is a narrower version of recklessness. In this version, the above elements are subjectivised: so it is for the defendant to decide whether ordinary people would take the risk that he did, or for the defendant to decide whether his risk was justifiable.[66] To illustrate its point, the Commission acknowledges that the defendant in *Shimmen*[67] would have been ordinarily reckless: no sensible person would have taken the true risk of breaking the window, as the Divisional Court can be taken to have accepted. But since Shimmen himself underestimated this risk, he was not 'recklessly indifferent' to breaking the window: he might have thought that the true risk was the low statistical risk which anyone would tolerate. His was 'really a

65 *R* v *Renouf* [1986] 2 All ER 449, *Sears* v *Broome* [1986] Crim LR 461, DC. See also A. Norrie, 'Subjectivism, Objectivism and the Limits of Criminal Recklessness' (1992) 12 OJLS 45.

66 See Consultation Paper, para. 3.22. See too the discussion at paras 3.149ff.

67 *Chief Constable of Avon and Somerset Constabulary* v *Shimmen* (1987) 84 Cr App R 7.

case of reckless stupidity'[68] and thus, if an analogous example were to arise in the law of homicide, more akin to gross negligence manslaughter, or manslaughter through recklessness as to injury.

This is a neat approach which deserves support. There surely is a moral difference between the person who believes that his risk was of an everyday, or of a justifiable nature, and one who held no such belief, even if one would only want to recognise that difference as a matter of substantive law when there is as much at stake as there is in the law of homicide. In other words, we may well think that people who foresee death, but do not desire death or serious harm, *and* who believe themselves to be acting justifiably should not be at risk of conviction for murder regardless as to whether a separate exculpatory defence might apply. But we can criticise the Commission for its relatively brief and casual discussion of 'reckless indifference'. For a start, it rather regrettably treats the 'everyday risk' and the 'justifiable risk' alternatives as being interchangeable.[69] But more fundamentally, it seems to assume that all decisions are to be subjectivised in 'reckless indifference'. It is submitted that this should not be so. The defendant's perception of the level of risk should indeed always be the one which matters, but whether the (perceived) level of risk is one which ordinary people would take should be a question for the court. A person who believes that it is normal to take 30 per cent risks of killing others on the roads (for no justifiable purpose) has precisely the 'reckless indifference' to human life which is better labelled as second degree murder: it is only the person who wrongly believes the relevant risk to be 1 per cent who might only be 'recklessly stupid' in the sense that manslaughter might be the better label. In other words, there is a difference between wrongly prizing the *value of life*, and wrongly assessing the *risk to life*.[70] Similarly, if the defendant argues that he took a justifiable risk of death, then again it is his assessment of the level of risk which should matter, along too with whether that level of risk was justifiable. But whether his purpose in taking the risk was capable of being 'justifiable' should be a question of law for the court. Where the defendant acted for a purpose which was self-centred and relatively trivial (such as the motorist who simply wants to get to work as quickly as possible) he should not be allowed to deny recklessness by virtue of having believed himself to have taken a

68 Consultation Paper, para. 3.24.

69 This is true throughout the Commission's Part Three, but it is especially grating in its (generally questionable) discussion of *Shimmen*: 'Foolishly, Shimmen thought that he had left a sufficiently large margin of error so as to make his taking of the risk *justifiable'* (emphasis added) at para. 3.24. Is it a positively good purpose to wish to demonstrate karate skills to one's friends?

70 The Commission seems to lose sight of this when it suggests that Shimmen was not recklessly indifferent. To be sure, Shimmen is entitled to be judged on the basis of the very small risk which he absurdly believed it to be, but whether an ordinary person even have taken the very small risk is still a matter for the court. Perhaps ordinary people would only take even such small risks with their own property, it might think. Cf. Glanville Williams, 'The Unresolved Problem of Recklessness' (1988) 8 *Legal Studies* 74 at 77). We shall return to the important distinction between not caring less and not caring enough shortly in the text.

justifiable risk. What he cannot do is to create his own 'justified purposes'.[71] We might indeed impose an evidential burden of the defendant who wishes to deny indifference on account of a justifiable risk, because only he will know for what purposes he acted, and the jury will also need to hear his testimony if it is to make much progress in deciding whether he honestly thought at the time that he was taking reasonable risks with other people's lives.

There is one other aspect in which the Commission is rather imprecise. It is not clear whether or not it regards the person who believed himself to be taking an 'everyday' or a 'justified' risk as being not indifferent by definition (in which case the definition of 'indifference' would be *negative*: it would be anyone who 'foresees death but who does *not* . . .'). Probably this is what the Commission had in mind. But it is hard to be confident, because elsewhere it describes indifference *positively*: it is said to be the attitude of some one who 'could not care less' whether another dies as a result of his actions.[72] But it offers no examples of cases where a person who might have thought that he was taking an 'everyday' or a 'justifiable' risk of death should nonetheless be found to be 'indifferent' on account of his own personal disregard for the other's life. Nor does it conversely suggest that a person who took a substantial but knowingly unjustifiable risk of death might escape if he did nonetheless 'care' about (perhaps 'regret' is a better word) the risk of death which he created. Possibly, then, the 'could not care less' formula is intended to be simply a more manageable rewording of the negative formulae, but clarification would have been welcome. We might return to the example of the juvenile who puts a heavy obstruction on the road in order to impress his friends with his daredevil attitude, but who secretly wishes fervently that no one will be harmed.[73] He knows that there is a substantial risk of death, which no jury will find that an ordinary person would have taken, and the judge should rule that he had no justifiable purpose for taking the risk. Does the Commission mean him to escape by testifying that he nonetheless 'cared'? It is true that he could have cared less about the risk but he could also have cared a lot more.[74] One suspects that most laypersons and probably even most

71 We should recall that the person who claims to have believed that he thought his risk was justified may deny reckless indifference notwithstanding that the level of risk was in his mind very high. If he is to succeed in this, then the court must at least agree that his purpose was a 'justified' one, even if it disagrees about the acceptable level of risk. The meaning of a 'justified purpose' does not need to be exhaustively defined: the legislator should just provide for examples of justified purposes (e.g. defence of persons or property against unlawful aggression or against natural disasters or threats) and allow judges to develop analogous ones. See P. Glazebrook, 'Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete Offences and General Defences' in A. Simester and A. T. H. Smith (eds), *Harm and Culpability* (Oxford University Press: Oxford, 1996).

72 See Consultation Paper, paras 3.150 and 3.166.

73 See above n. 19 and accompanying text.

74 The Commission anticipates that a workman who knowingly fits a defective boiler in a customer's house (in order to turn a higher profit) might properly be found guilty of reckless murder if the boiler explodes: Consultation Paper, para. 3.176. Since the workman would obviously strongly prefer that the explosion should not happen, it may be inferred that the Commission does not mean to distinguish

lawyers would say that he acts recklessly rather than (say) merely negligently.

Jury discretion

But, as we can see in Table 2 below, there is yet more to discuss when compiling a 'ladder' of oblique intention, recklessness and negligence as to death. As the law is at present, it appears that even if the jury is satisfied of the elements of oblique intention, it is still not obliged to find intention. It may have some (undefined) equitable jurisdiction in this respect.[75] The Commission is prepared to retain this uncertain jury discretion, subject to the views of consultees, though it hardly has a good word to say about it. Similarly, as the law stands, we know that the jury has discretion in gross negligence manslaughter cases, because it is for the jury alone to say when the negligence is 'gross'.[76] Consistently, then, there should be jury discretion in reckless murder too. Why would we have some equitable jurisdiction at the top (oblique intention) and at the bottom (gross negligence manslaughter) but not in the middle (reckless murder)? I hasten to add that I am no supporter of having any undefined jury discretion. One does not need to be a purist to suggest that one of the very priorities of codification of the law of homicide should be to remove such anomalous powers of the jury which have crept in to compensate for the uncertainties of the common law. But, first and foremost there should be consistency.

The Commission does consider restricting reckless murder beyond the notion of indifference, but not by the notion of jury discretion. Rather, it asks consultees whether the offence should be restricted to killings done in the course of 'another serious offence'.[77] But, this is not intended to, and it does not, suffice to introduce consistency in the ladder. Suppose that we have the case of a roofer who, after removing some heavy tiles from a roof, then throws them onto the street below because he does not wish to make the effort of carrying them down his ladder. He knows that there is a very good chance that there will be someone passing in the busy street below, but he does not care: let us suppose that he has some personality disorder and wishes to draw attention to himself. If the jury thinks that he recognised that he was virtually certain to cause death, they might convict of first degree murder, but only if they are unsympathetic (assuming here the existence of jury discretion); if more likely, it finds that he foresaw just *some*

between 'not caring less' and 'not caring enough'; but it is one of a number of points which could usefully be clarified, since as noted the example sits a little uncomfortable with its opinion that Shimmen was not 'indifferent' to breaking the shop window.

75 See *R* v *Woollin* [1999] AC 82, and the subsequent case of *R* v *Matthews and Alleyne* [2003] 2 Cr App R 30, (2003) 67 JCL 292 where the Court of Appeal hardly helped matters by suggesting that the jury does have some discretion in cases of oblique intention, but it will not inevitably render a conviction unsafe if it was not told of it!

76 The uncertainty in how they are expected to assess the gravity of the negligence is nonetheless not such as to violate Art. 7 of the European Convention of Human Rights: see *R* v *Misra* [2005] 1 Cr App R 21, (2005) 69 JCL 126.

77 See Consultation Paper, paras 3.176–3.179.

Table 2. *Mens rea* in relation to risks of death, as contemplated by the Law Commission

Offence	*Factual elements*	*An 'extra element'*
First degree murder	V's death foreseen as virtual certainty, unless D specifically intended to save V's life	Uncertain jury discretion as to whether this is to be construed as 'intention'
Second degree murder	D foresaw a risk of death, the extent of which was not thought to be justifiable, or one which an ordinary person would have taken in the circumstances	Consultation over whether D should also have been committing another serious offence at the time
Manslaughter	D should have known, having regard to his capacities, that he was taking a risk of causing death which was unjustifiable and which an ordinary person would not have taken	Jury to decide whether the negligence was 'gross'

risk of death, then it would not be able to convict of second degree murder because of the absence of any other serious offence: but they could again convict of gross negligence manslaughter, if they wish to exercise their discretion toward punishment when considering the matter of 'grossness'. But might they not wonder why the medium verdict, which might well best reflect their intuitions, was not available at all? The Commission is cautious about its 'serious criminal offence' query, but for the separate reason that it does not wish to undermine the rearguard action that reformers have been performing against constructive liability over the last 50 years.[78] An even more compelling reason is found when one sees reckless murder not as a separate offence but as existing in the middle of a ladder with oblique intention and gross negligence. Seen in this context, the only options are to enact openly some measure of jury equity or to abolish any such notions in all three offences.[79]

78 At paras 3.180–3.181.

79 In the case of gross negligence manslaughter, this would require removal of the word 'gross'. But this is not unthinkable. The offence would still be more serious than the ordinary tort of negligence, because for manslaughter, there must be a foreseeable risk of death from breach of duty, and as the Commission notes (see above n. 59) it should also be the case that a person is not criminally negligent if he was not able to perceive the risk of death, and perhaps also if he was not capable of

Conclusions

I hold a very high opinion of the Law Commission Report. Its three general offences of homicide reflect moral distinctions and ought to be workable. The aim of this article has been only to raise some issues which seem to merit attention. I have suggested that the Commission should address the difficulties which may arise when the jury agrees upon second degree murder for different reasons, and that it should require the jury to try to reach verdicts on *all* partial defences which are left for it to consider. I have also urged the Commission to take up the gauntlet on the fate of the mercy killer whose victim consents to the killing (but who will not invariably have a plausible case of diminished responsibility). Recognising consent to be killed as a separate partial defence would not only allow the jury to find second degree murder in cases where there is no abnormality of mind, but it would also enable the jury to find second degree murder but explicitly to record its dual findings of abnormality *and* consent in appropriate cases. Finally, I have urged the Commission to consider oblique intention, reckless murder and gross negligence to constitute a ladder of culpability in relation to undesired deaths. It is acceptable for it to employ the concept of 'indifference' in reckless murder only, but the definition of this concept needs to be more clearly thought through, and a schematic approach to matters of jury discretion is required, such that it is allowed or disallowed in all cases of undesired death.

assessing whether it was justifiable to take a certain risk or whether an ordinary person would take it.