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du Canada

CRIMINAL LAW

homicide

Working Paper 33

Canada

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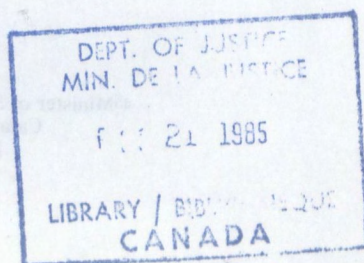
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Notice

Law Reform Commission of Canada

This Working Paper presents the views of the Commission at this time. The Commission's views may be modified or amended later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Commission

Mr. Justice Allen M. Linden, President
Professor Jacques Fortin, Vice-President
Ms. Louise Lemelin, Q.C., Commissioner
Mr. Alan D. Reid, Q.C., Commissioner
Mr. Joseph Maingot, Q.C., Commissioner

Secretary

Jean Côté, B.A., B.Ph., LL.B.

Co-ordinator, Substantive Criminal Law

François Handfield, B.A., LL.L.

Principal Consultant

Patrick Fitzgerald, M.A. (Oxon.)

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Introduction

Murder and other crimes of homicide occupy a special place in our criminal law. The unique harm involved,¹ the crucial value infringed and the imposition till recently of the death penalty² — all these combined to make such crimes “flagship” offences dominating the entire spectrum of the criminal law.

Within the common law jurisdiction this dominance is obvious. We see it in the way that theories of criminal liability, like that of J. W. C. Turner³ for example, advance, as being complete analyses of *mens rea*, mere generalizations of the mental element in common law murder.⁴ We see it in the way that cases on criminal participation inevitably focus on use of lethal force by one party without the consent or agreement of the other.⁵ And we see it in the way that defences like duress, self-defence and so on are typically explored, both academically and judicially, in cases concerning killing.⁶

The consequence — in Canada and other common law countries — has been production of copious case law, legislation and academic writing on the topic of homicide. The fruit of this has been elucidation in great detail of the law of homicide.⁷ Less beneficial, however, has been the creation of technicalities resulting in complexity and obscurity of principle. This is true both of the common law and of our *Criminal Code* provisions on homicide.

Evaluation of our *Code* provisions will centre round four different aspects of the present law: (1) the arrangement of the homicide provisions, (2) the physical element in homicide, (3) the mental element in the different homicide offences, and (4) the sanction for homicide.

CHAPTER ONE

Arrangement of the Homicide Provisions

To understand the present arrangement one must go back not only to the original drafting of the *Criminal Code* but also to the previous common law which formed the basis for that draft. For the original draft, and therefore our present law on homicide, is largely a mere codification of the common law.

I. Homicide in Common Law⁸

From early days (at least as far back as Williams' time) murder was quite distinct in English law from other forms of homicide. In principle, murder was killing done in secret, and all other killings were simple homicides. In practice, murder required, and other homicides did not require, presentment of Englishry to show that the victim was an Englishman, failing which he would be presumed to have been a Norman and a fine would be levied on the township where the crime occurred. The fine and the offence were both termed *murdrum*.

Although this practical distinction disappeared with the abolition in 1340 of Englishry, "murder"⁹ remained a term in popular use. Most probably, says Stephen, it survived by accident to describe the worst kind of homicide rather than to draw any conceptual distinctions. As it was, murderers were punished with the same sanction as those committing other types of homicide, and all were entitled to benefit of clergy.

By this time, homicide could be divided into three categories:¹⁰ (1) justifiable killing, for example lawful execution, which was no crime at all; (2) killing by misadventure, for instance, in self-

defence, which was to some extent regarded as blameworthy and as requiring the king's pardon; and (3) killing by felony, which was (subject to the rules on benefit of clergy) punishable by death. In this categorization murder was no different from other felonious homicides.

Later, towards the end of the fourteenth century, murder came to be distinguished from manslaughter by the presence of malice aforethought.¹¹ At that time such had been the abuse of the royal prerogative of pardoning that the king was forced to promise that whenever a general pardon for murder was granted or pleaded, a jury should be charged to try whether the victim "*fuist murdrez ou occis par agait apens or malice prepense*"¹² and that if a jury so found, the pardon would be void. In short, murder became a form of homicide for which a general pardon could not be pleaded.

Subsequently, murder and other homicides were further distinguished by sixteenth century statutes which excluded murder from benefit of clergy.¹³ In Stephen's view¹⁴ there came to be in consequence four categories of homicide: (1) murder, that is to say, killing with malice aforethought, which was a felony without benefit of clergy; (2) manslaughter, that is, wilful killing without malice aforethought, which was a clergyable felony; (3) homicide in self-defence or by misadventure, which was not a felony but which required pardon and entailed forfeiture of chattels; and (4) justifiable homicide, which was no crime at all. The distinction between murder and manslaughter clearly now lay in the presence or absence of malice aforethought.

"Malice aforethought" as yet had no clear meaning. Indeed its connotation was not fully clarified until the nineteenth century, when Stephen advanced a definition since accepted as authoritative.¹⁵ He defined it to mean one of the following states of mind:

- (1) an intent to kill or do grievous bodily injury;
- (2) knowledge that the act done will probably kill or do grievous bodily harm;
- (3) an intent to commit any felony; or
- (4) an intent to oppose by force any officer of justice in discharging certain of his duties.

By now, therefore, the common law on homicide was beginning to seem fairly straightforward. Any unlawful killing with one of the above four states of mind was the capital offence of murder. Any unlawful killing without them was the non-capital offence of manslaughter.

“Manslaughter,” then, denoted all culpable homicides other than murder. These had already been categorized in 1765 by Blackstone as voluntary and involuntary.¹⁶ Voluntary manslaughter was culpable homicide falling short of murder on account of provocation. Involuntary manslaughter was culpable homicide falling short of murder on account of the absence of malice aforethought.

Voluntary manslaughter required the existence of provocation. For this existence there were two conditions: (1) the accused had to be actually provoked; and (2) the provocation, whether consisting of words and deeds or deeds alone, had to be such as would have provoked a reasonable man. It was for the judge to instruct the jury whether in law the alleged provocation could provoke a reasonable man.

In Blackstone’s day, all other culpable killings without malice counted as involuntary manslaughter.¹⁷ Given a homicide without malice aforethought, the question was: was it excusable? If not, it qualified as manslaughter.

Over time, however, there was a change of approach.¹⁸ Given a homicide without malice, the question became: was it manslaughter? If not, it qualified as lawful. And to qualify as manslaughter it had to fall into one of two categories: (1) it had to be a killing resulting from gross negligence, or (2) it had to be a killing by means of an unlawful act, which was defined in 1883 by English case law to mean a criminal act.

II. Homicide in Canadian Law

This was the common law position in 1892 when Canada decided to enact a criminal code.¹⁹ In so doing she had a variety of codes at hand to use as models. Fifty years earlier, Macaulay had drafted a criminal code, which was enacted in 1860 as the Indian Penal Code, was adapted for use by certain other colonies, and

was highly commended by Stephen for its clear simplicity.²⁰ In 1878, Wright had prepared a Penal Code for Jamaica, which never came into force there but was adopted in some other colonies.²¹ In 1879 Stephen had drafted a criminal code which was introduced in Parliament but withdrawn, was slightly modified later by a Royal Commission of Judges including Stephen himself and re-introduced, but was never in fact enacted.²² Known as the *English Draft Code* (E.D.C.), it subsequently became the basis of criminal codes in New Zealand,²³ Queensland,²⁴ West Australia²⁵ and Tasmania²⁶ and served as the model for the authors of the first Canadian *Criminal Code*.²⁷

The general structure of our *Criminal Code* of 1892, therefore, together with the particular structure of its homicide provisions was modelled on that of the E.D.C. Here it is noteworthy that the E.D.C. had certain avowed aims.²⁸ It aimed to codify the common law as it then existed, it sought to reduce that law to an explicit systematic shape, and it attempted to remove technicalities and other defects disfiguring that existing law.

First, the E.D.C. sought to codify existing law. Within that codification, the provisions on homicide formed part of a much larger whole. Indeed a bill to codify the law of homicide had been rejected in Westminster in 1874 precisely on the ground that partial codification was a misconceived enterprise. This very rejection was what had led Stephen to draft a complete code.²⁹

Second, the E.D.C. attempted to reduce the law to an explicit systematic shape. To do this in the case of homicide, it distinguished between culpable and non-culpable homicide, specified the duties whose omission qualified (if death resulted) as culpable homicide, and set out *inter alia* special provisions concerning medical treatment or lack of it.³⁰ In these respects the model of the E.D.C. was clearly followed by our *Criminal Code*.

Third, the E.D.C. aimed to remove technicalities disfiguring existing law. Such technicalities had been explained by Stephen as "unintended applications of rules intended to give effect to principles imperfectly understood ... and rigidly adhered to for fear departure from them should relax legal rules in general."³¹ This explanation was illustrated by the following example:

The principle that when a man kills another by great personal violence criminally inflicted the crime is as great as if death were

expressly intended is sound. Express it in the rule that it is murder to cause death in committing a felony and you get the unintended and monstrous result that it is murder to kill a man by accident in shooting at a fowl with intent to steal it.³²

Modelled, then, on the E.D.C., our *Criminal Code* provisions on homicide remain much as they were in 1892, supplemented only by various *ad hoc* developments,³³ the most noteworthy being the following. In 1948 a new kind of homicide was added in the form of infanticide, on the model of the *Infanticide Act 1922* (U.K.).³⁴ In 1955, because of jury reluctance to return verdicts of manslaughter against motorists causing death by negligence, a new offence was created in the shape of causing death by criminal negligence.³⁵ In 1961 murders were divided into capital and non-capital,³⁶ and in 1976, after the abolition of the death penalty for murder, into first degree and second degree murder, the former excluding parole eligibility until after twenty-five years and the latter excluding it until after ten years of imprisonment.³⁷

III. The *Criminal Code* Provisions

Today our homicide law in Canada is to be found within sections 196-223 of the *Criminal Code*. The sections read as follows:

196. In this Part “abandon” or “expose” includes

(a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and

(b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

“child” includes an adopted child and an illegitimate child;

“form of marriage” includes a ceremony of marriage that is recognized as valid

(a) by the law of the place where it was celebrated, or

(b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated;

“guardian” includes a person who has in law or in fact the custody or control of a child.

197. (1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years;

(b) as a married person, to provide necessities of life to his spouse; and

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessities of life.

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the

person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

(3) Every one who commits an offence under subsection (2) is guilty of
(a) an indictable offence and is liable to imprisonment for two years; or
(b) an offence punishable on summary conviction.

(4) For the purpose of proceedings under this section,

(a) evidence that a person has cohabited with a person of the opposite sex or has in any way recognized that person as being his spouse is, in the absence of any evidence to the contrary, proof that they are lawfully married;

(b) evidence that a person has in any way recognized a child as being his child is, in the absence of any evidence to the contrary, proof that the child is his child;

(c) evidence that a person has left his spouse and has failed, for a period of any one month subsequent to the time of his so leaving, to make provision for the maintenance of his spouse or for the maintenance of any child of his under the age of sixteen years is, in the absence of any evidence to the contrary, proof that he has failed without lawful excuse to provide necessities of life for them; and

(d) the fact that a spouse or child is receiving or has received necessities of life from another person who is not under a legal duty to provide them is not a defence.

198. Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the

life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

199. Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

200. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for two years.

201. Repealed.

202. (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

203. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

204. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years.

205. (1) A person commits homicide when, directly or indirectly, by

any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act,

(b) by criminal negligence,

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or

(d) by wilfully frightening that human being, in the case of a child or sick person.

(6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.

206. (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not

(a) it has breathed,

(b) it has an independent circulation, or

(c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

207. Where a person, by an act or omission, does anything that results in the death of a human being, he causes the death of that human being notwithstanding the death from that cause might have been prevented by resorting to proper means.

208. Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith.

209. Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

210. No person commits culpable homicide or the offence of causing the death of a human being by criminal negligence unless the death occurs within one year and one day commencing with the time of the occurrence of the last event by means of which he caused or contributed to the cause of death.

211. No person commits culpable homicide where he causes the death of a human being

(a) by any influence on the mind alone,
or

(b) by any disorder or disease resulting from influence on the mind alone,

but this section does not apply where a person causes the death of a child or sick person by wilfully frightening him.

212. Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

213. Culpable homicide is murder

where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), section 246 (assaulting a peace officer), section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human

being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of

(i) facilitating the commission of the offence, or

(ii) facilitating his flight after committing or attempting to commit the offence,

and the death ensues from the bodily harm;

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;

(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or

(d) he uses a weapon or has it upon his person

(i) during or at the time he commits or attempts to commit the offence, or

(ii) during or at the time of his flight after committing or attempting to commit the offence,

and the death ensues as a consequence.

214. (1) Murder is first degree murder or second degree murder.

(2) Murder is first degree murder when it is planned and deliberate.

(3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in

causing the death of anyone or counselling or procuring another person to do any act causing or assisting in causing that death.

(4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;

(b) a warden, deputy warden, instructor, keeper, gaoler, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or

(c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76.1 (hijacking an aircraft);

(b) section 246.1 (sexual assault);

(c) section 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 246.3 (aggravated sexual assault); or

(e) section 247 (kidnapping and forcible confinement).

(6) Murder is first degree murder in respect of a person when the death is caused by that person and that person

has been previously convicted of either first degree murder or second degree murder.

(7) All murder that is not first degree murder is second degree murder.

669. The sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be,

(a) in respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;

(b) in respect of a person who has been convicted of second degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served at least ten years of his sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 671; and

(c) in respect of a person who has been convicted of any other offence, that he be sentenced to imprisonment for life with normal eligibility for parole.

670. Where a jury finds an accused guilty of second degree murder, the judge who presides at the trial shall, before discharging the jury, put to them the following question:

“You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against him. Do you wish to make any recommendation with respect to the number of years that he must serve before he is eligible for release on parole? You are not

required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before he is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five."

671. At the time of the sentencing of an accused under section 669 who is convicted of second degree murder, the judge presiding at the trial of the accused or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the accused, the nature of the offence and the circumstances surrounding its commission, and to any recommendation made pursuant to section 670, by order, substitute for ten years a number of years of imprisonment, (being more than ten but not more than twenty-five) without eligibility for parole, as he deems fit in the circumstances.

672. (1) Where a person has served at least fifteen years of his sentence

(a) in the case of a person who has been convicted of high treason or first degree murder, or

(b) in the case of a person convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until he has served more than fifteen years of his sentence, he may apply to the appropriate Chief Justice in the province or territory in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole.

(2) Upon receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to the character of the applicant, his conduct while serving his sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and such determination shall be made by no less than two-thirds of such jury.

(3) Where the jury hearing an application under subsection (1) determine that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in his number of years of imprisonment without eligibility for parole.

(4) Where the jury hearing an application under subsection (1) determine that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by order,

- (a) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or
- (b) terminate the ineligibility for parole.

(5) The appropriate Chief Justice in each province or territory may make such rules in respect of applications and hearings under this section as are required for the purposes of this section.

(6) For the purposes of this section, the “appropriate Chief Justice” is

(a) in relation to

(i) the Provinces of British Columbia and Prince Edward Island, respectively, the Chief Justice of the Supreme Court,

(ii) the Provinces of Nova Scotia and Newfoundland, respectively, the Chief Justice of the Supreme Court, Trial Division,

(iii) the Provinces of Saskatchewan, Manitoba, Alberta and New Brunswick, respectively, the Chief Justice of the Court of Queen’s Bench,

(iv) repealed, 1978-79, c. 11, s. 10, item 6(13),

(v) the Province of Ontario, the Chief Justice of the High Court of Justice, and

(vi) the Province of Quebec, the Chief Justice of the Superior Court;

(b) in relation to the Yukon Territory, the Chief Justice of the Court of Appeal thereof; and

(c) in relation to the Northwest Territories, the Chief Justice of the Court of Appeal thereof.

(7) For the purposes of this section, when the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction to empanel a jury to hear an application in respect of a conviction that took place in the Yukon Territory or the Northwest Territories, the appropriate Chief Justice may designate the judge from the Court of Appeal or the Supreme Court of the Yukon Territory or Northwest Territories, as the case may be.

215. (1) Culpable homicide that otherwise would be murder may be

reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

216. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

217. Culpable homicide that is not murder or infanticide is manslaughter.

218. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

219. Every one who commits manslaughter is guilty of an indictable offence and is liable to imprisonment for life.

220. Every female person who commits infanticide is guilty of an indictable offence and is liable to imprisonment for five years.

221. (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and is liable to imprisonment for life.

(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of such child.

222. Every one who attempts by any means to commit murder is guilty of an indictable offence and is liable to imprisonment for life.

223. Every one who is an accessory after the fact to murder is guilty of an indictable offence and is liable to imprisonment for life.

IV. Evaluation of the Arrangement of the Homicide Provisions

The arrangement of our homicide provisions is open to several criticisms. Many of the provisions are, in essence, General Part provisions and are therefore illogically located in the Special Part of the *Code*. Many are tortuously structured. And many include much unnecessary detail.

First, the location of general provisions in the Special Part goes against the basic idea of criminal law codification.³⁸ A central aspect of that idea is the principle that all general matters (for instance, matters relating to jurisdiction, *actus reus*, *mens rea*, general defences), being relevant to all offences, should be placed together in a general part of the *Criminal Code*.³⁹ This is essential for clarity and the avoidance of unnecessary repetition.

In complete disregard of any such principle, the authors of the E.D.C. and of our *Criminal Code* drafted a chapter on homicide as though it were intended either as part of a code without a General Part or as a self-contained code of homicide. For example, in Part VI of the *Code*, the definitions of homicide offences are preceded by sections imposing certain duties (sections 197 to 201 of the *Criminal Code*) which are in no way confined to crimes of homicide. Next, homicides are classified as culpable and non-culpable (section 205) — a classification which can surely be applied to most kinds of conduct. Then there are special provisions relating to causation (*Criminal Code* sections 205(6), 207 to 209 and 211), as though the problems of causation had no relevance outside the law of homicide. On these three topics more is said below.

Secondly, there is the tortuously complex arrangement of the homicide provisions themselves. This complexity arises from negative definitions, overlapping provisions and “piggy-backing” structures.

Negative definition is most obviously employed in section 217, which states that manslaughter is culpable homicide that is not murder or infanticide. Accordingly, to discover the nature of manslaughter, the reader must first wade through sections 205, 212 to 213 and 216 on culpable homicide, murder and infanticide. A simpler, more straightforward approach would have been to give a

separate self-contained definition of manslaughter, as is done for infanticide.

A further advantage of that approach would be avoidance of possible overlap. As it is, the effect of paragraph 205(5)(b) and section 217 is to make causing death by criminal negligence manslaughter, while the effect of sections 202 to 203 is to make it an offence in its own right. The overlap comes from negative definition resulting in "piggy-backing."

Such "piggy-backing" is conspicuous throughout the homicide provisions. As we have seen, section 217 on manslaughter is built on the complex foundations of sections 205, 212, 213 and 216. Sections 212 and 213 on murder are built on section 205 (on homicide). Finally, section 214 on first and second degree murder is then built on sections 205, 212 and 213.

This "piggy-backing," however, does not serve to obviate unnecessary repetition. For instance, although subsection 205(1) has already defined homicide as causing the death of a human being, sections 212 and 213 continue to repeat the formula "cause the death of a human being."

Thirdly, there is the matter of unnecessary detail. Some of the detailed provisions are no longer necessary because the law has altered: for instance, since the abolition of capital punishment for murder there is no need for subsection 205(6), which states that "killing by perjury" is not unlawful homicide.⁴⁰ Others, it may be argued, are unnecessary in that they can be covered by a more general rule: for instance, the special provisions in sections 207 and 208 on death which might have been prevented and on death from treatment of injury are only specific manifestations of a general principle relating to causation. It may also be argued that section 210, which states that no one commits culpable homicide unless the death occurs within a year and a day, is mere anachronistic detail⁴¹ designed presumably to spare juries from considering cases with doubtful connection between the wrongful act and the resulting death and so less needed today in view of the better availability of medical and scientific evidence.

V. Improving the Arrangement of the Homicide Provisions

In our view, the homicide provisions in the *Criminal Code* could be made much simpler, clearer and more straightforward if the following steps were taken.⁴² First, sections 197 to 199 on duties should be relocated in the General Part; section 205, which distinguishes between culpable and non-culpable homicide, should be deleted; and subsection 205(6) and sections 207 to 211, which contain special causation provisions, should be replaced by a general causation rule in the General Part. Next, all unnecessary detail like that contained in the causation sections should be removed. Finally, negative definitions, overlapping and piggy-backing, which have been discussed above, should be abandoned.

Sections like 197-199 imposing duties should be deleted from the Special Part and relocated in the General Part. For since the prime business of the Special Part is to create offences, this part should consist primarily of offence-creating sections. These can of course be buttressed by ancillary provisions defining those offences further or allowing special defences. They should not, however, be accompanied by “idling” sections, such as sections 197 to 199, which neither define offences nor allow for special defences, especially when such sections apply to other offences besides homicide. Such sections could most logically follow the General Part section stipulating that omission will only incur criminal liability if it is an omission to perform a duty imposed by law, and could amplify that section by explaining the nature of those duties (see below).

Next, section 205, which classifies homicide into culpable and non-culpable, should be deleted. In the first place, the presence of such a provision is inconsistent with the rest of the *Code*, which nowhere else begins a chapter of offences with this sort of classification. The assault provisions are not prefaced with a distinction between lawful and unlawful touchings. The theft provisions are not preceded by a distinction between lawful and unlawful takings. Why then introduce the homicide provisions by a distinction between lawful and unlawful killing?

Secondly, the section is objectionable from the standpoint of drafting. As argued above, sections in the Special Part should be

restricted to defining offences, assigning penalties and providing special defences to them. There is no place in the Special Part, for mere conceptual mapping.

Thirdly and most important, the inclusion of section 205 runs counter to the idea of systematic criminal codification. For the idea of this is that offences should be defined in the Special Part and general defences and principles of liability in the General Part. On this view, the homicide provisions should only create offences and leave questions of lawfulness to the General Part.

For these reasons the homicide chapter should not begin by classifying homicide as culpable and non-culpable. Instead it should straightforwardly define the different types of offence committed through causing death. Death caused intentionally, recklessly or by gross negligence will automatically be done unlawfully or culpably, absent some general exemption, justification or excuse which will accordingly be provided for in the General Part.⁴³

Next, subsections 205(5) and (6) and sections 207 to 211 should be replaced by a general causation rule in the General Part. In the first place, a code should aim, not at specific examples, but rather at general provisions. In the second, causation problems arise outside as well as within the context of homicide,⁴⁴ so that the rules for their solution should be situated in the General Part.

Accordingly, no special rule should be included regarding death which might have been prevented or death from treatment of injury. These questions are particular instances of a more general question, namely, can one particular factor said to be the cause of an effect resulting from a combination of that and other factors? The answer to this question should be given in a general rule within the General Part. The nature of that answer is discussed below. Meanwhile sections 207 and 208 should be deleted.

Nor is there any need today for paragraphs 205(5)(c) and (d) which stipulate that causing death by frightening is culpable homicide and section 211 which stipulates that generally killing by influence on the mind is not.⁴⁵ Of course, if homicide is classified as culpable and non-culpable and if culpable homicide is defined primarily as causing death by an unlawful act, then such supplementary sections are essential. For frightening another or influencing his mind are not necessarily unlawful acts. But if the

culpable/non-culpable classification is abandoned and if all causing of death is deemed unlawful given the requisite *mens rea* and absent some general defence, there remains no need for these supplementary provisions. Accordingly, paragraphs 205(5)(c) and (d) and section 211 should be deleted, and whether the death resulted (in the case of a child, sick person or normal adult) from frightening or influence on the mind should fall to be determined on the evidence.

Nor is there any longer any need for subsection 205(6). This subsection provides that it is not homicide to procure by perjury another's conviction and death by lawful execution. In substance it enacts a rule of earlier common law. Since the abolition, however, of capital punishment, it has become obsolete. It should, therefore, now be deleted.

Finally, sections 209 on acceleration of death and 210 on death within a year and a day should be deleted. The rule, that accelerating the death⁴⁶ of someone already dying from a disease is causing death, is merely a particularization of the general causation problem discussed above. The rule that no one commits culpable homicide unless death results within a year and a day is, as argued earlier, anachronistic.

With these alterations, much of the complexity due to piggy-backing would disappear. Instead of building the definition of manslaughter on that of murder and that of murder on that of culpable homicide, the *Code* could straightforwardly define murder, manslaughter and causing death by negligence as separate offences each in its own right.

RECOMMENDATIONS

1. Homicide should no longer be classified as culpable and non-culpable — section 205 to be deleted.

2. The specific duty sections should be replaced by provisions in the General Part — sections 197 to 199 to be deleted and a General Part section to be substituted.

3. The specific causation sections should be replaced by a general provision in the General Part — paragraphs 205(5)(c) and (d), subsection 205(6), sections 207 to 211 to be deleted and a General Part section to be substituted.

CHAPTER TWO

The Physical Element in Homicide⁴⁷

Essentially our homicide provisions define the physical element in crimes of homicide as follows. Subsection 205(5) of the *Code* defines culpable homicide as causing the death of a human being by means of an unlawful act, by criminal negligence, by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or by wilfully frightening that human being, in the case of a child or sick person. Subsection 205(6) excludes “killing by perjury” from the class of culpable homicides. Subsection 206(1) defines a human being as someone already born. Sections 207 and 208 concern deaths which might have been prevented. Section 209 deals with acceleration of death. Section 210 specifies that the death must occur within a year and a day. Finally section 211 rules out causing death by influence on the mind.

In addition to the above-listed sections, completeness requires reference to sections 197 to 199 and 202. Subsection 202(1) defines criminal negligence and states that everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons. Subsection 202(2) defines “duty” as a duty imposed by law. Section 197 imposes duties on parents, guardians and others to provide necessities. Sections 198 and 199 concern more general duties. In short the physical element in a homicide offence consists of (1) an act or omission, (2) causing, (3) the death, (4) of another, (5) human being.

I. Acts and Omissions: Duties

Death can be caused by acts or by omissions.⁴⁸ In this context “omission” means not just simple failure to do one of a series of

acts comprising the activity in which the offender is engaged, for example, failure to brake one's car properly when driving, to give proper warning of one's approach, or to keep a proper lookout — failures which can equally be regarded as improper modes of acting, for instance, of driving. Rather it means “not doing anything”, that is, not rescuing someone, not helping him, not providing him with necessities — in short “not-doing”.

When should one be liable for “not-doing”? Basically, when one has a duty to do something.⁴⁹ Morally a person is not to blame for an omission unless he has a moral duty to act. Likewise under our law he will not be held liable unless he has a legal duty to act. This legal rule, as argued earlier, and any special refinements of it belong, not to the homicide provisions, but to the General Part. In Working Paper No. 29, therefore, section 3 provides in general that no one commits an offence by reason of an omission unless he fails to perform a duty imposed by law.

But to what is the law referred?⁵⁰ Can criminal liability be incurred by omissions to perform duties imposed by any law or only by omissions to perform duties imposed by the *Criminal Code* itself? Working Paper 29, section 3 left the term “law” undefined and therefore with its case law meaning, which denotes any law including common law. On further consideration, however, we recommend that it should be given a restricted meaning and be limited to the law in the *Criminal Code*.

This restricted meaning accords with the apparent approach of the draftsmen of the 1953-54 *Code*.⁵¹ If they meant to criminalize all omissions to perform legal duties, why did they specify the duties given in sections 197 to 201? The fact that they thought such specification necessary to ensure that death resulting from their non-performance would be culpable homicide, suggests that they never meant to refer to other duties.

In our view that original approach was right. The duties whose breach constitutes a crime must be restricted to criminal law duties to avoid two undesirable consequences which would otherwise follow. First, given all the duties that may or may not exist outside the criminal law, the individual's potential liability for omissions could become intolerably uncertain because no one can possibly know all the duties imposed by all the laws of Canada. Second, it could vary from province to province⁵² — failure to provide

necessaries to a dying common law “spouse” will not result in a homicide conviction in Ontario, but could in Québec because that province has a general “assistance in danger” provision in its *Charter of Rights*.⁵³ Yet clearly, criminal law should be uniform across the country and should be made by Parliament.⁵⁴

To illustrate this further, take the following example. D1 and D2 are restaurant owners in cities A and B respectively. Fires break out accidentally in both restaurants, and patrons die.⁵⁵ Had the restaurants had special fire exits, the victims would not have died. City A has a by-law requiring restaurant owners to provide such exits, city B does not. So D1 has failed to perform a duty imposed by law and is guilty automatically of manslaughter while D2 has not and is not. This would be the absurd result of defining “law” here to mean all law in Canada. Obviously D1’s and D2’s criminal liability should not depend on the fortuitous circumstances of there being or not being in force some city by-law.

To avoid these undesirable consequences — lack of certainty and uniformity — the duties should be specified in the *Criminal Code* which should be comprehensive. The reader, therefore, should not have to look outside — to common law, provincial law, municipal law — to discover what he must and must not do. Instead the criminal law should be fully contained in one document which is not piggy-backed on other law.

Sometimes of course this is not possible. Take theft, for instance — dishonest interference with another’s property rights. The nature of those rights depends on rules concerning ownership, possession and transfer and is obviously a matter for civil law. Here criminal law must piggy-back on other law, partly because it prohibits interference with rights which criminal law itself does not confer, and partly because the law creating property rights is far too complex and voluminous to state within a *Criminal Code*.

The duties now under consideration are quite different. They do not have to be predicated or piggy-backed on a whole complex of non-criminal rights but, it is argued, arise themselves out of our criminal law provisions. For instance, young children have a legal right to obtain necessities from parents because at common law it was unlawful homicide for parents to let their children die for lack of necessities. Furthermore, these duties are themselves reducible to quite a few in number — witness the present *Code* provisions — and relate to fairly obvious, basic and general obligations.

What should these duties be? Common law divided duties into (1) natural and (2) assumed duties.⁵⁶ Natural duties meant duties owed by parents to small children. Assumed duties meant duties voluntarily undertaken, for instance, by guardians, doctors, nurses.

Following this tradition, our *Criminal Code* spells out the following duties. Section 197 imposes a legal duty on parents, foster parents, guardians or heads of families, to provide necessities for children under sixteen, on married persons to provide necessities for their spouses and on people in general to provide necessities for persons under their charge who cannot provide for themselves. Section 198 imposes a duty on anyone undertaking to administer surgical or medical treatment to use reasonable knowledge, skill and care in so doing. And section 199 provides that everyone who undertakes to do an act is under a legal duty to do it if its omission may be dangerous to life.

In addition, certain more specific duties are provided elsewhere in the *Criminal Code*. For example, section 77 provides that everyone who has an explosive substance in his possession is under a legal duty to use reasonable care to prevent bodily harm to others from that substance. Section 242 provides that everyone who makes an opening in ice that is open to the public is under legal duty to guard it in a manner adequate to prevent persons falling in by accident and that everyone who leaves an excavation on land that he owns is under a similar duty.⁵⁷

In our view all such duties should, instead of being scattered in specific provisions in the Special Part, be covered by a general formula in the General Part. For in the first place the duties are in the ultimate analysis of a very general nature — those covered by sections 77 and 242 are clearly only particular manifestations of them. Second, they apply beyond the context of homicide — non-performance of most of them is an offence in its own right and where causation of harm is needed, the harm need not be fatal.⁵⁸

Accordingly the nature of such duties will be fully examined in the context of the reconsideration of the General Part. Here be it noted *en passant* that if the recommendations in Report 20 are accepted, then letting a terminal patient die at his request will not qualify as homicide.⁵⁹ For if the law no longer requires a physician to continue treatment without the patient's express request, an omission to continue it will no longer be an omission to perform a duty imposed by law.

II. Causation⁶⁰

As suggested earlier, the treatment of causation in the *Criminal Code* leaves much to be desired. Instead of an overall rule or principle for general guidance, it merely gives various specific rules for specific cases. And instead of treating the topic as one of general application concerning many different crimes, it deals with it as though it were particular to homicide.

The rules in question are to be found in subsection 205(6), sections 207 to 209, and 211. Subsection 205(6) provides that a person does not commit homicide by causing a human being's death by procuring his conviction and execution by perjury. Section 207 provides that a person doing any act resulting in another's death causes that death even though it might have been prevented by resort to proper means. Section 208 provides that where a person causes a bodily injury of a dangerous nature from which death results, he causes the death even though its immediate cause is proper or improper treatment applied in good faith. Section 209 provides that where a person causes bodily injury resulting in death, he causes death even though the effect of the injury is only to accelerate death from a disease or disorder arising from some other cause. Section 211 provides that, except in the case of causing the death of a child or sick person by wilfully frightening him, it is not culpable homicide to cause the death of a human being by any influence on the mind alone or by any disorder or disease resulting from influence on the mind.

In our opinion a Code should avoid such specifics and aim instead at general principles. No reference need be made to death caused by medical treatment or lack of it, for this is only a special application of the general principles of causation. Next, for the reasons given earlier on pages 25 to 27, no reference is now required to causing death by perjury. Then, for the reasons given on page 27, no specific reference is necessary to causing death by frightening. Finally, no reference to acceleration of death is needed since this again is a specific application of the general principles of causation. These special references should be replaced by a general rule within the General Part, which could be inserted under section 3 to explain "causing a consequence".

But how should such a general rule be formulated? Clearly the law must differentiate between causes and conditions. The fact that

D's unlawful conduct is a necessary condition for V's death does not entail that it is inevitably a cause of it. Not every necessary condition — not every “but for” factor — amounts to a cause. A cause is a factor singled out for attribution of a consequence.

What is the basis of such attribution? Clearly, nothing results solely from one act or occurrence. The arsonist's fire requires not only the striking of the match, but also the presence of oxygen; the gunman's killing needs not only the shooting but also the operation of the laws of ballistics, and so on. Normally this raises no problem because one of the contributing factors may clearly stand out as the main cause. Occasionally, however, there may be a factor which contributes in such a way as to make it difficult knowing to what the result should be ascribed.⁶¹

Suppose D injures V, V is treated in hospital and death results.⁶² In such a case, is the cause of V's death the injury received from D or the treatment received in hospital? Or both?

According to common sense, the answer depends upon the nature of the treatment in question. If it is given in good faith but fails to save V's life, then D's infliction of injury is considered the cause of V's death. If it is not given in good faith or is utterly inappropriate — suppose that because of hospital error V's one good kidney is removed — then the treatment rather than D's injury is taken as the cause of death. In common sense, D has to take the risk of V's receiving unsuccessful treatment given in all good faith; he does not have to take the risk of V's receiving treatment that is utterly inappropriate or given in bad faith.

In such cases the answer, then, depends on the expectedness of the intervening event. Where the latter can be expected in the ordinary course of things — as can some measure of carelessness or negligence — the original actor has to take the consequences. Where it is totally unexpected in the ordinary course of things — as would be some intentional, reckless or grossly negligent maltreatment — the original actor is not responsible for the eventual outcome. As lawyers would put it, the “chain of causation” linking D's infliction of injury with V's death is snapped by a *novus actus interveniens* which is wholly outside reasonable expectations in the circumstances.⁶³

In our view, this is how most causal problems are treated by ordinary common sense on which our law is ultimately based. A

principle structured on these lines, then, should be articulated in a new *Criminal Code*. But since causation is not restricted to crimes of killing, this articulation should be located, not within the homicide provisions, but rather in the General Part.

III. Death

In all homicide offences there has to be a death. Ordinarily this presents no legal problem. In most cases, evidence will clearly establish that the victim died. The only question will be the factual one of showing how this happened.

Occasionally, however, there can be legal problems which are due to advances in medical technology.⁶⁴ Suppose D mortally wounds V, V is taken to hospital and after an irreversible cessation of all his brain functions, his heart is removed for transplant purposes. Was V dead before the heart removal? If so, D can be said to have caused his death. If not, given the causation principle above suggested, he cannot — V's death must be taken to have been caused by the doctors.

In this connection this Commission studied the need for legal criteria for determination of death and made final recommendations in Report No. 15. It concluded: that the adoption of a legislative definition of death was needed to avoid arbitrariness and give greater guidance to doctors, lawyers and the public; that such a definition should be flexible enough to adapt to medical changes; and, that the proposed definition should be general, applicable to all situations where death has to be determined, and inserted in the *Interpretation Act*.

The recommended definition reads as follows:

For all purposes within the jurisdiction of the Parliament of Canada, a person is dead when an irreversible cessation of all that person's brain function has occurred. The irreversible cessation of brain functions can be determined by the prolonged absence of spontaneous circulatory and respiratory functions. Once the determination of the prolonged absence of spontaneous circulatory and respiratory functions is made impossible by the use of artificial means of support, the irreversible cessation of brain functions can be determined by any means recognized by the ordinary standards of current medical practice.

IV. Of a Human Being

Next, the death has to be that of a human being. Three hundred years ago Lord Coke, in defining murder, spoke of killing a "reasonable creature in being."⁶⁵ Here "reasonable creature" denoted a human being and "in being" restricted the crime to victims already born. So long as the victim was already born, the unlawfulness of killing him would not be lessened by his consenting to his death or by his being the same person as the one doing the killing.⁶⁶

Under the *Code* the law is, with one exception, still the same in this regard. Except for the fact that suicide, and hence attempted suicide, is no longer a crime,⁶⁷ the law regarding victims and their consent retains the common law position.⁶⁸

V. Victims Already Born

Traditionally criminal law restricted homicide to victims already born.⁶⁹ To kill a child after birth, by a pre-natal or post-natal injury, was homicide, but to kill a child before its birth was no homicide. The victim of a homicide had to be "a reasonable creature in being," that is, a person already born.

Not that to kill a child before birth was no crime. On the contrary it was, said Coke, "a great misprision".⁷⁰ It did not qualify, however, as murder or manslaughter.

This is still the position today in Canada.⁷¹ Subsection 205(1) of the *Criminal Code* states that a person commits homicide when "... he causes the death of a human being." The term "human being" is then defined by subsection 206(1), which states that a child "becomes a human being within the meaning of this *act* when it has completely proceeded, in a living state, from the body of its mother...". Accordingly, to kill a child in the womb before its birth is not a homicide under Canadian criminal law.⁷²

These provisions raise questions both in form and substance. As to the form, if homicide is to be restricted to those already born, is the present *Code's* method the best way of doing this? As to substance, should homicide be restricted to those already born or should it be extended to include the unborn?

In form the law in question is clearly unsatisfactory. The restriction to victims already born is effected in two stages. First, subsection 205(1) provides that homicide means causing the death of a human being, and subsection 206(1) artificially restricts the term "human being" to a child that has proceeded in a living state from the body of its mother.⁷³ Why not provide a more straightforward restriction to the effect that homicide means killing someone already born?

The substantial question is more difficult. On the one hand it seems artificial to draw an arbitrary line between the born and unborn in this context; does it make sense that if D deliberately injures a child in the womb, he commits murder if the child dies of the injury five minutes after birth but no homicide at all if the child dies five minutes before birth? On the other hand, to take away that arbitrary line would raise other difficulties; a line would now have to be drawn between the conceived and unconceived, between embryos and foetuses, or between viable and non-viable foetuses; and this too would still be arbitrary.

In this matter, however, arbitrariness is not the only concern. The substantive question is: what value in this context, should be set on the child in the womb? On this, however, we recommend no change at present because we plan later to deal with the whole question of unborn victims in a separate Working Paper. For while ordinary homicide raises no special medico-ethical issues, termination of the unborn life cannot be fully considered without extensive attention to such issues. Accordingly, the question of killing the unborn will be considered later, along with the offences covered by sections 221 (killing unborn child in the act of birth), 226 (neglecting to obtain assistance in childbirth), 227 (concealing body of child) and 251 (procuring miscarriage).

Meanwhile, as pointed out above, the unlawfulness of a homicide is not altered by the consent of the victim. Murder and manslaughter, unlike assault, do not expressly require an act done against the victim's will. Indeed it is for this very reason that "active" euthanasia qualifies as murder.⁷⁴

Under our *Code* we have a special section dealing with this matter. Section 14 provides that no one can consent to death and that such consent will not affect the killer's criminal responsibility.

In our view no such section is required. In the first place, the *Code* defines culpable homicide as quite simply causing the death of a human being. It includes no such wording as “without his consent” as it does in the corresponding section on assault. In the second, there is no provision in the *Code* to the effect that a victim’s consent is a defence in general. Accordingly there is no general rule requiring the addition of a special exception regarding homicide.

Under a reformed chapter of homicide provisions it is envisaged that murder, manslaughter and causing death by criminal negligence would all be defined in terms of “causing the death of another”. This being so, lack of the victim’s consent would not be an essential requirement any more than under present law. Accordingly, no special provision like that in section 14 would be necessary.

It will be recalled that we have already recommended, under our discussion of the arrangement of the homicide provisions, that the classification of homicide into culpable and non-culpable should be abandoned, that the sections on duties should be relocated in the General Part and that the specific rules on causation should be replaced by a general rule within the General Part. In addition we make the following recommendations on the physical element of homicide offences.

RECOMMENDATIONS

4. As under present law, only victims already born should qualify as potential victims of homicide offences, but this should be formulated straightforwardly and not by an artificial restriction on the expression “human being.”

5. No definition of death should be included, on the understanding that the definition recommended in Report 15, *Criteria for the Determination of Death*, would be included in the *Interpretation Act*.

CHAPTER THREE

The Mental Element in Homicide

The most crucial question with regard to homicide concerns the mental element required for the various offences. As it is, all the offences share a common physical aspect: there must be a death, it must be caused by the offender's conduct and it must be caused culpably, for example by an unlawful act, by criminal negligence, and so forth. They differ only as regards the state of mind of the offender: murder is culpably causing death when meaning to kill or with some other specified state of mind⁷⁵ and manslaughter is culpably causing death in all other cases.⁷⁶ So the question in this context is: should the law continue to distinguish between crimes of homicide by reference to the state of mind of the offender?

In general, quite apart from codes of law, we do measure the gravity of wrongdoing largely by reference to the state of mind of the wrongdoer. If one person causes harm to another without justification or excuse, the extent to which he is held to blame depends upon his state of mind. If he causes the harm by pure inevitable accident, he incurs no blame. If he does so through some avoidable accident, he incurs criticism. If he does so through gross failure to act reasonably, he incurs serious blame. If he does so by consciously and deliberately exposing the victim to serious and unwarranted risk, he incurs greater censure. Finally, if he does so on purpose, he incurs the greatest reprehension.

These obvious common sense distinctions are reflected in our law of homicide. A person causing death through some inevitable accident incurs no liability whatsoever. A person doing so through ordinary negligence incurs civil liability and has to compensate his victim. A person doing so through gross negligence incurs criminal

liability for causing death by criminal negligence or for manslaughter. Finally, a person who kills intentionally (or in some cases recklessly) can be convicted of murder.

In this regard our homicide law has three noticeable features. First, the threshold of criminal liability is not crossed until the negligence is gross. Second, the meaning of gross or criminal negligence is less than fully clear — at common law to be negligent is to fall below the standard of reasonable care and to be grossly or criminally negligent is to fall (whether through inadvertence or some other factor) far below it,⁷⁷ whereas according to the Supreme Court of Canada in *O'Grady v. Sparling*,⁷⁸ to be criminally negligent one must foresee that one's act or omission is likely to endanger the lives or safety of others, that is, one must be reckless. Third and by contrast, to some extent recklessness is as good as intent — killing when meaning to do so and killing without meaning to but knowing that one's act is likely to cause death both count as murder.

In our view, our criminal law is rightly at one with common sense morality in this regard. It follows — and should continue to follow — the practice of labelling and distinguishing the different homicide offences according to the state of mind of the offender. With regard to a new *Code*, then, two questions will arise. First, what should be the mental element for the different homicide offences? Second, what should be the name or label for each distinct offence?

The labels pose a difficult problem. On the one hand, the existing terms “murder” and “manslaughter” are sanctified by centuries of usage and tradition, and a *Criminal Code* without them would seem unfamiliar and even perhaps emasculated. On the other hand, to the extent that we recommend redefinitions of the offences, retention of the terms “murder” and “manslaughter” could cause confusion. For the time being we use the words “intentional homicide” and “reckless homicide” to describe what we believe to be the appropriate categories of homicide.

I. The Mental Element in “Intentional” Homicide

Clearly, the prime question is: what should be the mental element in the most serious offence of killing? At what point are

we prepared to recognize that the mental state of one killer is so different from that of another as to warrant a legal distinction between them?

Traditionally, the common law drew the distinction by reference to malice. Murder was unlawful killing with malice aforethought. Manslaughter was unlawful killing without malice.⁷⁹

Now obviously the clearest form of murder — the paradigm case — was killing when you mean to, killing on purpose, killing with intent. At common law, however, this was by no means the only form of murder, for there were several other categories corresponding to other heads of malice. As observed earlier,⁸⁰ according to Stephen, it was murder at common law to kill:

- (1) with an intent to kill or do grievous bodily injury;
- (2) with knowledge that the act done will probably kill or do grievous bodily harm;
- (3) with intent to commit any felony; and
- (4) with intent to oppose by force any officer of justice in discharging certain of his duties.

Examination of these four heads of malice makes it clear that common law recognized at least six different forms of murder — one paradigm case and five additional ones. These were:

- (1) Killing with intent to kill;
- (2) Killing with intent to cause bodily harm;
- (3) Killing with knowledge that the act done will probably kill;
- (4) Killing with knowledge that the act done will probably do grievous bodily harm;
- (5) Killing with intent to commit a felony; and
- (6) Killing with intent to oppose by force an officer of justice.

By 1892, however, the question of what the mental element for murder ought to be was highly controversial.⁸¹ Some, such as Macaulay,⁸² R. S. Wright⁸³ and Stephen⁸⁴ himself, wished to restrict murder to cases of intent and recklessness and get rid of the

felony-murder rule together with Stephen's fourth head of malice. Others, including a majority of the Commissioners responsible for the E.D.C. wished to retain constructive malice.⁸⁵ In the event the E.D.C. and hence the 1892 *Code* retained all four of Stephen's heads of malice as set out in his *Digest*, but with significant differences in formulation.

A. Intent to Kill

First, the most obvious form of murder, which comes up front in Stephen's list, also comes at the beginning of our present murder section. Stephen began with "an intent to kill". Our *Code* in section 212 provides that culpable homicide is murder where the person who causes the death "means to cause his death". This form of murder therefore, is a "purpose" crime.⁸⁶

B. Recklessness

Next, cases (2), (3) and (4) mentioned on page 41 — meaning to do grievous bodily harm, knowing you are likely to kill and knowing that you are likely to do grievous bodily harm. These cases, it will be recalled, fall partly under head (1) and partly under head (2) of Stephen's heads of malice.⁸⁷ In our *Code* they are dealt with partly by subparagraph 212(a)(ii) and partly by paragraph 212(c). And the way that they are dealt with by those provisions is significantly different from the way that they were dealt with by the common law.

Take for example case (2) — killing with intent to do grievous bodily harm. At common law this falls under the first head of malice and is straightforward murder. Under our *Code* this is not so. Under our *Code* it is murder only in two situations. First, it is murder if the offender means to cause the victim bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not (subparagraph 212(a)(ii)). Second, it is murder if the offender for an unlawful object does anything he knows or ought to know is likely to cause death (paragraph 212(c)).

Our *Code*, then, differs from the common law in two respects. First, it is no longer enough for the offender to intend to do grievous bodily harm. Under subparagraph 212(a)(ii) the offender must mean to cause bodily harm *that he knows is likely to cause death*. In other words "grievous" has been more strictly defined to

mean in fact “known to be deadly”. Accordingly, to take an example given by Professor Hooper,⁸⁸ “if I administer a severe beating to a man but do not foresee his death and he dies anyway, I am guilty of murder at common law but not under section 212(a)(ii).”

Second, it is no longer enough to know that one’s act may cause death or “deadly” harm. Under subparagraph 212(a)(ii) you must also *mean* to cause bodily harm. So, to take another of Hooper’s examples:

I shoot at X not in the least wanting to wound him but merely to warn him off. However, I foresee that I may probably kill or wound him because I am not a very good shot and, in the circumstances, I am prepared to take the risk. If I kill X, I am clearly guilty of murder at common law. But am I guilty of murder under subparagraph 212(a)(ii)? Surely not. I did not intend to or mean to cause him any bodily harm.⁸⁹

Alternatively to know that one’s act will cause death may make one guilty of murder under paragraph 212(c) of the *Code*. But not by itself. Under paragraph 212(c) the act in question must be done *for an unlawful object*. And case law has now made it clear that the unlawful object for which the act is done must be different from the act that is being done and that the unlawful object itself must be a serious indictable offence requiring *mens rea*.⁹⁰

On the other hand, paragraph 212(c) has introduced some new notions. First, it provides that it is murder “where a person, for an unlawful object, does *anything*” The meaning of this term has generated considerable case law as to how widely the term should be understood.⁹¹ The present law, however, seems to be that it means an act dangerous to life.⁹²

Second, paragraph 212(c) does not confine itself to anything which the offender knows is likely to cause death but extends also to anything which he *ought to know* is likely to cause death. It may well be that his extension was originally added, as Hooper⁹³ has suggested, not to change substantive law but rather, at a time when the accused was not allowed to testify, to deal with a presumption of intent — to provide that it would be murder if the accused “must have known”, that is, if the obvious inference is that he knew. Be that as it may, the words were given an objective meaning by the case law, so that regardless of the offender’s actual

knowledge, he could be guilty of murder if a reasonable man would have had the requisite knowledge.⁹⁴ Today, however, the courts seem to be adopting a more subjective approach and using the standard of the reasonable man more as a guide by which to infer the actual knowledge of the accused.⁹⁵

Apart from any other consideration, it becomes clear from an examination of section 212 that the law in this area is difficult and complex. Suppose D is accused of murdering V by injuring him for the purpose of committing robbery. Suppose the prosecution argues (1) that D knew the injury was likely to cause death (2) that D was robbing V and (3) that D ought to have known that the injury was likely to prove fatal. Suppose D denies (1) that he knew the injury was likely to cause death and (2) that he was robbing V. When the trial judge has to explain the law relating to these two different hypotheses, as Hooper says, the confusion that would reign in the minds of the jury is not hard to imagine.⁹⁶ Yet surely criminal law, as Lord Goddard observed, “should rest on three principles — simplicity, certainty and an application that is neither fortuitous nor capricious.”⁹⁷

C. Constructive Malice

Finally, cases (5) and (6) — killing with intent to commit a felony and killing with intent to oppose by force an officer of justice. These were covered by heads (3) and (4) in Stephen’s listing of the heads of malice. Under our *Code* they are covered by paragraph 212(c) and section 213. The former is global and concerns, as we have seen, anything (1) known (or which ought to be known) as likely to cause death, and (2) done for an unlawful purpose. Section 213 is a more specific section which details both the kinds of acts likely to cause death and the kinds of unlawful purpose in question.

First, the kinds of acts specified by section 213 consist in

- (a) Causing bodily harm for the purpose of facilitating the commission of an offence or facilitating flight after its commission;
- (b) Administering a stupefying thing;
- (c) Wilfully stopping a person’s breath; and

- (d) Using or having a weapon, where death ensues in consequence.

Second, the kinds of unlawful purpose listed by section 213 include:

- treason;
- sabotage;
- piratical acts;
- hijacking aircraft;
- escape and prison rescue;
- assaulting a peace officer;
- sexual assaults;
- kidnapping;
- robbery;
- breaking and entering; and
- arson.

Clearly, this section, which is modelled on section 175 of the E.D.C., greatly adds to the complexity and detail of the law of murder. Under the common law the rule was quite straightforward: killing was murder if done in the course or furtherance of a felony (later a felony of violence) or in the course or furtherance of resisting an officer of justice. This rule, however controversial, was readily grasped and remembered. Section 213 may provide useful restrictions but does so at the price of loss of general principle, overburdening the law with detail and providing an *ad hoc* list of offences which are virtually impossible to remember.

Worse still, section 213 may be largely unnecessary. The only homicide covered by section 213 and not by paragraphs 212(a)(ii) or (c) is that resulting from the carrying of a weapon — a Canadian addition to the felony murder rule.⁹⁸ Certainly, once mention has been made in paragraphs 212(a)(ii) and (c) of harm likely to cause death, there is no need to add references to stupefying and choking. Likewise, once mention has been made in paragraph 212(c) of pursuing an unlawful object, there is no need to add a further list of specified offences. Stephen⁹⁹ himself doubted whether section 213's predecessor, section 175 of the E.D.C., added anything of importance but thought that any situation covered by that section would be one where a jury would feel no difficulty in finding that

the offender knew or ought to have known that this act was likely to cause death, in which case it would be murder under E.D.C. section 174. The same can be said about section 213 of our *Code*.

As it is, the coexistence of paragraph 212(c) and section 213 now adds a further burden for the jury. Suppose D unintentionally kills V in the course of a robbery. At common law he was clearly guilty of murder, for he killed V in the course of furtherance of a felony of violence. Under our law he may be guilty of murder under subparagraph 212(a)(ii) because he meant to cause V bodily harm which he knew was likely to cause his death, under paragraph 212(c) because for an unlawful object he did something which he knew or ought to know was likely to cause death, and under section 213 because he meant to cause bodily harm for the purpose of facilitating robbery. And the jury would need to be directed on all of these overlapping provisions.¹⁰⁰

D. Transferred Intent

Before leaving the present law we should briefly note one further distinction between Stephen's formulation and that provided by the *Code*. This relates to transferred intent. Stephen stated that it was murder to cause the death of a person with intent to kill or do grievous bodily harm to some person, whether the person killed is the intended victim or not.¹⁰¹ In other words, the offender does not need to intend to kill his actual victim. So if D shoots to kill X but misses X and kills V, D is guilty of murder. Likewise if D means to kill X, mistakes V for X and so kills V, he commits murder. This is the doctrine of transferred malice.¹⁰²

Following the E.D.C., our *Code* adopts a different formulation. It provides explicitly and separately in paragraph 212(b) that where a person meaning to cause death to a human being, by accident or mistake causes death to another human being, this is still murder. The common law result is reproduced by a more specific formulation.

In our view no such separate provision on transferred intent is required. First, as Professor Stuart¹⁰³ convincingly argues, no reference to mistake is necessary. If D kills V intentionally but by mistake for someone else, his mistake would not, according to the general principles on this particular defence, provide D with any excuse because his erroneous belief relates to a non-essential

factor. In other words, if you intentionally kill someone, it matters not who you thought the victim was — in such a case identity is quite irrelevant.¹⁰⁴ (On this see Working Paper 29, *The General Part*, section 9(1).)

In the second place, no reference to accident is necessary. If murder is defined as killing when meaning to kill anyone, then it matters not whether the actual victim was killed in fact by accident. Where D means to kill X but misses and kills V, this would be murder whether D knows that the act aimed at X is likely to kill V.

E. The Policy Issue

Clearly, then, the basic policy issue is: should “intentional” homicide cover not only cases of actual intention but also cases of constructive intention? Should it cover not only killings where the offender means to kill but also killings where he does not? First, should it cover killings done in the course of certain other offences — should there be a type of constructive “intentional” homicide? Second, should it cover killings done with knowledge that one’s act is likely to kill — should there be a type of reckless homicide within this category?

II. Constructive Homicide

Should one who kills another unintentionally ever be treated the same as one who does so on purpose? Should he be treated the same, and be liable to conviction for the most serious homicide offence, if the unintentional killing occurs in the course or furtherance of some other serious offence? Should the unintentional killing be regarded in law as tainted by that other offence and therefore as aggravated up to the seriousness of “intentional” homicide?

Consider the following situations. First D1, in order to facilitate a robbery unintentionally kills V1, in any of the following ways:

He hurls V1 violently to the ground and V1 unexpectedly strikes his head on a metal projection;

he chloroforms V1, who then unexpectedly dies of a heart attack;

he puts a hand over V1's mouth to stop him calling for help and V1 unexpectedly chokes to death;

he points his gun at V1 to cow him into submission, the gun goes off accidentally and V1 dies of the shot wound.

Second, D2 to facilitate a robbery intentionally kills V2 who is preventing the successful completion of the crime. Should D1 be guilty of the same offence as D2 as he would be under our present law?

Many would reply in the affirmative on various grounds. First, this is the reply in line with our common law tradition based as it is on centuries of judicial experience. Second, to make D1 here act at his peril serves the purpose of deterrence — bank robbers must learn to avoid bodily harm, to forego stupefying of drugs, to leave their guns at home. Third, from a retribution standpoint, D1 cannot complain: engaged in a criminal enterprise he knows that accidents can happen — people hurled to the ground sometimes kill themselves on projections, stupefying drugs can bring on heart attacks, guns can go off by accident. Finally, the natural inference is that people intend the natural consequences of their actions — a man who fatally shoots another usually intends, to do so.

Attractive as these arguments may seem, they are not fully convincing. Take first the question of common law history and tradition. Today it is trite learning that killing in the course of felony was always murder, but, as often happens, that learning is mistaken. As has been convincingly demonstrated by Professor Lanham,¹⁰⁵ far from enjoying the merit of historical legitimacy, "the felony murder rule can claim only the weakest of antecedents". Conceived by Coke in a statement "unsupported by his cited authorities and penned in the course of a discussion of homicide which was largely incoherent,"¹⁰⁶ the rule was rejected both by Dalton¹⁰⁷ and more importantly by Hale.¹⁰⁸ Indeed even by the early part of the nineteenth century there was still more authority against the rule than in its favour. This being so, it can be argued "the felony murder rule is not a relic of ancient barbarism but an instance of modern monstrosity."¹⁰⁹

Next, the argument concerning deterrence. This founders on two shoals — the uncertainty of the deterrent effects of punishment and the capricious operation of such constructive rules. As to the former, Stuart¹¹⁰ has put it convincingly. "As with most arguments

based on deterrence, the correlation is at best unproven. If the death penalty does not deter, an inflexible felony murder rule is highly unlikely to be effective, even assuming it is known.” As to the capricious operation of the rule, D1 in all the above examples is treated the same as D2 because V dies, yet V’s death in each case is *ex hypothesi* unintended, unforeseen and accidental from D’s standpoint. Of course if V’s death were foreseeable, D would have been reckless.¹¹¹ As it is, D’s liability ends up being measured by something quite outside his own control.

Admittedly this happens regularly in homicide. A shoots at B to kill him; A is guilty of murder if B dies and of attempted murder if he lives, although B’s survival may depend on the quality of the subsequent medical treatment. Or again, if X drives very dangerously and hits Y, X is guilty of causing death by criminal negligence if Y dies and of causing bodily harm by criminal negligence if he lives, although again survival may depend on the actions of doctors, nurses and others. If we accept a degree of capriciousness here, why not accept it equally in the cases discussed on page 47?

To this we would reply as follows. The element of capriciousness found in our attitude to cases in the preceding paragraph is more easily justified than that concerning cases discussed earlier (on page 47). For though the victim’s survival in both cases considered above were to some extent independent of the offender, the harm involved in death is so complete and irreversible that we are naturally drawn to consider the offender guilty of a more serious offence than when the victim lives.¹¹² But once the offender is guilty of a homicide, then if we are serious about differentiating with respect to the offender’s state of mind — intent, recklessness, gross negligence, and so on — then we should not capriciously assimilate some non-intentional killings to intentional killings simply because those killings occurred in special circumstances. In short, just as there is a clear common sense distinction between killing and mere injuring which is recognized by our present law, so there is an equally clear common sense distinction between intended and unintended killing which is not fully acknowledged by our present law.

This leaves the argument from retribution: the offender in such cases only has himself to blame; he has to take the consequences. Seductive as it is, this will not work because essentially it puts intended and unintended killings on the same footing. It draws no

distinction between the bank robber who kills unintentionally and the bank robber who kills on purpose, for instance, to get rid of a potential witness. Yet clearly, however, as bad as the first bank robber's conduct is, the second's is worse. This difference in moral gravity should, in our view, be reflected by any morally based system of criminal law. This, not the constructive murder rule, is the corollary of retributive principles.

Finally the question of the natural inference. Admittedly, if D points a loaded gun at V and kills him, particularly during the commission of a robbery, the natural inference is that he actually meant to kill. No doubt in ninety-nine cases out of a hundred, this is the very inference a jury will draw no matter what the accused contends. Here no great injustice results from application of an automatic rule that killing in such circumstances is treated as intentional killing.

But what of the hundredth case? What of the case where, on all the evidence, the jury is not satisfied beyond a reasonable doubt that the accused actually meant to kill? If they cannot draw this inference from the facts in question, why should they be forced by law to do so? Why should they be compelled to treat him as though he had killed on purpose when they are not convinced he did?

The standard answer is that otherwise the guilty may get off; allow the jury to acquit the hundredth offender who is innocent and then they will start acquitting some of the other ninety-nine who are not. Here three points must be made. First, it should be recalled that our society subscribes to the idea that better ten guilty men go free than one innocent be convicted — the very opposite of the argument above. Second, the bank robber discussed on page 47 does not get off; he can be convicted of armed robbery and also of a lesser crime of homicide; the idea that he might go scot-free is a red herring. Third, the present constructive murder rule is too inclusive; as Stuart¹¹³ observes, section 213 covers widely differing kinds of homicide — ranging from killing during organized armed robbery to killing in a drunken mugging.

In our view, no form of unintentional killing should be placed by criminal law on the same footing as intentional killing. Central to everyday morality is the idea that it is worse to do harm on purpose than to do the same harm through recklessness, worse to

do it through recklessness than through carelessness, and worse to do it through careless than by accident. Essential, in our view, to structuring a satisfactory criminal code is the need to base it on, and make it reflect, this central moral difference — a position argued by this Commission in the discussion of the principle of responsibility in Working Paper 29, *The General Part*. But if this central difference is to be reflected anywhere, it must *par excellence* be mirrored in the homicide provisions which concern the flagship offences and the major wrongs in the criminal calendar. To treat an unintentional killer as though he intended to kill involves the criminal law in artificiality and fictions and in the injustice of not treating significantly different cases differently.

For all these reasons, then, and particularly for the reason that the criminal law should not ride roughshod over important distinctions drawn by morality, we think the time has come “to bring the law up-to-date by turning the clock back to the days of Sir Matthew Hale”. We think that constructive murder should be abolished, that the rules contained in paragraph 212(c) and section 213 should have no place within our criminal law, and that killings where death is neither intended nor foreseen should be excluded from the category of “intentional” homicide whether or not they are brought about in furtherance of some other offence.

RECOMMENDATION

6. “Intentional” homicide should apply only to killings done with actual intent to kill, and cases of constructive intent should be excluded from this category.

III. Reckless Killing

At common law reckless killing was murder.¹¹⁴ Recklessness, it was said, was as good as intent. Accordingly, Stephen’s second head of malice comprises knowledge that the act done is likely to kill.

Canadian law is equally clear, although it gives a more restricted answer. Under subparagraph 212(a)(ii) it is murder where the offender means to cause the victim bodily harm that he knows is likely to cause death, and is reckless whether death ensues or not. Under paragraph 212(c) it is murder where for an unlawful

object he does anything that he knows or ought to know is likely to cause death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

We have already referred earlier (on page 43) to the constructive aspects of paragraph 212(c). There we would argue that any such constructive provision is objectionable on two grounds. First, case law notwithstanding, the words “ought to know” suggest an objective standard of knowledge whereas, in fact, a person who does not know that death is likely (even if he ought to know) is significantly different from one who knows that it is likely, let alone from one who intends death.¹¹⁵ Second, the fact that the offender acts for an unlawful purpose is no justification for putting him on all fours with one who means to kill. In short, the argument advanced against section 213 above apply to paragraph 212(c) as far as concerns “ought to know”.

Turning now to cases of pure recklessness — meaning to cause harm known as likely to cause death (subparagraph 212(a)(ii)) and doing for an unlawful object something known as likely to cause death (paragraph 212(c)) — we would begin by distinguishing three cases:

- (1) D means to kill V — a case of direct intent: for example, D wants to kill V and shoots him dead;
- (2) D means to do something which involves V’s death as a means to that end or as an inevitable result of it — a case of indirect or oblique intent: for example, D wants to destroy an aircraft in which V is travelling, puts a bomb inside it before take-off, then later triggers off the bomb, destroying the airplane and killing the passengers; and
- (3) D does something knowing it will expose V to serious risk of death — a case of pure recklessness: for example, D drives with reckless abandon, knows that doing so exposes himself, his passenger V and other road users to serious risk of death, and crashes killing V.

As to these three cases we argue as follows. First, cases (1) and (2) should be assimilated. The fact that in (1) D aims at V’s death, whereas in (2) he aims at some further goal to which V’s death is an undesired but necessary step, is surely irrelevant. Who

will the end will the means. In both cases D means to cause V's death.

Indeed it is cases like case (2) that give plausibility to the doctrine that recklessness is as good as intent. For D in case (2) merits as much blame as D in case (1): he is prepared to take V's life. But while case (2) is sometimes described as recklessness, this is misleading because D exposes V, the aircraft passenger, not to a risk of death, but rather to a virtual certainty thereof — to as much certainty as is possible in human affairs, the sort of certainty in issue when we talk of an intent.

By contrast recklessness has to do not with certainty but with risk or probability.¹¹⁶ A reckless killer is one who gambles with his victim's life. Now doing this, though reprehensible, is normally regarded as less heinous than intentional killing. For as argued above, it is generally thought worse to do harm on purpose than to do that same harm through recklessness. Morally, then, intent is worse than recklessness, and this should be reflected in the criminal law concerning homicide.

For these reasons, we consider that "intentional" homicide, like '*murdrum*' in earlier times, should be restricted to the worst kind of homicide. It should be used to denote the central case — intended killing. It should have no application to any less heinous forms of homicide like killing by recklessness, which should accordingly be covered by a lesser crime of reckless homicide.

RECOMMENDATION

7. "Intentional" homicide should apply only to killings done with actual intention and cases of reckless killing should be excluded from this category.

IV. The Mental Element in "Reckless" Homicide

At common law, manslaughter was unlawful killing without malice. This included voluntary manslaughter, that is, murder reduced to manslaughter by provocation, and involuntary manslaughter.¹¹⁷ Provocation is discussed below. Here we examine involuntary manslaughter.

At common law, involuntary manslaughter fell into two kinds. It could consist in causing death by an unlawful act. Or it could consist in causing death by a lawful act done with gross negligence.¹¹⁸ The state of mind, if any, required for manslaughter must be examined within these two contexts.

The first kind of involuntary manslaughter was subsequently narrowed by the case law. In *R. v. Larkin*¹¹⁹ (1962), it was held that to ground a verdict of manslaughter the unlawful act must be a dangerous act, that is, "an act which is likely to injure another person." This definition was approved by the House of Lords in *R. v. Church*¹²⁰ (1965).

The second kind of involuntary manslaughter was defined by two leading cases. As a result of *Bateman*¹²¹ (1925) and *Andrews*¹²² (1937), the lawful act causing death must be done with a degree of negligence which renders it a matter of public concern and not a mere matter for compensation between private parties.

Basically our *Code* has followed common law in this regard. Manslaughter is defined by section 217 as culpable homicide that is not murder or infanticide. If the culpable homicide is committed with the *mens rea* or its equivalent specified in sections 212 and 213, the homicide (absent any question of provocation) is murder. If it is committed in the circumstances specified in section 216, it is infanticide. But if it falls into neither of these categories, it becomes the residual offence of manslaughter.

Manslaughter is of course a form of culpable homicide. And culpable homicide is defined by subsection 205(5) as including causing death by an unlawful act or criminal negligence. Clearly then, under our *Code* as under common law, involuntary manslaughter can be committed in two different ways.

The *Code* however, does not tell us what is meant by an unlawful act in this context. For this we have to look to case law, which has followed the direction taken by *Larkin*¹²³ and *Church*.¹²⁴ In *R. v. Tennant and Naccarato*¹²⁵ (1975), the Ontario Court of Appeal held that it is manslaughter to cause death by an unlawful act which any reasonable person would inevitably realize must subject another person to risk of, at least, bodily harm. And *R. v. Cole*¹²⁶ (1981) held that if the unlawful act is not criminal, then to support a finding of culpable homicide it must be an intentional one

which, viewed objectively, is likely to subject another person to danger of harm or injury. "Bodily harm" has been defined by case law¹²⁷ as interference with health or comfort that is more than merely transient or trifling in nature — a definition adopted by section 245.1 of the *Code* within the context of offences of assault. Such a definition would perhaps be wide enough to allow cases of constructive manslaughter, as where D pushes V over, V has an eggshell skull and death results, since maybe the act of pushing should be taken as an act likely to cause bodily harm.

By contrast the *Code* does define criminal negligence. Subsection 202(1) provides that every one is criminally negligent who, in doing anything or in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons. Subsection 202(2) provides that "duty" here means a duty imposed by law.

This section is not free from difficulty. The section is entitled "Criminal Negligence" but the text speaks in terms of recklessness: "shows wanton or reckless disregard." These terms may be in conflict with each other.¹²⁸

"Negligence" is a term which is sometimes given different meanings. Some scholars argue that negligence denotes inadvertent risk-taking.¹²⁹ In tort, however, it means failure to take reasonable care, that is, the care which would be taken by a reasonable person. This failure can of course arise through inadvertence: the actor fails to notice what he is doing when he ought to. It can also arise without inadvertence: the actor adverts to the risk but nevertheless wrongly decides to take it. In either case he may be civilly liable for negligence. In ordinary language, too, which is far less precise than law, negligence may mean simply carelessness.

Recklessness too is difficult to define. Ordinarily it may mean simply very gross carelessness or negligence — the (advertent or inadvertent) taking of a very serious and unjustifiable risk.¹³⁰ Conventional legal wisdom, however, especially in the context of offences like malicious damage, malicious wounding and murder, developed a narrower meaning for the term; it limited recklessness to the conscious taking of a serious and unjustifiable risk.¹³¹

In this sense, recklessness is often contrasted with intent. Intent entails desire of consequences or its equivalent, that is to

say, foresight of their certainty; recklessness means foresight of their probability.

Recently, however, in *Lawrence*¹³² (1981) and *Caldwell*¹³³ (1981), the House of Lords, considering that words like recklessness should be viewed as far as possible as having their ordinary language meaning, held that recklessness meant simply very gross negligence. While this sort of approach usefully keeps law in line with ordinary language, it causes difficulty when words with a well-established special meaning are unexpectedly given instead the looser general meaning of ordinary language. How far these decisions of the House of Lords will be followed in Canada is hard to say.

Be that as it may, section 202 itself creates a conflict. By using the title "Criminal Negligence" it suggests that the test to be applied is an objective one: did the offender (whether advertently or inadvertently) fall below the required standard of care?¹³⁴ By using in the text the words "shows wanton or reckless disregard," it suggests that the test to be applied is a subjective one: did the actor advertently and consciously take a serious and unjustifiable risk?¹³⁵

This conflict could be resolved in one of two ways. It could be said that the term "criminal negligence" has a special meaning here and denotes subjective negligence; that is, the offender must advertently and consciously take the risk.¹³⁶ Alternatively, it could be said that the words "shows wanton or reckless disregard" have a special meaning in this section and are to be taken objectively rather than subjectively; that is, that the offender need only take the unjustifiable risk, whether consciously or inadvertently. The second alternative seems to have found favour with the courts. Fastening on the word "shows," they have interpreted section 202 as requiring, not that the offender in fact had wanton or reckless disregard, but only that his conduct showed such disregard.¹³⁷ In other words, they have interpreted it to mean that an offender is guilty under this section if his conduct manifested on the face of it a falling below the standard of prudence.

In our view, three criticisms can be levelled at our provision on manslaughter (apart from the formal criticism made earlier in this Paper). First, there is a complete overlap between the second kind of involuntary manslaughter and the offence of causing death

by criminal negligence. Second, the meaning of “criminal negligence” is still unclear. Third, the first kind of involuntary manslaughter may be too wide and may allow for cases of constructive manslaughter.

In our view the second most serious homicide offence, “reckless” homicide, should be restricted to recklessness. It should be restricted to cases where an offender causes death, not meaning to kill, but knowingly disregarding a substantial or serious risk of causing death. This kind of killing should be dealt with separately so as to distinguish it, on the one hand, from intentional killing, and on the other hand, from killing through gross negligence. Indeed this is the appropriate place for those reckless killings discussed at pages 47 and following.

RECOMMENDATION

8. “Reckless” homicide should be restricted to reckless killing, that is, causing death by knowingly exposing another to serious and socially unacceptable risk of death.

V. Other Homicide Offences

Should there be further homicide offences? Should there be an offence of negligent homicide? And should there be an offence of “drunken” homicide?

VI. Negligent Homicide

Should criminal law prohibit not only intentional and reckless but also negligent killing? Should it prohibit causing death through gross carelessness falling short of recklessness and consisting in some instances of inadvertence?

This is a highly controversial question, on which we received differing advice from our consultants. Some stressed that punishment for negligence is neither self-evidently objectionable nor wholly at odds with criminal law tradition. Evidence for this proposition is to be found in case law suggestions that mistake of fact had to be reasonable to operate as a defence, in the

development of the doctrines of constructive murder and constructive manslaughter and also in the importation into our *Code* of crimes of causing death and bodily harm by criminal negligence.

Other consultants replied that nonetheless in general criminal law tradition *mens rea* has always been restricted to intent and recklessness. Negligence was always confined in general to, and seen as a matter *par excellence* for, civil law. For this the reason surely was that inadvertence, from which in fact most negligence results, has not been clearly recognized as warranting punishment; it is mostly, to use Lord Atkin's¹³⁸ words, a matter for mere compensation between the parties.

In our view this is the better position. Real crimes — crimes of violence, dishonesty and vandalism, for example — have always required in principle, intent or recklessness. As Jerome Hall¹³⁹ has shown convincingly, negligence has no role to play within *mens rea*. For this reason we would have unhesitatingly recommended against any kind of negligent homicide offence, but for one problem.

That problem is, of course, that of death on the road. Today in Canada, as in all advanced Western countries, deaths resulting from motor accidents form one of the gravest problems facing society; the number of Canadians who die annually on the road is nearly as high as the average number of Canadians who died in each year of the second world war.¹⁴⁰ Small wonder then that there is constant, if not mounting, public pressure to seek solutions to this problem through the criminal law.

No solution seems wholly satisfactory. The earliest strategy, to prosecute for manslaughter, was fraught with difficulty. For one thing, courts faced problems trying to distinguish gross or criminal negligence from ordinary civil negligence. For another, juries proved reluctant to convict of manslaughter, and understandably since that was the crime of which they normally convicted people causing death through intrinsically unlawful activities or, worse still, people lucky not to be found guilty of murder.

A later approach, adopted in this country, to create a special crime of causing death by criminal negligence,¹⁴¹ was also open to objections. On the one hand, it ran counter to the tradition discussed above of limiting *mens rea* to intent and recklessness.

On the other hand, it left unclear first what was the difference between this crime and manslaughter and second what actually was meant in this context by negligence.

A third solution, used in the United Kingdom,¹⁴² was to create a special offence of causing death by dangerous driving. In our opinion this too has its drawbacks. The most significant is that it moves away from a principled approach to criminal law, which concentrates on criminalizing general categories of conduct, and relies on dealing with particular problems by special *ad hoc* solutions. The logic of such an *ad hoc* approach would be to burden criminal law with a multiplicity of special offences: causing death by dangerous flying, causing death by dangerous sailing, causing death by dangerous hunting, causing death by dangerous skiing, and so on.

A possibly more satisfactory solution, to which the English method points the way, might be to restructure the crime of dangerous driving so as to allow for different levels of maximum penalty depending on the consequential harm.¹⁴³ Such maximum could be, as now, two years' imprisonment in the absence of actual harm, five years' given resulting bodily injury and ten years' in case of consequential death. An approach on these lines would avoid *ad hoc* offences, would leave *mens rea* in homicide restricted, as traditionally, to intent and recklessness, and, best of all, would highlight the gravamen of the offender's conduct — his endangering the safety of others.

On this, however, we feel the need for further study and exploration. In the first place, driving is only one of many activities which entail a measure of danger but which, because of their social utility, have not been made unlawful. A thoroughly principled approach to criminal law, therefore, would shrink from treating driving in isolation but would prefer to deal with it in an overall provision which could relate generally to intrinsically dangerous activities like flying, hunting and perhaps drinking alcohol.

Secondly, this Working Paper focuses on homicides as being fatal offences of violence, that is, as offences consisting of intentional or at least reckless aggression. Later, the Criminal Law Project along with the Protection of Life Project will be investigating "endangering" offences, comprising engaging in certain activities in a dangerous manner, causing environmental pollution, and

possibly other conduct. In that context the problem of dangerous driving will again fall to be examined.

But thirdly, the specific problem of killing by dangerous driving will have to be examined also in the general context of road traffic offences. In due course, this Commission will have to explore *inter alia* two major questions on this general topic. One is the ethical question concerning the extent to which driving offences can qualify as real crimes, given that many of them may be committed without gross immorality but simply through ordinary negligence. The other is the factual question concerning the extent to which a useful contribution to the problem of road accidents can really be made by criminal law.

Meanwhile, for the reasons set out above, our interim conclusion would be not to include an offence of negligent homicide.

VII. “Drunken” Homicide

In our earlier consultations on Working Paper 29, *The General Part*, and in particular on the defence of intoxication advanced in section 6 on page 123 of that Paper, few questions were raised as often as the question how alternative (2) in that section would operate in cases of homicide. That alternative, put forward largely to avoid the illogicality accepted by Lord Salmon in *Majewsky*¹⁴⁴ but castigated (in our view rightly) by Dickson J. in *Leary*,¹⁴⁵ has two limbs. The first provides that a person charged with an offence shall be acquitted if, while committing the *actus reus* of that offence, he was prevented by his intoxication from having the purpose or knowledge required by the definition of that offence. The second provides that unless the intoxication resulted from fraud, duress or reasonable mistake, such a person shall be convicted of a new included offence of criminal intoxication and liable to the same penalty as the offence which, but for his intoxication, he would have committed.

In the context of homicide these rules are intended to apply as follows. Suppose D is charged with reckless homicide but claims not to have known, because of his intoxication, that he was exposing V to a serious risk which would have been obvious to anyone sober. Here, D would be acquitted of reckless homicide

because he lacked the knowledge required by the definition of that offence. He would, however, be convicted of criminal intoxication and liable to the same penalty because the only factor preventing him from having that knowledge was his intoxication. For reckless homicide is the offence which, but for his drunkenness, he would have been committing.

Next, suppose D is charged with intentional homicide but claims not to have killed V on purpose because he was too drunk to form any such purpose. Here too D must be acquitted of intentional homicide, convicted of criminal intoxication and made liable to the same penalty as that for the offence which, but for his intoxication, he would have been committing. But what is that offence? Clearly not intentional homicide, for whereas in the reckless homicide situation we were able to say that if he had been sober D would have known he was exposing V to a risk of death, in the intentional homicide case we obviously cannot say that if he had been sober D would have intended to kill V. The answer, then, must be reckless homicide, for here too in the intentional homicide situation if D had been sober he would have realized that his act would in all probability cause V's death.

Accordingly, given an intoxication defence, an "intentional" homicide charge allows for three possibilities and, a "reckless" homicide charge for two. The former allows for a conviction for "intentional" homicide, on the ground that D had the requisite purpose, for "reckless" homicide on the ground that he lacked that purpose but knew his act would probably kill, or for criminal intoxication with liability to a "reckless" homicide penalty. The latter allows for a conviction for "reckless" homicide on the ground that he did have the guilty knowledge or for criminal intoxication again with liability to a "reckless" homicide penalty.

Various objections have been raised to this approach. One is that it is unclear how the burden of proof would operate. To this objection the answer is that the matter will be dealt with later in the course of an examination of the burden of proof generally in criminal law.

Another is that it appears to blur important distinctions. Defendants charged with homicide, assault and vandalism could all, regardless of the original charge, end up convicted of the same offence of intoxication. And this, despite the different penalties to

which they will be liable in each case, is surely to some extent unfair.

The objection could perhaps be met by a change of labels as suggested by the Victorian Law Reform Commissioner in Australia.¹⁴⁶ The new *Code* could provide that in such cases the conviction would be not for criminal intoxication but for doing, in a state of intoxication, the act forming the *actus reus* of the offence charged. So the defendants mentioned above could be convicted of committing the act of homicide, assault or vandalism, as the case may be, in a state of intoxication. On this suggestion we would welcome feedback.

Another possibility, suggested by some consultants, would be to include an offence of “drunken” homicide carrying the same penalty as “reckless” homicide. But unless we were prepared to deal exceptionally with homicide in this regard — and we can see no compelling reason for so doing — the logic of that approach would be to accompany every *Code* offence with a corresponding “drunken” offence. We would have “drunken” assault, “drunken” vandalism and so forth. And this would put an end to the search for generality implicit in codification.

For this reason we would not recommend any kind of “drunken” homicide offence for inclusion in the homicide chapter.

VIII. General Conclusions and Labels

In sum, we envisage a subdivision of homicide offences as follows:

“intentional” homicide	intentional killing where D means to kill;
“reckless” homicide	reckless killing where D knows his act exposes V to a serious unjustifiable risk of death.

Under this scheme, an offender presently liable for murder under subparagraph 212(a)(ii), paragraph 212(c) or section 213, would only be guilty of "intentional" homicide if he meant to kill.¹⁴⁷ Failing this, he would be guilty of "reckless" homicide if he knew of the serious risk of death. Failing this, he would be not guilty of any homicide offence but he would still, of course, be liable for the crime he actually intended to commit — robbery, piracy or whatever.

CHAPTER FOUR

Sanctions for Homicide¹⁴⁸

What should be the sanctions for the homicide offences we have recommended? Should each form of homicide carry a different penalty to mark the progression in gravity, or should they carry penalties more in line with those existing in the present law?

I. Sanctions under Present Law

Present homicide sanctions have two notable features. First, manslaughter and causing death by criminal negligence carry the self-same penalty, namely, a maximum of life imprisonment. Second, murder carries in theory a fixed penalty of life imprisonment.

In having a fixed penalty, murder is virtually unique.¹⁴⁹ Admittedly, some offences under the *National Defence Act*¹⁵⁰ are punishable by death, but these are now of more theoretical than practical significance. These offences apart, all other crimes allow for a range of penalties — Parliament normally prescribes only a maximum and leaves the actual choice of sentence to judicial discretion.¹⁵¹ Murder, by contrast, excludes all such discretion and must be punished with imprisonment for life.

This inflexibility has always been the case with murder. At common law the penalty for it was death.¹⁵² Under our *Criminal Code* the same was true for over half a century. In 1965, however, the death penalty was restricted to certain more heinous types of murder (capital murder) and a fixed penalty of life imprisonment prescribed for less heinous types (non-capital murder).¹⁵³ Later, in 1976, when capital punishment was permanently abolished, capital

and non-capital murder were replaced by first degree and second degree murder, both of which were made punishable by a fixed penalty of life imprisonment.¹⁵⁴ The two offences differ, though, regarding parole eligibility: second degree murderers become eligible after ten years and first degree murderers only after twenty-five.¹⁵⁵ In effect, then, second degree murder carries a minimum penalty of ten years and first degree murder one of twenty-five.

The other notable feature of our present homicide sanctions relates to manslaughter and causing death by criminal negligence. Under the present *Code* both offences carry the same penalty. Manslaughter (which includes killings that would be murder but for provocation) and causing death by criminal negligence (which in fact is partly coextensive with manslaughter and seems to have been added to the *Code* because of jury reluctance to convict dangerous drivers who kill of manslaughter) are both punishable by a maximum of life imprisonment.

Here, then, there are four questions. First, if the law were to contain a negligent homicide offence, should it carry a lower penalty than reckless homicide? Second, should there be a lower penalty for reckless than for intentional homicide? Third, should there be a fixed penalty for all intentional homicides? Fourth, should there be degrees of intentional homicide?

II. Negligent and Reckless Homicide

If, contrary to our recommended scheme, there were an offence of negligent homicide, the difference between it and the more serious offence of reckless homicide would concern the state of mind of the offender. Negligent homicide would consist in killing through gross failure to take due care for the lives of others. Reckless homicide would comprise killing through consciously exposing someone to a serious and socially unacceptable risk of death. Basically the former crime would be one of inadvertence, the latter one of deliberate risk-taking.

As observed earlier,¹⁵⁶ there is a moral distinction between inadvertence and conscious recklessness. However blameworthy it may be to cause harm carelessly and unwittingly, it is clearly worse to cause that same harm knowingly and recklessly. This being so, it follows that to kill through inadvertent negligence,

however gross, must be less heinous than to kill through recklessness. Negligent homicide must be less grave than reckless homicide.

This difference in gravity, although not fully brought out in the present *Code*, should surely be reflected in our law. First, it should be reflected in the definitions of the offences by reference to a clearly articulated difference in the offender's state of mind, as would be done under the scheme proposed. Second, it should be mirrored in the penalties assigned to each offence, a lesser penalty being provided for negligent than for reckless homicide, as we would propose under the new scheme.

RECOMMENDATION

9. If there is an offence of "negligent" homicide, it should carry a lower penalty than "reckless" homicide.

III. Reckless and Intentional Homicide

Under the recommended scheme, reckless homicide and the yet more serious crime of intentional homicide would also be distinguished by reference to the state of mind of the offender. Reckless homicide would consist, as explained above,¹⁵⁷ in killing by knowingly exposing someone to a serious and socially unacceptable risk of death. "Intentional" homicide would consist in killing when meaning to kill. Basically the former would be a "knowledge" crime and the latter a "purpose" crime.¹⁵⁸

Here again there is a clear moral distinction. Morally, we differentiate between things done through recklessness and things done on purpose. However reprehensible it is to cause harm which is foreseen but not intended, it is surely worse to cause that same harm through aiming at it. The former case involves gambling with the victim's safety; the latter involves an actual intent to harm him. This being so, it follows that, other things being equal, killing intentionally must be reckoned worse than killing knowingly through recklessness.

This difference too should be articulated in our law. First, it should be marked by a distinction between intentional and reckless homicide based on the difference in the requisite state of mind.

Whereas traditionally at common law, murder was unlawful killing with malice aforethought and manslaughter unlawful killing without malice, so under the new scheme "intentional" homicide would be killing with intent and reckless homicide would be killing without intent.

Secondly, the distinction should be marked, like that between reckless and negligent homicide, by a difference in penalty. Traditionally at common law and in our *Criminal Code*, manslaughter and other homicides have carried a lower sanction than murder, which has always been the only homicide offence to carry a fixed penalty.¹⁵⁹ Under the scheme proposed, the crime of reckless homicide would carry a lower penalty than would the crime of intentional homicide.

RECOMMENDATION

10. "Reckless" homicide should carry a lower penalty than intentional homicide.

IV. A Fixed Penalty for All Intentional Homicide

Under the present *Criminal Code*, the penalty for second degree murder is imprisonment for life with no parole eligibility till after ten years. In theory, this penalty is a fixed one of life imprisonment; in practice it is a minimum one of ten years' imprisonment.¹⁶⁰

Clearly the law must stigmatize intentional killing more than reckless killing. Of course if the maximum penalty for the latter were less than life imprisonment, this could be done by setting a maximum penalty of life imprisonment for intentional homicide. As it is, since manslaughter itself is punishable by life imprisonment, the extra heinousness of murder can only be brought out by prescribing a fixed life imprisonment penalty.

The trouble with this solution is its rigidity. After all, murders are by no means all of the same kind; they vary enormously one from another in various ways and in particular as to their moral culpability. As was said in 1953 by the Report of the Royal Commission on Capital Punishment in England, "there is perhaps no single class of offences that varies so widely both in character

and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder.”¹⁶¹ At one end of the spectrum of reprehensibility comes unpremeditated killing in the course of a quarrel or for revenge or for some other evil motive. Next, and perhaps less heinous in our ordinary reckoning, might come killing in the heat of passion, for example, by a jealous spouse. Finally at the other end of the spectrum might fall killings done with a laudable motive from the offender’s standpoint perhaps but not from society’s perspective, for example, mercy killings.

Under our present law, of course, all these different types of murder are treated on an equal basis. Given that the offender means to kill, or has one of the requisite states of mind detailed in *Criminal Code* sections 212 and 213, he will receive in each case the same punishment. His motive is treated as irrelevant. Incarceration for a minimum of ten years is mandatory for each offence.

In justice, though, the law should surely take account in this context of the circumstances of each case and in particular of the offender’s motive. This, after all, is what is done throughout the rest of criminal law, which, no matter what the definition of the crime in question, prescribes a maximum rather than a fixed penalty and so allows judicial discretion to determine the sentence most appropriate to each situation. Accordingly, it permits factors like good motive, temptation and provocation to be dealt with flexibly at the post-conviction stage.

We believe the same approach could be taken with murder. The punishment for “intentional” homicide — or at least for second degree categories of it — could be left to be determined by the judge, who after all is in the best position to take account of all the individual circumstances of each particular crime. In short, this kind of homicide could, like all other offences, be made to carry merely a maximum penalty.

To this, one objection might be that it would be too sharp a break with legal tradition. Another might be that it could cause serious and understandable misgivings. For without fixed penalties, could we be really sure that murderers would get their just deserts or that society would be adequately protected or that the major crime in the calendar would incur sufficient denunciation?

Serious and understandable as such misgivings are, they can, we think, be allayed for several reasons. First, we see no reason to doubt that judges can be trusted to impose the appropriate sentence for this crime as they do for other offences. Second, in the exceptional case where the sentence imposed was clearly inappropriate, the Crown could still in Canada, unlike in other common law countries, appeal to higher courts and get them to correct such aberrations. Third and most important, our suggestion only relates to second degree "intentional" homicide; nothing is said at this stage about first degree crimes and the most heinous types of acts which would fall thereunder.

Removal of the fixed or minimum penalty for second degree "intentional" homicide then, would be a less drastic break with legal tradition than might at first sight appear. Indeed, it would be less a break with that tradition than an evolution of it. For if originally all murders were punishable, in law if not in fact, by death and if after 1965 second-degree murder became punishable in effect with a minimum of ten years' imprisonment, then removal of the ten year minimum is only a logical development to acknowledge the enormous variety of homicides, to allow a necessary flexibility in sentencing, and to put this crime on the same footing as all other offences.

In addition, however, removal of this minimum penalty would obviate the need for special rules on excess force in self-defence, provocation and infanticide. Instead of burdening the judge and jury with technical, complex rules of law, because of the fixed penalty for murder, we would allow the judge to take account of all such matters flexibly in sentencing, as he would do for any other offence. Each of these matters is briefly considered here in turn.

V. Excess Force in Self-Defence¹⁶²

The problem of excess force in self-defence is, in our opinion, inadequately dealt with by the present law. The problem is as follows. V attacks D. D defends himself with force. Unfortunately D uses more force than necessary and kills V. Of what crime should D be guilty?

One answer could be: of no crime at all, for self-defence should operate as a complete justification no matter how much

force involved. This view has not found favour in any jurisdiction, for obvious reasons. On policy grounds the use of force, particularly of lethal force, must be ruled out in any civilized society except to the extent that it is absolutely necessary. But force can only qualify as absolutely necessary when it constitutes the very minimum required for justifiable purposes like law enforcement, self-defence and so on. To license more than this minimum would endanger the whole structure of peace, order and good government.

A diametrically opposite answer would be: of murder, for the plea of self-defence should only be available to a person using no more force than reasonably necessary. Use of force within this minimum merits a complete acquittal. Force in excess negatives the justification and makes the user guilty of murder (given the necessary *mens rea*). This is the common law position,¹⁶³ the rule in Canada: *R. v. Brisson*,¹⁶⁴ and also the rule proposed by Working Paper 29 — *The General Part*.¹⁶⁵

Yet a third answer could be: he should be guilty of manslaughter. This “half-way house” answer, the one given in certain Australian jurisdictions,¹⁶⁶ acknowledges that those acting in self-defence, whatever the degree of force employed, are acting under special pressures and difficulties and are, for that very reason, clearly less culpable than those not under pressure but killing gratuitously. It also avoids the curious unfairness of allowing a concession to those acting under provocation, who are blameworthy to begin with, but denying it to some of those acting in self-defence, who are to start with blameless.

There could, however, be a yet more satisfactory solution to the problem. This solution, like the “half-way house”¹⁶⁷ answer, would recognize the reduced culpability of a person using excess force in self-defence, but would at the same time, unlike the “half-way house” position but like the common law and like the Supreme Court of Canada position in *R. v. Brisson*,¹⁶⁸ acknowledge that nonetheless, given the requisite *mens rea*, he means in fact to kill and should not therefore logically speaking qualify as guilty only of manslaughter.¹⁶⁹ The solution is to abolish the fixed penalty for second degree “intentional” homicide (1), to leave self-defence as no excuse where excess force is used but to allow the victim’s aggression to count as a mitigating factor when it comes to sentence.

VI. Provocation¹⁷⁰

Many assaults of course are not committed in reaction to a victim's aggression but rather to some other conduct which so angers the offender as to make him lose his normal self-control. Inexcusable as it is, such loss is understandable wherever the same would happen to an ordinary person in the offender's shoes; we may require, but cannot really expect, the offender to attain a standard higher than that of the ordinary man. We temper our disapproval of the offender's conduct, then, with recognition of the special pressures facing him.

This is the view taken by the common law. At common law, provocation is in general no defence but is a mitigating factor. Though not negating guilt, it can be taken into account in sentencing.¹⁷¹ If D under gross provocation assaults V, his being provoked cannot prevent conviction but can reduce his sentence. In an appropriate case, then, D would initially plead not guilty, cross-examine V to establish evidence of provocation and then change his plea and make a speech in mitigation.

In homicide, however, the position was always different. With murder carrying a fixed penalty, no mitigating factors could be taken into account. Accordingly, to allow provocation to be catered for, the crime had to be reduced to manslaughter, which carried no fixed penalty and therefore allowed for sentencing discretion. Such reduction was possible if the accused was actually provoked and if the provocation would have equally provoked a reasonable man.

The common law position is reproduced in substance in the *Criminal Code*.¹⁷² Subsection 215(1) states that culpable homicide that would otherwise be murder may be reduced to manslaughter if the person committing it did so in the heat of passion caused by sudden provocation. Subsection 215(2) states that a wrongful act or insult of such a nature as to deprive an ordinary person of the power of self-control is provocation if the accused acted upon it on the sudden and before there was time for his passion to cool. Subsection 215(3) states for the purposes of this section the questions whether a particular wrongful act or insult amounted to provocation and whether the accused was deprived of the power of self-control by the alleged provocation are questions of fact, but that no one shall be deemed to give provocation by doing anything he had a legal right to do or anything the accused incited him to do

in order to provide the latter with an excuse for causing death or bodily harm. Subsection 215(4) states that culpable homicide that would otherwise be murder is not necessarily manslaughter by reason only that it was committed by a person being arrested illegally, but that the fact that the illegality of the arrest was known to the accused may be evidence of provocation.¹⁷³

It may be argued that the law resulting from these provisions is objectionable on two grounds. First, the wording of subsection 215(2) is too complex. Second, there seems to be two different and overlapping ways of reducing murder to manslaughter.

First, the complexity. On the one hand, stipulation that the provocation must be such as to deprive an ordinary person of self-control provides an objective test excluding reference to the defendant's personal idiosyncracies¹⁷⁴ (though how can we cater properly to an offender's special difficulties without putting ourselves fully into that offender's shoes?). On the other hand, the provision in subsection 215(2) that a wrongful act or insult can be provocation if the offender acts upon it on the sudden and before there is time for his passion to cool has often been judicially interpreted as allowing a subjective test and as permitting consideration of an offender's personal idiosyncracies to determine whether he acted on the sudden and before cooling time elapsed.¹⁷⁵

Second, the two different ways of reducing murder to manslaughter. It may be so reduced by reason of provocation, as allowed by subsection 215(1). Alternatively, it may be so reduced because the offender's rage, whether or not resulting from provocation, deprived him of the requisite *mens rea* for murder.¹⁷⁶

With the abolition of a fixed penalty for second degree "intentional" homicide, these difficulties would no longer arise. Provocation would operate, here as in all other offences, as a mitigating factor rather than an element of the offence. In that case, killing under provocation would qualify more correctly — for the offender generally means in fact to kill — as "intentional" homicide instead of as a crime consisting typically of recklessness.

The wisdom of this scheme was doubted by some of our consultants. For one thing, they objected understandably to labelling as murderers those who kill under provocation. For another, they suggested that it would not be feasible under this

approach to elicit sufficient evidence of provocation for sentence purposes.

To the first objection we would reply as follows. First, even if 'murder' seems an inappropriate term for killing under provocation, 'manslaughter' is surely (with all due respect to the common law) as singularly inappropriate a term for killing with intent (which killing under provocation is). Second, for just this kind of reason it may well be desirable in any case to drop the traditional terminology and substitute some other terms like "intentional killing" and "reckless killing." Third, objections on the score of labelling should not side-track the central question, which is: how should we best deal with provocation — by providing special rules exempting from the fixed sentence for intentional killing or by prescribing merely a maximum sentence allowing for judicial discretion?

Our answer to the second objection is this. First, there should be no greater difficulty in principle in homicide cases than in non-fatal cases as regards establishing evidence. A defendant wishing to show provocation could plead not guilty, cross-examine to suggest provocation, then change his plea and make a speech in mitigation. But secondly, if the inevitable absence of the victim makes this course less satisfactory, then ways could be devised of eliciting the necessary evidence. The main question is: should we deal with provoked killing through sentencing discretion? If the answer is 'yes', then procedure and evidence can be worked out to implement this.

VII. Infanticide¹⁷⁷

The offence of infanticide was added to the *Criminal Code* in 1948 and assumed its present form in the 1955 revision. It is defined by section 216 as the causing of the death of a newly-born child by a wilful act or omission of its mother when not fully recovered from the effects of giving birth to the child and mentally disturbed by reason of the effects of giving birth or of lactation consequent on the birth. The penalty is a maximum of five years' imprisonment.¹⁷⁸

Essentially infanticide is a species of reduced murder.¹⁷⁹ Indeed, before 1948 a person committing infanticide would strictly have been guilty of murder. On the one hand, the mental disturbance now described in section 216 would have been insufficient to qualify as insanity under section 16, not being a disease of the mind resulting in lack of appreciation of the nature and quality of the act or omission or in knowledge that it was wrong. On the other hand no form of diminished responsibility short of legal insanity would have operated at that time to negate *mens rea*. Accordingly, the offence of infanticide was added to the *Code* to avoid murder convictions and death sentences for mothers suffering from mental disturbance resulting from childbirth or lactation.¹⁸⁰

In its present form, section 216 can be criticized on several grounds. First, as presently formulated, it creates a curious situation regarding onus of proof. Second, it is based on antiquated medical thought about the effects on women of giving birth. Third, it is, one may argue, unnecessary from a legal standpoint in view of recent case law developments on the defence of insanity.

First, then, although clearly designed to create a species of reduced murder, section 216 contains no words to that effect such as those in the corresponding English *Infanticide Act*. That statute contains the phrase "notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder." Instead, infanticide is defined simply as a separate offence in its own right. Hence the odd position concerning burden of proof.¹⁸¹

The oddity is this. If the mother's disturbed state of mind in the infanticide offence had been treated analogously to provocation, the burden of proof would have operated as follows: a defendant charged with murder would have had an evidentiary burden to adduce evidence of mental disturbance while the Crown would have had, as usual, the legal burden of persuading the jury beyond reasonable doubt that there was no mental disturbance. As it is, the Crown bears both the evidentiary and the legal burden of proving the defendant's mental disturbance beyond reasonable doubt.

This has a curious result. For whereas on the provocation model a defendant's failure to raise a reasonable doubt as to the

mitigating factor of mental disturbance would leave her guilty of the greater offence of murder, under present law, on a charge of infanticide, a failure (by the Crown) to prove mental disturbance beyond reasonable doubt leaves her not guilty of the lesser crime of infanticide but in principle guilty of the greater crime of murder, for which, however, she has not been charged and for which she now could not be prosecuted because this would put her "in jeopardy twice for the same homicide."¹⁸² To obviate this curious result, that is to say, a complete acquittal, section 590 provides that even without proof of the requisite mental disturbance, there can be a conviction for infanticide. In other words, one section of the *Code* defines an offence as requiring a certain element and then another section dispenses with the need to prove that element.

Secondly, current medical evidence¹⁸³ does not conclusively establish a connection between the effect of childbirth or lactation and mental disturbance. All we can safely say is that the physiological and psychological stresses of childbirth may trigger various psychoses or neuroses previously latent, that the period immediately following childbirth is when a woman is most likely to commit homicide, and that the most likely victim will be the new-born child.

If childbirth aggravates previously latent problems rather than itself creating mental disturbance, then our current infanticide law would seem too limited in scope. As has been frequently observed,¹⁸⁴ many stresses affecting a new mother may persist beyond the year following childbirth (a newly-born child is defined in section 2 as under the age of one year). Certain related stresses may affect the father as well as the mother. Any of these stresses may lead to killing a child other than a new-born baby. Although the inclusion of the special offence of infanticide may be based on sympathy for women who kill their new-born babies, sympathy which is evidenced by the jury refusal to convict such women of murder,¹⁸⁵ medical evidence no longer justifies restricting such special treatment for these defendants only while denying it to fathers acting under related stresses, or to mothers who kill children over one year old or children other than the one whose birth triggered the psychosis or neurosis. In other words, there would be greater justification for a more general defence involving mental disturbance in such circumstances.

Another reason militating against any need for an infanticide provision relates to case-law developments on mental disturbance

and *mens rea* in homicide. Most appeal courts in Canada¹⁸⁶ would now look at mental disturbance which falls short of section 16 insanity as nonetheless preventing a defendant from forming a specific intent to kill and so from actually committing murder.¹⁸⁷ This being so, in appropriate circumstances women accused of murdering their new-born babies could be acquitted of murder on this ground and convicted instead of the included offence of manslaughter.

Still more unnecessary would it become under our proposed scheme to have a special offence of infanticide. In the first place, given a flexible penalty for "intentional" homicide, the stress affecting a defendant in such cases could be taken into account in sentence as a mitigating factor. Secondly, with a rule like that suggested in Alternative (2) of section 5 of the Draft Legislation on the General Part in Working Paper 29, such a defendant could have a defence of mental disorder. This defence, being wider than the existing defence of insanity, would be open to anyone proving that as a result of disease or defect of the mind she lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of her conduct or to conform to the requirements of the law. In short, her diminished responsibility could be taken into consideration at two stages of the trial.

A possible objection to the recommended scheme is that of once again subjecting women in such circumstances to the trauma of an "intentional" homicide trial. In answer we would agree first that it is better for defendants suffering from what is really diminished responsibility to be acquitted and then subjected to special treatment for mental disorder than to be convicted and subjected to a possible prison term. But we would also point out that, in any event, the infanticide section is infrequently used. In 1981 only three actual infanticide offences were reported by Statistics Canada, only one charge was brought and there was no conviction.¹⁸⁸ Since 1974, the number of infanticides reported per year has generally not exceeded five. If a conviction results, it is often of a lesser offence such as failure to provide necessities.¹⁸⁹ Nor have we any reason to expect that any change in this regard would follow from the alteration of the law that we propose.

For all these reasons — to allow greater flexibility, to better tailor justice to the individual case, and to rid the law of complex rules on provocation and infanticide — we think there should be no fixed penalty for second degree "intentional" homicide.

RECOMMENDATION

11. There should be two degrees of “intentional” homicide, and the second degree offence should carry merely a maximum penalty of life imprisonment.

VIII. Degrees of Intentional Homicide

Finally, should there be only one single crime of intentional homicide with one penalty? Or should there be different degrees, with a higher penalty reserved for intentional homicide in the first degree?

In Canada the present distinction between the two degrees of murder is drawn by section 214. According to this section, first degree murder covers murders which are:

- (1) planned and deliberate;
- (2) done for payment, and so forth;
- (3) done to special types of victims, for example, police officers;•
- (4) done in the course of certain offences, for instance, hijacking aircraft; and
- (5) done by a previously convicted murderer.

Arguments could be raised, however, against such a distinction and in favour of the older common law approach of having no degrees of murder. First, one single crime of murder and one punishment is the rule throughout the history and tradition of our law; degrees of murder are a recent innovation. Second, killing is killing — an absolute evil which does not admit of degrees. Third, to have one single crime gives simpler law and surely “if there is any case in which the law should speak plainly, without sophism or evasion, it is in the case of murder.”¹⁹⁰

This third argument seems borne out by our present law. For clearly section 214 is far less clear and simple than it ought to be. That section itself, the classifying section, is piggy-backed on sections 212 and 213. These in their turn, the sections distinguishing murder from other homicides, are piggy-backed on section 205,

which defines culpable homicide. In consequence, we end up with a murder law which is intricate, hard to remember, and notoriously difficult to explain to juries.¹⁹¹

In addition there is considerable difficulty with the actual distinctions. Take the distinction drawn by subsection 214(2) between planned and deliberate murders and other murders.¹⁹² On the one hand, whenever an offender means to kill, it may be argued that the killing is planned and deliberate for, as was aptly said, premeditated means not done by afterthought.¹⁹³ On the other hand, whenever such an offender is provoked, even though not by provocation reducing murder to manslaughter, it may be argued that the killing is not planned and deliberate.¹⁹⁴

As well, there is a lack of rationale in the law. Subsection 214(5) provides that, whether planned and deliberate or not, murder is first degree murder when committed in the course of certain listed offences.¹⁹⁵ It is curious that the list there given is considerably shorter than that given in section 213 which makes killing murder if done in the commission of certain specified offences.¹⁹⁶ Inspection and comparison of the two lists, however, reveal no organizing principle in either of them and no rationale for the difference between them.

All this imposes a considerable burden on both judge and jury. It compels much time and effort to be spent examining, as matters of law, questions which are in essence matters of fact to be decided on the evidence.¹⁹⁷ It also leads inevitably to jury involvement in the sentencing process — a process from which, we recommended in Report No. 16, the jury should be excluded.¹⁹⁸

As against all this, much can be said in favour of degrees of murder. First, it is admitted that common law knew only one single crime of murder, but at common law it must be remembered the punishment for murder was death. There could not, therefore, be an aggravated form of murder. By contrast, degrees were introduced to restrict the death penalty to the worst kinds of murder but survived the abolition of capital punishment to single out the worse types of murder.

Second, although we admit that a single crime of murder means a simpler law and although also our present provisions on degrees of murder are highly complex, a classification into degrees

of murder does not have to be as complicated as it is under our *Code*. This is discussed further below.

Third, while it is true that murder is murder whatever the offender's motive, common sense sees some murders as worse than others. Murder in cold blood, for instance, is worse than murder in the heat of a quarrel. A contract killing is worse than a killing by a jealous wife or husband. A fatal shooting by a hijacker is worse than a mercy killing by a sympathetic doctor.

Now such considerations and such common sense intuitions are the underpinnings of section 214 of the present *Code*. As outlined earlier, that section deliberately picks out for condign punishment cold-blooded (that is, planned and deliberate) murders, contract killings (pursuant to an arrangement under which money ... passes), hijacking killings (while committing an offence under section 76.1 — hijacking an aircraft), and repeated murder (that is, by a person previously convicted of murder). In doing so, section 214 appears in line with ordinary moral notions.

Closer inspection, though, shows section 214 to be not on all fours with ordinary intuitions, since it regards some killings as more and some as less heinous than they are ordinarily thought to be. "Planned and deliberate," for instance, focuses on premeditation and execution in cold blood; it rightly singles out such killings done for gain, but wrongly covers mercy killings which, though done with the victim's consent and with no evil motive, will nonetheless be planned. Murder "of a police officer, etc." rightly acknowledges that law enforcers need special protection but wrongly sets more value on one person's life than on another's. Murder "in the course of other offences" rightly underlines the heinousness of hijack killings, for example, but wrongly puts them on a different footing than other acts of terrorism (for example, those done in ships and trains and buildings). Murder by a person "previously convicted of ... murder," rightly recognizes the extra blame attaching to recidivism but wrongly sees the victim's death as less abhorrent if the killer has not killed before.

Clearly, the law expressed in section 214 has not been based upon any well-determined principle or rationale. To find such a principle, let us inquire what murders stand out as worse than others. Obviously these would include murder for gain, revenge or other evil motive (for example, to get rid of a rival or a witness),

murder as a means of perpetrating some further crime, contract killings and murder as an act of terrorism.

What all these have in common is the murderer's deliberate subordination of the victim's life to his own purpose. Deliberateness, although essential, is not sufficient, for surely mercy killing is deliberate and yet not one of the more heinous murders. The extra factor that is needed is the contempt for life shown in the above examples of particularly evil killings.

In our view, a categorization of intentional homicide, based on this kind of principle, would rid the law of many of its present deficiencies. It would produce a far simpler rule to explain to the jury. It would be more in line with our ordinary thinking about murder. And it would also reassure citizens worried about the protection of society that really heinous murderers would be treated as such by the law.

In these circumstances we recommend a categorization on the lines of the principle outlined above. This principle is soundly in keeping with ordinary morality. It is in accordance with the needs of social policy. And it is one which in our view would receive with public support.

A rule drafted on these lines would articulate in a more principled fashion the basic thrust of section 214 of the present *Code*. We envisaged such a rule as covering planned and deliberate killings other than mercy killings, which do not involve deliberate subordination of the victim's life to the killer's own purpose. In particular, it would cover:

- (a) contract killings;
- (b) killings for pecuniary gain, for example, for robbery, theft or inheritance purposes;
- (c) killings for personal advantage, for example, killing a police officer, prison officer or other person to escape capture or detection;
- (d) killings for political motives, for example, terrorist killings, assassinations, and so forth; and
- (e) repeated intentional killings where the repetition manifests contempt for human life.

At the same time the rule would exclude some of the things presently included under section 214. It would exclude killing which was planned and deliberate but not a deliberate subordination of the victim's life to the offender's purpose, for instance, mercy killing. It would exclude repeated killings where the repetition did not manifest a clear contempt for human life. And it would also exclude all killings which are not really planned and deliberate, for example, killings in the course of fights, killing by a jealous spouse, and so forth, which are now second degree murders. These, together with other killings which are now included under voluntary manslaughter, would all, on this rule, count as second degree intentional homicide.

How such a rule could best be formulated is a matter for further exploration, discussion and consultation. In our view, any such rule should include and exclude the matters mentioned above, but there may well be certain other things that should be included and excluded and it may be that some of the things we have detailed will turn out on further reflection not to warrant inclusion or exclusion as we suggest. Preliminary consultations on homicide have persuaded us, against our initial thinking, that degrees ought to be retained. Likewise, further consultation may alter our views as to what should be included under first degree and may then sharpen up our grasp of the principle and of our notion of the rule which should articulate it.

In due course, a rule could be drafted with more certainty to articulate the underlying principle. One thing impressed on us by our consultations on homicide was the need for certainty in this particular matter. Of course, as Dixon J. observed in *R. v. Leary*,¹⁹⁹ criminal law in general should be characterized by clarity, simplicity, and certainty. But, as our consultants emphasized, in no area is certainty at more of a premium than in this one, where we are concerned with the most important of all crimes, the most important category of that crime.

Finally, it should be noted there is no recommendation as to the precise minimum sentence for first degree intentional homicide. The length of that minimum sentence would obviously depend on the sentencing policy of the entire new *Code*. If, for example, contrary to our recommendation, second degree "intentional" homicide itself ended up carrying a minimum penalty say of ten

years, then clearly first degree would need a higher minimum penalty. If on the other hand, second degree were to carry no such minimum penalty, and if the maximum sentence for other related offences against the person were considerably reduced from what they are at present, then the minimum sentence for first degree intentional homicide could be lower than at present. For this reason, this Working Paper and this particular Chapter of it have concentrated rather on matters of definition.

RECOMMENDATION

12. The first degree offence should carry a minimum penalty and be defined in principle as comprising intentional homicide involving deliberate subordination of the victim's life to the offender's purpose.

Summary of Recommendations

1. Homicide should no longer be classified as culpable and non-culpable — section 205 to be deleted.

2. The specific duty sections should be replaced by provisions in the General Part — sections 197 to 199 to be deleted and a General Part section to be substituted.

3. The specific causation sections should be replaced by a general provision in the General Part — paragraphs 205(5)(c) and (d), subsection 205(6), sections 207 to 211 to be deleted and a General Part section to be substituted.

4. As under present law, only victims already born should qualify as potential victims of homicide offences, but this should be formulated straightforwardly and not by an artificial restriction on the expression “human being.”

5. No definition of death should be included, on the understanding that the definition recommended in Report 15, *Criteria for the Determination of Death*, would be included in the *Interpretation Act*.

6. “Intentional” homicide should apply only to killings done with actual intent to kill and cases of constructive intent should be excluded from this category.

7. “Intentional” homicide should apply only to killings done with actual intention and cases of reckless killing should be excluded from this category.

8. “Reckless” homicide should be restricted to reckless killing, that is, causing death by knowingly exposing another to serious and socially unacceptable risk of death.

9. If there is an offence of “negligent” homicide, it should carry a lower penalty than “reckless” homicide.

10. “Reckless” homicide should carry a lower penalty than intentional homicide.

11. There should be two degrees of “intentional” homicide, and the second degree offence should carry merely a maximum penalty of life imprisonment.

12. The first degree offence should carry a minimum penalty and be defined in principle as comprising intentional homicide involving deliberate subordination of the victim’s life to the offender’s purpose.

Proposed Law of Homicide

Accordingly, we would envisage that in a restructured code, the law of homicide would be dealt with as follows. First, no distinctions would be drawn between culpable and non-culpable homicide. To cause another person's death would always be an offence if done intentionally, recklessly or with criminal negligence, in the absence of a lawful excuse or justification. Such excuses and justifications are set out in the General Part.

Second, no special sections on duties would be incorporated in the homicide provisions. Instead they would be located in the General Part. They would, we envisage, be very similar to the present provisions.

Third, no special causation sections would be incorporated in the homicide provisions. Instead a general causation rule would be included in the General Part. This would focus on the expectedness or unexpectedness of intervening acts and occurrences as outlined above.

There should be no reference in the *Code* to the irrelevance of the victim's consent.

The definition of death, it is envisaged, would appear in the *Interpretation Act*.

Accordingly, the homicide provisions could then be re-drafted as follows.

Suggested Draft Homicide Chapter

Homicide

Definition

1. For the purpose of the following sections the words “another” and “some other” apply only to persons already born.

Definition

2. In this context “born” means having completely proceeded in a living state from the body of the mother.

Intentional first degree

3. Everyone commits intentional homicide in the first degree who kills another meaning to kill a person other than himself (or knowing for virtually certain that his conduct will do so) and in so doing deliberately subordinates the intended victim’s life to his own purpose.

Intentional second degree

4. Everyone commits intentional homicide in the second degree who kills another meaning to kill a person other than himself (or knowing for virtually certain that his conduct will do so).

Reckless homicide

5. Everyone commits reckless homicide who kills another through knowingly exposing a person other than himself to a substantial and socially unacceptable risk of death.

Penalties.

Intentional first degree

6. (1) Everyone who commits intentional homicide in the first degree is liable to a minimum penalty of imprisonment for and a maximum penalty of imprisonment for

Intentional
second degree

(2) Everyone who commits intentional homicide in the second degree is liable to a maximum penalty of imprisonment for

Reckless
homicide

(3) Everyone who commits reckless homicide is liable to a maximum penalty of imprisonment for

Commentary

Section 1

This section restricts homicide to the same extent as is done by the present *Code* but more straightforwardly.

Section 2

“born” is given its common law definition, which is in fact the basis for subsection 206(1) of the present *Code*.

Sections 3 and 4

“*meaning*” is taken from the present *Code* and applies to direct intent.

“*knowing for virtually certain ...*” applies to cases of indirect intent: for example, D destroys an aircraft, not in order to kill those on it, but to defraud his insurance, but he knows that the destruction will cause their deaths.

“*to kill a person other than himself.*” On the one hand, the death intended must be that of some person other than the offender himself, for suicide is no longer a crime. On the other hand, the death intended need not be that of the actual victim. The phrasing in the section, however, retains the transferred malice principle presently spelled out in paragraph 212(b). It is intended that reckless homicide will be an included offence to a charge of murder. This has not been drafted here. Rather, it has been left for the moment as being a matter of procedure.

Section 5

“knowingly.” This entails a subjective requirement. The offender himself must know of the risk being disregarded; he must know that there is a risk, that it is a risk of death and that it is one he is disregarding. Given, however, the impossibility of seeing into another person’s mind and so of knowing for certain what was known to any particular offender, the trier of fact may reasonably infer (in the absence of any admission by the offender himself) that a risk was known to him if it would have been known to any ordinary person in his position. If an ordinary person would have known of it, then surely the defendant *must* have known of it.

There are then four possible situations:

- (1) The offender knew of the risk — he admits as much. There is a clear case of subjective recklessness.
- (2) The offender claims not to have known of the risk and the trier of fact is left in reasonable doubt on the question. Here the Crown cannot satisfy the legal burden of proving subjective recklessness.
- (3) The offender claims not to have known of the risk but because any ordinary person in his position would have known of it, the trier of fact infers that he too knew of it. Here is a case of subjective recklessness inferred from objective evidentiary criteria.
- (4) The offender claims not to have known of the risk and the trier of fact concludes that this lack of knowledge could only arise from the offender’s deliberate refusal to inform himself. In this situation wilful blindness qualifies as knowledge — (see Working Paper 29, *The General Part*, section 9 on Mistake of Fact). Here, then, is a case of imputed recklessness.

“*substantial and socially unacceptable risk*”. Three factors are relevant: (1) the social utility of the activity involving the risk, (2) the magnitude of the probability of the harm risked and (3) the gravity of the harm itself.

First, the social utility of the activity. Here two things can be said: (1) if the conduct involving the risk can be brought under a justification contained in the General Part or elsewhere, then taking the risk is justified; (2) if the activity in question is accepted as

having social utility, then again the risk-taking is justified. Which activities are accepted as having social utility, however, should not be set out in a criminal code. For one thing, the categories of such activities are too numerous for detailed specification in legislation; they include medical treatment, scientific experiment, manufacturing, transportation, sport and many other things. For another thing, the notion of what is sociably useful changes in a changing society and should not be frozen, therefore, in a code drawn up at one particular point in time.

Second, the magnitude of the probability of the harm risked. The greater the probability, the less permissible the risk, and vice versa. This of course will fall to be determined on the evidence.

Third and finally, the gravity of the harm risked. The graver the harm, the less permissible the risk, and vice versa. So a high degree of risk of minor harm may be as permissible or impermissible as a lower degree of risk of major harm — slight risk of serious harm may be as impermissible as serious risk of slight harm. Here, however, the risk is death, which is obviously a serious harm.

Endnotes

1. George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), at 341.
2. See English statutes: *The Homicide Act, 1957*, c. 11, s. 5 to 12; *Murder (Abolition of Death Penalty) Act 1965*, c. 71, s. 21; See Canadian statutes: *An Act respecting the Criminal Law 1953-54*, c. 51 s. 206; *Criminal Law Amendment Act (No. 2), 1976*, S.C. 1974-75-76, vol. II, c. 105, s. 5.
3. Turner, "The Mental Element in Crimes at Common Law," in *Modern Approach to Criminal Law* (L. Radzinowicz and J. W. C. Turner, eds., 1948).
4. Law Reform Commission of Canada, *The General Part: Liability and Defences* [Working Paper 29] (Ottawa: Supply and Services, 1982), 22-26.
5. In fact, many cases of homicide involve the legal rules of participation. The Law Reform Commission is presently undertaking a study on the subject of secondary liability.
6. These defences are dealt with in Working Paper 29, *supra*, note 4. Their special relevance to the present topic, self-defense, is discussed in the text on pages 70-71; and provocation is discussed on pages 72-74.
7. See J. C. Smith and Brian Hogan, *Criminal Law*, 3rd ed. (London: Butterworths, 1973); Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769); Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883, reprinted New York: Burt, 1964), vol. 3: *Russell on Crime*, 12th ed., by J. W. Cecil Turner (London: Stevens, 1964), vol.1.
8. For more details on the subject of homicide in common law see: Stephen, *supra*, note 7. *Kenny's Outlines of Criminal Law*, 19th ed. by J. W. Cecil Turner (Cambridge: Cambridge University Press,

1966), 130-98; Leon Radzinowicz, *A History of English Criminal Law from 1750* (London: Stevens, 1948), vol. 1, (1956) vol. 2.

9. Stephen, *id.*, 40.
10. *Id.*, 40-41.
11. *Id.*, at 41.
12. *Id.*, at 44.
13. *Id.*, 44.
14. *Id.*, at 44.
15. *Id.*, at 80.
16. Blackstone, *supra*, note 7, vol. 4, 190-92.
17. *Id.*, at 192.
18. Smith and Hogan, *supra*, note 7, 245-59.
19. *An Act Respecting the Criminal Law* (1892), 55 & 56 Vict., c. 29.
20. Stephen, *supra*, note 7, at 300. For Stephen:

[T]he *India Penal Code* may be described as the Criminal Law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India.
21. Friedland, "R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981), 1 *Oxford Journal of Legal Studies* 307, pages 334, and 337-338.

The Jamaica Legislative Council passed both the Codes of Criminal Law and the Code of Procedure (without any opposition), as requested by the Colonial Office. Jamaica telegraphed the Colonial Office on January 21, 1879: "Two codes through Committee." But they were never brought into force in Jamaica. This required the approval of the Colonial Office and the Colonial Office was starting to get cold feet.

The Colonial Office had greater success in other West Indian Colonies. The Code was brought into force in British

Honduras, and later in Tobago. Then St. Lucia's Chief Justice prepared a Code for that Island based partly on Wright's and partly on the Commissioners' Code, apparently taking the view, perhaps influenced by events in Jamaica, that "it may be better to follow rather than to lead 'the Mother Country'." But the Colonial Office took a firm line, Lord Kimberley sending a dispatch stating: "I request therefore that, unless you see any strong objection, you will cause a draft Ordinance (to be drawn in the form of the British Honduras Criminal Code)." St. Lucia complied with this request and, when the Chief Justice was later transferred to British Guiana, Wright's Code was adopted there as well.

The Jamaica Code was adopted in the Gold Coast in 1892, but, as it turned out, nowhere else in Africa.

22. Cross, "The Making of English Criminal Law: 6 Sir James Fitzjames Stephen," [1978] *Crim. L.R.* 652 (657).
23. *Crimes Act* (1961) (N.Z.), No. 43 as amended.
24. *Criminal Code Act* (1899) (Qld.), 63 Vict. #9, 1st schedule.
25. *Criminal Code Act Compilation Act* (1913) (W.A.), Appendix B, schedule.
26. *Criminal Code Act* (1924) (TAS.), 1st schedule.
27. *Supra*, note 19.
28. Stephen, *supra*, note 7, at 347.
29. Sir Stephen James Fitzjames, *A Digest of the Criminal Law (Crimes and Punishments)* (London: MacMillan, 1877). Stephen writes that:

In 1874 a Bill for the Codification of the Law of Homicide, drawn by me, was introduced into Parliament by the Recorder of London, and was referred to a Select Committee. The Appendix to the report of the Committee contains a memorandum by the Lord Chief Justice of England, in which he said: "I object to this bill, in the first place, as being a partial and imperfect attempt at codification."

Though a strong supporter of codification, and deeply regretting that the law of England should be suffered to remain in its present state of confusion, arising from its being partly unwritten and partly in statutes so imperfectly drawn as to be almost worse than unwritten law, I think that any attempt at

codification which is either partial or incomplete can only be productive of confusion and mischief. I object to the present bill as labouring under both these defects.

The law relating to homicide forms only part of the law relating to offences against the person, while this, again, forms only a part of the Criminal Law in general.

Many of the principles applicable to the branch now in question are common to the whole body of the Criminal Law. If introduced into the partial exposition of the law, they unnecessarily augment the bulk of the statute; if omitted, a question arises as to whether the omission is not intentional with a view to the exclusion of the principle or rule in the particular branch or department; and the more marked, of course, the effect of the omission.

30. *Id.*, at 83.
31. Stephen, *supra*, note 7, at 347.
32. *Id.*, at 347.
33. In the Report of the Royal Commission on the Revision of the Criminal Code, at page 6, the Commissioners state:

The *Criminal Code* was first enacted in 1892 and was founded largely upon the draft prepared in 1878 by the Commissioners appointed by the Imperial Government for the purpose of drafting a Code of the English criminal law, and also upon Stephen's Digest of the criminal law. Since that time amendments and additions have been at nearly every session of Parliament.
34. D. R. Stuart, *Canadian Criminal Law* (Toronto: Carswell, 1982), 451-452; *Royal Commission on Capital Punishment*, 1949-1953, paras. 155-62; *Martin's Criminal Code*, 1955, *infra*, note 35, 392-394.
35. Stuart, *Id.*, at 205; *Martin's Criminal Code*, 1955 (Toronto: Cartwright, 1955), at 370.
36. *An Act to Amend the Criminal Code (Capital Murder)* S.C. 1960-61, c. 44, s. 1.
37. *Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76, c. 105, ss. 4 and 5.

38. In the Study Paper: *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976), the Law Reform Commission of Canada states that "codification" is a confusing term because it often has been used to mean different things or to cover different situations. Sometimes it means the compilation or the rearrangement of disparate laws and regulations. Sometimes it denotes a basic piece of legislation as is the case in civil law countries. In Canada, the *Criminal Code*, the first written formulation of Canadian common law, is an example of the former type of "codification." And further on, at page 42, it mentions that:

[T]he new *Code* must be exhaustive in its statement of principles and rules of general application. It could contain a General Part, a Special Part, and basic principles of procedure, evidence and sentencing.

General principles belong in the General Part, as do rules of general application. The Special Part should contain the rules of special application, particularly those regarding offences, though not all existing rules have to be stated in the *Code* itself. Some of them can exist outside the *Code* as part of specific statutes, but will nevertheless be subject to the principles and rules of the *Code* unless a contrary intention is clearly expressed.

39. See *supra*, note 4, at 159-160.
40. Turner, *supra*, note 7, at 426-27.
41. Glanville Williams, *Textbook of Criminal Law* (London: Stevens and Sons, 1978). At page 325, Williams questions the requirement that the death must follow within a year and a day and replies that:

In origin the rule was perhaps dictated by the desire to limit the difficult problems of causation. When medical science was rudimentary, and life itself was far more uncertain than now, a victim who lingered for more than a year after the blow before dying could not be said with full assurance to have died as a result of the blow; at any rate, the rule saved awkward medical questions from arising. At the present day it is much less needed.

42. Stuart, *supra*, note 34. At page 228, Stuart mentions that:

[S]urely legislative intervention is needed to make homicide laws more simple, appropriate and workable. Our homicide laws are at present perhaps the most obscure, technical and unsatisfactory areas of the criminal law. The statutory defini-

tions are tortuous and elaborated by often contradictory judge-made law.

43. See *supra*, note 4, at 3-4, 159-60.
44. For example see: 1) Common nuisance — *Criminal Code*, R.S.C. 1970, c. C-34, s. 176; 2) Causing bodily harm by criminal negligence — *Criminal Code*, R.S.C. 1970, c. C-34, s. 204; 3) Causing unnecessary suffering — *Criminal Code*, R.S.C. 1970, c. C-34, s. 402.
45. For *Criminal Code*, R.S.C. 1970, c. C-34, s. 211, see: s. 223, S.C. (1892) c. 29; s. 255, S.C. (1906); s. 255, R.S.C. (1927); s. 200, S.C. c.(1953-54) c. 51; For subsection 205(5) of the *Criminal Code* see: s. 220, S.C. (1892) c. 29; s. 252, S.C. (1906); s. 252, R.S.C. (1927).
46. Smith and Hogan, *supra*, note 7, at 214. For *Criminal Code*, R.S.C. 1970, c. C-34, s. 209, see: s. 224, S.C. (1892) c. 29; s. 256, S.C. (1906); s. 256, R.S.C. (1927); s. 199, S.C. (1953-54) c. 51. For *Criminal Code*, R.S.C. 1970, c. C-34, s. 210, see: s. 222, S.C. (1892) c. 29; s. 254 (1906-1927); s. 198 S.C. (1953-54) c. 51.
47. For further details see: A. W. Mewett and M. Manning, *Criminal Law* (Toronto: Butterworths, 1978), 71-77, 451-7; Smith and Hogan, *supra*, note 7 at 214-33; Stuart, *supra*, note 34, at 98-100, 200-06; Turner, *supra*, note 7, at 399-427; Turner, *supra*, note 8, at 132-139, 188-194.
48. Omissions resulting in death can be regarded as either murder or manslaughter depending on the fault element. In practice, charges are rarely brought, and even if a charge of murder technically might succeed to the indictment is more likely to be for manslaughter. Criminal liability implies an *actus reus* on the part of the accused. Mere inactivity forms no ground for criminal liability. In criminal law, as in tort law, "not doing is no trespass." This general rule, however, admits of exceptions in that where such inactivity amounts to an omission, there may be liability. In this context "omission" means a failure to do what is required by law. Such a requirement may arise in three ways. The law may specifically provide that it is an offence to fail to do a certain act, *e.g.* to stop and identify oneself after a motor accident (*Criminal Code*, R.S.C. 1970, c. C-34, s. 233(2)). It may make a more general provision, *e.g.* that every one undertaking to perform an act must do it if its omission would endanger life (*Criminal Code*, R.S.C. 1970, c. C-34, ss. 199 and 202). Or it may, like common sense, regard a wrongful omission as a way of committing a wrongful act: *e.g.* in *Fagan v.*

Commissioner of Metropolitan Police, [1978] failure to remove a motor car from a police officer's foot when so requested was regarded as a positive act of keeping the car on the policeman's foot — an act amounting to assault.

49. Fitzgerald, *Acting and Refraining Analyses* (1967), vol. 27, 133-39.
50. Through the influence of Sir James Stephen, the Canadian *Criminal Code* limits criminal responsibility for omissions to cases where there is a legal, not merely a moral, duty to act.

Under our present *Code* there is no general section on criminal responsibility for omissions. The conventional approach is implicit in the specification in the *Code* of a number of duties to act. Bearing in mind section 8's prohibition against resorting to common law offences, it would seem criminal responsibility for omissions can only arise if: 1) the offence definition includes omissions and 2) there is a legal duty to act which can arise either by common law or by law: *R. v. Fortin* (1957), 121 C.C.C. 345 (N.B. C.A.); *R. v. Coyne*, 124 C.C.C. 176 (N.B. C.A.).

51. *Report of the Royal Commission on the Revision of the Criminal Code* (Ottawa: Queen's Printer, 1954), at page 12.
52. *R. v. Prue and Baril* (1979), 2 S.C.R. 547 (548), (1979) 46 C.C.C. (2d) 257.
53. See section 2 of the *Charter of Human Rights and Freedoms* (R.S.Q.) c. C-12 and *R. v. Alain Fortier*, November 17, 1980, File No. 500-01-00501-805, *Superior Court*, Longueuil, Qué.
54. *R. v. Boggs* (1981), 1 S.C.R. 49.
55. For example, see: *Criminal Code*, R.S.C. 1970, c. C-34, s. 392, defining setting a fire by negligence.
56. Williams, *supra*, note 41, at 233; Turner, *supra*, note 7, at 400-412.
57. *R. v. Aldergrove Competition Motorcycle Association and Levy* (1983), 69 C.C.C. (2d) 183.
58. For example, causing bodily harm by criminal negligence: *Criminal Code*, R.S.C. 1970, c. C-34, s. 202; see also for example, duty of care re explosive: *Criminal Code*, R.S.C. 1970, c. C-34, s. 78.

59. Law Reform Commission of Canada, *Euthanasia, Aiding Suicide and Cessation of Treatment* [Report 20] (Ottawa: Supply and Services, 1983), at p. 33.
60. For additional details or literature on the subject, refer to Mewett and Manning, *supra*, note 47, 71-77; Stuart, *supra*, note 34, 97-111; Williams, *supra*, note 41, 325-348; Williams, "Causation in Homicide" (1957), *Crim. L.R.* 431.
61. In terms of causation, the new intervening act (*novus actus interveniens*) of a responsible actor, that is, the intervention of a responsible actor who has full knowledge of what he is doing, and who is not subject to pressure, intimidation or mistake, will normally operate to relieve the accused of liability for a further consequence.
62. In England, the judges have considered the possibility of an intervening cause arising in the form of a medical maltreatment. In *Jordan* (1956), 40 Cr. App. R 152 (C.C.A.), the accused had been convicted of murder and sentenced to death upon evidence that he stabbed the victim in a café brawl. The conviction was set aside on appeal because, while the victim was in hospital after being stitched up and after his wounds had mainly healed, an antibiotic to which the victim was intolerant was administered and the victim died. In this case, the "act" of the accused had ceased to be a major factor, since the wounds had practically healed and they could not, therefore, be attributed to the stabbing. In contrast, in *Smith*, [1959] 2 Q.B. 35, the court upheld the accused's conviction for murder on the ground that the original cause was still continuing and was not interrupted by subsequent events — the accused had inflicted two bayonet wounds to the victim, but on the way to the hospital, he was dropped twice and at the hospital he was given the wrong treatment.

Had cases such as *Jordan* and *Smith* arisen in Canada, it seems that sections 207 and 208 of the *Criminal Code* would result in the accused being found to have caused the deaths of their respective victims.

63. This principle may not necessarily apply, however, where the unexpected event is not an intervening one but rather an already-existing condition. For example, in the classic "eggshell skull" case where D assaults V, who, unknown to D, has an eggshell skull. V falls and hits his head on the ground, and death results. There are two possible common sense conclusions: (1) D causes V's death because he takes his victim as he finds him, and (2) D does not

really cause V's death — death is due rather to V's unusual and unforeseen condition. In ordinary practice, then, and, it may be argued, also in our law, this kind of problem has no clear solution.

Similarly, this principle may not apply where the original act sets the stage for an unanticipated intervening event and both events contribute substantially to the cause of death. For example, D stabs V in the chest, seriously injuring him. V is placed in an ambulance to be rushed to the hospital for emergency care. On the way to the hospital, the ambulance collides with a truck and a shaft of steel is embedded in V's chest. V dies from a combination of shock and loss of blood. Even if the intervening event were not reasonably foreseeable, it may be argued that D's act is a cause of death because it remains a substantial contributing cause.

64. Law Reform Commission of Canada, *Criteria for the Determination of Death* [Report 15] (Ottawa: Supply and Services, 1981), 11-24. See *R. v. Kitchling and Adams* (1976), 6 W.W.R. 696 (Man. C.A.).
65. Coke, *The Third and Fourth Parts of the Institutes of the Laws of England* (London: Garland Publishing, 1979), at 47.
66. Suicide was, at common law, a felonious homicide and was often termed "self-murder." The law was changed by the *Suicide Act 1961* which enacted that "the rule of law whereby it is a crime for a person to commit suicide is hereby abrogated." Thus, it is no longer a crime to attempt suicide. Killing by consent, in contrast to abetting suicide, is still murder.
67. The crime of "attempt to commit suicide" contained in section 225 of the *Criminal Code* was repealed by the *Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13, s. 16.
68. The law regarding the "consent to death" is contained in *Criminal Code*, R.S.C. 1970, c. C-34, s. 14, which reads as follows:

No person is entitled to consent to have death inflicted upon him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted upon the person by whom consent is given. 1953-54, c. 51, s. 14.
69. The classic definition of homicide requires the victim to be *in rerum natura* or "in being" which means that he must be completely born. Williams, *supra*, note 41, 249.
70. Coke, *supra*, note 65, at 48.

71. *Mewett and Manning, supra*, note 47, 452-3.
72. Under section 251 of the *Criminal Code*, it is not the actual procuring of a miscarriage that is an offence, but the doing of an act or the use of some means with intent to procure the miscarriage. Whether the act or means are successful is not material: *Larivière v. Queen* (1957), 119 C.C.C. 160 (Qué. C.A.).
73. *R. v. Marsh* (Victoria County Court, No. 7, 1979, No. 52/79). Milward, J. held that a full-term fetus in the very process of being born was a "person" and thus anyone who caused the fetus' death by criminal negligence is liable to conviction under section 203 of the *Criminal Code*.
74. See *supra*, note 59, at 17-18.
75. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 205(4), 212 and 213.
76. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 205(4) and 217.
77. *Andrews v. D.P.P.* (1937), A.C. 576 (H.L.); *R. v. Bateman* (1925), 94 L.J.K.B. 791.
78. *O'Grady v. Sparling* (1960), S.C.R. 804, 33 C.R. 293, 128 C.C.C. 1, 33 W.W.R. 360, 25 D.L.R. (2d) 145.
79. See text, *supra*, pages 6-7.
80. See text, *supra*, page 6.
81. Turner, *supra*, note 7, at 471.
82. Stephen, *supra*, note 7, vol. 3, 313.
83. See *supra*, note 21, at 46.
84. Stephen, *supra*, note 7, at 80.
85. Turner, *supra*, note 7, at 476-477.
86. *Supra*, note 4.
87. See *supra*, note 79.
88. Hooper, "Some Anomalies and Developments in the Law of Homicide" (1967), 3 *U.B.C. Law Review* 55.

89. *Id.*, at 59-60.
90. *R. v. Vasil* (1978), 1 S.C.R. 469 (1981), 58 C.C.C. 97, 113.
91. *R. v. Tennant and Naccarato* (1975), 23 C.C.C. (2d) 80, 31 C.R.N.S. 1 (Ont. C.A.); *R. v. Quarranta* (1976), 24 C.C.C. 109.
92. See, *supra*, note 90.
93. Hooper, *supra*, note 88, at 62.
94. *Id.*, at 63-64.
95. See, *supra*, note 90, at 116-117.
96. Hooper, *supra*, note 88, at 60.
97. Uglow, "Implied Malice and the Homicide Act 1957" (1983), *Modern Law Review* 164 at 166.
98. Stuart, *supra*, note 34, 214-225; see *Hughes* (1942), S.C.R. 517, 78 C.C.C. 257.
99. Stephen, *supra*, note 7, at 83.
100. Hooper, *supra*, note 88, at 55-78.
101. Stephen, *supra*, note 7, at 40; also *supra*, notes 11 and 13.
102. Stuart, *supra*, note 34, at 195-198.
103. *Id.*, at 195-196.
104. See *supra*, note 4, s. 9 at 74.
105. Lanham, "Felony Murder — Ancient and Modern" (1983), 7 *Crim. L.J.* 91.
106. *Id.*, at 93.
107. *Id.*, at 94.
108. *Id.*, at 95-96.
109. *Id.*, at 101.

110. Stuart, *supra*, note 34, at 222-223.
111. See text, page 51 (Reckless Killing).
112. To be completely logical, and base guilt solely on the offender's state of mind, perhaps we should have one offence of "injuring" with different gradations depending on the state of mind with which the injury was inflicted.
113. Stuart, *supra*, note 34, at 223.
114. See *supra*, notes 11 and 13.
115. *Supra*, note 90.
116. Glanville Williams, *Criminal Law — The General Part*, 2nd ed., (London: Stevens and Sons, 1961), at 53.
117. Turner, *supra*, note 3, at 562.
118. *Id.*, at 582-598.
119. *R. v. Larkin* (1943), C.B. 174.
120. *R. v. Church* (1965), 2 All E.R. 72 (C.C.A.).
121. *R. v. Bateman*, *supra*, note 77.
122. *Andrews v. D.P.P.*, *supra*, note 77.
123. See *supra*, note 119.
124. See *supra*, note 120.
125. See *supra*, note 91; The approach taken in the *Tennant and Naccarato* case was followed by the Court in *R. v. Vasil*, *supra*, note 90.
126. *R. v. Cole*, 34 O.R. (2d) 416.
127. See *R. v. Maloney* (1976), 28 C.C.C. (2d) 323; *R. v. McNamara* (1980), 12 C.R. (32) 210; *R. v. Burkholder* (1977), 34 C.C.C. (2d) 214; *R. v. Donovan* (1934), 2 K.B. 498.
128. Burns, "An Aspect of Criminal Negligence or How the Minotaur Survived Theseus Who Became lost in the Labyrinth" (1970), 48

- Can. B. Rev.* 48-65; O'Hearn, "Criminal Negligence: An Analysis in Depth" (1964-65), 7 *Crim. L.Q.* 27; Stuart, "The Need to Codify Clear, Realistic and Honest Measures of *Mens Rea* and Negligence" (1973), 13 *Crim. L.Q.* 160-194.
129. Turner, *supra*, note 3; Glanville Williams, *The Mental Element in Crime* (Jerusalem: Magnes Press, 1965), 54-60.
 130. Fitzgerald, *Oxford Essays in Jurisprudence*, 1st ed. (Oxford: A. G. Guest, 1961), chap. 1; Williams, *supra*, note 41, at 68-72; White, "Intention, Purpose, Foresight and Desire" (1976), 92 *L.Q.R.* 569.
 131. Smith and Hogan, *supra*, note 7, 252-256; Stuart, *supra*, note 34, at 130-134; Williams, *supra*, note 41, at 68-72.
 132. *R. v. Lawrence* (1981), 1 All. E.R. 974.
 133. *R. v. Caldwell* (1981), 1 All. E.R. 961.
 134. *Smither v. The Queen* (1978), 1 S.C.R. 506; *Arthurs v. The Queen* (1972), 7 C.C.C. (2d) 438; *Leblanc v. The Queen* (1976), 29 C.C.C. (2d) 97.
 135. MacLeod and Martin, "Offences and Punishments under the New Criminal Code" (1955), 33 *Can. Bar. Rev.* 20 (29-32); Stuart, *supra*, note 34, at 130-140; *Rex v. Bateman*, *supra*, note 77.
 136. For a discussion of the question see: Mewett and Manning, *supra*, note 47, at 100-110; Jacques Fortin and Louise Viau, *Traité de droit pénal général* (Montréal: Thémis, 1982), 114-118.
 137. *Arthurs v. The Queen*, *supra*, note 134, at 442-447.
 138. *Andrews v. D.P.P.*, *supra*, note 77, at 582.
 139. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960), 105-141.
 140. The total number of deaths on roads for 1981 was 5,295. Statistics Canada, Health Division, *Causes of Death* (Cat. No. 84-203) (Ottawa: Supply and Services, 1982). The total number of Canadians who died in World War II was 42,011. (Average per year: 7,002). Walter S. Woods, *Rehabilitation (A Combined Operation)*, Department of Veterans Affairs (Ottawa: Queen's Printer, 1953).

141. *Criminal Code*, R.S.C. 1970, c. C-34, s. 203.
142. Smith and Hogan, *supra*, note 7, at 456-457.
143. *Criminal Law Amendment Act (1968-69)*, c. 38 s. 92.
144. *D.P.P. v. Majewsky* (1977), A.C. 443 (H.L.).
145. *R. v. Leary* (1978), 1 S.C.R. 29, 33 C.C.C. (2d) 473.
146. Law Reform Commissioner, Victoria, *Intoxication and Criminal Responsibility* (Issues Paper) (Victoria, South Melbourne: The Alcohol and Drug Foundation, 1983), at p. 6.
147. Whether there should be degrees of this crime is discussed beginning on page 67 in this text.
148. It is not the intention of the Law Reform Commission of Canada to study the death penalty in this Working Paper because it was abolished in 1976. For further details see the *Report* of the Royal Commission on Capital Punishment, 1949-1953 (London: HMSO, reprinted 1965), paras. 681-698, 790 (58-9); Morrison, "Criminal Homicide and the Death Penalty in Canada: Time for Reassessment and New Directions — Toward a Typology of Homicide" (1973), 15 *Can. J. Crim.* 367-396; Jayewardene, "Life or Death — Society's Reaction to Murder?" (1973), 15 *Can. J. Crim.* 265-273.
149. Of course, the punishment for high treason is also imprisonment for life: *Criminal Code*, R.S.C. 1970, c. C-34, s. 47.
150. *National Defence Act*, R.S.C. 1970, c. N-4. Section 63, Offences by commanders when in action; s. 64, Offences by any person in presence of enemy; s. 65, Offences related to security; s. 66, Offences related to prisoners of war; s. 68, Spies; s. 69, Mutiny with violence; s. 70, Mutiny without violence; s. 95, Offences in relation to convoys. Every person who is guilty of the above-cited offences, on conviction is liable to suffer death or a lesser punishment.
151. The process of sentencing requires a careful consideration of the aims of sentencing which can be summarized as follows: protection of society, punishment, deterrence, reformation and rehabilitation.

In order to determine how the aims of sentencing are to be applied in a particular case, the court must consider the relevant factors or circumstances. The most important factors are: the seriousness of

the offence, the age of the accused, his prior criminal record and sentences imposed by other courts in similar cases, and finally, the risk that the accused will commit another serious crime during his sentence unless he is imprisoned.

Before sentencing, the court can consider various types of punishment, *i.e.*, absolute and conditional discharge, probation, suspended sentence, intermittent sentence, or imprisonment. The court has some discretion to fine in lieu of other punishment: *Criminal Code*, R.S.C. 1970, c. C-34, ss. 646(1) and (2).

If an accused is convicted of an indictable offence punishable by imprisonment for five years or less, and for which no minimum term of imprisonment is provided, he may be fined in addition to, or in lieu of, any other *punishment*. If a minimum term of imprisonment is prescribed, he may be fined in addition to, but not in lieu of, imprisonment: *Criminal Code*, R.S.C. 1970, c. C-34, s. 646 (1).

If an accused is convicted of an indictable offence punishable with imprisonment for more than five years, he may be fined in addition to, but not in lieu of, any other *punishment*: *Criminal Code*, R.S.C. 1970, c. C-34, s. 646 (2).

152. *The Homicide Act*, 1957, c. 11, s. 5; *Murder (Abolition of Death Penalty) Act* 1965, c. 71.
153. *An Act to Amend the Criminal Code*, S.C. 1967-68, 16-17 Eliz. II, c. 15.
154. *Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76, vol. 2, c. 105, ss. 4 and 5.
155. *For first degree murder*, the accused will be sentenced immediately to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentences: *Criminal Code*, R.S.C. 1970, c. C-34, s. 669(a).

For second degree murder, before discharging the jury, the judge must put to them the question in section 670 of the *Code*: "Do you wish to make any recommendation with respect to the number of years that he must serve before he is eligible for release on parole?" The decision whether the minimum period of non-eligibility for parole is to be increased must, however, be made by the trial judge. In arriving at that decision, the judge is to have regard to (1) the character of the accused, (2) the nature of the offence, (3) the

circumstances surrounding the commission of the offence, and (4) any recommendation of the jury: *Criminal Code*, R.S.C. 1970, c. C-34, s. 671.

In imposing sentence, the trial judge will sentence the accused to imprisonment for life without eligibility for parole until he has served at least ten years of his sentence or such greater number of years, not exceeding twenty-five, as the judge sees fit to impose: *Criminal Code*, R.S.C. 1970, c. C-34, s. 669(b).

An application for judicial review to determine whether the accused's number of years of imprisonment without eligibility for parole ought to be reduced can be made where the accused has served at least fifteen years of his sentence a) in the case of an accused who has been convicted of first degree murder, b) in the case of an accused convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until he has served more than fifteen years of his sentence.

156. See text, *supra*, pages 55-57.
157. See text, *supra*, pages 53-57.
158. See *supra*, note 4, s. 3, pp. 26-27.
159. See Smith and Hogan, *supra*, note 7, at 205.
160. *Criminal Code*, R.S.C. 1970, c. C-34, s. 669(b).
161. Report of the Royal Commission on Capital Punishment, 1949-1953, *supra*, note 148.
162. Fortin and Viau, *supra*, note 136, at 262-264; Stuart, *supra*, note 34, at 447-451; Gold, "Manslaughter and Excessive Self-Defence" (1975), 28 C.R.N.S. 265.
163. Smith and Hogan, *supra*, note 7, at 330.
164. *R. v. Brisson* (1982), 29 C.R. (3d) 289 (341); (1982), 69 C.C.C. (2d) 97.
165. See *supra*, note 4, at 101-102.
166. *R. v. Howes* (1958), 100 C.L.R. 448 (Aust. H.C.); *Viro v. R.* (1978), 52 A.L.J. 416; 18 A.L.R. 257 (H.C.).

167. *Supra*, note 1, at 857-875.
168. *Supra*, note 164.
169. See *supra*, note 4, at 103.
170. See for further details: Bayne, "Automatism and Provocation in Canadian Case Law" (1975), 31 *C.R.N.S.* 257; Bennum, "Provocation — The New Law" (1978), 41 *M.L.R.* 722; Berger, "Provocation and the Involuntary Act" (1967), 12 *McGill L.J.* 303; Fortin and Viau, *supra*, note 136, at 312-317; Marc E. Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978), 171-177; Smith and Hogan, *supra*, note 7, at 235-245; Stuart, *supra*, note 34, at 434-445; Williams, *supra*, note 41, at 47-53.
171. At common law, provocation may reduce murder to manslaughter provided that there was an appropriate provocation which caused the prisoner to lose his self-control: see *R. v. Hayward* (1833), 6 C.P. 157. In the case of lesser crimes, provocation does not alter the nature of the offence at all, although it is taken into account in sentencing: see *Regina v. Cunningham* (1959), 1 Q.B. 288.
172. In Canada provocation as a defence to a charge of murder is governed by *Criminal Code*, R.S.C. 1970, c. C-34, s. 215 (1)(2) and (3). In the case of *R. v. Campbell* (1978), 38 C.C.C. (2d) 6 (Ont. C.A.), the Court confirmed that the defence of provocation is not available for any offence other than murder. Mr. Justice Martin, delivering the judgment of the Court, held that the defence of provocation could not reduce a charge of attempted murder to one of attempted manslaughter. In *R. v. Doucette, Dongen and McNutt* (1961), 129 C.C.C. 102 (Ont. C.A.), the Court held that provocation would not constitute a defence to a charge of assault, although it should be considered in the mitigation of the offence, and would have a bearing on the sentence or penalty to be imposed.

Not every provocation will partially excuse, only that which is carefully circumscribed by section 215 as provocation under which an ordinary person is temporarily deprived of the power of self-control: see *Parnerkar v. The Queen* (1973), 21 C.R.N.S. 129; *The Queen v. Faid* (1983), 33 C.R. (3d) 1.
173. In Working Paper 29, *supra*, note 4, the Law Reform Commission of Canada recognizes that there must be a right of self-defence against illegal arrest made knowingly, for this is simply an assault.
174. In *Bedder v. D.P.P.* (1954), 2 All. E.R. 801, it was held that the test is the effect of the alleged provocation on the mind of a

reasonable man; this hypothetical reasonable man does not have to be invested with the physical peculiarities of the accused. Williams, in "Provocation and the Reasonable Man" (1954), *Crim. L.R.* 740 at 750, wrote that it was "difficult to see how this test, intelligently understood and applied, can ever give rise to an acquittal of murder." However, in *D.P.P. v. Camplin* (1978), 2 All E.R. 168, the House of Lords declared that they were not bound by the *Bedder* ruling. The decisive factor seemed to be that section 3 of the *Homicide Act* of 1957 (5 & 6 Eliz. II, c. 11) now allows words to be evidence of provocation.

175. *R. v. Wright* (1969), S.C.R. 335; (1969), 3 C.C.C. 258.
176. *R. v. Campbell* (1977), 38 C.C.C. (2d) 6. The Court held that there may be cases where the conduct of the victim, amounting to provocation, produces in the accused a state of excitement, anger or disturbance as a result of which he might not contemplate the consequences of his acts and might not, in fact, intend to bring about those consequences. In such cases provocation operates not so much as a defence. Instead, the victim's conduct is a relevant piece of evidence on the issue of the accused's intent.
177. For more on this subject see: *Martin's Criminal Code*, 1955, *supra*, note 35, 392-394; Royal Commission on Capital Punishment, 1949-1953, *Report* (London: HMSO, 1953), paras. 155-162; Stuart, *supra*, note 34, at 451; Nigel Walker, *Crime and Insanity in England*, vol. 1, *The Historical Perspective* (Edinburgh: University Press, 1968), 125-137; Glanville Williams, *The Sanctity of Life and the Criminal Law* (London: Faber and Faber, 1958), 25-42.
178. *Criminal Code*, R.S.C. 1970, c. C-34, s. 220.
179. *The Infanticide Act*, 1938 (U.K.) section 1.(1):

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of [an offence], to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

180. Walker, *supra*, note 177, at 125; Williams, *supra*, note 41, at 39; Smith and Hogan, *supra*, note 7, at 338-339; Stuart, *supra*, note 34, at 452.
181. Mewett and Manning, *supra*, note 47, at 465-466.
182. *R. v. Marchello* (1951), O.W.N. 316 (319); *Martin's Criminal Code*, 1955, *supra*, note 35, 394.
183. Walker, *supra*, note 177, at 125.
184. See *supra*, note 180.
185. Smith and Hogan, *supra*, note 7, at 338.
186. In cases of murder, the courts have allowed mental illness or mental disorder, though falling short of proof of insanity, to negative intent to kill and so to reduce murder to manslaughter. See: *R. v. Blackmore* (1967), 1 C.R.N.S. 286 (N.S. C.A.); *R. v. Mulligan* (1974), 18 C.C.C. (2d) 270 (Ont. C.A.), affirmed [1977] 1 S.C.R. 612; *R. v. Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.); *R. v. Meloche*, [1975] C.A. 558 (Qué.). More recently, the courts allowed insanity to operate to negative any specific intent required by the definition of an offence. See: *MacDonald v. R.*, [1977] 2 S.C.R. 665; *Rabeay v. R.*, [1980] 2 S.C.R. 513, affirming (1977), 37 C.C.C. (2d) 461 (Ont. C.A.).
187. See Stuart, *supra*, note 34, at 337-342 for an analysis of this trend in the case-law.
188. These statistics are all taken from *Crime and Traffic Enforcement Statistics* (Cat. No. 85-205) and *Homicide Statistics* (Cat. No. 85-209) both published by Statistics Canada.
189. *Criminal Code*, R.S.C. 1970, c. C-34, s. 197.
190. Select Committee of the House of Commons 1874, (315) IX- 47 1 p.r.
191. *R. v. Farrant* (1983), 4 C.C.C. (3d) 354.
192. The phrase "planned and deliberate" was used in 1961 to define capital murder. It was interpreted strictly by the Supreme Court of Canada in *More v. R.* (1963), S.C.R. 522. For the majority, Mr. Justice Cartwright held that "planned and deliberate" connoted separate elements both of which had to be proved. Premeditation

was required for both. The word "deliberate" meant "considered, not impulsive." Interpreting "planned and deliberate" for the purpose of first degree murder, our courts have been content to apply the majority ruling in *More*. See: *R. v. Smith* (1980), 51 C.C.C. 381; *Charest v. Beaudoin* (1981), 18 C.R. (3d) 58.

The definition of "planned" by Mr. Justice Gale was as follows in *Widdifield* (1963-64), 6 C.L.Q. 152:

I think that in the *Code* "planned" is to be assigned, I think, its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean, of course, to say that the plan need be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate.

This was approved in *R. v. Reynolds* (1979), 44 C.C.C. (2d) 129.

193. Perkins, an American commentator in an article entitled "The Law of Homicide" (1945-46), 36 *J. of Crim. L., Crim. and Police Science* 391, at 398, wryly laments that the ancient "malice aforethought" hallmark of murder had been reduced by some courts to a virtual requirement that it must not be afterthought.
194. *The Queen v. Mitchell* (1964), S.C.R. 471 (474). The respondent was convicted of capital murder of his brother and there was evidence that on the day in question the brothers had been drinking and had quarrelled over a girl.

The court had to consider whether the trial judge erred in failing to point out to the jury that deliberation might have been negated by provocation and drunkenness. The Court followed the judgments it had rendered in *More v. The Queen* (1963), S.C.R. 522 and in *McMartin v. The Queen* (1964), S.C.R. 484, and stated:

I am of the opinion that the judgments in these two cases have as their *ratio decidendi* the principle that in determining whether the accused committed the crime of capital murder in that it was "planned and deliberate on the part of such person" the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind as affected by either real or even imagined insults and provoking actions of the victim and by the accused's consumption of alcohol. There is no doubt this is a finding of fact. The questions which the jury must decide beyond a reasonable doubt before they may convict the accused of capital murder

under the relevant subsection, section 202A (2)(a), are: Was the murder which he committed planned and was it deliberate? I separate the jury's problem in that form because I am in complete agreement with Whittaker J.A. when he said: "It is possible to imagine a murder to some degree planned and yet not deliberate." Therefore, to determine whether the charge to the jury delivered by the learned trial judge was adequate in submitting to them the issue of planning and deliberation the charge must be examined with some care.

It should be stated at once that the charge so far as it dealt with provocation under s. 203 and with drunkenness as it affects murder under the doctrine in *Director of Public Prosecutions v. Beard* was, with respect, excellent. That, however, I believe, is not sufficient. The jury should have been instructed upon those topics when the trial judge was dealing with murder, whether capital or non-capital, under s. 201. Then, with clear indication that he was passing on to the other and important matter of the additional ingredient needed to establish capital murder under s. 202A (2)(a), the learned trial judge should have brought the jury's attention to all relevant evidence to determine whether the murder was planned and deliberate on the part of the accused, and therefore, capital murder.

The court held that the appeal should be dismissed.

195. *Criminal Code*, R.S.C. 1970, c. C-34, s. 214.(5) provides:

Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

- (a) section 76.1 (hijacking an aircraft);
- (b) section 246.1 (sexual assault);
- (c) section 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (d) section 246.3 (aggravated sexual assault); or
- (e) section 247 (kidnapping and forcible confinement).

196. *Criminal Code*, R.S.C. 1970, c. C-34, s. 213 provides:

Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an

aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), section 246 (assaulting a peace officer), section 246.1 (sexual assault), 246.2 (sexual assault with a weapon threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being....

197. See *supra*, note 191.

198. The Law Reform Commission of Canada, *The Jury*, [Report 16] (Ottawa: Supply and Services, 1982): draft legislation section 26(1) dealing with the judge's instructions to the jury, suggests that:

As part of his instructions on the law, the judge shall instruct the jury that, in the event of a verdict of guilty, the jury has no prerogative to make any recommendation either as to clemency or as to the severity of the sentence.

This recommendation entails the repeal of the present section 670 of the *Criminal Code*, which provides that where the jury finds an accused guilty of second degree murder, the trial judge shall, before discharging the jury, invite them to make a recommendation regarding eligibility for release on parole. The Report continues on page 70:

The reasons for this departure are several. First, the jury's principal role is to arrive at a verdict of guilt or innocence by weighing the evidence placed before it at trial. It is no part of that role to determine what sentence is appropriate in the event of conviction. To permit the jury to make a recommendation as to clemency or severity of sentence is to confuse the proper role of the jury with the role of the trial judge, whose exclusive responsibility it is to pronounce sentence upon a finding of guilt. Second, the Commission believes that permitting the jury to recommend clemency may compromise the integrity of its verdict. The promise of a collective plea for clemency could well operate as an effective, but unconscionable, inducement to persuade a reluctant juror to vote with the majority. A recommendation for clemency which the trial judge is under no obligation to accept should play no part in a jury's deliberations about guilt or innocence. Third, because the jury will ordinarily be familiar with the facts of the

particular case before them, they will not be cognizant of the several different considerations that bear on sentence — the accused's prior criminal record, if any; his reputation in the community; his antecedent and present circumstances... .

199. See *supra*, note 145.