Articles

Reform of the Law of Homicide*

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In common law systems complex and in some cases unduly harsh relating to homicide have evolved. Issues concerned with the Mens rea *of homicide still remain unresolved, and the development of constructive murder and manslaughter continues to raise troublesome legal and ethical issues. An argument is here advanced for a radical simplification of the law which would confine criminal liability for causing death to cases where the accused intends or foresees death. An additional argument is made for the abolition of the fixed penalty for murder in order to effect a further simplification by making it unnecessary to provide for partial defences such as provocation and diminished responsibility.*

Les systèmes de common law *ont élaboré des règles complexes et parfois excessivement sévères en matière d'homicide. De nombreuses controverses entourent encore le* mens rea *de l'homicide et le développement du* constructive murder *et de l'homicide involontaire coupable continue de soulever de difficiles questions d'ordre juridique et moral. L'auteur propose une simplification radicale du droit qui ne retiendrait la responsabilité pénale de l'accusé que dans les cas où ce dernier avait l'intention de causer la mort ou prévoyait que la mort s'ensuivrait. L'auteur préconise en outre l'abolition de la peine fixe en cas de meurtre, ce qui rendrait inutiles les moyens de défense partiels tels que l'excuse de provocation et l'atténuation de responsabilité.*

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INTRODUCTION

> In homicide, as in all other crimes, the definition consists of two parts, the outward act and the state of mind which accompanies it; and there is no crime (unless it be treason or libel) in which so many different possible states of mind have to be considered. The case, moreover, is liable to one special qualification which is peculiar to this particular offence. Whatever else the definition includes it must include the fact of death; but there is no definite connection at all between the fact of death and the moral guilt or public danger of the act by which death is caused. The most deliberate, desperate and cruel attempt on life may not cause death, the most trifling assault may cause it. Death may be intentionally caused under circumstances of the greatest possible atrocity, or under circumstances which produce rather pity for the offender than horror at the offence; or, again under circumstances which indicate determined defiance of the law, but do not involve any special ill will to any particular person. This extreme variety in the circumstances under which, and the intentions with which death may be occasioned is the true cause of the great difficulty which has been found in giving satisfactory definitions of the different forms of homicide. — Sir James Fitzjames Stephen, 3 H.C.L. 17.

"The facts," said Lord Hailsham in *Hyam* v. *D.P.P.*,[1]

> are simple, and not in dispute. In the early hours of Saturday, July 15, 1972, the appellant [Mrs. Hyam] set fire to a dwelling house in Coventry by deliberately pouring about half a gallon of petrol through the letter box and igniting it by means of a newspaper and a match. The house contained four persons, presumably asleep. They were a Mrs. Booth and her three children, a boy and the two young girls who were the subjects of the charges. Mrs. Booth and the boy escaped alive through a window. The two girls died as a result of asphyxia by the fumes generated by the fire. The appellant's motive . . . was jealousy of Mrs. Booth whom the appellant believed was likely to marry a Mr. Jones of whom the appellant herself was the discarded, or partly discarded, mistress. Her account of her actions, and her defence, was that she had started the fire only with the intention of frightening Mrs. Booth into leaving the neighbourhood, and that she did not intend to cause death or grievous bodily harm.

If the facts were simple enough, then the law evidently was not, since the case exercised the Criminal Division of the Court of Appeal and divided the House of Lords by three votes to two in favour of upholding Mrs. Hyam's conviction for murder. The particular question for the appellate courts was whether the trial judge (Ackner J.) was right in directing the jury that Mrs. Hyam could be convicted of murder if, in setting fire to the house, "she knew that it was highly probable that she would cause (death or) serious bodily harm to [Mrs. Booth]". The more general issue was to determine the *mens rea* (malice aforethought) of murder. More generally still, the case invites discussion of what the *mens rea* of murder *ought* to be.

Before *Hyam* it was (or was thought to be) established in England that the *mens rea* of murder included (i) an intent to kill, and (ii) an

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[1] [1975] A.C. 55, at 65 (H.L.).

intent to cause grievous bodily harm;[2] but it was not clear how far, if at all, the definition extended beyond these. The trial judge thought it prudent to explore the uncharted area of the definition, no doubt because he felt that it was open to the jury on the facts to conclude that Mrs. Hyam did not intend (in the narrow sense of desire) to kill or cause grievous bodily harm to Mrs. Booth. In this context, however, *Hyam* is used not to determine what the common law of England is now thought to be, but as a convenient vehicle for discussing what the mental element in murder ought to be, and how, if at all, manslaughter is to be marked off from murder. These more general issues have been discussed by the Criminal Law Revision Committee in England,[3] by the Law Reform Committee in New Zealand,[4] and are, as I understand, under discussion by the Law Reform Commission in Canada.

SOME PRELIMINARY MATTERS

Any movement for reform must spring from a dissatisfaction with the present state of things. As I see it, there are two principal causes for dissatisfaction with the existing provisions in ss. 202-223 of the *Criminal Code*. The first is that the provisions are unduly complex and are not readily understandable. I think it more than ordinarily important that the criminal law (the whole of it, not merely that which pertains to homicide) should be understandable at least in its broad details by the citizen of ordinary intelligence, and I believe that the achievement of that aim lies well within our competence. Secondly, as I hope to show, certain of the provisions relating to constructive homicide are unduly harsh and at this stage of our social development have no place in a humane system.

It will be taken for granted, I think, that the *Code* must contain some prescription of homicide. Arguably, homicide could be subsumed in a more generally structured offence against the person which does not distinguish between conduct causing death and conduct causing harm less than death. After all, whether death be caused in fact is often a matter of chance only,[5] and there is much to be said for a law which emphasises the intent rather than the event. Though this view is theoretically attractive, I think that, as a practical matter, it is a non-starter. Stephen (in the passage quoted) saw that the definition must include the fact of death even though there might be no connection

[2]Lords Diplock and Kilbrandon held that the grievous bodily harm doctrine did not survive the abolition of constructive malice by the *Homicide Act,* 1957, and Lord Cross expressed no final view on that matter. The grievous bodily harm doctrine has, however, been reaffirmed by the Court of Appeal in *Ellerton,* [1978] *Crim. L.R.* 166.

[3]*Working Paper on Offences against the Person,* (1976) H.M.S.O.

[4]*Report on Culpable Homicide,* (1976).

[5]J. C. Smith, "The Élement of Chance in Criminal Liability", [1971] *Crim. L.R.* 63.

between that fact and the moral guilt of the offender. Whether or not it is logical, killing people happens to be regarded as more serious than causing harm short of death. Whoever read a whodunnit where the hero was investigating a causing of bodily harm with intent, or an administering of noxious things with intent to aggrieve or annoy? The issue thus resolves itself into defining homicide. What I have to say is mainly concerned with the mental element and only incidentally with the *actus reus.*

Usually a reformer of the criminal law can concentrate on the substantive law without, in the first place, paying too much attention to sentencing. A reformer of the law of homicide, however, must be acutely aware of the issue of capital punishment which, it may well be, excites much deeper passions than the reform of the substantive law. It is an issue which I will take up later.

One last general point by way of introduction concerns the form of any future legislation. I hope that any proposals which are made and implemented will strike the right balance between the need for clear legislative guidance on matters of principle and the desirability of leaving to the courts the detailed development of those principles to particular cases. I say this because there seems a discernible tendency in much modern legislation to provide an answer for every problem that human ingenuity can devise. This results not only in complicated legislation but forces the judge into the straight-jacket of literalism with all its attendant evils.

Quite what is the "right balance" is a matter of judgment. By way of illustration the concept of intention, which will surely figure in any definition of homicide, might be taken. I wonder how far it is possible and desirable to provide a comprehensive statutory definition of intention. The Law Commission in England believes that it can be done and has proposed[6] (for the criminal law generally) the following clause in its Draft Criminal Liability (Mental Element) Bill:

> (1) The standard test of intention is —
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> Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?

I realise I am quoting this clause in isolation but I must confess that I do not find the definition (or the test) all that helpful. At the risk of being frivolous, it seems to me not unlike a botanist defining a banana as "a fruit which is a banana, or a fruit about which there is no substantial doubt that it is a banana". I am not saying that I can do any better, and it may be that others can, but I do wonder about the feasibility, and therefore the desirability, of defining such concepts as intention. Is

[6] *Report on the Mental Element in Crime,* (1978) Law Comm. No. 89. The Report follows the Law Commission's Working Paper No. 31.

provision to be made also for transferred intention, for direct and oblique intention, for conditional intention, for specific and general intention? One solution to the problem may lie in the legislature providing notes of guidance by way of explanation of the statutory text which would be used by the judge as an aid in their interpretation. The advantage lies in their flexibility; the judge would not be strictly bound by them but they would indicate the broad direction in which the legislature's thinking lies.

At all events I remain convinced that the best solution to law reform lies in a partnership between the legislature and the courts. The legislature lays down the broad principles and the judges, far from being mere journeymen, are given a creative function. The legislature lays down the letter: the judges fulfil its spirit.

THE STARTING POINT

Returning to the case of Mrs. Hyam it would be possible to take different views of her mental state. She (a) may have intended to kill Mrs. Booth; (b) may not have intended (desired) to kill but realised that death was *highly probable;* (c) may not have intended to kill but realised that death was *probable;* (d) may not have intended to kill but realised that death was *possible;* or (e) may have intended only to frighten. She herself admitted to an intention to frighten and indicated her willingness to plead guilty to manslaughter. The prosecution would have none of that but clearly the prosecution had to establish more than an intention to frighten if a verdict of murder was to be supported. The trial judge, you will recall, confined his direction to (a) plus (b) so that if the jury had found that Mrs. Hyam foresaw death as merely probable or possible she could not have been convicted of murder. Laymen in this audience may be a little surprised to learn that lawyers believe that jurymen can distinguish between high probability, probability and possibility. If so, you have a sympathetic supporter in Lord Hailsham.[7] In the end, though, the House of Lords appears to have concluded that the trial judge was overcautious in confining the definition to (a) and (b) and should have extended it to (c) as well.

So far as I am concerned I would go farther still and include (d) — foresight of possibility. I say this because I believe the mental element for murder should accord with well established principles (at least well established for serious crime) so that if X causes Z's death either intentionally or recklessly, he ought to be guilty of Z's murder. I use recklessness here to connote *a* risk of death foreseen by X, not necessarily requiring that X should have foreseen death as probable, still less highly probable; and the risk must be one which, in all the circumstances of the case, was unreasonable to take.

[7][1975] A.C. 55, at 76. Hence Lord Hailsham preferred a test based on *intention* to create a serious risk of death. But whether a risk is *serious* involves a qualitative judgment.

In certain circumstances such a definition of the mental element may involve X in liability for murder *though he would not be liable* at present under the *Code.* It calls, therefore, for explanation and justification.

Suppose that X places a bomb in a store which is timed to explode at 10:30 a.m. At 10:15 a.m. he telephones the store to give a warning about the bomb. He hopes, and with average luck can safely anticipate, that the store will be promptly cleared so that no one will be killed or even harmed. He realises, though, that a number of things may go wrong. The bomb may explode before 10:30. There might be a delay when he tries to telephone. The warning might not be taken seriously. There might be delays in clearing the store. But, fortified by what he has read in the newspapers of similar cases in Northern Ireland, he reckons that the risk of injury or death is about one in ten. He hopes that no one will be killed but decides that this risk is acceptable. Essentially he does not care. Something does go wrong and a shopper is killed when the bomb explodes.

If these facts were to occur in Canada it appears to be the case that X cannot be convicted of murder. The case does not come within s. 212 (a) because he *means* neither to kill nor cause bodily harm. Nor is the case within the wider terms of s. 212 (c) because death is not "likely", that is, probable as opposed to possible.[8] Nor is the case within the even wider terms of s. 213 because X has not committed any of the proscribed offences; nor does he have any of the qualifying intents.[9]

M submission is that X *ought* to be guilty of murder in the above illustration. He has foreseen a risk of killing yet callously decided to take it. My guess is that few people would strongly dissent from the view that this ought to be murder; and I do not think that any code which characterised this as murder could be said to be unduly draconic.

The trouble arises, it is said, when we apply this reasoning not only to the reckless terrorist but also to the reckless motorist. Take the case of Y. He has been drinking, as he well knows, more than he should when he has the responsibility of driving home in his car. He has promised to be home by 7 p.m. but it's nearly that already so he decides he will have to cut a few corners in order to get home in time, in particular he will have to break a few speed limits. It occurs to Y that in his condition and driving at the excessive speeds in mind he may kill someone. It's not a big risk, he says to himself, with luck I'll get home all right. He doesn't.

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[8] "Likely", according to the *O.E.D.*, means "probably — in all probability". This view of "likely" in s. 212 (c) is clearly supported by *Molleur* (1948), 93 C.C.C. 36, at 44, *per* Casey J., and appears to be supported by Anglin J., in *Graves* (1913), 21 C.C.C. 44, at 55 (S.C.C.). It may, however, be open to the Canadian courts to hold that "likely" means no more than foreseeable so that it would extend to the case where death is foreseen as possible.

[9] X might be liable to be convicted of murder if he broke and entered in order to place the bomb and if the bomb can be regarded as a weapon.

He is unable to stop when there is a pedestrian on the crossing ahead and the pedestrian is killed.

Ought Y to be convicted of murder? His case is indistinguishable from that of X unless we are prepared to say that there is some social utility in driving home in excess of the speed limit which is not present in planting bombs. The truth is that in neither case is there any social utility *in creating the risk of death.* Yet both law reformers and courts shrink from a definition of murder that might include the reckless motorist. This tenderness towards the reckless motorist was in evidence in the decision of the House of Lords in *Smith,*[10] a decision not otherwise noted for its tenderness to anyone. That case purported to lay down an objective test as to foresight of death but it was limited by requiring proof that

> the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving.[11]

While it is not transparently clear what the "aimed at" qualification requires,[12] Lord Hailsham in *Hyam* thought that it would *usually* save the reckless motorist from conviction for murder.[13]

Why this tenderness for the reckless motorist? The answer is not hard to find. Most of us drive, many of us drink and it would be a harsh law that made us murderers if we killed. But it is not a conclusion from which I shrink. If X and Y deliberately choose to put life at risk, does it make all that difference that X uses a bomb and Y uses a car? It does not, it may fairly be supposed, make all that much difference to the victim. I think it should be kept in mind that the motorist is much less at risk than the bomber. Motorists frequently cut corners but in so far as they advert to risk at all, it is to the risk of an accident or of being caught by the police. To be guilty of murder it would have to be proved that the motorist foresaw the risk of death and deliberately and unreasonably chose to take it. Such cases will be very rare but where they do occur I see no good reason why the callous motorist should not run the risk of conviction for murder just as much as the callous terrorist.

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[10] [1961] A.C. 290.

[11] [1961] A.C. 290, at 327.

[12] See the discussion in Smith & Hogan, *Criminal Law* (4th ed.), at 287.

[13] [1975] A.C. 55, at 77. Lord Hailsham did not think it would *always* save the reckless motorist from conviction for murder.

POSSIBLE LIMITATIONS ON TREATING RECKLESS KILLINGS AS MURDER

If the view is taken that not *all* reckless killings should be treated as murder, various ways of limitation have been suggested. Recklessness as to death might be qualified by:

(a) *Requiring that X foresees death as highly probable.*

(b) *Requiring that X foresees death as probable.*

Support for both propositions (a) and (b) can be found in *Hyam.*[14]

(c) *Requiring a qualifying intention to cause bodily harm (or serious bodily harm) with foresight of death as (i) highly probable; or (ii) probable; or (iii) possible.*

S. 212 (a) of the Canadian *Criminal Code* appears to adopt (c) (ii).

(d) *Requiring the recklessness to manifest an extreme indifference to the value of human life.*

This last is the position adopted in s. 201.2 of the *Model Penal Code* of the American Law Institute.

If qualification (c) were to be adopted in any of its forms, it would extend neither to the bomber nor to the motorist in the illustrations given above. In both illustrations it was assumed that neither X nor Y intended harm to the person since both planned to avoid it. Accordingly both are entitled to an acquittal of murder whether they have foreseen death as a mere possibility or a high probability.

If qualification (a) or (b) were to be adopted then the bomber and the motorist would be guilty of murder if death is foreseen by them as a probability or high probability as the case might be. They would extend to neither if foresight were merely that death was "on the cards". In this connection it is worth noting a recent decision of Lowry L.C.J. in *McFeely.*[15] The case, almost a routine type in Northern Ireland, involved the planting of a bomb at an inn. The usual warning was given as the

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[14][1975] A.C. 55. Note that if the Law Commission's definition of intention were to be applied to murder (it will not be because the definition is to apply only prospectively and not retrospectively) it would presumably include (a) but not (b). If X foresees a consequence as highly probable, he can hardly have any substantial doubt about its occurrence. If X foresees a consequence only as probable, there is room for a substantial doubt. Or is there? Perhaps it is a question of what X thinks. He may have no substantial doubt though others, similarly placed, would have had a substantial doubt. Conversely, X may himself have a substantial doubt that an event will occur though others would think it a certainty to occur.

[15](1977), 24 November (unreported) *Belfast City Commission.* Note that trial is by judge alone in these cases.

terrorists decamped and the place was quickly cleared. The police were called and it was while they were making their investigations that the bomb exploded killing one of the officers. McFeely was charged with murder and the case against him was that he had driven the bombers to a spot near the inn. While Lowry L.C.J. was satisfied that McFeely knew of the plan to plant the bomb, he was also satisfied that McFeely knew that the warning would be given. Experience of such events in Northern Ireland showed that while people were sometimes killed even when warnings were given, such cases were exceptional. Hence, following *Hyam* which required at least a foresight of a probability of death, McFeely could not be convicted of murder. No doubt McFeely foresaw death as a possibility, but he did not foresee it as a probability.

In the course of his judgment the Lord Chief Justice asked (but prudently declined to answer) the question: what would the position have been if McFeely had driven the bombers to their destination in a series of attacks. The risk of death on any one attack is less than a probability, but the risk increases to a probability if a series of attacks are involved. It is a nice question and I understand that many law teachers who were appraised of the case used it in their criminal law examination papers last summer. I do not propose to answer the question but I do propose to utilise it to support the view that foresight of *a* risk of death should suffice. It strikes me as the height of absurdity that a McFeely, armed with statistics showing the incidence of deaths to bombings, could say: well, it won't be murder if I transport the bombers on no more than five occasions but it will be if I transport them on six. Looked at from the point of view of the Provisional Wing of the Irish Republican Army, it must seem like an unexpected bonus. They can ensure that their drivers and bombers are never at risk of a conviction for murder provided they are involved in no more than five attacks. My conclusion is, therefore, that foresight of risk (*i.e.*, a real risk and not something purely fanciful) ought to suffice.

What, then, is the position if qualification (d) is employed? In their comment on this proposal the American Law Institute is rather coy. The Institute says this:

> Recklessness . . . presupposes the awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness should be assimilated to purpose or knowledge. The conception that the draft employs is that of extreme indifference to the value of human life. The significance of purpose or knowledge is that, cases of provocation apart, it demonstrates precisely such indifference. Whether recklessness is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of the facts. If recklessness exists but is not so extreme, the homicide is manslaughter . . . .[16]

[16]*Model Penal Code,* Tentative Draft No. 9, at 29.

It is said that this notion is easy to criticise. What might be said in favour of the notion is that *if* it is thought necessary to bring the reckless bomber within the definition of murder while leaving the reckless motorist without, then it *may* be that this qualification provides a way of doing it. The trier of fact would have little difficulty in deciding that the bomber's recklessness manifests extreme indifference to the value of human life, but might well pause before concluding that the motorist's recklessness manifested such indifference.

It is impossible to say whether the American Law Institute had some such distinction in mind. It may be that the Institute had it in mind to trade this provision for a general abolition of the felony-murder rule in the various jurisdictions of the United States. Hence s. 201.2 goes on to provide that such recklessness and indifference are presumed if the actor is engaged in certain violent crimes. This, it would seem was added as a sweetener to the revanchist interests wedded to the doctrine of constructive murder. Of course when you read the small print[17] the presumption turns out to be rebuttable so what the Institute gives with the one hand it neatly abstracts with the other. Given agreement on the abolition of constructive murder this appendage to s. 201.2 would be unnecessary in Canada. Nevertheless, *if recklessness as to death is to be qualified at all,* the "extreme indifference" notion may be the best of the qualifications available.

CONSTRUCTIVE MURDER

Constructive malice has a lengthy, if uncertain, pedigree in the common law. In general terms it is a doctrine whereby a man is visited with liability for murder when he kills, however accidentally, while perpetrating some other offence. It was stated in its most extreme form by Lord Coke:

> If the act be unlawful it is murder. As if A., meaning to steal a deer in the park of B., shooteth at the deer and by the glance of the arrow killeth a boy that is hidden in the bush, this is murder, for the act was unlawful, although A. had no intent to hurt the boy and knew not of him. But if B., the owner of the park, had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure and no felony. So if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off without any evil intent in him, this is *per infortunium,* for it was not unlawful to shoot at the wild fowl; but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful.[18]

Stephen questioned whether constructive malice was ever this extreme even in Coke's time,[19] but Hawkins could authoritatively assert that it

[17] *Ibid.,* at 33.

[18] 3 Inst. 56.

[19] Stephen, *History of the Criminal Law* (3rd. ed.), at 57.

was murder to accidentally kill another while shooting at a fowl if the intention was to steal the fowl. Over the years, however, the doctrine was further whittled down until it extended only to (i) killing in the course of a felony involving violence (such as robbery, rape); and (ii) killing in the course of resisting a lawful arrest by an officer of justice.

These forms of constructive malice were abolished in England in 1957 following the recommendations in the Report of the Royal Commission on Capital Punishment. The Commission was clear that as a matter of principle no man should be punished for consequences of his act which he neither intended nor foresaw. The Commission examined and rejected arguments that its abolition might lead to grave offenders being inadequately punished. In the end, the Lord Chief Justice of the day (Lord Goddard), who had at first pressed for the retention of the doctrine, came round to the view that the abolition of constructive malice would in no wise diminish the security of the public.

When the *Code* was promulgated in Canada in 1892 it did contain the constructive murder doctrine, but in a distinctly less draconic form than it then existed in England. But, and here is an odd paradox, while English judges sought to restrict their doctrine still further, the Canadian legislature moved in the opposite direction so that Canada now has in s. 213, a more draconic law than it had in 1892! The requirement in the original *Code* for grievous bodily harm has been whittled down to any bodily harm; the range of offences to which the doctrine is applicable has been extended; and entirely new provision has been made for death caused by the use or possession of a weapon during the commission of the scheduled offences. Apropos of this last extension, Professor John Willis has shown[20] that it passed through the Commons and the Senate without a line of public discussion in the Government's haste to secure the passage of a number of *Code* amendments before the end of the session. Professor Willis castigated the provision as "savage and incoherent" but, unmindful of his strictures, Parliament subsequently deleted the words "of its use" which had formerly appeared after "and death ensues as a consequence" — thus increasing, at a stroke of the pen, both its savagery and its incoherence.

Concerning these forms of constructive malice I can do no better than ally myself with their critics who have pressed for their abolition. They have not merely outlived their usefulness: they have never had any utility other than to satisfy a primitive instinct for vengeance which, as I trust, society has now outlived.

There is another form of constructive murder implicit in s. 212 (c). Under this provision a man may be guilty of murder if in the pursuit of an "unlawful object" he does anything which he "ought" to know is

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[20](1951), 29 *Can. Bar Rev.* 784, at 792.

"likely" to cause death. It is now clear law that the sub-section imports an objective test in relation to the consequence of death so that the accused may be convicted of murder though he did not contemplate death. Yet Professor Hooper has cogently argued[21] that it was never intended (certainly it was not Stephen's intention) that this provision should be open to the "monstrous" interpretation that might extend murder to the extreme example given by Coke. Hooper pointed out that the words "ought to know" are "quite out of harmony with the rest of the section and with the avowed intention of Stephen and the Commissioners to restrict the ambit of the felony-murder rule." The conclusion which Hooper reached, and it is one with which I respectfully agree, is that the villain of the piece is the presumption of intent. The provision meant to imply no more than that it may be inferred that a reasonably foreseeable consequence was in fact foreseen by the accused; but the provision was poorly shaped to make this plain and the inference more readily deduced is that a rebuttable inference of fact has been replaced by an irrebuttable presumption of law.

There is no rule of the adjectival law that has caused more trouble in the substantive law of crime than the so-called presumption that a man intends the natural consequences of his acts. It led the House of Lords into serious error in *D.P.P.* v. *Smith*[22] and no decision of the House of Lords has been more reviled than that one. To defend the philosophy of *Smith* or of s. 212 (c) of the *Code* (for they are two sides of the same counterfeit coin) would require not merely a brave man, but a foolhardy one. The dislike, be it noted, has not been confined to academics; trial judges (who are probably not as cavalier with their criticisms of the House of Lords as academics) have quietly voted with their feet — they have just ignored it.[23]

MANSLAUGHTER

Thus far I have plumped for a definition of murder which restricts murder to cases where the accused intends to kill or knows that his conduct may kill. Turning to manslaughter I propose an altogether simpler solution which is to abolish it. A proposal arguably so bold calls for a word or two of explanation. Under the *Code* manslaughter takes three forms: killing by criminal negligence, killing by unlawful act, and killing under provocation.

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[21] Hooper, "Some Anomalies and Developments in the Law of Homicide", (1967) 3 *U.B.C.L.R.* 55, at 62.

[22] [1961] A.C. 290.

[23] Buxton, "The Retreat from Smith", [1966] *Crim. L.R.* 195.

Killing by Criminal Negligence

Criminal negligence is defined in s. 202 (1) as "wanton or reckless disregard for the lives or safety" of others. The decisions of the courts of the meaning of "wanton or reckless" are not always, or even sometimes, models of clarity,[24] but, if I may state my conclusion without lengthy argument, it is that "wanton or reckless disregard" does not require (though it would be satisfied by) actual foresight of danger by the accused. It does, though, require negligence of a very high order. It requires negligence such that a reasonable man, circumstanced as the accused, would instantly have recognised, not only a greater risk of injury, but a risk of great injury. The question here is whether it is permissible to punish a man for a failure — in this case a crass failure — to foresee what the reasonable man would have foreseen. I do not believe it is. From the utilitarian point of view, on what basis is punishment assigned for the accused's failure (even his gross failure) to foresee a risk which the most of us would have recognised? The punishment can hardly deter the majority of us for, as reasonable men, we would have foreseen the risk and thus had the choice of running it or avoiding it. Nor can it deter the minority who share the accused's lack of perpicacity because *ex facie* they would not have foreseen the risk either. Is it, then, that by punishing the accused we make sure that he does not make that mistake again? Possibly it will make sure that he does not make *that particular mistake* again, but it cannot ensure that he will not make other egregious errors of judgment in different situations. And from the moral point of view, I am unhappy about punishing a man who, because of physical or mental shortcomings, cannot recognise a risk that a normal man would have recognised.

If you remain unconvinced by the case for the abolition of criminal liability for negligently caused death, there are two alternatives that might be worth consideration. One is to reformulate, as Professor Hart has suggested,[25] the test of liability for negligence to take account of whether the accused, with his mental and physical capacities, ought to have foreseen the risk and could have taken measures to avoid it. The other (it is really an and/or) is canvassed by the English Criminal Law Revision Committee and is to create an offence less than homicide; their proposal being for an offence of reckless killing punishable by imprisonment for fourteen years.[26]

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[24]See Mewett & Manning, *Criminal Law* (Toronto: Butterworths, 1978), 100 *et seq.*

[25]*Oxford Essays in Jurisprudence* (1961), at 29.

[26]*Working Paper on Offences against the Person,* para. 91. The C.L.R.C. believes this would cover "most" cases of manslaughter by gross negligence but for the new offence, there would have to be foresight of "death or serious injury" — thus the C.L.R.C.'s proposal would extend to some killings that I would bring within the definition of murder.

Manslaughter by Unlawful Act

This is the doctrine of constructive manslaughter and historically is the junior partner of constructive murder. As the constructive murder doctrine was narrowed to become the felony-murder rule so constructive manslaughter grew to occupy the field vacated by the senior partner. In the United States it is commonly, and fairly accurately, referred to as the misdemeanour-manslaughter rule.

As may be guessed, I am in favour of dissolving the firm without compensation to either partner. It is significant that in mooting the abolition of constructive manslaughter in England, the Criminal Law Revision Committee mentions no arguments in favour of its retention. Quite right of course. There are none.

Killing Under Provocation

At first sight it seems clear that if murder is to be retained some form of reduced murder to encompass killings under provocation must be retained. But that, it seems to me, depends on the punishment for murder. Under the *Code* at present the punishment for murder is mandatory. Whether the conviction is for first or second degree murder the sentence must include imprisonment for life. But is it really necessary to have a mandatory life sentence on conviction for murder? In England the Criminal Law Revision Committee has expressed itself in favour of retaining the mandatory life sentence but the Law Reform Committee of New Zealand was in favour of abolishing the fixed sentence. I have to confess (a rare moment of weakness for me) that I have equivocated on this issue in the past but I am now of the view — I believe firmly — that the fixed penalty should be abolished and, as with practically all other crimes, the judge should fix an appropriate sentence having regard to all the circumstances.

Stephen (again in the passage quoted) reminded us that it is very difficult to produce a definition of murder that takes account of the infinite variety of circumstances in which killings take place. This is, incidentally, true of the definition of all crimes, but whereas discretion in sentencing which is available for most crimes allows the judge to fit the punishment to the circumstances, the fixed penalty for murder denies him this sensible option. Take the tragic case of *Simpson,*[27] for example. Returning home on leave from the trenches in France in the Spring of 1915, William Simpson found his two year-old son suffering cruelly from hydrocephalus (water on the brain) and neglected by Mrs. Simpson who spent much of her time out drinking with her boy-friends. The

[27](1915), 11 *Cr. App. R.* 218 (C.C.A.).

situation proved too much for Simpson and, unable any longer to tolerate his son's sufferings which were quite agonising, he killed the boy to end his pain. Since there was nothing upon which Simpson could predicate a defence of provocation he was convicted of murder. As the law stands in Canada[28] a Simpson may be convicted of murder and must be sentenced to imprisonment for life. But surely in such a case the public interest would be served, as it could be served if the penalty for murder were not fixed, by the imposition of a much more humane sentence.

Given the abolition of the fixed sentence I see the following as among the advantages.

First, there is no need to provide in the substantive law for a defence of provocation as the Law Reform Committee of New Zealand points out. Where a killing is done under provocation the trial judge would need only to take account of this in sentencing.

Secondly, it becomes unnecessary to provide in the substantive law for a defence of diminished responsibility. In England, where diminished responsibility has been introduced, it is available only on charges of murder because on virtually all other charges the judge has a discretion as to sentence which in any case enables the judge to make appropriate allowance for cases where responsibility is diminished.

Thirdly, it becomes unnecessary to provide for so-called mercy killings — a matter which has caused the Criminal Law Revision Committee in England very considerable problems. Mercy killings are usually easy to recognise but difficult in the extreme to define satisfactorily. Legislative provision in the substantive law for cases such as William Simpson's would be fraught with problems; the application in such cases of common sense and common humanity would not.

Are there any disadvantages? It has been suggested to me that my proposals would put too much power in the hands of the judges. It seems to me, however, that my proposals would merely bring murder into line with most other crimes where the judge has a discretion as to sentence. The decisions of the judge are open to review and in turn the decisions of appellate tribunals may be re-examined. As I see it, the emphasis would shift from the substantive law of crime to the principles of sentencing and what will be needed, of course, is a sophisticated

[28]In England, Simpson might now qualify for a verdict of manslaughter under the flexible doctrine of diminished responsibility. *Cf. Gray* (unreported) *The Times*, 7 October 1965. Gray's twelve year old son was suffering from incurable cancer and could not even bear the weight of his own bedclothes. Gray killed the boy while he slept. He was found guilty of manslaughter owing to diminished responsibility and was placed on probation for twelve months with a condition of psychiatric care, the judge adding that no one could account his action as criminal. Although Canadian courts recognise something akin to diminished responsibility in some circumstances (see Mewett & Manning, *Criminal Law*, at 212 *et seq.*) it is thought unlikely that it could be applied in cases such as these.

jurisprudence of sentencing. I think the courts are equal to the task. It is the legislature's function to spell out general rules for the governance of society: it is the judical function, within the legislative framework, to do justice in individual cases.

A POSTSCRIPT ON CAPITAL PUNISHMENT

With the renewal of the public controversy on capital punishment this may not be the most propitious of times to be advocating reform of the law of homicide. But I do not think that the proposals I have outlined in any way pre-empt the issue of capital punishment or the matter of degrees of homicide. It would be possible to single out certain murders (such as murders of police officers or murders during the course of specified offences) which may carry the death penalty or some other fixed penalty though only where the killing itself satisfied the new definition of murder.

I hope it will not be supposed, that I am advocating the return of the death penalty for any form of murder. All I am saying is that its reinstatement must be predicated, as a minimum requirement, on an intentional or reckless killing. It is unnecessary for me to rehearse the pros and cons of capital punishment (there is hardly a pro or con left which has not been extensively documented and exhaustively argued) but I cannot resist a word or two.

With those who would want to restore capital punishment I would like to raise two issues. One, which is apparently trivial and workaday, is: how do we set about recruiting an executioner? The question is not so absurd as may appear. In one of the last cases in Canada (this was 1973) where there was a real possibility that a death sentence might have to be carried into effect, genuine difficulties arose concerning the availability of a hangman. The provincial authorities took the view that it was a Federal responsibility to provide a hangman; for their part the Federal authorities said it was a provincial responsibility and the sheriff was bluntly told that if he could not find someone he would have to do the job himself. Inquiries were then made in England but a reprieve ended the search. How does a civilised community set about recruiting and training a hangman?

The other issue is this. While I have argued for a definition of murder based on intentionally or recklessly caused death and regard either as a necessary condition of *liability,* the degree to which a person is *responsible* involves a consideration of all the circumstances of the case and the offender. One does not have to be a moral philosopher to appreciate the difference between liability and responsibility, and to recognise the difference between a Cesare Borgia and a William Simpson. But I am not convinced that we know enough of human

behaviour to say with complete conviction that a man is so completely and totally responsible for his actions that we may kill him for his shortcomings. It is probably the case that all of us, partly through genetic factors and partly through social conditioning, are something less than free agents. The available evidence, imperfect though it is, suggests that people are more or less responsible, but I doubt whether a man can claim total responsibility for any act of his whether it is wholly good or wholly bad.

It is for this sort of reason that the progress of man in his treatment of his anti-social colleagues has been in the inexorable direction of humanity, understanding and compassion. Those who now stand for capital punishment, for harsher penal regimes, would no doubt have stood shoulder to shoulder with Lord Loughborough, the Lord High Chancellor of England, when in 1790 he opposed the Bill to abolish the burning of women for counterfeiting and to substitute hanging therefor. "My Lords," he said:

> I see no great necessity for the alteration because, although the punishment as a spectacle, is rather attended with circumstances of horror, it is more likely to make a lasting impression on the beholders than mere hanging; and, in fact, no greater degree of personal pain is thus inflicted, the criminal being always strangled before the flames are suffered to approach her body.[29]

There is, just possibly, a lesson to be learned from the history of crime and punishment. It is that the just society is best under-pinned by rationality, by understanding, by tolerance and compassion. Society is insecure when it is based on notions of self-righteousness, of mistrust and of revenge.

[29]Campbell, *Lives of the Lord Chancellors*, Vol. 6, at 326. His Lordship also expressed the view that he had not "the smallest doubt" but that the public dissection of the corpses of criminals "is attended with the most salutary consequences in repressing crime".