Principles, pragmatism and the Law Commission's recommendations on homicide law reform

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Crim. L.R. 333 In its final report on *Murder, Manslaughter and Infanticide,* [1] the Law Commission has taken some significant steps away from the more ambitious scheme put forward provisionally in its consultation paper, *A New Homicide Act for England and Wales?* [2] The Law Commission still recommends a three-tier law of homicide, but there are changes in the ambit of the different tiers or rungs on the "ladder". First degree murder will encompass not only killings with intent to kill (as proposed earlier) but also those killings with intent to cause serious injury that are coupled with awareness of a serious risk of causing death. This will be the only offence to carry the mandatory penalty of life imprisonment. Second degree murder, with a maximum penalty of life imprisonment, is to include killings with intent to cause serious injury, killings intended to cause injury or fear or risk of injury coupled with awareness of a serious risk of causing death, and killings that would fall within first degree murder but where there is a partial defence of provocation, diminished responsibility, or involvement in a suicide pact. Manslaughter, also with a maximum penalty of life imprisonment, will be committed either by killing with gross negligence or by killing through a criminal act that was intended or known to involve a serious risk of injury. There will also be a new form of manslaughter, consisting of complicity in an unlawful killing. The offence/defence of infanticide will continue unchanged. These recommendations conclude the first stage of a review, the second stage of which is envisaged to take the form of a public consultation by the government. [3]

The Law Commission should be congratulated on its careful work on this talismanic yet fraught subject, and none of the comments in this article are intended to detract from my admiration for the substance of the Report. The proposals in the 2005 consultation paper were the subject of detailed critical appraisal in the *Review,* [4] and many of those comments remain relevant to the Commission's final ***Crim. L.R. 334*** recommendations. In his article below, Professor Richard Taylor concentrates on the structure of second degree murder and the proper place of partial defences. This article examines some of the broader issues of structure and approach raised by the final Report, without purporting to cover all the recommendations in detail.

1. Defining first degree murder

The Law Commission is right to support a "ladder principle" in recommending reform of the law of homicide, although any process of categorising or "stratifying" homicides for this purpose is bound to be controversial. In its consultation paper it advanced strong arguments in favour of confining first degree murder to cases of intention to kill--a close connection with public opinion, a clear dividing line, and consistency with the correspondence principle (by dropping the "grievous bodily harm rule", which allows people to be convicted of murder when they merely intend to do serious harm). [5] This reasoning has now been discarded in favour of a "moral equivalence" argument supported by quotations from Sir James Fitzjames Stephen--that first degree murder (hereinafter murder 1) should include both cases of intent to kill and cases of intent to cause serious injury where that is coupled with awareness of a serious risk of killing. The definition is similar to that proposed nearly 20 years ago by the House of Lords Select Committee and in the draft criminal code, [6] and it goes a considerable distance towards the argument that cases of "attack" should fall within murder 1 whereas cases of endangerment should not. [7] The recommendation prompts four related questions, about the key concepts of intention, serious injury and serious risk, and about the "moral equivalence" thesis that is said to determine the scope of the new murder 1.

(a) Intention. The concept of intention will be relevant to the new murder 1 in both its forms, either intent to kill or intent to do serious injury. The Commission favours a definition along the lines of the existing law, rather than one that purports to make provision for a wider range of possibilities. Thus the simple definition should be "acting in order to bring a result about", a definition based on purpose but without the element of deliberation sometimes implied by that term. The extended definition, applicable where "the judge believes that justice may not be done unless an expanded understanding of intention is given", is the *Nedrick-Woollin* formula:

"an intention to bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action." [8]

Whatever position one holds on whether this extended definition should be regarded as a species of intention or as a separate culpability requirement, [9] it is unfortunate ***Crim. L.R. 335*** that the Commission leaves open the possibility that a jury may decide that D thought the act was virtually certain to cause death and then go on to decide--for some unarticulated reason--that this does not amount to intention and therefore not to murder 1. In other words, D's foresight that the consequence is virtually certain allows the jury to "infer intention" [10] or to "find intention" [11] but does not *require* them to do so. The Commission defends giving this latitude to juries as "the price of avoiding complexity." [12] The implication is that leaving juries with this "moral elbow-room" removes the need to make specific provision for possible scenarios such as Lord Goff's example of the man who throws his children from a burning building, believing it is virtually certain that they will die or suffer serious injury as a result but also believing that they are virtually certain to die if they remain in the building. However, for an offence as serious as murder, the aim should be to produce a tighter definition that *requires* juries to bracket foresight of virtual certainty with intention proper, [13] leaving these unusual cases to be dealt with by (partial) defences or otherwise. [14]

(b) Serious injury. Three issues may be raised here. First, the Commission is surely right to adopt "injury" in preference to "bodily harm", in the hope that "injury" will more easily encompass psychiatric illnesses. Secondly, the Commission decides against recommending that "serious injury" should be defined. This decision is not discussed in relation to murder 1, perhaps because it is assumed that the question whether or not an intended injury was "serious" will be overshadowed, in murder 1, by the question whether D was aware of the serious risk of causing death. The Commission merely states that juries "will not bring in a murder verdict unless the harm intended was very serious indeed." [15] However, there is no reference to "very serious injury" in the recommended formula for murder 1, and one assumes that the prevailing reason for this is that the adjective "serious" has not caused problems in the past, when juries have been instructed in murder cases that the harm intended must have been "really serious harm." [16] Thirdly, account must be taken of the likelihood that this head of liability for murder 1 will be much relied

upon. Under existing law, the minimum task for the prosecution is to prove an intent to cause really serious harm. Under the recommended law, the minimum task for the prosecution would be to prove an intent to do "serious injury" combined **Crim. L.R. 336* with awareness of a serious risk of causing death. It is likely that many cases will turn on this head of liability, and, if so, this suggests some need for precision in the law. After all, where the prosecution prove that D intended only non-serious injury, coupled with awareness of a serious risk of causing death, that is a form of murder 2. So the difference between that category of murder 2 and the second head of murder 1 lies only in the distinction between injury and serious injury. It may well be concluded that any definition of "serious injury" would have to be so complex as to be counter-productive, since it would confuse juries and give rise to frequent appeals. But, given the vital boundary that it marks, one might have expected more exploration of the possibilities of a definition or partial definition. [17]

(c) Serious risk. In its consultation paper the Commission argued that cases of an intent to cause serious injury should be classified as murder 2, rather than murder 1, largely on the ground that it is possible to intend serious harm without risking danger to another person's life. [18] This is a widely-held criticism of the present GBH rule, that it fails to mark out a category of the most heinous killings. In its Report the Commission partly recants, as we have just noted, concluding that killings based on an intent to do serious injury do warrant classification as murder 1 if an awareness of a serious risk of causing death is also proved. [19] The main argument for this is discussed in (d) below, but we must pause here on the term "serious". What is a "serious risk" of causing death? Risks may be ranged, theoretically, on a probability scale from 0 to 100. Nobody expects a criminal statute to specify a particular degree of probability, but it ought to indicate the approximate level of risk required. The Commission asserts that "serious risk" is one of those concepts that juries "can safely be left to apply to the facts of a case with a minimum amount of embellishment", and that minimum is found in the recommendation "that a risk is to be regarded as serious if it is more than insignificant or remote." [20] There are two weaknesses in this approach. The first is that the word "serious" is already used in a different sense in the same clause--intent to cause *serious* injury coupled with awareness of a *serious* risk of causing death. It is surely best to avoid that, especially when there are other statutes that use a phrase such as "a *significant* risk of serious harm", thereby avoiding the use of "serious" as indicating a degree of risk. [21] If the Commission really wants to have "serious" rather than "significant", it needs to say much more about the difference. The second weakness is the Commission's suggestion that the term "serious" is preferred because it is not just a question of probability, but also one of "whether the risk ought to be taken seriously." Degree **Crim. L.R. 337* of risk is merely "one factor" in the assessment. [22] Does this indicate a further evaluative element? Does it suggest that juries should be free to evaluate whether taking this degree of risk with someone's life might render the offence unworthy of the murder 2 label and sufficient only for manslaughter? [23] If so, the Commission must explain the proper parameters of such crucial judgements. If not, the use of the word "serious" here should be reconsidered.

(d) The moral equivalence thesis. It is widely accepted that causing death with intent to kill is a paradigm case of murder, but the Commission now moves away from its previous position that this should be the only form of murder 1 and seeks to bring in killings where there is an intent to cause serious injury coupled with an awareness of a serious risk of causing death. Leaving aside the detailed comments above, is this a convincing move? The Commission justifies this change by arguing that in cases where these two features are united--the intent to do serious injury, and awareness of a significant risk of causing death--the killing is morally equivalent to causing death with intent to kill, the other form of murder 1. [24] This approach avoids one objection to the current law, which is that a mere intent to cause GBH might amount to nothing more than an intent to break someone's arm or leg, which is not normally life-threatening. But it is hardly necessary for the Commission to go so far as to assert moral equivalence between the two heads of the new murder 1, and thereby to challenge the ingenious. It is enough to argue that such cases are morally closer to other cases of murder 1 than to other cases of murder 2. The Commission is recommending in effect that the two main forms of (what were formerly) murder 2 be top-sliced: the worst cases of killing with intent to do serious injury are those where D is also aware that a significant risk of death is being created, and the worst cases of killing by intentionally injuring someone in the knowledge that this creates a significant risk of death are those where D also intends to do serious injury. Where an offence is at the top of both categories of murder 2, as it were, it warrants inclusion within murder 1. [25]

2. The second rung on the ladder

In its Report the Law Commission recommends a three-tier structure for the law of homicide: murder in the first degree, murder in the second degree, and manslaughter. In structural terms this broadly follows the consultation paper, steering a middle course through many variants including the traditionalists who wish to keep the existing two-tier structure while making adjustments

to the definitions, and those who argue that there should be at least four tiers in order properly to distinguish cases where there is a partial defence. The recommendation *Crim. L.R. 338 is that murder 2 should include 5 separate heads of liability--intent to do serious injury; awareness of the serious risk of causing death coupled with an intent to cause injury or fear or risk of injury; murder 1 with provocation; murder 1 with diminished responsibility; and murder 1 in the context of a suicide pact. [26] The brief comments here will focus on the first two heads of liability, with additional reflections on the structure.

(a) Killing through an intention to do serious injury. It could be said that this is the only part of the Law Commission's package that involves any down-grading. Killing in these circumstances is currently murder and attracts the mandatory sentence of life imprisonment. Many believe this is inappropriate, since there are forms of intent to do serious injury that do not make death a foreseeable consequence (e.g. knee-capping, breaking a limb).[27] Moving this form of killing away from murder 1 and its mandatory penalty is therefore justified. However, it creates boundaries that will inevitably become the site of intense forensic argument. It will be necessary to distinguish injury from serious injury (see 1(b) above), which the Commission admits may be a "fine distinction" [28]; and it will be necessary to distinguish those cases where the intent to cause serious injury is and is not accompanied with awareness of a serious/significant risk of causing death (see 1(c) above). We return to this theme below.

(b) Reckless killing. The Commission states that the current law is too generous in treating most reckless killers as guilty only of manslaughter, and is right to argue that (certainly in the new three-tier structure) some of them deserve to be placed on the middle, rather than the lowest, rung. [29] It is also right to abandon the proposal to adopt the concept of "reckless indifference" as the reference-point for this group of cases, since that concept is too ambiguous as it stands. The recommended formula for reckless killings falling within murder 2 is therefore those cases "where the defendant intended to cause injury or fear or risk of injury aware that his or her conduct involved a serious risk of causing death." It is necessary to place this on a spectrum of four forms or levels of reckless (or "undesired" [30]) killing: those where D knew the risk of death was so high as to be virtually certain are murder 1; those where D was aware of taking a serious risk of causing death and intended serious injury also fall within murder 1; the present group falls within murder 2; and then there are reckless killings where D may realise the risk of death but is not intending to cause fear or risk of injury, which will fall into manslaughter in the third tier. Common to the second and third forms of reckless killing is an awareness of a significant/serious risk of causing death, already discussed critically at 1(c) above. The distinguishing element of the murder 2 variety of reckless killing is that D must *Crim. L.R. 339 have one of three attitudes towards injury (not necessarily serious injury). D may intend to cause injury, even if that is not a serious injury. It is sufficient if D intends to cause *fear* of injury, as by driving straight at a police officer hoping to be able to swerve away at the last moment (although that would be a case of fear of serious injury, but such cases fall within this category because murder 1 includes only an intent to *cause* serious injury). It is also sufficient if D intentionally creates a *risk* of injury (or, for the reason just given, of serious injury), which would presumably capture the driver who overtakes on a blind bend and causes the death of someone in an oncoming vehicle. There is no reference here to the magnitude of the risk created--certainly no reference to "serious/significant risk". Could it not be argued that to include an intent to cause (any degree of) risk of injury over-extends this head of murder 2?

(c) Labels and sentences. One of the objections to the present law of homicide is that the mandatory penalty of life imprisonment applies to too large a number of cases, on account of the wide definition of murder. We have seen that the Commission provisionally proposed to resolve this by confining the mandatory sentence to murder 1 and defining that offence narrowly in terms of an intent to kill. The Report now recommends a broader form of murder 1 that encompasses cases of killing with intent to do serious injury coupled with awareness of a significant/serious risk of causing death. Probably that will not greatly reduce the number of killings to which the mandatory penalty applies, since it will exclude chiefly cases where the serious injury intended would not normally be life-threatening. This raises the question why the second rung on the ladder should still be labelled "murder", albeit in the second degree, since four of its five heads are killings that are currently classified as manslaughter. Suggestions of a different label for the middle tier, such as grave or culpable homicide, have not moved the Commission. One may grant the Commission its argument that the current law is too generous to some reckless killings, and that such cases should be placed one tier below the highest category; but the argument put forward is that the culpability in these cases is so high that manslaughter is an inadequate label, [31] not that they justify classification as "murder". If indeed the culpability in these cases is so high, is it right that killings under provocation or diminished responsibility should be given the same label? [32] Is the Commission confident that juries will be prepared to apply the label "murder", as in murder 2, to killings under provocation or diminished responsibility? There is a strong argument that this is not an appropriate label, not least for killings that are often sentenced in the five to seven-year range. [33] The Commission's view is that the sentence mitigation principle is more important here than the use of the label "murder": partial defences operate solely in murder cases, because it is the only *Crim. L.R. 340 offence with a mandatory penalty. [34] Whatever the historical merits of that assertion, it is not persuasive at the level of

principle, [35] since there is a cogent argument that the mitigating force of provocation (well explained by the Law Commission itself) [36] and of diminished responsibility ("substantial impairment" resulting from mental abnormality) is such that a label other than murder is called for. [37] Moreover, in practice it may not accord with popular conceptions of what should and should not be called "murder", and thus jurors may expect provoked killings to have a different and lesser label. These reservations point towards a different label for the second tier, and may also raise an argument for a different tier for the three killings with partial defences--a move that may or may not reduce the practical problems caused by having 5 different heads of murder 2 with a single verdict. [38] The Commission concedes that the labelling issue should be revisited at the next stage of the review. [39]

脅迫建議

3. The duress recommendations

Another difficult part of this demanding project is what to do about duress. There is general agreement that the current law, barring duress as a defence or partial defence to murder, is unsatisfactory. In the consultation paper the Commission favoured re-introducing duress as one of the partial defences to murder 1. That proposal drew a range of responses "more divided … than on any other aspect of our review." [40] The Commission therefore reviewed the issue as a matter of principle and changed its position, recommending that duress be available as a complete defence to murder 1, murder 2 and manslaughter, provided (and here is a dose of pragmatism) that the burden of proof lies on the defendant. [41]

The discussion of the proper place of duress is, in large part, measured and principled. Having duress as a partial defence might have been supported as a middle-of the-road compromise that accommodates each side of the moral argument, but the Commission sweeps it away on the ground that "arguments of principle and morality point decidedly" towards allowing duress to be a complete defence. [42] The Commission argues that duress should not be aligned with provocation and diminished responsibility, recognising that "some instances of duress come close to being a justification for killing rather than an excuse." [43] In ***Crim. L.R. 341*** general, analogies with self-defence (as a complete defence, albeit a justification) are therefore found more attractive than comparisons with the partial defences. If duress is to be a complete defence, it is understandable that it should be tightly defined, as the House of Lords has insisted. [44] This leads the Commission to insist that the threat must be believed to be life-threatening, and that D's belief that the threat has been made must be based on reasonable grounds. The latter stipulation applies the anomalous and under-reasoned decision in *Graham.* [45] The Commission supports this on the ground that, compared with provocation and self-defence (which have no such reasonableness requirement), there is a less immediate temporal or physical nexus between the threat and the killing in duress cases. [46] This also becomes the primary argument in favour of transferring the burden of proving duress to the defendant in homicide cases--that the separation of the making of the threat from the killing creates extra difficulties for the prosecution. Is this right? Whereas on provocation and diminished responsibility there has been research, on duress we merely have the unsupported assertion that this occurs "in many cases". [47] Moreover, the House of Lords held that the carrying out of the threat must be immediately in prospect (so the temporal separation cannot be great), [48] and the Commission fails to give sufficient recognition to the great emotional turmoil brought about by threats of this magnitude, not least when directed at family members. Thus the Commission's argument that the reasonableness requirement is right because the duressee usually has "time to reflect" does not convince; and its claims about the relative difficulties of proving the qualifying conditions of duress are inadequately grounded.

Some of the other arguments for reversing the burden of proof are no more persuasive. This is not to deny the pragmatic force of this recommendation, as a quid pro quo that might sway some of those initially opposed to recognising duress as a complete defence. But that is not how the Commission seeks to justify its stance. Its major argument seems to be that duress is peculiarly difficult for the prosecution to investigate and disprove; even if this is substantiated, [49] difficulty of proof should not be determinative, [50] and proper attention should be paid to the similar problems of the defendant, not least where it is one person's word against another. The argument may be a version of the fallacy that defendants ought to prove matters "peculiarly within their own knowledge", which continues to bedevil judicial decisions on allocating the burden of proof. [51] The Commission claims that proof is particularly difficult in the few cases relating to acts done outside the jurisdiction [52]; if substantiated, it is not clear that this is a good reason for reversing the burden of proof in the majority of cases, not to mention cases ***Crim. L.R. 342*** where young or vulnerable duressees are involved. [53] The Commission also cites the risk of concoction, particularly in the context of organised crime [54]; this is a general risk with defences, and in duress there are already strong restrictions for those involved in criminal enterprises with others. The Commission points out that the partial defences of diminished responsibility

and involvement in a suicide pact place the burden of proof on D [55]; but diminished responsibility cases depend on medical evidence, and the arguments for reversing the burden of proof are strongly contestable, [56] while the "public protection" rationale used in suicide pact cases should not, of itself, be sufficient to justify convicting someone of murder when there is reasonable doubt about guilt. The Commission seeks support from the recent decision in *Makuwa,* [57] but fails to cite the passage in which the Court of Appeal held that D should bear only the evidential burden in relation to proof of his or her refugee status, with the prosecution bearing the burden of proof "as in the case of other more commonly raised defences, such as self-defence or alibi." [58] The arguments in the Report for reversing the burden of proof are not convincing, and the concerns that led the Commission to produce them are adequately assuaged by the efforts made by both the House of Lords and the Commission to ensure that the defence of duress is narrowly circumscribed. When the most serious of criminal offences is the focus, no one should be liable to conviction for failing to establish their innocence.

4. Pragmatism and principle

Reform of the criminal law is unavoidably political, and reform of homicide law is essentially political. There is no reason why lawyers should try to keep the cards close to their chests, and every reason to encourage public debate. However, in the present climate it is virtually impossible to avoid political posturing and points-scoring on a subject that engages such high emotions. History creates doubts whether there will be any legislation as a result of this Report. But, in the hope that the present or a subsequent government does take up the issue, the Commission has undoubtedly tried to present a package that is pragmatic and that members of the judiciary think workable. A three-tier structure for homicide law, with a 2-5-2 formation of heads of liability, is preferable to the current law's reliance on the two offences of murder and manslaughter. It will, however, have practical implications for the conduct of murder trials, with various avenues by which the defence can endeavour to have an offence reduced from murder 1 to murder 2. There is the risk of split verdicts and more generally of confusing juries, [59] and also the abiding problem of providing the judge with a clear factual basis for sentencing. [60] Moreover, ***Crim. L.R. 343*** to take full account of the practical implications would require consideration of self-defence as a defence to murder 1 and to murder 2 (together with the judge's duty to leave provocation as a defence to murder 1 where the evidence raises it), [61] and the role of intoxication as a defence to murder 1 and to at least the first head of murder 2. [62] Uncertainties such as these may have been the principal reason for the Commission stepping back from its provisional proposal that manslaughter, as the lowest rung, should have a determinate maximum sentence, although the only reason given for applying a maximum of life imprisonment is that "most judges" would be "uncomfortable" with anything lower. [63]

The most significant change from the consultation paper is the widening of the ambit of murder 1: given the strong arguments of principle adduced in the consultation paper for restricting murder 1 to cases of an intent to kill, the change is introduced on the basis that it creates "a greater measure of consensus". Of course there are arguments of principle in favour of both the narrower and the broader scope of murder 1, but it was clearly pragmatism that brought about the change. A similar determination not to be undone is found in the recommendations on mercy killings. Any attempt at homicide law reform that includes this topic is likely to meet acute controversy that may well derail the whole project of reform, and the Commission's pragmatism in recommending that the government undertakes a separate public consultation on that issue is surely understandable. However, in relation to duress, as we have seen, the pragmatic avoidance of controversy did not hold sway.

There will come a time, however, when this and other threads will need to be drawn together. This is not a complaint about the work of the Law Commission: it decided to report on murder, manslaughter and infanticide, and took pragmatic decisions to include duress and complicity and to exclude insanity and intoxication, for example. [64] The second stage of the review of homicide law is to be a public consultation by the government, and that should probably focus on the same issues. But it will soon become important to consider the relationship of these offences--notably those towards the foot of the ladder, such as manslaughter by a criminal act known to carry a risk of causing some injury [65] --to causing death by dangerous driving and the other "death by driving" offences, [66] and also to any offence of corporate killing. Sentencers have the task of determining the relativities between these offences, and if there is still an aspiration to produce a criminal code, all of them ought to have their place in it. [67] No doubt pragmatism indicates that the subject-matter of this Report should be dealt with first, but at some stage the interrelationships should be considered in principle and in practice.

Crim. L.R. 344 Finally, one theme of these comments has been the Commission's approach to definitions, and some concluding remarks on this may be appropriate. The Report places emphasis on the value of promoting certainty, [68] bringing

"order, fairness and clarity to the law of homicide", [69] and preferring "clarity and simplicity" to complexity. [70] Goals such as maximum certainty and clarity are a vital part of the rule of law, insofar as they conduce to predictability, consistency and accountability in decision-making. It was argued above that the Commission's approach to "serious injury" and "serious risk" may compromise those values unduly. The borderline between injury and serious injury is crucial at various points (see 1(b), 2(a) and 2(b) above), and other jurisdictions have definitions that appear to work, even though any definition may attract legal argument, case law and perhaps unwanted complexity. The Commission's judgment that defining "serious injury" would add to the length, complexity and cost of trials without much compensating benefit seems to have deflected it from examining further possible definitions, when its avowed commitment to promoting certainty ought surely to have led to further efforts. It was also argued in 1(c) above that "serious risk" is not the right term and is, in any event, under-defined. The term is used elsewhere in the recommendations, [71] and yet there remains ambiguity about whether it is a judgment of probability alone or has an evaluative element too. A third example concerns the extended definition of intention, where, as we saw in 1(a) above, the Commission recommends the retention of the gap between deciding that D knew that death or serious injury was virtually certain to result and holding that this amounts to sufficient intention for murder. It seems that the consultees responded along predictable lines, with most judges favouring the existing "flexibility" and most academics favouring fuller definition. [72] But it remains the case that the fuller definition need not be much fuller, and that the alleged need for the flexibility left to juries by the current *Nedrick/Woollin* definition awaits convincing justification. Thus there are questions of "technical" detail, as well as questions of broad structure and offence-labels, to be considered at the next stage of the review.

Footnotes

1 Law Com.No.304 (HC30, November 2006), available at *www.lawcom.gov.uk* (hereinafter Report). See Editorial [2007] Crim. L.R. 107, and J. Rogers (2007) 157 N.L.J. 48.

2 LCCP 177 (November 2005), available at *www.lawcom.gov.uk* (hereinafter LCCP 177).

3 Report, 1.7.

4 Editorial at [2006] Crim. L.R. 187; W. Wilson, "The Structure of Criminal Homicide" [2006] Crim. L.R. 471; A. Norrie, "Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper" [2006] Crim. L.R. 486; G.R. Sullivan, "Complicity for First Degree Murder and Complicity in an Unlawful Killing" [2006] Crim. L.R. 502; O. Quick and C. Wells, "Getting Tough with Defences" [2006] Crim. L.R. 514.

5 LCCP 177, 2.13-2.15 and elsewhere.

6 House of Lords Select Committee on Murder and Life Imprisonment (the Nathan Committee), HL Paper 78 of 1988-89; Law Com. No.177, *A Criminal Code for England and Wales* (1989).

7 An argument advanced strongly by William Wilson: see fn.4 above, and his "Murder and the Structure of Homicide" in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (2000).

8 Report, 3.27.

9 V. Tadros, "The Homicide Ladder" (2006) 69 M.L.R. 601.

10 *Nedrick* (1986) 83 Cr.App.R. 267

11 *Woollin* [1999] A.C. 82.

12 Report, 3.21. Note that this definition of intention will also apply to the first two heads of murder 2, discussed in 2(a) and 2(b) below. As Ian Dennis pointed out to me, no such latitude is left by s.66(3)(a) of the International Criminal Court Act 2001, which provides that a person has intention in relation to a consequence if he means to cause it or is aware that it will occur in the ordinary course of events.

13 In LCCP 177, 4.47-4.62, the suggestion was to add a clause as follows--"Proviso: a person is not to be deemed to have intended any result which it was his or her specific purpose to avoid." The Report does not say what difficulties that would cause.

14 As discussed by Alan Norrie, fn.4 above, at pp.495-499.

15 These words relate only to murder 2, and are followed (Report, 2.93) by the observation that "the judge will reflect the degree of harm actually intended in the sentence passed"--whereas in murder 1, the mandatory penalty applies.

16 The JSB Specimen Direction on Intention states that it is "usual but not necessarily essential" to put the adverb "really" before "serious". Should this apply to the recommended definitions of murder 1 and murder 2?

17 Compare Report, 2.88-2.94, with LCCP 177, 3.115-3.120 and Law Com. No.218, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993), 15.1-15.31.

18 See, more fully, LCCP 177, 3.33-3.39, 3.60-3.147.

19 *cf.* Criminal Law Revision Committee, *14th Report: Offences Against the Person* (1980), para.31; Ashworth, *Principles of Criminal Law* (5th edn, 2006), p.260.

20 Report, 3.40. The Commission aims for consistency of terminology on this point, so it also requires a "serious risk of causing some injury" as a component of criminal act manslaughter (3.49).

21 See Criminal Justice Act 2003, ss.225-229, as interpreted in *Lang* [2006] 2Cr.App.R.(S.) 3 at [17], where Rose L.J. (admittedly in a slightly different context) held that significant risk is "a higher threshold than the mere possibility of occurrence" and means (quoting the *Oxford Dictionary*) "noteworthy, of considerable amount or importance."

22 Report, 3.36.

23 Perhaps in parallel with the objective element in recklessness: see, e.g. Smith and Hogan, *Criminal Law* (11th edn, 2005, by D. Ormerod), p.102 and, in this specific context, Tadros, above, fn.8, pp.609-611.

24 Report, 2.60-2.69.

25 See Norrie, above, fn.4, at pp.493-495, although he would prefer to reduce reliance on intention as a delineator. The Commission regards the "moral equivalence" point as important, partly because it would no longer require judges to distinguish (when setting the minimum term for murder 1) between those who intend to kill and those who fall under the second head (Report, 2.68).

26 There is a sixth possible head: the Report recommends that duress should be a complete defence to murder 1, but raises the possibility that provision may be made for an imperfect defence of duress to operate as a partial defence that reduces murder 1 to murder 2: see 6.66-6.69.

27 On this, the Report includes two strange paragraphs (2.79-2.80) arguing that the GBH rule is compatible with "the so-called correspondence principle" because in almost all cases an intent to do serious harm "will have made D's death a foreseeable consequence."

28 Report, 3.48, in another context.

29 Report, 1.24 and 2.97.

30 See J. Rogers, "The LawCommission's Proposed Restructuring of the Law of Homicide" [2006] J.C.L. 223 at pp.238-239, making a similar point.

31 Report, 1.31. *Cf.* also 2.101, where the Commission refers to "a middle tier offence between murder and manslaughter."

32 See also Quick and Wells, above, fn.4, p.516, and Tadros, above, fn.8, pp.614-615.

33 The Commission states its expectation that "guidelines for sentencing in second degree murder cases will be set down by Parliament as part of any reforms to the law" (Report, 1.61), but it is not clear why this should be so. Appendix A puts the more limited argument that Parliament might wish to apply its "public policy" starting points (e.g. for cases involving firearms, or with police officers as victims) to murder 2 cases. This is most relevant to the first two heads of murder 2. Would Parliament wish to set down starting points for all 5 forms of murder 2? Currently it is the Sentencing Guidelines Council that provides such guidelines, e.g. *Manslaughter by Reason of Provocation* (Sentencing Guidelines Council, 2005).

34 Report, 2.147. In relation to the controversy over whether the partial defences should apply to the other two forms of murder 2, reducing them to manslaughter, it should be noted that the Commission shows no reluctance to allow infanticide as a defence to both murder 1 and murder 2: Report, 8.42.

35 See the article by Richard Taylor, below.

36 In Pt 5 of this Report, and more fully in Law Com. No.290, *Partial Defences to Murder* (2004).

37 See also W. Wilson, above, fn.4, pp.481-483.

38 Report, 2.141-2.145.

39 Report, 2.44.

40 Report, 6.1.

41 This reverts largely to the approach taken by the Commission in 1993: see Law Com. No.218, above, fn.16, critically reviewed by J. Horder, "Occupying the Moral High Ground? The Law Commission on Duress" [1994] Crim. L.R. 334.

42 Report, 6.45.

43 Report, 6.61; *cf.* also 6.48 and, more generally, Ashworth, *Principles of Criminal Law* (5th edn, 2006), Ch.4.9.

44 In the decision known as *Hasan* or as *Z* [2005] UKHL 22; [2005] 2 A.C. 467.

45 (1982) 74 Cr.App.R. 235.
46 Report, 6.79.
47 Report, 6.104.
48 See fn.42 above, *per* Lord Bingham at [28].
49 Cf. the forceful argument by Horder, above, fn 41, pp.335-337.
50 *Lambert* [2002] 2 A.C. 545.
51 A. Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10 E. & P. 241 at pp.267-268; see also I. Dennis, "Reverse Onuses and the Presumption of Innocence: the Search for Principle" [2005] Crim. L.R. 901 at pp.914-916.
52 Report, 6.107.
53 The plight of the young and vulnerable was a significant argument in the consultation paper, and is recalled in the Report at 6.46, 6.55 and 6.142. Such people would, on the Commission's view, have to prove their innocence in order to avoid a murder conviction.
54 Report, 6.109.
55 Report, 6.126-6.128.
56 For discussion and references, see Ashworth, above, fn.51, pp.263-266.
57 [2006] 2 Cr.App.R. 11; [2006] Crim. L.R. 911.
58 [2006] 2 Cr.App.R. 11 at [27].
59 *cf.* R.Taylor, "JuryUnanimity in Homicide" [2001] Crim. L.R. 283 and J. Rogers, above, fn.30, 229-232, with the relevant paragraphs in the Report, 2.117-2.121 and 2.132-2.145.
60 *cf.* Report, 2.142, with 2.68 and fn.25 above.
61 Adapting *Acott* [1997] 2 Cr.App.R. 94.
62 These complications are well illustrated by the survey reported in Appendix C to the Report, "Defences to Murder", by B. Mitchell and S. Cunningham.
63 Appendix A at A.4.
64 Report, 1.2-1.6.
65 Such offences have generally been ranked low on the scale by members of the public: see B. Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 B.J.Crim. 453.
66 These include causing death by careless driving while intoxicated and (since the Road Safety Act 2006) causing death by careless driving and causing death when driving while uninsured, unlicensed or disqualified.
67 Ashworth, *Principles of Criminal Law* (5th edn, 2006), p.59.
68 Report 1.10.
69 Report, 2.4.
70 Report, 2.25. See also the magnificent quotation at 1.71.
71 But not in respect of head (ii) of murder 2 where, for reckless killing, intending to cause "a risk" (any degree of risk?) of injury is sufficient: see part 2(b) above.
72 Report, 3.17.

