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LEGAL AND SOCIAL MURDER: WHAT'S THE DIFFERENCE?

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LEGAL AND SOCIAL MURDER: WHAT'S THE DIFFERENCE?¹

Alan Norrie

Murder or Manslaughter?

At a recent meeting in the House of Commons to mark six months since the fire that swept through Grenfell Tower killing 71 people, a bereaved relative tells Sajid Javid that his mother and sister had been 'murdered and cremated' in the fire.² A placard outside a hearing of the official enquiry reads 'Kensington and Chelsea Council Are Complicit in Murder'.³ The Metropolitan Police report to that Inquiry that amongst the offences they are investigating are manslaughter, corporate manslaughter, misconduct in public office and breaches of fire safety legislation – but not murder.

The choice between murder and manslaughter is always a significant question in criminal law and it has a significant symbolic dimension with regard to Grenfell. That it should be given proper consideration by the English legal system at this time, whatever the ultimate decision, is important in terms of its legitimacy in connection with such a tragic, highly contested, disaster. The criminal justice system will be judged by many with regard to Grenfell on whether it dealt justly and fairly with the outcome of the fire. At bottom, this leads to a question of criminal law. How should the law classify the deaths that occurred? An underlying credo is that criminal law should allocate responsibility fairly – in terms of a fair labelling of conduct. Alongside this, there is the legal question in a stricter sense: what does the law say and how may it be applied in its letter to a particular situation? These two questions, of legal application and fair allocation, should of course be aligned, but if they are not, and a judgment of fairness and an account of the law turn out to be out of phase with each other, what to do? Lawyers would want to see that fairness and interpretation align, but

¹ Professor of Law, Warwick Law School. I thank Jackie Hodgson, Jeremy Horder, Roger Leng and Victor Tadros for their comments on an earlier draft. Responsibility for the argument is mine.

² Guardian, 13 December 2017.

³ Guardian, 12 December 2017.

no lawyer would wish to say that where they diverged, a judgment based on fairness should simply ride roughshod over what the law says. If that is the case, the law should change, but the rule of the existing law must be observed.

Often, however, the law is subtle and flexible enough not to get itself into such an impasse. It balances legal interpretation and fairness by finding ways in which it can adapt to different situations. The rule of law proves more pliant than the strict doctrinal vision might imagine. The formal categories of law have sufficient flexibility to accommodate situations where social and moral instincts require it. It turns out that with a malleable law, outcomes depend on ethical and political assumptions, at least in hard cases, rather than on the compelling resoluteness of the legal rule. While this may seem scandalous to the formalist, to others, it is what permits law to navigate a world replete with conflict and contradiction.

Murder or manslaughter? Manslaughter is recognised as a category with a fair degree of pliability. Its different forms can be said to represent a kind of bucket shop in which killings that are not of the worst kind, but which are nonetheless seriously culpable, may be caught.⁴ If manslaughter is the appropriate label, as the police appear to think in Grenfell, it is to be hoped that it will be applied in a robust enough way to avoid the failure of a previous similarly high profile prosecution in the *Herald of Free Enterprise* case.⁵ It is also to be hoped that with regard to corporate manslaughter that the new offence proves more successful in achieving an appropriate outcome than the previous law was wont to.⁶ This is the territory that is already being explored by criminal justice professionals, but it

⁴ It is 'used to mop up killings which are not perceived, for one reason or another, as sufficiently heinous to deserve the label murder' (C.Wells and O.Quick, *Lacey, Wells and Quick: Reconstructing Criminal Law* (2010) Cambridge, Cambridge University Press, p.796).

⁵ C.Wells, *Corporations and Criminal Responsibility* (2001) Oxford, Oxford University Press, pp. 107-11. In the trial of individual defendants including senior management for manslaughter in this case, Turner J. halted proceedings and directed acquittals before the end of the prosecution case on the basis that none of the defendants has been reckless as to the drownings. For Wells, his decision in rejecting recklessness demonstrated 'a clear failure to consider what might be meant by risk' (p.110). In light of the discussion below about how we judge the appreciation of risk, her analysis of how risk was handled in the *Herald* case repays close attention.

⁶ But see C.Warburton, 'Corporate Manslaughter: In Deep Water' *Health and Safety at Work* 18 August, 2017; and A.Norrie, *Crime, Reason and History* 3rd ed (2014) Cambridge, Cambridge University Press, pp.117-34.

leaves out from the start the possibility that the family members and their supporters might have a point in speaking about murder. This essay seeks to think through whether murder can be so easily discounted in a case like Grenfell. It considers the connection between legal, social and political murder – between murder in law and the ways in which society characterises killings as seriously wrong in moral terms. Wherein lies the difference, what does the law really say?

In considering these questions, I will focus on the main element in the legal definition that distinguishes murder and manslaughter, *mens rea*. I will reflect on two issues that ultimately may be conjoined. The first concerns the form of *mens rea* for murder that involves an intention to cause serious harm, where intention involves foresight of a virtual certainty that harm will ensue. Here, I consider the possibility that such an (indirect) intention may be more likely to be found where actors within a system have responsibility for, and the vantage point of oversight of, the system as a whole. The second concerns the potential flexibility of the law of indirect intention in a situation where the law retains a certain ‘moral elbow room’,⁷ which may be used where a jury is ‘entitled to find’⁸ that a defendant foresaw an outcome as virtually certain. This is said, most recently by the Supreme Court in *Jogee*,⁹ to lead to an *evidential* standpoint, which leaves the precise nature of the legal rule open to interpretation by a jury. These two points, jointly and severally, suggest that the gap between murder in law and as it is perceived in a setting like Grenfell may not be as wide as is sometimes thought.

From Social to Legal Murder

In the aftermath of the fire, John McDonnell, Deputy Leader of the Labour Party, claimed that residents had been ‘murdered by political decisions’, that ‘politicians’ decisions over recent decades were important factors in the deaths of 79 people in the tower block in north Kensington, London’.¹⁰

⁷ J.Horder, *Ashworth’s Principles of Criminal Law* (2016) Oxford, Oxford University Press, p.195.

⁸ *Woollin* [1998] 3 WLR 382.

⁹ *R v Jogee* [2016] UKSC 8, para 83.

¹⁰ Guardian, 25 June 2017.

When pressed on the matter, he opted to link murder by political decisions to what he called social murder:

There's a long history in this country of the concept of social murder where decisions are made with no regard to consequences of that, and as a result of that people have suffered. That's what's happened here, and I'm angry. I believe social murder has occurred in this incidence and I believe people should be accountable.¹¹

When asked to explain who the murderers were, McDonnell said:

I think there's been a consequence of political decisions over years that have not addressed the housing crisis that we've had, that have cut back on local government so proper inspections have not been made, 11,000 firefighter jobs have been cut as well – even the investment in aerial ladders, and things like that in our country.¹²

To repeat the question: who were the murderers? Presumably, McDonnell would say that it was the politicians involved in making cuts over many years, and that would include politicians of different parties who have been in power over a long period, including McDonnell's own party. Perhaps the entire political class over decades should be arraigned in court for producing a Grenfell, but we might think this an unlikely outcome. The claim lacks the kind of detail and precision that a court of law would require. On McDonnell's view, as we have it here, the gap between legal and social murder appears too broad.

Interestingly, a better focused argument can be taken from Frederick Engels (McDonnell's inspiration?) in the mid-nineteenth century when he described the concept of 'social murder' in *The Condition of the Working Class in England* (1845).¹³ To begin, like McDonnell, Engels associates social murder with the structural violence endemic to the social system:

¹¹ Guardian, 16 July 2017.

¹² Guardian, 16 July 2017.

¹³ F.Engels, *Condition of the English Working Class in 1844* (2010) Cambridge, Cambridge University Press.

When one individual inflicts bodily injury upon another such that death results, we call the deed manslaughter; when the assailant knew in advance that the injury would be fatal, we call his deed murder. But when society places hundreds of proletarians in such a position that they inevitably meet a too early and an unnatural death, one which is quite as much a death by violence as that by the sword or bullet; when it deprives thousands of the necessities of life, places them under conditions in which they cannot live – forces them, through the strong arm of the law, to remain in such conditions until that death ensues which is the inevitable consequence – knows that these thousands of victims must perish, and yet permits these conditions to remain, its deed is murder just as surely as the deed of the single individual; disguised, malicious murder, murder against which none can defend himself, which does not seem what it is, because no man sees the murderer, because the death of the victim seems a natural one, since the offence is more one of omission than of commission. But murder it remains.¹⁴

To this analysis of systemic or structural violence Engels then added some agential specificity. He went on to say that he would prove that murder was the appropriate term because ‘society *knows* how injurious such conditions are to the health and the life of the workers, and yet does nothing to improve these conditions. That it *knows the consequences of its deeds*; that its act is, therefore, not mere manslaughter, but murder’ (emphasis added). He would establish his case ‘when I cite official documents, reports of Parliament and of the Government, in substantiation of my charge’.¹⁵ With these comments we are still at the level of the system, but if it is possible to cite official documents and reports, these have to be written by officials and they must pass across the desk of politicians who act on them. Engels’s account implicitly differentiates murder from manslaughter in something like legal terms, and his intention is to show that social murder is a specific form of legal murder, killings for which agents may be responsible. Significantly, what is important is what relevant actors

¹⁴ *Ibid*, p.95-6.

¹⁵ *Ibid*, p.96.

know to be the case through the receipt of reports which tell them what is happening; but how would that connect with murder's formal definition?

Murder: the Mental Element

The present law on murder in England and Wales is complicated, especially around the mental element for the crime. Mens rea can involve either intent to kill or to cause serious injury, and the intention to do either of these can be direct or indirect. A person may be guilty of the crime where a death occurred that she caused and she is found to (a) have intended the death itself, or (b) intended to do serious harm to the deceased, or (c) foresaw the death or serious harm as a virtually certain outcome of acts in which she was engaged.

Other features of the crime are that an outcome must be related to actions in a causal chain, where the agent need not have been the sole cause, so long as s/he was a contributing cause. Omissions can take the place of acts in homicides where the actor was under an obligation to have acted to avoid an outcome.¹⁶ Causation and omissions each bring their own issues,¹⁷ but these are not the main things to think about in considering culpability for the deaths at Grenfell. I will not consider them further here, for the main difference between murder and manslaughter rests on the mens rea issue. There, the main focus is on the question of direct or indirect intention, the latter involving

¹⁶ D.Ormerod and K.Laird, *Smith and Hogan's Criminal Law* (2015) Oxford, Oxford University Press, pp.75-6. In Andrew Ashworth's account, omission liability would stem from (a) the general obligation of a state to protect and provide security for its citizens, together with (b) the voluntarily incurred obligations of office-holders in the state: see 'Criminalising Omissions' in A.Ashworth, *Positive Obligations in Criminal Law* (2013) Hart, Oxford, ch 2.

¹⁷ William Wilson has an argument significant to murder if it takes the omission route. He suggests that murder by omission should admit only a mental element of purpose, direct rather than indirect intention. This is premised on a line he draws between murder and manslaughter based on the notion of an 'attack' as the moral foundation for murder, contrasted with 'endangerment' as the moral foundation for manslaughter. Murder by omission requires the direct, purposive form of intention in order to be clear that there has been an attack in moral terms. Such a line of argument is not however supported by the criminal law of England and Wales, where (a) the alternative mens rea for murder of intention to cause serious harm involves an endangering element, and (b) indirect intent incorporates the potential recognition of endangerment. If this were a proposal for reform of the law on normative grounds, I would add that the line cannot be drawn so as to avoid an intermediate grey zone between the two concepts of attack and endangerment. See W.Wilson, 'Murder by Omission: Some Observations on a Mismatch Between the General and the Special Parts' (2010) *New Criminal Law Review*, 1. I discuss the two issues of mens rea in murder mentioned here below, but not especially in relation to omissions.

‘foresight of a virtual certainty’, and this is linked to the two forms of mens rea, intention to kill or cause serious harm. What do these terms mean?

The first thing to note is that intentionality *with regard to death* is unnecessary. The assailant does not need to know that the injury would be fatal for him or her to be guilty of murder, provided that s/he meant to inflict the injury. This is a matter of some contestation in the modern law. The Supreme Court has recently noted that murder ‘has a relatively low mens rea threshold’,¹⁸ and this has been the subject of repeated complaint;¹⁹ nonetheless this is the law, and its effect is to broaden liability to a range of cases in which injuries leading to death can lead to a murder charge provided that they were intended and death resulted.

This leads us into the main issue to be faced: could either national or local politicians, or say commercial developers or a landlord, carrying out acts or omissions, be said to have intended to kill or cause serious injury to the residents in the case of a fire such as at Grenfell? When Engels wrote about this all those years ago, he noted two possibilities: first, that society knew ‘and yet does nothing’; and second, that it ‘knows the consequences of its deeds’. As for the first, an omission can lead to criminal liability if there is an obligation to act, and if the other terms of liability are then satisfied. As for the second, where there is knowledge of the consequences of one’s deeds, how does this knowledge relate to the law of intention as described? Knowledge might be a sign of an actor’s purpose (her direct intention). The fact that A knew that death or serious injury would follow his or her acts could be seen as evidence that s/he did indeed intend the outcome. Knowledge would raise a question about purpose, albeit one that could be rebutted depending upon other available evidence. But purpose or direct intention is not what is thought of in the situation of social murder. No one *directly intended* to kill or cause serious injury in the Grenfell Tower case, it was no one’s aim. This leads to the second possibility: that A *foresaw death or serious injury as a virtual certainty*

¹⁸ *R v Jogee* [2016] UKSC 8, para 83.

¹⁹ Law Commission, *Murder, Manslaughter and Infanticide* (2006) Law Com No 304.

of his or her acts or omissions. A's foresight meant that, while it was never her purpose to kill, she had knowledge that death or serious injury would occur, such that one could say she foresaw it as virtually certain to happen.

Could this apply in a case such as Grenfell? We have to imagine a jury considering acts (or omissions) in terms of their outcomes, and what the actors anticipated as a consequence of their conduct. If we take the case of death, the question is: did any actor foresee death as a virtually certain outcome of their acts? By virtual certainty is meant something that will happen 'barring some unforeseen intervention',²⁰ unless 'something unexpected supervenes to prevent it'.²¹ Would any actors have expected deaths, unless something unexpected happened? Would they in that sense have foreseen death as a virtual certainty? Here, everything depends, I suggest, on the actor's vantage point. *From where the actor stood*, what could they have foreseen, and, what, if they could have foreseen death, might a jury find that they did foresee? The latter question is determinative of guilt, but answering it depends to a large extent on the jury's judgment of the situation.

With serious injury, it must similarly be proved that A foresaw such injury as a virtually certain outcome of their acts. This is a lower threshold than death in that (a) serious injury may involve a lesser form of violence than one directly causing death, and is usually more easily achieved; and in that (b) the foresight of the virtual certainty of this lesser violence is counted as sufficient for the crime of murder, provided that death did occur. A serious injury such as for example a broken bone is much more likely to occur in any chain of events involving fear, panic and rush, and particularly in the kind of mayhem that is likely to ensue in something like a fire in a block of flats. That someone might suffer such an injury and that this might be foreseen as a virtually certain outcome makes a murder charge likely easier to establish than if one has to prove foresight of the virtual certainty of death itself to the same standard.

²⁰ *R v Nedrick* [1986] 1 WLR 1025, 1028; affirmed in *Woollin* [1998] 3 WLR 382.

²¹ *R v Moloney* [1985] 1 All ER 1025, 1039.

Foresight and Standpoint

Nonetheless, the success of establishing either foresight of serious injury or death depends on something else, mentioned above: the question of the actor's *vantage point*. Take a reckless driver, who day in, day out drives at 70mph in a built up area. If we stopped our driver on any particular day, and asked him what he thought the risk of killing someone that day would be, he would likely respond with an estimate of a low probability. The individual act of driving on one day would be like the other days on which he has driven without accident. Imagine a police officer with long experience of road safety observing our driver, and being asked what she foresees the risk as being (a) if the driver drives that way on that day and (b) if he continues to drive that way on this stretch of road every day for a lengthy period. The officer might well indicate that she regards it as virtually certain that the driver will kill someone not on any particular day but within the period as a whole by reason of driving consistently badly. Then imagine that we bring together the driver and the officer, and the officer gives the driver the benefit of her advice. He will, if he carries on this way, eventually kill someone. If the driver then continues to drive as previously, and death or serious injury were then to occur, we might well think that he foresaw it as virtually certain that death (a fortiori serious injury) would result. It had, after all, been pointed out to him.²²

The example does two things. First it catches the difference in standpoint between an actor within a system, and someone with an overview of the system. The latter has a different perspective and can see things differently, and better, in terms of outcomes of the system. In our example, the driver's benefit of system knowledge imparted by the officer provides him with a different view from that which he had as a simple actor in the system. Second, it points out the moral relevance of knowledge and communication to establishing responsibility in the system. The driver is placed in a

²² In line with this, the Sentencing Council's (2008) guidelines state that in sentencing for causing death by dangerous driving, failing to heed a warning constitutes an aggravating factor.

different normative position by his new understanding,²³ and his responsibility changes in light of what he is advised by the officer. Once brought to his attention, one expects more of him.

What is the relevance of this to Grenfell? In that case, many individuals would not have foreseen death or serious injury coming in that block of flats on that day, despite the various fire hazards that existed. However, a situation where there was both system overview and specific warning to those responsible for running it seems to have been in place. Warnings came from residents to the local council, and warnings also came from within the system itself to those in government. To provide one illustration, a similar fire had occurred at Lakanal House in July 2009 resulting in the death of six occupants. As a result of this the Coroner had written a 'Rule 43 letter' to the relevant Secretary of State, a letter specifically prompted by the risk that similar deaths might occur in similar situations unless action was taken.²⁴ In response to this, the Secretary of State wrote back detailing what his Department was doing. A key concern, though not the only one, identified by the Coroner and reportedly not taken forward by the Government concerned retro-fitting of sprinklers. Reports emerging after Grenfell in July 2017 suggested the failure of the Government to instigate appropriate responses to earlier concerns.²⁵ No doubt in due course authoritative findings of the facts will appear.

Whether those with responsibility to act acted appropriately in this situation is not a matter that can be judged here. I make no claim on that, only about the terms in which liability should in principle be framed in law. My point, however, is that (a) in a defective system, sooner or later a particular risk of an individually low probability will become a virtual certainty within the system as a whole for some unfortunate people who are its victims, even if it is not possible to say precisely to whom, where and

²³ J.Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) *Cambridge Law Journal* 53, 502; A.Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) *New Criminal Law Review* 11, 232.

²⁴ Under the Coroners and Justice Act 2009, Schedule 5, para 7, coroners have the duty to make reports to a person, organisation, local authority or government department or agency where the coroner believes that action should be taken to prevent future deaths.

²⁵ Guardian, 17 June, 2017; Independent, 18 June, 2017.

when something will happen; and that (b) a system such as the housing system possesses actors with system responsibilities and the vantage point to possess perspectival oversight, such that it may be possible, especially if they are alerted, for them to foresee the risk. The risk foreseen as virtually certain to occur could be one of death or a serious injury, and where there was death and either of these foreseen risks established, we are in the area where a jury could, depending on facts presented to it, find actual foresight by a system agent, and therefore the crime of murder.

To consider the strength of the argument in principle, imagine a situation seven years hence when an enquiry has found that the systems of fire prevention at Grenfell had been seriously defective, in line with the previous experience at Lakanal. Limited criminal prosecutions on lesser health and safety charges have occurred. Defects have again been drawn to the government's attention, and all sorts of expressions of regret and resolutions never to let it happen again have been made.

Sufficient time has passed for clearly identified remedial action to be taken, but it has not. There then occurs a further fatal tower fire. What would we think then? Would we be still of the view that this was not murder, or does the abject experience of repetition make a difference to our judgment? If so, that is surely because we recognise that systemic foresight plus responsibility to act effectively is a relevant basis for culpability. If next time, why not this time, given Lakanal? We look to be in a position where a legal question could be raised, though it would be for a jury to decide.

Rule of Law or Rule of Evidence

The previous section is based on a straightforward reading and application of the law of intention as it relates to the law of murder. However, there is another aspect that bears upon the issue whether an event such as the Grenfell fire might constitute the crime. It concerns the law's formalism in the face of actions that are the stuff of substantive moral evaluation and condemnation.²⁶ The law has

²⁶ I make this argument at greater length in A. Norrie, *op cit*, note 6. The argument is summarised at pp. 71-2. The broader argument is that law constitutes a particular way of establishing normative order, according to a 'morality of form', that is with a particular formal structure that constitutes its 'architectonic'. For the former term, see A. Norrie, *Punishment, Responsibility and Justice* (2000) Oxford, Oxford University Press; for the latter, A. Norrie, *Justice and the Slaughter Bench* (2017) Abingdon, Routledge, ch.1.

been stated above quite simply: an intention to kill or cause serious injury, or foresight of the virtual certainty of death or serious injury, will constitute the mens rea of murder. Yet this is a superficial view. As relatively recently as 2003, the Court of Appeal in *R v Matthews and Alleyne*²⁷ stated that the law of England and Wales had not yet established a legal definition of murder, and that with regard to the law of indirect intention, what existed amounted to no more than rules of evidence from which juries could find that a murder had occurred. The leading case on the law, *R v Woollin* (1998),²⁸ stated that a jury was 'entitled to find' intention where it found that there was foresight of a virtually certain outcome, but this appears to be permissive rather than compulsory. A jury may (is entitled to) find the mens rea for murder, but on the other hand, it may not. There is a degree of flexibility in the law, which is maintained by keeping the legal definition of intention relatively vague and open, and the *Matthews and Alleyne* distinction between law and evidence sustains this.²⁹

This might be seen as a form of doctrinal legerdemain, but it does leave the law able to accommodate what has been called a 'moral threshold',³⁰ whereby some kinds of cases where an intention to kill or cause serious harm, or foresight of its virtual certainty, may fairly be said to be present, yet the courts will in practice not press home the conviction. This is seen for example in cases of mercy killing where D means to kill or sees death as a virtual certainty of her acts, yet, though she satisfies the formal requirements of the offence, she will not be found guilty, because prosecutors, judges or juries will in effect turn a blind eye.³¹ The law in effect permits this through its 'entitled to find' formula. The intention is there, but there is a *moral* threshold that has not been crossed. These are cases of good motive, that is, cases where the moral motive of the killer is such that, though she formally satisfies the legal definition, this is not translated into a conviction. The looseness of the law provides the formal licence for this to happen, and the power is effectively

²⁷ [2003] EWCA Crim 192.

²⁸ *Woollin* [1998] 3 WLR 382.

²⁹ Norrie, *op cit*, note 6, 67-71; HM Keating. SR Kyd Cunningham, T Elliott and MA Walters, *Clarkson and Keating: Criminal Law* 8th ed (2014) London, Sweet and Maxwell, 155-6.

³⁰ R.A.Duff, *Intention, Agency and Criminal Liability* (1990) Oxford, Blackwell; Norrie, *op cit*, note 6, 70-1; A. Norrie, *Justice and the Slaughter Bench op cit*, note 26, 89-94.

³¹ Norrie (2017), *op cit*, note 26, ch 5.

turned over to, especially, the jury to find as they see morally fit, despite what the law might be thought formally to entail were the apparent rule consistently applied.

The question is whether the moral threshold also applies in the opposite case, that is, where the motive of the defendant is not morally good but morally bad, yet D's mental state is such that it would not be clear that death or a serious injury was either intended or foreseen as a virtual certainty. If *Woollin* were treated as a case laying down *the law* for indirect intention, then it seems that foresight of a virtual certainty of death or serious injury alone will do, and a lesser form of foresight will not. If on the other hand *Matthews and Alleyne* is right in its interpretation of *Woollin*, we do not have a rule *of law* on the matter, only a rule *of evidence* as to when an indirect intention may be deduced.³² That position was affirmed by the Supreme Court in the recent case of *Jogee*.³³ Though this is a case of complicity rather than intention more generally, complicity involves taking a position on intention. There, as a matter of general principle, it was stated that 'foresight of what might happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention'.³⁴ If foresight of 'what might happen' really is evidence from which an intention can be deduced, then the deduction descends from the higher reaches of foresight of virtual certainty to the realm of lower levels of risk, foresight of what might happen. If so, the nature of the risk does not *ex hypothesi* involve a requirement of virtual certainty. 'What might happen' denotes possibility or probability, not virtual certainty, so the jury is left with a more open judgment in the light of all the evidence to say whether this or that form of foresight is sufficient evidence from which to find intention. Despite *Woollin's* language of the need for foresight of virtual certainty, cases like *Matthews and Alleyne* and *Jogee* indicate that a jury might make do with the lesser forms of probability implied in the questions: what might have been likely to happen; and did the

³² [2003] EWCA Crim 192.

³³ *R v Jogee* [2016] UKSC 8.

³⁴ *Ibid.*, para 83.

defendant foresee the likelihood? These questions operate evidentially to guide and sanction a finding of indirect intention.

It is at this point that the evidential formulation of the question takes in issues of the motive of the accused. How the jury judges foresight of a risk is likely to be influenced by the overall nature of the situation as it sees it, including questions of what was at stake and what the defendant ought to have foreseen in the circumstances of his action and its outcomes. These background understandings are crucial to judging what was foreseen, and they lead to questions of motive and context in which he acted. Motives such as callousness, wickedness or unacceptable discrimination (for example, racial or class-based) in the creation of risk of injury or death can then come into play. This kind of thinking already colours the law of indirect intention. Cases that fit this picture are those where an individual callously or with a reckless indifference sets a dangerous act into the world but claims, perhaps with justification, that they neither intended nor foresaw death or serious injury as a virtual certainty. Examples of such 'indiscriminate malice' would be planting a bomb but giving a warning that fails for reasons beyond D's control, or setting fire to a property knowing someone is inside, but doing so only to frighten and believing they can get out. These are cases of what Scots Law calls 'wicked recklessness', and they are considered murder in Scotland.³⁵ In England and Wales, what are they? Strictly speaking, they are cases of manslaughter, because death or serious injury is not foreseen as a virtual certainty. But that is not necessarily the whole story, as *Matthews and Alleyne* suggests. They could be situations generating evidence of what might happen from which a jury could infer an intention.

Throughout the period of discussion of the mens rea of murder, from the case of *Hyam*³⁶ onwards, there were indications that whatever the law might formally say, there could be cases where a callous or recklessly indifferent motive could lead to a finding of the mens rea for murder. The

³⁵ J.Chalmers and F.Leverick 'Murder through the looking glass: Gillon v HM Advocate'. *Edinburgh Law Review* (2007) 11, 230-236.

³⁶ *Hyam v DPP* [1974] 2 All ER 41

history of discussion of the ensuing line of cases is beyond this essay,³⁷ but it is worthy of note that even though the most recent highest court authority on murder, *Woollin*, set its face against making the law more open to this kind of argument, the term ‘indiscriminate malice’ was used by one judge in that case, indicating that cases such as that of the terrorist bomber could still fall within the law.³⁸ The strand of the law enabled by the evidence formulation in *Matthews and Alleyne* and *Jogee* plays into that line of argument, and cannot be ignored.

The nature of the morally negative motive that might be identified in Grenfell is somewhat different from these existing examples. But if it were to be found there had been a reckless disregard for human life leading to the Grenfell fire; if a flagrant danger was found to have been set loose in the world through decision-making that was judged callous as to the value of human life; if a meretricious motive of putting costcutting above lives was considered to have been at play; and if all this were put together with the analysis of system risk discussed above, then there could be a question as to whether the law of murder ought to reflect deaths or serious injury that occur in such conditions. There is, as we have seen, a certain openness of the law as to how it finds the mens rea of murder, and into that opening may emerge ideas of wicked recklessness, indiscriminate malice or moral callousness as interpretive ancillaries to finding intention for murder. The law remains to a degree formally open: it is a matter of a rule of evidence and an ‘entitlement to find’ rather than a clearly stated law, leaving a gap for negative moral judgment in the legal form. If juries may respond to good motives by refusing to apply the virtual certainty rule in such cases, might they not also do so in the way they respond to callous, wickedly reckless, indiscriminately malicious forms of behaviour that produce injury and lead to death? Might they then find it possible to call these murder? I repeat that these are questions for a jury and here, where the law is vague, this is

³⁷ See Norrie, *op cit*, note 6, 57-71.

³⁸ Lord Hope in *Woollin* [1998] 3 WLR 382.

particularly so. The argument merely identifies the true legal parameters in which decisions about the mens rea of murder are made.

Conclusion

There are potential obstacles to the law moving in this direction, and here I will mention two, one normative, the other social. The normative objection would be to think that the system perspective approach overprovides. Every government oversees many systems, and the governance of all aggregative activities involves recognising risks and accepting them at certain levels. This is obviously the case with road traffic systems, where we know a certain number of accidents are virtually certain to occur each year. Systems administrators are broadly justified in regulating such systems in ways that recognise deaths and serious injury will occur without being held criminally responsible for them. But suppose that a government department had sanctioned road building where it had been brought to its attention that old mine workings were close to the surface and subsidence was a real possibility, or had agreed bridge designs that it knew were prone to collapse, and as a result somebody had died in a car accident. These would be known risks that systems administrators foresee and cannot justifiably, take even in a system that permits a generally acceptable level of risk in the context of responsible system design. The criminal law must have purchase where responsible, system-based, decision-making by individuals was egregiously and knowingly at fault.

The social problem is that of naming certain kinds of activity as seriously criminal when these are carried out by those at the 'moral centre' of the community.³⁹ System administrators and political representatives are precisely those who are regarded as the bearers of social trust, and not those for whom the criminal law is intended. Egregious wrongdoing is however what it is, and it could not be right that wrongdoing should be overlooked for reason of the lack of social or political imagination that throws its protective mantle around white collar criminals more generally. To argue in effect that system administrators or politicians are not subject to the formally defined criminal law by

³⁹ A.Turk, *Political Criminality: the Defiance and Defence of Authority* (1982) Sage, London.

virtue of their office would be to exclude consideration of liability on false grounds. It leads to the circular argument that, as regards politicians, they are immune from criminal action by virtue of the fact that they are politicians. The gap between legal and 'social' or 'political' murder would rest on no more than a social and political blindspot in the law's vision.

I have suggested two *separate* routes down which an argument about murder might go in a situation such as that in Grenfell. It is not necessary to run the second argument in order to make the first work, though they may be thought eventually to support each other. The first hinges on what a jury might understand as foreseen as virtually certain by actors within a system in the light of the foresight requirement (death or serious injury) for murder. It works on appreciation of how perspective and vantage point in a system work, and interact with warnings to responsible agents. In this setting, a finding that serious injury was foreseen as virtually certain is the easier to imagine. The second relates to the flexibility that exists in the law of intention resulting from the lack of a formal definition, which allows a jury to apply the law flexibly in light of a judgment about the surrounding context and the morally good or bad attitudes evinced by the person under investigation. Here, in the space provided by the 'evidential' formulation of the law, the finding of foresight of virtually certain serious injury or death is related to the callousness or indifference with which the actor acted, and is a matter for a jury.

Whichever way the argument goes, it does not seem to me that the law lacks the resources to find prima facie grounds for reflecting on a prosecution on the most serious homicide charge in a situation such as Grenfell. If manslaughter is the preferred charge, it would be important for all concerned that this be openly explained. When one thinks about it, the in principle gap between 'murder in law' and 'social or political murder' may not be as great as is sometimes thought. If there were to be a will, there could be a way.