

COMMENTS AND NOTES

INFERRING INTENTION

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INTRODUCTION

It is with some trepidation that one finds another appellate decision on the vexed issue of inferring intention in the law of murder. This trepidation is brought about in part by sheer fatigue for we have been here many times before.¹ However the wariness is also justified as there are significant philosophical issues that need to be addressed by the courts despite the fact that the underlying issue can be stated with some degree of clarity: in what situations can the jury infer that a defendant must have intended to kill his victim even though killing the victim was not his primary purpose?² This is a crucial determination as the law of England and Wales, along with the law of Northern Ireland, specifies that intention is the only form of *mens rea* that will suffice for murder. Recklessness, however extreme, is not sufficient for murder, though gross recklessness can satisfy the *mens rea* for manslaughter.³ Other jurisdictions, such as Scotland, have largely avoided the problem⁴ by expanding the *mens rea* for murder to include extreme forms of recklessness.⁵ Recently the Irish Law Reform Commission has gone down this route by suggesting that the *mens rea* for murder include reckless killing manifesting an extreme indifference to human life.⁶

¹ See in particular *DPP v Smith* [1961] AC 290; *Hyam v DPP* [1975] AC 55; *R v Moloney* [1985] AC 905; *R v Hancock*, *R v Shankland* [1986] 1 AC 455; *R v Nedrick* [1986] 3 All ER 1; *R v Walker and Hayles* (1990) 90 Cr App R 226; *R v Scalley* [1995] *Crim LR* 504; *R v Woollin* [1998] 4 All ER 103; and *Re A (Children) (Conjoined Twins: Surgical Separation)* [2004] 4 All ER 961. The secondary literature is vast.

² For a recent overview of the philosophical debate see Kaveny, "Inferring Intention from Foresight" (2004) 120 *LQR* 81.

³ *R v Adomako* [1995] 1 AC 171. See comment by Gardner, "Manslaughter by Gross Negligence" (1995) 111 *LQR* 22; Leigh, "Liability for Inadvertence: A Lordly Legacy?" (1995) 58(4) *MLR* 457; Oliphant, "Manslaughter: Recklessness or Gross Negligence?" (1995) 6 *King's College Law Journal* 149; Stannard, "From Andrews to Seymour and back again" (1996) 47(1) *NILQ* 1; and Virgo, "Reconstructing Manslaughter on Defective Foundations" (1995) 54(1) *CLJ* 14.

⁴ See Christie, *Introduction to Scots Criminal Law* (2003), p 43.

⁵ *Drury v HM Advocate* 2001 SLT 1013. See further Jones, "The Scottish Law of Murder" (1989) 105 *LQR* 516; and Christie, "The Coherence of Scots Criminal Law: some aspects of *Drury v MH Advocate*" [2002] 6 *Juridical Review* 273. A useful comparative survey is provided by Newman, "Reforming the mental element of murder" (1995) 5(2) *Irish Criminal Law Journal* 194.

⁶ Law Reform Commission, *Consultation Paper On Homicide: The Mental Element of Murder* (2001), para 4.075. Para 6.06 states that '[a] person acts recklessly with

The situations that have concerned the courts in those jurisdictions which require intention to be found have typically involved individuals engaging in objectively highly dangerous conduct, such as throwing concrete slabs from a motorway bridge⁷ or setting fire to an occupied house at night,⁸ where the defendant claimed that his primary purpose was something other than to kill. From the jury's perspective the only way of verifying the defendant's intention, and hence his guilt or innocence, is to infer his intention from his actions. So that whilst the jury are being asked to make a subjective determination as to whether the defendant intended to kill, that determination has largely to be made on an objective assessment of the defendant's actions. Not unsurprisingly juries have sought guidance on the circumstances in which they can infer intention and, again perhaps unsurprisingly, the courts have either been reluctant to provide this advice or have provided the kind of advice that required further refinement in subsequent appellate judgments.

For once though, the judgment in *R v Matthews and Alleyne*⁹ is to be welcomed. For reasons that we expand on below, we believe that the Court of Appeal has taken vital remedial action to correct previous misinterpretations of the leading House of Lords' judgment. What is decided can be summarised comparatively briefly but its significance is real, both for the substantive criminal law and for the law of evidence.

The Facts

In *Matthews and Alleyne*¹⁰ the appellants had been convicted, along with another individual named Dawkins, of robbing, kidnapping and subsequently murdering a young man called Jonathan Coles who had been out celebrating a friend's birthday in Milton Keynes. Another individual, Canepe, was acquitted of robbery and murder but had pleaded guilty to manslaughter. Jonathan Coles was initially assaulted outside a nightclub by Alleyne and Dawkins. They stole his wallet which contained a bank card. Matthews and Alleyne were later caught on CCTV attempting unsuccessfully to withdraw money with the card from a cash machine. According to Rix L.J. this lack of success "made them angry".¹¹ Jonathan Cole meanwhile, who had become separated from his companions and who had lost his glasses, was attempting to flag down passing cars either for assistance or for a lift. The defendants drove past and forced Jonathan into the car. At trial the appellants argued that they played no further part in the proceedings but were clearly not believed by the jury. The other two defendants provided a detailed account

respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation'. See comment by Chief Justice Keane, "Murder: the mental element" (2002) 53(1) *NILQ* 1; and Bacik, "If it ain't broke – a critical view of the Law Reform Commission Consultation Paper on Homicide: the mental element in murder" (2002) 12(1) *Irish Criminal Law Journal* 6.

⁷ As in *R v Hancock, R v Shankland* [1986] 1 AC 455.

⁸ As in *Hyam v DPP* [1975] AC 55 and *R v Nedrick* [1986] 3 All ER 1.

⁹ [2003] WL 117062.

¹⁰ [2003] WL 117062.

¹¹ At p 2.

of what happened subsequently to Jonathan that clearly implicated Matthews and Alleyne. Although one of Matthews' grounds of appeal was that he had no case to answer, this was, according to Rix L.J. "rather half-hearted"¹² with the result that the appellants had to accept the version of events presented by Dawkins and Canepe at the trial.

According to them, Jonathan had been driven to Tyringham Bridge, after Matthews had ominously suggested that Jonathan be taken swimming. Canepe stayed in the car whilst the other three took Jonathan to the crown of the bridge. Despite protestations from Jonathan that he could not swim, the appellants placed Jonathan over the crown of the bridge. He struggled to cling to the bridge and lost his grip after Matthews hit him on the back of his hand. He fell 25 feet into the river which was 64 feet wide at that point. The appellants ignored his cries for help and left him to drown. The relevant issues at trial and the grounds for appeal are outlined in the next section.

Intention and The Substantive Criminal Law

The basic requirements of murder are the absence of a defence, that a person causes death by an unlawful act or omission (this is the *actus reus* element of the offence) and that the person also has the necessary mental element (the *mens rea*).¹³ In murder the *mens rea* is "malice aforethought", which does not of necessity imply premeditation or malice as those terms are usually understood. Malice aforethought consists not only of an intention to kill (or cause grievous bodily harm). A result may also be said to be intended, in certain circumstances, if the actor foresees with virtual certainty that one of the consequences of what he does will be that someone may be killed, even though it is not his intention or purpose¹⁴ to cause that consequence.¹⁵ This additional element considerably widens the scope of "direct" intention to include what has been called "indirect" or "oblique" intention.¹⁶

In cases of "direct" intention, where it can adequately be proved that the defendant intended to kill, no problems arise, but the courts have been struggling to deal with "indirect" intention since *DPP v Smith* in 1961.¹⁷ That case was followed by a number of attempts at clarification: *Hyam*,¹⁸ *Moloney*,¹⁹ *Hancock and Shankland*,²⁰ *Nedrick*,²¹ *Walker and Hayles*,²²

¹² At p 3.

¹³ Labelled a "rough and ready...analytical tool" by Ashworth, *Principles of Criminal Law* (2003), p 96. See also Smith, "On Actus Reus and Mens Rea" in Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Smith* (1978), p 96.

¹⁴ While the ordinary meaning of intention might well be defined in terms of aim or purpose, the element of foresight introduces a distinction between the meaning of intention and purpose. See Norrie, *Crime, Reason and History* (2001), p 47.

¹⁵ *R v Woollin* [1998] 4 All ER 103.

¹⁶ Commonly used to describe the foresight element, for example, by Williams, "Oblique Intention" (1987) *CLJ* 417, and by Norrie, "Oblique Intention and Legal Politics" [1989] *Crim LR* 793.

¹⁷ [1961] AC 290.

¹⁸ [1975] AC 55.

¹⁹ [1985] AC 905.

²⁰ [1986] 1 AC 455.

²¹ [1986] 3 All ER 1.

*Scalley*²³ and *Woollin*.²⁴ *Matthews and Alleyne*²⁵ is the latest in this long line of authorities and, significantly, would appear to resolve the long-overdue dispute over the status of “indirect” intention following the misinterpretation of Lord Lane’s classic *Nedrick* direction in both *Woollin* and *Re A (Children)*.²⁶

In *Nedrick*, Lord Lane said that:

“ . . . the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.”²⁷

This test confirms that foresight, even of virtual certainty, does *not* constitute intention;²⁸ to the contrary, it simply allows the jury to *infer* intention. The test was approved in *Woollin*²⁹ and indeed it was hoped that the problem with the meaning of intention in the so-called “foresight” cases had been resolved by the House in that case, but this was not so.³⁰ In *Woollin*, Lord Steyn followed the direction Lord Lane gave in *Nedrick* but then contradicted its clear meaning by claiming that “the effect of the critical direction is that a result foreseen as virtually certain *is* an intended result”.³¹

If we look back at Lord Lane’s direction, we can see that it does not say that the jury *must* find intention, it merely confirms that they *may* do so.³² As Norrie confirms:

“The use of the word ‘entitled’ . . . suggests that the jury may . . . identify intention, but, alternatively may not do so. ‘Entitled’ is permissive rather than obligatory. . . .”³³

²² (1990) 90 Cr.App.R. 226.

²³ [1995] *Crim LR* 504.

²⁴ [1998] 4 All ER 103.

²⁵ [2003] WL 117062.

²⁶ [2000] 4 All ER 961.

²⁷ *Per* Lord Lane [1986] 3 All ER 1 at 3-4.

²⁸ Lacey comments that Lord Lane “stops short of positively defining intention”; see Lacey, “A Clear Concept of Intention: Elusive or Illusory?” (1993) 56 *MLR* 621, p 635, in n 54.

²⁹ Subject to substituting the word “infer” with “find”.

³⁰ See Norrie, “After *Woollin*” [1999] *Crim LR* 532; and Wilson, “Doctrinal Rationality After *Woollin*” (1999) 62 *MLR* 448. Smith, while conceding that the case has left ambiguity in so far as the jury are not bound to find intention, still felt that a result foreseen as a virtual certainty should be deemed to be an intended result in his commentary on *Woollin* [1998] *Crim LR* 890 at 891. The Court of Appeal in *Matthews and Alleyne* disagreed with Smith’s view at 10.

³¹ *Per* Lord Steyn [1998] 3 All ER 103 at 110 (emphasis added).

³² Williams, “The Principle of Double Effect and Terminal Sedation” [2001] 9(1) *Medical Law Review* 41, p 43. See also Wilson, *op cit* n 30 at 456: ‘Juries are entitled to find intention where there is foresight of virtual certainty, which is not the same as being bound to.’

³³ Norrie, *op cit*, n 30 at 537. Also in agreement on this point are Ashworth, *op cit*, n 13 at 177; and Smith, *op cit*, n 30 at 891. The point is conceded by Smith and Hogan, *Criminal Law* (2002), p 72.

Wilson also reminds us that the critical direction is set out in the conditional negative:

“[It] does not say ‘you must find intention if the defendant foresaw the consequences as certain’; rather it says, ‘do not find intention unless the defendant . . . foresaw the consequence as certain.’”³⁴

The fallacy is perpetuated in *Re A (Children)*³⁵ where both Lord Justice Ward and Lord Justice Brooke in the Court of Appeal, although approving and ostensibly applying Lord Lane’s direction in *Nedrick*, misinterpreted the *mens rea* element of murder by holding that death is intended where it is foreseen as a virtual certainty; no mention is made of the direction that the jury is “entitled to find”.³⁶ Similarly in *Matthews and Alleyne*³⁷ the judge at first instance, claiming to follow the *Nedrick/Woollin* direction, said that:

“With regard to proving ‘an intent to kill’ the prosecution will only succeed in proving this intent either:

- (i) By making sure that this specific intention was actually in the mind/s of the defendants, or
- (ii) (a) By making sure that Jonathan Cole’s death was a virtual certainty (barring some attempt to save him), and (b) The defendant . . . appreciated . . . that this was the case, and he had no intention of saving him, and knew or realised that the others did not intend to save him either.”³⁸

Matthews and Alleyne’s main ground of appeal was that the above was a misdirection which made the convictions unsafe.³⁹ This argument relied on two separate points. Firstly that alternatives (i) and (ii) might lead the jury to think that they could convict of murder on alternative (ii) even if they rejected (i) and, secondly, that alternative (ii) was presented as a substantive rule of law rather than as a rule of evidence.

The second point is more important and will be dealt with first. In response to Counsel’s submission that Lord Steyn’s comment in *Woollin*⁴⁰ moved the House of Lords “away from a rule of evidence to a rule of substantive law”, Rix L.J. held that:

“[In] our judgment . . . the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty . . . we do not regard *Woollin* as yet reaching or laying down a substantive rule of law.”⁴¹

³⁴ Wilson, *op cit*, n 30 at 455.

³⁵ [2000] 4 All ER 961.

³⁶ See McEwan, “Conjoined Twins: Murder or Mercy?” (2001) *Bracton Law Journal* 7 at 13.

³⁷ [2003] WL 117062.

³⁸ *Ibid* at 6.

³⁹ This was based on “lurking doubts”.

⁴⁰ That “the effect of the critical direction is that a result foreseen as virtually certain is an intended result” see text to n 31 *ante*.

⁴¹ [2003] WL 117062 at 10. In addition, at 9, Rix L.J. noted that Lord Lane in *Nedrick* “continued to think of his direction as being in the realm of a rule of evidence not of substantive law”.

The Court of Appeal felt that the judge had gone too far in his interpretation of the direction but that this did not render the verdict unsafe because where all that is required is an appreciation of virtual certainty of death there was “very little to choose between a rule of evidence and one of substantive law”.⁴² Moreover, the “irresistible nature of the inference or finding of intent to kill” was highlighted by the fact that the defendants had no intention of saving the victim from drowning. In the court’s view it was therefore perfectly natural that the jury would find that the defendants intended him to die.⁴³ In other words, the fact that the defendants omitted to do anything to rescue Jonathan reinforced their virtual certainty that he would drown and made it inevitable that in this case their virtual certainty would be construed as intention.

This reference to the defendants’ omission to rescue the victim from drowning raises an interesting point for debate. In order to avoid placing an “intolerable” burden on people who would otherwise be liable without limit,⁴⁴ there is no general liability for omissions.⁴⁵ Before an omission can be culpable, there must be a duty to act.⁴⁶ Liability only arises where the parties stand in such a relationship to each other that duty or obligation is imposed.⁴⁷ An example of such a duty would be a doctor’s duty of care towards a patient. A common law duty can also arise in murder (and in manslaughter), for example, where a parent has a duty to care for a child.⁴⁸ More importantly, however, a duty can arise where a person simply accepts responsibility for another.⁴⁹

⁴² *Ibid* at 10. The Court of Appeal also commented that this was “probably” the reason for Lord Steyn’s interpretation of the *Nedrick* direction.

⁴³ *Ibid* at 11.

⁴⁴ Glover, *Causing Death and Saving Lives* (1986), pp 93-94.

⁴⁵ Although the *Shorter Oxford English Dictionary* defines an omission as the “non-performance or neglect of an action or duty”, there is considerable theoretical debate surrounding the concept. For example, Fletcher has distinguished between two types of omission – a breach of a duty to act and a failure to intervene; see Fletcher, “Ethics and Euthanasia” in Williams (ed), *To Live and to Die: When, Why and How?* (1973), p 121.

⁴⁶ Williams, “Criminal Omissions – The Conventional View” (1991) 107 *LQR* 86 at 86. The duty requirement has been described as a device which, very much like causal inquiry, “narrows [a] field of liability” which would otherwise be too wide; Fletcher, “Prolonging Life: Some Legal Considerations” in Downing (ed), *Euthanasia and the Right to Death* (1969), p 80. See also Norrie, *op cit*, n 14 at 134.

⁴⁷ “It is the nature of the relationship that is crucial in determining responsibility”; Fincham and Jaspars, “Attribution of Responsibility” in Berkowicz (ed), *Advances in Experimental Social Psychology* (1980), p 98.

⁴⁸ *R v Gibbons and Proctor* (1918) 13 Cr.App.R. 134.

⁴⁹ *R v Stone and Dobinson* [1977] QB 354. The case was decided on the basis of involuntary manslaughter and sets out a test based on recklessness. Since the case of *R v Adomako* [1995] 1 AC 171 the test has been altered to one of gross negligence. Sometimes a duty may extend to someone who is unrelated. For example, the Court of Appeal held that a duty may arise where a close friend of a drug addict had provided him with a fatal dose and had stayed with the victim until he died; *R v Sinclair* [1998] *NLJ* 1353. However, in *R v Khan* [1998] *Crim LR* 830 it was felt that expecting a drug dealer to summon help for one of his customers would be to extend the duty too widely.

In *Matthews and Alleyne*, the defendants submitted that the judge placed too much emphasis on their failure to rescue the victim. Rix L.J. said, however, that “it was a striking feature of the case, relevant to the question of intent”.⁵⁰ Certainly the implication is that, by kidnapping Jonathan Coles and throwing him into the river from a high bridge in the dark, without his glasses and as a non-swimmer, the defendants were responsible for his safety and indeed his life. Having thrown him in the river, their duty was clearly to rescue him from drowning. Indeed, Fletcher has defined a “duty” in this type of situation as a “vehicle by which we select those relationships that require people to intervene to prevent the death of others”.⁵¹ In this case the decision not to intervene made just as much difference to the victim’s fate as throwing him in the river⁵² and, as Ashworth suggests in his commentary on the case, the defendants may even have been found guilty if they were virtually certain that Jonathan would drown but made no effort to prevent that from happening.⁵³

Rix L.J. then proceeded to dispose of the remaining grounds of appeal. As to the first part of the main ground of appeal,⁵⁴ he concluded that the jury could not possibly have misunderstood the way the judge worded the direction bearing in mind that point (i) was the Crown’s primary case and that point (ii) was their “fall-back” position.

Finally, Rix L.J. considered the allegation that the verdicts were unsafe on grounds of “lurking doubt”. Despite the evidence of the other two defendants to the contrary, both Matthews and Alleyne claimed that they were not present during the events that led to Jonathan Coles’ death. Part of their allegation of “lurking doubt” was thus that the jury may have seen them as lacking in credibility because they had lied and given false alibis. In dismissing the appeal, Rix L.J. held that there was no “lurking doubt” which rendered the verdicts unsafe and himself found it “[hard] to think that they had any credibility at all”.⁵⁵

CONCLUSION

Underlying much of the confusion in this area has been a failure to distinguish between issues relating to the substantive criminal law and issues relating to the law of evidence. This might seem strange for one would think that it would be easy to distinguish between the two, after all the substantive criminal law could be summarised as the law which determines what is, or is not, a crime. To paraphrase Fletcher, the substantive rules establish “guilt in principle” whereas procedural rules determine whether an individual is

⁵⁰ [2003] WL 117062 at 12.

⁵¹ Fletcher, *Rethinking Criminal Law* (1978), p 372.

⁵² Harris deals with this in the context of acts and omissions in medical treatment; Harris, *The Value of Life* (1985), p 31.

⁵³ Ashworth, “Commentary on *R v Matthews and Alleyne*” [2003] *Crim LR* 553 at 555. For more on liability for omissions see Ashworth, “The Scope of Criminal Liability for Omissions” (1989) 105 *LQR* 424; Hughes, “Criminal Omissions” (1958) 67 *Yale LJ* 590; Smith, “Liability for Omissions in Criminal Law” (1984) 4 *Legal Studies* 88; and Williams, *op cit*, n 46.

⁵⁴ That alternatives (i) and (ii) might lead a jury to think that they could convict of murder on alternative (ii) even if they rejected (i), see text following n 39 *ante*.

⁵⁵ [2003] WL 117062 at 13.

“guilty in fact”.⁵⁶ Yet, despite the fact that an intention to kill (or cause grievous bodily harm) remained the *mens rea* for murder throughout the period, there was confusion in the case law about whether foresight of virtual certainty was a rule of substance or procedure. In effect if the jury were *required* to find intention if there was foresight of virtual certainty – as would appear to have been the effect of Lord Steyn’s judgment in *Woollin* – then it would have become a rule of the substantive criminal law: if the defendant saw death as a virtual certain consequence of his actions then he has satisfied the *mens rea* for murder.

In verifying that the *Nedrick / Woollin* direction is a rule of evidence, and not one of substantive criminal law, the Court of Appeal in *Matthews and Alleyne* has upheld the jury’s right to decide if they think foresight of virtual certainty can be equated with intention or not on a case by case basis. The jury can thus, quite properly, use the direction as a “get out clause whereby they may decide that although the defendant foresaw death as virtually certain, he or she did not intend it”.⁵⁷ However, while it can be said that the case has defined the *status* of the direction on intention, it has not defined the concept of intention itself.⁵⁸ It remains the case that judges simply give advice as to how intention can be found; they do not say what it actually means.⁵⁹ Thus, in the absence of a definition and while attempts to codify provisions relating to intention remain unimplemented,⁶⁰ the conversion of foresight into intention remains in the jury’s hands.⁶¹ This is surely correct as s.8 of the Criminal Justice Act 1967 states that:

“A court or jury in determining whether a person has committed an offence –

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

Clearly the jury should be at liberty to draw whatever inferences they see fit from the available evidence in determining whether or not the defendant

⁵⁶ Fletcher, *Basic Concepts of Criminal Law* (1998), p 7.

⁵⁷ McEwan, *op cit*, n 36 at 13. See also Wilson, *op cit*, n 30 at 456 on this point. This is what Ashworth calls “moral elbow-room” in his textbook, *op cit*, n 13 at 179. In his commentary on the case he notes that the consequence of this is that some kinds of case can slip through a “door which has been left ajar”; *op cit*, n 53 at 554-555.

⁵⁸ Note Ashworth’s comment that “the courts do not adhere to a single definition” anyway and that the reason for this is so that they can diverge from the “standard definition” in certain circumstances; Ashworth, *op cit*, n 13 at 177-178.

⁵⁹ See Griew, “States of Mind, Presumptions and Inferences” in Smith (ed), *Essays in Honour of J. C. Smith* (1987), p 82.

⁶⁰ See, for example, Law Commission No 177 clause 18(b)(ii); House of Lords Select Committee on Murder and Life Imprisonment; Law Commission Consultation Paper No 122.

⁶¹ See, for example, Norrie who comments that even though intention is “perhaps the core concept [it] remains obscure and mystifying”, *op cit*, n 14 at 37; and Lacey who believes that “a valid concept of intention is. . . illusory”, *op cit*, n 28 at 642.

intended to kill. Ordinarily, if a juror believes that the defendant saw death as a virtual certainty of his actions then the juror will draw an inference that death was intended. However *Matthews and Alleyne* leaves open the possibility that a juror will not see it as proper to infer intention even if the available evidence suggests that death was a virtually certain consequence of the defendant's actions.⁶² We welcome the case as an important decision on the status of the current direction on intention for what is, after all, one of the most serious of offences and applaud the Court of Appeal for correctly maintaining the distinction between matters of substance and matters of evidence.

⁶² See the sources at, *op cit*, n 57. For example, in so called "mercy" killings, where the jury is sympathetic towards the defendant, the jury could return a "perverse" verdict. For further discussion see Schopp, *Justifications, Defences and Just Convictions* (1989) and Williams, "Provocation and Mercy Killing" (2001) 65(2) *Journal of Criminal Law* 149.