Criminal Law Reform Now

Proposals and Critique

Edited by
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Done to Death? Reform of Homicide Law

SALLY KYD

In 2000 a collection of papers first presented at a conference in Oxford was published, edited by Andrew Ashworth and Barry Mitchell, the purpose of both being political: to 'relaunch debate on the future of the English law of homicide'.[1] At that time, the Law Commission had recently reviewed the law of manslaughter,[2] but not homicide as a whole. Mitchell was motivated to seek Ashworth's help in organising the conference because, having spent much of his professional life researching homicide, he was clear that the law causes injustice and requires reform. Eighteen years later, much debate has occurred. In its 2004 report, *Partial Defences to Murder* the Law Commission described the law on murder as 'a mess' and recommended a complete review.[3] In 2005 a consultation took place, and the Law Commission published its report, *Murder, Manslaughter and Infanticide* in 2006.[4]

Of the recommendations, only those relating to the partial defences of provocation and diminished responsibility were adopted by the Government, which elected not to proceed with reforms to the structure of homicide as a whole. The Coroners and Justice Act 2009 introduced those reforms of the partial defences to the existing law of murder, bringing some clarification to the definition of diminished responsibility, and both broadening and narrowing the defence of provocation by replacing it with loss of control. Whatever the strengths and weaknesses of the new definitions of those partial defences, they were originally proposed as part of a package of reform, and operate very differently transplanted into the existing law than they would have done had the other recommendations been adopted. They will not be considered further here.[5]

[1] A Ashworth and B Mitchell, *Rethinking English Homicide Law* (OUP, 2000) 1.

[2] Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996).

[3] Law Commission, *Partial Defences to Murder* (CP No 290, 2004).

[4] Law Commission. *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006).

[5] Other issues beyond the scope of this chapter include the question of whether duress should be a defence to murder; the offences/defences of infanticide, encouraging or assisting suicide and killing in pursuance of a suicide pact; abortion; mercy killing/euthanasia.

In putting forward the law of homicide as a potential project for law reform, I must face the objection that discussion of reform of homicide law has been 'done to death', but that in no way diminishes the strength of the need for law reform in homicide, nor the importance of the issues it covers. My recommendation is for consideration of the whole law of homicide, although I have space in this chapter only to consider involuntary manslaughter in detail. I concede that the obstacle to the Law Commission committing further resources to this issue is that its efforts need to be directed towards reforms that are most likely to be implemented. There seems to be little political will to see legislative change in this area. And yet, there has been the political will to introduce new statutory 'regulatory' homicide offences over the past two decades. The political mileage to be made in creating highly punitive offences penalising death on the roads has driven parliament to create three new constructive homicide offences in the past 12 years,[6] as well as a new offence of corporate manslaughter.[7] Additionally, it is now 14 years since the familial homicide offence of causing or allowing the death of a child or vulnerable adult was created.[8]

Promisingly, there has in fact been some interest in revitalising the discussion of reform of the law of murder, with a debate taking place in the House of Commons in June 2016,[9] leading to an evidence session on the law of homicide held by the Justice Select Committee on 14 September of that year, a day after I presented this paper at a conference. Although the Minister of State for Courts and Justice was clear at the time that the government had no plans to reopen the consultation on reform in this area, he said that he would keep an open mind; and Professor David Ormerod QC is clearly in favour of taking forward a proposal for reform based on the recommendations made in 2006 following a further review process.[10] The suggestion here is that the law can and should most definitely be improved, and an attempt is made to build on the Law Commission's previous recommendations, as well as some of the suggestions of Jeremy Horder, writing from his experience as Law Commissioner at the time of the latest review of homicide offences.[11] The focus is on involuntary manslaughter and, unlike the Law Commission, I have considered the need to examine how (some[12]) existing statutory offences might fit within a codified version of murder and manslaughter. Specific homicide offences regulating certain forms of causing death fell outside the terms of reference for the Law Commission in 2005. Although Horder advises strongly against 'grandiose schemes for the codification of all the law relevant to the commission of homicide',[13] I see a need to rationalise the existing offences to

[6] Road Traffic Act 1988, ss 2B, 3ZB and 3ZC.
[7] Corporate Manslaughter and Corporate Homicide Act 2007.
[8] Domestic Violence, Crime and Victims Act 2004, s 5.
[9] Hansard Reports, *Homicide Law Reform* (30 June 2016, Volume 612).
[10] The Justice Committee, *Evidence session on the law of homicide* (8 September 2016).
[11] J Horder, *Homicide and the Politics of Law Reform* (OUP, 2012).
[12] I do not here consider all the offences that may be ripe for reform, such as the offence under Domestic Violence, Crime and Victims Act 2004, s 5.
[13] Horder (n 11) 113.

establish how a codification of the common law could sit alongside a rethinking of the regulatory or 'bureaucratic-administrative' model of offences.[14]

I. Horder's Models

By way of explanation of the rationale underpinning the proposals made here, a basic summary of the existing models of law explicated by Horder will be provided briefly, before the suggestions for reform are made in that context. These models are the traditional-codifcatory model and the administrative-regulatory model. In explaining the traditional-codificatory account of law-making which has been used by the Law Commission in relation to homicide, Horder draws on the work of Kamenka and Tay[15] in employing two German terms to portray the significance of particular elements of this model of reform: *gesellschaft* and *gemeinschaft*.[16] The former represents the idea that law puts in place rules that are exhaustive, requiring statutory provisions to be drafted using broad language in order to capture every example of wrongdoing that warrants the label of a particular offence such as murder or manslaughter. These labels are then used under the *gemeinschaft* ideal of law to infuse the law with moral judgments.

The bureaucratic-administrative model, on the other hand, employs the law in order to regulate potentially harmful activities, rather than to adjudicate in cases where a harm has been caused as to who is at fault and ought to face retributive punishment. Many such laws will relate to activities carried out for profit, but perhaps the most universal example of this model's use is in relation to driving offences under the Road Traffic Act 1988. This model jettisons the value-laden labels used by the traditional-codificatory model and provides more utilitarian labels for offences, such as causing death by dangerous driving.[17] Similarly, the purposes of punishment have been seen as utilitarian rather than retributive, particularly in the sense of aiming at general deterrence in order to increase road safety. The original rationale behind such offences employing the bureaucratic-administrative model has not endured in relation to some such offences, however:

> The offence of causing death by dangerous driving (together with its punishment) has in effect outgrown its origin merely as a heavy-duty tool for reinforcing a deterrent regulatory message about road safety. The offence has become more like a traditional common law crime, in which the public interest in securing retribution typically predominates over other (more forward-looking) concerns. It has proved difficult, then, for Governments to have their cake and eat it too. It has not been easy to satisfy the perceived need, for deterrence reasons, to increase road safety through increasing

[14] Horder, (n 11) 75.

[15] E Kamenka and A Tay, 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology' in E Kamenka and RS Neale (eds), *Feudalism, Capitalism and Beyond* (Edward Arnold, 1975).

[16] Horder (n 11) 71.

[17] Road Traffic Act 1988, s 1.

> numbers of prosecutions and convictions for causing death on the roads (taking the administrative-regulatory approach, rather than leaving homicides to be dealt with as potential manslaughters), whilst also satisfying the demand for sentences of a retributive kind that would certainly have fitted the crime, had it remained manslaughter.[18]

It is these forms of killings that will be the focus of discussion later in this chapter.[19] An attempt will be made at 'imaginative solutions'[20] to the problem of killing with cars, taking on board what Horder suggests about the advantages of what might be seen a hybrid of his two models: corporate manslaughter. He notes that corporate manslaughter has the advantage of adapting a 'general common law crime, with its value-laden and retribution-orientated *gemeinschaft* label (manslaughter), to fit a specific regulatory context'.[21] There are other contexts in which such a traditional-codificatory-regulatory-bureaucratic hybrid model might also be employed,[22] but they are beyond the scope of this chapter.

II. Codifying the Common Law Offences

My primary focus, in terms of proposing anything of novelty, will be on the regulatory homicide offences, but if they are to work alongside codified versions of murder and manslaughter, it is surely necessary to consider what these should be.[23] In making my suggestions, one of my priorities is to give effect to the correspondence principle, meaning that in my view any fault element in a homicide offence should make reference to a risk of causing *death*. This is not to take an exclusively subjective/cognitive approach to blameworthiness and mens rea, but rather to at least require an obvious risk of death to be proved at all levels of homicide.

A. Murder

Despite being singled out as the most serious offence in England and Wales in that it leads to a mandatory life sentence,[24] murder is currently a fairly broad offence, as a result of it requiring either an intention to kill *or* an intention to cause grievous bodily harm as constitutive of malice aforethought.[25] Given the broadness of the

[18] Horder (n 11) 74.
[19] See Part III below.
[20] Horder (n 11) 88.
[21] Horder (n 11) 72.
[22] Examples suggested by Horder include medical manslaughter, armed police officers killing in the execution of their duty and parents failing to prevent the death of their child through physical abuse. See Horder, (n 11) ch 2.
[23] Excluded from consideration, however, are issues of complicity and how the proposed offences might apply to secondary parties.
[24] Murder (Abolition of Death Penalty) Act 1965, s 1.
[25] *Cunningham* [1982] AC 566.

current offence, the Law Commission proposed splitting murder into two degrees, each with different mens rea requirements. Consultees provided a 'good deal of support'[26] for the Law Commission's 2004 proposals which required that for first degree murder D must have an intention to kill.[27] Although the Law Commission went on to loosen the requirement for mens rea for that offence,[28] which it might have hoped would lead to the recommendations finding more political favour, the original proposals are stronger in their rational structure, providing clarity in singling out the most heinous of homicide offences. If the substantive law is to be specific enough to assist in the task of sentencing killers, rather than relying wholly on a provision equivalent to Schedule 21 of the Criminal Justice Act 2003, and/or guidelines from the Sentencing Council,[29] it seems desirable to divide the general homicide cake into three rather than two layers.[30] Slicing off the top layer as *the* most serious offence worthy of a mandatory life sentence would allow the offence to be reserved for the most blameworthy state of mind: an intention to kill. Below that, second degree murder would incorporate those who intend to cause serious injury. But in order to comply with the correspondence principle, I would require more than just that. Taking Tadros' view of how the correspondence principle could be complied with by objectivists,[31] I see it as sufficient to require that D be liable for second degree murder where D killed V with intention to cause serious injury in circumstances where D had created a foreseeable risk of death.

If that were the case, then second degree murder should also include those who are 'recklessly indifferent' to death.[32] This test was replaced in the 2006 recommendations by a mens rea requirement of intention to cause injury or a fear or risk of injury where D was aware of a serious risk of causing death.[33] This, unlike my suggestion above, is a *subjective* test, requiring that death be foreseen rather than merely foreseeable. In most cases, D will be unlikely to foresee death unless an objective risk of death is present, but even if others in D's shoes would not have foreseen death as a result of D's actions, the fact that D did so would suggest that D is sufficiently blameworthy to be convicted of second degree murder. If first degree murder is confined to those who intend to kill, meaning that D must either act with the purpose of causing V's death or foresee it as a virtual certainty,[34] then those who intend to cause serious injury and foresee death as likely, but not

[26] Law Com 304, [2.53].
[27] Law Commission, *A New Homicide Act for England and Wales?* (CP No 177, 2005), [5.26].
[28] Law Com 304, [2.50].
[29] At the time of writing the Sentencing Council had recently published a consultation on sentencing in manslaughter cases (both voluntary and involuntary). The proposed guidance on sentencing in cases of manslaughter by loss of self-control makes reference to culpability factors influencing the minimum term to be served for murder under Criminal Justice Act 2003, Sch 21: Sentencing Council, *Manslaughter Guideline Consultation* (July 2017) 30.
[30] Horder, (n 11), 95.
[31] V Tadros, *Criminal Responsibility* (OUP, 2005) 95.
[32] CP No 177.
[33] Law Com No 304, [2.116].
[34] The test for intention as laid down in *Woollin* [1999] AC 82.

virtually certain, ought to be liable for second degree murder. It may be desirable to include what Taylor refers to as 'advertent lethal risks'[35] within the mens rea of a lower level murder offence.

B. Manslaughter

Setting aside the issue of voluntary manslaughter and the question, which is beyond the scope of this chapter, of whether the existing partial defences to murder should apply to reduce first degree murder to second degree murder or manslaughter, the next issue to deal with in rationalising homicide law is that of involuntary manslaughter. The current law encompasses two or, perhaps, three forms of involuntary manslaughter[36] in a way that lacks coherence and breaches the correspondence principle. Unlawful act manslaughter is seen as particularly controversial and would require extensive reform if codified in statute. This form of manslaughter encompasses deaths caused as the result of any unlawful and dangerous act,[37] such as a single punch. The Law Commission recommended that a form of unlawful act manslaughter be retained but with the requirement that by the unlawful act D either intended to cause injury or was aware there was a serious risk of causing injury.[38]

i. Unlawful Act Manslaughter

Horder labels 'one punch' manslaughter as 'the pure form of manslaughter'[39] and has no doubt that it should continue to amount to manslaughter. This is one issue upon which he and Mitchell do not agree, being on different sides of the objectivist/subjectivist divide.[40] Distilling the issue down to one of objectivism versus subjectivism might be seen as an oversimplification of their views on the relevance of the correspondence principle, but it is difficult to see how this debate can be resolved without resort to 'intuition' regarding the relevance of the moral luck argument. Horder argues that '[w]hen someone intentionally attacks

[35] R Taylor, 'The Nature of "Partial Defences" and the Coherence of (Second Degree) Murder' [2007] *Crim LR* 345, 356.

[36] Unlawful act manslaughter and gross negligent manslaughter clearly exist as separate species of manslaughter. Some doubt exists over the third species of reckless manslaughter, previously recognised by the Law Commission: Law Com No 237, [5.15]; CP No 177, [1.10]. Stark's analysis suggests good reason to harbour such doubts, and provides an explanation for why reckless manslaughter is not mentioned in the Sentencing Council's *Manslaughter Guideline Consultation* (see above, n 29): F Stark, 'Reckless Manslaughter' [2017] *Crim LR* 763.

[37] *DPP v Newbury* [1977] AC 500.

[38] Law Com 304, [1.67].

[39] Horder (n 11) 140.

[40] See B Mitchell, 'More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-punch Killer' [2009] *Crim LR* 502.

another's physical integrity, they attack an interest in preserving that integrity – an interest wherein being alive is a constituent element',[41] and relies on Duff's distinction between intentional attacks and endangerments[42] to support a law that categorises as manslaughter those criminal acts which amount to attacks on V's physical integrity, but otherwise does away with manslaughter based on unlawful acts falling outside the family of offences against the person. An attack on physical integrity amounts to something more than a mere trespass to the person,[43] but is otherwise not clearly defined; what is clear, however, is that Horder's suggestion is *not* based on the dangerousness of the attack:

> [U]nderstanding it in this way is not to make an implicit claim that attacks on physical integrity are more dangerous to life than attacks on property. That may be a false claim, for example, in cases of arson. Manslaughter committed through an intentional attack on V's physical integrity does not rely *at all* for its rationale on an assessment of the danger to life or limb posed by such conduct. It is enough that D caused death, in the meaning given by law to the notion of 'caused', by such an attack.[44]

Others agree that unlawful act manslaughter ought to be confined to offences against the person. At the 2000 conference, Clarkson similarly suggested that constructive manslaughter should be retained but only for unlawful acts of personal violence involving at least a common assault with intention or foresight of some injury.[45] I remain unconvinced about the retention of liability for manslaughter for those whose act may not create an obvious risk of death, but who lose their temper and lash out, whilst excluding liability for manslaughter for those who create an obvious risk of death in other ways. The example provided by Clarkson[46] of a case not falling within his proposal, of setting a car alight, seems to be as blameworthy as punching someone. In both cases a prudent individual who stopped to think about the consequences of their actions would realise the risks involved, and the risk of death to anybody caught in a fire is perhaps higher than the recipient of a punch. I suggest that if we are to retain any form of constructive manslaughter,[47] it should be based on creation of an obvious risk of death, whether an attack or an endangerment, which was, if not foreseen, then foreseeable to D. Again, this is to emphasise the importance of the correspondence principle. It would not require

[41] ibid.
[42] A Duff, *Answering for Crime* (Hart, 2007) 148–58.
[43] Horder (n 11) 149.
[44] Horder (n 11) 143.
[45] CMV Clarkson, 'Context and Culpability in Involuntary Manslaughter' in Ashworth and Mitchell (n 1) 160.
[46] *England* (1995) 16 Cr App R 777.
[47] It might be questioned whether there is a need to retain a form of constructive manslaughter at all, and rather simply define manslaughter as killing when D acts having created an obvious risk of death, where D had the capacity to foresee such a risk, and D acted unreasonably in taking that risk. However, I wonder whether there are political reasons to propose offences that *generally* follow the contours of the common law; there may be more chance of such proposals being adopted and reform going ahead.

D to have foreseen a risk of death, but it could involve a reformulation of the *Church*[48] test to include a requirement that sober and reasonable people would recognise the risk of *death,* rather than of *some harm*.

Although my proposal would adhere to the correspondence principle, it would do so in a way that might offend a strict subjectivist. The strict subjectivist could criticise the suggested offence construction on the basis that it could make manslaughterers of those who did not advert to a risk of death. The proposal put forward for manslaughter in the appendix does at least adopt a modified version of 'objective' recklessness, however, in order to avoid a situation where those who were mature enough to realise that starting a fire might cause damage to property[49] but who failed, perhaps due to incapacity, to realise the inherent risk of death, could be labelled manslaughterers. The addition of a clause to ensure that only those with the *capacity* to have realised an obvious risk of death be held liable for manslaughter is thus required, although further amendment might be needed here in order to avoid the provision being too clumsy.[50] It can also be seen that the suggested provision incorporates a requirement that the risk of death exists *by virtue* of the act being unlawful. This is to ensure that there is a connection between the unreasonableness of the risk D is taking in committing the unlawful act and the causation of death, in order to avoid D being liable for the causing of death through a combination of unfortunate events leading on from the commission of an offence which would not normally give rise to a risk of death in and of itself.[51]

Such a change would not necessarily cover every example of Horder's 'pure' manslaughter, in that a punch struck in anger might not create an obvious risk of death, but only of some lesser physical harm, depending on the circumstances. But it could cover unlawful acts from other families of offences, such as arson. Thus, unlike Horder, I do think that the dangerousness of the underlying act, rather than an attack on physical integrity, is what is important. This suggestion could have the result of extending the way in which manslaughter is prosecuted to incorporate appropriate cases of killing with a motor vehicle.[52]

[48] [1966] 1 QB 59.

[49] Satisfying the mens rea requirement according to *G* [2003] UKHL 50.

[50] A more detailed provision could be drafted with Hart's comments regarding negligence and capacity in mind: HLA Hart, 'Negligence, Mens Rea and the Elimination of Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP, 1968) 152–57.

[51] There is a need to avoid an offence formulation that risks labelling as manslaughterers those who commit a regulatory offence such as driving without insurance and are involved in a fatal collision, such as the defendants in *Williams* [2010] EWCA Crim 2552 and *Hughes* [2011] EWCA Crim 1508 (prior to the reversal of the Court of Appeal decision in *Hughes* [2013] UKSC 1356). It might be argued that there is always an obvious risk of death involved in driving a motor vehicle, but principle requires that there must be a serious risk of death relating to the underlying offence in order for D to be called to answer for the death.

[52] However, as will be discussed below, as I am also proposing a separate offence of vehicular manslaughter there would not be a need for this generic form of manslaughter to be prosecuted in driving cases.

ii. The Relationship between Manslaughter and Regulatory Offences

Since *Andrews v DPP*[53] it has been assumed that a driving offence can never form the basis of a prosecution for constructive manslaughter. This is based on Lord Atkin's determination that the unlawful act must be unlawful for some reason other than it was negligently performed.[54] Driving is seen as a lawful activity, which only becomes unlawful if D fails to adhere to the rules of the road and other regulations put in place to promote road safety. Such a determination was made in a period of history when driving was less prevalent than it is today, a preserve of the upper classes, and there was less regulation.[55] I suggest that in modern times, and in order to underline the road safety purposes of regulation, it would be preferable to present driving as an unlawful activity only made lawful if certain conditions are met.[56] Wells similarly questions the way in which driving is perceived as lawful and the point in time when it becomes unlawful, comparing it to the lawful social activity of going on a pub crawl which later turns into a brawl.[57]

Although there was less regulation of driving at the time of *Andrews*, there was of course some, and it is worth pausing to examine in more detail Lord Atkin's statement in relation to this regulation and how it has been interpreted since. Lord Atkin specifically referred to regulation on the roads as follows:

> [T]he Road Traffic Acts … have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed no doubt to cases of negligent driving, which if death be caused would justify convictions for manslaughter, extend to degrees of negligence of less gravity. Sect 12 of the Road Traffic Act, 1930, imposes a penalty for driving without due care and attention. This would apparently cover all degrees of negligence. Sect 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter: and the Legislature appears to recognize this by the provision in s 34 of the Road Traffic Act, 1934, that on an indictment for manslaughter a man may be convicted of dangerous driving. But, apart altogether from any inference to be drawn from s 34, I entertain no doubt that the statutory offence of dangerous driving may be committed, though the negligence is not of such a degree as would amount to manslaughter if death ensued. As an instance, in the course of argument it was suggested that a man might execute the dangerous manoeuvre of drawing out to

[53] [1937] AC 576.

[54] At 585.

[55] For a discussion of the history of the regulation of driving and construction of 'car crime' see C Corbett, *Car Crime* (Willan, 2003).

[56] See S Cunningham, 'Vehicular Homicide: Need for a Special Offence?' in CMV Clarkson and S Cunningham, *Criminal Liability for Non-Aggressive Death* (Ashgate, 2008), 101.

[57] C Wells, *Corporations and Criminal Responsibility* (OUP, 2001) 118–19.

> pass a vehicle in front with another vehicle meeting him, and be able to show that he would have succeeded in his calculated intention but for some increase of speed in the vehicles in front: a case very doubtfully of manslaughter but very probably of dangerous driving. I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that if he had caused death he must have been convicted of manslaughter. It therefore would appear that in directing the jury in a case of manslaughter the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman's* case[58] and then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death was caused by dangerous driving within s. 11 of the Road Traffic Act, 1930, and no more, would in my opinion be a misdirection.[59]

Much has changed since 1937, and it is no longer the case that the Road Traffic Acts make no direct reference to causing death by negligence. Causing death by reckless or dangerous driving was first introduced by the Road Traffic Act 1956, and has gone through a number of iterations, with the current law being established through the Road Traffic Act 1991 amending the relevant provisions of the Road Traffic Act 1988.[60] It is still the case, however, that where a driver's negligence in causing death meets the degree of grossness required under *Bateman* and, now, *Adomako*,[61] he can be liable for gross negligence manslaughter. However, the effect of *DPP v Andrews* on charging practice has been that no offence under the Road Traffic Acts is ever treated as the underlying unlawful act on the basis of which unlawful act manslaughter is constructed. The online CPS legal guidance states that: 'Driving carelessly or driving dangerously do not, on their own, amount to unlawful acts for the purpose of unlawful act manslaughter.'[62] Death by motor car does sometimes get charged as manslaughter based on an unlawful act, but only where the car was used as a weapon of offence, or where the driving injects danger into an offence such as burglary.[63]

Although drivers are not prosecuted for unlawful act manslaughter on the basis of an offence under the Road Traffic Acts, it is not unheard of for offences under such Acts to form the basis of such a charge. In the case of *Meeking*[64] the

[58] (1927) 19 Cr App R 8.

[59] *Andrews v DPP* [1937] AC 576, 584–85.

[60] Section 1.

[61] [1995] 1 AC 171.

[62] CPS, *Road Traffic Offences – Guidance on Charging Offences arising from Driving Incidents* (CPS Website, updated February 2018).

[63] As seen in *Bristow* [2013] EWCA Crim 1540. A recent example of this approach may have been that of Michael Johnson, who was sentenced to 5 years and 3 months' imprisonment after pleading guilty to manslaughter for running over and killing the victim whilst he was in the process of stealing a trailer from the farm on which the victim lived. It is not clear whether manslaughter was charged on the basis of an unlawful act and, if so, whether the unlawful act was an assault or some theft-related offence.

[64] [2012] EWCA Crim 641.

defendant was charged with manslaughter, having pulled on the handbrake of a car in which she was the passenger, causing a collision which killed her husband, the driver. The prosecution argued their case on the basis that D had committed the unlawful act of interfering with a motor vehicle so as to endanger road users, contrary to section 22A(1)(b) of the Road Traffic Act 1988. This provides that:

> (1) A person is guilty of an offence if he intentionally and without lawful authority or reasonable cause –
>
> (a) causes anything to be on or over a road, or
> (b) interferes with a motor vehicle, trailer or cycle, or
> (c) interferes (directly or indirectly) with traffic equipment,
>
> in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.

As noted by Ashworth, this offence appears to be both a crime of negligence and a crime of intention.[65] But Ashworth's interpretation of the provision is that it is essentially a crime of negligence,[66] and that intention only forms a small part of the wrong involved in qualifying the means adopted in such negligence. Intention here is used in the sense used by Lord Atkin in the quotation above, when he provides an example of a case which he thinks would amount to dangerous driving but not to manslaughter, where D has a 'calculated intention' to overtake other vehicles.

Another example of a case of unlawful act manslaughter which could have been based on an offence of similar construction (a crime of negligence where intention was relevant to the way in which such negligence was carried out) is in fact the leading House of Lords case of *Newbury*.[67] Here the House of Lords was determining whether a defendant could be convicted under unlawful act manslaughter where he did not foresee that his act might cause harm to another. The answer was clear: yes; meaning that the convictions for manslaughter of the two 15-year-old boys, who had dropped a paving slab from the parapet of a bridge onto a train below, killing the train guard, were upheld. What the House of Lords did not address was what the unlawful act was on which the charge of manslaughter could be based, given that the appellants accepted that they had committed an unlawful act and this was not an issue before the court.

The Law Commission has suggested a number of unlawful acts the defendants in *Newbury* may have committed. The first of these is the offence of doing or omitting anything to endanger passengers by railway, under section 34 of the Offences Against the Person Act 1861:[68]

> Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway,

[65] A Ashworth, 'Commentary to R v Meeking' [2013] *Crim LR* 333, 334.
[66] ibid.
[67] [1977] AC 500.
[68] Law Commission, *Involuntary Manslaughter* (CP No 135, 1994), [2.10].

> or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

The Law Commission note that the elements of this offence are unclear:

> The section stipulates that the 'omission or neglect' which forms the basis of the offence must have been 'wilful'. 'Wilful' in this context means that the omission or neglect was deliberate and intentional, not accidental or caused by inadvertence. Although the word 'wilful' does not qualify 'unlawful act', it can perhaps be assumed by implication that the required mental element is that the act was done voluntarily and intentionally.[69]

Thus, it would appear that 'wilful' here has the same meaning as 'intentionally' under section 22A of the Road Traffic Act 1988, according to Ashworth's analysis. Although the Law Commission goes on to identify alternative offences which could have formed the unlawful act upon which the defendants' convictions for manslaughter in *Newbury* were based, it does appear that Lord Atkin's rule of excluding offences of negligence for this purpose is sometimes overlooked.[70]

Whether or not it is right that dangerous driving should be capable of amounting to the unlawful act upon which an allegation of constructive manslaughter is made, the fact that statutory offences have been introduced under the bureaucratic-administrative model makes it highly unlikely that the limits of Lord Atkin's judgment will be further tested. He was clear that manslaughter should not be based on driving without due care and attention, and yet there now exits a separate offence penalising the causing of death in this manner.[71] The use of bureaucratic-administrative homicide offences has additionally been extended to offences requiring not even the merest degree of negligence, with the offences of causing death by driving whilst uninsured and unlicensed,[72] and causing death by driving whilst disqualified,[73] constructing liability for the causing of death based on underlying crimes of strict liability. There does not, at present, exist an offence of homicide penalising the causing of death by drunk driving *simpliciter*; under section 3A of the Road Traffic Act 1988 a drink driver may be convicted of causing death if he drove carelessly as well as being over the drink/drug drive limit. The question arises as to whether such causing of death should amount to manslaughter under the proposals put forward here.

Horder suggests that the existing offences under sections 3A, 3ZB (and now) 3ZC 'could – and should' amount to unlawful act manslaughter: 'Each involves the commission of an unlawful act – respectively, driving under the influence of drink or drugs, and unlicensed, disqualified, or uninsured driving – that may pose a danger of causing some harm, but is not unlawful solely in virtue of involving

[69] ibid.
[70] See also M Dyson, 'The Smallest Fault in Manslaughter' (2017) 6 *Archbold Review* 4.
[71] Causing death by careless driving is an offence under s2B of the Road Traffic Act 1988.
[72] Road Traffic Act 1988, s3ZB.
[73] Road Traffic Act 1988, s3ZC.

negligent or careless conduct'.[74] Presumably, then, Horder would be content to see convictions for the proposed manslaughter offence in any of these situations, as well as in cases of causing death by dangerous driving. His argument in relation to dangerous driving is that 'the public interest in strong measures being taken against those whose driving poses a danger of death seems to me to justify in law *treating* a death so caused as gross negligence manslaughter'.[75] Under the proposal here, some of the present causing death by driving offences could amount to the revised 'unlawful act' version of manslaughter, provided that there existed an obvious risk of death, whilst others might fall under the alternative version based on gross negligence.[76]

That is not to say that any death resulting from a collision involving a driver who has committed a regulatory offence ought to be liable for manslaughter. In many cases, even dangerous driving would not be sufficient, given that the definition of 'dangerous' under section 2 of the Road Traffic Act 1988 requires only a risk of injury or serious damage to property. The proposed requirement that the unlawful act involve an obvious risk of death would mean that dangerous driving *could* form the basis of a manslaughter charge, but only if the driving was so bad as to satisfy that requirement. Likewise, the offence of drink/drug driving *could* lead to a conviction for manslaughter, but only where D was so intoxicated as to create a foreseeable risk of death to another road user from driving in such a condition. This might exclude those whose blood alcohol concentration is only just above the legal limit, depending on how the alcohol affected them and their ability to drive.[77]

iii. Gross Negligence Manslaughter

The proposal is that any codified version of manslaughter should cover both a redefined version of unlawful act manslaughter to comply with the correspondence principle, and a version of gross negligence manslaughter. The latter would give the opportunity to clarify the test in *Adomako*, and should be fairly uncontroversial. Its inclusion in this proposal is to take a 'belt and braces' approach; depending on whether the suggestion below is also agreed to, it may only be necessary to fill the gaps. Despite the House of Lords seemingly laying down a clear test for gross negligence two decades ago, recent cases have shown that there are elements of the offence with which the courts continue to struggle. The recent cases of *Rudling*[78] and *Rose*[79] illustrate this, resulting in the Court of Appeal inserting

[74] Horder (n 11) 82–83.
[75] Horder (n 11) 82.
[76] As discussed at Part II.B.iii below.
[77] The effect of alcohol depends on numerable factors. See P Callow, 'The Drink- and Drug-Driving Offences and the Criminal Law Paradigm' (PhD thesis, University of Sheffield, 2014). The risk of driving after consuming alcohol was famously analysed in the *Grand Rapids* study: Borkenstein et al, *The Role of the Drinking Driver in Traffic Accidents* (Bloomington, 1964).
[78] [2016] EWCA Crim 741.
[79] [2017] EWCA Crim 1168.

an additional test into that laid down by Lord Mackay in *Adomako.* Lord Mackay's test is fourfold, requiring that:

(a) the defendant owed a duty of care to the victim;

(b) the defendant breached that duty of care;

(c) the breach of that duty caused the death of the victim; and

(d) the breach of duty should be characterised as gross negligence and therefore as a crime.[80]

However, in citing cases such as *Misra,*[81] in which Judge LJ had referred to the case of *Singh,*[82] the Court of Appeal in *Rudling* identified an additional requirement which was subsequently inserted between requirements (b) and (c) above in *Rose,* namely that:

> … it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death.[83]

It is not tolerably clear that Lord Mackay would have approved of the addition of this requirement, given that he did not include it in his own test and was at pains to avoid the language of recklessness used in *Lawrence*[84] in setting out the law in relation to manslaughter. In his speech he talks instead of the seriousness of the *breach* being relevant, and acknowledges that it is a risk of death which is relevant in determining the extent to which D's conduct departed from the proper standard of care. Thus, he was leaving it to the jury to determine whether the risk of death was sufficiently 'serious and obvious' to class D's breach of duty as a crime, without seeing the need to direct them in those terms. That the last element of Lord Mackay's test is problematic is without controversy: it has been criticised as being circular and unhelpful to the jury, although it has been held not to breach articles 6 or 7 of the European Convention of Human Rights.[85]

In *Rose* an optometrist had failed to carry out an examination of the deceased's eye which, had she done so, would have revealed an obvious and serious risk of death and necessitated referring him for medical investigation. At trial the judge had directed the jury that the Crown must have proved that it was reasonably foreseeable that D's breach of her duty of care gave rise to a serious and obvious risk of death and yet despite this direction, the jury convicted D of manslaughter in circumstances in which it was not foreseeable at the time of D's breach that there was an obvious and serious risk of death. The Court of Appeal quashed the

[80] Summarised from Lord Mackay's judgment at 187.
[81] [2005] 1 Cr App R 21.
[82] [1999] Crim LR 582.
[83] At [77].
[84] [1982] AC 510.
[85] *Misra* (n 81).

conviction on the basis that in assessing the reasonable foreseeability of a serious and obvious risk of death, it is not appropriate to take into account what the defendant *would have* known but for her breach of duty.

If the law is to be codified it is likely desirable that the requirement of the existence of an obvious and serious risk of death be incorporated into statute, as suggested in the appendix, in order to avoid criminalising defendants such as Ms Rose. It is desirable that the scope of gross negligence manslaughter be narrowed to exclude defendants who have breached their duty when such a breach did not give rise to an obvious and serious risk of death. To require this risk to be taken into account again ensures compliance with the correspondence principle, and does so in a way which is not open to interpretation in the same way as Lord Mackay's broader test is.

I have additionally taken the lead from the Law Commission[86] in using the language of dangerous driving in specifying the degree of negligence required for manslaughter, in requiring that V's conduct falls far below that which can reasonably be expected of D in the circumstances. However, given the difficulty for juries in determining how bad negligence has to be in certain contexts before it amounts to *gross* negligence deserving of criminal punishment, even if they are assisted by this change in terminology, my proposals do not end there. Below I suggest that manslaughters committed in certain contexts ought to attract their own test and offence label, drawing on the drafting of the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 for inspiration. The proposal put forward is for an offence of vehicular manslaughter, but the same offence model could be used in other contexts of lethal gross negligence, such as medical manslaughter. However, it is unlikely that the legislature would be able to employ the bureaucratic-regulatory model to create separate offences of manslaughter in every conceivable context giving rise to a risk of death, and it would be undesirable to do so in the sense that it would risk creating too many over-specialised offences,[87] and therefore a generic offence of gross negligence manslaughter remains necessary.[88]

[86] Law Commission (n 4), [3.60].

[87] I would not, for example, agree with a suggestion that the regulation of cycling is something that ought to give rise to separate special homicide offences. The recent case of Charlie Alliston gave rise to a review of the law in relation to cycling after he was acquitted of manslaughter but convicted of wanton and furious driving. The manslaughter charge was based on the unlawful act of riding a bike with no brakes, despite the difficulties of arguing constructive manslaughter on the basis of an act which is, like driving, generally lawful. See L Thomas, *Cycle safety review independent legal report* (DfT, March 2018). This report has proposed the creation of a new causing death by dangerous cycling offence, which I do not support. However, there is no reason why the offence I propose in the appendix should not also include cyclists as well as the drivers of motor car vehicles within its remit. For that reason, the draft provision makes reference to 'vehicle' rather than 'motor vehicle' and it is envisaged that it could, therefore, apply to pedal cycles in the same way as the Offences Against the Person Act, s 35.

[88] Gross negligence manslaughter might continue to be employed to cover cases which involve those liable under the current law through an omission where D was under a duty to act. In cases where it is doubtful that any underlying unlawful act has been committed, but where D has owed a duty of care and has been grossly negligent and caused death, liability for manslaughter should ensue.

III. Regulatory Domain Offences

There is a strong argument to be made that killing on the roads should, where it satisfies the test under *Adomako*, amount to gross negligence manslaughter.[89] However, even if the proposals for manslaughter ever did find favour with legislators, the likelihood of drivers being convicted of that offence would still depend on a change in prosecutorial guidance and practice[90] and, perhaps, an increase in jurors being prepared to convict drivers of an offence otherwise aimed at violent offenders.[91] It therefore appears necessary to propose something slightly different.[92] The proposals here would replace existing bureaucratic-administrative offences of causing death by driving. As noted above, Horder recognises that although the statutory causing death by driving offences are constructed upon regulatory offences designed to improve road safety, their punishment is mainly retributive rather than deterrence based,[93] meaning that they depart from one of the characteristics he attributes to the regulatory model.[94]

It seems impossible to turn back time to reinstate causing death by dangerous driving as manslaughter *simpliciter*,[95] but I want to develop Horder's next point:

> [S]upport should be given to the way in which, for example, the corporate manslaughter offence seeks to combine forms of law reflecting different casts of legal thought. Seen in a positive light, such a strategy can be regarded as a way of helping traditional ways

[89] See, for example, Cunningham, (n 56); and S Cunningham, 'The Reality of Vehicular Homicides: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving' [2001] *Crim LR* 679. Gross negligence manslaughter is rarely charged in the context of driving, and where this happens it is often because an element of dangerous driving cannot be proven for the purposes of causing death by dangerous driving, such as that the driving did not occur on a road or other public place.

[90] As noted (n 62) the CPS Guidance advises against the use of unlawful act manslaughter based on a driving offence. It does, however, allow for charges of gross negligence manslaughter in the worst cases, but these remain rare. An example is the case of *Dobby* [2017] EWCA Crim 775, where D pleaded guilty to a charge of gross negligence manslaughter, having 'driven in a deliberately appalling manner' and was sentenced to 15 years' imprisonment. Leave to appeal against the sentence as unduly lenient was granted 'because of the considerable importance of the case, its unusual circumstances and the fact that manslaughter had been charged'. The Court of Appeal dismissed the appeal.

[91] It may be that the increase in media calls for drivers to be treated as manslaughterers has influenced public opinion and Mitchell found that the public expressed a view that drunk drivers in particular ought to be liable for manslaughter: B Mitchell 'Further Evidence of the Relationship between Legal and Public Opinion on the Law of Homicide' [2000] *Crim LR* 814. However, there may persist a mentality of 'there but for the grace of God go I' amongst jurors making a conviction for generic manslaughter difficult to secure in driving cases (the reason for the introduction of the statutory causing death by driving offence in 1956: see B MacKenna, 'Causing Death by Reckless or Dangerous Driving: a Suggestion' [1970] *Crim LR* 67 and Cunningham, n 89).

[92] I have previously been reluctant to accept additional context-specific vehicular homicide offences: see Cunningham (n 56). However, I am now persuaded that the advantages outweigh the negatives in using corporate manslaughter as the basis for a vehicular manslaughter offence.

[93] See also, S Cunningham, 'Punishing Drivers who Kill: Putting Road Safety First?' (2007) 27 *Legal Studies* 288.

[94] See quotation in text to n 18 above.

[95] Although, as argued above, it might be possible and appropriate to charge the codified version of manslaughter in some cases of driving causing death.

> of thinking and categorizing to find continued meaning and relevance in a modern regulatory context: here, in the shape of a 'bureaucratic–administrative' form of law with a *gemeinschaft* label, 'manslaughter'. The argument may turn out to be, then, that reformers should have adopted such an approach, an approach more supportive of the common law's mixture of *gesellschaft* and *gemeinschaft* forms of law, in the road traffic and perhaps also in other contexts.[96]

What might such a combined offence look like? An examination, even at a very basic level, of the most important provisions of the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 is necessary in order to understand what Horder might envisage.

The CMCHA is a long statute, and any new homicide offence based on the same structure would want to avoid the complexity of the different provisions it contains. However, most of these relate to the complications involved in convicting a legal personality, rather than a human being, of homicide, and are not necessary in other contexts. The essence of the offence can be distilled into a few provisions. Corporate manslaughter requires death to have been caused by a gross breach of a duty of care owed by the defendant organisation to V. In defining a 'gross breach', section 1(4) borrows from the definition of dangerous driving under section 2A of the Road Traffic Act 1988, which states that a person is regarded to have driven dangerously if the way he drives falls far below what would be expected of a competent and careful driver. Under corporate manslaughter, the way in which an organisation's activities are managed or organised amounts to a gross breach of its duty of care if it falls far below what can reasonably be expected of the organisation in the circumstances.[97] A jury, in making the decision as to whether there has been a gross breach of a duty of care can, in turn, take into account any failure to comply with health and safety legislation.[98] In doing so, the jury can consider how serious the failure was and the risk of death it posed. Thus, although a jury might struggle with judging whether the organisation fell far below what could have been expected of it, they are assisted in making that judgment with reference to something tangible. Existing regulatory offences under health and safety legislation provide a good measure for what can be expected of any company engaged in potentially dangerous activities and adherence to those rules exemplifies conduct expected of such an organisation.

I have taken the essential elements of the CMCHA (particularly section 8) and drafted basic provisions for an offence of vehicular manslaughter. One clear benefit of this proposal as compared to the current regulatory offence is that unlike causing death by dangerous driving, reference is made to the specific regulatory document that should be known to any driver: the Highway Code. This ought to make the determination of whether D is liable easier, insofar as it avoids the current problem of juries having to think about what can be expected of a 'competent and careful

[96] Horder, (n 11), 74.
[97] CMCHA 2007, s 1.
[98] CMCHA 2007, s 8.

driver' with little guidance other than their own experience.[99] An objection might be made that for vehicular manslaughter to truly follow the contours of corporate manslaughter, a gross breach ought to be determined by reference to offences under the Road Traffic Act or other statutes, rather than a document which does not carry the full effect of the law. However, there is a potential road safety benefit to be had by making reference to the Highway Code, a document which every licensed driver ought to know. Few drivers will be aware of the full content of the Road Traffic Act 1988, but all can be expected to know and remind themselves of the content of the Highway Code and referring to it might actually promote the regulatory aspect of the offence, by encouraging drivers to be so knowledgeable. If such a provision were passed, efforts ought to be made to publicise the content of the new law, in order that this benefit may accrue.[100]

The label of vehicular *manslaughter* is important in ensuring that the offence is imbued with a sense of gravity, and may well go a long way to satisfying bereaved families that justice is seen to be done in such cases,[101] but the sentence may also remain important. Despite the continued ratcheting up of sentences for death by driving offences, there remain loud calls for sentences to be increased yet further, with campaign groups such as Brake seeking to push the issue up the political agenda and the Government having recently conducted a consultation exercise.[102] I am not in favour of the present causing death by driving offences attracting higher sentences than the existing maximum of 14 years' imprisonment, not least because if proportionality in sentencing is to be maintained then an offence which is prosecuted where it is thought that gross negligence cannot be proved should attract a lower maximum penalty than that of life for gross negligence manslaughter.[103]

[99] For problems with the current test see S Cunningham, *Driving Offences: Law, Policy and Practice* (Ashgate, 2008).

[100] See A Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 *MLR* 1.

[101] The need to take into account the needs of victims is discussed in Cunningham (n 56) 117–22.

[102] Ministry of Justice, *Driving offences and penalties relating to causing death or serious injury* (Cm 9381, 2016). Following this consultation the MoJ has announced that it intends to bring forward proposals, when parliamentary time allows, to increase the maximum penalty for the offences under the RTA 1988, ss 1 and 3A to life imprisonment: Ministry of Justice, *Response to the consultation on driving offences and penalties relating to causing death or serious injury* (Cm 9518, 2017) [57].

[103] Despite the calls to increase the maximum penalty for causing death by dangerous driving to life, in line with manslaughter, it is questionable whether raising the maximum penalty would, or should, result in an increase in sentences passed for such offences, in comparison to sentences for manslaughter. An example of a recent case of manslaughter by motor vehicle is that of Matthew Gordon and Peter Wood, convicted at Bristol Crown Court of manslaughter resulting from faulty brakes on a the tipper truck they owned/serviced (S Morris, 'Bath tipper truck crash: haulage company owner and mechanic jailed' *Guardian Online* (27 January 2017)). The sentence given to Gordon of seven-and-a-half years is well within the 14-year maximum for causing death by dangerous driving. The case of *Dobby* (n 90) is unusual in resulting in a sentence of more than 14 years' imprisonment, and this sentence in and of itself provides an explanation for the Crown's decision to charge manslaughter rather than an offence under ss 1 or 3A of the RTA 1988. Under the Sentencing Council's proposals for sentencing guidelines for gross negligence manslaughter, a starting point for the least culpable form of the offence is given of two years' imprisonment, compared to a starting point of three years' imprisonment laid down in relation to a case falling within level 3 (the least serious) of the current causing death by dangerous driving guidelines. See Sentencing Council (n 29) 27, and Sentencing Guidelines Council, *Causing Death by Driving: Definitive Guideline* (2008) 11.

However, since my proposed vehicular manslaughter offence would require a level of blameworthiness equivalent to that required for gross negligence manslaughter, albeit expressed in a way which provides more guidance to the jury in making that decision, there is reason to suggest that it should attract the same maximum penalty as other codified versions of manslaughter.[104]

The proposed offence would likely cover most of the offenders currently caught by the offence of causing death by dangerous driving, and might be broader in covering other drivers who kill, such as drunk drivers. Allowing a drunk driver to be convicted of an offence carrying the label of manslaughter would accord with the results of the public opinion research conducted by Mitchell, whose interviewees argued that the drunken motorist who killed a pedestrian in a scenario should be convicted of manslaughter 'at least':

> … interviewees frequently pointed to the mass of publicity warning of the potential horrors that are likely to ensue from bad driving. People are well aware that cars and lorries are potentially 'lethal weapons' and that other road-users are very much at the mercy of drivers. It is therefore reasonable to place road traffic homicides on a par with traditional murders and manslaughters. Failure adequately to reflect the gravity of such incidents – the harm and personal culpability – would merely bring the legal system into disrepute.[105]

However, it would not necessarily include those who can presently be convicted under the other causing death by driving offences. That is to its benefit, in that those whose blameworthiness does not amount to a gross breach of a duty of care arguably ought not to be punished for the unfortunate result of causing death. However, the advantage of the proposal is that it *could* cover those who might presently be liable for causing death by driving whilst disqualified under section 3ZC of the Road Traffic Act 1988, but only where D's decision to drive, despite being disqualified,[106] amounts to a gross breach of the duty D owes to all road users. It is not the case that every person who is disqualified from driving poses a significant risk of death by deciding to drive and this will depend on the specific facts leading to D's disqualification, as well as the degree to which D otherwise departed from the Highway Code.[107]

[104] This is where my proposal departs from the suggestions put forward by Horder, who is of the view that a truly condemnatory offence label would do some of the punitive work required of any homicide offence, implying that a lesser maximum penalty than even the current statutory causing death offences might be warranted: Horder, (n 11), 87.

[105] Mitchell, (n 91), 824.

[106] This is where the question of whether D's breach was an intentional violation or not becomes particularly useful. The current offences under ss 3ZB and 3ZC of the RTA 1988 are based on strict liability, in that D need not even know that he is driving without insurance or a licence or whilst disqualified to be convicted of the offence. Under this proposal, D's state of mind in relation to the underlying breach becomes important in deciding whether the breach was gross, with juries being more likely to find such a gross breach where D knew he was breaking the rules. This would mean that those who drove without insurance because, for example, their policy had expired without their knowledge, would not be liable for a homicide offence as they might be under current law.

[107] In relation to uninsured driving it would be difficult for any case of vehicular manslaughter to be made out on the basis that D intentionally violated the law by driving without insurance, since presumably the risk of death involved in driving would not be increased solely by the fact that D was uninsured.

The proposal includes a clause which allows the jury to take into account whether the breach of the Highway Code was intentional, and therefore can be categorised as a 'violation'. An intentional violation of the Highway Code would indicate a far higher level of blameworthiness than an unintentional 'lapse' or 'error'.[108] The terms 'violation' and 'error' are used in very specific ways by psychologists in the field of driver behaviour, who have demonstrated that the cognitive processes involved in committing violations and errors are very different, requiring different corrective responses.[109] Under the current law, those guilty of causing death by careless driving will often have committed an error in their driving; a momentary loss of attention which leads to catastrophic consequences.[110] The reference to whether a breach of the Highway Code has been intentional or not will likely lead to a narrowing of the types of cases prosecuted, in that it is unlikely that many of those who are guilty of causing death by careless driving will pass the evidential test in the Code for Crown Prosecutors for the purposes of a vehicular manslaughter charge. However, those who for example use a mobile phone whilst driving might more readily be charged with vehicular manslaughter than they are with causing death by careless or dangerous driving, since this will be seen as a *violation* of the Highway Code and, depending on the circumstances, might also be defined as a gross breach of a driver's duty of care to other road users creating a high risk of a fatal collision.[111]

IV. Conclusion

Horder's suggestion for developing new homicide offences based on the corporate manslaughter model was first made in an edited collection resulting from a conference examining the question of whether specific homicide offences are needed for negligent killings in particular contexts.[112] There is a need to inject some coherence into the law, which has developed in a piecemeal fashion under the

[108] For a suggestion of how this distinction might be used in relation to driving offences more generally, see Cunningham, (n 93).

[109] See, for example, J Reason, *Human Error* (CUP, 1990); J Reason, A Manstead, S Stradling, J Baxter, and K Campbell, 'Errors and Violations on the Roads: A Real Distinction?' (1990) 33 *Ergonomics* 1315–32.

[110] S Kyd Cunningham, 'Has Law Reform Policy been Driven in the Right Direction? How the New Causing Death by Driving Offences are Operating in Practice' [2013] *Crim LR* 711.

[111] Current guidance suggests that using a mobile phone whilst driving is an example of both careless and dangerous driving, which is far from helpful. Dangerous driving will be charged where a driver's use of the mobile phone caused them to be not only avoidably distracted but *dangerously* distracted by such use: see CPS (n 62). It can be argued that *any* use of a mobile phone whilst driving is dangerous. See: P Burns, A Parkes, S Burton, R Smith and D Burch, *How dangerous is driving with a mobile phone? Benchmarking the impairment to alcohol* (TRL Report, TRL 547, 2002).

[112] J Horder, 'Homicide Reform and the Changing Character of Legal Thought' in CMV Clarkson and S Cunningham, *Criminal Liability for Non-Aggressive Death* (Ashgate, 2008).

two distinct models identified by Horder. This can be achieved partly by adopting reforms similar to those recommended by the Law Commission under the traditional-codificatory model, but with the addition of further manslaughter offences. It might be argued that to develop a third, hybrid model, based on corporate manslaughter, will do no more than to muddy the waters even further. However, so long as certain principles are followed to ensure coherence within the law, Horder's reasons for suggesting the development of such a model are persuasive. In concluding a discussion of whether the law should rely on generic offences of manslaughter, or develop further nominate offences to deal with killings in specific contexts, Ashworth puts forward the principle that the law should aim to ensure the equal treatment of offences of equal seriousness.[113] In applying that principle, he suggests that even where nominate offences are thought advisable for some types of homicide, the thresholds of liability for such offences should be the same. Thus, the proposals put forward here are aimed at adhering to this principle in a way which takes into account practical issues too.

Killing with cars is a problem that has plagued the law and its subjects since the motor vehicle became a popular mode of transport. While there has been a general decline in the number of people killed on the roads there are still too many deaths caused by unnecessary risk-taking.[114] I have argued elsewhere that the criminal law ought to be used in order further to reduce such death toll, but that this can only be achieved through enforcement of the regulatory offences contained in the Road Traffic Act 1988, which are generally conduct crimes not requiring the occurrence of any particular harm.[115] On the other hand, those who are blameworthy in taking irresponsible risks involving a high risk of death ought to be treated the same, whether they take such risks by driving at high speeds or by engaging in street violence. The advantage of the model of vehicular manslaughter put forward here is that it underscores the link between the regulation of driving, in making reference to the Highway Code, and the ultimate harm (death) which regulatory offences are designed to avoid. If a homicide statute were to make reference to the Highway Code it may be that drivers would become more aware of the moral reason for the existence of some driving offences, providing drivers with a moral incentive to abide by the rules of the road, leading to normative compliance.[116] That does not mean that anyone involved in a fatal collision who has breached the Highway Code would face vehicular manslaughter charges though; only where there is a *gross* breach will such charges be appropriate.

A question remains for those cases of road death that might fall under the generic version of manslaughter, either through commission of an unlawful act

[113] A Ashworth, '"Manslaughter": Generic or Nominate Offences' in Clarkson and Cunningham (ibid).

[114] There were 1,730 deaths on Great Britain's roads in 2015: Department for Transport, *Reported Road Casualties Great Britain: Annual Report 2015* (2016).

[115] Cunningham (n 93).

[116] A Bottoms, 'Morality, Crime, Compliance and Public Policy' in A Bottoms and M Tonry (eds), *Ideology, Crime and Criminal Justice* (Willan, 2002) 25.

such as drink driving, or through their gross negligence. Should a restriction be put in place to necessitate such cases being prosecuted as vehicular manslaughter? In the past I have always been clear that such cases should be prosecuted as generic manslaughter but, if a nominate offence of vehicular manslaughter were created, it might be accepted that this should be the only offence to apply in a case of road death. On the other hand, where a car has been used as a weapon of offence there might be scope for charging second degree murder, so long as intention to cause serious injury could be proved. Vehicular manslaughter should be available as a lesser included offence to such a charge, even though it might be possible to prove generic manslaughter in such a case.[117] This is not intended to undermine the seriousness of the wrongdoing by labelling killing by motor vehicle as a distinct offence; on the contrary, use of the label manslaughter is to highlight the gravity with which the offending ought to be treated. The reason why it is being proposed is mainly a pragmatic one: to employ the censuring function of the law and use a separate offence in a communicative endeavour.

Appendix: Proposed Homicide Offences

1st degree murder D kills with intention to kill

2nd degree murder D kills with

i. intention to cause serious injury, and there is an obvious risk of death;

or

ii. intention to cause serious injury *and* foresight of death.

Manslaughter D intentionally commits an unlawful act which amounts to a criminal offence; D's act creates an obvious risk of death which D had the capacity to foresee; the risk of death is created by virtue of D's act being a crime; and D's act in fact causes the death of V;

or

D breaches a duty of care owed to V; it is reasonably foreseeable that the breach of that duty gives rise to a serious and obvious risk of death; that breach causes V's death; and D's conduct falls far below that can reasonably be expected of D in the circumstances.

[117] At present it is likely that a charge of murder in a case of road death, if not made out, will result in conviction for causing death by dangerous driving. That was, at least, the position at the end of the last century. See Cunningham, (n 89).

Corporate manslaughter as under the CMCHA 2007

Vehicular manslaughter

1. D commits vehicular manslaughter where D is a driver of a vehicle and the way in which D drives:
   (a) creates a foreseeable risk of death; and
   (b) causes another person's death; and
   (c) amounts to a gross breach of the duty of care owed by D to other road users.
2. Gross breach: factors for jury

   This section applies where it is established that D caused the death of another road user and it falls to the jury to decide whether there was a gross breach of the duty of care owed to other road users.

   The jury must consider whether the evidence shows that D failed to comply with any provisions of the Highway Code, and, if so:

   (a) How serious that failure was;
   (b) Whether D's failure to comply can be categorised as a violation (an intentional breach of the Highway Code).

   This section does not prevent the jury from having regard to any other matters they consider relevant.

Comment on Chapter 4

Reform of the Law of Murder?

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This is a response to Sally Kyd's excellent chapter, 'Done to Death? A Reform of the Law of Murder'.[1] The response is by necessity shorter than the substantive argument for reform and seeks to approach the case against reform by looking at the underlying rationale advanced for reform, the offence of causing death by dangerous driving, and some conclusions. At the outset, nothing in this response should take away from Kyd's analysis or arguments; its express purpose is to offer counter-argument and widen debate on the issue. At the conference in 2016, which conceived the idea of pulling together these papers, the oral response was on a theme of Monty Python's dead parrot sketch – the idea of further reform had 'passed on, is no more, kicked the bucket … etc'; this was to lighten the topic for attendees, rather than passing a verdict on further or future reform. In reality, reform may just be resting, and better law may await its awakening in due course. Again, nothing in the response is designed to undermine the importance of aspiring for reform, and this is the easier to achieve when the subject is given the excellent treatment evidenced in Kyd's chapter.

I. Reform: Problems with the Underlying Rationale

A. The Law Commission and Further Calls for Reform

The law of murder is, as the Law Commission reported in *Partial Defences to Murder*, 'a mess'.[2] It did, as Kyd concedes, recommend a review but this was not, contrary to her interpretation of it, expressed as a 'complete review'. The Commission in fact said there was 'every reason to believe that a comprehensive consideration of the offence and the sentencing regime could yield rational and sensible conclusions about a number of issues', but it limited the scope of the proposed review to four discrete areas, two of which had nothing to do with the

[1] Ch 4 of this volume.
[2] Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004).

substantive offence but rather sentencing and whether children should be subject to the same regime as adults.[3]

The report that followed, *Murder, Manslaughter and Infanticide,*[4] recommended the introduction of a new Homicide Act. The government rejected this recommendation, but it did adopt suggested reforms of provocation and diminished responsibility. Kyd argues that these reforms were intended as part of 'a package of reform' and operate differently than intended when grafted onto the existing framework.[5] In fact, there is no evidence to support this assertion. For example, during the passage of the Coroners and Justice Bill in the House of Lords Baroness Murphy supported the change in the law from 'abnormality of the mind' to 'abnormality of mental functioning' because it offered:

> … a legislative route towards ensuring that conditions put forward in the defence come within accepted diagnostic criteria … That will avoid the idiosyncratic diagnoses that have been offered in the past by many experts … We would like to see the definition narrowed, and I accept that the new definition will ensure consistency.[6]

The recommendation that found its way into the Law Commission report had its origins in submissions by the Royal College of Psychiatry, the overall effect of which 'would be to encourage better standards of expert evidence and improved understanding between the courts and experts'.[7] The provision, as enacted in section 52 of the Coroners and Justice Act 2009 (the 2009 Act), may not have ultimately provided the narrowness envisaged by Baroness Murphy, but the new defence encompasses any recognised medical condition (so includes both physical and psychological conditions). This is positive and a development that has been able to work effectively notwithstanding it was not part of overarching homicide law reform. But if Kyd is right, then Albany's cautionary words in Shakespeare's King Lear may be apposite when he said that in 'striving to better, oft we mar what's well'.

Kyd has been encouraged by recent parliamentary debate. Alex Chalk, a Conservative MP, was behind the motion for Homicide Law Reform that was debated on 30 June 2016. He used two examples to advance his case for reform. The first was that of a retired colonel with an unblemished record who has served his country with great distinction, and is known for his charitable work. A neighbour tests the colonel's patience to breaking point by making a persistent nuisance of himself. The colonel confronts his neighbour (with a cricket bat) at 3am. Disgruntled by the neighbour's dismissive and rude attitude, the colonel strikes his neighbour's toe with the intention of breaking it. The neighbour falls back, hits his head on a crate of beer standing in the hallway and is knocked unconscious.

[3] ibid, [274].
[4] Law Commission, *Murder, Manslaughter and Infanticide* (No 304, 2006).
[5] Kyd, (n 1) 101.
[6] Hansard HL Vol.712, col 177 (30 June 2009).
[7] Law Commission (n 4), [5.114].

The police and ambulance service arrive. Unwisely, perhaps, the colonel tells them exactly what happened. The neighbour is rushed to the local hospital, diagnosed with a bleed on the brain and dies. According to Mr Chalk, the only offence the colonel could be charged with is murder. He goes further and states the colonel must plead guilty. Due to the operation of the mandatory life sentence, the colonel gets life with a minimum term of 25 years.

In his second example, the defendant assaults a female in a nightclub queue. He has a string of criminal convictions for assault and criminal damage. He strikes the victim repeatedly and hard to the side of the face with his open hand. She falls back, hits her head on the kerb and is knocked unconscious. The victim later dies, and the post-mortem shows that she suffered bruising – albeit no fracture – to her cheekbone and the fatal injury was caused by the impact on the kerb. The police arrest the defendant, who denies everything, but CCTV proves his guilt.

Again, according to Mr Chalk the law requires the defendant to be charged only with unlawful act manslaughter, because the harm that he caused (or, presumably, that he intended to cause) falls short of grievous bodily harm. The net effect is that he will be convicted of an offence that carries a far lesser stigma than murder and for which there is no mandatory requirement for a life sentence; if he gets a determinate sentence, he will serve only half of it. The zenith of Mr Chalk's argument follows:

> Is that thug, I ask rhetorically, less culpable than the retired colonel or his wife? The only distinction is that the colonel intended to break a toe and the thug intended to commit a marginally less serious assault. In my view, that is a distinction without a difference – it is a distinction that is completely lost on the general public and, frankly, on me.

The examples advanced by Mr Chalk, laced it has to be said with latent prejudices, are defective, self-defeating and do not withstand any forensic scrutiny. Ironically, the retired colonel, even if charged with murder – that decision remains a matter for the prosecutor taking all of the facts into account – is now afforded a partial defence of provocation following the reforms provided for in the 2009 Act. Under the reforms to the offence of murder proposed by Kyd, the colonel would still be guilty of murder, albeit 'second degree'; the 'thug' is still probably only guilty of manslaughter. It is not clear that the examples provided by Mr Chalk move reform forward that much and unlikely to be in the direction Kyd would prefer. Such optimism Kyd may have had in renewed interest from parliamentarians may have been, on reflection, misplaced.

What the two examples really underscore is, first, the difficulty of proving intent; and secondly, the question of sentencing. In the colonel's case, if convicted of murder he receives a mandatory sentence of life in prison. In reality the punitive aspect of his sentence, the so-called 'tariff' would be significantly lower than 25 years and could even be in single figures.[8] Equally, the drunk could expect a

[8] See by way of example *Blackman* (or Marine A) [2015] 1 WLR 1900 (8 year tariff for the murder of an insurgent in Afghanistan); Blackman was later cleared of murder.

significantly higher tariff. The question of sentencing is addressed later in this reply. There are a number of conclusions that can be reached from the recent debate on the need for reform. First, it was predicated on an understanding of the law and how it is applied in practice that was at best questionable and probably self-serving. Secondly, there is no evidence that the debate resulted in a change in the government's stance that systemic review or reform is not part of its political agenda. Thirdly, regardless of how strong the case for reform might be, there is little, if any, prospect of it happening in the near future.

B. The Case for Codification

Kyd's primary argument is for codification. She seeks to demonstrate the need for this using Horder's thesis on the existing models: the traditional codificatory model (exhaustive, rules-based statutory code) and the (bureaucratic) administrative model (law infused with moral judgments).[9] Her focus is what she says is the particular problem in causing death by dangerous driving. There is nothing problematic in principle with these models (the Law Commission itself has adopted them) other than that they are conveyed as mutually exclusive concepts, when in fact the law is unlikely to be that clear or proscriptive in reality. It is in fact this that makes Kyd's premise difficult for the logician. She conceives of 'a need to rationalise the existing offences to establish how a codification of the common law could sit alongside a rethinking of the regulatory or "bureaucratic-administrative" model of offences'.[10] Underpinning her argument is a dual and apparently conflicting purpose – codification of the common law *and* re-thinking the existing scheme of regulatory offences – when in fact reform, if there is to be any, ought to be some form of unification of both schemes. Indeed, in the present context, this is Horder's entire raison d'être.

Horder's respected opinion that the offence of causing death by dangerous driving (the offence which Kyd has used as the focus of her discussion) has outgrown its utility as 'a heavy-duty tool for reinforcing a deterrent regulatory message about road safety'[11] is a tremulous basis upon which to resurrect the debate about the exhaustively scrutinised law of murder. It is, after all, only respected opinion. The treatise from which his opinion emerges is *Homicide and the Politics of Reform*.[12] It is true that politicians, when faced with particularly egregious examples of where the law seems inadequate (or, for that matter, a blunt instrument), have a propensity to seek out a change in the law, but this politically driven 'reform' does not fit easily with either of the models explicated by Horder.

[9] J Horder, *Homicide and the Politics of Reform* (OUP, 2012).
[10] Kyd, (n 1) 102–103.
[11] Horder (n 9), 74.
[12] ibid.

Moreover, (and possibly, because it does not), amendments to the law of this nature rarely end well. An obvious and contemporary example is the amendment to the Criminal Justice and Immigration Act 2008 by section 43 of the Crime and Courts Act 2013, the 'use of force in self-defence at place of residence'. The then and uninspired Lord Chancellor Chris Grayling said of the amendment:

> … we really should be putting the law firmly on the side of the homeowner, the householder, the family, and saying 'when that burglar crosses your threshold, invades your home, threatens your family, they give up their rights'.[13]

After hearing lengthy arguments on the correct interpretation of the provisions, the High Court disagreed. *In R (on the application of Collins) v The Secretary of State for Justice*,[14] Sir Brian Leveson held that the court's interpretation of the new defence represented:

> … no more than a refinement to the common law on self-defence. Thus, I do not accept that the construction placed on s. 76(5A) by the editors of Archbold, 2016 at para. 19-48a (to the effect that force in a householder case is only to be regarded as unreasonable if it was grossly disproportionate) represents an accurate statement of law. The position is better expressed by the editors of Blackstone, 2016 at para A3.63 which makes it clear: 'The new provision merely affects the interpretation of "(un)reasonable in the circumstances" so that force is not by law automatically unreasonable in householder cases simply because it is disproportionate provided it is not grossly disproportionate'.[15]

The court was unsurprisingly of the view that the burglar does not give up his rights by trespassing onto a person's property, although it also held that the provision was not incompatible with Article 2 of the European Convention on Human Rights.

The amendment was neither an exhaustively considered rule, nor law infused with moral judgment. It was politically driven and divisive, as the recent case of Richard Osborn-Brooks has exemplified.[16] In that case, Mr Osborn-Brooks' arrest following the fatal stabbing by him of a burglar gave rise to media campaigns for his release that raised questions of contempt of court and the usurpation of due process. In the event, he was released without charge. Insofar as the state of the law of causing death by dangerous driving is concerned, Horder was doing no more than placing the politics of the issue under a forensic lens and hypothesising, no doubt in the hope that if law reform was proposed, government might actually take note of his analysis. A political imperative to change the law relating to death by dangerous driving should be viewed cautiously therefore. It may not in reality be reform at all but mere refinement, or, worse, undermine the efficacy of something that works, albeit not perfectly.

[13] A Lusher, 'Does the law allow you to kill a burglar who has broken into your home?' *Independent* (5 April 2018).

[14] [2016] 2 WLR 1303.

[15] Para 34.

[16] A Lusher, 'Pensioner held for murder over fatal stabbing of home intruder "was just protecting himself", neighbours say' *The Independent* (5 April, 2018).

C. Degrees of Murder

Kyd's proposals for codification of the existing law of homicide and the creation of two degrees of murder have a good deal of support, including from the Law Commission, albeit she parts company with the Commission on the question of a subjective test as to the risk of causing death.[17] She identifies the division between recognised experts, Horder and Barry Mitchell, along subjective–objective lines in the context of manslaughter, aligning herself generally with the objectivist school of thought. Before dealing with the issue of codification, it is worth emphasising that the division is really attributable to the problem of intention. This is rarely straightforward and because of this lends itself better to the existing binary approach to homicide law, rather than a hierarchical scheme of murder by degrees. Intention is a question of evidence (how a defendant's thoughts and actions are interpreted by a jury) and rarely, if ever, a question of legal construction (about which it receives judicial directions).

The difficulty in proposing different categories for murder is that there is little evidence of it working in those jurisdictions that have it, or at least of it working any better than the existing United Kingdom model. Canada, to use one example, has the offences of first and second-degree murder. The former consists, in summary, in planned and deliberate murder including of specified victims or by different categories of offenders (eg, terrorists and organised criminals); the latter covers murders that are not first-degree murder. Its felony murder provisions, not entirely dissimilar to Kyd's manslaughter proposal, were struck down as unconstitutional, principally because of the risk of injustice to defendants. A lack of foresight of death, falling short of effective forensic definition, may also offend Canadian law on the same ground. In at least one paper, 'Homicide in Canada'[18] it is argued that if 'lawmakers got rid of the categories of homicide and simply charged every accused with homicide it would eliminate the difficulties of overcharging'.[19]

Recent developments in the law of joint enterprise reveal the practical difficulties reform could present. In *Jogee*,[20] the Supreme Court, acknowledging that the courts had taken a 'wrong turn' for more than three decades, quashed the appellant's murder conviction and ordered a retrial. In Canada and in other jurisdictions joint enterprise would classically fall within the category of second-degree murder. In the United Kingdom it may be murder or, as Lord Neuberger said in *Jogee*, 'a person who joins in a crime which any reasonable person would realise involves a risk of harm, and death results, is guilty at least of manslaughter'. Jogee was later convicted of manslaughter. He was sentenced to 12 years imprisonment, although he was eligible for release within less than a year due to time served. Under Kyd's proposals, it is not clear where murder as a result of joint enterprise would fit.

[17] Law Commission (n 4), [2.53].
[18] B Walford, 'Homicide in Canada' (1988/89) 1(2) *Journal of Prisoners on Prisons* 1.
[19] ibid, 43.
[20] [2016] UKSC 8.

This is unlikely to satisfy either side of the very polarised division on the issue, which could result in bringing the law into (some may argue further) disrepute. In doing so it would fail to solve the existing difficulties and may create potentially damaging new ones. Rhetorically, would justice have been better served if he had been convicted of second-degree murder?

II. Road Kill

Kyd's central premise is that since *Andrews v DPP*[21] 'it has been assumed that a driving offence can never form the basis of a prosecution for constructive manslaughter'.[22] This is a narrow view. Driving carelessly or driving dangerously does not, without more, constitute an unlawful act for the purpose of unlawful act manslaughter. Ordinarily, the offence of unlawful act manslaughter would be committed where the driver of the vehicle either intended to cause injury to the victim or was reckless as to whether injury would be caused.

Moreover, the Crown Prosecution considers that:

> If the vehicle was intentionally used as a weapon to kill or commit grievous bodily harm, a charge of murder may be considered. If the killing was involuntary, that is to say, where it was not intended, manslaughter may be considered. Manslaughter may arise as unlawful act manslaughter and gross negligence manslaughter. In addition, the charge of corporate manslaughter is also available …
>
> Manslaughter should also be considered where the driving has occurred 'off road' ie other than on a road or other public place, or when the vehicle driven was not mechanically propelled, and death has been caused. In these cases the statutory offences such as causing death by dangerous driving or causing death by careless driving do not apply.

There have been a number of notable examples where murder charges have been levelled in fatal car-related deaths, including in the case of Police Constable Dave Phillips in 2015,[23] (although the defendant was found guilty of manslaughter) and the death of Mohammed Miah in West Bromwich on 17 March 2018.[24]

There is nothing wrong in principle with the concept that if, whilst otherwise driving lawfully, A kills B, whether as a result of speeding, tiredness or other form of negligence – in the search for a relatively neutral term – A is not guilty of homicide. Of course, there will be borderline cases about which some quarters of the media will express outrage, but the function of the State in prosecuting offences is to undertake a sober and objective review of the facts and law and their sterile application without, as the saying goes, passion or prejudice. A violation of the Highway Code resulting in death as a gateway to homicide is repugnant.

[21] [1937] AC 576.
[22] Kyd, (n 1) 109.
[23] 'Clayton Williams convicted of PC Dave Phillips's manslaughter' *BBC Online* (21 March 2016).
[24] 'Murder charge over West Bromwich "'car drag" death' *BBC Online* (20 March 2018).

The law as it stands is flexible enough to accommodate the facts of the individual case. As things stand, the full range of offences is available to the CPS and is being used. The case for reforming road killings is simply not made out.

III. Conclusions

The case for reform of the law of murder has not been done to death. The absence of political will to reform has led to reform withering on the vine. It is easy to relate to Kyd's paper; the current author acted for Private Lee Clegg, a soldier convicted (though later cleared) of murder. The House of Lords in 1995[25] recognised a case in principle for law reform where a soldier or police officer shoots someone dead in excess of reasonable force. The public debate following his conviction was intense: the press and other media campaigned relentlessly for his release on licence, and once this was achieved there were riots, now known unceremoniously as the 'Clegg riots', on the streets of Belfast. Their Lordships were unable to change the law, saying it was a matter for the legislature. It was to no effect. But as Peter Alldridge opined at the conference that preceded this collection, consulting, particularly the public, in matters of law is dangerous. A vote on the re-introduction of capital punishment is the most compelling example: in 2016, for the first time on record since capital punishment was abolished, those in favour of bringing back hanging dropped below 50 per cent; the vote was in fact 48 per cent – the same number that voted that the UK should remain part of the EU. The only time the public should be asked to vote in the context of criminal justice is in the jury room. Politicians legislating to appease public opinion leads to bad law – the Dangerous Dogs Act 1991, and the provisions in the so-called Protection of Freedoms Act 2012 relating to judicial approval of local authority surveillance, are examples that spring to the mind.

The case for codification of the criminal law generally is a persuasive one. The former Lord Chief Justice, Lord Thomas, revived Lord Bingham's calls for codification during a speech before his retirement.[26] Kyd's proposals are limited in scope in the same way as there was implementation of limited reforms following the Law Commission's review in 2006. If there is going to be reform it must be comprehensive. Word count constrained her considering some areas, but there are others, which in current times need to be included in any proposal for reform: the pervasive role of artificial intelligence and where criminal liability lies cries out for consideration and extends from the driverless car (this exposes an immediate lacuna in Kyd's draft offence of vehicular manslaughter) to targeted killing by lethal drone. The criminal law needs to be equipped to deal with the exponential rate of technological change.

[25] *Clegg* [1995] 1 AC 482.
[26] The Right Hon. The Lord Thomas of Cwmgiedd (Dinner for Her Majesties Judges, 6 July, 2016).

But there is something inherently unpalatable about emulating the United States' criminal justice system. It can hardly be held up as a shining light – anyone who watched 'Making a Murderer'[27] can only be convinced that it should be in the dock itself and not emulated any more than it already is. Moreover, the gradation of murder is the subject of criticism by respected commentators. A review of the historical and contemporary literature makes it clear that it is riddled with the same difficulties as those apparent in other jurisdictions. Insofar as there is any commonality between the issues that arise, these relate to the nebulous concepts of intention and recklessness. The basic architecture is the same – it is the inability to clearly define the terms that is the recurring problem here, in the US, Europe and the rest of the world. Even after *Jogee* intention still entangles our greatest legal minds. The Law Commission in 2006 said that any reforms should 'promote certainty … in a way that non-lawyers can understand and accept'. Even Kyd admits that the concept of 'reckless indifference' to death poses some difficulty in where this would fit in to the scheme of new offences.

As to gross negligence manslaughter, there is no real difficulty in the suggestion that this should be embodied in statutory form, but equally juries manage to return verdicts, despite arguments that the definition is circular. Reality cuts through the sterility of academic nuance. Creating a new category of homicidal medical practitioners is more problematic. In light of the *Bawa-Garba*[28] case it is difficult to see where the justice lies in doing so.

Much of the injustice arising in this area could be readily resolved through the abolition of the mandatory life sentence. This is often where the real injustice lies. In cases of, for example, assisted suicide and fatal shootings by the State – unquestionably murder (indeed, first degree murder, based on Kyd's proposal), but falling into a quite unique category of killing – freeing the trial judge up to sentence on the basis of the facts on the case, the aggravating and mitigating facts, and mercy where appropriate, would cure many ills. Where a judge is considered to have been unduly lenient, the Attorney General would remain capable of seeking a review of the sentence.

[27] D Browne, '"Making a Murderer": The Story Behind Netflix's Hit True-Crime Show' *Rolling Stone* (6 January 2016).

[28] [2018] EWHC 76 (Admin).