

STRUCTURING HOMICIDE: BROADER PERSPECTIVES

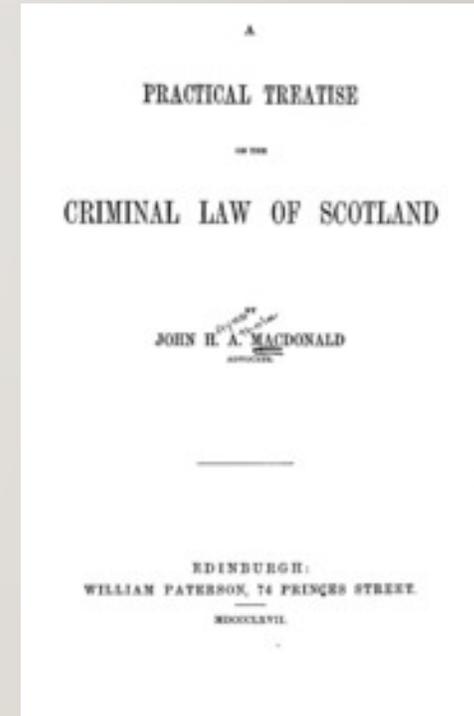
LINDSAY FARMER

UNIVERSITY OF GLASGOW

THE STANDARD VIEW

Two categories of criminal homicide (murder and culpable homicide).

- *Actus reus* is always the same:
 - “Any wilful act causing the destruction of life...”
(Macdonald, *Practical Treatise* p.89)
- Differentiation on grounds of *mens rea*:
 - Intentional killings more serious (murder)
 - Reckless killings (probability + foresight)



PROBLEMS

- Persistence of forms of constructive liability:
Unlawful act culpable homicide: *MacAngus v HM Advocate*; *Kane v HM Advocate* 2009 SLT 137
- Not clear how ‘voluntary’ culpable homicide (provocation/diminished responsibility) fits into this model;
- Other ‘statutory’ forms of liability for causing death:
Road traffic: Causing death by dangerous driving (Road Traffic Act 1988 s.1); causing death by careless driving (s.2B), causing death by driving while under the influence of drink or drugs (s.3A); causing death by driving while disqualified, unlicensed or uninsured (s.3ZB & C)
Corporate homicide: Corporate Manslaughter and Corporate Homicide Act 2007 s.1
- “Most homicide does not result from a conscious decision to kill ... Moreover, the fatal conduct we judge most antisocial is not necessarily the conduct committed with the most deliberation.” (Binder, “Homicide”, p.725)

HISTORICAL PERSPECTIVES I: MURDER

Murder was defined narrowly ('forethocht felony')

- 'Casual' (accidental) homicide and homicide in self defence not capital (APS 1661, c.22)
- Certain kinds of violent *killing* were presumptive evidence of murder
 - Use of a weapon
 - Evidence of mutual combat
 - Engaging in commission of another felony
 - No evidence of provocation
- Focused on violent acts/anti-social motives (dole)

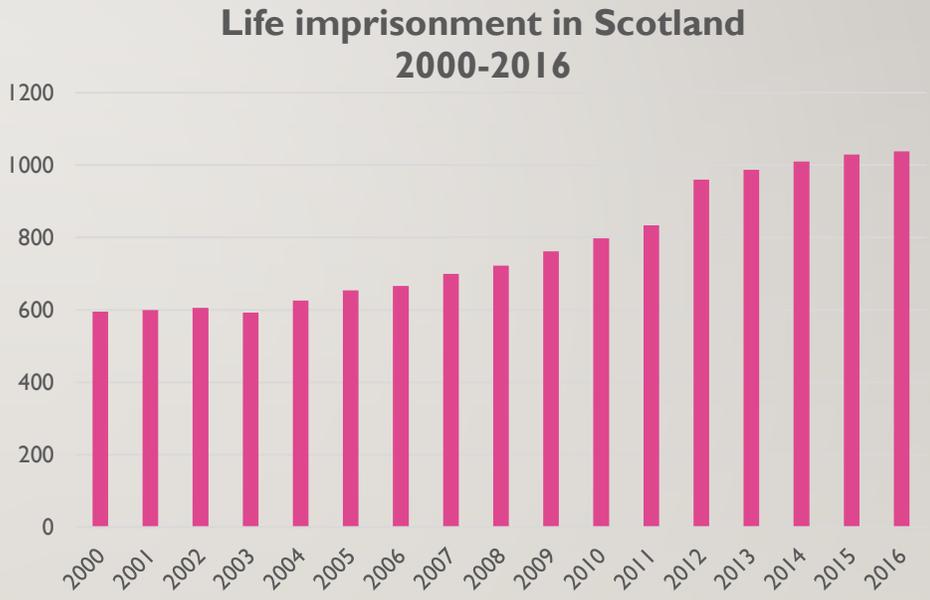
HISTORICAL PERSPECTIVES II: THE RISE OF CULPABLE HOMICIDE

- Residual category. Originally a class of culpable killings that were not murder
Provocation/excessive self defence/some casual homicides
Punishment “according to the quality of the fault” (Hume, *Commentaries*, I, p.233)
- Rise of new model of culpably *causing* death (19thC)
Culpable homicide first charged 1781 (*Crichton, Burnett, Criminal Law*, p.26); commonplace by 1820s
Required proof of intention to do injury or knowledge that another was exposed to risk (Ld J-C Hope in *Paton & McNab* (1845) 2 Broun 525 at p.532). A question of degree
- Taken as model for homicide law as a whole
“All unlawful killing or destroying the life of a human being is culpable homicide; but the term murder is technically applied to that culpable homicide which is done maliciously” (Ld Young in *HM Adv v Marshall* (1897) 4 SLT 217)

THE MANDATORY LIFE SENTENCE I

Country	Life-sentenced prisoners	Percentage of sentenced prison population	Per 100 000 of national population
France	489	0.9	0.7
Germany	1,863	3.7	2.3
Turkey	7,303	6.0	9.3
England and Wales	7,361	9.9	12.7
Scotland	1,038	16.6	19.3
Russia	1,766	0.4	1.2
Europe		3.0	
South Africa	13,190	10.5	22.7
India	71,632	53.7	5.5
United States	161,957	9.5	50.3

*Data for England and Wales, France, Germany, Scotland Turkey and the USA are from 2016.
Data for India, Russia and South Africa are from 2014.*



(Figures from D van Zyl Smit, University of Nottingham)

THE MANDATORY LIFE SENTENCE II

Scotland imprisons relatively more people for life than any other European country. Why?

- Non-parole periods imposed by courts are getting longer
From average 13.8 years in 2004 to average 18 years in 2013
- Low number of releases of life sentenced prisoners by the Parole Board
In 2015-2016 only 44 of 336 cases before the Parole Board released while 195 rejected and 144 postponed and 13 withdrawn
- Long-term growth in number of life sentenced prisoners returned to prison annually
Low of 10 in 2000-1 to 89 in 2016-7

Are we imprisoning only the “worst of the worst”?



IMPLICATIONS

Is the model of culpably causing death still appropriate?

- Explore *actus reus*:

Killing/causing the destruction of life

Types of killing:

“Any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.” (German Criminal Code, §211)

An act causing death/conduct resulting in death?

- May not be possible to remove mandatory life sentence, but limit its effect?
Degrees of murder? (See Law Commission, No.304 (2006), Pt.II)
- A ladder or a grid?

REFERENCES

G Binder, “Homicide” in MD Dubber & T Hörnle, *The Oxford Handbook of Criminal Law* (Oxford UP, 2014)

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