FUNDAMENTAL ISSUES IN HOMICIDE

Barry Mitchell*

Abstract: There are good reasons why we should be less than happy with both the substantive law and the sentencing of murder. The Law Commission's recommendations for restructuring the substantive law in 2006 have largely fallen on deaf ears and the deficiencies they identified remain unaddressed. Serious concerns have also been raised about the sentencing law. One of the main assumptions behind the mandatory life sentence — that it was supported by the overwhelming majority of the public — has been doubted following careful survey research, and Sch.21 to the Criminal Justice Act 2003 (to which judges must have regard when determining the minimum term) has been heavily criticised. Through an analysis of the principal shortcomings of the status quo in England and Wales, this article suggests how the criminal justice system should deal with the more serious cases of unlawful homicide by revisiting both the definition of murder and the punishment of convicted offenders.

Keywords: *Criminal Justice Act 2003; homicide; mandatory life sentence; restructuring of offences; serious offences*

All countries, be they based on common or civil law traditions, rank crimes of homicide as the most serious on their domestic criminal/penal law menu. Other common features include the recognition of more than one homicide offence and the reflection of ordinal proportionality in sentencing so that, in broad terms, the more serious cases attract more severe punishments. But the details and the boundaries vary from one jurisdiction to another — how many offences the law should recognise, how the "homicide cake" should be divided, what the minimum degree of moral culpability should be for conviction of a homicide offence, what the most severe form of punishment should be and so forth. Midway through the second decade of the twenty-first century, it is perhaps surprising to find that so many fundamental issues are still to be satisfactorily resolved about the structure and nature of the law on what is widely regarded as the most serious forms of illegal behaviour. This article addresses some, though admittedly not all, of these basic issues.

* Formerly Professor of Criminal Law and Criminal Justice, School of Law, Coventry University, United Kingdom.

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I. To Merge or Not to Merge?

For hundreds of years English criminal law has distinguished between the more serious homicides (murder) and the less serious cases (manslaughter). The French Penal Code refers to "assassination"[1] and "meurtre",[2] whereas the German Code distinguishes "mord"[3] from "totchslag".[4] But it was not always thus; an historical survey reveals that at one time all criminal homicides in England were regarded as murder[5] and that manslaughter gradually evolved through a recognition that some cases were markedly less serious than others and warranted less punishment. This evolutionary process has been very protracted and English criminal law now differentiates the more serious from the less serious homicides by various methods. But some factors that are critical in the distinction between murder and manslaughter are of absolutely no relevance to the conviction in other areas of the criminal law. The most obvious example of this is non-fatal offences against the person. For whereas murder may be reduced to manslaughter on the basis of loss of control (formerly provocation), or diminished responsibility, if the victim should survive the assault (however fortuitously) neither plea can affect the defendant's conviction, though they might well influence the sentence.

The argument about whether murder and manslaughter should remain separate offences or be merged is not especially prominent within the subject generally but it is raised every now and again. In recent years, two leading commentators, the late Professor Terence Morris and Sir Louis Blom-Cooper, argued in favour of merging murder and manslaughter into a single offence of criminal (or unlawful) homicide.[6] Constraints of space prevent detailed examination of their arguments, but Morris and Blom-Cooper cite the views of senior members of the judiciary who have also expressed support for merger. Thus, for example, in *Hyam v Director of Public Prosecutions*, Lord Kilbrandon said:

> "It is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it the crime of manslaughter. There is something wrong when crimes of such gravity…call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for …Since no

1 French Penal Code, art.221-3.
2 *Ibid*., art.221-1.
3 *Ibid*., art.211.
4 *Ibid*., art.212.
5 See, for example, JM Kaye, "The Early History of Murder and Manslaughter" (1967) 83 LQR 365, 569.
6 See, especially, Louis Blom-Cooper and Terence Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) and Terence Morris and Louis Blom-Cooper, *Fine Lines and Distinctions: Murder, Manslaughter and the Unlawful Taking of Human Life* (Hook: Waterside Press, 2011).

> homicides are now punishable with death, these many hours and days have been occupied in trying to adjust a definition of that which has no content. There does not appear to be any good reason why the crimes of murder and manslaughter should not be both abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment".[7]

These comments contain a number of related points. First, whilst the crime of murder is intended to distinguish the most serious forms of criminal homicide from the lesser cases (which are catered for by the offence of manslaughter), it is widely recognised that, at least as murder is currently defined, cases resulting in murder convictions reflect significant variations in gravity and culpability.[8] Indeed, some manslaughters are regarded as more serious than some murders.

Second, and arguably more importantly for our present purposes, the difference between a murder conviction and a manslaughter conviction may depend on very fine and very difficult distinctions being made by the court. The importance and significance of differentiating between the offences is, of course, not only simply a matter of formally attaching the correct label to the defendant's offending but also one of determining the appropriate punishment, and those convicted of murder are likely to be sentenced much more severely.[9] There are, of course, various ways by which a person charged with murder may be convicted of manslaughter. On the one hand, the defendant may admit he acted with the *mens rea* for murder but successfully argue either: (1) that he had lost his self-control at the time of committing the fatal assault; or (2) that he was suffering from an abnormality of mental functioning that substantially impaired his ability to understand what he was doing or to form a rational judgment or to exercise self-control; or (3) that he had killed in pursuance of a suicide pact. This latter category of case is rare and seldom results in formal prosecution, but the success or otherwise of one of the first

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7 [1975] AC 55, 98. See also, for example, Lord Mustill in *Re A-G's Reference (No 3 of 1994)* [1998] AC 245, 250.

8 *Ibid.*, in *Hyam*, Lord Kilbrandon commented that: "It is no longer true, if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide". In *R v Howe* [1987] AC 417, 433, Lord Hailsham said:

> "Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so-called Moors murders to the almost venial, if objectively immoral, 'mercy killing' of a beloved partner".

9 Sentencing will be discussed in more detail later in the article: suffice it to say at this stage that, following an increase in the periods of detention for convicted murderers by virtue of the Criminal Justice Act 2003, sentences for manslaughter in England and Wales have also increased, so as to retain a sense of ordinal proportionality in the punishment of the two offences.

two pleas may be very difficult to predict. In loss of control cases, for example, different juries may interpret the evidence in different ways.

On the other hand, defendants may admit causing the victim's death but deny murder on the basis that they lacked the necessary *mens rea*. Cases in which the defendant intended or knowingly risked relatively minor injury will fall within the definition of manslaughter — their *mens rea* clearly falls short of an intent to cause serious injury (the minimum requirement for murder). But where the defendant knowingly risked causing serious harm — that is where serious harm was caused recklessly rather than intentionally — the distinction between murder and manslaughter becomes much less apparent. In fact, it may well depend on whether the jury conclude that the defendant was virtually certain that serious injury (or death) would result or that he thought it was (only) very likely. In other words, the jury's conclusions about the precise extent to which the defendant foresaw the outcome of the assault may be absolutely crucial. Given that the jury's conclusions on this must ultimately be by inference, and given that even if they decide that the defendant did foresee serious harm as virtually certain they may, if they so choose,[10] still decline to infer the relevant intent, one can understand the claims that the difference between conviction for murder or manslaughter may depend on too fine a distinction.

Morris and Blom-Cooper thus propose that the law should recognise a single offence of criminal homicide and variations in culpability and blameworthiness should be reflected in the sentence.[11] However, other leading commentators and august bodies have forcefully argued in favour of maintaining separate crimes. Indeed, a further (related) issue is whether the majority of criminal homicides should be accommodated by just the existing two crimes or whether more should be created. In other words, rather than reducing the number of homicide offences to one, the question is whether the present offences of murder and manslaughter are being stretched too far.

In 1976, the Criminal Law Revision Committee (CLRC) expressed its support for retaining separate crimes on the basis that the public are particularly sensitive to the deliberate taking of human life and that the word "murder" reflects their revulsion for those who do this. Merging murder with manslaughter might imply that the law has ceased to regard intentional killing as "especially grave".[12] The CLRC referred to the significance of what is often described as the "sanctity of life", and the English Law Commission agreed that this is an important factor for many people. The giving and taking of human life is seen as "God's special possession, as something over which God has jurisdiction".[13] The crime of murder

10 In English law, what the defendant foresaw is not the same as what he intended: foresight provides (inconclusive) evidence on intent. Furthermore, there is nothing the judge can say to a jury which may guide them in deciding whether to infer intent from foresight.

11 See Blom-Cooper and Morris, "With Malice Aforethought" (n.6) p.175.

12 Criminal Law Revision Committee, Offences against the Person (CLRC R No 14, 1976), para.15.

13 J Kleinig, *Valuing Life* (New Jersey: Princeton University Press, 1991) p.18.

should be retained because it reflects the "core ideal at the heart of the view that life is sacrosanct",[14] and it is important for the law to show that it regards murder as a uniquely serious offence.[15]

The English Law Commission has also quite recently rejected the suggestion that murder and manslaughter be merged into a single offence. The Commission acknowledged that Morris and Blom-Cooper and the organisation Victim Support also argued in favour of merger. The latter's argument is that the adversarial dimensions of murder trials often lead defendants to blaming the victim in their efforts to avoid a murder conviction. But the Commission thought that such concerns could be addressed by reforming the law on partial defences such as provocation (now loss of control).[16]

Whether a religious or more secular view is taken of the idea of the "sanctity of life", the Commission felt that it is important to distinguish between intentional killing and accidental or careless killing. This led to the conclusion that "[murder] is a crime whose central definition connects it with the core ideal at the heart of the view that life is sacrosanct".[17] This, of course, endorsed the view of the CLRC in 1976 that the law should not underestimate the need to formally identify those cases where life was deliberately taken. Morris and Blom-Cooper rejected this argument. They referred to the changes in society since the CLRC published their report; capital punishment for murder had only relatively recently been abolished, and the Judaeo-Christian tradition is no longer dominant and "other religious faiths are now recognised as a major feature of the social landscape".[18] Rather than stress the "sanctity of life", they preferred to look to art.2 of the European Convention on Human Rights and to use the term "right to life".

On that basis they argued that what matters — especially to the bereaved — is the fact of death, the loss of a human life, rather than the specific circumstances surrounding it: "Whatever the circumstances, the inalienable right to life has been violated, or….the sanctity of that life has been profaned".[19] Even if the victim had acted in a morally reprehensible or unlawful manner, this would not affect the significance of the violation of the right to life.[20] A short review of various aspects of English homicide law led the authors to "suggest that, to adopt Orwell's phrase, the law regards the lives of some people as more sacrosanct than those of others. That, in our view is a consequential defect of the disarray in the present law, which we maintain is remediable by returning to a single crime of criminal homicide".[21]

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14 Law Commission Consultation Paper, A New Homicide Act for England and Wales? A Consultation Paper (Law Com CP No 177, 2005), para.2.30.
15 *Ibid*., para.2.31.
16 *Ibid*., para.2.33.
17 *Ibid*., para.2.30.
18 Morris and Blom-Cooper, "Fine Lines and Distinctions" (n.6) pp.224–231.
19 *Ibid*., p.226.
20 *Ibid*., pp.227–228.
21 *Ibid*., p.231.

Having pointed out that in 1978 the Law Commission itself expressed support for what they called "the Kilbrandon formula"[22] — that is the merger of murder and manslaughter[23] — Morris and Blom-Cooper further argue that the concept of intentional killing should not be regarded as the only satisfactory indicator — presumably accompanied by an absence of any significant mitigating factors — of the most serious homicides.[24] This very subject will be considered in more detail later in this article, but it is sufficient for present purposes to acknowledge the arguments that certain forms of reckless killing and/or cases where the defendant showed a culpable indifference whether victims lived or died should be viewed as equally culpable as deliberate killing.

Morris's and Blom-Cooper's argument that variations in culpability in homicides should simply be reflected in the sentence was rejected by the Law Commission. The logical extension of that argument would be to similarly reflect variations in the outcome of the assault on the victim in the sentence, rather than through recognition of a separate offence.[25] Homicide would simply be at one end of a broad offence concerned with unjustifiable harm. Having assumed that Morris and Blom-Cooper would not want to extend their argument in this way, the Commission thought that "if the fact that death has been caused can provide sufficient justification for the creation of a distinct offence worthy of special categorisation, so can the mental element with which it was caused".[26] In their reply, Morris and Blom-Cooper acknowledged that the rule which is breached in homicide is the same as the broader rule which prohibits the unjustifiable or inexcusable harming of another. But they then reiterated their assertion that it is important for the law to uphold the right to life and thus recognise the offence of criminal homicide.[27]

An additional plank on which Morris and Blom-Cooper sought to base their case for merger was the claim that what matters is "the general perception that it is the severity of the penalty that is the benchmark against which the gravity of the offence is measured, not the label by which the offence is identified".[28]As far as I am aware, there are no objective data on this. But one immediate concern that might be expressed is that the principle of fair (or representative) labelling[29] — that crimes should be defined and labelled so as to reflect the nature and seriousness

22 See works referred to in note 8.

23 Memorandum: Comments of the Law Commission on the Criminal Law Revision Committee's Working Paper on Offences against the Person (1978).

24 Morris and Blom-Cooper, "Fine Lines and Distinctions" (n.6) p.232.

25 This draws on the work of Paul Robinson, "Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?" in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford: Oxford University Press, 1993) pp.187–211.

26 Law Commission Consultation Paper, A New Homicide Act for England and Wales? (n.14) para.2.36.

27 Morris and Blom-Cooper, "Fine Lines and Distinctions" (n.6) pp.235–236.

28 *Ibid*., p.232.

29 See, for example, Andrew Ashworth, "The Elasticity of *Mens Rea*", in C Tapper (ed), *Crime, Proof and Punishment* (London: Butterworth, 1981) pp.45, 53–56.

of the offending — would surely be compromised. Supporters of fair labelling would argue that it is important to reflect the wide-ranging variations in culpability and seriousness of homicides through the formal recognition of separate offences. Thus, on the one hand, it is not hard to find instances of media reports highlighting the sentence imposed by the court (perhaps by way of criticism or as a means of underlining the seriousness of the case), and on the other hand, it is also not hard to find examples where the nature of the conviction — the verdict — is criticised. For example, a report refers to a conviction for manslaughter so as to suggest that the defendant was fortunate in not being convicted of murder.[30]

Whatever may be the competing merits of the arguments for and against merger, the remainder of this article is based on the assumption that the law will continue to formally recognise more than one homicide crime.

II. Distinguishing the Most Serious from the Less Serious Homicides

Some cases of what in English law are called manslaughter are clearly much less serious — in that the defendant was markedly less morally culpable in bringing about the victim's death — than many murders. Compare, for example, (1) A fires a gun at B's heart from close range with a desire and confident expectation that B will die and kills B immediately, with (2) using no more than moderate force C punches D in the face causing D to fall backwards and hit his head against a wall; D has an unusually thin skull which is fractured and he subsequently dies. Surely there would be almost unanimous agreement that whilst both homicides are serious A's crime is much more serious than that of C.

But, as is implicit in the title of Morris's and Blom-Cooper's book, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide*, the distinction between conviction for murder or manslaughter can be very fine indeed. The difference between murder and what is sometimes referred to as "reckless manslaughter" may ultimately depend on the precise degree of foresight with which the jury decide the defendant foresaw the outcome of his conduct. If they are satisfied that the defendant believed that death or serious injury was "virtually certain" or "inevitable",[31] then they *may* infer that he intended to kill or seriously injure; but if they conclude that he was less than sure about the outcome of his conduct, the jury should have no such choice and the verdict should be one of manslaughter. Even if they do decide that the defendant had the relevant degree of foresight, they are not

30 It is impossible to say with any real confidence just how far this criticism of the verdict arises because conviction for murder will be followed by a much more severe sentence than conviction for manslaughter.

31 The phrases "virtually certain" and "inevitable" are taken from the judgment of Lord Lane CJ in *R v Nedrick* [1986] 1 WLR 1025.

bound to infer the intent for murder — they have a crucial choice to make, but there is no guidance that the judge can give them about how to make it.

Of course, a line has to be drawn marking the boundary that separates one crime/conviction from another and very occasionally the gap between them must inescapably be fairly narrow. But the obvious concern here is whether the difference between conviction for murder or manslaughter and the implications that would have for sentencing[32] should depend on the making of such a fine distinction as to the defendant's foresight. A closely related question is whether it is right to effectively place the burden of making this critical distinction on the jury and leaving them with little or no guidance. Ought the law to provide a clearer indication of the minimum requirement for conviction for murder, and especially the meaning of "intent"?

III. Identifying the Most Serious Criminal Homicides

Jurisdictions seek to identify and distinguish the most serious from the comparatively less serious homicides for two main purposes — to differentiate between homicide offences and to indicate which cases should attract the most severe punishments. Here the focus is on the former, on determining the most appropriate way of defining what English and Welsh law regards as murder.

Even a fairly cursory glance reveals a broad range of ways by which different jurisdictions distinguish the most serious forms of criminal homicide from lesser cases. Clearly, these variations reflect cultural and social differences, and the differences are found not only between jurisdictions but also over time; any society may well change — or at least adjust — its view about how it regards the seriousness of offences. English criminal law focuses attention on a combination of the nature of the defendant's intent (at the time he committed the fatal assault) and the presence or absence of one of three mitigating factors. If the defendant intended to kill or cause serious injury, and he had neither lost his self-control nor suffered from an abnormality of mental functioning (that brought him within the plea of diminished responsibility) nor killed in pursuance of a suicide pact, then he may be convicted of murder. If he lacked the necessary intent or if any one of the three mitigating factors was present, he would be liable to be convicted for manslaughter at most.

Thus, what is meant to ensure that there is a sufficient degree of moral blameworthiness to justify conviction for the most serious form of criminal homicide is (first) an intent to kill or cause serious injury. At first sight, an intent-to-kill requirement seems appropriate since that underlines and emphasises the

32 At present, in England the average time served in prison for murder before being eligible to apply for release on licence is approximately 20 years; whereas those convicted of the more serious instances of manslaughter might expect a sentence of 12 to 15 years in prison with release at the halfway stage.

defendant's culpability and "authorship" of the victim's death. But "intent" can be inferred either on the basis that the defendant desired the death or aimed to bring it about or if the jury conclude that the defendant foresaw death as a virtually certain consequence of his action.[33]

This can have what some commentators would regard as an undesirable consequence, an obvious example of which is the case of a mercy killing. (The problems surrounding this group of cases are considered more fully later in the article.) The point here is that the defendant desires to cause the victim's death and — presumably in many such cases — foresees that the victim's death is virtually certain. This supports an allegation of murder and, in the absence of a suitable defence, conviction may follow. Thus, the presence of an intent to kill does not *per se* ensure that the homicide should be treated as especially serious.

The alternative intent that currently suffices for murder, an intent to cause serious injury, has long been criticised as inadequate, and there is no need to repeat these criticisms here. The intended serious injury need not be life-threatening. Thus, suppose D strikes V across the arm with a wooden club intending to break V's arm. V is taken to the hospital and undergoes surgery on the broken arm. Complications arise during surgery and V dies. *Prima facie* D is guilty of V's murder. Opponents of the current law argue that the gap between serious (but not life-threatening) injury and death is simply too great, even though it is accepted that we cannot exert absolute control over the outcomes of our actions. Death may be unexpected by both the defendant and by ordinary or "reasonable" people and in those circumstances conviction for a lesser form of homicide would be warranted.

When reviewing the law a decade or so ago, the English Law Commission agreed that a bare intent to seriously injure should not suffice for the most serious homicide offence and recommended that the minimum requirement should be an intention "to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death".[34] This would clearly require a higher level of culpability than the current law and, by combining recklessness as to causing death with an intent to cause serious injury, it would satisfy the principle of correspondence. Supporters of this principle would argue that the *mens rea* of a crime should correspond with the *actus reus*, so that a person should only be held liable for an outcome if he intended or knowingly risked bringing it about.[35] How well this would work in practice is not clear, and hitherto there has been no indication that this recommendation might be taken up.

Experts have also argued that there are some homicides in which the killer does not appear to have acted intentionally but the case is one which would widely

33 See, for example, *R v Woollin* [1999] 1 AC 82.

34 Law Commission, Murder, Manslaughter and Infanticide (Law Com No 304, 2006), para.9.6(2).

35 For a critical discussion of the principle, see Jeremy Horder, "A Critique of the Correspondence in Criminal Law" [1995] Crim LR 759; Barry Mitchell, "In Defence of a Principle of Correspondence" [1999] Crim LR 195 and Jeremy Horder, "Questioning the Correspondence Principle: A Reply" [1999] Crim LR 206.

be regarded as very serious and would attract widespread condemnation. These cases seem to put the emphasis not on what D intended (in the legal sense of that term) but on D's attitude towards the lives of other people. Take the case of what might be called the "Russian roulette" killer. D puts a single bullet into a chamber in the cylinder of a gun and spins it. He then points the gun at V and pulls the trigger.[36] It is arguable that D does not intend to kill (or cause serious harm) because he does not positively desire or aim to do so nor does he foresee the outcome as virtually certain; when he pulls the trigger, D does not know whether the single bullet will be discharged from the gun. Strictly, D has killed recklessly, because he knowingly took an unjustifiable risk of causing death and should thus be regarded as a manslaughterer. What attracts our condemnation and opprobrium is D's indifference whether V lives or dies; in common parlance, he could not care less. If told in advance that the bullet would be discharged, D would still pull the trigger, and in that respect he bears the same moral blameworthiness as the intent-to-kill killer.

It is not difficult to think of similar instances of such apparently callous indifference to human life. Consider, for example, a case where, motivated by the desire to make some profound political or ideological gesture, D plants a bomb in a crowded shopping precinct and from several miles away he denotes the bomb. He too cannot be sure of the outcome of his action. It has been argued that cases of this sort can, in fact, be analysed so that the killer's culpability is defined as a form of intent — the killer acted with an intent to expose his victim(s) to the risk of death.[37] But should we really categorise this as a form of intent? Is it not better regarded as a form of recklessness — the deliberate (intentional) taking of an unjustified risk?

A second group of cases that do not fall within the current English legal definition of murder but which are generally regarded as among the most serious homicides are those where the defendant has killed recklessly in order to commit some other serious crime. Suppose, for example, D is being chased by a police officer as he flees from a bank from which he stole some money whilst brandishing a gun. (Since he is still running away from the bank, the act of robbery is arguably not completed.) D is becoming increasingly tired and whilst running fires his gun in the direction of the pursuing officer, intending to deter him from continuing the pursuit. But the bullet strikes the officer and kills him. Since he did not desire or aim to kill, nor was he virtually certain that the officer would be killed, D did not intend to kill. But he knowingly took an unjustifiable risk of killing and is therefore guilty of manslaughter. Some commentators would argue that the combination of D's recklessness in killing and the fact that he did so in order to commit the serious

36 Strictly speaking, this is perhaps a variation on Russian roulette — according to the *Oxford English Dictionary*, D points the gun at his own head.

37 See, for example, William Wilson, "The Structure of Criminal Homicide" [2006] Crim LR 471, 479–480.

crime of robbery should justify conviction for murder.[38] The aggregated harm and culpability and the causal link between the two elements (homicide and robbery) effectively make up for the fact that (strictly) there was no intent to kill or cause serious injury.

In the United States, homicides such as this are regarded in some states as examples of "felony murder", and there is no doubt that they are characterised by high levels of harm and moral culpability and merit severe sentences. But whether they justify conviction for the most serious form of criminal homicide is debateable. One obvious argument is that, in the context of a debate about what should constitute the most serious forms of homicide, we should be careful about the number and variety of scenarios that fall within it and we should instead insist that the focus of attention is on the defendant's *blameworthiness for causing death*. Should this not be the key factor? Rather than simply looking for a high volume of moral culpability, the law should be concerned with the defendant's blameworthiness for what is obviously the key characteristic of any homicide, causing the victim's death.

Consider what would *prima facie* be manslaughter, where D killed V whilst aware of the risk of serious injury. There may be several other aggravating factors but that should surely not warrant raising the case to one of murder simply on the basis of aggregating the aggravating factors. Moreover, there are two further points here. First, as a general proposition, there is a risk that the wider the reach of the definition of a crime, the more likely it becomes that it will be stretched too far, so that it ceases to do what it was meant to do. The danger is that some cases resulting in murder convictions will be no more serious than many manslaughters. Second, the fleeing robber who recklessly kills the pursuing police officer can still be convicted of manslaughter and robbery and can be given a lengthy prison sentence that reflects the overall gravity of his wrongdoing. Murder should be reserved for those who bear the highest levels of moral blame for killing.[39]

IV. The Minimum Culpability for a Homicide Offence

The term "manslaughter" is a broad label that represents a wide variety of "not-quite-so-serious" homicides, and one of the underlying concerns of the Law Commission when it reviewed the existing law of murder and manslaughter in 2005 and 2006 was that these two general crimes are being stretched too far, they are being made to fit too broad a range of situations and one of the obvious consequences is that the label "manslaughter" ceases to have any clear meaning

38 *Ibid*., pp.480–481. Wilson suggests that gross negligence (rather than recklessness) as to causing death ought to suffice.

39 In putting forward this argument, it is accepted that the courts should be careful to ensure that the sentencing of what might be called "high-end" manslaughters is in proportion to the punishment of murders, especially where the latter do not contain any additional aggravating factors.

other than as a loose indicator that the offence was a "lesser homicide". This is not the place to embark on a detailed discussion of the scope of offence definitions and in any event the issue is ultimately not susceptible to a wholly objective or scientific approach. But it is worth looking at the variations in the minimum levels of culpability that characterise the different varieties of manslaughter. All forms of voluntary manslaughter require at least an intent to cause serious harm (together with the relevant mitigation); but involuntary manslaughters vary from (1) gross negligence (that gives rise to a risk of causing death), (2) recklessness in that D believes serious harm is very probable or (3) (in what appear to be the most common cases[40]) an awareness by any ordinary individual of the risk of some but not serious harm.

As Ashworth pointed out, the homicide law in England and Wales goes against the general trend in that liability for serious offences usually requires some form of advertence in the form of either an intent or recklessness.[41] It seems that an exception is made in homicide because the loss of human life is considered to be so significant that criminal liability is justified even in cases of inadvertent fault — as in gross negligence manslaughter. Indeed, there is a good argument for saying that the moral culpability in some instances of inadvertent risk-taking is as great as in cases of advertent risk-taking — for example, where the defendant failed to appreciate a risk that most people would have recognised and would not have taken. If, as English law requires, the gross negligence creates a risk of causing death,[42] the argument in favour of a manslaughter conviction is clear, and there is correspondence between the harm that was risked by the negligence and the consequence for which the defendant is held liable.

In addition, English criminal law also recognises a series of road traffic homicide crimes. This series has expanded over the years, at least partly because of perceived public concern about the need for the criminal justice system to adequately reflect the full gravity of the loss of human life through different forms of culpable or unlawful driving. One of the more serious of these offences is causing death by dangerous driving, which carries a maximum sentence of 10 years imprisonment.[43] Driving is dangerous for this purpose, provided (1) the standard of driving fell *far* below that of a competent and careful driver and (2) it created a risk of injury to any person or serious damage to property.[44] Falling far below the standard of the competent and careful driver makes it resemble gross negligence manslaughter, but the need for no more than a risk of injury — which need not be serious let alone life-threatening — or of serious damage to property is clearly below the threshold

40 Barry Mitchell and Ronnie Mackay, "Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases" (2011) 31(1) Oxford Journal of Legal Studies 165.

41 Andrew Ashworth, "'Manslaughter': Generic or Nominate Offences?" in Chris Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Farnham: Ashgate Publishing, 2008).

42 *R v Adomako* [1995] 1 AC 171.

43 Section 1 of the Road Traffic Act 1988.

44 *Ibid*., s.2A.

necessary for gross negligence manslaughter. As Ashworth remarks, the law should ensure there is an "alignment of the culpability requirements for homicide offences, in the absence of strong reasons to the contrary".[45] No such reasons have thus far been advanced and there is surely good cause to doubt that there is sufficient culpability to justify convicting the dangerous driver of homicide.

One of the striking features of some of these road traffic homicides is the comparatively low level of moral culpability that suffices for conviction. Perhaps the most controversial example is the offence of causing death by driving whilst disqualified from driving, without insurance or without a licence, the maximum punishment for which is two years imprisonment.[46] To secure a conviction, the prosecution have to satisfy the court that the defendant motorist caused the death of another person whilst driving in one of the three stated circumstances. There may not be too much sympathy for the motorist who ignores the fact that he has been disqualified or who does not bother to obtain insurance or to get a licence, but the offence might also arise where a person simply forgets to renew his insurance. More significantly, however, conviction may arise even though the defendant's driving was not at fault: the victim may have been killed through a collision with the defendant's vehicle with the fault resting entirely with the victim.[47] The manner of the defendant's driving need not be blameworthy nor need the defendant be morally culpable in causing the victim's death.

The punishment for such an offence is not, in the wider scheme of things, especially severe, but the question is whether a person should be liable to conviction for a form of homicide whilst bearing relatively low moral culpability for causing the victim's death. The government attempted to justify the offence on the basis that driving whilst disqualified etc. is *per se* tantamount to careless driving even though there may be nothing reprehensible about the manner of the driving.[48] It is, of course, true that the defendant ought not to have been driving on a public road, and had he not been he would not have been involved in the incident which resulted in the victim's death. But as Duff commented, it can only be said that the defendant caused death by driving whilst disqualified etc. if it was his being disqualified etc. "that made his driving especially dangerous".[49] Being disqualified may be the consequence of dangerous or incompetent driving, and being unlicensed may evidence a lack of competence to drive safely, but (argued Duff) being uninsured implies a lack of paying for harm that has been caused "rather than with avoiding causing it". Even in cases of disqualified drivers or unlicensed drivers, "it is far

45 Ashworth, "'Manslaughter': Generic or Nominate Offences?" (n.41) p.247.

46 Section 3ZB of the Road Traffic Act 1988.

47 See Michael Hirst, "Causing Death by Driving and Other Offences: A Question of Balance" [2008] Crim LR 339–352.

48 Home Office Consultation Paper, Review of Road Traffic Offences Involving Bad Driving: A Consultation Paper (Home Office CP, 2005) para.4.2.

49 Antony Duff, "Whose Luck Is It Anyway?" in Clarkson and Cunningham *Criminal Liability for Non-Aggressive Death* (n.41) p.77.

from clear that the connection is close enough to treat the causation of death as the actualisation of a risk that made the driving wrongful in the first place".[50]

A second offence that merits inclusion in this context is that of causing death by careless or inconsiderate driving, the maximum sentence for which is a maximum of five years imprisonment.[51] The fault element in this offence arises when the defendant's driving falls below that of a "competent and careful driver" or when others are inconvenienced thereby.[52] Thus, the fault test is an objective one: the manner of the defendant's driving is simply compared with that of the hypothetical "competent and careful driver" in the same circumstances, and the defendant's own view of the standard of his driving is irrelevant. The offence was created because the government thought there was a gap in the legislation. The only crime for which motorists who killed through this form of driving could be convicted was careless or inconsiderate driving and that is punishable simply by a fine and penalty points on the defendant's licence. In addition, the only crime that reflected the causation of death was the more serious causing death by dangerous driving, but that was inappropriate and prosecution would fail because dangerous driving requires a higher degree of fault. (As indicated above, the driving must fall *far* below the standard of a competent and careful driver.)

It might well be thought that careless driving should not be regarded as reflecting a sufficient degree of moral blameworthiness to justify conviction for causing the death of another, so that the offence gives unwarranted weight to the consequence of the bad driving. But the government felt that the consequences of bad driving are sufficiently important to justify recognition of the offence, notwithstanding the relatively low level of culpability.[53] In so doing, the government ignored the fact that elsewhere in the substantive law — most obviously in the various forms of involuntary manslaughter — the prosecution is required to show at least *gross* negligence. Simple negligence may be a good basis for a civil action, but criminal liability, especially for serious offences, traditionally requires a higher degree of blameworthiness. Concern about the justification for creating this offence of causing death by careless driving is neatly summed up by Clarkson *et al*:

> "In advance of the offence coming into force the Court of Appeal stated: 'absent the consumption of alcohol, careless driving on its own almost always involves culpability at the lowest possible scale. In one sense, every driver is careless when he makes a mistake. Every driver, even the best, and most experienced, and normally careful, does so from time to time.' In cases of fatal collisions involving carelessness there may be a

50 *Ibid*.

51 Section 2B of the Road Traffic Act 1988.

52 *Ibid*., s.3AZ. It is assumed that most cases are prosecuted as causing death by careless rather than inconsiderate driving.

53 Home Office Consultation Paper, Review of Road Traffic Offences Involving Bad Driving (n.48) para.3.30.

> number of factors contributing to the collision and death, including the carelessness of the driver who dies. Is it fair that any death be attributed to the driver who was lucky to survive? Arguably, in allowing this, luck plays too great a role in determining liability".[54]

If it is accepted that, as a general principle, the minimum culpability for criminal liability for homicide should require gross negligence as to death, we must ask whether there are any circumstances that might justify a lower threshold. Ashworth reminds us that three possible justifications might be asserted:

(1) if the defendant causes death through the commission of what would otherwise be no more than a minor offence, the fact that he has committed a crime means that he has changed his normative position vis-à-vis the victim;
(2) where the defendant has assaulted the victim, he has made an attack and that should be distinguished from mere endangerment because an attacker wants to succeed; and
(3) where death arises through unlawful conduct, it is argued that the defendant has caused death, and liability is warranted because death would not otherwise have occurred.[55]

It is suggested that none of these provide an adequate justification for lowering the threshold for criminal liability in homicide below gross negligence as to death. Ashworth is surely right when he emphasises that the "key question is the relationship of the defendant's fault to the fatal result".[56] But all three arguments do no more than demonstrate that the defendant acted unlawfully and ought to be held responsible for some level of harm: none of them provide a convincing case for stretching the defendant's liability for causing death.

V. Mercy Killing

In England and Wales, and quite probably in many other jurisdictions, determining the criminal liability of mercy killers has long been problematic,[57] and there is no sign of any satisfactory solution being found in the foreseeable future. In theory, mercy

54 Chris Clarkson, Heather Keating and Sally Cunningham, *Clarkson and Keating: Criminal Law: Text and Materials* (London: Sweet and Maxwell, 2010) p.715.

55 Ashworth, "'Manslaughter': Generic or Nominate Offences?" (n.41) pp.240–242. As Ashworth points out, this argument is essentially the one on which the offence of causing death by unlawful driving (see text around note 45) is based.

56 *Ibid*., p.239.

57 The root of the problem was neatly summed up by the English Law Commission: "A 'mercy' killing involves an intention to prevent the continuation of one kind of harm (extreme pain and suffering) to a person by doing another kind of harm (killing) to the very same person"; see Law Commission, Murder, Manslaughter, and Infanticide (n.34) para.7.3.

killing constitutes murder — the defendant obviously desires (and therefore legally intends) to kill and the law does not appear to recognise a suitable defence such as "compassionate motive". Occasionally, defences that were not created specifically to accommodate mercy killers may enable them to avoid a murder conviction, but they are of limited assistance.[58] There is, though, survey evidence to suggest that the public regard mercy killing as relatively "less serious" when compared with other forms of homicide, and this seems to mean that they would not regard it as an example of murder.[59] In practice, therefore, it is not surprising that suspects who are regarded as mercy killers are likely to be examined by psychiatrists and their reports may support a plea of diminished responsibility.[60]

Some mercy killings are treated in this way and the defendant is able to thereby avoid a murder conviction and the mandatory life sentence (MLS) that accompanies it. But this may only be possible if there is a willingness to adopt a generous interpretation of the diminished responsibility law.[61] Indeed, it is not hard to find cases that have resulted in conviction for murder. For example, *R v Cocker*[62] pleaded guilty to the murder of his wife who was suffering from the incurable disease Friedreich's ataxia. He had looked after her for more than 10 years; she was severely incapacitated and repeatedly asked him to end her life. Eventually, he strangled and suffocated her, after she had spent the night again begging him to end her life. The Court of Appeal rejected his plea of (what was then) provocation (now loss of control). Even though he had told the police that his wife's entreaties that night had been "the last straw", he was regarded as not having lost his self-control. (There is no obvious reason why such cases would be treated any differently under the new loss of control law in England.)

The status quo is far from satisfactory. Over the years there have been various recommendations to improve the situation, though none has been taken up.

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58 See Amanda Clough, "Mercy Killing: Three's a Crowd?" (2015) 79(5) Journal of Criminal Law 385–372.

59 In a public survey conducted in England, in 1995, respondents rated a mercy killing scenario at a mean average of 3.5 (on a seriousness scale of 1–20), and the vast majority thought the mercy killer should not be sentenced to imprisonment; see Barry Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38(3) British Journal of Criminology 453–472. See also Barry Mitchell and Julian V Roberts, *Exploring the Mandatory Life Sentence for Murder* (Oxford: Hart Publishing, 2012) pp.95–97.

60 See s.2(1) of the Homicide Act 1957 (as amended by the Coroners and Justice Act 2009). Two relatively recent examples of mercy killing being regarded as diminished responsibility manslaughter are Mann (April 2015), available at https://www.judiciary.gov.uk/wp-content/uploads/2015/05/r-v-mann-sentencing-remarks-130415.pdf and Gazeley (June 2015), available at https://www.judiciary.gov.uk/wp-content/uploads/2015/10/r-v-gazeley-2.pdf.

61 See Barry Mitchell, "Putting Diminished Responsibility Law into Practice: A Forensic Psychiatric Perspective" (1997) 8(3) Journal of Forensic Psychiatry 620–634. Mackay remarked: "[I]n order to achieve the desired outcome for the accused… there must be something of a benevolent conspiracy between the psychiatrist and the trial judge"; see Ronnie Mackay, *Mental Condition Defences in the Criminal Law* (Oxford: Clarendon Press, 1995) p.186. In saying this, Mackay cited Professor Bluglass (see R Bluglass, *Psychiatry, the Law and the Offender: Present Dilemmas and Future Prospects* (London: Institute for the Study and Treatment of Delinquency, 1980)).

62 [1989] Crim LR 740.

In 1976, the CLRC proposed a new offence of "mercy killing",[63] but withdrew it four years later (partly at least because there was no reference to the victim's wishes).[64] The House of Lords Select Committee subsequently took the view that mercy killing cases could be adequately dealt with if the penalty for murder was made discretionary.[65] A decade or so ago the Law Commission considered the issue as part of its wider review of English homicide law and recommended that there should be "a public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing".[66] Regrettably, this recommendation has thus far not been acted upon, and there is no apparent sign that the issue will be reviewed in the foreseeable future.

Predictably perhaps, the criminal liability of mercy killers varies between jurisdictions. In France, the position is similar to that in England and Wales in that no special provision is made for such cases. In Germany, on the other hand, killing on request (*Totung auf Verlangen*) is a separate, lesser offence, carrying a sentence of six months' to five years imprisonment.[67] Whatever the jurisdictional variations, the issue of mercy killing surely merits further investigation and discussion.

The remainder of this article focuses on issues relating to sentencing and, in particular, the punishment of those convicted of the most serious forms of homicide.

VI. Mandatory versus Discretionary Sentencing

Variations exist between jurisdictions not only in the definition of what constitutes the most serious form of criminal homicide but also in the way in which convicted offenders should be punished. These variations apply within common law and civil law jurisdictions, and one fundamental issue concerns the amount of discretion that the law allocates to judges when passing sentence. In England and Wales, the law has long imposed a mandatory penalty — currently life imprisonment (or equivalent)[68] — which permits the presiding judge only a limited degree of discretion. In all cases the sentence will only finally come to an

63 CLRC, Offences against the Person (n.12) paras.79–87.

64 CLRC, Fourteenth Report: Offences against the Person (Cmnd 7844, 1980), para.115.

65 Select Committee of the House of Lords, *Murder and Life Imprisonment* (London: HMSO, 3 vols, 1989), para.100.

66 Law Commission, Murder, Manslaughter and Infanticide (n.34) para.7.49.

67 Section 216 of the German Penal Code.

68 By s.1(1) of the Murder (Abolition of Death Penalty) Act 1965, capital punishment was replaced by a mandatory sentence of life imprisonment. Note, however, that those aged under 21 years at the date of conviction must be sentenced to "custody for life": see s.93 of the Powers of Criminal Courts (Sentencing) Act 2000; and offenders aged under 18 years when the offence was committed must be ordered "to be detained at Her Majesty's pleasure": see s.90 of the Powers of Criminal Courts (Sentencing) Act 2000. Both these sentences are indeterminate.

end on the death of the offender, and the judge's task is to decide how long the offender must serve in prison before he can formally apply for release into the community on licence (under supervision). But, for example, in New Zealand[69] (a common law jurisdiction) and France[70] (a civil law jurisdiction), the punishment is discretionary and the judge can impose a sentence up to a specified maximum. In Germany (another civil law jurisdiction), *mord* carries a mandatory life penalty (and all convicted offenders will be imprisoned for 15 years and can then apply for release),[71] whereas in Australia (common law) the picture varies from state to state.[72] What are the arguments for and against mandatory as opposed to discretionary sentencing for murder?

A. The uniqueness of murder

Those who favour the MLS in England usually argue that murder is a unique crime which merits a special form of punishment, even though it does not sit comfortably with certain basic sentencing principles. It is relatively easy to see that the harm in murder — the victim's death — is special in that, in contrast to other harms, it cannot be undone or made good (at least to the same extent). Criminologists such as Rock have argued forcefully that the next of kin suffer very differently from other victims of crime.[73] In addition, Fletcher sets out the argument that "causing death is a harm of a different order".[74] Whilst on the face of it this may appear to reflect a view that would appeal to those with some form of religious affiliation, Fletcher (surely rightly) suggests that those with no such affiliation also tend to think there is something special or different in this respect about murder.

On the other hand, these arguments are not really unique or confined to murder for, quite obviously, lesser (albeit very serious) homicide offences also involve the death of the primary victim. It is more accurate to say that the case for regarding murder as a unique offence is based on a combination of causing death and a high level of moral culpability for doing so. Sadly, however, there is no shortage of observations by senior members of the judiciary that in England and Wales cases resulting in murder convictions vary considerably in their seriousness[75] and that casts grave doubt over the justification for imposing a MLS. This, of course, is

69 The MLS was abolished and replaced by a presumption in favour of life imprisonment; if the presumption is not rebutted the offender must serve a minimum of 10 years in prison — in the most serious cases, a period of up to 17 years in custody may be imposed (see ss.103 and 104 of the Sentencing Act 2002).

70 Article 221-3 of the French Penal Code.

71 See s.211 of the German Penal Code.

72 A useful overview can be found in Ian Leader-Elliott, "Recklessness and Moral Desiccation in the Australian Law of Murder" in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Oxford: Hart Publishing, 2007) especially Table 7.2.

73 See Paul Rock, *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) especially ch.2.

74 See, George P Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000) especially ch.4.

75 See, for example, the comments made by Lords Kilbrandon and Hailsham in *Hyam* and *Howe* (see works referred to in note 8).

a clear reminder that mandatory sentencing places a major premium on (1) the need for the law to recognise and define a range of offences and defences that will accurately reflect the nature and gravity of an offender's wrongdoing and (2) the ability of the criminal justice system to provide a process which ensures that verdicts accurately reflect the circumstances of the cases. Failure to achieve both these requirements will almost certainly lead to injustice.

B. The maintenance of public confidence in the criminal justice system

A quite separate argument that is often used in support of the MLS in England and Wales is the need to maintain public confidence in the criminal justice system. Put simply, it is said that there would be a significant loss of such confidence if those convicted of murder were not inevitably and automatically sentenced to life imprisonment. When the current law was passed in 1965, it was assumed that anything less than the MLS in murder cases would lead the vast majority of people to think that the law was being unduly lenient. Surprisingly perhaps, there was no scientific research on the issue until quite recently. In May 2010, a survey of opinion was conducted which found no evidence of overwhelming public support for the MLS, and thereby cast doubt over the assumption behind the legislation.[76] The 2010 survey endorsed previous survey research[77] which found that the public recognise clear variations in the seriousness of murders and it seems there is a keen desire for the punishment to reflect these variations. Whilst those who favour the MLS may argue that the sentencing judge does have a measure of discretion, in that he decides how long the offender should spend in prison before being allowed to apply for release, a significant proportion of respondents felt that a determinate sentence — reflecting the relative seriousness of the case in hand — would be adequate and acceptable.

C. Failure to ensure that all murders reflect a minimum level of seriousness

It was argued earlier that making the life sentence mandatory means that it is extremely important that convicted offenders are invariably guilty of committing a very serious crime; some degree of variation in seriousness is permissible, but no case should vary too far below the norm. Unfortunately, however, it seems that cases do occasionally fall significantly below the norm, the most obvious examples of which are mercy killings. English criminal law makes no apparent provision for mercy killers to avoid a murder conviction. Admittedly, the plea of diminished responsibility is sometimes construed generously so as to avoid a murder

76 See Mitchell and Roberts, *Exploring the Mandatory Life Sentence for Murder* (n.59).
77 See, for example, Mitchell, "Public Perceptions of Homicide and Criminal Justice" (n.59).

conviction, leaving the judge with a sentencing discretion.[78] But this is not always the case; see, for example, *Cocker*[79] and *R v Inglis*[80] where the defendants received a MLS. Such cases are widely regarded as of comparatively less seriousness,[81] and yet the sentences passed on these defendants were the same as those imposed on Ian Brady, Myra Hindley and Peter Sutcliffe for each of their murders. Although such defendants can confidently be expected to serve longer periods in custody than mercy killers such as Cocker and Inglis, the fear must be that by forcing judges to impose life imprisonment for all murders public confidence in the sentencing of offenders will be undermined.

D. Deterrence and public protection

Deterrence, either of the individual offender or of offenders generally, is clearly one of the key aims of the penal process.[82] Unfortunately, the extent to which potential murders are deterred is unknown. The official statistics in England and Wales indicate that the number of murders (and manslaughters) does not vary significantly over time. Those who favour the MLS may seek to argue that this supports the deterrent effect of the current law, but (again) the fact is that we simply do not know how far this is true. Moreover, it is interesting to note that in the Australian states of Victoria and New South Wales, where the MLS has been abandoned, there has been no apparent increase in the incidents of murder.[83]

Indeed, there are good reasons to suspect that deterrence is unlikely to be achieved through the MLS. The official statistics have consistently shown that homicides are commonly spontaneous rather than premeditated, committed on the spur of the moment, often resulting from quarrels, arguments or loss of temper.[84] Furthermore, as the House of Lords Select Committee recognised,[85] and as was confirmed in the 2010 public survey,[86] there is a widespread awareness that the MLS is something of a misnomer in that people know that most convicted murderers do not literally spend the rest of their lives in prison. Thus, the MLS is unlikely to have much of a deterrent impact on the incidents of murder.

Finally, whilst deterrence is clearly an important potential means of protecting the public, judges become experienced in determining when to impose

78 See Mitchell, "Putting Diminished Responsibility Law into Practice" (n.61) and Ronnie Mackay, *Mental Condition Defences in the Criminal Law* (Oxford University Press, 1995).

79 *Cocker* (n.62).

80 [2011] 1 WLR 1110.

81 See, for example, Mitchell, "Public Perceptions of Homicide and Criminal Justice" (n.59).

82 The relevant English authority is s.142 of the Criminal Justice Act 2003.

83 See, for example, Law Reform Commission of Victoria, Homicide (Discussion Paper No 13, March 1988), para.94 and Stanley Yeo, "Sentencing Murderers: A New South Wales Innovation" [1987] Crim LR 23, respectively.

84 See Focus on Violent Crime and Sexual Offences: Year Ending March 2015, ch.2: Homicide — Appendix Table 2.09.

85 Select Committee of the House of Lords, *Murder and Life Imprisonment* (n.65) para.114B.

86 Mitchell and Roberts, *Exploring the Mandatory Life Sentence for Murder* (n.59) pp.81–84.

a discretionary life sentence for crimes other than murder and are therefore well practised in the art of achieving this aim.

E. Would discretionary sentencing lead to inconsistencies?

Supporters of the MLS sometimes argue that giving judges more discretion would lead to inconsistencies. More specifically, if allowed to impose determinate sentences for murder as well as manslaughter, the judges would sometimes struggle to calculate the appropriate length of custody. Yet judges are well versed in assessing the gravity of cases. They are assisted by a growing body of guidance from the Court of Appeal and by publications from the Sentencing Council.[87] And in the event that a sentence might be thought unduly lenient the Attorney-General could refer the case to the Court of Appeal under s.36 of the Criminal Justice Act 1988.

F. Inconsistency with sentencing principles

A final concern about the MLS is that it does not sit comfortably with certain basic principles of sentencing that are found in various jurisdictions. First, there is the principle of proportionality, which embodies the idea that the court should assess the seriousness of each case and then reflect that in the sentence it imposes. The point is that proportionality cannot be determined without reference to a particular set of facts; it is not something that is susceptible to being judged in advance. Thus, by making life imprisonment mandatory whenever an offender is convicted of murder, there is a real danger that important variations in seriousness — in the elements of harm and culpability — will inevitably be overlooked or inadequately reflected. Supporters of the MLS may point out that variations can be reflected in the length of the minimum term (MT), but the sentence only ends on the death of the offender and even after release he is at risk of being recalled to prison without necessarily committing further offences. In this sense, there is a risk that some offenders may be punished too severely.

Second, there is the principle of parsimony (or restraint), which looks to courts to impose the least severe penalty that will achieve general sentencing aims.[88] The problem with the MLS in this respect is that there will inevitably be some convictions for murder — mercy killing being an obvious illustration — for which a lesser punishment is appropriate. The *a priori* stipulation by Parliament that *all* murders must be met with a MLS means that the principle of parsimony — which,

87 See, for example, Sentencing Guidelines Council, Overarching Principles: Seriousness (2004). There is a separate publication on the old plea of provocation which, presumably, will be updated in due course, and it is hoped that additional guidance may be published on sentencing in cases raising other aspects of the homicide law.

88 In England and Wales, for example, s.153(2) of the Criminal Justice Act 2003 states that where a custodial sentence is warranted it should be for the shortest period that is commensurate with the seriousness of the offence.

like the principle of proportionality, can only be put into practice against a specific set of circumstances — cannot always be upheld.

Third, there is a potential problem with the MLS in achieving the appropriate degree of retribution. The least serious cases of murder usually contain significant elements of mitigation and judges impose MTs in the order of six or seven years and possibly even less. This creates a paradox in that the seriousness of murder is said to require a life sentence, and yet the offender is to be able to seek and quite possibly obtain release after a relatively short period of detention. This in turn creates the risk that the sentence will be regarded as nonsensical by the public because of the discrepancy between the label "life sentence" and the time actually served.

G. Implications

On balance, it is difficult to see how a strong case can be made in support of making the sentence for murder mandatory, certainly as the offence is presently defined. Earlier in this article it was argued that the current definition of murder in England and Wales is far from satisfactory. Simple logic suggests that a narrowing of the definition might help to strengthen the case for the MLS if it effectively raised the minimum degree of culpability. But the assessment of culpability is complicated and there would surely remain some doubt whether a definition could be found that the MLS was invariably warranted. In the circumstances, therefore, the better alternative is surely to opt for discretionary sentencing.

VII. The Maximum Penalty for the Most Serious Cases: Whole Life Orders

Not surprisingly, perhaps, the nature of the most severe form of punishment that the courts may impose on those convicted of the most serious forms of criminal homicide varies between jurisdictions. In England and Wales, murders described in para.4 of Sch.21 of the Criminal Justice Act 2003[89] as of exceptional seriousness may attract a "whole life order" (WLO). Whereas in the majority of murders the judge will identify a "minimum term" — a period of imprisonment that reflects the needs of retribution and deterrence — at the end of which the offender may apply to the Parole Board for release on licence,[90] in these most serious cases, a WLO means that the offender should expect to spend the rest of his natural life in prison.

89 By virtue of s.269(5) the judge must "have regard to" the principles set out in Sch.21. This leads the judge to look at the characteristics of the case before him and identify a starting point in his calculation of the MT. Paragraph 4 provides a non-exhaustive list of factors, the presence of any one of which indicates a starting point of a WLO.

90 Release will only be granted if that is regarded as consistent with the protection of the public.

Clearly, this is the punishment that most closely reflects a mandatory sentence of "life imprisonment".

Both domestic and European Union courts have upheld the legitimacy of WLOs in principle: they do not, for example, conflict with the protection against inhuman and degrading treatment in art.3 of the European Convention on Human Rights.[91] The English courts have stressed that WLOs should be reserved for relatively rare cases where the seriousness is truly exceptional, and should not be imposed if the judge thinks the case is "borderline".[92] That said however, it is worth considering whether there is adequate justification for the imposition of WLOs, as opposed to very lengthy finite periods of imprisonment (such as 50, 70 or 100 years, etc).

A WLO is an alternative to what in England and Wales is called a MT and, whether the court imposes a WLO or MT, the relevant considerations should be confined to the requirements of retribution and deterrence; the protection of the public is immaterial at this stage.[93] A MT is a clear means of reflecting the perceived relative seriousness of the case in hand — the longer the MT, the more serious the murder. But WLOs are inherently more uncertain. Granted, any WLO implies that the case is exceptionally serious, but all WLO cases appear to be of equal seriousness. Obviously, whilst the judge may have a very general idea of the offender's life expectancy, when the order is made the length of the imprisonment is unknown.

It is, of course, true that there is a degree of uncertainty in cases resulting in a MT, in that the offender simply knows when he may formally apply for release; there is no automatic right or even expectation of release on expiry of the MT. But the uncertainty in a WLO is undoubtedly more fundamental. It is therefore relatively easy to determine whether the principle of proportionality is being upheld in MT cases, whereas in cases where a WLO is imposed it is impossible to apply the principle. Even in the narrow group of WLO cases, there must be variations in seriousness but they are not reflected in the sentence (as they are in MT cases).

Looking at the issue from a different angle, one might ask whether there is something about WLOs that makes them more desirable than very lengthy MTs. In other words, is there something special or unique about WLOs that MTs cannot provide? The obvious answer is that an offender who has been given a WLO knows that he should expect to spend the rest of his life in prison, and it is this mental or psychological perspective that is important. Consider the case of an offender who is aged 25 at the date of sentence. Even if the judge imposes a 50-year MT, the offender knows that he has some chance of being released, albeit at a distant point in the future. But if a WLO is imposed he knows there is a strong likelihood that he will never be released. (Of course, being given a lengthy MT may also lead older offenders to think that they will die in prison.)

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91 See, for example, *R v Oakes* [2013] QB 979 and *Vinter v United Kingdom* (2016) 63 EHRR 1.

92 See, for example, *R v Jones* [2006] 2 Cr App R (S) 19.

93 See *R v Andrews* [2015] 2 Cr App R (S) 40.

There is an underlying difficulty here which seems not to have been examined in any detail. In jurisdictions where WLOs can be imposed, judges surely need guidance about when to impose such an order and when to impose a long fixed term of imprisonment, for even the most serious cases tend to consist of a cocktail of aggravating and mitigating factors. Suppose the judge identifies a WLO as the starting point and then has to take further aggravating factors but also some mitigation into account. The case is still extremely serious, but how does he know when a WLO is warranted as opposed to a very lengthy MT? Of course, a lengthy MT may ultimately have the same effect as a WLO in that the offender may die in prison, but the point is that there is no apparent guidance about when the unique psychological element of a WLO is appropriate. WLOs possess this unique characteristic, but hitherto at least there has been no indication of the kinds of cases in which they would be appropriate and a long MT would be inadequate.

In addition to these concerns about WLOs, the decision of the Grand Chamber of the European Court in *Vinter*.[94] exposed what may well be a conflict between English and European Union law. When stating that in principle WLOs do not breach art.3 (inhuman and degrading treatment), the Grand Chamber emphasised that two conditions must be met:

(1) a WLO must not be grossly disproportionate; and
(2) it must not be "irreducible".

By this latter condition, the Grand Chamber meant that all prisoners, however appalling their criminality, should not be deprived of all hope of release, and this requires domestic laws to provide some form of review. This review should consider whether, notwithstanding the correctness of the WLO at the date of sentence, the offender has made such progress in rehabilitating himself that it might yet be thought appropriate to release him. In saying this, the Grand Chamber stressed that rehabilitation is becoming one of the dominant aims of punishing offenders in many European jurisdictions.

Whilst rehabilitation is undeniably one of the considerations that English courts should make,[95] there is a clear potential conflict between the achievement of this objective and the desire to ensure that the needs of retribution are met. The penal culture in some jurisdictions may mean that rehabilitation will be a prominent aim and will carry sufficient support so that offenders subject to WLOs may, following a review, in fact be released into the community. But in other jurisdictions, where the culture is different, rehabilitation may sit lower down the list of penal priorities and have to give way to retribution. Nonetheless, regardless of the penal culture, the imposition of a WLO may well prove to be an obstacle to rehabilitation. Such an order seems to jeopardise the prospects of an offender

94 See works referred to in note 91.
95 See Section 142(1) of the Criminal Justice Act 2003.

adopting the necessary constructive and cooperative approach to his sentence that rehabilitation would require.

Finally, the question was previously raised whether there is something special that can only be provided by a WLO. This article has already raised concerns about WLOs and thereby implied that it would be preferable to require judges to impose very lengthy MTs. There is yet further reason to do so, for WLOs may cause injustice. The obvious benefit from requiring fixed-term MTs is that the judge can provide a much more precise indication of the seriousness of the offence and that in turn is consistent with the principle of proportionality. In jurisdictions such as England and Wales, which permit WLOs for the most serious cases, there is a risk that the offender will ultimately be "over-punished". This was recognised by Lord Woolf MR, in the well-known case *R v Secretary of State for the Home Department, ex p Hindley*. Hindley was originally given a MT of 30 years but this was increased to a whole life. Lord Woolf remarked:

> "If the announcement of a whole life tariff meant, absent fresh circumstances, that the Secretary of State had decided that she should spend possibly more than double the provisional tariff of 30 years in prison, I am bound to say I would regard the period for punishment and deterrence as being disproportionate and unreasonable, if there was to be left out of account the question of public reaction and her own behaviour in prison".[96]

It is difficult, to say the least, to see any real justification for WLOs. Lengthy fixed-term MTs can achieve all the benefits that WLOs can offer and more, without also creating the problems that are associated with whole life sentences.

VIII. Conclusion

Whilst in England and Wales there is no sign of a call for reviewing the homicide law, there are good reasons to think that the current state of the substantive and penal laws require further investigation and discussion. The minimal response of the then Coalition administration to the Law Commission's recommendations in November 2006, and the fact that the present Conservative government has shown no positive inclination to take up the matter, is disappointing. Many if not all the issues raised in this article are of equal pertinence in jurisdictions around the world. Would we have to wait until there are claims of injustice arising from a case which receives a high public profile before there is a detailed review of the status quo in such an important area of the criminal law?

96 [2000] QB 152, 167.