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A Confluence of Authority and Critique

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Critical Notice

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A Confluence of Authority and Critique

[Review of *The Law of Homicide*, by Christine Boyle, Isabel Grant & Dorothy Chunn, (Toronto: Carswell, 1994).][1]

It is a measure of my enthusiasm for the scholarship of the authors of this rich new text that I responded with uncharacteristic ardour to the request to write a review. In fact, at first I rather lost track of the approach to its grisly subject matter which a legal text must take, recalling instead George Orwell's evocative portrayal of the use of stories about murder as recreation:

> It is Sunday afternoon . . . You put your feet up on the sofa, settle your spectacles on your nose, and open the *News of the World*. [A delicious meal has] put you in just the right mood. Your pipe is drawing sweetly, the sofa cushions are soft underneath you, the fire is well alight, the air is warm and stagnant. In these blissful circumstances, what is it that you want to read about?
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> Naturally, about a murder.[2]

Reading about murder in the news, seeing it portrayed on the long-running British television series *Inspector Morse*, or pondering it as one digests *Crime and Punishment* are in many ways far preferable to studying, teaching or practising the law of homicide. After a few chapters, and particularly following my re-immersion into the cold substantive law of homicide which commences in chapter 3, one is certainly reminded that this is not a work to read as a pastime in "blissful circumstances". It is, nonetheless, a remarkably good book in terms of its breadth, authority and originality in approach and substance. It marks a point of some maturation in Canadian legal scholarship in several senses. It presents a comprehensive discussion of the most serious of crimes, long the subject of the treatise writer, but its looseleaf format permits a regular updating of the law as Parliament and the courts contribute to its evolution in the

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1. *The Law of Homicide* is available both as a softcover text (448 pp.) and an updatable looseleaf version.

2. George Orwell, "Decline of the English Murder", in *Decline of the English Murder and Other Essays* (Penguin, 1968) at 9.

post-*Charter*[3] era. Thinking back on my review of another recent publication, Don Stuart's *Charter Justice in Canadian Criminal Law*,[4] I recalled my analysis of the utility of writing a conventional book in these times:

> My conclusion on the matter of currency of this book is that it may no longer be possible or useful to write other than a looseleaf volume, which purports to state the law "as of . . . ," such is the rate of change.[5]

Here the authors have wisely chosen to provide a regular updating service, which will help to avoid the now ominous spectre for Canadian authors of what one writes today being out-of-date tomorrow. Indeed, between the time I started preparing this review (September, 1995) and the time when I was able to finally concentrate upon it (January, 1996), the authors were kind enough to send me the revisions for the 1995 edition to chapters 3, 4 and 5, so that some of the comments I might earlier have made have been eclipsed. Even so, some juridical events occurred after their forwarding of these chapters and the others had not yet been sent to me.

The book is also noteworthy in Canadian scholarship for what it represents in other ways. It is a collaborative effort, representing the work of three prolific women scholars. The authors are consistent in their emphasis on understanding "issues relating to the sexual politics of homicide."[6] They are concerned to explore how the law should "respond to the use of homicide as a mechanism for controlling women?"[7] This candid dedication to portraying the law of homicide from a feminist perspective is surely to be welcomed in an atmosphere where legal texts often pose as presenting only black letter law from a value neutral stance. One hopes that the book will enjoy a circulation commensurate with its quality, but in addition its widespread use would contribute to the prospects of a shift within the criminal bar away from its patriarchal anchors. As recently as ten years ago one would have thought the chances of putting together such a major treatise with an avowedly feminist slant, getting it published and eventually seeing it relied upon by the profession, were slim. Perhaps the times are changing (and not a moment too soon).

I always have some reservations about offence specific books. Although they may be of interest to the practitioner who has a case arising

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3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
4. D. Stuart, *Charter Justice in Canadian Criminal Law*, (Toronto: Carswell, 1991).
5. H. Archibald Kaiser, "Keeping up with Criminal Law in Post-*Charter* Canada", Reviewing *ibid.* vol. 5, 1 (1994), Criminal Law Forum 105 at 107.
6. *Supra* note 1 at vi.
7. *Ibid.*

from the particular subject-matter, these works seldom provide the site for discussion and speculation on the classical themes of criminal justice. Fortunately, the special nature of homicide provides what is otherwise missing from such books. Homicide cases are typically litigated by senior practitioners, before trial judges who are relatively scrupulous in their discussion of the facts and the law for the jury and are then considered by successive appellate courts. The offence therefore provides what theft or assault may not, a body of facts and law that is given the highest level of attention by the legal system.

The book is unique in terms of its concentration on the law of homicide in Canada. Other works have canvassed the same field, indeed for hundreds of years, but homicide has never been quite as exhaustively presented in Canada. One might well ask if anything new is added by this text. In examining Dalhousie's collection of rare books on the subject, I was quickly made aware that many of the basic issues the authors explore are certainly timeless. For example, I read a fragile original text from 1773 which considered many of the same aspects of homicide:

> The proper distinction [between manslaughter and murder] to be observed is, when the *intention* of *killing* is not necessarily *implied* in the act itself; as when a man strikes another merely with his hand, or fist, in sudden anger; or thrusts him suddenly from him, whereby he falls and receives a hurt, which occasions death; in these and similar cases, the striking, or thrusting is, indeed, *voluntary*, yet the *killing* or *manslaughter* is not so, but entirely undesigned and unexpected; which proper and necessary distinction the Law Commentators have unhappily neglected. For, though the act of *striking or thrusting in anger* bears some resemblance to *malice*, and though such act is certainly *unlawful in itself*, yet it is reasonable to make some allowance for the frailty of human nature, and the sudden passion of a man that is provoked, whenever *a more criminal malice* is not necessarily *implied* in *the act itself*, which occasions death.[8]

Sharp's short work not only addressed many of the same problems, but did so with the same dedication as these authors. He tried to analyze the origins of some of the existing doctrines of law, showing where the commentators and jurists had erred, focusing on the phenomenon of duelling, which he maintained was too often seen as a lesser homicide, when to him it was clearly murder. For the most part, the authors of *The Law of Homicide* are similarly rigorous in their analysis of the modern incarnations of homicide, seldom content to accept the status quo without carefully scrutinizing its origins and its implications.

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8. G. Sharp, *Remarks on the Opinions of Some of the Most Celebrated Writers on Crown Law, Respecting the Due Distinction between Manslaughter and Murder* (London: White and Horsefield, 1773) at 26–27.

In its consciousness of the relationship of gender and homicide, and to a lesser extent such other influences as sexual orientation and race, the book demands a re-examination of the common wisdom. It does so in a manner which is challenging, but never arrogantly dismissive of existing jurisprudence. Its reach could be extended in many areas, but this is a relatively minor criticism of such an ambitious book. For example, subsequent editions might well be as sensitive to other relevant factors such as mental disability or social class, points of view which have not infused the rest of the work to the same extent as the aforementioned factors. Similarly, the authors decided to avoid a thorough discussion of other related topics, such as war crimes and homicide by corporations, although both types of killing and the authors' rationale for not covering them are briefly mentioned.

I believe that the usefulness of the work would have been improved had there been a bibliography organized by subject. As it stands, it is copiously footnoted and has a comprehensive table of cases, but a topical consolidation would be extremely helpful, particularly of the secondary sources referred to. Subsequent editions might contemplate providing more tactical, strategic and generally professional advice for the criminal practitioner, who is, after all, its intended audience. Even acknowledging that the book deals with the *law* of homicide, there is still room for additional levels of guidance for the lawyer, judge or legislator dealing with these issues. One would not want the book to fundamentally change its character, but when examining shorter and less doctrinally weighty works, such as *Defending Mentally Disordered Persons (1995)*,[9] one sees the contribution to a practitioner's life that a book can offer. This type of material could be either a companion piece, an additional chapter, or integrated into the existing text.

More fundamental for subsequent editions is the authors' working through some of the conundrums raised by their outlook on many aspects of the elements of offences and defences. Thus, for example, the authors say that they "have tried to pay attention to what might be termed 'equality' issues, focusing, for instance, on questions on the relevance of race, gender, economic power, and mental disability in the development of legal doctrine",[10] yet they also argue for a retention of the mandatory minimum sentence for murder,[11] the difficulties of which are examined in this review. Perhaps these and other positions, set forth in their

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9. H. Bloom & R.T. Butler, *Defending Mentally Disordered Persons (1995)* (Toronto: Carswell, 1995).
10. *Supra* note 1 at 7-91.
11. *Ibid.* at 7-55.

"Conclusions" need to be re-examined. These authors have demonstrated a sufficient grasp of the moral, political and legal dilemmas inherent in the current legal structure regarding homicide to entitle them to offer some overarching theory of crime and punishment (or some alternative to the current punitive response to anti-social behaviour). It may be that they have already reached their positions after sufficient thought and I am merely disagreeing with some of them, such as the mandatory minimum sentence for murder, but as I point out later, the book would benefit from extended conclusions. Given the symbolic significance and legal influence of any discussion of murder, the overall effect of this work might then reverberate beyond its concentration on homicide.

Most of the balance of this review will be occupied by discussion of portions of the individual chapters and will therefore be more specific. For any book that is to be taken seriously, this has always seemed to me to be an important part of the reviewer's responsibilities, to not only critically evaluate the book, but to actually convey in some form or other what the authors have said. Although I and others may take issue with some of their perspectives on occasion, nothing in this review should be seen as diminishing this author's admiration for this singular achievement in Canadian criminal law.

In the Preface, the authors set forth their ambitious agenda: "to provide legal practitioners with an analysis of the criminal law relating to homicide in Canada."[12] The book omits few major questions in Canadian law with respect to homicide although, of course, it is possible that subsequent editions may pick up some of the themes that the authors have chosen to ignore. Therefore, the work does contemplate the major criminal offences, such as murder, manslaughter, infanticide, attempts and causing death by criminal negligence. On the other hand, there are killings which are given less coverage in the book, in part because they have been largely neglected by legislators, investigators and courts, such as death caused by the workplace or dangerous products. The authors have demonstrated in the first two chapters (and interspersed throughout) that they do have a grasp of the many levels of analysis which should be engaged in to achieve a full understanding of their topic. The express orientation of the book towards legal practitioners may mean that some of the authors' more challenging perspectives are either not included in the book or are given short shrift. Therefore, one might have wanted them to be more specific in their analysis of "the use of homicide as a

12. *Ibid.* at v.

mechanism for controlling women"[13] or the extent to which "the criminal law [should] be used to deter business decisions which put lives at risk".[14] If subsequent editions of the book do not contemplate more explicitly these and other issues which are regrettably unconventional for a legal text, one hopes the authors will continue their writing in the field in other publications.

Chapter 1, "The Social Reality of Homicide", is relatively unusual in a book ostensibly examining a single type of offence from a substantive perspective. Rather than immediately leaping into the elements and available defences, the authors have chosen to deal with very fundamental questions about the nature of homicide in Canada. Following a brief definitional discussion, killing is presented as another aspect of deviant behaviour which is "a relativistic, socially-constructed phenomenon; a shifting set of labels or statuses which reflects the priorities and interests of more powerful individuals and groups in a society at a given moment."[15] This level of understanding leads the authors to discuss the "gendered nature of killings."[16] The chapter goes on to provide an illuminating survey of the "Demographics of Homicide", highlighting the fact that "non-culpable homicides far outnumber culpable killings"[17] in Canada, that the "average" homicide perpetrator "usually kills someone like himself and someone he knows",[18] and that there are some startling anomalies in the phenomenon of homicide, such as the dramatic overrepresentation of Aboriginal peoples among homicide perpetrators and victims. Finally, the chapter recognizes that the "legal definitions of homicide"[19] inevitably cause the "focus on some offences and offenders rather than others",[20] decisions which are viewed as "not only political but also ideological in nature."[21] One might well wonder what the practitioner, to whom the book is dedicated, is going to do with information such as this, but this portion of the text should not be dismissed as being too arcane. Lawyers ought to have a clearer conception of the social context of the offences in which they become involved. There might even be an independent practical benefit to this analysis, perhaps with respect to the sentencing process, parole applications or attempts at influencing the exercise of prosecutorial discretion.

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13. *Ibid.* at vi.
14. *Ibid.*
15. *Ibid.* at 1-2.
16. *Ibid.* at 1-4.
17. *Ibid.* at 1-9.
18. *Ibid.* at 1-11.
19. *Ibid.* at 1-17.
20. *Ibid.*
21. *Ibid.*

Chapter 2, "Criminological Theories of Homicide", continues in this remarkable and expansive tradition. In reviewing the classical, positivist, critical and feminist schools of criminology, the authors reveal different answers to some key questions:

> Why is (culpable) homicide so overwhelming a lower-class male phenomenon? Do we need sex-specific theories of homicide? What accounts for the disproportionate number of homicide perpetrators from racial and ethnic minorities?[22]

This meta-explanation enables one to stand outside hegemonic accounts of homicide so that in accepting the dominant explanation, one understands that it is a choice, rather than a necessity to rely upon assumptions such as universal and equal rationality in examining homicide. Given the grounding of Canadian criminal law in variations of the classical or positivist models, one might again ask about the utility of this interesting and authoritative synthesis in this chapter for the practitioner. While the courtroom is an unlikely venue for a direct debate among causal theories, it is nonetheless possible to construct arguments either in the pre-adjudicative or sentencing stages of a criminal trial which borrow from the range of explanatory theories presented in this chapter. To illustrate, it might be useful for counsel to try to establish how his or her client fits in with common paradigms and related explanatory frameworks for a particular type of killer, such as the woman who kills a child, and who therefore does not fit into the usual "assumptions" that all women are "natural" mothers and no "normal woman could possibly commit such a horrific act."[23]

Chapter 3 reviews the common elements of all culpable homicides, starting with some remarks on the boundaries of "human" for purposes of determining homicide. The following section canvasses ways of determining whether death has occurred and particularly addresses the potential conflict between a bio-medical perspective and legal definition on the cessation of life. The authors point out that for determinations of death and other issues such as causation, different interpretive routes may be taken depending upon whether one is concentrating upon subjective culpability of the accused or the harm caused by the accused.[24] Although they observe that "the Canadian criminal justice system has traditionally opted for a mixture of the culpability and harm approaches but without much reflection on the appropriate balance",[25] it is not at all clear whether

22. *Ibid.* at 2-1.
23. *Ibid.* at 2-19.
24. *Ibid.* at 3-17.
25. *Ibid.* at 3-18.

there is a way of reaching a conceptual balance which will be helpful in all, or even most, contexts. The authors do include a helpful discussion of reform options both here and in most other parts of the book, so that the lawyer should be well aware of the possibilities of development in the area, whether in common law settings or through legislative activity.

The chapter also considers the many thorny issues involved in causation of a death. Although as a law teacher I enjoy presenting these problems because of their complexity, the irreconcilability of the cases and the interrelationship with fault, the percentage of cases where the interpretation of causation actually matters to an accused must be small indeed. The authors observe that "[o]ften, the causal connection between an accused's act (or omission) in a death will be obvious",[26] but beyond this, one is left to wonder about the opportunity cost of so many Canadian legal scholars anxiously pondering a legislative or curial solution to causation issues in the literature. While synthesizing this extensive scholarship very competently, the authors do manage to contribute some insightful suggestions. For example, they propose that "it is not self-evident that the causation test for manslaughter should be more relaxed than that for murder",[27] arguing that "one could see this issue in precisely the opposite way and argue that, because we require such a high degree of fault for murder, a rigorous causation test is not necessary."[28] The chapter concludes with a discussion of some reform options, although it does not mention such documents as the Report of the Sub-Committee of the House of Commons[29] or the June 28, 1993 White Paper,[30] both of which were released after the 1992 Canadian Bar Association proposals which the book does note.

Liability for killing by omission is acknowledged as a substantive issue arising with other offences.[31] Their review of general principles and specific cases is, as always, thorough, although at times one feels that the authors speak with sufficient authority to permit them to suggest their conclusion sooner, that most forms of culpable homicide can be committed by omission. Similarly, although the authors have provided an

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26. *Ibid.* at 3-20.
27. *Ibid.* at 3-39.
28. *Ibid.*
29. Blaine Thacker, Chair, *First Principles: Recodifying the General Part of the Criminal Code of Canada*, Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General (February, 1993).
30. Proposals to amend the Criminal Code (general principles), The Minister of Justice of Canada, June 28, 1993 (draft bill). There are also accompanying Ministerial Speaking Notes released in *Justice Information* on the same date.
31. *Supra* note 1 at 3-51.

argument "in favour of holding corporations responsible for culpable homicides"[32] they need not have been quite so painstaking in pointing to their conclusion. On the other hand, it is perhaps this reviewer's fundamental concurrence with at least these major propositions that motivates a tolerance of less thoroughness. Given the possible influence of such a comprehensive work, the authors' devotion to detail is not so much a criticism as an observation that they have captured what may be a policy consensus on many major issues in homicide.

In chapter 4, the book commences with a quick recommendation for the dispatch of the "Year and a Day" rule as well as the anachronistic declaration that homicide cannot be committed "(a) by any influence on the mind alone".[33] The chapter continues with an analysis of the *actus reus* of unlawful act manslaughter, which the authors conclude could be that of "any unlawful act (from provincial absolute liability offences to federal *mens rea* offences) causing death",[34] as long as the fault requirement for the unlawful act is at least "a marked departure . . . plus the fault requirement for the consequence of death",[35] which would "permit such provincial offences as breaches of health and safety legislation to be included as unlawful acts".[36] In this and other portions of the book the authors seem to be gravitating fairly consistently to a tolerance or encouragement of the expansion of the boundaries of culpable homicide, grounded in an acknowledgement of the harm caused in this crime, rather than in more individualistic assessments of culpability. They are probably not breaking any new ground here. The authors seem to share the perspective in *Creighton*,[37] that a marked departure from the standard of the reasonable person is required to sustain a conviction for unlawful act manslaughter, although they review the issues of what one uses as the "base line level of care"[38] and the extent to which an accused must fall below the standard which has been established.

The book examines the issue of "whether the deliberate assaulter, but accidental killer, could be convicted of manslaughter [arguing that] it would be unfair to convict the accidental killer of manslaughter",[39] a perspective which appears to be somewhat inconsistent with their willingness to push the limits of culpable homicide with respect to other

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32. *Ibid.* at 3-70.
33. Section 228 of the Criminal Code.
34. *Supra* note 1 at 4-15.
35. *Ibid.*
36. *Ibid.*
37. *R.* v. *Creighton*, [1993] 3 S.C.R. 3.
38. *Supra* note 1 at 4-17.
39. *Supra* note 1 at 4-20.

elements of manslaughter. On the other hand, the authors do want to provide some control over the criminal sanction in homicide, which they see the Supreme Court as having demanded in a foreseeability of bodily harm which is neither trivial nor transitory, rather than a foreseeability of death.[40] The chapter then dissects culpable homicide by criminal negligence, concentrating on the offences of manslaughter by criminal negligence and causing death by criminal negligence.

The authors lament the failure of the Supreme Court to explicitly define "wanton or reckless disregard",[41] although they observe that "current Canadian law is leaning toward, or even has already adopted, an objective test [which is] consistent with the balance of authority in the Commonwealth generally."[42] The subsection contains an argument for bringing "to the surface of judicial analysis"[43] "such assumptions about social utility and the appropriate scope of manslaughter",[44] as seem to be implicit in judgments construing disregard for the lives or safety of other persons, where there is some tacit assumption that "some activities are socially useful and, therefore, should not attract criminal liability for a homicide."[45] The chapter also ponders issues regarding the comparatively rare problems of the homicide being caused by threats or wilfully frightening a person.

The book considers murder, noting that although it is "now virtually taken for granted",[46] "the use of the mental state as the determining factor between the two crimes [of murder and manslaughter] is not self-evident."[47] A section of the chapter is devoted to the distinction between the actual intention and recklessness strains of liability under s. 229 of the *Criminal Code*,[48] in which the authors note the difficulty in drawing a line between foresight of substantial certainty of death (equivalent to intention after *R. v. Buzzanga*[49]) and knowledge of a likelihood or probability of death, constituting recklessness.[50] If the accused had a belief that the death was possible only, although not likely, a conviction for manslaughter is the only available verdict. The authors argue that "intention should extend to someone who knows that his or her actions will cause death,

40. *Ibid.*
41. *Ibid.* at 4-25.
42. *Ibid.* at 4-27.
43. *Ibid.* at 4-28.
44. *Ibid.* at 4-28.
45. *Ibid.*
46. *Ibid.* at 4-34.
47. *Ibid.*
48. R.S.C. 1985, c. C-46 [hereinafter *Code*].
49. *R.* v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).
50. *Supra* note 1 at 4-40.

even if that is not the actor's primary purpose for acting."[51] They expand upon the distinctions between "likelihood" and "possibility" later in the chapter, approving the approach in *R. v. Piri*,[52] in which the New Zealand Court of Appeal took the approach that "a fine calculation that the odds were against it, although the risk was plainly there, is no defence."[53] Sections 229(b) ("by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being") and 229(c) ("where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death") are discussed as well. The difficulty of analyzing these subsections after several recent decisions from the Supreme Court provides a forceful argument for the reformulation of the homicide provisions in a manner that would eliminate overlap and uncertainty.

Section 230 of the *Code*,[54] the constructive murder provision, is unconstitutional as a result of several decisions, although it remains in the *Code*.[55] The authors do set out how the section operated in order to provide a foundation for their subsequent presentation of the various Supreme Court of Canada cases.

The book elucidates the constitutional dimensions of fault represented by the *Vaillancourt*[56] and *Martineau*[57] decisions, explaining the reluctance of the Court to extend the insistence upon subjective foresight of death to the other homicide provisions. The result of judicial decisions in the area is acceptable to the authors, because it has "produced a defensible structure . . . [with] an offence of murder which is tilted toward an emphasis on culpability . . . in addition to a less serious offence of manslaughter tilted towards the recognition of the harm in causing death and oriented toward encouraging people to take care to avoid causing that harm."[58]

There is an extensive treatment of the impact of the *Charter* on various types of defences: those that involve a challenge to the objective component of a defence that relates to an element of the offence; those that concern an objective component of an excusing or justifying defence; and those that would address limiting conditions on existing defences, other

51. *Ibid.* at 4-41.
52. [1987] 1 N.Z.L.R. 66 (C.A.).
53. *Ibid.* at 78.
54. *Supra* note 48.
55. *Ibid.*
56. *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636.
57. *R.* v. *Martineau*, [1990] 2 S.C.R. 633.
58. *Supra* note 1 at 4-69.

than objective standards in the application of defences. In addition, "the *Charter* could be used to challenge the removal of a defence in the context of homicide",[59] in response to which the authors specifically consider s. 33.1 of the *Code*[60] introduced through Bill C-72 as a response to the *Daviault*[61] decision on extreme intoxication in general intent offences. In the end, the authors plead for caution as courts evaluate such legislative attempts to limit defences, recognizing that

> [w]hile adequate concern must be given to protecting the liberty interests of the accused, it must also be recognized that limiting conditions on defences serve the purpose of providing limits on when violence will be tolerated and, as such, of providing more protection for the victims of violence.[62]

The book relates the obstacles in trying to give retroactive effect to *Vaillancourt*[63]/*Martineau*[64] type developments, where a court has invalidated a criminal provision, specifically here in the context of s. 230. The reluctance of the courts to intervene and give full effect to their decisions should not frustrate the pursuit of justice. They concur in Professor Manson's suggestion that "the Royal prerogative of mercy should be used to deal with those offenders for whom the mandatory period of parole and eligibility is excessive."[65] With the recent establishment of the Self Defence Review chaired by Judge Ratushny to investigate those cases of women convicted of homicide who might have benefited from an application of *Lavallée*[66] or like decisions, there is now a firm precedent for both the initial use of such mechanisms and a procedure which may be employed. In subsequent editions, the book should develop suggestions as to how this approach was reached in that context, as well as how one might lobby for it in others, together with a discussion of the eventual actual findings and recommendations of the investigator, as this route should become part of the practitioner's armoury.

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59. *Ibid.* at 4-72.
60. *Supra* note 48.
61. *R.* v. *Daviault*, [1994] 3 S.C.R. 63.
62. *Supra* note 1 at 4-75-76.
63. *Supra* note 56.
64. *Supra* note 57.
65. *Supra* note 1 at 4-77.
66. *R.* v. *Lavallée*, [1990] 1 S.C.R. 852. The Terms of Reference of the Self Defence Review acknowledge that "there have been developments in our understanding of the law of self-defence as it relates to battered women who have been involved in abusive relationships." Judge Ratushny is empowered, *inter alia*, "to make recommendations in appropriate cases to the Government of Canada for individual women whose circumstances merit consideration for the granting of royal prerogative of mercy." Department of Justice, *Self Defence Review: Terms of Reference* (Canada: October 4, 1995) [on file with Author].

The authors present a consolidation of reform proposals for the law of murder, as well as their own recommendations, which would in the main simplify the crime to be that of:

> Any act or omission, done with the intent to kill a human being (or recklessness with respect to death) which does kill, should be sufficient for murder and there is no further need to inquire into whether there was an unlawful act, criminal negligence, etc. The definition of murder should include express reference to the possibility of murder by omission where there is a duty to act. We support a definition of murder that includes intentional murder and reckless murder.
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> Meaning to kill, or knowing that one is almost certainly going to kill, should constitute intentional murder.[67]

The underpinnings of the crime of infanticide are critically examined and, while the authors note that "it is difficult to draw any conclusion from the conflicting literature about the extent to which medical and social factors influence postpartum disorders",[68] they ask some fundamental questions about the apparent premise of the law, "that women who kill their children while suffering from such a condition should be treated as a special category of offender."[69] The authors note that without the offence-creating provision of s. 233, "a woman who wilfully killed her newborn would be charged with murder, or at least manslaughter"[70] and therefore the section has the effect of offering a defence. Although the authors identify many levels of difficulty with respect to the crime of infanticide, including the application of prosecutorial discretion and constitutionality, they conclude by saying that "the offence of infanticide is constitutional", based upon their recognition of the "unique pressures and strains faced by a new mother that have no equivalent in new fathers."[71] The authors believe that trying for murder a woman who kills her newly-born child is too harsh.[72] The options they canvass include abolition of the offence, with the result that such women would be charged with murder or manslaughter, although there is some equivocation as to the applicability of the mental disorder defence in such circumstances. A second possibility would be to permit a defence of diminished responsibility, which recognizes the transitory nature of postpartum disorders. The third option reviewed "would be to abolish the offense of infanticide and to enact a defence related to postpartum

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67. *Supra* note 1 at 4-78.
68. *Ibid.* at 4-87.
69. *Ibid.* at 4-85.
70. *Ibid.* at 4-89.
71. *Ibid.* at 4-98.
72. *Ibid.* at 4-101.

disorders."[73] This recommendation strikes one as being highly unusual, given that it would raise one particular disorder to a position of prominence, when there are many variations of mental disability which affect new mothers and others.

In considering the implications of retention and abolition of this crime, the authors observe that the former option connects reproduction and criminality and signals compassion, while the latter suggests that mothers who kill their newly born children would be held just as responsible as anyone else. Although Crown discretion is recognized as a way of avoiding these alternatives, it would seem that it is just as compatible a method of confronting some of the essential dilemmas to merely eliminate the minimum penalty for murder, thereby preserving judicial discretion in sentencing, which could contemplate everything from evidence of disorder which did not satisfy the mental disorder prerequisites, to social, economic and physiological factors which were relevant in the commission of the offence. At various places in the book, this difficulty of a sentencing structure setting the stage for the substantive framework is noted. For example, at the beginning of s. 6.11, "Diminished Responsibility", the authors observe that "like other defences to murder, the doctrine developed largely as a result of the inflexible sentencing structure for murder."[74] A similar observation occurs in the sentencing section.[75]

Chapter 5 begins with a discussion of s. 21(1) of the *Code*[76] which makes the actual committer as well as any aider and abetter, culpable parties to an offence. The section reviews the basic elements of party liability, clarifying the *actus reus/mens rea* distinction with regard to murder and manslaughter and explaining the possibility of a party being guilty of a different form of homicide from the principal offender. The section evinces a clear understanding of the effect of s. 21(2) of the *Code*,[77] which deals with the situation where two or more individuals agree to commit an offence and one of them commits a further offence. The various combinations of liability particularly in the wake of the *Martineau*[78] and *Creighton*[79] decisions are fully canvassed.

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73. *Ibid.* at 4-102.
74. *Ibid.* at 6-122.
75. *Ibid.* at 7-54.
76. *Supra* note 48.
77. *Supra* note 48.
78. *Supra* note 57.
79. *Supra* note 37.

There is a succinct but accurate discussion of the rarely used s. 22(1) of the *Code*,[80] which punishes as a party one who counsels the commission of an offence. As in other instances, the authors explain their interpretation of the law clearly and demonstrate their willingness to tolerate a conviction in a wide variety of circumstances, where an undiluted subjectivism might have countenanced another course.

Chapter 5 also presents the crime of attempted murder, on the basis of its being an included offence to murder and therefore "of obvious importance to the subject of this book."[81] The authors discuss the extension of the *Vaillancourt*[82] and *Martineau*[83] rulings to the crime of attempted murder, as it too is seen as a special stigma crime, requiring subjective intention, without the attenuation of recklessness. The authors are concerned with the exclusion of reckless attempts, citing arguments on both sides of the issue, but supporting the extension to include recklessness that many critics have recommended. The ensuing discussion of the *actus reus* of attempted murder illustrates the difficulty involved in trying to state a test of broad utilizability, touching as well on the problems in cases involving impossible attempts. There is some brief attention to included offences and attempts with respect to other types of homicide.

Chapter 6 examines "an eclectic mixture of arguments that can lead to acquittal or a reduced verdict, other than denials of the most straightforward elements of the homicide offences."[84] Provocation is analyzed first, as "a defence steeped in sexual politics, since its users are primarily male."[85] One eagerly awaits their assessment of the Supreme Court decision in *Thibert*,[86] which sadly seems unresponsive to their critique of provocation. Although it is undeniable that the cases are replete with instances of sexist and homophobic invocations of the defence, the reviewer is unaware of any authoritative research in the Canadian context examining national patterns of use of this defence over time. In any event, the section clearly makes the point that "the standard of self-control and anger itself are social constructs" and "the content of the ordinary person test is likely to contain significant messages about the interaction of anger/self-control and race, gender, age, etc.",[87] noting the "increasing recognition of the difficulties inherent in the use of an 'ordinary person'

80. *Supra* note 48.
81. *Supra* note 1 at 5-1.
82. *Supra* note 56.
83. *Supra* note 57.
84. *Supra* note 1 at 6-2.
85. *Ibid.* at 6-4.
86. *R.* v. *Thibert*, [1996] S.C.J. No.2 (Q.L.).
87. *Supra* note 1 at 6-11.

test in multicultural systems of law."[88] The authors offer a compelling argument that it is "legitimate for the law to label someone a murderer for killing his wife because she was leaving him or for killing, because of extreme homophobia, a man perceived as gay."[89] Although they consider most of the arguments raised by the partial defence, the discussion would have been enriched had the authors provided a section on law reform and more particularly turned their minds to the question of whether the defence should exist at all or whether it is merely another artifact of the awkward distinction between intentional killers who receive the minimum mandatory sentence for murder and intentional killers who benefit from the discretionary sentencing regime of manslaughter.

In contrast, the authors present a relatively abbreviated account of a defense of intoxication, which they are satisfied is considered comprehensively elsewhere.[90] Although at the time of the writing of the first edition, the landmark decision of *Daviault*[91] had not been handed down by the Supreme Court of Canada and the response of Parliament in the form of Bill C-72 had not been devised, the authors are somewhat prescient in their observation that "barriers to intoxication as a defence to manslaughter will dissolve in due course."[92] In the 1995 (Release 1) edition, the authors defend the constitutionality of Bill C-72, particularly on the basis of the need to inform any analysis of its constitutional implications by a consideration of the equality implications of the use of the defence of intoxication.[93]

Defence of the person is analyzed from the perspective of the doctrinal development in *Lavallée*,[94] rejecting any notion that *Creighton*[95] has eroded the applicability of the former case in the Court's "stressing the importance of a uniform standard."[96] The authors simply argue that the *Lavallée*[97] case requires the decision-maker to be informed "of the overall context in applying" the relevant standard.[98] They celebrate the "willingness to take a contextual approach"[99] to self-defence and explain some of the implications of this doctrinal accretion "with respect to the perspectives

88. *Ibid.* at 6-17.
89. *Ibid.* at 6-20.
90. *Ibid.* at 6-30.
91. *Supra* note 61.
92. *Supra* note 1 at 6-35.
93. *Ibid.* at 4-75.
94. *Supra* note 66.
95. *Supra* note 37.
96. *Supra* note 1 at 6-43.
97. *Supra* note 66.
98. *Supra* note 1 at 6-43.
99. *Ibid.* at 6-44.

of members of disadvantaged groups whose experiences are unlikely to be mirrored in those of judges and to a lesser extent juries".[100] There are also some difficult questions posed in the chapter, with respect to the Supreme Court's rejection of "'excessive self-defence' as a device for convicting of manslaughter rather than murder."[101] Whether the law should impose a duty to retreat and the implications of such a requirement, particularly for disadvantaged groups such as battered women or others, for whom a safe exit may be either not within the accused's knowledge or itself contain many risks, are discussed. Some ancillary issues are noted, such as the constitutionality of an objective test of reasonableness and the possible alternative justifications for the use of deadly force offered by s. 35 (where the accused was the original aggressor), and s. 37 (the use of force to prevent an assault) and s. 27 (use of force to prevent commission of an offence).

The presentation of the defence of duress (in the 1994 version) will be revised in subsequent editions following the decision in *Hibbert,*[102] which responds to some of the questions that the authors raise. The case may also demand some revision of the previous review of the duty to retreat issue in self-defence, as the Court emphasizes the importance of the accused's having had an opportunity to safely extricate himself or herself from the situation of duress. The necessity defence is assessed from the perspective of whether it should be available as a defence to murder, which the authors seem to support, at least to the point of rejecting the position of the Law Reform Commission of Canada that necessity should be unavailable: "the matter should not be dealt with by a blanket rule, which could provide an unfair contrast with duress and self-defence, but rather by an application of general principles."[103] The following section, "Protection of Persons Acting Under Authority", requires revision in light of the passage of s. 25(4) of the *Code*[104] with regard to the use of deadly force by peace officers.

The ensuing survey of the mental disorder defence is unremarkable, although it does present its major features following the substantial changes to the *Code* in 1992.[105] Again, updating will be necessary to reflect the subsequent *Oommen*[106] case from the Supreme Court of Canada. Involuntariness, in the guise of non-insane automatism, is

100. *Ibid.* at 6-45.
101. *Ibid.* at 6-46.
102. *R.* v. *Hibbert*, [1995] 2 S.C.R. 973.
103. *Supra* note 1 at 6-75.
104. *Supra* note 48.
105. S.C. 1991, c. 43, s. 4.
106. *R.* v. *Oommen*, [1994] 2 S.C.R. 507.

presented with some concentration on the insistence of the objective test governing psychological blow of automatism, which the authors see as potentially giving scope to "racist, homophobic and misogynist assumptions", although it is noted that "there is little support for this in the case law."[107]

The concluding subsection, "Potential Defences (Consent)", reviews some of the major issues with respect to the ability to consent to one's death, unfortunately again written in the period prior to the release of the Senate Report on these issues, which highlights the major policy arguments inherent in changing the law with respect to assisted suicide and euthanasia.

The final chapter, "Sentencing", starts with a short history of the abolition of the death penalty in Canada. Although irrelevant as a current penalty, the ugly spectre of its revival must always be considered and some reference to developments after the 1987 vote by Parliament should be included.

There follows an extensive discussion of the various ways in which a killing can be elevated to being designated a first degree murder, with the accompanying twenty-five year minimum period of ineligibility for parole. The closing with its concerns over the excessiveness of the penalty and the values which the first degree murder classifications represent, presents some interesting commentary on the relevant sections of the *Code*.[108] However, given the courts' acceptance of the classificatory scheme of Parliament, there seems to be little point in hoping that a challenge can be based upon any of these arguments. The following section regarding sentencing for second degree murder will require revamping in the face of the Supreme Court's decision in *Shropshire*,[109] although many of the factors discussed in the book will still be relevant to the decision to fix an extended period of parole ineligibility. The Supreme Court has preserved the salience of the character of the offender, the nature of the offence and the circumstances surrounding the commission of the offence, all factors set forth by Parliament in the text of s. 744. The *Shropshire* case also discusses the assessment of future dangerousness, denunciation and deterrence. Therefore, the analysis of the use of evidence relating to mental illness, intoxication, age, criminal record, guilty plea, status of the victim, brutality, premeditation and so on, all of which are reviewed in the book, will still be pertinent to preparation for a second degree murder sentencing. Where *Shropshire* will be of particular

107. *Supra* note 1 at 6-117.
108. *Supra* note 48.
109. *R.* v. *Shropshire*, [1995] S.C.J. No. 52 (Q.L.).

relevance to the authors is in its requiring a more deferential attitude on the part of courts of appeal in examining decisions on parole ineligibility, which specifically reject "a standard of appellate review that was tantamount to substituting its opinion for that of the trial judge."[110]

The discussion of the "reform of sentencing for the crime of murder" reinforces the inter-relationship of substantive law and sentencing, and repeats the point that "the sentencing scheme for murder has also complicated the substantive law of murder in that it has led to the development of defences aimed at avoiding the harshness of the sentence".[111] However, having noted this relationship and the extensive academic and quasi-governmental discussion of the topic, the authors nonetheless conclude that "the mandatory life sentence for murder should be retained",[112] as parole ineligibility reflects "our outrage at Canada's most serious crime."[113] This is one area where the innovative spirit of the rest of the book seems curiously absent. Perhaps later versions will either reflect a change in perspective or more support for their rather hard-line position than the book currently offers. The authors do endorse the abolition of degrees of murder, suggesting that "one crime of murder is adequate so long as there is some flexibility in sentencing for that crime."[114]

The consideration of sentencing ranges and factors in attempted murder contains the conclusion that the case law shows that "attempting to kill a loved one is generally seen as a mitigating factor in sentencing, [leaving] women (and possibly children), often the victims of such assaults, inadequately protected by the law."[115] The authors conclude that while guilt is largely determined based on a culpability model, "the harm analysis has a greater role at the sentencing stage of attempted murder."[116] It is uncertain whether this observation will still be viable after s. 718.2 of the *Code*[117] becomes effective, which contains a list of factors which aggravate a sentence in normal circumstances, including the offence being "motivated by bias, prejudice or hate" or the offender abusing "a position of trust or authority in relation to the victim".[118]

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110. *Ibid* at 17.
111. *Supra* note 1 at 7-54.
112. *Ibid.* at 7-55.
113. *Ibid.*
114. *Ibid.*
115. *Supra* note 1 at 7-62.
116. *Ibid.* at 7-64.
117. *Supra* note 48.
118. *Act to amend the Criminal Code*, S.C. 1995, c. 22, s. 6.

The manslaughter sentencing cases are assessed, acknowledging the discretion given to judges and the huge variation in actual sentences. The extremes of life imprisonment and non-custodial sentences are cited first, followed by a review of factors which might become influential in the more typical cases. Drawing from sources such as Ruby[119] and Nadin-Davis,[120] the authors both reveal some of the existing sub-classifications of factors and offer a critique of some of the more troublesome ones.

The "Conclusions" are too compressed in their four pages, as they contain a discussion of recent history and the possibilities of dramatic changes in current trends in sentencing. Although the authors note "the historical over-representation of the disadvantaged in the criminal justice systems of western nations" and "a growing population of long-term prisoners",[121] the conclusions are disappointing in their reach and substance, given the general thoroughness of this book and the obvious breadth of knowledge of the authors. The authors recognize the conundrums of some of the positions enunciated in their work, with some of their arguments leading to less punitiveness and others sounding "like a call for more, and more finely-tuned, retribution, which fails to take into account the brutalizing effects of lengthy imprisonment on individuals."[122] The focus of the book is said to be "on the internal priorities and methods of reasoning of the present law [rejecting] paralysis as an option in the face of the social reality of homicide".[123] Although they again defend their choices as being consistent "with a much broader search for a humane system of criminal justice,"[124] little is offered by way of either methods of understanding or proposals for achievement of such visions. An extended conclusion, more consonant with their declared long-term aspirations, would be desirable in a major scholarly work such as this. Part of the influence of such works is toward changing some of the norms of the criminal justice system and while the authors seem to accept this challenge on an incremental basis in the midst of various chapters, a conclusion that provides more by way of transformative ideals or aspirations and recommendations would be a welcome addition.

In the final analysis, this book is of such a quality that its publication should continue with regular updates. I suppose that this is a matter that will ultimately be determined by its commercial success, which is not at

119. C.C. Ruby, *Sentencing*, 3d ed. (Toronto: Butterworths, 1987).
120. R.P. Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982).
121. *Supra* note 1 at 7-93.
122. *Ibid.* at 7-94.
123. *Ibid.*.
124. *Ibid.* at 7-95.

all certain. There cannot be very many practitioners who will invest in this book, however estimable. Despite the attention of the news, the novelists and the jurists, there are really relatively few culpable homicides in Canada and obviously even fewer lawyers who are specialized in the area. If the combined circulation does not justify additional editions, then this will be very much a loss for Canadian legal scholarship. On the other hand, the work does stand on its own as a major contribution to the understanding of the legal response to killing in Canada.