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**Restructuring the homicide offences to tackle the problems of violence,
discrimination and drugs in a modern society**

Catherine Elliott and Claire de Than

Abstract

This article argues that the current law on homicide fails to satisfy the goal of “fair labelling” leading to an indirect risk of discrimination against vulnerable members of our society who are not being consistently recognized as the victims of a fatal crime. The case is put forward for two new rungs in the homicide ladder of “aggravated murder” and “aggravated manslaughter”, along with statutory offences which directly cater for the victims of drug homicides and domestic abuse leading to a suicide.

Keywords

Murder, manslaughter, infanticide, Law Commission

**Restructuring the homicide offences to tackle the problems of violence,
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Catherine Elliott and Claire de Than*

1. INTRODUCTION

The existing homicide offences have failed to adapt to the needs of a modern society and as a result do not achieve the right balance between the requirements of fair labelling and particularism. The common law has failed to evolve with the changed social conditions in which many homicides are committed today, leaving dangerous gaps in the imposition of criminal liability. The offences should be restructured to tackle the problems, of violence, discrimination and drugs in a modern society. The current division between murder and manslaughter is too simplistic and two additional tiers in the homicide hierarchy should be introduced: aggravated murder and aggravated manslaughter, so that the labels applied to the criminal conduct provide an accurate moral insight into the gravity of the offence. These aggravated homicides would enable society to deliver a proportionate response to killings that target a particular victim because of a general characteristic shared by a section of society or which target society as a whole (“general target killings”) and which cause considerable fear in our society. The common law is currently failing to convict for homicide where death results from the illicit supply of drugs (“drug homicides”) and where there is a suicide following domestic abuse (“abuse suicides”). In order to push the criminal justice system to provide an adequate response to these crimes, new statutory homicide offences should be established.

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The Government is currently undertaking a major review of the homicide offences¹ and some initial work in this process has been completed by the Law Commission.² It has published its final report on the subject³ which is now being considered by the Home Office. The Commission has proposed that the current two tier division of the homicide offences should be replaced by three tiers: first degree murder, second degree murder and manslaughter.⁴ The mandatory life sentence would only apply to the former. This article argues that there is a fundamental problem with these proposals: they are too deeply rooted in the historical foundations of the common law, when new homicide legislation needs to tackle directly the type of homicide offences that are being committed in a modern society. Our society has changed considerably since the key principles of the existing homicide offences were developed and it is not sufficient to simply move the boundaries for the hierarchy of these offences. The definitions of the offences need to be subjected to more fundamental change to reflect the specific contexts in which homicide offences are being committed, in order to satisfy the fair labelling principle and to support the goal of equality: every life is of equal value.

¹ Statement made by the then Home Secretary, Mr Blunkett, to the House of Commons, *HC Debs* vol. 425 col. 1579 (28 October 2004). This Review follows the report of the Law Commission *Partial defences to Murder* Law Com No 290 (2004) which had concluded that the whole law of murder was in a 'mess' (at paragraph 2.74) and that a more substantial review of murder was required to achieve justice in the long term.

² Law Commission, *A New Homicide Act for England and Wales?* Consultation Paper No 177 (2005).

³ *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006).

⁴ *Ibid.* at para 1.38.

2. FAIR LABELLING VERSUS PARTICULARISM

The establishment of offences to deal with general target killings, drug killings and abuse suicides would satisfy the requirements of fair labelling.⁵ The existing law and the Law Commission's proposed reforms fail to pay sufficient attention to this principle which was described by Glanville Williams as "immune from challenge as a principle of justice".⁶ Andrew Ashworth has written that the principle of fair labelling aims:

to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.⁷

A range of goals can be achieved by respecting this principle. It helps to ensure that the criminal law provides a proportionate response to law-breaking, it can assist the law's educative and declaratory functions and reinforce social standards.⁸ A failure to respect the principle of fair labelling has been a weakness of the old common law in trying to push all homicides within two labels: murder and manslaughter. The Law Commission

⁵ Described as 'representative labelling' by A Ashworth 'The elasticity of mens rea' in C Tapper (ed) *Crime, proof and punishment: essays in memory of Sir Rupert Cross* (Butterworths, London 1981), 45.

⁶ G Williams 'Convictions and Fair Labelling' (1983) 42 CLJ 85.

⁷ A Ashworth, *Principles of Criminal Law* (5th edn OUP, Oxford 2006), 88.

⁸ *Ibid.*

would add a third category of offence, by dividing murder between first degree murder and second degree murder, but this would still leave the criminal system with very blunt instruments to deal with a wide range of different forms of homicide. The best labels for the homicide offences should avoid the modern tendency towards “morally sanitized formulae for offences”,⁹ a danger that is epitomized by the Law Commission’s use of numbers to label “first degree murder” and “second degree murder”. The only tool that the Law Commission uses to distinguish between the different grades of homicide is mental culpability. *Mens rea* in isolation is inadequate to distinguish the gravity of the different forms of homicide, as this ignores potentially significant factual variations such as the motive¹⁰ and vulnerability of the victim.

The main benefit to be gained from satisfying the requirement of fair labelling by giving separate labels for general target killings is that the offence labels differentiate the more serious levels of harm caused by this form of killing. With the passing of s. 269 of the Criminal Justice Act 2003, laying down minimum sentences for murder, Parliament has effectively acknowledged that there are some valid moral distinctions to be drawn between different forms of murder, but the current legal arrangements remove these moral factors from consideration by the jury and leave them purely in the hands of those involved in the sentencing process. This conflicts with the fundamental traditions of our criminal justice system according to which such matters should rest in the hands of the jury.

⁹ *Ibid.* at 89.

¹⁰ Although motive is generally irrelevant to criminal liability, it may be crucial in crimes with a special factor, such as hate crimes.

The main benefit to be gained from satisfying the requirement of fair labelling in relation to drug homicides and domestic abuse suicides will be an impetus for effective prosecutions. The existing common law offences have proved ineffective in these contexts.¹¹ As with the statutory road traffic offences, the provision of express statutory offences to deal with these specific forms of homicide, should assist the attainment of successful prosecutions by sending a clear message that prosecutions are appropriate and by providing offences under which convictions are possible in these circumstances.

Critics of the principle of fair labelling have drawn attention to the risk that it can lead to over particularism, with a vast number of offences being developed which the public will be unable to remember.¹² Any law reform should seek to achieve an acceptable balance between the need for fair labelling and the risk of over particularism. Particularism is a problem when offences are defined using detail that “merely exemplifies rather than delimits the wrongdoing”.¹³ Defendants can exploit the detail in offences to avoid liability on a technicality. The proposed homicide offences are sufficiently generalised to avoid this weakness. Horder has argued¹⁴ that non-fatal offences should be particularised to reflect the different values that are being protected rather than the different factual situations in which they occur. This argument is not completely persuasive as the concept of a value is a vague basis upon which to build criminal liability. However, it is arguable that a statutory offence tackling targeted victim

¹¹ *R v Kennedy (No. 2)* [2007] UKHL 38; [2008] 1 A.C. 269; [2007] 3 W.L.R. 612; *R v D* [2006] EWCA Crim 1139; [2006] 2 Cr App R 24.

¹² J Horder, ‘Rethinking Non-fatal Offences against the Person ‘ (1994) 14 OJLS 335, 340.

¹³ *Ibid.* at 338.

¹⁴ *Ibid.* at 344.

killings protects the value of a peaceful society, and the drug homicide offence and abuse suicide offence protect the value of equality.

It is not proposed that there should be new, narrowly defined homicide offences reflecting minute variations between factual situations. For homicide the risk of generating a plethora of offences when achieving the goal of fair labelling is reduced because the ultimate harm suffered by the victim is the same: death.¹⁵ Thus, compared to, for example, the non-fatal offences¹⁶ there are potentially fewer factual situations which will need to be distinguished by the law. In addition, the number of variations is limited by the far smaller number of offences committed.

Horder¹⁷ has argued persuasively that a level of particularism is justifiable to satisfy the requirements of moral nominalism - the naming of one's wrongdoing which is at the heart of the principle of representative labelling. In the context of the homicide offences, this element of moral nominalism can be achieved by developing the concepts of aggravated murder and aggravated manslaughter to deal with the problem of general target killings. It provides a valid distinction between the homicide offences which is not purely based on the *mens rea* of the offender, but also on the level of harm caused by the offender. The proposed offences will provide a moral grasp of the wrongdoing and not purely an understanding of the factual situation that occurred.

¹⁵ CMV Clarkson, 'Context and culpability in involuntary manslaughter: principle or instinct?' in A Ashworth and B Mitchell (eds) *Rethinking English Homicide Law* (OUP, Oxford 2000), ch. 6.

¹⁶ J Gardner 'Rationality and the Rule of Law in Offences against the Person [1994] CLJ 502, 515; see Horder (n 12).

¹⁷ Above (n 12).

3. AGGRAVATED MURDER AND MANSLAUGHTER

The criminal law has traditionally recognized the existence of aggravated forms of certain basic offences such as aggravated criminal damage and aggravated burglary. Even where the label “aggravated” is not used, an equivalent offence may well exist, for example robbery is essentially an aggravated form of theft. The existence of an aggravated murder offence alongside an aggravated manslaughter offence should help ensure a proportionate response to exceptionally serious crimes and assist in the law’s educative and declaratory functions.¹⁸ The creation of such offences would be an appropriate development in the law because “it is possible to identify the essential nature of the “core” crime and the new dimension brought by the aggravation is less serious (though not so insignificant as to warrant wholly ignoring it)”.¹⁹ Barry Mitchell has observed:

The adjective “aggravated” is prima facie ambiguous; it does not communicate a very clear indication of the nature of the offending, but that should not deter us from using it. What matters is that the label warns us that, for example, D’s murder was significantly different from other incidents of murder.....²⁰

¹⁸ B Mitchell, ‘Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling’ (2001) 64 MLR 393, 398.

¹⁹ *Ibid.* at 405.

²⁰ *Ibid.* at 410.

The law should recognize socially accepted distinctions between different forms of wrongdoing. Important moral differences between different forms of action should figure in offence labels.²¹

Treating important features of the defendant's conduct as having a bearing only on sentencing fails to appreciate the fundamental role of a trial. It treats the trial as merely instrumentally valuable, as a way of identifying who is to be subject to a decision about punishment, rather than as intrinsically valuable in its declaratory role.²²

The proposed aggravated murder offence would recognize that certain forms of murder target members of a particular community within our society, such as a racist or homophobic murder, or target our society as a whole, such as a terrorist bombing. Such offences can create considerable public distress and insecurity. The impact of these crimes goes beyond the immediate victim, family and friends, and affects the community as a whole. The significance of this wider impact has been recognized in international criminal law, through offences such as crimes against humanity. It is this heightened impact on society which would justify a more serious response from the criminal law. Simester and Sullivan have observed that:

²¹ See Gardner (n 16).

²² V Tadros, 'The Homicide Ladder' (2006) 69 MLR 601, 618.

different offences may criminalise actions which have differing social significance, and not just outcomes. So, for example, it would be a mistake to assimilate vandalism with negligent damage to property. Even though the harm to property is the same.²³

One characteristic of our modern society is the development of mass media so that the public is quickly aware of serious offences which have been committed in the remotest parts of the country, as well as those which have been committed on their doorstep. This has the potential to heighten the public's fear of becoming themselves victims of crime. This public fear is especially poignant where the victims of the crime have been identified by the perpetrator because of a general characteristic which is shared by a particular community in our society. For example, a homophobic murder once reported by the media can create considerable anxiety within the homosexual community. The impact of such crimes is, as a result, much greater than crimes which can be identified by the public as being quite specific to the individuals involved. For example, when a husband murders his wife, this is a heinous crime which disgusts the public, but the public are not frightened that they are potentially the husband's next victim.

The aim of an aggravated murder offence would be to recognise and respond appropriately to the greater harm caused by this type of offence. The law would be acknowledging that groups within a community need extra protection, a fact that those individuals are already very aware of and those anxieties in the past have been aggravated by concerns as to whether the state's response has been adequate. This offence would

²³ A P Simester and G R Sullivan *Criminal Law Theory and Doctrine* (2nd edn Hart, Oxford 2007),31.

seek to send a message to these groups and potential offenders that these offences are taken seriously by the state.

All the crimes that would fall within the proposed offence of aggravated murder have the unifying factor of generating pervasive and debilitating fear within society. An important function of the criminal law is to censure people for their wrongdoing. Assessment of the seriousness of the wrong should take proper account of the wider community element of the offence.²⁴ The political and social significance of fear has been accepted through the legal response to national and international terrorism. What the suggested aggravated murder offence would do is recognize that fear can be induced across whole sections of society, not just through direct acts of terrorism, but also through the targeting of specific sections of a community.

It is submitted that the murder of a child by a person who is not related to the victim should give rise to the offence of aggravated murder. The murder of a child is an aggravated murder in some US jurisdictions, and reforms to introduce such offences are being discussed in others.²⁵ Cases such as the murders of Sarah Payne, Holly Wells and Jessica Chapman, involving the random killing of a child by a stranger, cause considerable fear among child carers and other children when they are aware of these killings. In practice, most killings of children are actually committed by members of the child's family²⁶ and do not cause the same level of public disquiet so that the simple label of murder would be appropriate for such killings. This is not to belittle the tragic death of

²⁴ A Ashworth 'Is the criminal law a lost cause' (2000) 116 LQR 225.

²⁵ For example, in New Jersey.

²⁶ See for example, C Cobley, T Sanders and P Wheeler, 'Prosecuting cases of suspected "Shaken Baby Syndrome" – a review of current issues' [2003] Crim LR 93, 97.

a child at the hands of a family member, but it recognizes that the public can reassure themselves that the defendants do not pose any potential threat to their own children. By having this distinction between aggravated murder and murder, this could also be a tool in educating the public as to the real dangers to their children. At the moment the freedoms of our children are being unnecessarily curtailed because of unjustified fears that children are at greater risk outside the home.

A further situation where this level of public fear is created is where the offender is a mass or multiple murderer, and the label of aggravated murder would again be appropriate. This category would cover both serial killers such as Harold Shipman and terrorists who plant a bomb in a busy train station. Barry Mitchell has argued that where it is possible to identify the essential nature of the criminality, incidents of multiple wrongdoing can and should be treated as crimes in their own right, carrying their own label.²⁷ This is because offences of multiple wrongdoing operate on a different scale from those of single wrongdoing, and this is particularly true in the context of homicide.²⁸

The proposed new offence of aggravated murder would, therefore, apply in two situations. The first situation is where the victim was chosen by the defendant because of a general characteristic, such as their race, gender, homosexuality or age; the defendant's conduct created an obvious risk of death; the defendant either intended the death or was subjectively reckless as to causing death; and the conduct was premeditated.²⁹ Where there was a terrorist attack the victims could have been selected purely on the basis that

²⁷ See Mitchell (n 18) at 409.

²⁸ *Ibid.* at 399.

²⁹ The Law Commission rejects the concept of premeditation in its consultation paper, n 2 above, at para 2.45.

they were members of the British society and this would amount to a relevant characteristic for these purposes, as the broader the characteristic the greater the potential impact on society, and therefore it would be illogical to restrict this offence to where there had been reliance upon a very precise characteristic. A terrorist attack might target employees of a particular organisation, such as a scientific laboratory carrying out tests on animals or a foreign embassy. This offence would not deny that all human life is equally valuable, but it would recognize that the loss of certain human lives in certain circumstances will have a greater impact on society than others, and would end the undervaluing of multiple deaths which occurs in the current homicide offences. Note that the definition of this offence would not seek to lay down a prescribed list of victim characteristics which would be relevant to its commission because prejudices are irrational and cannot be ranked. Instead what is important is that the victim has been identified because of that general characteristic, as it is this method of victim selection which generates the broader fear in those members of the public sharing that characteristic.

Premeditation would be required where the lesser form of *mens rea* of recklessness was relied on by the prosecution. This premeditation could be either as to the killing itself, or as to the wrongful conduct that led to the killing. Thus, a terrorist who gave a warning that he had planted a bomb, could not argue that the deaths were not premeditated because he had not planned to kill anybody, since his wrongful conduct was clearly premeditated. In practice, where there is premeditation it will frequently be straight forward for the prosecution to prove the existence of intention as well. Professor

Mitchell's research³⁰ found that premeditation was regarded as marking an offence out as more serious than most other forms of homicide.³¹ In its consultation paper on homicide reform, the Law Commission argued that to introduce a distinction based on premeditation would involve “intractable problems of proof, and would not create a fairer system.”³² They used the examples of mercy killing and killing a domestic abuser to support this view, but both scenarios would fall outside the proposed offence of aggravated murder for which premeditation would be relevant. The objections of the Law Commission to a premeditation element are predicated upon their belief that murder should not be confined to premeditated killings; they do not object specifically to the existence of an aggravated crime of premeditated killing. Further, such crimes do exist in many other jurisdictions; for example, French criminal law provides for aggravated murder in similar, though not identical, situations.³³

Some lawyers may be concerned that it is proposed that this aggravated form of murder should include recklessness as a possible form of *mens rea*. There are also similarities between the first form of aggravated murder and the abolished offence of constructive murder.³⁴ However, it can be distinguished and recklessness justified

³⁰ B Mitchell (2004) ‘A brief empirical survey of public opinion relating to partial defences to murder’ published as Appendix C to the Law Commission Report *Partial Defences to Murder*, Law Com No 290 (2004).

³¹ See the Law Commission (n 1) at para 2.23.

³² See the Law Commission (n 2) at para 2.43.

³³ C Elliott *French Criminal Law* (Willan Publishers, Devon 2001), 147.

³⁴ The resurrection of ‘felony murder’ was expressly rejected by the Law Commission (n 3) at para 2.112.

because of the additional requirements that the victim was targeted because of a general characteristic, the conduct (if reckless) was premeditated, the behaviour was dangerous and created an obvious risk of death and the defendant was at least subjectively reckless as to the killing. Further, many American states still have offences of constructive murder within their criminal law, without political, judicial or public discontent.

The second way in which the offence of aggravated murder would be committed, would be where the offender was a mass or multiple murderer who killed with an intention to kill. As an indication of gravity, conviction of aggravated murder could give rise to a mandatory life sentence and a minimum period in custody of 30 years.

In preparing its consultation paper, the Law Commission chose not to consider any aggravating features:

Issues we will not be addressing include aggravating features of a murder, such as an especially evil motive or the fact that a child or law officer on duty was intentionally targeted. We have also left these out of consideration as we regard them as having been adequately addressed by Parliament through the guidance that it has recently given on sentencing in murder cases.³⁵

This is an odd conclusion to have reached in the context of a paper that accepts the “ladder principle”.³⁶ Under this principle the hierarchy of the offences should reflect degrees of seriousness and degrees of mitigation and individual offences should not be so

³⁵ See the Law Commission (n 2) at para 1.3.

³⁶ *Ibid.* at para 1.31.

wide that they cover conduct varying greatly in gravity. Certain aggravating features seem to be precisely those factors which determine the gravity of an offence, and the appropriate label for a particular crime, and this label and associated sentencing threshold should be chosen by the jury.

In its final report the Law Commission rejects the authors' response to the consultation process that there should be an aggravated form of murder on the basis that "we regard the aggravating features as best reflected through an uncompromising approach to the length of the minimum custodial sentence imposed for murder."³⁷ When considering the Police Federation's suggestion that killing a police officer on duty should be an aggravating factor, it observed:

In our view the point-and-distinction making and legalism that would inevitably accompany the creation of special categories of persons whose killing is to be automatically regarded as "first degree murder" should not be regarded as an acceptable aspect of the way in which categories of homicide are divided.³⁸

While this criticism is persuasive when the aggravating factor is based purely on the status of the victim, it is not convincing when the aggravating factor is the premeditated targeting of categories of victim, creating widespread fear in the community. The proposed offence does not contain a definitive list of which characteristics will be sufficient to fall within it, as this would indirectly create a hierarchy of lives which have

³⁷ See the Law Commission (n 3) at para 2.34.

³⁸ *Ibid.* at para 2.169.

greater value than others, instead any characteristic can potentially be relevant to the offence and therefore every member of the public is equally protected by the law.

4. A STATUTORY DRUG HOMICIDE OFFENCE

A fundamental social problem that our society is currently facing is whether and how to criminalize behaviour involving illegal drugs. Each year, the illicit sale of these drugs leads to the death of some drug users, but the House of Lords' case of *Kennedy (No. 2)*³⁹ has effectively shut the door to successful prosecutions of drug dealers in these circumstances. It has done this by taking a traditional but narrow approach to the concept of causation. Any reform of the law on homicide needs to provide a direct response to this specific problem in our society.

On top of the legal obstacles facing a criminal prosecution following *R v Kennedy (No. 2)*, a look at the social context in which the criminal law is being applied to drug related deaths throws up three key problems facing a prosecution for manslaughter under the current law. Firstly, drug use is, regrettably, prevalent in our society. While self-declared figures among teenagers tend to be much higher, Home Office statistics suggest that 12 per cent of 16-59 year olds have taken an illicit drug, and 1 million of those people have taken a class A drug.⁴⁰ In the light of the prevalence of drug use in British society, there is a risk that prosecutions for manslaughter come across a jury which is not prepared to convict because the jurors feel "There, but for the grace of God, go I".

³⁹ Above (n 11).

⁴⁰ Home Office (2003) *Prevalence of drug use: key findings from the 2002/2003 British Crime Survey*

Secondly, the immediate drug supplier is frequently a friend of the victim,⁴¹ as was the case in *Kennedy (No. 2)*. In the high profile case of Leah Betts, who died in 1995 after taking an ecstasy tablet, her immediate supplier was a friend, Stephen Packman. He had bought the pill from a drug dealer and then passed it on to Leah Betts, without seeking to make a profit. The current law makes no distinction between the drug dealer who is a stranger and selling for profit, and the drug supplier who is a friend and passing on a drug without any view to making a profit.⁴² Nor, arguably, should the law draw this distinction.⁴³ The “friend” is a vital part of the drug chain, as consumers are much more comfortable purchasing dangerous goods from someone they know than from a stranger. Criminals involved in pyramid frauds provide an example of how effective the friend can be in boosting sales. But a jury may not be comfortable with imposing liability for manslaughter on a friend of the victim who had not made any personal profit from the drug transaction.

There is a risk that the law will be applied inconsistently in this context. Where the decision makers empathize with the defendant a manslaughter conviction is unlikely. Thus, following Leah Bett’s death Stephen Packman, a middle class student, was only prosecuted for being concerned in the supply of a controlled drug and not for manslaughter. In two consecutive trials the jury failed to reach a verdict and he was acquitted.⁴⁴ Where defendants are themselves dependent drug users who have become

⁴¹ R Runciman *Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (Police Foundation, London 2000), 61.

⁴² In Italy, the free exchange of drugs is only subject to an administrative sanction.

⁴³ The Runciman Report came to the opposite conclusion, n 41 above, at 62.

⁴⁴ J Cooper, ‘Media Coverage – from the Taylor Twins to Leah Betts’ [1997] 147 NLJ 963.

socially excluded, the decision makers are unlikely to empathize with them and a manslaughter conviction becomes more likely. As a result, there is a risk of a two-tier system of justice with those who are already socially disadvantaged receiving harsher punishment for the same wrongs.

The third contextual issue which raises potential problems for manslaughter prosecutions against drug dealers, is that criminal organisations posing a significant threat to our society, are frequently one step removed from the direct supply of the drug to the drug user. For both constructive and gross negligence manslaughter, the issue of proximity pose significant difficulties for the prosecution: most drug dealers are not on the scene at the time of the death or at least when the user becomes ill, and it would be difficult to convict for the current offences where the defendant was not present at the relevant time. Thus, in the case of Leah Betts, an organized criminal gang was involved in running the nightclub and controlling its security. It was this criminal organisation that had brought the drugs into the nightclub and which had sold the drug to Stephen Packman. While the criminal law struggles with the issue of causation, it is highly unlikely that members of the criminal organisation could be found liable for manslaughter, where the final act of supply was carried out by a third party (the friend).

The primary goal of the criminal law when tackling a death caused by drugs must be to reduce drug use in order to reduce the harm caused by drugs. This will only be achieved if the law works with the public as we are all potential drug users, drug dealers and drug victims. This reality does not deny the need for criminalisation when a death has occurred because those involved in causing the death have made informed choices to allow the risk of that death to occur. The three contextual issues discussed above mean

that the current criminal law cannot effectively work with the public when pursuing a manslaughter conviction. The Law Commission's recommendations for the reform of manslaughter will merely aggravate this problem, rather than resolve it because the revised offence of constructive manslaughter would have an additional requirement that defendants intended to do some harm or realized that they might cause some injury.⁴⁵ The solution is to create a new statutory offence as part of the modernization of the homicide offences. This offence could have a restricted *mens rea* and more limited requirements for causation than the existing manslaughter offences and would thereby facilitate the imposition of homicide liability in these circumstances. The offence could be defined in the following terms:

1 (a) A person is liable for an offence if he or she knowingly and unlawfully supplies to the victim a Category A controlled drug, or is an accessory to the supply of the controlled drug or is part of a conspiracy to supply the controlled drug, and the person's conduct causes the death of the victim.

(b) A person will be held to have caused the death of the victim when:

(i) he or she does an act which makes a more than merely negligible contribution to its occurrence; or

(ii) he or she omits to do an act which might have prevented its occurrence.

⁴⁵ See the Law Commission n 3 above at para 2.163.

- (c) A person does not cause a result where, after he or she does such an act or makes such an omission, an act or event occurs:
- (i) which is the immediate and sufficient cause of the result,
 - (ii) which he or she did not foresee, and
 - (iii) which could not in the circumstances reasonably have been foreseen.
- (d) A defence to this offence will apply where the defendant has attempted to seek medical assistance for the victim within a reasonable time.⁴⁶

The maximum sentence for the offence could be ten years, which is less than life traditionally available for manslaughter, but in tune with fatal road traffic offences and appropriate to the lower threshold requirements for the imposition of liability. Where the tougher requirements for common law manslaughter could be satisfied then a prosecution for this offence would still be possible, but the availability of the proposed offence should provide justice where at the moment following *Kennedy (No 2)*⁴⁷ no liability would be imposed.

5. DOMESTIC VIOLENCE, SUICIDE AND HOMICIDE LIABILITY

The Crown Prosecution Service brought a test prosecution for manslaughter following the suicide of a woman after a lengthy period of domestic abuse. In *R v D*,⁴⁸ on 22nd

⁴⁶ A detailed definition and analysis of this proposed offence can be found in C Elliott and C de Than 'Prosecuting the drug dealer when a drug user dies: *R v Kennedy (No. 2)*' (2006) 69 MLR 986.

⁴⁷ Above (n 11).

⁴⁸ Above (n 11).

November 2005, Mrs D committed suicide by hanging herself. There was clear evidence that over a number of years she had been the victim of serious domestic abuse at the hands of her husband. On the evening of the suicide, he had struck her on the forehead, causing a cut from the bracelet which he was wearing. He was subsequently prosecuted for manslaughter and inflicting grievous bodily harm under s. 20 of the Offences Against the Person Act 1861. In the Crown Court, Judge Roberts QC had ruled that the case should not proceed to trial as there was no basis on which a reasonable jury, properly directed in law, could convict the defendant of either offence. The Crown Prosecution Service made an application to appeal against this ruling, using its new power to do so under s. 58 of the Criminal Justice Act 2003.

The application to appeal was unsuccessful for two reasons. Firstly, the Court of Appeal held that in order for there to be liability for a section 20 offence the victim must have suffered bodily harm. This would include, following cases such as *Chan-Fook*,⁴⁹ medically recognisable psychiatric illnesses. From the evidence available to the court, while the victim had clearly suffered psychological injury, a jury could not be satisfied beyond reasonable doubt that she had suffered a recognisable psychiatric illness. Secondly, the prosecution were seeking to impose liability for constructive manslaughter, relying on the section 20 offence as the unlawful act that caused the death. Since the prosecution had failed to provide sufficient evidence to support a section 20 conviction, the prosecution for manslaughter also had to fail. It is tragic that the absence of clear psychiatric symptoms can be a reason for a person who attempts suicide following domestic abuse to receive inadequate medical support. The criminal system is relying on

⁴⁹ (1994) 99 Cr App R 147.

the same absence of psychiatric disease that leads to inaction in the medical services, to justify inaction to the victim's ultimate death. Research carried out by Stark and Flitcraft found:

Where [suicide] attempts are accompanied by complaints about marital distress rather than frank symptoms of psychiatric disease, the attempt is considered a transitory event requiring little in the way of dramatic intervention or ongoing support.⁵⁰

It is important that where a person has ultimately been let down by the public services and committed suicide to escape from abuse, that the same excuses that were used to support inaction during the victim's lifetime do not continue to have force after her death.

On the facts of *R v D*⁵¹ it should have been possible for the prosecution to present an effective case to the jury to obtain a conviction under the existing common law. The two main obstacles to obtaining a conviction – the issue of causation and the absence of a section 20 offence to found a conviction for unlawful and dangerous act manslaughter - could both have been avoided.⁵² The existence of a causal connection in law has been forcefully argued by Professor Horder.⁵³ Stark and Flitcraft⁵⁴ have established the

⁵⁰ E Stark and A Flitcraft 'Killing the Beast Within: Woman Battering and Female Suicidality' (1995) 25 International Journal of Health Services 43, 53.

⁵¹ Above (n 11).

⁵² J Horder and L McGowan *Manslaughter by Causing Another's Suicide* [2006] Crim LR 1035.

⁵³ *Ibid.*

⁵⁴ See Stark and Flitcraft (n 50).

significance of domestic violence for suicide attempts by showing the close proximity of these events: suicide attempts occur on the same day as a hospital visit for treatment of injuries caused by domestic violence in 37 per cent of cases. Sylvia Walby has concluded:

It might be reasonable to assume that for at least those 37%, who attended hospital for a domestic violence injury the same day as the suicide, that the domestic violence was the primary cause.⁵⁵

Suicide rates differed significantly between battered women and non-battered women only after the first recorded abusive injury, suggesting that battering might be a key to understanding suicidal tendencies in this population. Stark and Flitcraft concluded that domestic abuse could be the single most important cause of female suicide attempts.⁵⁶ They had undertaken a study of the medical records of all 176 women who went to the emergency services of a US hospital as attempted suicides over a period of one year. They found that 30 per cent of the women who attempted suicide were battered (and had experienced physical injury). The law should not ignore this statistical reality. In the case of *R v D*⁵⁷ there can be no doubt that the fact of domestic abuse operated as a cause of the suicide; the issue is whether in law this causal link would be accepted as sufficient. Psychiatric evidence suggested that the suicide's "overwhelming primary cause....was

⁵⁵ S Walby, *The Cost of Domestic Violence* (Women and Equality Unit, London 2004), 56.

⁵⁶ Above (n 50).

⁵⁷ Above (n 11).

the experience of being physically abused by her husband in the context of experiencing many such episodes over a very prolonged period of time”.⁵⁸

Under the traditional principles of causation the voluntary conduct of the victim breaks the chain of causation⁵⁹. In the Crown Court, however, Judge Roberts suggested that, where a “decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct”, it would be possible for the Crown “to argue that that final assault played a significant part in causing the victim’s death”. The prosecution, however, chose not to pursue this argument. While suicide is an extreme act, current research is clear that it is within the range of foreseeable responses to domestic violence.⁶⁰ Women who have been subjected to domestic violence are more likely to commit suicide than other women.⁶¹

The courts have long been prepared to accept that the chain of causation is not broken by the voluntary conduct of the victim which is a foreseeable response to the defendant’s behaviour. In *R v Corbett*⁶² a mentally handicapped man had been drinking heavily all day with the defendant. An argument ensued and the defendant started to hit and head-butt the victim, who ran away. The victim fell into a gutter and was struck and killed by a car. At Corbett’s trial for manslaughter the judge directed that he was the cause of the victim’s death if the victim’s conduct of running away was within the range of foreseeable responses to the defendant’s behaviour. An appeal against this direction was

⁵⁸ Above (n 11) at para 6.

⁵⁹ Reaffirmed in *R v Kennedy (No. 2)*, above (n 11).

⁶⁰ See Walby (n 55) at 56; see Stark and Flitcraft (n 50).

⁶¹ See Walby (n 55).

⁶² [1996] Crim LR 594.

rejected. In *R v Dear*⁶³ one of the arguments put forward by the defendant was that the chain of causation had been broken by the victim committing suicide either by reopening the wounds inflicted by the defendant or by failing to seek medical attention when it was required. This argument was rejected and the Court of Appeal stated that on the facts of the case it was not even necessary to consider whether the victim's conduct had been foreseeable, it would still not have broken the chain of causation. In the well known case of *R v Blaue*⁶⁴, the decision of the victim to refuse a blood transfusion was in effect a suicidal decision, but the Court of Appeal did not hesitate to impose criminal liability on the defendant for the ultimately fatal stabbing of the victim.

As regards the existence of an unlawful act to found a constructive manslaughter offence, in *R v D* the court appears to place an inappropriate emphasis on the physical assault when, following *Ireland and Burstow*,⁶⁵ words and mental abuse are equally relevant. It was accepted in this case and another case involving stalking, *R v Constanza*,⁶⁶ that a course of conduct could together cause the relevant harm; it is not necessary to identify a single action or omission that caused the harm. In those cases the relevant harmful result was non-fatal, but it would be illogical to refuse to apply the same principle where the harm that resulted was death.

In addition to the fact that constructive manslaughter liability should have been possible on the facts of *R v D*,⁶⁷ the prosecution could have argued their case on the basis

⁶³ [1996] Crim LR 595.

⁶⁴ [1975] 3 All ER 446; [1975] 1 WLR 1411.

⁶⁵ [1998] AC 147.

⁶⁶ [1997] 2 Cr App R 492.

⁶⁷ Above (n 11).

of gross negligence manslaughter. Under the principles laid down in *R v Adomako*⁶⁸, the defendant owed a duty to his wife as someone it was reasonably foreseeable would be harmed by his abusive conduct, he breached that duty by behaving in a repeatedly abusive manner and this abuse was grossly negligent and caused her death, with the same issues regarding causation as are discussed above. In practice *R v D* represents the only prosecution for homicide following a suicide linked to domestic abuse, and this prosecution was unsuccessful. Thus, while in theory, it may well be possible to fit this type of homicide into the existing common law, in practice this has not been happening. This gap between theoretical legal liability and actual effective justice for suicide victims driven to suicide by domestic abuse, requires a change in legal culture which can only be achieved through a new statutory offence giving official recognition that homicide liability should be pursued in such cases. These victims would then cease to be the forgotten victims of domestic abuse and instead become people who are officially recognized as having a right to justice for their deaths, with the responsibility for their deaths being very clearly placed in the hands of the abuser. A legislative response from Parliament is needed, not because there is automatically a gap in the current homicide offences, or the proposed reformed homicide offences being put forward by the Law Commission: such legislation should push prosecutors to bring prosecutions after a suicide occurs which is linked to domestic abuse.

There is also a human rights impetus towards reform: the number of suicides which can be attributed to domestic violence is so great that there is a strong argument of a violation of the procedural requirements of Article 2 of the European Convention on Human Rights, under which the state is subject to a positive obligation to conduct an

⁶⁸ [1995] 1 AC 171; [1994] 3 All ER 79.

effective investigation of any death, capable of leading to the prosecution of an individual identified as having caused the death. At the moment the criminalization, investigation and prosecution in relation to such deaths may all be found wanting.⁶⁹ Once it has been identified that a person has caused the death of another, or inhuman or degrading treatment of another, then there may be an obligation to prosecute.⁷⁰ The vulnerable, including domestic violence victims, are entitled to effective protection by the criminal law.⁷¹ When there are approximately 188 such deaths a year⁷², and we are only in 2006 seeing the first test prosecution, this shows that the current law is not being applied effectively to respond to such cases, and hence that it is not a suitable tool to vindicate the rights of victims of domestic violence.

Frequently, the victims of domestic abuse who subsequently commit suicide have been let down by the public services which have failed to recognize their abuse and to provide an adequate response. Research carried out by Stark and Flitcraft⁷³ found that following a suicide attempt, only 42.7 per cent of non-battered women were discharged from hospital, while 65.3 per cent of battered women were discharged “home” where they would be immediately vulnerable to further abuse which could have been the trigger for the suicide attempt.

⁶⁹ See for example C de Than, ‘Positive obligations under the European Convention on Human Rights: towards the human rights of victims and vulnerable witnesses?’, (2003) 67 JCL 165.

⁷⁰ *X and Y v The Netherlands* [1985] ECHR 4; *M.C. v Bulgaria* [2003] ECHR 651.

⁷¹ For example, *X and Y v The Netherlands*, n 70 above.

⁷² See Walby (n 55).

⁷³ See Stark and Flitcraft (n 50).

At best, the clinical response to female suicide attempts identified here failed to provide needed recognition or support.⁷⁴

This failure to recognize and respond adequately to the abused person's situation "replicated the batterer's pattern of denial and victim blaming".⁷⁵ It is important that this blindness to the situational reality does not continue following an abused woman's suicide: responsibility for the death must be placed by the criminal law where it belongs: with the abuser and not the victim. In some cases the appropriate response of the criminal law to a suicide following domestic abuse will be a conviction for a homicide offence. A failure to prosecute for homicide can validate the abuser's claim that the victim was "sick" rather than the abuser, legitimating the abuse process itself.

While it could be argued that the common law could already criminalize such conduct as manslaughter, the reality is that it has not been doing so and the test case of *R v D*⁷⁶ was unsuccessful, therefore to force a sea change in the criminal system's response to such cases, legislation is now required. A new statutory offence could be established providing for a maximum sentence of ten years upon conviction. The trial judge, Judge Roberts, expressed a hope that the Law Commission's review of homicide would provide a less convoluted route to liability in such prosecutions. Regrettably, the Law Commission has failed to accept this challenge, but there remains the possibility that the Home Office might be more proactive on this front. It is important for the entrenchment

⁷⁴ *Ibid.* at 58.

⁷⁵ *Ibid.* at 58.

⁷⁶ Above (n 11).

of a healthy society that respects the equality of women that prosecutions in such cases are brought in the future and are successful.

Given the enormous barriers to addressing male violence against women, the decision to identify abuse, to name it publicly as a crime and to educate female clientele about its significance, is a political step towards reducing the differences in power that give rise to battering in the first place.⁷⁷

6. EQUALITY THROUGH CRIMINALISATION

The emphasis of the Law Commission's recommendations appears to be on simplicity and the creation of a clear homicide ladder of liability, but this is at the expense of a very important goal in the context of the homicide offences: equality. Every life must have equal value before the law, and if the common law is failing to respect this principle then Parliament needs to intervene. Undoubtedly, ranking the homicide offences appropriately to reflect relevant wrongdoing is an important goal, but even more important is making sure that all killings that result from morally wrong conduct, in the absence of a justification or an excuse, are effectively criminalized. Case law provides an important source of information as to how the criminal law is working in practice. Recent cases, such as *Kennedy (No. 2)*⁷⁸ and *R v D*⁷⁹ have highlighted the fact that certain categories of killing risk falling outside the net of the criminal law altogether, when there are strong

⁷⁷ Stark and Flitcraft (n 50) at 60.

⁷⁸ Above (n 11).

⁷⁹ Above (n 11).

arguments to suggest that criminalization is appropriate. The courts seem to be hesitating in relation to both drug homicides and suicides following domestic abuse, as to whether a homicide conviction is required. This hesitation is unnecessary and potentially discriminatory. Parliament should intervene to make sure that such conduct is effectively criminalized. Andrew Ashworth has observed:

The principle of equal treatment is nothing if not a practical injunction: it should be applied not merely to the enactment of laws, but also to the responses to misconduct in practice. A system of criminal justice that allows the differential enforcement of its laws is not a system that honours the principle of equal treatment.⁸⁰

Society has evolved, the types of homicide offences that are committed have changed and the common law offences are not always adequate to respond to these developments. Historically, drugs did not constitute the major social problem that they constitute today. The position of women has improved considerably and there is a greater recognition of the problem of domestic abuse. As a result, the public's perception of what should constitute a crime has also changed and the law needs to respond adequately to these changes. Parliament has already chosen to respond directly to particular gaps in the criminal law by creating specific homicide offences to deal with the problem of ineffective prosecutions. Thus, statutory homicide offences have been created in the

⁸⁰ See Ashworth (n 24).

context of driving offences and in relation to the killing of vulnerable individuals, particularly children, in their home.⁸¹

Additional homicide offences can work perfectly well alongside the basic ladder of the main homicide offences of murder and manslaughter. Creating specific offences in such situations is not aimed at clarifying a hierarchy, or ladder, of offences, but ensuring that wrongdoers are effectively identified and prosecuted by the criminal law. In response to a parliamentary question, Lord Williams of Mostyn stated that offences should only be created when “absolutely necessary”, and that the factors that would be taken into account to determine this included whether:

- the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
- the mischief could be dealt with under existing legislation or by using other remedies;
- the proposed offence is enforceable in practice;
- the proposed offence is tightly drawn and legally sound; and
- the proposed penalty is commensurate with the seriousness of the offence.⁸²

The statutory homicide offences discussed here would appear to satisfy these principles.

⁸¹ Domestic Violence, Crime and Victims Act 2004 s. 5.

⁸² Lord Williams of Mostyn (then Minister of State at the Home Office), in a written reply to a question by Lord Dholakia, *HL Debs* vol. 602, WA 57 (18 June 1999) quoted by Ashworth (n 24) at 245.

With regard to homicide liability for a suicide that follows domestic abuse, arguments are sometimes put forward that the criminal law should keep away from family disputes. However, to respect the principle of equality, the criminal law cannot ignore family cases.⁸³ Instead, the principle of equality demands that the criminal law provide an adequate response to such offences. When there has been a death, there is no possibility that the concept of equality could somehow be outweighed by another principle such as family privacy.

By creating express offences catering for particular situations where the current law is clearly failing in practice, Parliament can send a very clear message to prosecutors, the courts and the public that the relevant type of conduct justifies a response by the criminal system and will not be ignored. A subsidiary benefit of this process is that the new statutory crimes will have labels which reflect the nature and gravity of the offending. Just as with the current fatal driving offences, the prosecution will still be entitled in appropriate cases to prosecute for a traditional manslaughter offence, with the new offences simply providing an alternative and potentially more effective charge. The aim is not to create further grounds for differentiation, but to make sure that where criminalisation is appropriate, convictions for homicide are pursued.

Clarkson has identified a risk that the creation of separate offences:

brings with it a danger of marginalisation in that the crime would not be regarded as being as serious as the normal homicide offences. Without the fair labelling

⁸³ See Ashworth (n 24) at 246.

stigma and censure of a manslaughter (or equivalent) conviction, it could become regarded as little more than a regulatory offence.⁸⁴

But he goes on to point out that this fear of marginalization could be misplaced, as it has not proved to be a problem in relation to vehicular homicides. In the context of drug homicide and suicides following domestic abuse, it is better that statutory homicide liability be imposed rather than no conviction at all.

Barry Mitchell has suggested that “fair labelling can only make a valuable contribution if offences are delineated so as to reflect distinctions in moral wrongfulness.”⁸⁵ But certain factual distinctions are important to decisions as to whether to prosecute and as to how far any prosecution will be successful before the courts. Thus, for example, the drug homicide cases have, because of their facts, raised real problems for the courts on the issue of causation.⁸⁶ So separate offence labels can be required where there is no moral difference involved but where it is apparent that the main homicide offences are not providing an adequate response to certain factual situations.

In determining the issue of whether criminalisation is appropriate the focus tends to be on the harm principle, legal moralism and the existence of a public wrong.⁸⁷ Provided the issue of causation is satisfied, then all three approaches can support

⁸⁴ CMV Clarkson, ‘Context and culpability in involuntary manslaughter: principle or instinct?’ in Ashworth and Mitchell (eds), (n 15) ch. 6.

⁸⁵ See Mitchell (n 18) at 398.

⁸⁶ Above (n 11).

⁸⁷ RA Duff and SP Green ‘Introduction: The Special Part and its Problems’ in Duff and Green *Defining Crimes* (2005).

criminalisation in this context. In particular, these deaths are not purely private matters to be sorted out informally by those involved, but involve the most serious form of harm, raising issues of public concern which require public condemnation. Such new statutory offences would not create a risk of “over criminalisation”.⁸⁸ Husak has identified certain doctrines which could be used to identify whether criminalisation is appropriate:

(1) the criminal law is that body of law that subjects persons to punishment. Since punishment expresses condemnation, only conduct worthy of condemnation should be criminalized;

(2) criminal laws should not punish innocent conduct, so criminal statutes should be interpreted to ensure that innocent conduct is not proscribed;

(3) each criminal law must do more good than harm;

(4) conduct should not be criminalized unless the state has a compelling interest in punishing those who engage in it. A criminal law must be necessary to achieve a compelling state interest; non-criminal means to prevent the conduct must be found to be inferior to the criminal alternative. The criminal law must be narrowly tailored to serve the state’s compelling interest; criminal laws should be neither over inclusive nor under inclusive.

(5) each criminal law must be designed to prevent a non-trivial harm or evil.⁸⁹

⁸⁸ DN Husak ‘Limitations on criminalization and the General Part of Criminal Law’ in Shute and Simester ‘Criminal Law Theory (OUP, Oxford 2001).

⁸⁹ *Ibid.* at 45.

There is nothing in these doctrines which would suggest that criminalisation in the case of drug homicides and suicides following domestic abuse would be inappropriate.

9. CONCLUSION

By announcing this Review of the homicide offences, the Government has created an important opportunity to establish homicide offences which can respond adequately to the real problems in our modern society. A response to this opportunity that simply shifts the boundaries without confronting the new social problems, the need for fair labelling and the curse of discrimination, is a missed opportunity. An offence of aggravated murder acknowledges the social impact of targeted attacks on particular sections of our community or random terrorist attacks which threaten the whole of society. A statutory drug homicide offence would be a significant tool in the current fight against drugs. An offence drafted as a direct response to the suicide of a woman who has been the victim of domestic abuse would be a long over due attempt to recognize and respond appropriately to this form of homicide. English homicide law has suffered over the centuries from novel, difficult situations being pushed into the existing offence categories regardless of fit, consistency and sometimes logic. A more radical reform of the law could provide a clear and rational hierarchy of the homicide offences, which can be understood by the public and which provides a direct response to today's social problems.

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