

1

Introduction

ANDREW ASHWORTH AND BARRY MITCHELL

This volume contains six essays by leading academic lawyers on the English law of homicide. The volume was conceived for what might be described as a political purpose, that is, to relaunch debate on the future of the English law of homicide. Trials for murder and manslaughter still attract great public attention, and the study of those branches of criminal law occupies a central place in university criminal law courses that belies the relative rarity of homicides in practice. Yet the shape of English homicide law remains partly in the grip of a statute passed amid passionate debates about capital punishment, and partly governed by common-law doctrines that have never received parliamentary attention. The development of the law has been left largely in the hands of the senior judiciary: even if it is thought satisfactory that the dividing lines between the most serious offences in the criminal calendar are drawn by judges rather than by Parliament, there are limits to what can be achieved by them. The structure of the offences cannot be altered by judicial decision, and it seems to be accepted that partial defences cannot be abolished or introduced in that way either.¹ Most of those concerned with the operation of the law recognize the need for change. Of reform proposals there has been no shortage—notably the Fourteenth Report of the Criminal Law Revision Committee in 1980,² whose recommendations are incorporated in the draft Criminal Code of 1989;³ the report of the Select Committee of the House of Lords in 1988–9;⁴ and the Law Commission's report on Involuntary Manslaughter in 1996.⁵ But there has been no legislative action, and the prospects for any general reform of the law of homicide (as distinct from a decision to legislate on one element, such as the proposed offence of corporate killing) do not seem great.

One primary purpose of this volume is to rekindle debate on some of the major issues in the law of homicide, with a view to reawakening interest in

¹ See e.g. Lord Lloyd of Berwick in *Clegg* [1995] 1 AC 482, 499–500.

² *Offences Against the Person* (1980) (Cmnd. 7844).

³ Law Commission, *A Criminal Code for England and Wales* (Law Com. no. 177) (1989), cll. 54–64.

⁴ House of Lords, *Report of the Select Committee on Murder and Life Imprisonment* (H. L. Paper 78, 1989).

⁵ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com. no. 237) (1996).

a broad reform initiative. To engage in these tasks productively is no easy matter. Academic criminal lawyers, whose work involves research into, writing about, and teaching the law, are well placed to engage in debate about the structure of the law and the reasons for and against change. But it might be argued that the law of homicide, with its unusually high public profile, can only be altered if there is public and political acceptance of the details of the proposed reform, and therefore that a volume of academic essays is likely to be too remote from the fray. These public and political perspectives are not neglected in this volume: both in this Introduction and in the essays that follow there is discussion of the proper relationship between the shape of homicide law and 'public opinion', and indeed there is keen analysis of what passes for 'public opinion' and of what evidence can be regarded as reliable. Of the eight authors contributing to this volume, one (Barry Mitchell) has conducted empirical research into public views about the law of homicide and the distinctions it should embody, and another (Ronnie Mackay) has been a member of the Parole Board for several years and has ample experience of reviews of life-sentence prisoners.

The differing experience of our authors leads on to another point. Some politicians, civil servants, or members of law-reform bodies have been known to ask what the academic view is on a certain issue. There have also been occasions when it has been said that the publication of one or two academic articles critical of a proposal from the Law Commission or some other body 'weakens' the proposal, because it suggests that it is controversial and not securely based. But academics are not a homogeneous group who chose their career because they hold the same views as others. On the contrary, the academy contains individuals who hold a wide range of views, and who approach problems from a variety of perspectives. Thus there are groups or tendencies within academic criminal law—for example, one might label some as subjectivists, others as objectivists, some as critical scholars, others as contextualists, and so forth. The authors of this volume do not share a single approach to the subject matter, save that they have agreed for present purposes to think and to write about the project of reforming the law of homicide. This diversity of approach should be celebrated at an intellectual level, in so far as it is evidence of academic independence. But the law itself has to take a view, and one set of reform proposals needs to be put forward as the most appropriate, the least objectionable, or the 'best fit'. That leads on to deeper questions about the standards by which appropriateness and 'fit' should be judged, and much of this introductory chapter is concerned with those issues.

At several points in the essays below, the argument turns to major issues of principle that affect the criminal law generally. Some of these run into questions of moral philosophy, such as the extent to which either criminal liability or sentencing ought to be based on 'moral luck' (as where death results unexpectedly from a person's act or omission). This Introduction

will pursue some of those issues, whilst also exploring the legal and political context of homicide law (notably, the mandatory penalty for murder, and the role of the jury in criminal trials). What will not be found, either in the Introduction or in the essays, is a detailed examination of the existing English law of homicide. That is available in the leading textbooks, and the essays look to possible futures more than to the past or the present. Nor is it claimed that the book is comprehensive in its coverage of the law of homicide, and there are several categories of killing (for example infanticide, suicide pacts, killings in self-defence, euthanasia) which are not dealt with here. Nor does the volume aim to provide a review of previous law-reform recommendations or the laws of other jurisdictions, although there are discussions of comparative law on several specific issues. The aim of the volume is to explore some of the central questions of principle and structure that need to be tackled if a satisfactory law of homicide is to be designed.

Drafts of the six essays were presented at a conference in Oxford in January 2000, having been circulated in advance, and there was extensive and stimulating discussion. The editors are grateful to Chris Gane, Roger Leng, Ian Dennis, and Malcolm Davies, each of whom kindly agreed to give oral comments on a particular paper in order to launch the discussion. Special thanks go to Lord Justice Buxton, who not only chaired the conference with wit and good humour, but also made several astute comments and interventions which enriched both the conference and this volume. The conference received generous financial support from the British Academy and the Society of Public Teachers of Law, for which we and over forty colleagues who attended it are most grateful.

A. CONCERNS ABOUT THE EXISTING LEGAL STRUCTURE

Criminal homicide is a comparatively rare occurrence in England and Wales; in a country of over 50 million people, there are around 750 offences initially recorded as murder or manslaughter each year, and only 450–500 convictions.⁶ But the relative rarity of such homicides should not be used as an excuse for ignoring the need to reform the law. Some have argued that criminal homicide is a unique form of offending in so far as it represents a wrong done against a ‘higher authority’.⁷ Whatever view one takes of this, homicide has a strong claim to be (at least) one of the most serious crimes. Instead of prescribing a maximum penalty, as is the usual practice, the law specifies a mandatory sentence for convicted murderers. The need for the criminal justice system to respond to its most heinous offences in a principled and rational manner is unaffected by the volume of offences.

⁶ Home Office, *Criminal Statistics, England and Wales 1997* (1998) (Cm. 4162), ch. 4.

⁷ See e.g. G. P. Fletcher, *Rethinking Criminal Law* (Boston, Mass., 1978), ch. 5.

The existing law of homicide in England and Wales can be summarized briefly. The offence of murder carries a mandatory penalty of life imprisonment, and a person is liable for murder through causing a person's death, whether by act or omission, either with intent to kill or with intent to cause grievous bodily harm. That liability to conviction for murder may be reduced to manslaughter if the killing stemmed from provocation, diminished responsibility, or a suicide pact. These are commonly referred to as forms of 'voluntary manslaughter'. If a person causes another's death without the intent necessary for murder, there may be liability to conviction for manslaughter if it is shown that the defendant was subjectively reckless as to death or grievous bodily harm, or grossly negligent as to death, or that the death resulted from an unlawful and dangerous act of the defendant's. These are commonly referred to as forms of 'involuntary manslaughter'. All offences of manslaughter carry a maximum penalty of life imprisonment, and it will be evident that the offence covers cases of killing that are almost serious enough for a murder conviction, as well as some cases in which the culpability is relatively low on the scale. Among the other homicide offences in English law are causing death by dangerous driving, and causing death by careless driving when intoxicated, both of which have a maximum penalty of ten years' imprisonment.

One of the reasons for drawing a distinction between the two offences, as murder and manslaughter, is probably that it is thought fair to label degrees or types of homicide separately, although for many years we have had a single offence of manslaughter which encompasses two rather different types of homicide, the 'voluntary' and 'involuntary' forms described above. From time to time the suggestion is made that English law should go further and merge the two offences into one, which would carry a maximum penalty of life imprisonment, and would leave the trial judge to reflect the gravity of the homicide in the sentence.⁸ Reform bodies, however, have resisted this⁹ and, indeed, the existing English view is, at least at a superficial level, one which has been adopted in several other Western jurisdictions.¹⁰ However, the laws of those other countries vary considerably in the number of offences recognized, in the factors which characterize the worst homicides, and in the interpretation of basic concepts. Some, for example, do not recognize provocation and/or diminished responsibility as a valid (partial) excuse; some attach weight to what are seen as good or bad motives; and others regard the method of killing as significant in determining the offence category.

English law has reached its current state largely in a piecemeal fashion,

⁸ See e.g. Lord Kilbrandon in *Hyam v. DPP* [1974] 2 WLR 607, 640; and Lord Hailsham in *Howe* [1987] 2 WLR 568, 581.

⁹ e.g. Criminal Law Revision Committee, n. 2 above, para. 15.

¹⁰ For a description of the structure of homicide law in several other countries see House of Lords, n. 4 above, app. 5.

as a result of gradual evolution. Reviews have tended to focus on specific aspects of homicide, such as murder¹¹ and involuntary manslaughter,¹² and the only general review of homicide law is now rather dated.¹³ However, there is objective evidence of discrepancies between the law in theory and the verdicts reached in the courts,¹⁴ and part of the explanation for it may be a lack of satisfaction amongst lawyers, judges, and the public, who then try to correct what they perceive to be shortcomings within the law. For many years the separation of murder from manslaughter was based in part on an untested assumption that it met with general public approval,¹⁵ but more work is necessary before we can accurately gauge the precise extent to which ordinary people support the law.

B. THE PENALTY FOR MURDER: THE CART BEFORE THE HORSE?

The principal statute in the English law of homicide is the Homicide Act 1957, and the structure of that statute was much influenced by the decision to separate some capital murders from other non-capital murders. That separation ceased in 1965 when the death penalty was abolished, but since then the mandatory sentence of life imprisonment has continued to exert significant effects on the structure of homicide law. Because judges have no discretion when sentencing for murder, this means that the only possible approach to a case for which the mandatory penalty is manifestly inappropriate is to reduce the offence to a lower category (usually manslaughter). This is the reason often given for the category of ‘voluntary manslaughter’: thus the Homicide Act provides that killings in circumstances of diminished responsibility, provocation, or a suicide pact fall into this lesser category, even though the intent required for murder was present. Even with this distinction, the category of murder still includes cases which lie a considerable distance apart in terms of heinousness—one might contrast a deliberate contract killing with a killing in a pub brawl in which a chair or ashtray is used as an impromptu weapon on the victim’s head.

It is not simply that judges are obliged to pass the same sentence on offenders with significantly different degrees of culpability. Distinctions of culpability are drawn, but they are drawn behind closed doors by the Home Secretary and his advisers, who have the responsibility for determining the release date of adults sentenced for murder. Although the European Court of Human Rights has in recent years found the United Kingdom in breach of the Convention for its law on discretionary life-sentence prisoners and on young offenders detained during Her Majesty’s Pleasure for murder, it has

¹¹ *Ibid.*

¹³ Criminal Law Revision Committee, n. 2 above.

¹⁴ See e.g. B. Mitchell, ‘Distinguishing Between Murder and Manslaughter’ (1991) 141 *NLJ* 935–7, 969–71.

¹⁵ See Criminal Law Revision Committee, n. 2 above, para. 15.

¹² See Law Commission, n. 5 above.

declined to find the mandatory sentence for adult murderers to be in breach of either Article 5 or Article 6 of the Convention.¹⁶ This is despite the fact that the length of detention is effectively set by a politician, the Home Secretary, who is plainly not an 'independent and impartial tribunal' within the terms of Article 6. It is a source of concern that those convicted of the highest offence lack the regular access to a court (which, for these purposes, includes the Parole Board) that is available for those serving discretionary life sentences.

As mentioned above, for these and other reasons there has been a succession of recommendations that the mandatory penalty of life imprisonment should be abolished—notably, in recent years, the Select Committee of the House of Lords on Murder and Life Imprisonment,¹⁷ and the Lane Committee on the Penalty for Murder.¹⁸ Little has been said about the consequences of this, in terms of the range of determinate sentences that might then be passed by the courts for offences of murder. The assumption is that a tariff would be developed, with guidance from the Court of Appeal, which would be compatible with lengths of sentence handed down for other serious offences.

Should debate about the future of the law of homicide take for granted the continuation of the mandatory penalty for murder? As a matter of practical politics it seems unlikely that there will be change in the next few years, since the current government has made clear its desire to keep the mandatory penalty and the power it concentrates in the hands of the Home Secretary. The public and political reaction to any proposal for change is hard to predict. Empirical research in October 1995 indicates a good deal of public support for life imprisonment—in the form of natural life—for those cases which are viewed as the most serious.¹⁹ Predictably, though, there appears to be no clear consensus as to the characteristics of these homicides. Nevertheless, if the mandatory penalty were abolished, public acceptance of the new system might well be determined by the sentences handed down in

¹⁶ Decisions that have brought about changes in English law include *Thynne, Wilson and Gunnell v. UK* (1990) 13 EHRR 666 on discretionary sentences of life imprisonment and *T. and V. v. UK* [2000] Crim LR 187 on detention of young murderers during Her Majesty's Pleasure; cf. *Wynne v. UK* (1994) 19 EHRR 333 where the European Court held that the mandatory sentence of life imprisonment for murder removes the offender's right to liberty for the rest of his life, because of the seriousness of the offence, and that it is therefore not objectionable for a politician rather than a court to decide whether he may be released at an earlier point. Nevertheless pending legislation under which tariffs for those under 18 years would be set by the trial judge in open court, the Home Secretary proposed that the Lord Chief Justice review the tariffs of all defendants convicted of murder as juveniles and currently detained at H.M.'s pleasure. The Home Secretary would set new tariffs following the L.C.J.'s recommendation in existing and future cases, the recommendation being made in open court: see Practice Statement (Juveniles: Murder tariffs) *The Times*, 9 August 2000. ¹⁷ See n. 4 above.

¹⁸ *Report of the Committee on the Penalty for Murder* (chairman, Lord Lane) (Prison Reform Trust, London, 1993).

¹⁹ B. Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 Br J Crim 453.

individual cases—an unusually low sentence might fuel opposition to the change, even if corrected by means of an Attorney General's Reference to the Court of Appeal. In the context of this volume it is important that the analysis is not restricted by assumptions about the continued presence of the mandatory penalty; this applies particularly in the sphere of sentencing, where (as Martin Wasik shows in his essay) there would be a need for considerable development if the mandatory penalty were abolished.

Two other points need discussion, however. Firstly, there is the question whether the structure of the law really is so dependent on the penalty for murder. It may or may not be true historically that the desirability of avoiding the mandatory penalty was the reason why the Homicide Act 1957 declared that killings that would be murder except for the existence of diminished responsibility, provocation, or a suicide pact, should be classified as manslaughter. However, the penalty is not the only significant issue. There is also the label to be applied. One might argue that it is morally and socially appropriate to convict, say, a provoked killer of an offence less than murder, in recognition of the mitigating circumstances under which the killing occurred. One might further argue that, if juries were not presented with this possibility, they might nevertheless try to find some (probably less satisfactory) way of avoiding a murder conviction. Where the law offers two or more grades of liability for causing the same consequence, and especially where the offences have such a high profile as murder and manslaughter, it is surely wise to exploit that gradation in order to reflect significant differences in culpability. Versions of this argument are found in several places below.

The second and final point on the penalty for murder concerns the determination of how long an individual offender should serve in prison. The Home Secretary controls these decisions at present, and it has been argued that this is unsatisfactory for various reasons—not least because, for example, the Home Secretary is a politician, and there is no hearing. If murder cases were treated as, or might include, discretionary sentences of life imprisonment, then courts would set a tariff period and this would bring a significant part of the sentence-fixing operation into a public forum. After the expiry of the tariff period, release would then be in the hands of the Parole Board, which means that the actual release date would still be set by a tribunal at a later date. Under the present 'mandatory' system, these decisions remain in the domain of the Executive, and a power that courts normally have in criminal cases is absent in murder.

C. WHICH DISTINCTIONS OUGHT TO BE REFLECTED IN THE LAW?

At present there are two principal offences of homicide, murder and manslaughter, underpinned by various other offences such as infanticide

and causing death by dangerous driving. We have already noted that the label 'manslaughter' encompasses two different species of offence—'voluntary manslaughter', which amounts to mitigated murder, where the requirements for murder are present but there is also evidence of provocation, diminished responsibility, or a suicide pact; and 'involuntary manslaughter', where the requirements of murder are not present and the culpability may be considerably lower. One could clearly argue that voluntary and involuntary manslaughter ought to be separated as different offences; but it is interesting to note, as Martin Wasik demonstrates in his essay, that such a separation would not create a hierarchy of offences for sentencing purposes, since the sentence for some crimes of involuntary manslaughter (that is those falling just short of murder) would be considerably higher than most sentences in cases of provocation or diminished responsibility. The argument for separation would be one of labelling rather than one of sentencing.

Questions of labelling raise the issue of parameters. What is to be the touchstone of appropriateness in labelling? This is a general question in criminal law. For example, it is well known that it would be possible to draft a single offence to cover theft and deception, but it was decided to retain separate offences and separate labels. There may be a moral distinction between thieving and deceiving, and it is a distinction that people may expect to be reflected by the law, but we have little hard evidence on that. It is certainly possible to create a single offence of criminal homicide: but, quite apart from the fact that a single undifferentiated offence of homicide would transfer power away from juries to judges and the Parole Board, it is unlikely that people would want such an undemonstrative and uninformative law. Indeed, there is evidence that people expect the law to draw finer distinctions than that: a survey in England and Wales revealed very strong support for separate offences to reflect perceived variations in the nature and gravity of homicides. Much less clear, however, is the precise number of offences; participants in the survey found the exercise difficult but, if anything, they appeared to favour a minimum of two offences.²⁰ Here we should discuss the issue in terms of principle and policy: what should determine whether we should have one, two, five, or seven offences of homicide? Apart from the distribution of decision-making power, and also the capabilities of decision-makers (too many alternatives might confuse juries), what other considerations should determine the label?

One attractive principle is that offences should be labelled separately where this reflects a morally and socially significant difference, either in degree of culpability or in the context of offending. Part of the attractiveness of the principle is, of course, its vagueness. The reference to moral and social significance propels us into a dark area: is there consensus on the

²⁰ *Ibid.*

significance of many of the factors that might arise in homicide cases? Various questions need to be answered if progress is to be made in this area, and some of them tend to be obscured by broad references to 'public opinion'. It is important to distinguish the opinions of people who are questioned as part of a well-conceived survey, from 'public opinion' in the shape of answers to unsophisticated yes/no questions, and then again from the views put forward by the popular press or some politicians in the name of public opinion. So far as possible it is the first kind of public opinion that has a claim to be considered when reshaping the law of homicide, and there are very few British surveys that measure up to the required standard. The task of eliciting reliable data which also offers explanations for responses across a reasonably comprehensive range of issues almost inescapably warrants more than one lengthy interview with each respondent. Much care is necessary in the use and definition of terminology, and the minimum sample size needed to justify comments about public sentiment throughout the country naturally makes the task very costly as well as time-consuming.

When the results of a well-conceived survey emerge, the next question is how much weight should be given to them. There is evidence of considerable abhorrence of child killings,²¹ even where there is no intent to kill, the reasons for which include the child's helplessness, defencelessness, loss of life expectancy and, where the killer is an adult, the idea that there has been a breach of trust—that all adults have an important welfare duty towards children. The definition of 'child' might be debatable,²² but there is an argument based on social revulsion and welfare for treating child homicides as particularly serious. Ought the law to reflect this? To answer that question we must consider the issues of principle that ought to shape the law of homicide, and even the most carefully elicited public opinion must be scrutinized by reference to its rationality. Can the category of child killings be identified as distinct, on defensible moral grounds, from other forms of killing? For example, if it is the vulnerability or helplessness of the victim that makes people regard these killings as more culpable, are there not other killings (for example of the elderly or disabled) that ought to be classified similarly? If it is the fact that the killing of a child deprives the victim of a whole lifespan, does that mean that killings of the elderly should be regarded as less culpable or harmful because they do not have as long to live? If killing in X circumstances is held to be worse than killing in Y circumstances, the reasons need to be scrutinized and then compared with reasons relied upon elsewhere in the law of homicide, and perhaps in criminal law generally.

²¹ *Ibid.*

²² Unpublished findings from qualitative research undertaken in July–October 1998 suggest that sixteen would be the favoured upper age limit; see B. Mitchell, 'Further Evidence of the Relationship Between Legal and Public Opinion on the Homicide Law' [2000] *Crim LR* (forthcoming).

What detailed questions of labelling need to be resolved? Many of these appear in the remainder of the book, but a number of particular points can be signalled here. Firstly, given the extent of the variations in the factual circumstances and moral culpability in homicides, should there be more than two principal offences? As we have seen, in existing law the offence of manslaughter is divided into two forms (voluntary and involuntary) with differing requirements, and each of those may be committed in different ways. Should the label 'manslaughter' be applied to both, or would it be better to confine that label to a more distinct group of homicides and to devise fresh labels for other lesser forms of homicide (as, for example, Chris Clarkson argues below)?

Secondly, much of the debate about the structure of the existing law has focused on the lower boundary of murder, that is, where to draw the culpability line between murder and manslaughter. As senior members of the House of Lords have recognized, those convicted of murder do not necessarily represent the most reprehensible killers.²³ Some of them deserve neither the stigma of being labelled a murderer nor the mandatory life sentence. This may be due in part to the definition of murder, particularly the fact that neither the defendant nor an ordinary prudent individual need have anticipated death.²⁴ Moreover, the legal definition of intent—which has a crucial bearing on the existing boundary between murder and manslaughter—is arguably still far from satisfactory, notwithstanding a series of appeals spanning twenty-five years or so.²⁵ In addition, considerable reservations have been expressed about the wisdom of relying solely on the cognitive concept of intention as the appropriate means of selecting the worst kinds of unlawful killing.²⁶ Moreover, William Wilson argues that labels and offence-differentiation may perform functions other than marking the relative seriousness of offences: in his essay, he demonstrates that a different wrong is involved in deaths resulting from attacks, and argues that this should be marked by the use of the distinct label, 'murder'.

Thirdly, is it appropriate to keep the various forms of mitigated murder separate, or should we contemplate a single form of mitigated murder that

²³ e.g. in *Hyam v. DPP*, n. 8 above, 640, Lord Kilbrandon commented: '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'; and in *Howe*, n. 8 above, 581, Lord Hailsham remarked: '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.'

²⁴ The arguments for and against the GBH rule are set out in A. Ashworth, *Principles of Criminal Law*, 3rd edn. (Oxford, 1999), 270.

²⁵ See e.g. W. Wilson, 'Doctrinal Rationality after *Woollin*' (1999) 62 MLR 448; and A. Norrie, 'After *Woollin*' [1999] Crim LR 532. Naturally, these concerns as to the meaning of intent apply to many other crimes apart from murder.

²⁶ See e.g. R. A. Duff, *Intention, Agency and Criminal Liability* (Oxford, 1990).

does not require the law to define provocation, or diminished responsibility, or intoxication, but rather provides that any killing that satisfies the definition of murder and yet proceeds from extreme emotional or mental disturbance should be classified as a lesser offence? There may be certain pragmatic arguments in favour of a general category of mitigated murder, but there is a strong counter-argument based on labelling. It is that partial defences such as diminished responsibility and provocation are fish from different kettles and ought to be kept morally separate. But this claim assumes a coherence in the doctrine of provocation that might not exist. It is one thing to argue that, whatever people's differences in character, the law should expect them to exercise reasonable self-restraint in the face of provocation—at least to the extent of not launching a serious physical attack on another. It is quite another thing to draw a defensible line between those personal characteristics of the defendant that may properly be taken into account in such cases, and those characteristics (if any) that ought to be left out of account. The English courts, perhaps sensitive to the argument that the law is unduly influenced by male perspectives on emotion and anger,²⁷ have delivered conflicting judgments on this crucial issue of 'characteristics'.²⁸ Some of those decisions have diluted the objective condition in provocation considerably, by allowing account to be taken of the abnormal mental condition of defendants.

In her essay Celia Wells argues that there really is no sustainable distinction in practice between the two sets of 'characteristics' mentioned above. How should that argument be assessed? The paradigm case of provocation is surely some distance from the paradigm case of diminished responsibility, but there is a middle area where the two notions come so close as to be barely distinguishable, in the eyes of some. Celia Wells poses poignant questions about the distinctions relied upon in some of the decisions, and about the ability of the existing legal structure to accommodate some of the issues she raises. Moreover, in existing law there is no sharp distinction between provocation and diminished responsibility as partial defences: it is possible to plead them as alternatives, or for a court to find both of them proved.²⁹ In his essay Ronnie Mackay argues that in principle the two defences should not be regarded as mutually exclusive. However, he would see them as part of a general restructuring of the law that would find a place for a realistic and workable defence of insanity—ensuring that those suffering from acute forms of mental disorder are acquitted of homicide altogether, rather than

²⁷ See e.g. D. Nicholson and R. Sanghvi, 'Battered Women and Provocation: the Implications of *Ahluwalia*' [1993] Crim LR 728; A. McColgan, 'In Defence of Battered Women who Kill' (1993) 13 OJLS 508.

²⁸ The split decision of the House of Lords in *Morgan Smith*, on 27 July 2000, is unlikely to have settled the matter; see further J. Horder, 'Between Provocation and Diminished Responsibility' (1999) 9 King's College LJ 143.

²⁹ See R. D. Mackay, 'Pleading Provocation and Diminished Responsibility Together' [1988] Crim LR 411.

convicted of manslaughter on the ground of diminished responsibility. He would retain the doctrine of 'diminished' to deal with lesser forms of mental abnormality, but would rid it of the various conceptual and drafting confusions from which section 2 of the Homicide Act 1957 suffers.

A fourth labelling issue raises the politically awkward question of how to deal with mercy killings. It seems that there is a reluctance to admit openly, by creating a separate category, that cases of mercy killing are dealt with on different principles than other cases that fulfil the definition of murder. The fear is that there would be staunch opposition in Parliament and from the media for any explicit relaxation of the law. So we continue with the implicit relaxation of the law, usually manifested by psychiatrists stating that the mercy killer was suffering from an abnormality of mind at the time. The prosecution will often accept a plea of guilty to manslaughter by reason of diminished responsibility, there is no trial, and the sentence is light. But such an outcome is a travesty of fair labelling, since in some such cases the defendant is not suffering from any mental abnormality. The label is an affront to the mercy killer, who is often as calm and collected as can be, in the face of abnormal suffering by the deceased (often a close relative or friend). It is an inaccurate label in many cases, and therefore an inappropriate one. If pragmatism really does demand this gross mislabelling so as to avoid political embarrassment, we should be clear exactly why principle is being compromised.

A fifth issue of labelling concerns what has been termed 'the principle of correspondence'—the principle that the fault element required for an offence should have, as its object, harm of the same degree of seriousness as that which the offence punishes. In bald terms, if murder is the offence, an intent to kill (and nothing less) ought to be the specified fault element. In his essay William Wilson argues that, whatever views might be held by members of the public,³⁰ there is a sound moral reason for going beyond the correspondence principle and maintaining a wider fault element for murder. He locates this sound moral reason in a line of argument found, in slightly different forms, in the writings of John Gardner³¹ and Jeremy Horder.³² Its foundation lies in the notion of attack: one who makes an intentional attack on another's bodily safety should not be judged according to a slide-rule with exact degrees of blame tracking exact degrees of foresight, but ought to take responsibility for wider (though not disproportionate) consequences of that attack, even if they were not foreseen. This is

³⁰ On which see B. Mitchell, 'In Defence of a Principle of Correspondence' [1999] Crim LR 195 and, more fully, *id.*, nn. 19 and 22 above, suggesting that many members of the public would expect a murder verdict to be based on a serious, life-threatening attack rather than some lesser assault.

³¹ Most clearly in 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 CLJ 502.

³² e.g. in 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759.

not pure constructive liability, the argument goes, because a person who intends a mere assault would not be held guilty of murder. It is a more limited and rational response to a person who intentionally sets himself against another's interests, limited in the sense that it requires fault of the next least degree of harm. Thus William Wilson argues that a version of the GBH rule can be defended on this basis; in a similar way, and on similar moral grounds, Chris Clarkson would wish the law of homicide to distinguish between homicide by gross negligence and homicide resulting from an intentional assault by some violence less than grievous bodily harm. He too draws upon the notion of attack as expressing a distinct wrong.

Some will doubt whether, even in this more restricted form, the claim that the user of force has 'changed his normative position' vis-à-vis the victim is a compelling reason for concluding that he should therefore be held criminally liable for consequences that were unexpected and unforeseeable, and labelled a murderer. Why should the degree of criminal liability turn on the chance outcome rather than on what the perpetrator intended or knowingly risked? It is hardly convincing to reply that a person who chooses to use violence 'makes his own luck', because that begs the question. Why should the law adopt that approach for offences of violence, in preference to the rival principle that defendants should be judged on what they intend, or knowingly risk, or (even) are grossly negligent about?

A final point about labelling concerns the reasons why one might wish to affix different labels. Many of the issues mentioned above are not reflected in the labels for other offences: provocation, recklessness as distinct from intention, and mental abnormality falling short of clinical mental disorder, are rarely reasons for convicting of a lesser offence. This is partly because in many parts of the criminal law there is not a hierarchy of offences—although there has long been a hierarchy of non-fatal offences, and neither the legislature nor the courts of England and Wales have exploited this to give effect to qualified defences.³³ Such a hierarchy has been used to facilitate the grading of homicide offences, and indeed could be expanded. Substantial differences in culpability might be reflected by different offence labels: at present the law distinguishes killings with intent to kill or to cause grievous bodily harm from other killings, whether reckless or grossly negligent, and Chris Clarkson argues that the latter two ought to be labelled separately. Another ground for separate labels might be the context of the killing, which leads Clarkson to argue for separate offences of corporate killing and causing death by dangerous driving—not that such offences are more or less serious than other forms of homicide, but that the circumstances in which they are committed may warrant a distinct label. The arguments for and against this are discussed in his essay

³³ Cf. the laws of other Commonwealth jurisdictions, such as the Griffith Code of Queensland and Western Australia.

below. A further reason for separate labels may be to distinguish different grounds for mitigating what would otherwise be a murder: thus it was argued above that a general category of 'mitigated murder' might trample on important moral distinctions by lumping together the genuinely provoked killer with the unprovoked mentally abnormal killer, for example. What is clear about these varied reasons for separate labels is that they do not always relate to gradings of seriousness. Thus, if one follows Clarkson's argument, causing death by dangerous driving might properly be sentenced more severely than grossly negligent killing or some cases of killing by attack. Thus substantial differences in culpability ought to be reflected in different offence labels, but there are also other strong reasons for separate labelling.

D. PARTIAL DEFENCES AND DEGREES OF RESPONSIBILITY

Provocation and diminished responsibility, along with other forms of justification and excuse such as self-defence and duress, may be thought to have a role to play in mitigating murder. Where the killing is in self-defence, the existing law takes an 'all or nothing' approach; once the defendant goes beyond reasonable force he is liable to conviction for murder,³⁴ and the fact that he acted in self-defence (albeit excessively) is legally immaterial. This approach was upheld by the House of Lords in *Clegg*,³⁵ although Lord Lloyd seemed to favour a compromise verdict of manslaughter. Nevertheless, the Government subsequently expressed the view that, whatever force there is in such an argument, it is outweighed by the complexity that it would introduce to the law.³⁶ The law adopts a tougher approach where the killing was committed under duress, rejecting either a full or a partial defence based on necessity, duress, or duress of circumstances. However, there is a forceful argument that, subject to certain safeguards, the law should show some sympathy to those who kill in such circumstances.³⁷ Again, research suggests that members of the public take a very different view from that of the law—indeed, the only real uncertainty seems to be whether they would prosecute the killer for any offence at all, let alone murder.³⁸

If elements of excuse and justification are to be given some weight in the legal process in homicide cases, should they make their presence felt at the conviction or sentencing stage? Part of the problem, as Nicola Lacey points out in her essay, is that their relevance varies—for example, provocation

³⁴ *Palmer v. R.* [1971] AC 814.

³⁵ See n. 1 above.

³⁶ *Report of the Interdepartmental Review of the Law on the Use of Lethal Force in Self-Defence or the Prevention of Crime* (Home Office, London, 1996).

³⁷ See J. C. Smith, *Justification and Excuse in the Criminal Law* (London, 1989), 73–9.

³⁸ See Mitchell, n. 19 above, 457, 458.

seems to go to grading or perhaps labelling, whereas diminished responsibility operates as an exemption without apparently influencing the question of gravity. Nevertheless, the rationale for partial defences or mitigating factors calls for an examination of the nature and extent of a defendant's responsibility for, in homicide, causing death. The capacity theory *prima facie* implies a strong case for a broad range of partial defences to murder, but it raises practical difficulties of meaningful assessment and its hints of determinism surely threaten the traditional normative nature of the law's judgments and evaluations. Thus, we might look instead to some form of the hitherto less fashionable character theory, and in her essay Nicola Lacey considers the claims of a restricted version of it, in the form of a 'reasons' approach. Here the legal spotlight would fall on what the defendant's conduct reveals in the light of the circumstances and context in which it occurred. If that conduct is founded on reasons which are consistent with good citizenship, the defendant should be at least partially if not wholly exonerated. Some potential excuses, such as involuntary intoxication, appear not to sit comfortably with this theory, and there may be some doubt about the extent to which there always exists a clear notion of what is socially approved (that is, fulfilment of the rule-of-law requirements of certainty and consistency seems rather dubious). Moreover, Lacey's approach would necessitate a more finely graded criminal law, which required juries to make quite detailed choices among a number of alternatives. But Lacey argues that, if this is what the social function of criminal law requires, it is what we should aim to achieve.

There is a second, quite separate issue about responsibility which has traditionally been raised in relation to diminished responsibility but which surely ought to affect other pleas such as provocation. This stems from the obvious fact they are founded on the idea that a person's responsibility can be reduced: these defences imply a sliding scale of responsibility, and that an individual's whereabouts on the scale should indicate the extent of legal liability. This is not uncontroversial: some have argued that responsibility is only susceptible to a simple distinction—a person either is responsible for her actions or she is not; there can be no 'halfway house'.³⁹ However, there can surely be degrees of culpability, and there is every reason to use the structure of homicide to allow expression to be given to those degrees.

E. JURY TRIAL AND FACT-FINDING

Once the debates about labelling and the separation of offences have been conducted, one must return to the practicalities of jury trial and consider

³⁹ e.g. A. Kenny, 'Can Responsibility be Diminished?', in R. G. Frey and C. W. Morris (eds.), *Liability and Responsibility: Essays in Law and Morals* (Cambridge, 1991).

whether there are pragmatic reasons for modifying the scheme that has been decided to be the most appropriate on grounds of principle. If it were decided, say, that there is a case for eight different legal categories of homicide (for example: murder; killing upon provocation; killing during mental abnormality; killing by excessive force in self-defence; killing under duress; reckless killing; grossly negligent killing; killing as a result of an attack), in addition to infanticide and others such as corporate killing and causing death by dangerous driving, there is an obvious question about whether this proliferation of categories would tend to complicate trials to an extent that risked obfuscating juries, to the detriment of the fair administration of justice. It matters not whether defendants or the prosecution might be expected to benefit, or that the 'benefits' might be unpredictable, if it were thought on good evidence that the risk of inaccurate verdicts would increase.

Let us suppose that good evidence pointed in the direction of an unwelcome increase in the risk of inaccuracy. The obvious response would be to consider some simplification of the categories, assuming that no radical reform of the jury system (for example the judge retiring with the jury) is likely in the short term. Returning to the notional list of eight categories in the last paragraph, one might combine cases of mental abnormality with those of duress; one might combine cases of provocation with those of excessive defence; and one might combine cases of reckless killing with those of killing by attack. If this were thought insufficient to clarify proceedings and promote accurate verdicts, one might argue for a single broad category of mitigated murder that encompasses provocation, mental abnormality, duress, and excessive defence—perhaps along the lines of the American Model Penal Code's (MPC) category of killing during extreme emotional or mental disturbance.

Any drift in this direction raises three objections that need to be confronted, even if they are not thought conclusive. Firstly, we must be clear that the sacrifice of more communicative labels is acceptable. Labelling arguments cannot be dismissed as academic musings: we have noted that labels may matter to the public, both on and off juries, and may also matter to defendants. Thus we have argued that the paradigm provoked killer occupies a different moral position from the paradigm mentally abnormal killer, and that to lump them together blurs important moral distinctions. If pragmatism drives us towards a single category of 'mitigated murder', this is a communicative loss. Secondly, a move from specific labels to broader categories may also result in a rule-of-law deficit. Thus in existing law there are statutory provisions on provocation and diminished responsibility, which have been interpreted in subsequent judicial decisions. A broad category such as killing during extreme emotional or mental disturbance would blur the boundaries considerably: all would turn upon the evidence of the degree of disturbance in the case, to be

determined by medical evidence or by inference from the circumstances, and all manner of different conditions might be included, or excluded. The boundaries of existing categories would doubtless be broken, and it would not be necessary to show that a person was provoked at all, let alone reasonably provoked, if it appears that control was lost to some extent. A (partial) answer to this would be that any rule-of-law protections provided by statutory and judicial definitions are largely illusory anyway. Thus Celia Wells's argument is that there is little practical point in pursuing separate categories in view of the historical tendency for them to become distorted and even to merge (which could be said of the recent trends in provocation and diminished responsibility).

All of this brings us to the third objection. In the absence of separate categories for provocation or duress, for example, there would be a significant procedural deficit in that evidence on these matters might not be relevant at trial, unless needed to establish the degree of emotional disturbance experienced by the defendant, and in order to give the judge sufficient information on which to pass sentence the matters would have to be ventilated in a *Newton* hearing, before sentence, where standards of evidence and presentation might be less exacting than at the trial. Again, it is not relevant to speculate in whose favour this lowering of standards might operate. Assuming that the idea of a broader qualified defence to murder of this kind were to be fully accepted, so that provocation would disappear as a distinct legal doctrine, the questions to be addressed are whether provocation (or duress) should still be relevant to sentence, and, if so, how the procedural requirements of *Newton* hearings can be sharpened suitably.

Returning to the functions of the jury, there is the further question of its normative role. One hears of instances of 'jury nullification', where a jury takes a decision that effectively nullifies a legal distinction or judicial direction, and thereby exercises a normative judgment. But there are also examples of the law deliberately placing considerable normative discretion in the hands of the tribunal of fact. The primary example is perhaps dishonesty in theft, where magistrates and juries often have the power to decide, by applying what are termed 'the current standards of ordinary decent people', the effective reach of the criminal law. It would be possible to expand this approach within the law of homicide. Gross-negligence manslaughter already has a test that culminates in the question whether 'the conduct of the defendant was so bad in the circumstances as to amount in the jury's judgment to a criminal act or omission'. The test of provocation contained in clause 58 of the draft Criminal Code culminates in the question whether in all the circumstances the provocation was 'sufficient ground for the loss of self-control', which leaves the normative issue firmly in the hands of the jury. Clause 56 of the draft Criminal Code takes the same approach to diminished responsibility, the test being whether the mental abnormality was 'a substantial enough reason to reduce the offence to manslaughter'.

Now it might be argued that the need for rule-of-law protections is not great when we are considering qualified defences to murder. No citizen should place reliance on these doctrines when acting, since the law's simple injunction is: 'you must not kill'. However, there is another important aspect of the rule of law, and that is consistent decision-making. It would surely be objectionable if some juries accepted, for example, the homosexual advance defence in provocation whereas others refused to contemplate it. Within the doctrine of provocation lie several normative issues (including matters such as identity and gender, highlighted by Celia Wells) that should not be open to resolution by prejudice, ignorance, or other inappropriate means. Some will consider this to be a powerful argument in favour of both retaining a distinct doctrine of provocation and retaining a legal framework for determining what factors should and should not be taken into consideration. But the counsel of despair, or reality, is that the resulting legal distinctions tend to become blurred and self-contradictory (as Celia Wells contends in relation to provocation) and that juries are likely to follow their own lights anyway. But if there is to be a choice between sharing the power and responsibility between judge and jury (by requiring juries to select a verdict from among several alternatives, thus assisting the judge in passing sentence) or concentrating considerable power in the hands of the judge (by leaving few choices to the jury), then there is an argument for trying to draw juries more into decision-making. As Nicola Lacey argues, the criminal law here is performing an important social function, for which the institution of the jury seems well fitted. If the reply to this is that in practice there are problems in jury trials, the path of principle is to direct attention to solving those problems rather than to give up on the jury.

F. SUBJECTIVITY, CERTAINTY, AND MORAL RESONANCE

In the foregoing paragraphs we have referred to the importance of upholding 'rule of law' values in any reformulation of the law of homicide. We have also recognized that there are limits to this in practice: there are few topics on which we can formulate a clear and certain test which will yield just results in all or even most cases. That does not remove the principle of maximum certainty as a goal, but it does require a realistic appraisal of practical possibilities and warns against any tendency to claim that the principle is being respected when it is not.

One of the benefits of adopting a subjective principle of criminal liability is that it should yield fairly specific and certain tests. Thus the current mental element for murder—intention to kill or cause grievous bodily harm—ought to achieve a fairly high degree of certainty and of conformity to rule-of-law values. That high degree is lowered in some cases, however, because of the judges' approach to defining intention, and in particular

their refusal to affirm that foresight of virtual certainty amounts to intention. The House of Lords again had the opportunity to make an unambiguous statement in *Woollin*,⁴⁰ but it failed to do so, and held that where foresight of virtual certainty is proved a jury is entitled to find that the defendant intended death or grievous bodily harm. This form of words harbours considerable uncertainty. It can be read as suggesting that courts may only find intention where the defendant foresaw the result as certain, and thus as a tightening of the law.⁴¹ On the other hand, it can be read as preserving the possibility that a court might decide that a defendant did have the relevant foresight of virtual certainty but should not be held to have intended the result. Since such a conclusion could only be reached by the intervention of some factor not explicitly declared in the legal rule, it follows that the courts may have retained an amount of 'moral elbow-room' which, like the Scots test of 'wicked recklessness', leaves a gap to be exploited, at least in cases of foresight rather than direct intention. Such a gap may allow the tribunal to load into its decision all manner of prejudicial or other extraneous factors.

In law this gap could be closed, simply by defining intention in terms of either purpose or foresight of virtual certainty (although 'virtual' inevitably leaves some scope for judgment). But that would not conclude the issue of subjective standards and certainty, because there is the further question whether the law can be formulated so as to use only subjective concepts (with a high degree of certainty) and yet capture the necessary moral distinctions. A simple 'intent to kill' formula would narrow the definition and enhance certainty, and might also claim a 'moral fit' with public opinion. When invited to say what characterizes their perception of the most heinous homicides, a significant proportion of respondents referred to premeditation, but on further clarification they identified an intent to kill. When asked to comment on the adequacy of an intent to cause serious harm (without more), respondents were very hesitant and many seemed intuitively unhappy that such a fault element should suffice for murder.⁴²

An alternative approach would be to broaden the definition of murder as Scots law does—the test of 'wicked recklessness' allows various moral and social distinctions to be reflected, at least in categorizing a killing as murder or culpable homicide. However, in doing so it sacrifices 'rule of law' values to too great an extent. One could preserve those values and yet specify that killings which stem from terrorist motives, or where the victim is a child or a police officer, should be classed as murder if there was an intention to cause serious injury. Alternatively, one could widen the test still further, as William Wilson proposes in his essay, so as to convict those who kill and who intend to expose another person, without lawful excuse, to a

⁴⁰ [1999] AC 92; and see n. 25 above.

⁴² See Mitchell, n. 22 above.

⁴¹ Wilson, n. 25 above.

serious risk of death. This, in Wilson's view, both captures the nature of the wrong in murder and satisfies the certainty principle.

Both this proposal, and the reliance of the existing law on the *Woollin* definition of intention, leave open the distinct possibility that extraneous factors might enter into decision-making at crucial points. What little knowledge we have of jury discussions suggests that there are occasions on which prejudicial assumptions dominate the jury's approach to its task, whether explicitly or implicitly. It may be difficult to exclude these from any sphere of judgement, homicide no less than others, and the remedy lies in changes to the jury system rather than in changes specific to the law of homicide. But some of these extraneous factors may stem from more basic moral assessments of right and wrong, which are not reflected in the law. For example, Celia Wells shows that the notion of loss of self-control used in provocation cases encompasses a wide variety of emotional states, some of which seem to fall well outside the natural meaning of the words. Provocation cases also raise questions about the idea of self-protection and its role, especially in cases where an abused woman kills her partner when he is resting or sleeping. There is no legal category that reflects the moral assessment of such cases—certainly not the doctrine of provocation, strictly construed, and probably not self-defence, strictly construed.⁴³ Public-survey research indicates considerable support for self-preservation as a wholly or partly acceptable ground for deliberately killing another (although this includes both cases classified as self-defence and those classified as duress, which English law presently excludes from homicide cases).⁴⁴ And what of revenge? One of the primary categories of murder, recorded annually in the Criminal Statistics, is 'revenge killings'. But since a revenge killing is usually one that follows on something done by the victim to the offender, exactly how should revenge killings be distinguished from provoked killings, on a moral plane? The unsatisfactory concept of loss of self-control hardly seems equal to the task. Lapse of time is not a sure indicator, at least if one considers many of the cases now held to fall within the doctrine of provocation. Are reflection, planning, and premeditation the kinds of factor that generate the distinction? Can we say that someone who reacts without reflection to an adverse act may be categorized as 'provoked', whereas someone who has time for reflection commits a revenge killing (and therefore murder)? Questions of this kind suggest that some of the basic moral distinctions underlying the law of homicide are not clearly resolved, either in principle or in practice. Only if they were could one begin to discuss the way in which legal categories ought to reflect them.

⁴³ Cf. McColgan, n. 27 above.

⁴⁴ See Mitchell, n. 22 above.