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Reforming Wicked Recklessness in the Scottish Crime of Murder

Christopher Vannart*

Abstract: This paper considers the development of and potential reforms to the element of wicked recklessness within the Scottish crime of murder. It shows how case law has negatively affected how wicked recklessness is defined such that it now cannot adequately capture instances of death following extremely reckless risk-taking within the definition of murder in the absence of an assault. It also shows, using a comparison with the law in England and Wales, that moving to a definition of murder where intention would be the only standard of mens rea which could sustain a conviction would unacceptably distort the meaning of an 'intention to kill'. Finally, the paper endorses the standard of 'callous recklessness' set out by the authors of the Draft Criminal Code for Scotland and provides a proposal for how this concept should be interpreted. This interpretation contains both objective and subjective elements in order to provide a distinction between murder and culpable homicide.

On 14 April 2017, the media reported that police were interested in tracing a group of youths who had tied a ladder to railway tracks close to Livingston North Railway Station.¹ Though a train struck the ladder, no harm was done other than minor damage to the running rails. However, a Police Constable serving with the British Transport Police highlighted the very real danger which the youths' actions caused:

Although only superficial damage was caused to the tracks, the ladder could have easily been propelled onto the platform and struck a member of the public. Not to mention the fact that this train could have been derailed.²

While it is fortunate that no-one was injured as a result of these actions, the circumstances serve as a good example to analyse the law concerning crimes of homicide in Scotland. What crime would the youths have been guilty of had the ladder struck someone waiting on the platform or derailed the train and resulted in the death of one or more people?

* Lecturer in Law and PhD student at the University of Dundee. I would like to extend my thanks to Professor Pamela Ferguson and Dr Eva Jüptner, for their insightful comments on earlier drafts of this paper. This paper has been produced in furtherance of work which I undertook during my LL.M. degree at the University of Aberdeen. I would also like to extend my thanks to Dr Elizabeth Shaw for supervising this work during my time in Aberdeen.

¹ Josh Halliday, 'Police Hunt Youths Who Tied Ladder to Railway Tracks' *The Guardian* (14 April 2017) <https://www.theguardian.com/uk-news/2017/apr/14/police-hunt-youths-ladder-railway-tracks-livingston-north-edinburgh> [accessed 19 May 2023].

² *ibid.*

It is noted that the Scottish Law Commission is currently undertaking work to reform the *mens rea* of the homicide offences in Scotland,³ with a discussion paper being released in May 2021.⁴ The consultation period on this paper ended in October 2021, and the Commission is now working on producing a Report on the topic. As such, it is timely to consider how the law regarding the *mens rea* of these offences could be reformed so as to resolve some of the difficulties which the law now faces.

The law concerning homicide offences has become far more controversial since the early 2000s following the decision of the Court of Criminal Appeal in *Drury v HM Advocate*.⁵ Scotland recognises two common law homicide offences which capture the majority of criminal killings.⁶ These offences are murder, and culpable homicide. These offences share the same *actus reus* element – causing the death of another human being.⁷ What differentiates these offences, therefore, are their *mens rea* elements.⁸

There are two standards of *mens rea* which make an accused person liable for murder when they cause the death of another person. These standards of *mens rea* are a (wicked) intention to kill,⁹ and wicked recklessness. In the example outlined above, it will be assumed that the youths did not directly intend to kill anyone by tying the ladder to the tracks. Thus, the question becomes whether they would be guilty of murder through wicked recklessness.

This paper considers the current definition of wicked recklessness. It will use the example set out to show that this concept requires reform. First, the paper sets out how the problems with wicked recklessness came to pass. It also undertakes a comparative analysis to show how that maintaining a recklessness standard of *mens rea* for murder is necessary. In doing so, the paper

³ Scottish Law Commission, *Tenth Programme of Law Reform* (Edinburgh: Scottish Law Commission, Scot Law Com 250, 2018), 18-19.

⁴ Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Edinburgh: Scottish Law Commission, Scot Law Com DP 172, 2021).

⁵ *Drury v HM Advocate* 2001 SLT 1013.

⁶ Additional specific offences are provided for in cases where the accused kills the deceased through dangerous or careless driving under the ss 1 and 2B of the Road Traffic Act 1988, and instances where the death can be attributed to the actions of a body corporate under s 1 of the Corporate Manslaughter and Corporate Homicide Act 2007

⁷ Gerald H Gordon, *The Criminal Law of Scotland*, edited by Michael Christie (3rd edn, Edinburgh: W Green, 2001), vol ii, para 23.01. It should be noted that the *actus reus* of the homicide offences has also changed over time, with the classic definition of the *actus reus* being taken as “the destruction of life” – see J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* edited by James Walker and D J Stephenson (5th edn, Edinburgh: W Green, 1948), p. 89.

⁸ Pamela Ferguson and Claire McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, Edinburgh: Edinburgh University Press, 2014), para 9.3.1.

⁹ The word ‘wicked’ being inserted into the requirement for intention by *Drury* 2001 SLT 1013. The court reasoned that this was necessary to distinguish between a person who genuinely intended to kill their victim and another who (though acting intentionally) killed their victim while acting under provocation – see *Drury* at [18].

analyses the approach taken in England and Wales to cases which equates cases in which death results through very serious risk-taking with cases where death was caused intentionally and argues that this distorts what it means to intend to kill. The paper finally makes some suggestions which could be considered in reforming the law in this area.

1. THE DEVELOPMENT OF WICKED RECKLESSNESS

The Former Definition

The institutional writer, Hume, described those convicted of murder as having “a wicked and depraved disposition; a heart regardless of duty or humanity...”.¹⁰ Though the law has developed significantly since his time of writing, he makes clear that the distinguishing feature between a culpable homicide and a murder is the quality of the accused’s state of mind when they bring about their victim’s demise.

Prior to 2001, courts and practitioners used the definition of murder provided by Macdonald. This definition provided that:

Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences.¹¹

To determine whether an accused was “regardless of consequences”,¹² Alison interpreted Macdonald’s definition as meaning that the accused must show “an utter recklessness as to the life of the sufferer, whether he lives or dies.”¹³ Judges started to use Alison’s interpretation when directing juries as to the law on this point, thereby showing how useful this concept was when determining whether an accused had acted with wicked recklessness when they caused their victim’s death.¹⁴

Macdonald’s definition and Alison’s interpretation of that definition clearly continue Hume’s assertion that the accused’s mental state and their actions were linked together. The question of whether an accused truly disregarded whether their victim lived or died was to be determined

¹⁰ David Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn, Edinburgh: Bell and Bradfute, 1884), Vol i, p. 256.

¹¹ Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (1948), p. 89.

¹² Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (1948), p. 89.

¹³ Archibald Alison, *Principles of the Criminal Law of Scotland* (Edinburgh: 1832), Vol i, p. 1.

¹⁴ Robert Goff, “The Mental Element in the Crime of Murder” (1988) 104 LQR 30, 54 citing *HM Advocate v Byfield* (Unreported, HCJ Glasgow, 1976).

by what the accused did to cause the death. These definitions may be criticised as being overly broad, resulting in the possibility of a wide range of conduct which causes death being labelled as murder. However, it can be appreciated that the addition of the word ‘wicked’ into the recklessness standard which murder requires allows for a certain degree of flexibility.¹⁵

In applying the classic definition of wicked recklessness to the example set out in the introduction to this paper, it could be claimed that the youths had acted with wicked recklessness. One could point to the fact that they had no business tying a ladder to a fast-running railway line and that their mischievous plan was carried out with no regard for the consequences of what could happen to anyone either on-board the train or waiting at the nearby railway station. The level of danger posed to other members of the public was extremely high. The circumstances in the ladder-on-the-railway example, however, give rise to a number of possibilities regarding the *mens rea* of the youths. The actual assessment of their *mens rea* would require evidence of what the youths actually intended, as well as what they knew or ought to have known at the time they carried out their plan. Further *mens rea* inferences and the implications of those inferences are discussed in more detail below in the discussion applying the scenario to the intention requirements of murder in English law, and when attempting to distinguish murder from the crime of culpable homicide in Scots law. While it is not a certainty that a jury would have found that the youths acted with wicked recklessness, their actions were so utterly reckless that labelling them as murderers may be morally deserved were their actions to result in the death of another person.

The Purcell Problem

It must be noted, however, that recklessness also suffices as a standard of *mens rea* for culpable homicide as well as murder. Though allowing juries the option to convict of either murder or culpable homicide allows them to enter a conviction which reflects what the accused morally deserves,¹⁶ this flexibility comes at the price of bringing the definitions of simple recklessness in culpable homicide and wicked recklessness in murder very close to each other.

Thus, the definition of wicked recklessness was amended in the case of *HM Advocate v Purcell*.¹⁷ The facts of *Purcell* are relatively straightforward. The accused was charged with

¹⁵ Ferguson and McDiarmid, *Scots Criminal Law: A Critical Analysis* (2014), para 9.12.2.

¹⁶ Gordon, *The Criminal Law of Scotland*, (2001), Vol ii, para 23.21.

¹⁷ *HM Advocate v Purcell* [2007] HCJ 13; 2008 JC 131

the murder of a 10-year-old boy, having struck the boy as he was crossing the road at a pedestrian crossing. This occurred as part of a wider case of dangerous driving and, at the time of the collision, the accused had been overtaking a line of traffic (which had stopped to allow the victim to cross the road) on the wrong side of the road at a speed of over 60 miles per hour.¹⁸ The question in this case was whether the accused's appalling standard of driving could amount to the wicked recklessness necessary for it to be open to the jury to convict him of murder. It was held that it could not since the accused did not intend to do his victim (or another person) any harm.¹⁹ Thus, wicked recklessness can now only be found where the accused intends to assault (in other words, cause some physical harm) to someone and does so regardless of whether the eventual victim lives or dies.

Under this amended definition, therefore, the youths at the railway station could only be convicted of culpable homicide. They did not intend to assault anyone by derailing the train. Though they would still be criminally liable for their actions, the Crown could only secure their conviction for murder if their reckless actions could be shown to have been accompanied by some intention to do physical harm to another person.²⁰ Even in circumstances where the accused's actions are utterly reckless, such as the actions of the hypothetical youths, a conviction for murder cannot result in the absence of such an intention.

The implication of *Purcell's* case is that unintentional deaths which occur as a result of an intended assault on the victim are viewed more seriously than unintentional deaths caused by some other form of conduct where the accused is still impervious as to whether their victim lives or dies. One could ask why this is the case. Indeed, Goff enumerates several examples showing how wicked recklessness could have been used to convict of murder in cases where it was not entirely clear whether the accused intended either kill or assault their eventual victim.²¹ The Scottish Law Commission, in their discussion paper, doubted whether wicked recklessness could now be used in the way Goff proposes in each of the given examples owing to the restrictions placed on the concept by *Purcell*.²² Given the significant weight which is placed on criminal labels by the wider public,²³ it is important that the label ascribed to criminal conduct sufficiently highlights the seriousness of the accused's behaviour. Unfortunately, the

¹⁸ *Purcell* 2008 JC 131 at [3].

¹⁹ *Purcell* 2008 JC 131 at [16]. It should be noted that the Crown accepted the accused's plea of guilty to a charge of culpable homicide following the conclusion of this case.

²⁰ Michael Plaxton, "Foreseeing the Consequences of *Purcell*" (2008) SLT 21, 22.

²¹ Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30, 55-57.

²² Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide*, para 4.24.

²³ James Chalmers, and Fiona Leverick, "Fair Labelling in Criminal law" (2008) 71(2) MLR 217, 223.

Purcell decision has removed the beneficial flexibility which was inherent in the previous definition of wicked recklessness. This now presents difficulty in dealing with cases where a death results from utterly reckless conduct, but where the accused held no intention to assault the victim.

The Implications of the *Purcell* Problem

The difficulties in securing convictions for murder in cases of reckless killings can be seen in the case law of the High Court. The case of *Petto v HM Advocate*²⁴ concerned the accused setting fire to a flat on the ground floor of a tenement block to conceal evidence of another murder. As the building burned, the resident of another flat higher in the block died. The accused argued that he could not be convicted of murder as, following *Purcell*, he did not intend to cause that resident any harm.²⁵ Though the case did not turn on this point, their Lordships noted *obiter* that as the flat was set afire wilfully, and that action caused the resident's death it would have been open to the jury to find that wicked recklessness existed in this case.²⁶ Following the importance which *Purcell* places on the accused's intention to assault their victim, it is questionable why the fact that the accused wilfully started the fire or that he should have foreseen the possibility of the fire causing another person's death would factor into determining whether he had acted with wicked recklessness.²⁷

Though the actions of the hypothetical youths in the example set out above are clearly not as serious as Mr Petto's, it is possible to draw some comparisons. It can be argued that they displayed the same disregard for others as he did, and that they did so without there being any direct intention to harm anyone else. It is interesting to note that Lord Carloway proposed, in *Petto*, that it would have been open to the Lord Advocate to libel a charge of assault against the accused for each resident in the block.²⁸ This does not sit well with the argument, which the court in *Petto* appears to be suggesting, that a qualitative assessment of the accused's actions still lies at the heart of the definition of wicked recklessness.

As opposed to clarifying the law, the court in *Petto* used concepts found in English law (such as foresight and virtual certainties) to shoehorn the facts of this case into the unnecessarily

²⁴ *Petto v HM Advocate* [2011] HCJAC 78; 2012 JC 105.

²⁵ *Petto* 2012 JC 105 at [8].

²⁶ *Petto* 2012 JC 105 at [18].

²⁷ Peter Ferguson, "Wicked Recklessness" (2008) *Jur Rev* 1, 5.

²⁸ *Petto* 2012 JC 105 at [31].

narrow definition of wicked recklessness. It would, perhaps, have been more straightforward to acknowledge the problems which *Purcell* caused and reverse the law to what it was prior to that case.

While concepts such as foresight and virtual certainty are useful in determining whether the accused has acted recklessly, there is an important distinction between them and the overall concept of recklessness. Foresight, awareness and knowledge concern what the accused knew or ought to have known at the time they decided to act. Recklessness, on the other hand, deals with the risk which the accused posed to themselves²⁹ and others.³⁰ The more severe the risk which a person subject another to, the more likely we are to say that they were acting recklessly as opposed to simply being negligent.

The Difference Between Murder and Culpable Homicide

Were the original position to be restored (in other words, the possibility of wicked recklessness existing absent the accused's intention to cause physical harm), it may be asked how murder and culpable homicide are to be told apart from each other. The similarity in *mens rea* standards between the two crimes makes this a legitimate question. In *Paton v HM Advocate*, the recklessness of conduct necessary to convict of culpable homicide was described as "gross, or wicked, or criminal negligence, something amounting... to a criminal indifference to consequences...".³¹ It would be illogical to hold that the same standard of recklessness could satisfy the *mens rea* for both murder and culpable homicide; a point which was correctly mentioned in *Purcell*.³²

It is true that narrowing the definition of wicked recklessness such that it applies only in conjunction with the intention to cause physical harm does provide a way to tell murder and culpable homicide apart. But the weakness of this distinction lies in its inability to take account of incredibly dangerous risk-taking. There was already a difference between the standards of recklessness in murder and culpable homicide. As Ferguson and McDiarmid argue, there is a distinction between a person who is indifferent to another person's safety (and thus is guilty of

²⁹ I mention the level of risk to the accused themselves in order to cater for offences such as culpable and reckless conduct, where an offence can be committed by putting oneself in unacceptable danger. An example of such conduct could be participating in adventure sports where doing so is unacceptably risky, and then requiring a complex rescue effort to be mounted in order to protect one's life.

³⁰ Christopher Stephen, "Blazing a (New) Trail for Murder? *Petto v HM Advocate*" (2009) SLT 177, 178.

³¹ *Paton v HM Advocate* 1936 JC 19, 22.

³² *Purcell* 2008 JC 131 at [12].

culpable homicide if their actions cause another's death), and a person who is indifferent as to whether another person lives or dies.³³ This lack of consideration for the life of the person affected by their actions appears to make the latter killer far more blameworthy for their victim's death.

Since murder is one of the most serious crimes known to the law, the circumstances where murder convictions are appropriate must be constrained to the most serious forms of homicide.³⁴ Thus, if recklessness is to be used as a standard of *mens rea* for murder, the reckless accused's actions must be so serious as to allow them to be equated with the actions of an intentional killer.³⁵ While the former definition of wicked recklessness may have been too broad, *Purcell* has unacceptably restricted its application resulting in a gap between circumstances which the law labels as murder and circumstances which the law ought to label as murder, but does not currently do so.

2. SUFFERING THE PROBLEMS OF ENGLISH LAW

The discussion thus far has shown that the Scottish law on reckless homicide is currently problematic. The attention of the paper now turns to potential reforms which could be made to the law. It was noted above that the court in *Petto* used the facts that the accused deliberately set the flat on fire while knowing that he was placing the other residents at risk of serious injury of death to equate his actions with an intention to assault them.³⁶ That equivalence combined with evidence that the accused was indifferent to whether any of the other residents lived or died allowed the *Purcell* test for wicked recklessness to be met.

The approach considered in *Petto* is similar to how courts in England and Wales deal with homicide cases where the accused does not obviously satisfy the *mens rea* for murder in that jurisdiction. In England and Wales, murder is an 'intention-only' crime, meaning that it is only made out if the prosecution shows that the accused intended to kill their victim or intended to cause them serious physical harm.³⁷ A possible method of resolving the difficulties posed in Scotland by the wicked recklessness standard of *mens rea* would be to abolish it altogether and

³³ Ferguson and McDiarmid, *Scots Criminal Law: A Critical Analysis* (2014), para 9.12.10.

³⁴ Gerry Maher, "The Most Heinous of all Crimes": Reflections on the Structure of Homicide in Scots Law" in James Chalmers *et al* (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), p. 238.

³⁵ Gordon, *The Criminal Law of Scotland* (2001), vol ii, para 23.16; para 23.21.

³⁶ *Petto* 2012 JC 105 at [18].

³⁷ *R v Cunningham* [1982] AC 566.

adopt the English concept of oblique intention to capture cases where the accused's intentions cannot easily be made out.

Oblique Intention

Oblique intention allows the accused's foresight of certain consequences to be used as evidence that they intended for those consequences to occur.³⁸ In the past, oblique intention was drawn widely and amounted to a wholly objective test requiring no foresight of consequences on the part of the defendant.³⁹ Statute later changed this position, providing that a person did not have to be convicted of an 'intent' crime solely because a result was a "natural or probable consequence" of an action.⁴⁰ In similar fashion to wicked recklessness, the meaning of oblique intention was gradually narrowed by several cases which culminated with *R v Woollin*.⁴¹ *Woollin* approved a jury direction given in a previous case⁴² that a jury was entitled (though, importantly, not obliged) to find that an accused had intended a result of their action if it were proved that the result was virtually certain to occur as a result of the accused's actions and the accused knew this fact.

The question of whether a person intends, through their actions, to bring about virtually certain results is tenuous. This can be seen in the example set out in the introduction of this paper. If evidence were to be adduced which showed a desire on the part of the youths to see what would happen when the train struck the ladder, it could be said that they intentionally placed the ladder onto the tracks, that they intended for the train to strike the ladder, and they intended for the train to be derailed.⁴³ If we assume that the youths knew that it was virtually certain that someone would die as a result of their actions, following *Nedrick* and *Woollin*, a jury in England and Wales would be entitled to find the necessary intention to convict them of murder.

Although, perhaps, this approach results in the correct result being reached (highly culpable wrongdoers being convicted of murder in these circumstances), it could be argued that the use of oblique intention distorts what it means to 'intend' for something to happen. As a result, it

³⁸ Gerard Coffey, "Codifying the Meaning of 'Intention' in the Criminal Law" (2009) 73(5) J Crim L 394, 405.

³⁹ *DPP v Smith* [1961] AC 290.

⁴⁰ Criminal Justice Act 1967 s 8.

⁴¹ *R v Woollin* [1999] AC 82.

⁴² *R v Nedrick* [1986] 3 All ER 1.

⁴³ Thomas Weigend, "Subjective Elements of Criminal Liability" in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), 494.

becomes necessary to retain a standard of recklessness to ensure that cases of serious risk-taking remain captured within the definition of murder without causing this distortion.

The Meaning of Intention

There are several elements at play when attempting to determine a person's intention when they act in a particular way. Elements such as knowledge, desire, and motive are of particular relevance when determining a person's intention; but they are separate from intention and cannot be substituted for it.⁴⁴ For example, Williams would argue that the hypothetical youths intended to cause the death of any passenger who died in the train derailment if they knew they would not be able to derail the train without killing one or more of the passengers.⁴⁵ Any comments to the effect that the youths had no desire to kill anyone would be irrelevant in determining their intention.

However, Williams' argument assumes that a person must intend every consequence that they know is certain to happen from their actions. Thus, every driver intends to wear down the tyres on their vehicle because they know that driving will cause the tyres to eventually wear out. This does not reflect the reality of the situation as, by driving, our intention is to reach our destination. The wearing down of tyres does not factor into the driver's active contemplation.

It must be acknowledged that one cannot assume that the everyday definition of the word 'intention' adequately describes criminal culpability.⁴⁶ Despite this, it should be noted that juries are not instructed about the meaning of everyday words,⁴⁷ of which intention is one. Since murder cases are always tried by juries, it would be unsurprising if they were to apply the concept of intention as they generally understand it.

Furthermore, the criminal law is as much the business of the public as it is the business of the individual accused.⁴⁸ Though not its only function, the criminal law serves to adequately label wrongdoers for their actions.⁴⁹ Intention ought to be defined narrowly to maintain the general understanding of the word. If causing death was not a person's primary purpose in acting, the

⁴⁴ Weigend, 'Subjective Elements of Criminal Liability' in *The Oxford Handbook of Criminal Law* (2014), 497-498.

⁴⁵ Glanville Williams, *Textbook of Criminal Law* edited by Dennis Baker (3rd edn, Sweet and Maxwell, 2012) para 4-018.

⁴⁶ Desmond Clarke, "Intending as a Defining Feature of Murder" (2016) 39(2) DULJ 285, 290.

⁴⁷ Beatrice Krebs, "Oblique Intent, Foresight and Authorisation" (2018) 7(2) UCL J L and J 1, 6.

⁴⁸ Andrew Cornford, "The Architecture of Homicide" (2014) 34(4) OJLS 819, 834.

⁴⁹ Chalmers and Leverick, "Fair Labelling in Criminal Law" (2008) 71(2) MLR 217, 226.

causing of death should not be taken as being intentional regardless of how culpable their actions were.

Separating Intention from Moral Blameworthiness

It is likely to be uncontroversial to argue that their actions would be extremely culpable were they to be aware that death would be certain to follow were they to derail the train.⁵⁰ As such, it might be possible to say that causing death would form part of their wider plan were it virtually certain that someone would die as a result of their derailing of the train.⁵¹ Horder argues that such an argument could make sense since there is no possibility of performing the directly intended action (derailing the train to see what happens) without the allegedly unintended results occurring (causing the death of one or more passengers).⁵² Thus, the youths must not carry out their desires to derail the train because they know that death is virtually certain to result. If they continue, they could be taken to have intended both their actions and all the consequences stemming therefrom.

Williams admits that oblique intention is not intention as it is understood in its ordinary meaning.⁵³ However, it is perhaps more straightforward to view any deaths which the youths cause through derailing the train to have been committed recklessly. They are acting because they wish to see what happens when the train derails. They are not acting out of any desire to kill another person, but they do act with indifference as to whether death will result. Since oblique intention can only apply where consequences are virtually certain to occur, its use reduces the question of whether actions are carried out intentionally to one of statistical probability.

The moral quality of a person's act is an entirely separate matter from determining what their intentions were when they chose to act,⁵⁴ however oblique intention attempts to combine these questions. On Kaveney's reasoning, the only legitimate conclusion which could be reached on the hypothetical youths' actions is that any deaths caused by the derailment are simply side-effects of that action. In the event they are foreseen by the youths as a consequence of derailing

⁵⁰ Itzhak Kugler, "Conditional Oblique Intention" (2004) Crim LR 284, 286-287.

⁵¹ Glanville Williams, "The Mens Rea for Murder: Leave it Alone" (1989) 105 LQR 387, 388.

⁵² Jeremy Horder, "Intention in the Criminal Law – a Rejoinder" (1995) 58(5) MLR 678, 686.

⁵³ Williams, *Textbook of Criminal Law* (2012), para 4-018.

⁵⁴ Cathleen Kaveney, "Inferring Intention from Foresight" (2004) 120 LQR 81, 84.

the train, they cannot be said to have been caused intentionally because they are not the main reason motivating the youths' actions.⁵⁵

Assessment of Abolishing Wicked Recklessness in Scotland

There is an ongoing need to retain recklessness as a form of *mens rea* for murder in Scotland. Limiting the *mens rea* of murder such that only an intention to kill or cause serious harm would suffice to support a conviction for murder would still result in inventive definitions of intention being used to fit cases deserving of being labelled as murder into the definition of the crime. It would lead to considerable disparity in the legal and dictionary definitions of intention, risking the undermining the communicative ability of the law.

The operation of oblique intention in English law has reduced the question of intention to one of probability. If death is anything less than a virtual certainty, then a jury may not find the necessary intention to convict the defendant of murder and a conviction for one of the species of manslaughter recognised in that jurisdiction would likely result. Oblique intention arises out of cases where a person has been indifferent to the risk of death posed by their actions. It combines two quite different questions – the determination of the person's intentions in acting, and an assessment of their moral blameworthiness. While a person's indifference to whether death was caused can be indicative of extremely high culpability, this does not mean that the indifference can be legitimately regarded as intention.

Prior to *Purcell*, wicked recklessness criminalised the same indifference to the lives of others which is labelled as oblique intention in England and Wales. But in doing so, the previous definition of wicked recklessness avoided the convoluted process necessary in England and Wales to place this indifference within the scope of intention. There is a risk that with the restrictions imposed on wicked recklessness by *Purcell*, the prosecution will attempt to convince a jury that a reckless killing took place intentionally in order to secure conviction for murder.⁵⁶

A recklessness standard of *mens rea* in the crime of murder ought to be viewed as a positive feature of Scots criminal law for the flexibility it could, and previously did, offer to capture highly culpable killings where the intention of the accused is not easily be made out. The next

⁵⁵ Kaveney, "Inferring Intention from Foresight" (2004) 120 LQR 81, 86.

⁵⁶ Plaxton, "Foreseeing the Consequences of Purcell" (2008) SLT 21, 22.

section will consider how wicked recklessness could be reformed in order to restore its previous utility.

3. REFORMING WICKED RECKLESSNESS IN SCOTLAND

The above discussion shows that jurisdictions which restrict the *mens rea* of murder to an intention to kill or an intention to cause serious injury have difficulty in legitimately convicting highly culpable (though unintentional) killers of that crime. *Purcell*, when read with *Petto*, appears to be leading Scots criminal law down a similar road, with intention being the only mental state sufficient to sustain a conviction for murder. The *Petto* court recognised that the *mens rea* of murder in Scotland is in desperate need of reform⁵⁷ and it is encouraging that the Scottish Law Commission has taken up this challenge. Indeed, the discussion paper released as part of their project on reforming the law pertaining to homicide offences invited views on a number of potential ways in which the wicked recklessness standard could be reformed.⁵⁸

When making reforms to the law regarding murder, it must be remembered that any changes to how murder is defined will also affect how the offence of culpable homicide is construed.

Equivalence between Reckless and Intentional Killers

It is important to consider why reckless and intentional killers, in some circumstances, ought to be treated as equally culpable for causing a death. The English cases lead us to conclude that it is the reckless killer's knowledge of the consequences that will result from their actions which mean they are viewed in the same light as an intentional killer.⁵⁹ That conclusion, though, simply contributes to the problematic nature of the *mens rea* of murder in England and Wales. The series of cases from *Smith* to *Woollin* shows that the whole idea of oblique intention is predicated on a question of probability, with no recognition that risks (though not virtually certain to happen) can be viewed just as seriously.⁶⁰

⁵⁷ *Petto* 2012 JC 105 at [22].

⁵⁸ Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide*, para 4.35.

⁵⁹ Coffey, "Codifying the Meaning of 'Intention' in the Criminal Law" (2009) 73(5) J Crim L 394, 397-398.

⁶⁰ Victoria Nourse, "Hearts and Minds: Understanding the New Culpability" (2002) 6(1), Buffalo Crim LR 361, 377-78

It would be difficult to argue that death would follow a train derailment as a virtual certainty.⁶¹ Despite this, it does not seem right that a person who deliberately does something to derail a train (and thereby exposes train passengers to the risk of death in the derailment) should be convicted of a lesser homicide offence should death result. The focus on the probability of consequences coming to pass ignores the indifferent attitude of the unintentional killer towards their victims. It is submitted that this indifference is what permits the equivalence of an unintentional killer with someone who kills intentionally.

Macdonald's formulation of wicked recklessness amounting to a person being "regardless of consequences"⁶² provides a standard for evaluating the accused's attitude towards the consequences which their victim could suffer. It holds that a person will be guilty of murder if it can be shown that the accused did not care sufficiently about the outcome for their victim.⁶³ Simply put, they are indifferent as to the effects of those consequences on the victim. Mitchell admits that the probability of consequences occurring is a relevant consideration when assessing a person's indifference,⁶⁴ but judging culpability by reference to indifference allows the outside observer to take a holistic view of how the accused put their own interests before those of the victim.⁶⁵ Thus, in the derailment example used throughout this paper, it becomes legitimate to say that because the youths were so determined to derail the train, they take on a level of responsibility for causing death equivalent to that of intentional killers since they carried out their plan, despite realising that someone could die. There is, of course, a moral difference between killers who subjectively realise that their plan could result in another person's death, and those who ought to have realised this fact, but did not do so. Any revised standard of recklessness in the crime of murder would require to take account of this difference, and the implications of it are discussed below.

⁶¹ Office of Rail and Road, 'Statistical Dataset: Rail Accidents and Safety' available at <https://www.gov.uk/government/statistical-data-sets/rai05-rail-accidents-and-safety> [accessed 08 August 2023]. In particular ORR Table 5260 – *Train Accidents by Severity* shows that there were a total of 61 fatalities attributed to all causes of railway accidents between April 2002 and March 2022. Derailments make up a subsection of these, but it is not possible to attribute the exact number of these fatalities to derailments. Derailments made up 318 of the total 698 Potentially Higher Risk Train Accidents recorded on the mainline network.

⁶² Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (1948), 89.

⁶³ Barry Mitchell, "The Minimum Culpability for Criminal Homicide" (2001) 9(3) Eur J Crime Cr L Cr J 193, 204.

⁶⁴ Mitchell, "The Minimum Culpability for Criminal Homicide" (2001) 9(3) Eur J Crime Cr L Cr J 193, 203.

⁶⁵ Alan Brudner, "Subjective Fault for Crime: A Reinterpretation" [2008] 14(1) LT 1, 34.

Different Forms of Indifference

Mitchell offers a simpler explanation of how a person's attitude can affect the assessment of their culpability in unintentional homicide cases. Such cases can be divided into two groups. Firstly, there are people who take risks when they are not sure what the outcome will be but would have acted differently had they known that death could result.⁶⁶ Then there are people who, in spite of knowing that death could result, choose to run that risk.⁶⁷ People who fit into both of these groups demonstrate some level of indifference because they run unacceptable risks. But, the running of unacceptable risks in the knowledge that death is likely to result shows a callous disregard for the lives of others.⁶⁸

This differentiation could provide a means to adequately distinguish between the crimes of murder and culpable homicide in Scotland. The indifference shown by both groups towards the lives of others ought to be criminalised. However, the wilful nature of the latter group's acceptance of the risk that death could occur seems to elevate their culpability such that it is equal to that of an intentional killer.⁶⁹ The delimitation of homicide offences along these lines is indicative of character culpability theory, with the deliberate acceptance of the risk serving as stronger evidence of undesirable and, therefore, culpable, characteristics.⁷⁰ If the distinction in culpability proposed by Mitchell is acceptable, we must now consider whether it can be incorporated into the structure of homicide in Scotland.

Redefining Unintentional Murder in Scotland

Lord Gill remarked in *Petto* that any reform to the definition of murder should be made through legislation in preference to any further piecemeal development of the law through the decisions of the court.⁷¹ A suggested replacement for the definition of murder was put forward in the Draft Criminal Code for Scotland.⁷² The Code was written in 2003, so the definition of wicked recklessness contemplated by the authors would not have taken the amendments made by *Purcell* into account. They proposed to replace this definition of wicked recklessness with a

⁶⁶ Mitchell, "The Minimum Culpability for Criminal Homicide" (2001) 9(3) Eur J Crime Cr L Cr J 193, 204.

⁶⁷ Mitchell, "The Minimum Culpability for Criminal Homicide" (2001) 9(3) Eur J Crime Cr L Cr J 193, 204-205.

⁶⁸ Mitchell, "The Minimum Culpability for Criminal Homicide" (2001) 9(3) Eur J Crime Cr L Cr J 193, 204-205.

⁶⁹ Claire McDiarmid, "'Something Wicked this Way Comes': The Mens Rea of Murder in Scots Law" (2012) Jur Rev 283, 301.

⁷⁰ Michael Bayles, "Character, Purpose, and Criminal Responsibility" (1982) 1(1) Law and Philosophy 5, 7.

⁷¹ *Petto* 2012 JC 105 at [22].

⁷² Eric Clive, Pamela Ferguson, Christopher Gane and Alexander McCall Smith, *Draft Criminal Code for Scotland with Commentary* (Edinburgh: Scottish Law Commission, 2003). It should be noted that the Code has not been enacted.

concept which they called “callous recklessness”.⁷³ They note that the use of the term “callous” as opposed to wicked better describes why the recklessness is being labelled as murder rather than culpable homicide, without using the value-laden terms of the former definition.⁷⁴

Adopting the Draft Code’s proposed standard would also provide an opportunity for courts to establish a firm threshold of indifference which would separate the distinction between the standards of recklessness necessary to secure convictions for culpable homicide and murder. Scotland has tended to take an objective view of recklessness in criminal cases.⁷⁵ Ferguson and McDiarmid comment that this section of the Draft Code contains significant objective overtones, but it is drafted in such a way that would allow elements of subjectivity to form part of the definition.⁷⁶ If such commentary is correct, Mitchell’s structure outlined above could fit in with this new definition.

The Proposed Standard of Recklessness in Murder

When considering the distinction between murder and culpable homicide, it is proposed that a person should be guilty of culpable homicide where a person causes death in circumstances where there was an objectively unacceptable risk of causing death, but where the person did not themselves realise that risk. In Mitchell’s terms, this would have been a “knowledge deficit”.⁷⁷ Homicides which occur in such circumstances are still deserving of punishment to reflect the harm caused, but they ought not to attract the particular stigma which follows a murder conviction because such a deficit indicates that the person would have chosen to act differently had they held the knowledge of the risk posed by their actions. That stigma, it is argued, requires to be imposed when a person fully appreciated the unacceptable risk of death, yet carried on regardless. Mitchell would probably class those who kill in these circumstances as having a “value deficit”.⁷⁸

It is suggested that, were the Draft Code’s definition enacted, the courts should take the opportunity to demarcate murder and culpable homicide along these objective and subjective lines. This interpretation of the Draft Code reinstates a similar standard of recklessness in the definition of murder as existed immediately prior to the *Purcell* decision. It recognises that

⁷³ Clive, Ferguson, Gane and McCall Smith, *Draft Criminal Code for Scotland with Commentary* (2003), s 37(1).

⁷⁴ Clive, Ferguson, Gane and McCall Smith, *Draft Criminal Code for Scotland with Commentary* (2003), p. 87

⁷⁵ See, Joshua Barton, “Recklessness in Scots Criminal Law: Subjective or Objective?” (2011) *Jur Rev* 143, 155.

⁷⁶ Ferguson and McDiarmid *Scots Criminal Law: A Critical Analysis* (2014), para 9.14.2.

⁷⁷ Mitchell, “The Minimum Culpability for Criminal Homicide” (2001) 9(3) *Eur J Crime Cr L Cr J* 193, 204.

⁷⁸ Mitchell, “The Minimum Culpability for Criminal Homicide” (2001) 9(3) *Eur J Crime Cr L Cr J* 193, 205.

circumstances other than assaults can give rise to a significant risk of death and permits these circumstances to be prosecuted and punished as murder where death results. Perhaps more importantly, this analysis means we can accept McDiarmid's contention that the proposed interpretation better reflects the characteristics which murder ought to criminalise than the law does at present.⁷⁹

It may be objected that this proposal is similar to oblique intention. However, oblique intention and Mitchell's deficit standards target different things. Oblique intention seems only to target the probability of the victim's death occurring, remembering that it only applies in cases where death is a virtual certainty. The proposed interpretation of callous recklessness instead focuses on the acceptance of risk that death could result. While this interpretation is wider than oblique intention, it still requires the prosecution to prove that the accused wilfully took on that risk. This does represent a narrowing of the previous definition of wicked recklessness.

Even so, it may be further contended that it would be difficult for the prosecution to prove that the accused had wilfully accepted the risk of death. However, their argument rests on the accused running a defence that they did not appreciate the possibility of death occurring. Scots law has dealt with such claims by examining the accused's actions as a whole. An example of this is the case of *Halliday v HM Advocate*.⁸⁰ In this case, two brothers killed their victim by kicking him repeatedly. While doing so, they paused their attack, shook hands and declared that they were "great brothers"⁸¹ before going on to further beat their victim. Once the brothers discovered that their victim had no pulse upon them completing their attack, they called the emergency services and requested that an ambulance be sent for him. The brothers sought to use this as evidence that they did not intend to kill their victim.

The appeal court was less than impressed by this argument. The Lord Justice-General expressly referred to the shaking of hands to support the claim that the brothers were completely indifferent as to whether their victim lived or died.⁸² Thus, although this case was decided on the pre-*Purcell* definition of wicked recklessness, it provides an example of the court looking at the attitude of both accused in light of the full circumstances of the case. The evidence of the acceptance of risk would undoubtedly be brought forward by the prosecution.⁸³ It is

⁷⁹ McDiarmid, "Something Wicked this Way Comes": The Mens Rea of Murder in Scots Law" (2012) *Jur Rev* 283, 303.

⁸⁰ *Halliday v HM Advocate* 1999 SLT 485

⁸¹ *Halliday* 1999 SLT 485, 486.

⁸² *Halliday* 1999 SLT 487.

⁸³ McDiarmid, "Something Wicked this Way Comes": The Mens Rea of Murder in Scots Law" (2012) *Jur Rev* 283, 303.

therefore likely that an accused seeking to avoid a conviction for murder through the proposed definition of callous recklessness would have to actively demonstrate how they did not foresee death as a possibility.

Wilful Blindness

A potentially significant gap could exist in defining callous recklessness as the accused's wilful acceptance of an unacceptable risk of causing death. That gap appears in cases where the accused thinks that death might be a possible result of their actions, but they do not know this risk exists for sure. Suppose the youths from earlier tie the ladder to the railway tracks and they think that it might be the case that someone could die in a derailment. However, they do not know for sure whether the train will derail. In spite of this, they deliberately choose to put this possibility out of their mind and carry on with their plan. If death were to result from the derailment, the youths may then attempt to use their deliberate lack of knowledge as a method of showing that they did not accept the risk of causing death thereby avoiding conviction for murder on the grounds of callous recklessness.

To close this potential gap, the law must provide that a person who excludes themselves from such knowledge to avoid liability should be taken to be aware of the risk. This concept is not entirely unknown to Scots law, with wilful blindness forming a *mens rea* element of the crime of reset.⁸⁴ Where wilful blindness is used as a method of satisfying *mens rea* elements of certain crimes, this is usually justified on the basis that a person who could find out the facts (or, indeed, the risks associated with their conduct) but who choose not to do so are equally as culpable as a person who has actual knowledge of those facts or risks.⁸⁵

Sarch is critical of defining wilful blindness in this way because it appears to capture those who have a legitimate reason not to investigate whether an incriminating fact is true. He provides the example of a person who suspects that a friend is operating a drugs farm, but investigating this fact would expose him to a deadly allergen.⁸⁶ In these circumstances, Sarch would argue that although the person would have an obligation to investigate whether the drugs farm was in operation (else be exposed to the allegation that they are also concerned in the production of

⁸⁴ Ferguson and McDiarmid, *Scots Criminal Law: A Critical Analysis* (2014), para 12.12.6.

⁸⁵ GR Sullivan, "Knowledge, Belief, and Culpability" in Stephen Shute and Andrew Simister (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002) 207, 213-214.

⁸⁶ Alexander Sarch, "Equal Culpability and the Scope of the Willful Ignorance Doctrine" (2016) 22(3/4) LT 276, 284-86.

drugs),⁸⁷ it would not be reasonable for them to fulfil this obligation because the serious risk that it would pose to their life.

Sarch's proposition would fit well within the definition of callous recklessness being advocated here. The imputed awareness brought by being wilfully blind would be equated with actual knowledge of the risk of causing another person's death. Once a person has been shown to be wilfully blind, the reasons why that person chose to remain unaware of the risk which they posed to their eventual victim becomes a live issue at trial. There may be evidence which justifies the accused's failure to become aware of such risks.

The reasons why an accused person chooses not to investigate the risks which they pose to another person could be said to be indicative of their character. Bayles deals with ignorance in general by noting that where there is an innocent explanation for why a person remains ignorant of facts or risks, the negative reflection on their character is not as pronounced for failing to recognise those risks.⁸⁸ It can therefore be assumed that the opposite is also true – a person who deliberately chooses not to investigate the risk of causing death, when able to do so, for the specific reason of avoiding convicting for murder should be taken to have seriously undesirable traits. We can say this primarily because their behaviour is indicative of a strong desire on the part of that person to satisfy their own interests whatever the cost to other members of society may be. A person with this motivation, it is submitted, is deserving of being labelled a murderer. Incorporating a wilful blindness standard such as the one advocated here ensures that this can be done, while setting a sufficiently high standard which the prosecution must meet to secure a murder conviction.⁸⁹

4. CONCLUSION

This paper has demonstrated that defining the *mens rea* of murder is not straightforward. With the consultation on this topic now concluded, the Scottish Law Commission has a challenging task ahead of it. Scotland's two-tier system governing homicide offences requires that a definition of murder be formulated which captures those whose conduct is deserving of that label (and the consequences which flow from it) while excluding from its application those whose conduct does not. It is not controversial to say that those who kill intentionally are

⁸⁷ Sarch, "Equal Culpability and the Scope of the Willful Ignorance Doctrine" (2016) 22(3/4) LT 276, 298.

⁸⁸ Bayles, "Character, Purpose, and Criminal Responsibility" (1982) 1(1) Law and Philosophy 5, 10-11.

⁸⁹ Alexander Sarch, "Wilful Ignorance in Law and Morality" (2018) 13(5) Philosophy Compass, 3.

deserving of being labelled a murderer (despite the confusion introduced by *Drury*). Unfortunately, the same cannot be said for those who kill culpably, though unintentionally.

The considerable narrowing of the definition of wicked recklessness in *Purcell* was not a desirable development. Requiring the presence of an intention to assault the victim ignores the fact that someone can expose another person to an extremely serious risk of death in the absence of any intention to assault them. This was demonstrated by way of adapting a real-life example where youths tied a ladder to a railway line to see what would happen when a train struck it. It was fortunate no injuries occurred, but the risk of a derailment occurring was real. The paper therefore used this example, and the case of *Petto*, to show that *Purcell* poses significant difficulties in ensuring legal justification of murder convictions in cases where the accused's intention to assault another person is absent.

Petto used terms of probability to show that the accused had the necessary intention for wicked recklessness to apply. As this paper has shown, this approach potentially allows the English concept of oblique intention to be used in cases where wicked recklessness would otherwise be in issue. It then considered whether the abolition of wicked recklessness in favour of oblique intention would be a positive step forward, but concluded that it would not. The example of the railway derailment demonstrates that a death cannot legitimately be said to have been caused intentionally where the person was unaware of the possibility of it occurring.

Using oblique intention to secure murder convictions amounts to the merging of two separate issues - the person's actual intentions, and their moral blameworthiness. If we wish to say that the reckless person's blameworthiness is deserving of a murder conviction should they cause death, then this should be reflected in the law. It is not satisfactory to stretch words beyond their ordinary meaning in order to secure such a result. On that basis, the recklessness standard of murder in Scotland must continue to exist.

Two proposals to reform the *mens rea* of murder in Scotland have been advanced. First, it was suggested that we embrace the standard of recklessness contained in the Draft Criminal Code for Scotland. As well as the ancillary benefits which were set out, it was submitted that adopting this standard would afford courts the opportunity to redefine how reckless homicides are dealt with in Scotland.

In interpreting this concept, it was suggested that it contains both objective and subjective elements. The objective element, that a person ran an unacceptable risk of death, could be used to define recklessness in both murder and culpable homicide. It is indicative of a person having

a lack of knowledge, however such a person who has only a lack of knowledge would still be culpable if they could have been expected to have knowledge hence this element would feature in the definition of culpable homicide. However, the subjective element contained in murder would better differentiate the two crimes. It was considered that the subjective element should be that the accused deliberately accepted that risk and carried on their actions regardless of it. This argument was drawn from character culpability theory, which holds that criminalisation should be based on the undesirable characteristics that a person displays. The complete indifference required for a conviction of murder under this proposed definition is considered to be highly undesirable indeed.

The second reform proposed by this paper seeks to address a gap in this definition. A mechanism needs to be in place to ensure that a person who was deliberately ignorant of a risk with the principal purpose of avoiding liability to murder was ascribed the label that they deserved. It was suggested that the courts hold such connivance to be equivalent to acceptance of the risk. In deciding whether to so hold, it was suggested that courts could enquire into the reasons behind a person's ignorance to determine whether or not the ignorance could be justified.