

TWO VIEWS OF MURDER

PETER MacKINNON*
Saskatoon

This article analyses approaches to criticism and reform of the law of murder. It assesses the impact of the mens rea problem and the mandatory sentence of life imprisonment on the definition of the crime and on its place in homicide law. Relevant proposals in the Law Reform Commission of Canada's Working Paper on Homicide are considered and an alternative approach to reform is indicated.

Dans cet article, l'auteur analyse les différentes façons d'aborder la critique et la réforme de la législation sur le meurtre. Il détermine l'importance qu'ont, sur la définition qu'on donne à ce crime et sur la place de celui-ci dans la législation sur l'homicide, le problème de mens rea et la condamnation obligatoire à l'emprisonnement à vie. Pour ce faire, il étudie les propositions faites dans son Document de travail sur l'homicide par la Commission de réforme du droit du Canada et offre une façon différente d'aborder la réforme.

Introduction

The literature of the law is replete with vivid references to our supposed attitudes to murder. What for Blackstone was the crime "at which human nature starts"¹ is today said to be a crime "standing out from all others".² The very fact of death is striking to beings inclined as we are to fear it, and when occasioned by another it holds particular interest for us. It is only upon reflection that we are reminded that the meaning of murder is not self-evident, and that both its definition and status relative to other forms of homicide present serious difficulties in criminal law theory. For some time these problems have been under consideration elsewhere³ and they are now before those concerned with criminal law revision in this country.⁴ In this article I wish to consider what seems to me to be two fundamentally different and competing approaches to criticism and reform of the law on this subject.

These "two views of murder" are not entirely discrete but are, rather, perspectives on the subject which have implications for the sub-

* Peter MacKinnon of the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

¹ J.W. Ehrlich, Ehrlich's Blackstone (1959), vol. 2, p. 394.

² Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person, Cmnd. 7844 (1980), p. 7.

³ See, for example, Criminal Law Revision Committee, *ibid.*; New Zealand Criminal Law Reform Commission, Report on Culpable Homicide (1976).

⁴ Law Reform Commission of Canada, Working Paper 33, Homicide (1984).

stantive law by which homicide offences are defined and arranged, for defences that may be pleaded and penalties which may be imposed. Upon one view murder is a unique crime, among even other culpable homicides; its distinctiveness is conveyed in the emotive connotations of our description of perpetrators as "murderers" and recognized in a body of law on defences and penalties which is peculiar to this offence. The second view accords less emphasis to the uniqueness of what we now call murder and encourages a more integrated approach to all culpable homicides, one that may be reflected in terminology as well as definition, and also in the law of defences and penalties. These views will be considered with reference to those aspects of the law of homicide which highlight their differences, and an attempt will be made to reconcile them.

It was less than a decade ago that Lord Kilbrandon alluded to the controversy that concerns us here. In *Hyam v. Director of Public Prosecutions*⁵ he stated:

There does not appear to be any good reason why the crimes of murder and manslaughter should not be 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.

The sweeping implications of his comment begin with the suggested abandonment of the term "murder". That this word is entrenched in our popular vocabulary is illustrated by the response of an editorialist to a New Zealand proposal to adopt the term "unlawful killing" as a substitute for "murder".⁶ The latter word, he wrote,⁷

is ancient and universal; it can be translated without equivocation into the language of any civilized people. . . . To put aside a word which carries in its dark syllables a deposit of horror from centuries of history, and to replace it with a euphemism, is surely to weaken the connection between law and common experience.

But more is at stake here than what Romeo had in mind when he enquired, with rhetorical flourish, about the significance of calling a rose a rose. Another New Zealand commentator replied that "it would be wrong to allow substantive reforms to be blocked by an emotional attachment to a word".⁸ The issue is not simply one of terminology. It is the concern that retention of a crime called murder would tend to perpetuate a more or less traditional hierarchy of homicide offences beset by long-standing problems of definition and constrained by special rules relating to mitigating defences and a fixed penalty. This concern is well founded. Though it is hardly the most pressing question in homicide law reform,

⁵ [1975] A.C. 55, at p. 98, [1974] 2 All E.R. 41, at p. 72 (H.L.).

⁶ New Zealand Criminal Law Reform Committee, *op cit.*, footnote 3, p. 1.

⁷ M.H. Holcroft, Editorial, New Zealand Listener, September 3, 1977, quoted in G.F. Orchard, Culpable Homicide—Part 1, [1977] New Zealand Law Journal 411, at p. 412.

⁸ Orchard, *ibid.*, at p. 412.

whether or not we call a homicide crime "murder" does have substantive as well as symbolic importance, and in the discussion here it is the substantive which will be emphasized. But the symbolism of language should not be lightly dismissed. A philosopher has observed that "[t]he word murder stands to homicide much as the word 'lie' stands to falsehood".⁹ Just as lies are understood to be deliberate falsehoods as distinct from false utterance born of ignorance, carelessness or indifference to truth, the word murder is generally accepted as referring to the most serious killings. This is reason enough for retaining it in the language of the law. That some of what is now called murder should not be so called is not as much an objection to its retention as it is a plea for better definition. The concern that there are wider substantive implications of retaining a crime called murder is more serious, though it too can be met provided the crime is defined in a more limited and less controversial way than it is now.

And so we turn to this problem of definition, and to the issue upon which the shape of homicide law depends most—the mental element of murder.

I. *The Mens Rea Problem*

In popular lore which is the stuff of good detective stories, the *mens rea* of murder is conceived as the intended and usually planned destruction of human life. And here death is intended in the uncontroversial sense of the word—it is wanted and sought by the actor. But the word does not in all cases have an obvious and settled meaning.¹⁰ Though we would not in common parlance describe as intended those consequences of our conduct which we did not want to occur, the boundaries of the concept are extended for the purpose of legal analysis to include consequences anticipated as certain whether we wanted them to happen or not. It is the extension of the concept of intention to include foreseen consequences which is at the root of the *mens rea* problem. If in legal analysis "intended" meant what it is popularly understood to mean, the resulting definition of murder would be clear. However once we include reference to foresight of consequences the blurring of a distinction between intended and reckless killing begins. Not, it will be replied, if it is required that consequences be anticipated as certain. Yet it is because in the real world consequences are rarely foreseeable as certain, that Glanville Williams and others have suggested that what we are really talking about in this context is *virtual* certainty.¹¹ If by virtual certainty we mean, as I think we must, a very high degree of probability, the problem becomes apparent: there exists an

⁹ Phillip Devine, *The Ethics of Homicide* (1978), p. 16.

¹⁰ See the discussions in George Fletcher, *Rethinking Criminal Law* (1978), pp. 449 *et seq.*; Hyman Gross, *A Theory of Criminal Justice* (1979), pp. 88-103.

¹¹ Glanville Williams, *Textbook of Criminal Law* (1978), p. 65.

indistinct point of merger between the legal concepts of intention and recklessness which makes separate definition of intentional killing and reckless killing very difficult. Further, once it is recognized that in legal analysis "probable" may mean what is usually called possible,¹² we must consider that this point of merger along the scale running from bare possibility to high probability may be lower than we usually suppose it to be.

The case which was the point of reference for the English Criminal Law Revision Committee's recommended definition of the *mens rea* of murder¹³ was *Hyam v. Director of Public Prosecutions*.¹⁴ There the appellant had been jealous of one Mrs. Booth who she felt had attracted the attention of one who was or had been her lover. Very early one morning she went to Mrs. Booth's home—on her account in order to frighten her—poured gasoline through the letter box, ignited it and went home. Two of Mrs. Booth's children were killed in the resulting fire. The House of Lords concluded that this was murder, holding that consequences foreseen as probable are to be taken as intended and the jury must have concluded that Hyam knew it to be highly probable that death or serious bodily harm would result from her setting fire to the house.

The Criminal Law Revision Committee disagreed with this result and felt that in principle nothing less than an intention to kill should suffice for liability for murder.¹⁵ However they were prepared to compromise to the extent that they would include as murder cases in which the killer intended to cause serious bodily injury and knew there was a risk of causing death.¹⁶ What was thought to distinguish this definition of the *mens rea* of murder from that applied to *Hyam* was the intention to cause serious bodily injury. It was contemplated that the killer would have "shot, stabbed or otherwise seriously injured" the victim,¹⁷ and not incidentally put his life at risk by engaging in other reckless conduct. It is not awareness of a high probability of death that is important here; knowledge that it is risked is sufficient provided the critical limiting factor—the intention to cause at least serious bodily injury—is present.

This approach was seen by the Committee as placing emphasis on the uniqueness of murder in relation to other homicides. What was stressed is the need for better expression of its unique status through clearer and

¹² Glanville Williams, *Criminal Law: The General Part* (2nd ed., 1961), p. 44.

¹³ The Committee proposed that it should be murder (a) if a person, with intent to kill, causes death and (b) if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death; *op. cit.*, footnote 2, p. 14.

¹⁴ *Supra*, footnote 5.

¹⁵ *Op. cit.*, footnote 2, p. 10.

¹⁶ *Ibid.*, p. 13.

¹⁷ *Ibid.*

more limited definition of the *mens rea* to refer only to intention. But intention is defined in the Report to mean "the state of mind of a person (i) who wants the particular result to follow from his act or (ii) who, though he may not want the result to follow, knows that in the ordinary course of things it will do so".¹⁸ And so we return to the problem. In defining intention to include (ii), the door is left open for the continued recognition of many reckless killings as murder. Did Hyam know that "in the ordinary course of things" setting fire to Mrs. Booth's home in the middle of the night would result in death or serious bodily injury to one or more among its sleeping occupants? The Committee did not think so but others could be forgiven for taking a different view. There is ambiguity in the phrase "ordinary course of things" but what it seems to convey is the probability or likelihood of an event occurring. Perhaps it encompasses a very high probability but we cannot be certain that it does or that it would be so interpreted. No one has suggested that the statistical probability of suffering death or serious harm in house fires, and the general awareness of the extent of that risk, be studied in aid of answering the question. Applying the Committee's definition of intention, it is likely that the result in *Hyam* would not be changed, whether one applied the trial judge's test requiring that the result be foreseen as highly probable, or the probability test acceptable to the House of Lords.

Now of course in Canada we have a somewhat narrower view of the meaning of intention than that taken in *Hyam*. In *R. v. Buzzanga and Durocher*¹⁹ the Ontario Court of Appeal rejected the proposition that an "actor's foresight that a consequence is highly probable, as opposed to substantially certain, is the same thing as an intention to bring it about".²⁰ But the Court considered that, as a general rule, "a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence".²¹ How is this finding to be made?

Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them. The greater the likelihood of the relevant consequence ensuing from the accused's act, the easier it is to draw the inference that he intended those consequences.²²

Is this rejection by the Ontario Court of the rule in *Hyam* significant? The answer is no. Both the definition of intention and the nature of the fact-finding process referred to in *Buzzanga* invite reminders that in hu-

¹⁸ *Ibid.*, p. 4.

¹⁹ (1979), 101 D.L.R. (3d) 488, 49 C.C.C. (2d) 369 (Ont. C.A.).

²⁰ *Ibid.*, at pp. 503 (D.L.R.), 384 (C.C.C.).

²¹ *Ibid.*

²² *Ibid.*, at pp. 506 (D.L.R.), 387 (C.C.C.).

man affairs the foresight of consequences always belongs to the realm of probability and that the degree of probability identified—from “more likely than not” to “substantially certain”—is, as it must be in the trial process, intuitive and can not be scientifically determined. It thus becomes apparent that even the most basic and uncontroversial definition of murder in our law—meaning or intending to cause death—is problematic. What will we say of Mr. Brown who, in attempting to commit suicide, drove into the path of an oncoming vehicle whose driver was killed in the ensuing accident.²³ Did he intend to kill the other driver? In accordance with the *Buzzanga* rule the answer will depend on whether he foresaw the death as substantially certain. Is this really different from asking whether Mrs. Hyam knew it to be highly probable or even only probable that setting fire to the Booth home in the middle of the night would kill one or more among its sleeping occupants? Even if it is different, is it a difference to which we wish to attach fundamental significance in distinguishing liability for murder from liability for a lesser crime of homicide? Again, it is suggested, the answer is no.

Let us for the moment contemplate another distinction—that between suddenly impulsive killings and those that are premeditated. It has been convincingly argued that when a killing is impulsive, concepts which emphasize rational processes—forming an intention or contemplating a risk—have little meaning.²⁴ The actor lost his self-control for whatever reason and the enquiry as to his *mens rea* will amount “more or less to the negation of duress, insanity and fundamental mistake coupled with some minimal notion of foresight of consequences”.²⁵ It is difficult to see here the basis for a distinction between intention and recklessness, let alone a classification of homicide offences which attaches importance to a finding of one or the other.

Planned and premeditated killing is different. Here the actor has written the script for the drama that ensues. Having reasoned his way to kill he presents a unique threat to his intended victim's life and, more generally, to the rules necessary for the preservation of social order. This is not to say that in all cases his crime is more serious than that of one who kills impulsively; we can think of very heinous instances of impulsive killing and less heinous examples of planned and premeditated killing. It is however to recognize that it is different and *in general* more seriously wrong than other killings.

²³ See *Re Brown and the Queen* (1983), 4 C.C.C. (3d) 571 (Ont. H.C.).

²⁴ See Tom Hadden, *Offences of Violence: The Law and the Facts*, [1968] Crim. L. Rev. 521. Of particular importance is his conclusion at pp. 527-528 that “murder and manslaughter are defined almost wholly in terms of rationalistic concepts of intention and recklessness which have little relevance to the majority of the cases which come before the courts”.

²⁵ Hadden, *ibid.*, at pp. 532-533.

What conclusions on the definition and arrangement of crimes of homicide may be drawn from these reflections on intention and recklessness, and on impulsive and planned and deliberate killing? One answer to the problem of distinguishing intentional and reckless killings might be that the recognition of some reckless homicides as murder is unobjectionable. But which ones? We may have little difficulty in labelling as murder Mrs. Hyam's destruction of Mrs. Booth's children, yet be hesitant about viewing as murder the conduct of a reckless driver who runs down and kills a pedestrian.²⁶ We may try to distinguish among these and other examples on the basis of whether the defendant's conduct was "aimed"²⁷ at someone, or according to our intuitive sense of the degree of probability with which death or injury causing death is foreseeable—from "virtually" or "morally" or "substantially" certain, to highly probable and so on down the scale. The trouble is that our intuition is not a particularly reliable guide to such matters. The result is that any definition of intention wide enough to embrace some reckless killings would likely mean that the difference between killings intended in this sense and other reckless killings would remain indistinct.

This is precisely the difficulty with the Law Reform Commission of Canada's working paper on homicide.²⁸ That document proposes a major revamping of the law in this area and, though it includes many recommendations that should attract wide support,²⁹ its approach to definition does not meet the problem discussed here. The pertinent proposals are numbered 6, 7 and 8 in the summary of recommendations:³⁰

6. "Intentional" homicide should apply only to killings done with actual intent to kill and cases of constructive intention should be excluded from this category.
7. "Intentional" homicide should apply only to killings done with actual intention and cases of reckless killing should be excluded from this category.
8. "Reckless" homicide should be restricted to reckless killing, that is, causing death by knowingly exposing another to serious and socially unacceptable risk of death.

These recommendations reveal the proposed new scheme of homicide offences. The Commission was not firm on nomenclature so it is not yet clear whether it will in its final report propose that intentional homicides, or some of them,³¹ be labelled murder, but it is nonetheless a

²⁶ See Don Stuart, *Canadian Criminal Law* (1982), p. 136. In contrast see Brian Hogan, *Reform of the Law of Homicide* (1980), 29 U.N.B. Law J. 9, at pp. 14-15.

²⁷ *Director of Public Prosecutions v. Smith*, [1961] A.C. 290, [1960] 3 All E.R. 161 (H.L.). See also the discussion by the Criminal Law Revision Committee, *op. cit.*, footnote 2, pp. 10-14.

²⁸ Law Reform Commission of Canada, *op. cit.*, footnote 4.

²⁹ Of particular significance is the proposed abolition of constructive murder. Other recommendations would serve to simplify and clarify the law.

³⁰ *Op. cit.*, footnote 4, p. 85.

³¹ The proposals call for two degrees of intentional homicide. The first degree would involve "the murderer's deliberate subordination of the victim's life to his own purpose"

scheme which accepts that the distinction of fundamental importance is that between intention and recklessness. In its analysis of the meaning of intention the Commission accords significance to the difference between the anticipation of death as a "virtually certain" consequence of an act and its foreseeability as probable, and includes the former as an instance of intention.³² In support of this position is cited the popular example of placing a bomb on board an aircraft where the motive is something other than the death of one or more of the passengers. That the actor may not have wanted the passengers to die, or was indifferent to their fate, does not matter; he intended the death that occurred.

To be sure, one who intends to kill another often has an ulterior³³ purpose—or what the Commission calls an "indirect or oblique intent"—for doing so. That he kills for reasons other than mere pleasure derived from his victim's death does not mean that he is to be regarded as having done other than sought his death. Indeed the aircraft bomber's conduct may be characterized as the "planned and deliberate" destruction of the aircraft and its passengers. He chose to bring it about and planned to do so. That his act was but the means to achieve some further purpose rather than an end in itself does not matter. In other words a distinction is to be drawn between "means to ends" and "consequences of acts". The former can be part of the actor's planned and deliberate conduct. The latter are its possible or probable by-products.

The distinction between a consequence that is seen by an actor as the means to a desired end and one that is a by-product of it is discussed by Professor R.A. Duff with reference to the law of attempts,³⁴ but is useful in this context as well. The distinction does not mean, however, that we are no longer to be troubled by the difference between consequences anticipated as certain (intention) and those foreseen as probable (recklessness). On the contrary it illustrates that recognition of the difference will persist. Why this is so becomes apparent if we reflect upon what it is that affects our classification of phenomena as one or the other—as an instrument and means to an end or as a by-product of pursuing that end. To return to the familiar example cited by the Law Reform Commission, the placing of an explosive on board an aircraft is done with the knowledge that those on board will almost certainly be destroyed along with the plane. Though it may not be the actor's objective or wish to kill the passengers, do we not take their deaths to be something he has decided to bring about as the means to achieve whatever it is that he wants to

and would be punishable by at least an as yet unspecified minimum penalty; *ibid.*, pp. 78-83.

³² *Ibid.*, pp. 52-53.

³³ *Ibid.*, p. 52.

³⁴ R.A. Duff, *Intention, Mens Rea and the Law Commission Report*, [1980] Crim. L. Rev. 147, at p. 157.

accomplish? If we do (and I think we do) is it not because of the certainty, or as near to a certainty as there can be, with which the deaths of the passengers can be foreseen? In contrast, when Mrs. Hyam set fire to a house in the middle of the night in order to frighten its occupants, we are less likely to say that her chosen means to this end included the deaths of those asleep in the house. The reason lies in the degrees of probability with which death can be foreseen in the two cases. Because there is known to be a good chance of escaping a house fire, as distinct from virtually no chance of escaping the mid-air disintegration of an aircraft, we are inclined to view the deaths of the occupants of the house as the by-product of what Mrs. Hyam did rather than the means chosen for doing it.

Thus we do have to contend with the distinction between killings that are intended in the sense that death is anticipated as a near certainty and those where it is foreseen only as probable. But it is done here in the context of determining what is eligible to be included within the meaning of "planned and deliberate". And our conclusion is that in addition to an actor's goal, his premeditation may extend to the means he chooses to reach that goal. This is very different from putting the distinction between intentional and reckless killings at the core of the classification of homicide offences as is done now and is proposed by the Law Reform Commission.

Let us now turn to the alternatives that we are presented with. Assuming it to be desirable, a crime called murder could be retained in our law but to be distinctive it would have to be defined differently than it is now or would be on the approach of either the Law Reform Commission of Canada or the English Criminal Law Revision Committee. Another possibility would see the collapse of the distinction between murder and manslaughter and a substitution for them of a single crime of unlawful homicide.

It is the latter that Lord Kilbrandon had in mind in *Hyam*. His proposal has some appeal. There is superficial attraction to the idea of collapsing imperfect distinctions that are presently made and substituting for them a crime cast in more general terms. For the purpose of defining criminal offences, however, the principle of legality requires us to account for important distinctions among different kinds of conduct. Just as lies are identifiable as a particular class of falsehood some killings are distinguishable as a class from others. They have features which can be discussed separately and most would agree that they bear a different moral quality. A failure to account for them in the definition of offences would serve no good purpose. The problems encountered in definition would only be postponed until penalty is considered and imposed, a stage of the trial where the fact finding process is far less rigorous than it is in the determination of liability. Basic differences should be reflected in

definition and there are basic differences in the circumstances in which people kill one another.

The question then is wherein lie the differences that should find expression in definition. It has been suggested that existing law and proposed reforms in Canada and England invite two serious objections. The first is that the distinction between intentional and reckless killings is and will remain indistinct. The second is implied by the first: trying to draw a line where it cannot adequately be drawn suggests that nothing of fundamental importance should depend on the effort. Earlier we contrasted premeditated killings with those that are suddenly impulsive and it was suggested that a line could be drawn here and that there would be good reason for doing so. How is this distinction to be expressed in our law?

At one time a test for distinguishing capital and non-capital murder,³⁵ the phrase "planned and deliberate" is now one designation of first degree murder.³⁶ Both words—"planned" and "deliberate"—have been distinguished from "intention".³⁷ A popular authority³⁸ for the meaning of "planned" is *R. v. Widdifield*³⁹ where it was said to refer to "a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed".⁴⁰ The second word—"deliberate"—is conceived in contradistinction to "impulsive".⁴¹

These words capture the essence of what, it is suggested, should now distinguish murder from other homicides. However, there is a concern to which we should be attentive. Professor Stuart has expressed the fear that there may be "too many verdicts of [planned and deliberate] murder in the usual context of a highly emotional series of events occurring over a short span of time".⁴² A similar concern could be expressed about what is proposed here, that is, there would be too many convictions of murder as distinct from another crime designating other unlawful homicides. What may underlie his concern might be likened to the objection taken here to a classification based on the distinction between intention, as the word is presently understood in legal analysis, and recklessness:

³⁵ J.H. McC. McNair, *Capital and Non-Capital Murder* (1962), 20 U.T. Fac. of Law Rev. 53.

³⁶ Criminal Code, R.S.C. 1970, c.C-34, s. 214(2).

³⁷ *R. v. Mitchell*, [1964] S.C.R. 471, (1964), 46 D.L.R. (2d) 384.

³⁸ It is cited in *Re Brown and the Queen*, *supra*, footnote 23; *R. v. Rolls* (1981), 62 C.C.C. (2d) 512 (Yukon C.A.); *R. v. Smith* (1979), 51 C.C.C. (2d) 381 (Sask. C.A.); *R. v. Reynolds* (1978), 44 C.C.C. (2d) 129 (Ont. C.A.).

³⁹ (1963-64), 6 Crim. L.Q. 152 (Ont. H.C.).

⁴⁰ *Ibid.*, p. 153.

⁴¹ *Ibid.*; see also *More v. R.*, [1963] S.C.R. 522, at p. 534, (1963), 41 D.L.R. (2d) 380, at p. 382.

⁴² *Op. cit.*, footnote 26, pp. 146-147.

just as this is a difficult distinction to make, so too is that between killings that are planned and deliberate and those that are not. This objection takes us to the heart of the matter and merits closer consideration.

First of all we may concede that there are "hard cases" where the issue is whether the killing is planned and deliberate or is not. The closer in time the plan is conceived to the causing of death the more difficult is this problem. However there are cases where the killing is indisputably planned and deliberate. Killing by pre-arrangement is one type of case and there are others where it is evident there was considerable advance planning. So too the sudden and impulsive nature of many and perhaps most killings is apparent. The fact that in the hard cases the category of "planned and deliberate" tends to shade off into the impulsive category is not a fatal objection to a classification based on a distinction between the two.⁴³ It is rare that the essence of phenomena can be entirely and neatly captured by language. In a comparison of things or of behaviour there are boundaries which typically are shaded rather than abrupt. What this requires is particular caution on the part of the observer in deciding where in his classification a given act falls, and not abandonment of his scheme altogether.

The objection taken to the intention/recklessness categories is more fundamental. It is not simply that the two overlap at the boundaries. It is that there is an indistinct point of merger—perhaps lower than we usually suppose it to be—between them. Further, as was noted earlier, it is when killing is sudden and impulsive that concepts such as these which emphasize rational processes have little meaning.⁴⁴ That is to say, underlying our problem with definition is a lack of theoretical justification for making these categories the central focus of our enquiry.

It must be said that a plea for a structure of homicide law that looks primarily at whether or not a killing is planned and deliberate does not preclude the recognition of further division among crimes of homicide. I have argued,⁴⁵ as have others,⁴⁶ that the felony-murder doctrine as expressed in section 213 of the Criminal Code⁴⁷ should be abolished. And if murder was defined to mean planned and deliberate killing, what is now covered by section 213 would fall outside its scope. This is not to deny, however, that some killings could be deemed to be murder notwithstanding the absence of planning and deliberation. The case for doing so may be strong for some of what is included in section 214 of the Code,

⁴³ Hadden, *loc. cit.*, footnote 24, at p. 532.

⁴⁴ *Ibid.*, at pp. 527-528, 532-533.

⁴⁵ Peter MacKinnon, *The Path of Felony Murder* (1979), 11 *Ottawa L. Rev.* 509.

⁴⁶ See, for example, P.T. Burns, R.S. Reid, *From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?* (1977), 55 *Can. Bar Rev.* 75.

⁴⁷ *Supra*, footnote 36.

particularly section 214(4) which concerns the killing of police officers and prison authorities. The matter should be studied further and is mentioned here only to emphasize that our present concern is with general structure and definitions, and not with the blueprint of complete homicide law.

II. *The Penalty for Murder*

We have proceeded thus far without doing more than allude to the problem of disposition. It is said that "[u]sually a reformer of the criminal law can concentrate on the substantive law without . . . paying too much attention to penalty".⁴⁸ We cannot do so here. The view of murder which emphasizes uniqueness of that crime has come to be associated with the desirability of a fixed penalty, in Canada mandatory life imprisonment.⁴⁹ The argument favouring its retention focusses primarily upon its symbolic importance in recognition of this especially serious crime.⁵⁰ The alternative view is that for murder, as for other crimes, the penalty should be discretionary and variable from case to case depending upon particular circumstances. But the significance of this question is not limited to the determination of appropriate sentences; the entire structure of the law of homicide is heavily influenced by decisions about penalty. Indeed in the law of murder as it has developed to this point it is as if lawmakers had been enjoined to "let the crime fit the punishment" rather than the other way around. Of particular interest is the status of the special defence of provocation and the claims to special status of other mitigating factors, most notably the use of excessive force in self-defence.

It is because murder has carried a mandatory penalty that provocation is a special defence reducing murder to manslaughter. The fact that one convicted of assault was provoked by his victim can be considered in sentencing, but, if the assault resulted in death, provocation is legally relevant only if it reduces liability from murder to manslaughter where life imprisonment is the maximum and not the mandatory penalty. The applicable rule is set out in section 215 of the Criminal Code⁵¹ and we need do no more here than point out that it has been rightly criticized on account of its ambiguity, complexity, and the fully objective test implied by the statutory language.⁵² In themselves, these criticisms are blunted by judicial interpretation of the section⁵³ and might be more fully met by

⁴⁸ Hogan, *loc. cit.*, footnote 26, p. 12.

⁴⁹ Criminal Code, *supra*, footnote 36.

⁵⁰ Criminal Law Revision Committee, *op. cit.*, footnote 2, p. 20.

⁵¹ *Supra*, footnote 36.

⁵² Stuart, *op. cit.*, footnote 26, pp. 434-440.

⁵³ *Director of Public Prosecutions v. Camplin*, [1978] A.C. 705, [1978] 2 All E.R. 168 (H.L.).

reformulation of the test.⁵⁴ However, fundamental questions would remain. Is there good reason for continuing to accord this special recognition of provocation to the exclusion of other mitigating factors, perhaps equally or more compelling? Would we be better served by removing the fixed penalty and allowing provocation, whether or not of a kind contemplated by the existing test, to be taken into account along with these other mitigating factors in imposing sentence?

These questions are in turn related to other aspects of homicide law. If the mandatory penalty and the special defence of provocation were removed from the law, and the label "murder" retained for the extended crime thus created, provoked killings would be murder rather than manslaughter as at present. In addition to the feeling that provoked killings do not merit this hard label, it may be important that juries have available to them an intermediate verdict between murder and an acquittal and that there be a specific finding on the issue of provocation as guidance to the judge in sentencing.

Similar considerations apply to the use of excessive force in self-defence, or to diminished responsibility where it is a special defence.⁵⁵ The Supreme Court of Canada has rejected the former⁵⁶ with the result that one who uses more force than is necessary in defending himself and kills his attacker is guilty of murder. Again the central question is whether there should be an intermediate verdict to accommodate this situation. And again, in addition to any merit that special recognition that a claim of excessive force in self-defence may have, the answer will depend upon the structure of homicide law as a whole and upon the penalty provisions in particular.

How are the competing views on penalty to be accommodated? In one response to this question the Law Reform Commission of Canada proposes the abolition of the mandatory penalty and a substitution for it of a discretionary sentence to a maximum of life imprisonment for all intentional homicides except those falling into a first degree category for which an as yet unspecified minimum penalty would be provided.⁵⁷ These recommendations are intended to add flexibility, to obviate the need for special rules relating to provocation, excessive force in self defence and infanticide, and at the same time to recognize that killings of the most serious kind should carry at least a minimum sentence in recognition of

⁵⁴ For example along the lines proposed in England where it was recommended that provocation be a defence to a charge at murder "if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with a murderous intent"; Criminal Law Revision Committee, *op. cit.*, footnote 2, p. 43.

⁵⁵ For example in England; see Homicide Act, 1957, 5&6 Eliz. c.11, s. 2.

⁵⁶ *Brisson v. R.*, [1982] 2 S.C.R. 227, (1982), 69 C.C.C. (2d) 97.

⁵⁷ *Op. cit.*, footnote 4, pp. 78-83.

that fact. Proponents of reform in other jurisdictions have reacted differently. For example in New Zealand, where it was recommended that the crime of murder be replaced by one of "unlawful killing", it was suggested that there be provision for a maximum of life imprisonment but with no minimum period,⁵⁸ and in England, where it was recommended that a crime called murder be retained, an almost evenly divided Criminal Law Revision Committee⁵⁹ felt itself to be in no position to recommend a change in the mandatory life imprisonment penalty.

A preferred approach to the question of penalty depends upon what is thought to be the appropriate emphasis to give to the most serious homicides whether known as murder or by another name. And it depends as well on the anticipated reaction to change. What to some will be the advantage of greater flexibility if the mandatory sentence is repealed will for others be a weakening of a well-deserved sanction and a softening of the law in an area where the law should not be soft. It is important, however, that we recognize that reform of the law of homicide cannot take place without the repeal of the mandatory penalty; indeed it must begin here. Nor should this step be seen as a more lenient approach to punishment but simply one that permits different homicides to be treated differently.

The proposal in this article easily accommodates the repeal of the mandatory life sentence and the substitution of a more flexible penalty structure. It has been suggested that henceforth only planned and deliberate killing should be murder and that other unlawful killings constitute the crime of unlawful homicide. For the latter, at least, the penalty would be discretionary to a maximum of life imprisonment. Because reaction to provocation or to another's attack is expected not to be planned and deliberate what the law now recognizes as provoked killings, as well as those where excessive force is used in self-defence, would fall into the unlawful homicide category. No special rules would be necessary and judges could consider either or both in deciding upon sentence.

There remains the question whether for murder as defined in this proposal there ought to be a mandatory penalty, and whether special defences relieving defendants from conviction of murder for some planned and deliberate killings would be necessary. It can be argued that unless the mandatory penalty is retained the distinction between murder and unlawful homicide is one of name only. Of course we have assumed that there is some significance in labels, but it is possible to go beyond them without establishing a mandatory penalty and create a presumption or sentencing guideline which would in general see planned and deliberate killing punished more severely. The argument here has been that these killings are different, not that in all cases they should be punished in the

⁵⁸ New Zealand Criminal Law Reform Committee, *op. cit.*, footnote 3, p. 1.

⁵⁹ *Op. cit.*, footnote 2, pp. 19-26.

same way or more severely than other homicides. Once this is conceded the difficulty of justifying retention of a mandatory penalty becomes apparent.

The argument against a mandatory penalty for planned and deliberate killing is essentially the same as that against the fixed sentence of life imprisonment for murder as it is presently defined. The labels of the criminal law are crude. The range of behaviour contemplated by any one of these labels is wide. This is true for murder as it is for robbery or sexual assault. In restricting murder to planned and deliberate killing we would narrow the range appreciably but still it would be broad. A contract killing is planned and deliberate, but so too may be an act of euthanasia or a killing produced by cumulative acts of provocation on the part of a cruel victim. Few would argue that the same punishment is equally appropriate for all three.

What is common to the three, however, and what by this argument would distinguish them as murder, may support the stipulation of a fixed minimum sentence. The argument underlying much of the writing on homicide, that murder is an especially serious crime worthy of recognition in the form of a unique punishment, applies with greater force when murder is conceived as restrictively as it is here. A fixed minimum sentence would serve to distinguish murder from unlawful homicide other than in name only and yet would avoid the complete inflexibility of the mandatory sentence.

III. *Infanticide and Euthanasia: Special Cases?*

The destruction of offspring and mercy killing are bound to be controversial aspects of homicide law. The former, which otherwise would be murder, is given recognition in the Criminal Code as the special offence of infanticide.⁶⁰ There are well known problems with both the definition of the crime⁶¹ and the rationale for its present status.⁶² The events that preceded the enactment in England of the legislation upon which the Canadian offence is based make it apparent that this law was born of the reluctance of juries to convict offending mothers of murder, and of the protests of judges against the "solemn mockery" of passing the sentence of death upon them when it was well known that the sentence would not be carried out.⁶³ The question for us is whether a similar or other rationale supports the continued existence of the separate offence.

⁶⁰ Criminal Code, *supra*, footnote 36, s. 216.

⁶¹ See the historical annotation in Martin's Criminal Code (1955), pp. 203-205; Stuart, *op. cit.*, footnote 26, pp. 450-453.

⁶² Martin's Criminal Code (1955), p. 393.

⁶³ *R. v. Rolfs*, *supra*, footnote 38.

The question is different in cases of euthanasia to the extent that if what is called mercy-killing falls within the definition of murder there is liability for that offence. The issue, however, is the same. What, if any, special recognition ought to be accorded to the fact either that a disturbed parent has killed a newborn, or that it was mercy for the victim that motivated the taking of his life?

The Law Reform Commission of Canada has taken the position that the infanticide problem can be met by repealing the mandatory sentence of life imprisonment. The fact that the case was one of infanticide could then be considered in the imposition of sentence for the proposed crime of intentional homicide and there would be no further need for the special offence. Mercy killing was thought to be the more difficult problem because many, perhaps most, instances of euthanasia would fall within the first degree of the proposed intentional homicide crime and render an accused liable to at least the minimum penalty proposed for that offence. The labelling problem is important here as well. If a crime called murder is retained this label may be seen by some as particularly inappropriate for perpetrators of infanticide and euthanasia.

Under the scheme proposed here there would be little difficulty, provided that what is now known as infanticide is not considered "planned and deliberate" killing. It would fall into the unlawful homicide category and could be dealt with accordingly. Even in cases where it is alleged that there was "planning and deliberation" the defendant's mental condition would be considered in relation to that issue in the same way that mental illness may be relevant now in determining whether liability is for first or for second degree murder.⁶⁴ Though theoretically possible, it is difficult to imagine that there would remain cases of infanticide for which the verdict would be murder as conceived here and it would seem that the special offence could safely be removed from our law.

Euthanasia is different because many and perhaps most instances of what might be called mercy killing are planned and deliberate and hence would amount to murder under this proposal. We should remember, however, that the terms "euthanasia" and "mercy killing" are used very loosely to describe many different kinds of involvement by one person in the death of another⁶⁵ and that existing criminal law doctrine is of great importance in determining whether the involvement will incur liability.

⁶⁴ For discussion of this problem see Neil Elliott, *The Gods of Life* (1974), pp. 122-123; see also Eike-Henner W. Kluge, *The Ethics of Deliberate Death* (1981), pp. 10-11.

⁶⁵ For a discussion of the duty requirements see Helen Beynon, *Doctors as Murderers*, [1982] *Crim. L. Rev.* 17, at pp. 23-28.

⁶⁶ *R. v. Adams*, unreported, referred to by Williams, *loc. cit.*, footnote 11, p. 236. See also the report of the inquiry into the death of Candace Taschuk, *Globe and Mail* (Toronto), August 25, 1983, p. 3.

The scope of duties to aid in the preservation of life,⁶⁶ and the law of causation⁶⁷ and of justification⁶⁸ serve to narrow the field considerably and reduce the instances of what may casually be called euthanasia for which there is substantial risk of criminal liability. Fewer yet are the cases for which there may be liability for murder defined as it is here to refer only to planned and deliberate killings. And for those cases it is difficult to argue in support of special provision precluding liability for that offence. Can we say more than that we may empathize with one moved to kill by the suffering of his victim? This is but one among motives that we may find understandable, even laudible, and motive may affect penalty subject to any prescribed minimum sentence. On the assumption that the Law Reform Commission's proposal against legalizing active euthanasia⁶⁹ reflects values that the criminal law should continue to reflect, allowing motive to be considered in the determination of penalty is as much a concession to mercy killing as can reasonably be expected.

Conclusion: The Proposed New Law of Homicide

We may in conclusion summarize the nature of the homicide law to which the present arguments lead. It borrows from both of the competing views of murder that have been discussed. The influence of the traditional view is felt in the retention of a crime called murder, a limited hierarchy of crimes of homicide, and a fixed minimum, though not a mandatory sentence, for the crime of murder. From the alternative view comes simplification and greater flexibility by reason of the proposed changes in penalty and the special defences.

At the core of discussion on this topic are the problems of *mens rea* and penalty. The substance and shape of homicide law falls into place more or less routinely depending upon decisions that are taken with respect to them. The case for the abolition of the mandatory sentence is very strong notwithstanding that such a proposal would attract considerable controversy. But the interest in penalty should not divert attention from the *mens rea* issue. What I have argued is that existing law which rests upon the distinction between intention and recklessness is fundamentally flawed and that any proposal perpetuating this distinction is likely to be similarly flawed. However, rather than suggesting that this distinction be collapsed into a single crime of unlawful homicide, it has been contended that existing offences should be replaced by murder and unlawful homicide defined according to the presence or absence of plan-

⁶⁷ With respect to the definition of recklessness as the *unjustifiable* taking of a known risk, and with respect to the defence of necessity.

⁶⁸ Law Reform Commission of Canada, Report on Euthanasia, Aiding Suicide and Cessation of Treatment (1983).

ning and deliberation. The most compelling reason for such a change is that it puts the separate existence of these crimes on a sounder theoretical foundation than is the case at present. The result is a narrower definition of murder but it is a definition that expresses well the kind of homicides which deserve to be known by this name. Murder is, after all, a unique crime, but it is the way in which it is said to be unique that is important.