REPORTS

The Homicide Ladder[1]

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Dying, or at least the death of significant others, is one of the worst things that can happen to you, perhaps even *the* worst thing. Death is so bad that, at first sight, the way in which you die might not make all that much difference as far as you're concerned. That being said, people often think carefully about the way in which they would like to die: dying with dignity, for a noble cause, in one's sleep, of old age might seem relatively attractive options (though perhaps one can't have all those things). From the perspective of those who are left living, perhaps the mode of death makes even more of a difference. The death of a loved one may seem senseless or avoidable, and that might make that death all the worse. Those left living are often consoled by the fact that death was swift and painless, or that the deceased had time to prepare and say their last goodbyes, or that death was relatively timely, or that the central aims of the deceased in life had been fulfilled.

Being killed wrongfully seems to me to make death all the worse. Those that kill wrongfully, then, have reason not only to feel bad about having caused the death itself, but also to feel bad about its mode. That being said, death itself is sufficiently bad that our intuitions are often blunted about the mode of death. Even accidentally causing a death may result in sleepless nights, feeling incredible remorse and a strong desire to turn the clock back and to recompense. And the reaction of relatives left behind may not track the degree of wrongfulness of the killing very precisely. When death is caused it is a natural reaction to look around for someone to blame. In the law this is reflected by an expansive law of homicide: even grossly negligent killings, killings where perhaps the defendant has done everything in their power to prevent the death, in my view wrongly, fall within its ambit.[2]

The fact that our intuitions in attributing blame for death tend not to track the wrongfulness of the killing very accurately provides a powerful reason for the law to differentiate between degrees of wrongdoing more precisely. In distinguishing between different levels of wrongdoing, the law provides public guidance about how we should perceive the killer where it is needed most; where our intuitions, particularly if we are bound up with the deceased, often fail us.

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1 Analysis of the Law Commission *A New Homicide Act for England and Wales? A Consultation Paper* (No.177, 2005). Hereafter referred to as 'the consultation paper'. Unreferenced paragraph numbers refer to this paper.

2 *R* v *Adomako* [1995] 1 AC 171. For my criticisms, see V. Tadros *Criminal Responsibility* (Oxford: OUP, 2005) ch.3.

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This seems to lead us to develop a scale, or ladder, as the Law Commission in their recent paper *A New Homicide Act for England and Wales?* call it, of wrongdoing. The traditional way to construct such a ladder would be to use more or less traditional grounds of fault.[3] At the top we have intending to kill, second foresight of virtual certainty of death, third risking death, fourth failing to appreciate the risk of death where a reasonable or ordinary person would have appreciated that. Somewhere in that mix we might add a familiar attitudinal concept: indifference to death. We could draw our lines between homicide offences around those concepts. The more categories of offence we have, or the more rungs we slot into the homicide ladder, the more we differentiate between kinds and degrees of killing for the purposes of conviction.

However, things are not quite so simple. First, what about cases where very bad things are intended, but not death? Here we might argue that if the defendant caused death it matters not that he lacked a specific mental state associated with death, for he is in the same ballpark as the intentional killer. The law and the academic literature have tended to focus on non-fatal, non sexual offences against the person, as the kind thing that is most likely to contribute to death. We might add in other kinds of offences such as sexual offences, kidnapping, public order offences or property offences.[4] We are then invited to work out how to categorise incommensurable faults. Is it as bad to rape another as it is to risk the death of another? How big a risk? Is it as bad to directly intend very serious physical injury as it is to act foreseeing that one will be virtually certain to cause death? How serious an injury?

Second, the traditional mental state concepts are not the only factors which drive our intuitions about how wrongful on our scale a particular killing is. And we are likely to disagree about which other factors play a role. For some, sneaky poisoners are worse than courageous duellers. For others that way of thinking is driven by Victorian phallocentricism or worse. Those who believe it, however, might be willing to see a murder conviction for a sneaky poisoner who only risks death where a dueller who intends to kill might be seen as a mere manslaughterer. For some, the nature of the victim makes all the difference: killing those who are vulnerable is much worse than killing those who aren't. For others that should make no difference at all: that the victim was killed at all shows all the vulnerability that we should care about. For some, killing a child is particularly bad as children are all potential. For others that is to denigrate the value of the old, whose potential has more or less been realised. Reflecting on reform of the law of homicide, then, one is confronted with disagreement. Any single factor that is picked out to help to differentiate the law of homicide will make only a marginal difference, a drop in the tormented pool of contested moral concerns.

3 Compare W. Wilson 'Murder and the Structure of Homicide' in A. Ashworth and B. Mitchell (eds) *Rethinking English Homicide Law* (Oxford: OUP, 2000) who thinks that homicide offences should be distinguished by kind rather than degree. My sense is that the approaches don't really come apart. There are many kinds of killing, and the law should focus on differences in kind that reflect differences in degree.

4 See Wilson 'Murder and the Structure of Homicide' n 3 above for some suggestions.

The Law Commission approaches the difficult task of restructuring the homicide ladder using traditional *mens rea* concepts and partial defences. This is intended to provide the kind of transparent and rational structure that will feed effectively into decisions about the meaning of a mandatory life sentence now governed, in a harsh and rigid manner, by the Criminal Justice Act 2003.[5] One central purpose of the proposals is to ensure that it is only the most serious homicides that receive a mandatory life sentence and are therefore governed by the 2003 Act.

This is to be achieved by dividing the offence of murder into two categories of first and second degree murder, beneath which the offence of manslaughter would remain. Hence, where there are now two homicide offences there would be three. It would only be a conviction of first degree murder that would result in a mandatory life sentence. A consequence of this would be an overall increase in flexibility for the judiciary in disposal in cases currently categorised as murders, something that the 2003 Act was designed to prevent.[6]

The range of issues considered in the consultation paper is broad. It outlines proposals on complicity, to be developed in the future,[7] and applies them to murder. It considers the offence of infanticide. It also develops some proposals to adjust the role that partial defences play in the law. Partial defences would continue to provide opportunities for the defence to move between offence categories as is currently the case. However, it is proposed that the extant partial defences of provocation and diminished responsibility would only allow a move between first and second degree murder where currently they allow a defendant who fulfils the *mens rea* of murder to be convicted of manslaughter. Hence, partial defences would continue to have the role of ensuring that defendants who fall within them are not subject to the mandatory penalty that is to be reserved for first degree murder. The range of partial defences available would be broadened to cases of duress, which is currently unavailable as a defence to murder, and cases of killing with consent and diminished responsibility.

Overall, the Commission's preliminary proposals are impressive, imaginative and detailed. The range of issues considered is broad, and the technicalities in the area are addressed with vigour. However, there are also some weaknesses both in the offence definitions and the role of defences. The Commission have not done as much as they might to address some concerns about the common law.

I will not have space to consider every issue that is raised in the document. I will focus primarily on the definition of intention, the two categories of murder, and the role of partial defences. My main aim is to investigate the ladder that the Commission are considering and how one might move down it using defences if one would otherwise be on the highest rung, and consequently I will leave aside the detail in the redefinition of partial defences. I will also, for the most part, leave

5 The relevant provisions are outlined in Part 12, chapter 7.

6 For the history of the tussle between the Courts and the government over control over the effects of the mandatory sentence, see S. Shute, 'Punishing Murderers: Release Procedures and the "Tariff" 1953–2004' [2004] Crim LR 873.

7 See Part 5, which does not involve radical departure from the common law.

aside the Commission's views on complicity, on infanticide, and on the use of partial defences in mercy killing cases.

THE DEFINITION OF INTENTION

The definition of intention plays two roles in the offences proposed. First, the *mens rea* of first degree murder is proposed to be defined as intention to kill. Secondly, in the *mens rea* of second degree murder, which, alongside reckless indifference as to death, includes intent do serious harm.

As all criminal lawyers will be aware, determining the scope of intention is no straightforward matter. The literature on what the concept of intention captures, on whether intention is a descriptive or a normative concept, and on whether there is a determinate answer to those very questions themselves, is vast. Consequently, the whole of Part 4 of the report is devoted to the definition of intention.

Here I will raise two concerns about the Law Commission's discussion. First, it isn't as conceptually transparent as it might be. It perpetuates the mistake of providing a definition of intention which includes more than that word ordinarily suggests, which can only confuse juries, and which has implications for the discussion of some cases where the defendant cannot possibly have intended a consequence that he foresees as virtually certain. The Commission suggests that the ordinary meaning of intention is 'aim or purpose', but they are not of the view that restricting the legal definition of the term to that ordinary meaning would have sufficient scope for the purposes of the law of murder at least. And that is so for the reason that the ordinary definition would not include cases where it was not D's purpose to kill, but D was virtually certain to kill as a consequence of his actions.

I will suggest that they ought to abandon the question of whether belief in the virtual certainty of a consequence ought to be incorporated into the definition of *intention*. Instead they should focus on defining the *mens rea* of murder directly. The clearest way of achieving this is to restrict the definition of intention to its narrowest interpretation and to develop further rules for states of mind that are not intentions but which are sufficient to fulfil the *mens rea* of murder.

Secondly, the Commission refers to *knowledge* of virtual certainty that a consequence will occur as part of the definition of intention. I will suggest that it is *belief* of virtual certainty that is the appropriate concept rather than knowledge. As a person's knowledge is dependent both on their mental state and on the state of the world (in that one cannot know something that is not the case) the Commission oddly incorporate an objective element into the concept of intention. That element was also present in the *Woollin* approach, and even more explicitly, but it has counterintuitive consequences.

The Commission, at least in broad terms, endorses the position of the common law that has been developed through a line of cases ending in *Woollin* concerning the definition of intention. They have two alternative suggestions for the relevant direction to the jury with regard to intention. One suggestion is to codify a definition of intention which includes direct intention as well as knowledge of virtual certainty. The other is more or less to codify the *Woollin* direction. Either

way, knowledge of virtual certainty would provide part of the definition of intention for the purpose of the law of homicide at least.

As the report notes, *Woollin* doesn't provide a complete *definition* of intention. Rather it provided a sufficient condition for finding that D intended to *v* and an alternative condition which can contribute to a finding of intent to *v* if that sufficient condition is absent. The sufficient condition is that D acted in order to bring *v* about. The alternative condition is that D foresaw that *v*ing was a virtual certainty. If that alternative condition is fulfilled, the jury are 'entitled to find' that D intended to *v*.

One thing that has always been obscure about the *Woollin* direction is what the jury are supposed to do in cases where they think that the necessary condition has been fulfilled. In that case, they are *entitled* to find that D intended *v*, and this implies that they are not *required* to find that D intended *v*. This appears to give the jury an invitation to consider other factors that are relevant to determining whether D intended to *v*. But without any indication of what those other factors might be, what should they investigate? If the Commission are right that the ordinary meaning of the phrase 'intention to *v*' is acting 'in order to bring *v* about', it is difficult to see what could be added to foresight of virtual certainty that would make it an intention other than that D acted in order to bring *v* about, which would make the alternative direction suggested by *Woollin* redundant. So although it has been suggested that *Woollin* allows the jury some flexibility in determining whether D intended *v* based on ethical considerations, it is not clear that this is its effect in fact. For the jury are invited to look for *D's intention*, primarily a factual investigation,[8] not to determine whether he is *as culpable* as the person who intends the relevant consequence.

This problem arises primarily because of the attempt to meet two conflicting ambitions. The first ambition is to restrict the scope of the *mens rea* of murder to what is intended, and to draw a clear line between intention and recklessness. The second is to have a direction on the *mens rea* of murder that accommodates some cases where D did not act in order to bring *v* about. That requires the suppression of the thought that D doesn't intend to *v* just because he recognises that *v* was virtually certain to come about as a consequence of his actions. It is unclear why the Commission think that the best way forward in defining the *mens rea* of murder is to restrict it to an intention to kill, but then to define intention in a counter-intuitive way to include some cases in which, by their own lights, there is no such intention. Much better would be to get clear about the conceptual distinction between what is intended and what one believes is virtually certain and then to indicate that either should be sufficient for the *mens rea* of murder rather than treating the latter concept as part of the 'definition' of intention.

This confusion may seem trivial, but it has two implications. First, given that there is good reason to think that the relationship between direct and oblique intention should not be consistent through the law,[9] the Commission would

8 There is disagreement in the literature about how factual that investigation is. For my attempt to show that it is primarily factual, see V. Tadros *Criminal Responsibility* (Oxford: OUP, 2005) chapter 8.

9 See V. Tadros, 'The System of the Criminal Law' (2002) 22 *Legal Studies* 448.; *Criminal Responsibility* chapter 8.

invite different definitions of intention for different context, and that can only be confusing. Secondly, the definition leads to counterintuitive results in cases where the defendant acts precisely in order to avoid the outcome which he believes he is nevertheless virtually certain to bring about for the reason that failing to act in that way would make the outcome *even more certain*. The example that the Commission use was developed by Lord Goff.[10] Adjusted to fit the problem under consideration, it would read as follows:

> a father who is trapped in an attic floor with his two little girls. They are too frightened to jump. He recognises that if he does nothing they will definitely die. If he throws them out of the window, the only other alternative, they are virtually certain to die.

In that case, there is good reason for the father to choose to act in a way that is virtually certain to cause death. Where one wishes to avoid *v*ing, one is better acting in a way that is virtually certain to *v* than acting in a way that is *completely* certain to *v*.

Now, if D does *v* in those circumstances, it would obviously be wrong to say that he intended to *v*. This is for the reason that *v*ing was precisely the thing that he was trying to avoid. And one can't intend to *v* and try to avoid *v*ing at the same time. So defining intention in a way that includes such cases seems paradoxical: the law would stipulate that D intends to *v* when D in fact intends to avoid *v*ing. But to include those cases within the *mens rea* of murder, in contrast, is not paradoxical at all. Of course, we would not want D to be *convicted* of murder. But properly defined defences seem to be the ordinary way to ensure that. Acting in a way that D knows is virtually certain to cause death is normally sufficient description of D's mental state to mark him out as a murderer if indeed he kills. Unless he does so in order to avoid the certainty of death. In that case, D should be provided with a defence. This solution only appears unavailable to the Law Commission because they think that it is imperative that knowledge of virtual certainty is part of the definition of intention rather than an alternative to an intention to kill that is sufficient for the *mens rea* of murder.

The second problem with the proposal also stems from the common law. Although this is often overlooked, the *Nedrick/Woollin* direction includes an objective feature in the direction regarding foresight of virtual certainty.[11] That sits oddly with the ambition to provide a definition of *intention*, a subjective state, and it also has counterintuitive implications. Lord Lane's judgement in *Nedrick*, which was affirmed in *Woollin*, suggested that

> the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm *was a virtual certainty (barring some unforeseen intervention)* as a result of the defendant's actions and that the defendant appreciated that such was the case.'[12]

10 From the Nathan Committee Report, Report of the House of Lords Select Committee on Murder and Life Imprisonment, HL 78–1 (1989). Consultation paper, para 4.21–2 and 4.45–9.

11 See also the question posed in M. Allen *Elliott & Wood's Cases and Materials on Criminal Law* 8th Ed (London: Sweet and Maxwell, 2001) 107.

12 [1986] 1 WLR 1025 at 1028.

This direction focuses on the defendant's state of mind (his appreciation), but in reference to a fact *about the external world*. That idea is reflected in both the Law Commission's models for defining intention. The second model would more or less codify this direction. The first model would include 'knowledge of virtual certainty', either as a consequence of his action, or if his primary purpose were carried out.

This rules out of the scope of intention cases where the defendant believed that a result was virtually certain to occur, but where it was not in fact virtually certain to occur. Consider the facts of *Woollin* itself. In that case the defendant killed his three month old son after losing his temper and throwing him onto a hard surface. Now, suppose that, unbeknownst to the defendant the surface had soft patches such that it *was* no longer virtually certain that his actions would cause serious harm or death.[13] It would be odd to think that whether D intended to *v* could depend on a fact of which he was completely unaware. If liability is not to depend on such irrelevant facts about probabilities, the word 'knowledge' ought to be replaced with 'belief', a concept that is entirely subjective.[14]

Overall, then, I suggest that if the *mens rea* of first degree murder is to be confined to the range of cases that the Law Commission propose (on which, more in a moment), the jury should be directed along the following lines: a conviction of first degree murder would be competent only if the prosecution had proved beyond reasonable doubt that the defendant either intended to kill or (if this was a point in issue) believed that, through his actions, it was virtually certain that he would kill. If further direction on the meaning of intention was required, intention could be equated with purpose. This direction is relatively simple and straightforward, much more so than the *Woollin* direction. If there are cases which fall within this definition but where a conviction of first degree murder is inappropriate, defences should be created to ensure that justice is done.

FIRST DEGREE MURDER

A more significant way in which the suggested *mens rea* of first degree murder is distinguished from the current *mens rea* of murder in English criminal law has to do with the *content* of the intention required. Whereas intent to do serious harm is sufficient for a conviction of murder, first degree murder would be committed only if D intended to kill. As the mandatory life sentence would be restricted to first degree murder by the Law Commission, this would involve increasing the sentencing discretion of judges in homicide cases beyond cases where intent to kill is proved.

One obvious concern that might be expressed at this is that it will be difficult to prove intent to *kill* in particular,[15] although if one thinks that intent to kill

13 It might be argued here that, given the trajectory of the throw, death or serious injury would have been virtually certain even were that the case. However, that thought would be akin to denying the existence of risks, in contrast with perception of risks, altogether.

14 I shouldn't talk as I make the same error in *Criminal Responsibility* ch.8 above n 8. It might be necessary to exclude beliefs that are outlandish or far removed from the way in which the *actus reus* comes about, an issue that is familiar from discussion of impossible attempts.

15 Wilson above n 3, 24–26.

describes the appropriate level of culpability that point should not have too much weight. One ought to be disinclined to warrant first degree murder convictions in cases where one cannot be sure that the defendant was at fault to the requisite degree.[16] The Commission questions the foundation of this evidential concern, however. They point out, firstly, that it is difficult to know how many convictions result from the jury finding intent to serious harm where they would not have found intent to kill. Secondly they point to the conviction rate of attempted murder (80–90 cases per year), the *mens rea* of which is intent to kill, which suggests that juries are not unable to find intent to kill.[17]

As I have noted above, the Commission may be motivated by the fact that they were not permitted to consider abolition of the mandatory life sentence, and so this might be seen as a laudatory strategy to restrict its application as much as possible. Whether it is best seen in strategic terms will depend on whether the most serious homicide offence ought to be restricted to cases where the defendant intended to kill on moral grounds.

Now, for the reasons suggested in the introduction, any reasonably precise and restricted criteria for distinguishing levels of homicide will involve inappropriate categorisation. Second degree murder is distinguished from first degree murder only in terms of degree of fault rather than in the *kind* of conduct that it captures. It may be easier to draw rational distinctions between offences by kind than by degree. When thinking about how to rationalise property offences for example, it makes sense to distinguish between theft and robbery even though there will be instances of theft that are worse than instances of robbery. Whilst the label robbery is perhaps more stigmatic than theft, in that it is mostly the case that robbing is worse than stealing, a really bad thief is still a thief. If one can find the core wrong of an offence, the label becomes appropriate when that wrong is perpetrated, regardless of how bad an instance of that wrong it is.[18]

When distinguishing between offences in terms of degree, in contrast, we are likely to be presented with the general problem that I referred to in the introduction that there are many things that can contribute to the relative badness of one's conduct. So any particular feature of the conduct that we focus on in definition will involve exclusion of other features that carry moral weight. Furthermore, as I have already noted, the moral weight of particular factors is likely to be a contested issue.

One advantage that the Commission claims for restricting the *mens rea* of murder to intent to kill is that it satisfies the correspondence principle. That is, the content of the *mens rea* refers to the *actus reus* of the offence. Of course, it has been

16 Para. 3.6. In my view this concern stems from the presumption of innocence. See , 'The Presumption of Innocence and the Human Rights Act' (2004) 67 MLR 402 and 'Rethinking the Presumption of Innocence' *Criminal Law and Philosophy*, forthcoming.

17 Paras 3.6–3.7. Of course, it is difficult to interpret the reasons behind the conviction rate in attempted murder cases. It may be that juries have no difficulty in identifying intentions to kill. But it may also be that even if they cannot identify intentions to kill, they are willing to convict on the basis of something less despite the letter of the law. If a strict law of murder will not be applied in practice, that would be some reason, even if it is not decisive, to define first degree murder in a more expansive way.

18 That's not to say that all offences must have core wrongs. See V. Tadros 'The Distinctiveness of Domestic Abuse' in R. A. Duff and S. P. Green *Defining Crimes* (Oxford: OUP, 2005).

questioned whether this truly is a general principle of the criminal law. It has been argued, by Jeremy Horder, himself now a Commissioner, that the principle of proximity is a stronger principle than the correspondence principle on the grounds that if the content of the *mens rea* was in the same ballpark as the *actus reus* of the offence, the defendant can no longer claim that the worse consequence that the victim suffered was just bad luck.[19] Indeed that very principle appears to drive the definition of second degree murder, which I discuss below. The implicit view of the Commission, then, is that the defendant who satisfies the correspondence principle is 'worse' than the defendant who does not.

But this is open to question. First, we might question whether it is always, or even generally, worse to intend to kill than to intend serious injury. Think of the worst serious injury that you can: say the defendant intends to cause the victim severe and long term pain and mental and physical disability. If the defendant kills the victim, we might say that it was a small mercy that the victim died rather than suffer the consequences intended by the defendant. If one thinks that the value of life is dependent entirely on its quality,[20] intending that one's victim only has a life of negative quality may well be worse than intending their death.

Secondly, we might doubt whether intending death is always worse than risking death. Take the well known example of the terrorist who exposes the victim to the risk of death in order that he can create fear and alarm. It might be argued that there is no moral distinction to be drawn between that case and the case of the person intending death. Perhaps exposing others to serious risk of death in complete absence of justification is insufficiently distinguished from intending to kill to justify the category difference that the Commission propose. At any rate, as death is so bad, it becomes somewhat difficult to draw these distinctions in a very precise way.

Furthermore, the proposals suggest that the relevant difference between cases will be in the *quantity* of the risk that D exposes V to. The difference between first and second degree murder is the difference between killing when death is *virtually* certain and killing when death is less certain than that, say highly probable or almost certain. Elsewhere, the Commission think that the attitude of D towards V's death is at least as important as the quantity of risk as far as second degree murder is concerned, although I will raise some concerns about that in a moment. So why does quantity of risk play such an important role in distinguishing first and second degree murder?

SECOND DEGREE MURDER

Overall, the proposals envisage a broader category of murder than is available in England and Wales at the moment, effectively covering all cases currently covered by both English and Welsh and Scots law. The definition of murder in England and

19 See 'A Critique of the Correspondence Principle' [1995] Crim LR 759. For Horder's excavation of the principle from the law, see , 'Two Histories and Four Hidden Principles of *Mens Rea*' (1997) 113 LQR 95 Horder vacillates between calling it the principle of 'proximity' and the principle of 'proportionality'.

20 See J. Raz *Value, Respect, and Attachment* (Cambridge: CUP, 2001) chapter 3 for an argument of that kind.

Wales is in a way narrower and in a way broader than that in Scotland. It is narrower in that it is only intentional conduct, as outlined in *Woollin*, that is covered. But intent to do serious harm is sufficient. In Scotland, intent to do serious harm would not be sufficient if the accused was not wickedly reckless, which is more or less defined as indifference as to death.[21] But proof of intent *to do anything* would not be required to warrant a conviction. So if the accused takes a risk with the life of another, that might result in a murder conviction even if grievous bodily harm was not directly intended or a virtually certain consequence of his action.

Despite some concerns about the flexibility or vagueness of the Scots law of murder, it is certainly the view of most criminal lawyers north of the border, as well as some commentators to the south,[22] that it would be wrong to restrict the scope of murder to cases of intent. Exposing one's victim to a serious risk of death ought to be capable of grounding a murder conviction. For example, D drives his car at 70mph down a busy street with the police in hot pursuit. He drives up onto the pavement without caring about the consequences and V is hit and killed. The Commission, I think, are right to include such a case within the law of murder.

If recklessness is appropriately defined, including the English-style alternative *mens rea* of intent to serious harm is more or less redundant. After all, almost all cases in which D intends to cause serious harm to V involve the appropriate degree of recklessness. Hence, in Scotland although intent to do serious harm is insufficient for a conviction of murder, in almost all cases it would be sufficient evidence of wicked recklessness and would result in a conviction. In cases where D intends seriously to harm V but does not believe that there is a risk of death serious enough to constitute the *mens rea* of murder in its own right, it might be questioned whether a murder conviction is appropriate. However, it might be argued that if the defendant is broadly in the same moral ballpark as the person who intends death, a conviction would be justified in the absence of such a risk. Certainly, the proposals on this issue would mark a significant improvement on the current state of English law by providing a proper definition of serious harm.[23]

Overall, having two alternative *mentes reas* of second degree murder, broadly along the lines suggested by the Commission, could be defended. The main difficulty, I think, is the definition of the recklessness limb of the *mens rea*. This limb is labelled 'reckless indifference' and is defined as follows:

> D is indifferent, manifesting a "couldn't care less" attitude to death, when he or she realises that there is an unjustified risk of death being caused by his or her conduct, but goes ahead with that conduct, causing the death. D's own assessment of the justifiability of taking the risk, in the circumstances, is to be considered, along with all the other evidence in deciding whether D was recklessly indifferent and "couldn't care less" about causing death.[24]

21 For a more detailed consideration, see 'The Scots Law of Murder', available on the Law Commission's website.

22 See Wilson above n 3; Lord Goff 'The Mental Element in the Crime of Murder' (1988) 104 LQR 30.

23 The suggestion, in para. 3.119, is that serious harm is defined as 'harm of such a nature as to endanger life, or to cause, or to be likely to cause, permanent or long-term damage to a significant aspect of physical integrity or mental functioning.'

24 Para 3. 150.

This is intended to capture cases in which the defendant is 'willing to tolerate' death in pursuit of his or her ends.[25]

Aside from its general complexity and opacity, there are two main difficulties with this test. The first concerns the focus on a particular attitude of the accused. Whilst this idea has received some academic support,[26] it wrongly narrows the focus of the *mens rea*, excluding cases where the defendant cares about whether death is caused, but unjustifiably thinks that there are reasons to take a risk.[27] This relates to the second difficulty: the defendant's assessment of the justifiability of the risk is deemed to be relevant. But it is not clear how. If the defendant's conduct is not in fact justifiable, even partially so, how can his wrongful assessment that it is justifiable exonerate him? I will consider these points in turn.

It is a general feature of life that sometimes one must do something which one wishes to do, despite recognising the negative consequences that flow from one's conduct. If one recognises those negative consequences, one is not indifferent to them. One acts in recognition of the wrong that one perpetrates, but regards the wrong as justified. Sometimes people get those judgements wrong, even spectacularly wrong. This is one motivation for the alternative *mens rea* of foresight of virtual certainty in the *Woollin* judgement. If D *v*s knowing that death or serious injury is virtually certain to occur, the fact that D regrets death or serious injury makes little odds as far as far as D's culpability is concerned. This is particularly so if, contrary to D's view, there are no reasons in favour of *v*ing. The classic example of D who puts the bomb on the plane to get the insurance money, believing that it is virtually certain that death or serious injury will occur, illuminates this idea. The fact that D regrets killing the passengers makes little difference to our assessment of D's culpability. And this is particularly so because trying to get the insurance money by blowing up the plane is itself wrong.

This idea militates strongly against using terms like 'indifference' or 'couldn't care less' in the definition of offences. For there will be cases where D regrets exposing V to a risk of death, but where he thinks it's worth it in fulfilling his own purposes. That D is, in the Commission's terms, 'willing to tolerate' V's death does not indicate that he is indifferent to V's death.

Of course there may be reasons in favour of exposing V to the risk of death, and those reasons might contribute to us thinking less badly of D even if we think that D's action was unjustified all things considered. So if D exposes V to the risk of death in order to save the whales or rescue his marriage we might be inclined not to think as badly of D as we do of the person who is indifferent as to death. But if D thinks that his action was justified for wholly abominable reasons, we may even think worse of D than we do of the indifferent defendant. For example, if D thinks that he is justified in exposing V to the risk of death in order to cover up his illicit business selling child pornography or ensuring that he gets away with the money from a bank robbery, the fact that he regretted death has at best little

25 Para. 3.154–6.

26 R. A. Duff *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990), although Duff is concerned with *practical* indifference as manifest in conduct rather than the mere attitude itself. That may be what the Commission have in mind as well. See para.3.165–3.166.

27 For other criticisms of the indifference test, see Wilson above n 3, 29–31.

purchase on our evaluation of his conduct when comparing him with the indifferent defendant.

This exposes both weaknesses with the indifference test that I alluded to above. If the defendant cared about the victim's life, but not enough to outweigh his desire to do something else wrongful, he ought not to be distinguished from the indifferent defendant, but that is precisely the effect of using the term indifference in this context. Here's an example:

> D is a member of a police force, but he's been robbing banks on the side. At a robbery, members of his force turn up and try to arrest him. He thinks that the only way that he'll get away is if he fires several shots at them at them exposing them to the risk of death. However, the members of the force are his friends, and he would deeply regret killing anyone. He wants them not to be killed. But he doesn't think that firing in the air will be enough to prevent them from capturing him. One of his officer friends is hit and killed.

D isn't indifferent as to the death of the officer. He regrets it. But that ought not to make him less culpable for it. The fact that he thought that exposing his force to the risk of death was necessary in order that he could get away from the crime scene ought to be sufficient to justify a conviction of murder whether he cares about the death or not.[28]

The Commission's proposals, it might be argued, capture such cases by defining indifference around what D deems to be justified. He might think it *necessary* to expose the police officers to the risk of death, but does he really believe that he is *justified* in doing so? However, his *assessment* that he was justified cannot contribute anything at all to our assessment of his culpability. The fact that he *thought* that it was justified is irrelevant if he in fact wasn't justified. This is one important truth in the dogma that the criminal law excludes evidence of motive from *mens rea* decisions. That D thinks that *m* is a good reason to *v* can carry no weight in our moral assessment of *v*ing unless *m* is a good reason to *v*.[29] If D thinks that firing at the police officers is justified because he needs the money to fulfil some goal that he deems worthy, say to spread the Christian word, that does not make him less culpable, particularly in the eyes of atheists who have no truck with his ideals.

An alternative would be the much simpler idea that D is reckless as to the death of V if he knowingly exposes V to a substantial and unjustified risk of death. This would still leave open a potential role for partial excuses, such as coercion and provocation, if, contrary to the proposals, those defences are to be made available to reduce second degree murder to manslaughter. The worry with that proposal is that it does not do enough to distinguish between higher and lower risks of death. So, for example, driving round a blind corner over the speed limit might fulfil the *mens rea* of murder, and yet a conviction of murder in such cases seems too harsh. Furthermore, defendants will generally not have the quantity of risk present to

28 It's worth noting that this also creates concerns about evidencing the defendant's attitude. In the context of Scots law, see the different approaches taken in *Broadley* v *HMA* 1991 SCCR 416 and *Halliday* v *HMA* 1998 SCCR 509 which I discuss in the Overseas Comparative Study, available on the Law Commission's website.

29 See *Criminal Responsibility* above n 8, chapter 8 for further discussion.

their mind when they take that risk. But if there are no special epistemic problems in the case, that should not be relevant to establishing culpability.

Some have argued that it is having as one's *aim* exposing another to the relevant risk that distinguishes murder from manslaughter. For example, William Wilson[30] suggests that directly intending to expose one's victim to mortal danger would provide the appropriate *mens rea*. However, that doesn't capture the right cases either.[31] It fails to include defendants who are willing to take a very high risk of the death of others for wrongful purposes, but who hope that the risk will not be realised. For example, the driver attempting to escape the police by driving at 70 mph up the pavement of a busy shopping street does not have as his aim exposing others to mortal danger, but the risk of death is so high that a murder conviction would seem to me appropriate.

One suggestion would be to develop Wilson's idea to include oblique as well as direct intention. Perhaps 'believing that he was exposing someone to mortal danger' would be better. The phrase 'mortal danger' sends the appropriate message to the jury that the risk of death must be high without restricting their analysis to purely quantitative concerns. Alternatively, the jury could be directed that if the defendant *heinously* exposes the victim to an unjustified risk of death, which would have the advantage of allowing the jury to take into consideration the distinction between directly intending to expose the victim to the relevant risk and doing so only obliquely at the margins without entirely excluding the possibility of a conviction in either kind of case.

If an approach like that is taken, it is crucial that the direction is supplemented either by a range of examples where a murder conviction would be competent, or by some of the relevant considerations that might help to determine that, or both. One thing that might help would be to focus the minds of the jury on the nature of the offence. They might consider whether the defendant's conduct is deserving of the stigma associated with the crime of murder. It might be objected that referring to the label of murder to define murder is circular.[32] But using the stigmatic quality of the offence label to help guide the jury about the ambit of the offence is not circular at all. It invites the jury to reflect on whether the defendant's conduct deserves the stigma that would be imposed on him by conviction. There is arguably no clear and precise formula which determines that, rather there are a range of factors that the jury could use to direct their judgement. The law should articulate, either in an open or a closed list, the relevant factors for consideration, as decided upon democratically, in order to ensure that there is broad consistency between cases.

THE ROLE OF PARTIAL DEFENCES

One way of adding to the factors that can come into consideration in determining the category of offence which a killer falls into is through partial defences. Partial

30 Above n 3. See also A. Pedain, 'Intention and the Terrorist Example' [2003] *Crim LR* 579.
31 See *Criminal Responsibility* above n 8, chapter 8 for the argument.
32 See, for example, the Law Commission's own criticisms of *R* v *Adomako*, 'Involuntary Manslaughter' Law Com No. 237 (1996), para. 3.9.

defences allow consideration of factors which tend to erode responsibility or reduce blameworthiness for the death for the purposes of categorisation. Once again, there is a debate about whether morally relevant factors should be recognised in the form of defences or rather at the sentencing stage. The Commission's views about partial defences were outlined in detail in their 2004 report and full consideration is beyond the scope of this paper. I will restrict myself to commenting on the role that partial defences have in moving the defendant down the homicide ladder before making a few more general points about the range of defences available.

If an additional rung were added to the homicide ladder, what would be the role of partial defences? Where there are only two rungs on the homicide ladder, as is currently the case, the only role that a partial defence could play is to move the defendant from the higher to the lower rung. Of course, there is still the question of whether equivalent defences might provide a complete defence to manslaughter, about which more in a moment.

In this context it should be recalled that the common law on complicity, which is more or less reflected by the proposals of the Commission, is very broad, particularly in cases of joint enterprise. If D agrees to commit an offence with P and believes that P *might* commit murder in the course of their enterprise, D will be liable for murder if P does so. The agreement between D and P might be to commit a very minor offence, and the likelihood of P committing murder may have been very small. This is potentially expansive and unfair in itself, but it is particularly problematic given a restricted palette of partial defences.

One model would be to allow a successful defence to move the defendant one rung down the ladder. Two successful defences might move him two rungs down. So if the defendant is charged with first degree homicide, but successfully raises the defences of provocation and diminished responsibility, he would be convicted of manslaughter, where either one of those defences alone would be result in a conviction of second degree murder. And then there is the question of whether the defendant can ever fall off the bottom of the ladder, which in the present law is not permitted. Another model would allow different degrees of defence. So a defendant charged with first degree murder, but provoked a bit, would be convicted of second degree murder. But extreme provocation would result in a manslaughter conviction.

The suggestion of the commission is broadly pragmatic in the following sense. Partial defences have a role to play only if it would have 'practical' consequences for the defendant. Given that the mandatory life sentence would be limited to first degree murder, and there is to be discretion in sentencing for the two other main offences, there are two ways in which the defendant can benefit practically from the use of a partial defence. A defence might ensure that the defendant is not subject to the mandatory life sentence by removing him from the category of first degree murder, or it might result in an acquittal.

As far as provocation and diminished responsibility are concerned, the suggestion is that they would only recategorise those charged with first degree murder as second degree murderers. Duress, on the other hand, would be a partial defence to first degree murder, but may be available to ensure an acquittal if the defendant is charged with second degree murder or manslaughter.

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Here we might wonder why partial defences do not play different roles in categorisation. If the point of the ladder principle is to ensure that defendants are categorised on the rung of the ladder commensurate with their degree of wrongdoing, there would seem good reason to allow partial defences a role in moving between categories of the ladder regardless of the sentencing consequences. The Commission recognise that provocation may make killing with intent less culpable. So there is no reason why it can't have the same effect on killing with intent to cause serious harm. If the defendant who is provoked into intentionally causing serious harm is less culpable than the defendant who acts in the same way in the absence of provocation, why should he not be entitled to climb down one rung of the ladder? Given that there will not be many cases in which the prosecution can prove intent to kill, the Commission's proposals, if enacted, would ensure that provocation and diminished responsibility would play only a very minimal role at trial, pushing fundamental issues of culpability to the sentencing stage.

The Commission's argument against this is that if diminished responsibility and provocation were available as defences to second degree murder, they should also be available in respect of other offences.[33] But that is unconvincing. Most other families of offences do not reflect the ladder principle. But even where that principle is adopted, as in non-fatal non-sexual offences against the person, it is driven by consequences rather than pure fault. It would hardly be consistent with the principle of fair labelling to allow provocation to reduce a charge of an offence involving intent to do GBH to a conviction of an offence expressing that the defendant intended only ABH. The provocation can't affect the content of the intention, and if that is part of the offence label itself, provocation can't be available as a partial defence. On the other hand, if there were offences of assault 1 and assault 2, there would be good grounds to allow provocation to operate as a defence to the more serious assault.

Secondly, one wonders why it is only duress that is available to provide a complete defence to a homicide offence. One thing that might be thought to distinguish duress from provocation and diminished responsibility is that duress might potentially be a justification as well as an excuse. Threats to oneself or one's family might justify some degree of violence, albeit not death. Although one is not justified in killing, one might be justified in intending some lesser harm or some risk of harm in appropriate cases. If that is the case, one should not be convicted of a homicide offence if one unfortunately causes death. If one is only excused it might be argued that one is still at fault for killing, and therefore that one is not entitled to a complete defence.

However, there are complete excuses to criminal offences. For example, whilst some in some cases the insanity defence should exempt the defendant, other cases are appropriately categorised as excuses.[34] Of course, as far as diminished responsibility is concerned, there is good reason why it is not available as a complete defence. The whole point of the defence is that the defendant retains some responsibility for his conduct. It's not as though a defendant who has diminished respon-

33 Para. 6.28.
34 See *Criminal Responsibility* above n 8, chapter 12 for a defence.

sibility with regard to killing has no responsibility at all with regard to lesser harms. If the defendant wishes to argue that he has a complete lack of responsibility for his conduct due to mental disorder he should be utilising the insanity defence. Reform of diminished responsibility ought not to be used to mitigate failings in the insanity defence.

But things are less clear with regard to provocation. Provocation might appropriately be a complete defence to minor assaults, for example. To take a classic example, the defendant who is told by the victim that the victim raped his daughter might be justified in slapping the victim. Indeed, this position is defended by Horder.[35] If the victim falls over and dies, a typical thin skull case, it might be argued that provocation should provide a complete defence to manslaughter. Justified defendants have done what is permissible on the balance of reasons. The unlucky consequence of causing death can't make the defendant's conduct of intentionally slapping unjustified.

The Commission might have thought about developing a broader range of partial defences. Where duress and provocation operate as excuses, they tend to be structured in the following way. The defendant has justification for getting into a certain emotional state, anger in the case of provocation or fear in the case of excuse. In that state, we cannot expect the defendant to make his behaviour conform to the reasons for action that he would normally recognise. This suggests three ways in which more colours might be included on the palette of defences.

First, it might be that the emotions that ground the two defences included can be justified by things other than provocation or duress. The defence of duress is restricted to threats made by third parties to induce the defendant to commit the offence. But fear might be induced by natural threats or threats by individuals which are not intended to induce the offence. Should not such emotional disruption also partially excuse, perhaps in the form of a partial defence of necessity?

Secondly, it may be that there are other emotional states that excuse in this way beyond anger and fear.[36] Indeed, it is recognised that depression might have such consequences by the commission in relation to carers who kill the terminally ill people that they care for.[37] There might be further examples focussed on compassion. Perhaps there should be a general defence of extreme emotional disturbance, which would recognise the range of emotional states that might excuse of which provocation and duress would provide instances.[38]

Finally, it may be that the law should recognise excuses where the defendant is not justified in getting into the relevant state, but rather lacks responsibility for getting into that state. In particular, there ought to be a partial defence of involuntary intoxication to murder to reflect that idea. If the defendant has a bad reaction

35 *Provocation and Responsibiltiy* (Oxford: OUP, 1990) 134–135 and 160.

36 See R. A. Duff 'The Virtues and Vices of Virtue Jurisprudence' in T. Chappell (ed) *Values and Virtues* (Oxford: OUP, forthcoming) and S. Uniacke 'Emotional Excuses' *Law and Philosophy*, forthcoming.

37 See Part 8 of the Consultation Paper.

38 See American Law Institute, Model Penal Code (ALI 1985) s.210.3(1)(b) for a general defence of this kind. The general wording of the section, it seems, is not matched by its interpretation, but is rather used in provocation cases. See C. Finkelstein 'Report on the Basic Aspects of the Law of Murder in the United States', appended to the Consultation Paper.

to an intoxicant which makes him very aggressive, there might be reason to give him a partial defence even if his state does not deprive him of intent to kill. Or the defendant who is given a drug which makes him much more suggestive or compliant against his will should perhaps be entitled to such a defence in joint enterprise cases. Admittedly there will be relatively few cases such as this, but that is not a reason against making the defence available.

I will not advocate any particular model of partial defences here, but I do think that further consideration has to be given to their role than has been done by the Commission in the consultation paper. If the rationale for adding rungs to the homicide ladder is primarily fair labelling, then it is important that defendants are categorised according to the appropriate level of fault. Consider familiar cases where the defendant responds to persistent domestic abuse with violence. Short of establishing self-defence, the abuse would become relevant to the offence category only in cases where the prosecution has proved intent to kill. Even in cases where the defendant intended only serious harm, the proposals would warrant a conviction of second-degree murder, the abuse being relevant only to the sentence. I think it wrong that if the defendant falls just outside the defence of self-defence she would be automatically labelled a murderer.

CONCLUSION

Reforming homicide law is a difficult enterprise. The moral significance of death requires the law to differentiate carefully between different levels of culpability. But the range of factors affecting culpability is broad. Consequently, reform can be assessed on a scale between two extreme options. One extreme would be to pick on some of the most significant factors that tend to mark out levels of culpability at the expense of others, incorporate them into offence definitions and defences, and define them precisely. This has the virtue that the law will tend to be applied in a more consistent manner. But it is at the cost of flexibility. A consequence will be that some cases in higher categories will be less serious than cases in lower categories on grounds that the law is blind to. The other would be to define offence categories using broad moral standards. This allows all relevant moral factors to be taken into account. But it is at the cost of consistency. Disagreement between different juries about which factors are morally relevant and the weight to be assigned to them will result in factually similar cases being categorised differently.

The law at present is, in a sense, the worst of both worlds. Some morally significant elements such as common *mens rea* concepts are picked out, but poorly defined. A narrow range of partial defences does some work to avoid the worst consequences of that, but not nearly enough to result in a system that is even broadly fair. Couple that with the rigid structure of tariff setting outlined in the 2003 Act and it would be a great surprise if the practical consequences were not systematically unfair.

The Commission's proposals would remedy some of these defects significantly. They would restrict the application of the 2003 Act to a smaller category of cases, and they have picked out one of the most morally significant features in assessing

killing, intent to kill, to define that category. They would also increase the range of partial defences available to ensure that a broader range of significant factors affect categorisation.

However, some defects still remain. The definition of offences excludes too much relevant information from the category decision. Furthermore, the range of partial defences would still, in my view, be too narrow to reflect the justifications and excuses that ought to be made available to defendants. Perhaps more importantly, extant partial defences would only operate in relation to first degree murder, but as there will be relatively few cases in which intent to kill can be proved, the use of those defences will be restricted. A consequence is that the category difference between second degree murder and manslaughter would reflect moral differences between cases only in the crudest manner.

This would result in many of the significant issues being decided at the sentencing stage rather than at the trial itself. Criminal justice scholars, as well as their students, can be tempted by the thought that if it is possible to achieve at the sentencing stage, we need not worry too much about categorisation. But that should be resisted.[39] Aside from practical considerations, in convicting defendants, criminal trials ought to declare publicly established knowledge about criminal wrongdoing. Treating very morally significant features of the defendant's conduct as having a bearing only on sentencing fails to appreciate this fundamental role of trials. It treats the trial as a merely instrumentally valuable, as a way of identifying who is to be subject to decisions about punishment, rather than as intrinsically valuable in its declaratory role.

39 See also Wilson above n 3, 24.

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