Reforming Homicide Law to Separate Guilt from Sentence: An International Gloss

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This article argues that Canadian homicide law is handicapped by trying to combine two contradictory approaches. In general, Canadian criminal law adopts the approach of setting out relatively rigid rules for determining guilt or innocence. That is, the Criminal Code sets out particular offences, and if the elements of an offence can be proven, then failing the presence of any defence (also relatively rigidly defined), any accused will be found guilty. The question of guilt or innocence is not individualized to the circumstances of the offender. On the other hand, sentencing decisions adopt exactly the opposite approach, and are made on the assumption that it is necessary to individualize each separate decision.

Because first- and second-degree murder have mandatory sentences but the sentencing for manslaughter is flexible, the "guilt or innocence" question is simultaneously a sentencing decision. This approach therefore commits us to doing simultaneously two tasks to which we normally take diametrically opposed approaches. It is no surprise that difficulties should arise.

Drawing on the experience of a number of other countries with homicide law, defences, and sentencing, the author argues that the relatively simple step of abolishing the mandatory sentence for second-degree murder would resolve a number of inconsistencies and inelegancies in our law.

L’auteur de cet article prétend que le droit canadien est desservi par la cohabitation de deux approches contradictoires en matière d’homicide. Généralement, le droit criminel canadien énonce des règles relativement rigides en vue de la détermination de l’innocence ou de la culpabilité d’un individu. En d’autres mots, le Code criminel prévoit des infractions particulières et, en l’absence d’une défense (aussi définie de façon rigide), tout accusé sera déclaré coupable s’il est possible de prouver les éléments d’une infraction. Ainsi, la détermination de l’innocence ou de la culpabilité d’un

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individu n’est pas une question qui est adaptée à la réalité de chaque individu. En revanche, la détermination de la peine est un exercice qui requiert l’application du principe inverse fondé sur la nécessité d’adapter chaque décision à chaque situation.

Comme le meurtre au premier degré et le meurtre au second degré sont des infractions passibles de peines automatiques, contrairement à l’homicide involontaire coupable où une plus grande marge de manœuvre est accordée au moment de la détermination de la peine, la détermination de la culpabilité ou de l’innocence de l’individu et la détermination de la peine sont simultanées. Cette approche nous contraint ainsi à accomplir simultanément deux opérations qui, normalement, sont fondées sur deux principes contradictoires. Il n’est pas surprenant que des difficultés se présentent.

En s’inspirant de l’expérience d’un certain nombre de pays eu égard au droit en matière d’homicide, aux défenses et à la détermination de la peine, l’auteur fait valoir que le simple fait d’abolir l’imposition d’une peine automatique en matière de meurtre au second degré parviendrait à résoudre un certain nombre d’incongruités et de contradictions dans notre droit.

Introduction

It is commonplace to suggest that the Criminal Code is desperately in need of a complete review, ranging over the inclusion of a general part, the elimination of anomalous and anachronistic offences, introducing new provisions to deal properly with changing social situations, and sorting out the nearly innumerable inconsistencies and confusions which have arisen through near-constant piecemeal amendment to a statute which has not undergone a comprehensive overhaul in over half a century.1 Even if this need is a more general one, however, there is an argument for looking in particular at the murder and manslaughter provisions in the Criminal Code and the issues related to them. Those provisions remain in large measure as they were first introduced in 1892, subject to a few ad hoc legislative revisions and of course to the Charter-based elimination of the constructive murder provisions. Wrapped up with these provisions are the self-defence provisions in the Code, which various courts have explicitly called upon Parliament to rewrite, and which have been characterized by the Supreme Court of Canada as “unbelievably confusing.”2 Also intimately connected with the homicide provisions is the partial defence of provocation, which is


increasingly anachronistic in the more and more multi-cultural society that Canada has become. Courts more frequently have begun to hold, faced with cross-cultural attempts to rely on this defence, that "[t]he ‘ordinary person’ should not be fixed with beliefs that are irreconcilable with fundamental Canadian values." One is forced thereby to consider exactly which reasons for flying into a homicidal rage could be reconciled with such values.

The justification for reviewing this set of provisions is therefore relatively clear. Furthermore, a useful tool for undertaking such a review, allowing reliance on the experience in a number of other countries, arises through recent work of the Law Commission of England and Wales. That Commission has recently proposed significant restructuring of their law of murder, and in the course of doing so gathered information on the approaches now taken in many countries, including France, Germany, Canada, the United States, Australia, and others. The experience of other countries provides a number of lessons, both negative and positive.

It will be argued in this paper that fundamentally, the problems and confusions which arise in Canadian homicide law result from the sentences associated with conviction: near-complete flexibility in the case of manslaughter, contrasted to mandatory life sentences for first- and second-degree murder accompanied by mandatory non-eligibility for parole periods of ten and twenty-five years respectively. This approach arises first from the division of murder into capital and non-capital murder in 1961 and then from the abolition of the death penalty in 1976. However, it is an attempt to do simultaneously two things: determine guilt and decide sentence. In the abstract, there might be nothing wrong with combining these tasks. As a matter of fact in Canada today, however, it is a problem. In essence, we have a normal approach to determining guilt, which serves us well enough. We also have a normal approach to determining sentence, which equally serves us well enough. Those two approaches, however, are contradictory to one another. It is hardly surprising, therefore, that we should run into difficulties if we try to combine both into a single step.

The fundamental principle which governs our approach to determining guilt is the rule of law. This is reflected, for example, in section 9 of the Code, eliminating common law crime. It is a principle of fundamental justice


6 With the exception, of course, of criminal contempt of court. Any significance of this exception was essentially eliminated when the Court spelled out quite precisely the elements of that offence: U.N.A. v. Alberta (Attorney General), [1992] 1 S.C.R. 901, 1992 CarswellAlta 465, 1992 CarswellAlta 10, C.R. (4th) 1, 71 C.C.C. (3d) 225 (S.C.C.)
that the law should be fixed, pre-determined and accessible and understandable by the public. The rule of law requires that “the law must be accessible and so far as possible intelligible, clear and predictable.” Whatever ambiguities might actually arise in practice, our theoretical ideal—our intended approach to determining questions of guilt—is that a “yes/no” answer ought to be available in advance:

The divergence between the law on the books and the law as applied—and the uncertainty and unpredictability that result—exacts a price paid in the coin of injustice....it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly—a fundamental tenet of the rule of law.  

So in deciding whether particular behaviour is or is not criminal, we assume that the same rules should be consistently applied every time, to every case. We should not decide, for reasons outside the rules, that this person is guilty but that person is not. We do not individualise questions of guilt or innocence in that way.

On the other hand making individualized decisions is exactly what we normally do when, after guilt has been determined, we approach the question of sentence. At that stage, for the most part we abandon any notion that the same sentence is always appropriate, and rather treat it as an exercise unique to that case. What is appropriate for one offender and one set of facts might be entirely wrong for another. As the Court has recently observed:

Far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge’s competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process.  

Hence, our current approach to homicide law combines two opposite approaches. In pronouncing an accused guilty of first- or second-degree murder, the judge or jury is applying the set of relatively rigid “guilt” rules that allow for little consideration of individualized factors. That same pronouncement, however, largely ousts the individualized sentencing exercising that would otherwise have allowed consideration of the different nature of the planning and deliberation that goes into in a contract killing on the one hand and a mutual suicide pact on the other. As a result, we have sometimes attempted to reform those more rigid rules to accomplish the goal of achieving greater flexibility. The result is a situation which is unsatisfactory from

7 UNA, supra note 6.
9 Ferguson, supra note 8, at 72.
10 R. c. M. (L.), 2008 SCC 31, 56 C.R. (6th) 278, 231 C.C.C. (3d) 310, 2008 CarswellQue 4418, 2008 CarswellQue 4417 (S.C.C.) at 17. The greater reliance on mandatory minimum sentences in the Code, for example in the case of offences involving firearms, is of course an exception in part, but does not change the general rule.
either perspective. The relatively rigid rules are the right approach at one stage, while the flexibility is right at another. To try to merge and amalgamate the two, to a certain extent, means that we are not taking the right approach at either stage. Accordingly, it is argued here, abandoning a mandatory sentence, at least for second-degree murder, would appropriately split the two steps and create an approach more likely to achieve just results.

Of course difficulties can arise with both stages even considered individually. Finding a set of rules that properly reflects our moral intuition on what should or should not be called murder is by no means a simple task. There is real scope for disagreement over not only exactly what kind of behaviour and what mental state should be called murder, but even the proper approach for answering that question. As Jeremy Horder observes:

One might argue that criminal law statutes stand more plausibly to be judged (along with standards such as their fitness for purpose) by the moral integrity of the wrongs they express than by whether 'the best brains of the legal profession' endorse them.\(^\text{11}\)

That issue is a difficult enough one when the only interest at stake is one of "fair labelling,"\(^\text{12}\) an issue of some concern to the stigma analysis adopted by the Court in its section 7 analysis of the murder provisions. Similarly, there is a great deal of scope for disagreement over the appropriate penalty even in murder cases. As the Latimer case showed, there is no general consensus in Canadian society that every intentional killing deserves even a ten-year mandatory period of parole ineligibility.\(^\text{13}\)

But if each of these issues is difficult enough on its own, that offers even more reason to treat them separately, rather than trying to answer both challenges at once.

Of course, this is a problem common to many countries. Some have adopted approaches similar to ours, and impose mandatory sentences in the case of particular homicide offences.\(^\text{14}\) Others have abandoned mandatory sentences, or have adopted a number of techniques making them less than mandatory in practice.\(^\text{15}\) Furthermore, various countries have adopted a wide variety of techniques simply to deal with the fair labelling and sentencing issues in their own right. It is therefore useful, as part of the argument here, to begin by discussing exactly what set of rules we have adopted in Canada on the fair labelling issue, and how they compare to the approaches in other countries. Following that we will turn to look at the interplay with defences, particularly the defence of provocation. Finally, I will argue in conclusion

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\(^{12}\) Stanley Yeo, "Fault for Homicide in Singapore" in Horder, supra note 4, at 214.


\(^{14}\) See for example chaps. 8 and 9 in Horder, supra note 4 dealing with Scotland or Singapore.

\(^{15}\) See for example chaps. 3 and 7 in Horder, supra note 4 dealing with France and Australia.
that abandoning a mandatory minimum sentence for second-degree murder would allow the resolution of a great number of difficulties.

The Structure of the Homicide Provisions

The homicide provisions in the Criminal Code have quite a complex structure. In fairness, it is clear they could never be simple and actually do the job we want them to do. On the other hand, it is equally clear that the current level of complexity is unnecessary. To see both these points, it is easiest to start from a simple model, and then see how it is inaccurate.

One can envision a simple model of the homicide provisions as a branching tree chart, with regular subdivisions to represent greater degrees of sophistication in how seriously we regard each new stage. Causing the death of another person by itself is not necessarily a crime at all: rather, it divides into the two categories of homicide and culpable homicide. Culpable homicide then further subdivides into two categories: manslaughter and murder. Finally, murder further subdivides into first-degree and second-degree murder.

Chart of Homicide Provisions

```
          causing death
           |
   _homicide_   |
       |         |
  culpable homicide  |
       |         |
  manslaughter     |
       |         |
   murder        |
       |         |
second degree    |
       |         |
first degree     |
```

Further, on a simple model it is relatively clear how one decides which branch on this chart to take. In each instance, adding a further element or elements is required to move one step to the right (and down). Homicide becomes culpable homicide by the addition of an unlawful act. Culpable homicide (manslaughter) becomes murder by the addition of intent to kill. Murder become first-degree murder by the addition of planning and deliberation.

As stated at the start, however, this chart presents a simple model which, while giving an accurate "broad brush" picture, is inaccurate in virtually all of its details. It is not, for example, merely the addition of an illegal act
which can turn homicide into culpable homicide: criminally negligent behaviour will also be sufficient, as would be causing the death through threats, fear of violence, or deception, or "by wilfully frightening that human being, in the case of a child or sick person."\textsuperscript{16} Culpable homicide does not actually divide into only manslaughter and murder, since a separate infanticide provision exists.\textsuperscript{17} It is not merely the addition of intent to kill the victim which turns manslaughter into murder: recklessness will also do, as will the transferred intent to kill another person, or the intent to commit a crime one knows is likely to cause death even in the absence of an intent to cause death.\textsuperscript{18} Finally, murder can be raised to first degree by many factors other than planning and deliberation. Contract killings, murders of a peace officer, and murders in the course of committing particular listed offences all fall within that category. Indeed, further additions continue to be made on an \textit{ad hoc} basis, so that it is also first-degree murder "where the act or omission constituting the offence also constitutes a terrorist activity," involves the use of explosives on behalf of a criminal organization, or occurs during an attempt to intimidate a justice system participant.

There is of course nothing objectionable in principle with making the chart more sophisticated: extra considerations are not always unnecessary complexity. If I intend to kill A but shoot and kill B by mistake, it does seems as though my intent to kill \textit{someone} outweighs the accidental aspect of what occurred. In that event allowing transferred intent to push my crime from manslaughter to murder probably matches most people's intuitions. That is, even if we are thinking only along "fair labelling" lines, there is a legitimate reason to make the chart more complex in this case. That is the point of having rules: to make them match as closely as possible society's moral sense of how seriously particular behaviour should be regarded. The same can be said of listing factors which turn murder into first-degree murder:

\begin{quote}
There is nothing intrinsically problematic about a catalogue of qualifying factors which identify killings which are typically more repulsive and serious than other intended killings, and the reason they are more serious.\textsuperscript{19}
\end{quote}

But if there is nothing in principle objectionable, of course, that is a long way from saying that the particular set of categories we have chosen to use is unambiguously the right one. International comparison is therefore particularly useful to allow us to see how other societies decide to draw the lines. Consider, for example, the approach in Germany to separating murder from other voluntary killings. They choose to single out, among others, murders committed from a lust for killing, in order to find sexual gratifica-

\textsuperscript{16} Section 222(5)(d).
\textsuperscript{17} Section 233.
\textsuperscript{18} Section 229(a)(ii), (b) and (c), respectively.
\textsuperscript{19} Antje du Bois-Pedain, "Intentional Killings: The German Law" in Horder, \textit{supra} note 4, at 74; list by author, chapter.
tion, or when it is motivated by greed "or by other despicable reasons."20 They also elevate murders committed "deviously" or "cruelly."21 Some of these categories overlap with ones used in Canada to elevate a murder to first degree: contract killings, for example, are motivated by greed, though obviously that category would include more than that. Some of these criteria, such as being committed cruelly, seem more immediately to attempt to invoke our moral sense directly. This approach can be appealing, but also carries drawbacks: deciding what counts as a "despicable" motive might be so open-ended a question as to be hard to reconcile with the rule of law.22

Similarly, consider the situation in Australia, where criminal law is a state matter and so there are a variety of approaches. All states there include intent to cause death as one of the ways of committing murder, as one would expect, but only six of the nine still call it murder where death is caused recklessly. Similarly seven of the nine include intent to cause grievous bodily harm,23 but only two of those seven are still willing to call it murder when there is merely recklessness over causing grievous bodily harm. France, in contrast, does not include reckless killings as murders.24 Germany to some extent does, but sets a deliberately high standard for when recklessness will be made out.25 Note that the Law Reform Commission of Canada recommended some years ago that reckless killings should be excluded from the definition of murder.26

Recognizing that there are different ways in which an intuitive sense of morality has been reflected in categorical rules must lead one to question the particular categories we have created. Is it really true, for example, that planning and deliberation is inevitably an indication of greater blameworthiness? Bois-Pedain, discussing German law, argues the contrary:

Some of the most heinous murders are not premeditated, but spontaneous...Conversely, some of the least serious killings are premeditated, and their perpetrators have spent a long time deliberating over the perceived need to kill (for instance killings motivated by compassion for suffering, or killing by individuals victimised through years of domestic abuse). A move away from the current, differentiated set of qualifying factors would not be a move in the right direction.27

20 Bois Pedain, supra note 19, at 67.
21 Bois Pedain, supra note 19, at 67. Note that there are other potentially elevating factors as well.
22 Bois-Pedain, supra note 19, notes that "[t]he degree of elasticity which inevitably results from this definition is indeed problematic, and the tensions arising from it have not been satisfactorily resolved." (68).
23 West Australia, uniquely in that country, creates the two separate offences of murder and wilful murder, depending on whether only bodily harm is intended.
24 JR Spencer, "Intentional Killings in French Law" in Horder, supra note 4, at 43.
25 Bois-Pedain, supra note 19, at 57.
26 Law Reform Commission, supra note 5, at 53.
27 Bois-Pedain, supra note 19, 74.
Similarly, is intention always the hallmark of greater blameworthiness, or can indifference to the result of death in some cases be more serious?\textsuperscript{28}

For that matter, even our fundamental three level structure - manslaughter, second-degree murder, and first-degree murder - can be seen as anomalous compared to many countries. Singapore distinguishes only murders and culpable homicides which are not murder.\textsuperscript{29} The Law Commission of England and Wales is currently proposing a move to three categories rather than two, but quite a different set of three. Under the proposals, first-degree murder would simply be intentional killings - primarily second-degree murder in Canada - while second-degree murders would include killings where the perpetrator intended serious injury, whether aware of a serious risk of causing death or not. In other countries, there are three categories, but only the “top of the line” is considered murder. For example, the German criterion discussed above of deviousness or lust for killing must be satisfied simply to make the crime one of murder, rather than a voluntary killing not classed as murder. Scotland seems to require not merely an intention to kill, but a “wicked intent” to do so.\textsuperscript{30} In France, murder is limited to intentional killings, with no “downgraded versions” as manslaughter.\textsuperscript{31} That is:

> the defendant who kills by acts that were intended to cause harm short of death does not commit a \textit{meurtre} (or, a fortiori, any of the aggravated versions of this offence); instead, he commits an aggravated version of one of the lesser offences against the person.

In this particular approach, it appears, France has adopted exactly the approach rejected by the Supreme Court of Canada in \textit{Creighton}:

> ...it might well shock the public’s conscience to convict a person who has killed another only of aggravated assault—the result of requiring foreseeability of death—on the sole basis that the risk of death was not reasonably foreseeable. The terrible consequence of death demands more. In short, the \textit{mens rea} requirement which the common law has adopted—foreseeability of harm—is entirely appropriate to the stigma associated with the offence of manslaughter.\textsuperscript{32}

So, the international comparison allows us to question whether, granting that we need to add sophistications to our simple structure in order to better match our intuitions, the particular additions we have made are the best ones.

\textsuperscript{28} See the discussion in Claire Finkelstein, “Patterns of Criminalisation in the US” in Horder, \textit{supra} note 4, at 102 (Finkelstein).

\textsuperscript{29} Yeo, \textit{supra} note 12, at 210.

\textsuperscript{30} “Seems to,” because Victor Tadros, “The Scots Law of Murder” in \textit{Horder}, note 4 notes at p. 189 that “[t]he \textit{mens rea} of murder in Scots law is in a chaotic state.”

\textsuperscript{31} Spencer, \textit{supra} note 24, at 42.

There is more to be said, however. Some of the intricacies that exist in Canadian homicide law do not seem to be justified on any basis.

For example, it was noted that culpable homicide does not actually divide neatly into manslaughter and murder, because there is also an infanticide provision. The need for such a separate offence at all is questionable, especially one which sees as plausible of a woman that because "of the effect of lactation consequent on the birth of the child her mind is then disturbed." Even leaving issues such as that aside, however, the real problem, as Winifred Holland points out, is that the section "is in reality a defence framed as an offence." It is actually a way of allowing a woman who kills her child to be found guilty of something less than murder, in order that a different sentence can be imposed. This creates the oddity that the Crown has the burden of proving that particular excusing conditions apply. Adding to the oddity is that a later provision which then excuses the Crown from having to prove those conditions.

There is also awkwardness created by what the Law Reform Commission referred to as "negative definition." "Manslaughter" is only defined in the Code as "culpable homicide that is not murder or infanticide." This causes the difficulty, they point out, that the meaning of manslaughter can only be deduced through a comprehensive review of a number of other sections: a "separate, self-contained definition of manslaughter" would be preferable.

For that matter, homicide does not really divide into the three categories of infanticide, manslaughter and murder, despite what section 234 says. Section 249(4) creates the offence of dangerous operation of a vehicle causing death, though dangerous operation of a vehicle is itself an offence (either an illegal act or criminal negligence) and so would already be contained within the definition of culpable homicide in section 222(5). The Law Reform Commission notes that this addition was originally introduced because of the reluctance of juries to convict drivers of manslaughter. Similar provisions now deal with criminal negligence causing death, street racing causing death, and setting traps causing death. Some of these sections can be seen primarily as sentencing provisions, but nonetheless they overlap substantively with manslaughter.

Further, the methods of making the law correspond to our intuitions about which types of behaviour are more serious than others are at times extremely oblique. Think about causation, for example. The general point,
that to be found guilty of first-degree murder rather than second degree, an accused's behaviour should have been more blameworthy, seems unassailable. If we wanted to capture that intuition in a newly drafted law of homicide, however, it is difficult to conceive that we would do so by using the same word—"cause"—in two places, state that the greater degree of blameworthiness is captured by the fact that the word has a different meaning in each of the two places, then further state that it is any case rarely necessary to talk about the issue at all. Similarly it is hard to imagine why one would allow the lower of those two causation standards to be described in two seemingly quite different ways but then direct that a trial judge can explain that standard to the jury in either fashion without falling into error—or for that matter can simply not instruct the jury on the issue at all and in the majority of the cases have been correct to do so. Equally, one would think that it should be entirely clear whether the higher standard applied to all first-degree murders or only to a smaller subset of them. It must, one would think, be possible to capture the sensible point that more blameworthy behaviour is required for first-degree murder in a simpler fashion than that, but that is the current state of Canadian law.40

Our law on causation, of course, merely reflects one aspect of how law develops, and why different countries can start with much the same law but end up in different places. Law inevitably develops at least in part by accretion—by both common law and legislative responses to particular problems. As the same problems do not arise everywhere, different issues become important in different places. Hence, as noted above, the fact that juries will not convict drivers of manslaughter but will convict them of dangerous driving causing death leads to the creation of a separate offence which is essentially duplicative.41 Other countries have faced different issues, with the result that they have created special rules around half-completed suicide pacts or over "fire-raising" where we have found no need to do so.42

40 See R. v. Smithers, [1978] 1 S.C.R. 506, 34 C.C.C. (2d) 427, 40 C.R.N.S. 79, 1977 CarswellOnt 25, 1977 CarswellOnt 479F (S.C.C.), R. v. Harbottle, [1993] 3 S.C.R. 306, 1993 CarswellOnt 121, 1993 SCC 7, 84 C.C.C. (3d) 1. 24 C.R. (4th) 137, 1993 CarswellOnt 992 (S.C.C.), and R. v. Nette, 2001 SCC 78, [2001] 3 S.C.R. 488, 2001 CarswellBC 2482, 2001 CarswellBC 2481, 46 C.R. (5th) 197, 158 C.C.C. (3d) 486 (S.C.C.). Harbottle deals with an accused charged with first-degree murder under s. 231(5). If one sees it as purely an issue of statutory interpretation of the word "caused" in that section, then the higher standard of "essential, substantial, and integral cause" applies only to that subsection, and perhaps to 231(6), (6.01), (6.1) and (6.2), each of which use the phrase "when the death is caused." If one focuses on the aspects of the decision dealing more generally with the level of moral blameworthiness, however, there is no reason the approach should not also apply to s. 231(2), first-degree murder through planning and deliberation.

41 Though note that Horder, supra note 11, sees a separate offence of causing death by dangerous driving as the more sensible approach, as an aspect of an attempt "to make engagement in the acceptable activity safer." (35)

42 See the discussion of England and Wales at p. 21 and of Scotland at p. 190 of Horder, supra note 4. It is possible that fire-raising—arson in our terms—will become an issue of
What all of this shows, of course, is that in general there would be value
in an overhaul of the homicide provisions. In part this would allow a systematic approach, rather than the “reform by accretion” which has affected us as much as anyone else. It would also allow re-thinking of some of the basic structures of the offence.

The Interplay with Defences

Any such restructuring should include consideration of defences. The self-defence provisions in the Code, as they relate to the use of deadly or non-deadly force, have been characterized by the Supreme Court of Canada as “unbelievably confusing.” The duress provisions in the Code are in a state of flux, with there being reason to question whether the blanket ban on a principal relying on duress in a case of murder is constitutional or not. The only defence which will be considered here, though, is provocation. A partial defence which only has the effect of reducing murder to manslaughter, it is really another example of using rigid guilt rules to substitute for a flexible sentencing decision. To analyse the elements of provocation in an individual case and decide that the defence applies is to remove the minimum life sentence and substitute a more open-ended sentencing decision.

It is not my goal here to analyse the defence of provocation in its own right. Rather, this discussion will look at the purpose for having a provocation defence at all, which is a recognition of the intuitive sense that some intentional killings are less blameworthy than others. That point is surely correct: what is interesting in this context is to see the way that that same recognition has affected the law in other countries. In most cases we can see reflections of the attempt to create rigid rules, and can also see that those attempts are unsatisfactory.

In Scotland, for example, the defence of provocation exists, but in a relatively limited form. Whereas in Canada provocation can come from the relatively open-ended category of “a wrongful act or insult,” Scotland


45 This category is not completely open-ended, of course—see R. v. Thibert, [1996] 1 S.C.R. 37, 1996 CarswellAlta 368F, 1996 CarswellAlta 518, 45 C.R. (4th) 1, 104 C.C.C. (3d) 1 (S.C.C.) or Tran, supra note 3.
allows provocation only from physical violence or from a discovery of infidelity. In the former case, the defence has been interpreted in a further restrictive fashion, so that only immediately prior physical violence counts: that is, there can be no cumulative provocation. This is the opposite of the approach taken in Canada,\textsuperscript{46} or for that matter in England and Wales, and Tadros notes that it effectively makes the defence unavailable to battered spouses.\textsuperscript{47} On the other hand, the infidelity branch of the defence has been interpreted more broadly. It need not be a discovery of the partner in the act but can include a mere disclosure of infidelity, or disclosure of continued infidelity of which the partner was already aware. In addition the defence has been expanded to include any relationship where there is an expectation of fidelity, including same sex couples. As Tadros notes:

This process of expansion is an ironically modern and politically correct evolution in an arguably anachronistic and perhaps even sexist context.\textsuperscript{48}

Scotland, then, represents an attempt to spell out intuitions on what makes an intentional killing more serious or less serious with some precision. One can question how successful an attempt it is—Tadros calls it “in need of substantial reform”\textsuperscript{49}—but it represents one such approach. A starkly contrasting approach is that in New York, based on the Model Penal Code of the United States, which has revised its defence of provocation to the extent that it cannot accurately be labelled that any more. The statute states that murder will be reduced to manslaughter where the killing is intentional but the accused acted “under the influence of extreme emotional disturbance.” It carries on to describe what that standard means:

The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.\textsuperscript{50}

This provision, really, has the potential to create the opposite of a rule-based approach. It seems to invite triers of fact to substitute their own moral judgment about a situation for fixed and predictable rules: to say “yes, normally intentional killing is wrong, but on the facts here I see where the killer was coming from.” Taken purely as a sentencing exercise, that might be a reasonable point, but slotted in the guilt-deciding stage, it potentially challenges the rule of law. It is perhaps not surprising to find that judges have been reluctant to go down that route, and have in fact tended simply to

\begin{footnotes}
46 See Thibert, supra note 45.
47 Tadros, supra note 30, at 202.
48 Tadros, supra note 30, at 204.
49 Tadros, supra note 30, at 200
50 Finkelstein, supra note 28, at 99.
\end{footnotes}
use this defence in circumstances where the traditional provocation defence would have applied.\textsuperscript{51}

An approach even more difficult to reconcile with the rule of law can be found in Australia, and again is a reflection of the tension between using rigid guilt-deciding rules to settle sentencing decisions. In Canada, we have rejected the notion of jury nullification: in Morgentaler, for example, the Court made absolutely clear that it was not open to a jury to find an accused not guilty of an offence if guilt was proven, on the basis that they did not approve of the law or the accused having been charged. That is fundamentally an affirmation of our adherence to the rule of law:

[n]o system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.\textsuperscript{52}

In Australia, however, courts have permitted virtually that. There are cases where it is clear that the evidence can only support one of two conclusions: a conviction for murder or a complete acquittal. In such cases, Leader-Elliott points out, the law in Australia permits juries to return a verdict of manslaughter, and indeed it is an error for a trial judge to instruct them that they cannot do so. As he notes:

Recent decisions in the High Court accept that juries may choose to play the role of moral arbiters and choose among the available verdicts, rather than follow the trial judge's instructions in a "mechanistic" fashion. The Court has accepted that a jury, faced with a choice between convicting the accused of murder and outright acquittal, might choose to disregard inadequacies in the evidence and convict out of compassion for the victim or his or her family. It is also possible, when juries are aware of their power to return a verdict of manslaughter, that compassion for the defendant might induce them to convict of that offence, though there is overwhelming evidence that the defendant is guilty of murder.\textsuperscript{53}

The point seems to be in some dispute, but it is suggested that this ability is a constitutional right of juries, not merely "an ungovernable power."\textsuperscript{54}

In somewhat similar fashion, and controversially, German courts have taken themselves to be "constitutionally authorised" to ignore the mandatory life sentence in murder cases in rare cases where that sentence would be disproportionate.\textsuperscript{55} This seems to amount to an acceptance of the remedy of "constitutional exemptions" rejected by our Court in Ferguson.

\textsuperscript{51} Finkelstein, supra note 28, at 100.
\textsuperscript{53} Ian Leader-Elliott, "The Australian Law of Murder," in Horder, supra note 4, at 182, footnotes omitted (Leader-Elliott).
\textsuperscript{54} Leader-Elliott, supra note 53, at 182.
\textsuperscript{55} Bois-Pedain, supra note 19, at 70.
Other jurisdictions have attempted to deal with issues like this by creating additional partial defences beyond provocation, which also operate to reduce murder to manslaughter. Diminished responsibility plays that role in Scotland and Singapore, for example, and is also relevant in Germany.\footnote{See Yeo, supra note 12, at 226, Tadros, supra note 30, at 198, and Bois Pedain, supra note 19, at 63-64. Note that in Germany diminished responsibility is a mitigating factor in sentencing, rather than a consideration helping determine guilt or innocence} Singapore also allows excessive self-defence to be a partial defence, and indeed allows for five other partial defences.\footnote{Yeo, supra note 12, at 226.} All of these are attempts to create rules making the legal result on whether a killing is less serious correspond to a moral intuition.

The final word on provocation and its appropriate role, however, is best found from France. That country has eliminated mandatory minimum sentences for murder. Therefore, a person convicted of murder rather than manslaughter will not of necessity face a harsher penalty, though of course they might still receive it, since a sentence that fits the exact circumstances can still be imposed.\footnote{It should be noted that sentences in French murder trials are imposed by a jury consisting of nine lay people and three judges: Spencer, supra note 24, at 41.} As a result, the defence of provocation no longer exists at all: once mandatory sentences were gone, there was no longer any need for it.\footnote{Spencer, supra note 24, at 47.}

Conclusion

Ultimately, then, the discussion of both the elements of various homicide offences and the defence of provocation lead to the same place: that many of the difficulties arise from trying to do two things at once. The fair labelling concern is a difficult one on its own, but there seems no reason to think that our ordinary approach of increasingly sophisticated but relatively rigid rules should be any worse in this context than in any other. The difficulty arises by "upping the stakes," so that making a decision regarding the category of an offence automatically settles, in a major way, the sentencing exercise.

No matter what set of rules one creates, it is always possible to construct a hypothetical "hard case": indeed one of the common features of virtually all chapters in *Homicide Law* is the ability of writers about different jurisdictions to find a scenario where application of the rules will produce what seems like it might be a conviction for the wrong crime.\footnote{See, for example, Bois-Pedain, supra note 19, at 69-70, Horder, supra note 11, 24, 26-29, or Finkelstein, supra note 28, at 91-92.} Some of these scenarios inevitably do not remain merely hypothetical, but arise in fact. There are limits on the ability of words in a statute to perfectly capture our sense of how serious behaviour is. As Leader-Elliott points out:

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56 See Yeo, supra note 12, at 226, Tadros, supra note 30, at 198, and Bois Pedain, supra note 19, at 63-64. Note that in Germany diminished responsibility is a mitigating factor in sentencing, rather than a consideration helping determine guilt or innocence
57 Yeo, supra note 12, at 226.
58 It should be noted that sentences in French murder trials are imposed by a jury consisting of nine lay people and three judges: Spencer, supra note 24, at 41.
59 Spencer, supra note 24, at 47.
60 See, for example, Bois-Pedain, supra note 19, at 69-70, Horder, supra note 11, 24, 26-29, or Finkelstein, supra note 28, at 91-92.
The problem about overt reference to a moral criterion...is that it adds very little to one's intuitive understanding of the difference between murder and manslaughter.61

This is not a plea to abandon such references however: on the contrary, such criteria are the essence of the rule of law. The rule of law is the central issue to the fair labelling issue. The point, rather, is not to let such rigid rules also enter into the sphere where they are much less appropriate, the sentencing stage.

It is one thing to say "if these are the facts, then offence X has been committed, not offence Y." Reaching that conclusion does not interfere with the conclusion that a particularly serious instance of offence Y might be more blameworthy than a less serious instance of offence X. In that event, the categorical decision does not mean that courts cannot still sentence according to the facts. But in the case of manslaughter and murder, the categorical decision means exactly that. To call the offence murder is to impose a mandatory minimum life sentence, and that is where intuition sometimes breaks down and the sentence does not necessarily match the perceived blameworthiness.

This is of course not a novel observation. The Royal Commission on Capital Punishment in England concluded, half a century ago, that no legal formula could "provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder."62 The Law Reform Commission of Canada recommended, a quarter-century ago, that second-degree murder should carry no minimum sentence.63 The most recent recommendations of the Law Commission of England and Wales call for no minimum sentence for second-degree murder, precisely because that is where the blurry dividing line between murders and manslaughter is to be found:

whilst the labelling issue will continue to divide commentators, the sentencing consequences are not so stark...64

Further, as noted, abandoning a mandatory sentence for second-degree murder indirectly produces a number of other benefits. The infanticide provisions are complex, anomalous, and scientifically unsound. As Holland points out, if there were no fixed sentence for second-degree murder, the infanticide provisions could simply be repealed and any relevant facts could be dealt with as a sentencing issue.65 The same would be true of provocation. Courts would no longer need to decide whether an ordinary person, fixed with whatever characteristics are suitable but not with attitudes that are

62 Quoted by Leader-Elliott, supra note 53, at 185.
63 Law Reform Commission, supra note 5, at 69.
64 Horder, supra note 11, at 29.
65 Holland, supra note 34, at 131.
inconsistent with fundamental Canadian values, would have been provoked, on the sudden, and so on. Rather, issues relating to why the accused acted as he or she did would become mitigating or aggravating factors to be weighed along with other sentencing considerations. The use of excessive force in self-defence, a partial defence like provocation in some jurisdictions\(^{66}\) but “inadequately dealt with” in Canada\(^{67}\) could become a relevant sentencing factor. Other issues, such as diminished responsibility, could be taken into account at the more flexible sentencing stage, rather than be forced to be dealt with as either as either a section 16 claim, or through a partial defence.

One must ask, of course, whether repealing a mandatory life sentence for second-degree murder, and more importantly the mandatory ten year period of parole ineligibility, will result in sentences which are widely seen as too lenient, or which will fail to perform the denunciatory role that sentencing is intended to play. One cannot say that that is an impossibility, of course, though as the Law Reform Commission of Canada pointed out, there is no obvious reason to think judges cannot “be trusted to impose the appropriate sentence for this crime as they do for other offences.”\(^{68}\) Those convicted of second-degree murder now frequently receive parole ineligibility periods which exceed the ten year minimum which must be imposed.\(^{69}\) Sentences can also be appealed in Canada, allowing a level of standardization and supervision through appellate review.\(^{70}\)

Further, recent judicial views on sentencing do not suggest that sentencing decisions, either at trial or on appeal, will result in particularly lenient sentencing. One of the most recent issues to face the Supreme Court was not an issue of too-lenient sentencing, but the question of imposing the maximum sentence available even though the facts of the case were not the worst imaginable. The Court emphasised the ability of sentencing judges to impose very strict sentences:

20 In *R. v. Cheddesingh*, [2004] 1 S.C.R. 433, 2004 SCC 16, the Court acknowledged the exceptional nature of the maximum sentence, but firmly rejected the argument that it must be reserved for the worst crimes committed in the worst circumstances. Instead, all the relevant factors provided for in the *Criminal Code* must be considered on a case-by-case basis, and if the circumstances warrant imposing the maximum sentence, the

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66 See Bois-Pedain, *supra* note 19, at 59 and Yeo, *supra* note 12, at 228.
67 Law Reform Commission, *supra* note 5, at 70. The Commission proposes that this should be a mitigating factor in sentencing, not a separate defence, a recommendation which hinges on their earlier call for the elimination of a mandatory minimum for second-degree murder.
68 Law Reform Commission, *supra* note 5, at 70.
69 Statistics on this point are surprisingly difficult to find. The John Howard society reports that the average period of parole ineligibility for second-degree murder is 12.5 years. See John Howard Society, Fact Sheet #5, May 1995, http://www.johnhoward.on.ca/Library/Factsheet/fsch5.pdf.
70 The Law Reform Commission notes that this is not true in other common law countries: Law Reform Commission, note 5, at 70.
judge must impose it and must, in so doing, avoid drawing comparisons with hypothetical
cases...  

22 Thus, the maximum sentence cannot be reserved for the abstract case of the worst
crime committed in the worst circumstances.71

Nothing in this approach leads one too fear an outbreak of routine “slaps
on the wrist” for those found guilty of what is undeniably the normally very
serious offence of second-degree murder.

Perhaps the final word on the subject should be given to the experience
in France, where among other things, capital punishment for murder was
abolished without being replaced by a mandatory sentence of life impris-
onment. Speaking of this point to an English audience, but with words that
should ring equally true in Canada, Spencer notes:

...the French law of murder conforms to the shape that liberal reformers in this country
have usually advocated for the law of murder here. That this can be so in a country
which faces similar social problems to our own, and where the media and the general
public are at least as prone as they are here to criticise politicians, judges and the courts
for being “soft on crime,” seems to me to give our liberal reformers a simple message:
bon courage.

71 L.M., supra note 10, at 20-22.