A COMPARISON OF MURDER AND CULPABLE HOMICIDE 1973 - 1976

R.V. GEARY

This dissertation is submitted for the qualification of Master of Laws at the University of Glasgow, Department of Forensic Medicine, Faculty of Law.

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Law, says the judge as he looks down his nose,

Speaking clearly and most severely,

Law is as I've told you before,

Law is as you know I suppose,

Law is but let me explain it once more,

Law is The Law.

Law Like Love.

W.H. Auden.

SUMMARY

The Scots law of homicide is based on principles that are both vague and flexible, thereby allowing the Crown, the Courts and juries to take a pragmatic approach in deciding whether to reduce a charge of murder to one of culpable homicide. The main reason why these principles are vague is that they evolved at a time when the death penalty was in existence, and there was an antipathy to having rigid principles that would have necessitated the imposition of the death sentence in cases where it was not considered to be warranted. Prior to 1965, murder, when it was not affected by the Homicide Act 1957, was consequently distinguished from culpable homicide on the basis of whether the accused should suffer the death penalty for having killed the deceased, and in fact it was rarely thought that he did warrant such a punishment. The Murder (Abolition of Death Penalty) Act 1965 has, however, transformed the situation by removing the restraints imposed by the existence of the death penalty. Consequently there is now a greater percentage of homicides regarded as murder than formerly, and cases that would previously have been regarded as culpable homicides may now be determined as murders.

Although the law of homicide has not changed, these decisions can be justified on the basis that the reducing factors of homicide, of diminished responsibility or a lack of wicked recklessness on the part of the accused, or of provocation by the victim, are all relative. They can consequently be regarded as occupying hypothetical continuums against which individual cases can be judged, with one end of the continuums justifying reduction and the other end precluding it.

Although the continuums provide the justification for whether reduction will occur or not, the cases in this sample fell into broad categories that appeared to influence whether they would be regarded as murders or culpable homicides. Certain homicides were normally considered to be sufficiently imbued with wicked recklessness for them to be regarded as murders because of certain factors in the killing, such as where the motive behind the killing was sexual or robbery. Premeditated killings formed only a very small proportion of the sample and were naturally regarded as murders. Killings in the private sector, normally involving older accused who were either related or closely acquainted to their victims, however, were more likely to be regarded as culpable homicides. In contrast, killings in the public sector, where the accused were more likely to be younger and unknown to the victim, were more likely to be considered to be murders. Killings in the public sector though, are more likely to be perceived as involving 'dangers' to society as a whole, whereas killings in the private sector are regarded as being domestic, although individual killings in the private sector are just as likely to arouse public indignation as killings in the public sector.

Facts which are considered to be equivocal, such as whether the accused has been wickedly reckless, will normally be left to the deliberation of the jury; whilst psychiatric or medical evidence indicating diminished responsibility or a lack of intent on the part of the accused will be more likely to produce reduction prior to the commencement of the trial.

As imprisonment is now the punishment for both murder and culpable homicide, however, there is little point in maintaining what is basically an artificial distinction between the two crimes. Con-

sequently the crimes of murder and culpable homicide should be abolished and replaced by a single crime of unlawful or criminal homicide, for which the penalty could vary from life imprisonment to absolute discharge.

INTRODUCTION

Between 1st January 1973 and 31st December, 1976 there were 339 homicides made known to the police in Scotland.

	1973	1974	1975	1976	Total
Murder	43	38	47	63	191
Culpable Homicide	34	40	31	43	148
Total	77	78	78	106	339

Homicides made known to the police consist of completed acts of homicide, irrespective of the number of persons killed. Thus if more than one person is killed at the same time, or in a succession of immediately consecutive acts, then that is regarded as one homicide. I was kindly allowed access by the Crown Office to their papers for 255 of these cases, or 75% of the total number of homicides for those years. The remaining homicides were either not proceeded with in the High Court of Justiciary; not proceeded with as homicides; or there had been nobody charged with the homicide; or the papers at the time of the study were then being used in regard to some aspect of the case by the Crown Office.

The purpose of the study was to see what factors, if any, distinguished murder from culpable homicide. Consequently cases resulting in the accused's acquittal were excluded from the figures comprising the study, as were cases where the accused was found to be insane in bar of trial. The only exception to this was when the accused had the charge reduced to culpable homicide prior to his going to trial, since the factors that motivated the Crown to reduce the charge at this stage of the proceedings were relevant. Cases where the accused had originally

appeared on petition charged with culpable homicide were also excluded on the basis that, as they only consisted of seven homicides, the sample was too small for analytical purposes. As a result of this 31 cases were excluded from the sample. Six of the cases under analysis, however, consisted of thirteen deaths, and for the purposes of analysis these killings were considered separately rather than as only six completed acts of homicide. The sample, therefore, eventually consisted of 231 deceased and 261 accused, to whose individual factors statistical testing was then applied in order to see whether there was a significant variation of the individual factors in the question of reduction. Once having done this the individual factors were compared with one another, with statistical testing being applied to the results, in order to see whether there was a significant variation in their distribution with one another.

As the study is not concerned with the reason for acquittals, references in the following chapters will only be to convictions for murder and culpable homicide. Although it is obviously always open to the Crown, the Courts and juries either not to proceed or to acquit, it would not be on the basis of distinguishing murder from culpable homicide, and so the cases and the law are considered as if the facts themselves, that the accused did kill the deceased, were not in dispute.

The general law of murder and culpable homicide is considered in order to see whether there are any consistent trends in reduction and what in law justifies reduction. Case examples are also given from the study, with the case number denoting the number in which it appeared in the sample.

A comparison is then made of the criminal statistics for murder and culpable homicide in Scotland from 1898 to 1976 in order to see how the percentage distribution of the two crimes in the total figures for homicide have varied over the years.

Finally, after considering what influence the abolition of the death penalty for murder in 1965 has had on the question of whether a charge of murder will be reduced to one of culpable homicide, it is considered whether it is still logical to maintain the distinction between the two offences.

I. HOMICIDE

> "We are now to enter on that class of crimes which are injurious to the person; and among these I shall begin with that one, the highest of any, and of which nature has most abhorrence, the crime of homicide, by which life is taken away, and the person of a human creature is destroyed." 1

With these words Hume commenced his chapter on homicide in "Commentaries on the Law of Scotland Respecting the Description and Punishment of Crime". For homicide is regarded by both the law and the public as being the most serious crime that one individual can inflict upon another. In one study carried out by Weiss and Perry, for example, surveys were conducted in eight disparate cities, Athens, Bombay, Dublin, Istanbul, London, Paris, St. Louis and Tokyo, in order to gauge which crimes were regarded by the public as being the "worst crimes". They found that:

> "The first remarkable fact about the results was the high level of agreement in many responses among subjects in these eight very different kinds of cities. Eighty-five (84.9) percent of respondents endorsed homicide (or any sort of intentional killing or attempt to kill) and 70.5% endorsed theft of any variety as "worst crimes". 2.

Despite receiving almost ubiquitous condemnation, however, the act of homicide manifests itself in multifarious variations which differ in the seriousness with which the law and public repugnance regards them. This difference was previously reflected in the existence of the death penalty, and it is for this reason that the law of Scotland has separated homicide into the two divisions of murder and culpable homicide, man-slaughter being the analogous term for the latter in England.

Homicide, being defined as the destruction of a self-existent human life, can be committed by any act or culpable omission that results in the

death of the deceased. As long as nothing intervenes to interrupt the chain of causation between the initial incident and the death of the victim it is irrelevant how long a period should elapse between the two events. This differs from the situation in England, where it is held that death must have occurred within a year and a day of the initial injury for it to be regarded as a homicide. The longer a victim does survive in Scotland, however, the more difficult it becomes to show that the death was directly attributable to the initial injury and that nothing has intervened to interrupt the chain of causation.

Homicide though, can be either criminal or non-criminal, with the latter again being divided into casual and justifiable homicide. Casual homicide is homicide involving an accident or mischance, with the perpetrator neither contravening the law by his actions nor being culpably careless; whilst justifiable homicide is a non-accidental killing occurring in circumstances which are deemed to have warranted the act of killing. These circumstances occur in the following cases:

1. In the execution or furtherance of public justice.
2. Where a member of the armed forces kills in the exercise of his duty.
3. Where the killing is carried out in response to a lawful command.
4. Where, although there are no Scots authorites on the matter, there has been a justifiable necessity other than self-defence.
5. Finally, and most importantly, in the case of self-defence.

It is, however, with the division of criminal homicide into murder and culpable homicide, and the latter into categories of voluntary

and involuntary culpable homicide, that we begin to be beset with difficulties. Murder can be easily enough defined. Thus Macdonald states:

> "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." 3.

similarly Alison writes:

> "Murder, the greatest crime known in the law, consists in the act which produces death, in consequence either of a deliberate intention to kill, or to inflict a minor injury of such a kind as indicates an utter recklessness as to the life of the sufferer, whether he live or die." 4.

In contrast to these definitions of murder, involuntary culpable homicide"is distinguished from murder by reference to mens rea, involuntary culpable homicide being, roughly speaking, homicide which is neither intentional nor grossly reckless."[5] Voluntary culpable homicide, on the other hand, "is best described by saying that voluntary culpable homicide is murder under mitigating circumstances."[6] These mitigating circumstances can be classified into two categories. The first are unofficial categories where it has long been the practice of the Crown to charge only culpable homicide in specific circumstances, although it would still be open to the Crown to properly bring in a charge of murder, and secondly legal categories which are defined and restricted by law. According to Gordon[7] the unofficial categories can basically be said to consist of the following categories:

1. Infanticide (see chapter II).
2. Euthanasia.
3. Suicide pacts where there is a survivor of the pact.

4. Where the killing occurs in circumstances where the accused believed that he was acting in the execution of his duty but the action of the accused is deemed to have been excessive or unjustifiable in the circumstances.
5. Cases involving necessity or coercion would probably be regarded as culpable homicide.
6. Deaths resulting from culpable omissions rather than intent, such as in a case of child neglect ending in a fatality, would generally be regarded as culpable homicide. In this case, however, the culpable homicide should probably be more properly regarded as involuntary rather than voluntary.

It also has to be remembered, in the case of euthanasia and suicide pacts, that the consent of the victim of a homicide is never a defence to a charge of murder or culpable homicide. The legal categories of mitigating circumstances consist of diminished responsibility (see chapter 8) and provocation (see chapter 7).

In general then, culpable homicide can be distinguished from murder on either one or more of three factors; of either a lack of gross recklessness or intent, or of diminished responsibility on the part of the accused, or of provocation by the victim. All these reducing factors, however, are relative. Consequently continuums can be constructed for each of the reducing factors, it depending on which part of the continuum that a particular case is placed as to whether the charge will be reduced or not. Thus one end of the continuum will preclude reduction, whereas the opposite end will necessitate reduction. The middle of the continuum though, will be a less

clearly defined area. It will then depend on which point of the continuum is regarded as marking the point of demarcation, separating those cases which can be reduced from those which cannot. This point of demarcation will shift slightly in conformity with shifting standards of judicial interpretation and tolerance. In the immediate years following the two world wars, for example, an increase in crimes of violence in Scotland led, it appears, to the Crown and the courts taking a more stringent attitude to the question of reduction of homicides. Thus it can be said that the point of demarcation had temporarily shifted to prejudice reduction. There had been no change in the law in regard to provocation, wicked recklessness and diminished responsibility, but there had been a change in the attitudes of the Crown and the courts towards these reducing factors. Consequently there had been a reduction of those parts of the continuums that would justify reduction. The greatest shift in the points of demarcation, however, occurred with the abolition of the death penalty in 1965. The reducing factors were originally required to avoid the imposition of a mandatory death sentence for murder. Given then, the low number of convictions for murder, as opposed to culpable homicides, in the years when the death penalty was in existence, it is reasonable to assume that the continuums and points of demarcation were biased against convicting of murder, and thereby having to sentence the accused to death. The abolition of the death penalty, however, removed these restraints and shifted the points of demarcation on the continuums so as to produce a greater portion of the continuums precluding reduction.

Consequently, diminished responsibility can be regarded as occupying the middle of the continuum of human personality, neither allowing the law, in a case of murder where it is successfully put forward,

to regard the accused as being insane mor as being fully responsible for his actions. Provocation can be placed on a continuum on which the actions of the victim can be judged to have been innocuous, irritating or provocative to the extent of having caused the accused to lose all self-control. Finally, the question of the degree of recklessness exhibited by the accused can also be judged on a continuum, of whether the recklessness that he has displayed has been gross and wicked, or whether it falls short of a standard of wicked recklessness.

Insofar as these reducing factors are all relative though, it is possible in nearly every case of homicide to argue, however tendentiously, that one or more of them is present, and that the charge should, therefore, be reduced. This can result in the public being justifiably confused as to when reduction is applicable, and in their often regarding reduction as being dependent on aleatory or esoterical processes. On the other hand, because the reducing factors are relative, the outcome of any case, whether it is a conviction of murder or culpable homicide, can be explained in terms of one or more of the three continuums in question; that the individual case either does or does not occupy that part of the continuum that would justify reduction.

Also, through being relative these reducing factors can be susceptible to change, to either expansion or constriction, depending on the degree and weighting of legal, medical and public opinion, although since the passing of the Murder (Abolition of Death Penalty) Act 1965 the incentive for such changes has been very much reduced. For it has to be emphasised that the reducing factors of culpable homicide were

originally intended not simply to reduce the classification of the homicide, but to avoid the mandatory death sentence which resulted on a conviction of murder. Thus Hume, writing about lack of intent and provocation before the concept of diminished responsibility had been introduced into Scots Law, stated that:

> "These seem to be the obvious and reasonable grounds, on which to maintain the distinction between culpable homicide and murder; the one punishable with death, the other at the discretion of the Judge." 8.

If, however, it is feared that cases are merely examples of a growing social menace, then the courts might very well adopt an attitude of exemplary deterrence in their determination of the cases. In recent years we have seen the stereotypes of the young gang member, the professional criminal and the drug user all paraded through the courts on murder charges. Rather than the particular circumstances of the cases serving to bring about reduction, however, they have merely served to invoke the courts' denunciation . In 1946, for example, it was argued in Carraher v H.M.A.[9] that a person suffering from a psychopathic personality should be regarded as being in a state of diminished responsibility. At that time, however, there was a grave concern about the amount of violence and gang activities occuring in the west of Scotland, which was one of the reasons why the appeal was rejected. More recently, drug or alcohol intoxication has been rejected as a reducing factor in Brennan v H.M.A.[10], it being stated, accepting and endorsing Hume's analysis of the law of Scotland on intoxication, that:

> "with the increasing misuse of drugs in these times, it would be wholly irresponsible to alter or modify it in any way." 11.

Consequently the standard and scope of the reducing factors can fluctuate

in accordance with changes in legal, medical and public opinion, which can in turn be affected by the incidence and types of homicides prevalent at various times.

The incidence of homicide though, is the incidence of homicide known to the police, and we obviously have no means of being able to gauge or estimate the extent of the phenomenon of secret or concealed homicides, although cases occasionally occur to remind us that homicides are not always obvious. One of the most quoted examples of this was the case of Emmett-Dunne in 1953[12]. Originally it had been thought that the deceased had committed suicide by hanging, the findings of a post-mortem being a vertical fracture of the thyroid cartilage and vertical tears in the carotid arteries. The following year, however, suspicions were aroused when Emmett-Dunne married the deceased's widow. An investigation and a second post-mortem then revealed that the deceased had been killed by a blow from the side of the hand to the front of the neck, a practice that is taught in unarmed combat. Both Emmett-Dunne and the deceased were soldiers, and it was discovered that after killing the deceased, Emmett-Dunne had suspended his body from the balustrade of some stairs in order to simulate a suicidal hanging, an illusion that was initially accepted. Commenting on this case, Professor Camps has written:

> "These unarmed combat blows leave very little mark, and it is a matter for conjecture why no other cases have been recorded when it is appreciated how many men were trained to use them during the war. Thus, it is obvious that the doctor must be the first line of defence against concealed homicide, for I do not subscribe to the view that obvious murder is a difficult case to handle other than in the interpretation of the findings. It is the 'easy case' unsuspected which is most difficult." 13.

Advances in forensic medicine, and a greater awareness on the part of the medical profession as regards possible concealed homicides, can reveal homicides that would otherwise have been classified as being due to natural or accidental causes. One example of this is the battered baby syndrome, which has shown that many of the injuries that babies and young children incur can be non-accidental, a fact that has only comparatively recently gained credence within medical and legal circles. The problem is not simply confined to infant deaths, however, it extends through the whole spectrum of death, and unless the circumstances are themselves suspicious and further tests undertaken, a homicide may remain concealed.

Coupled with this problem is the fact that we simply do not know how many of the people who every year disappear have done so voluntarily, for one reason or another, and how many have in fact been the victim of a homicide. These missing factors in the incidence of homicide obviously do not enter into the official statistics. Consequently the official statistics do not necessarily record the actual incidence of homicide, but it is these statistics that can influence fluctuations in the number of murders reduced to culpable homicides. For an apparent increase in the incidence of homicide can alarm public opinion, which can in turn produce judicial concern, and can consequently lead to an attitude of deterrence being adopted by the courts in regard to homicide. This phenomenon is also more pronounced today since the practical effects of reduction and non-reduction are not constrained and influenced by the possibility of the infliction of the death penalty and are instead only concerned, apart from the question of stigmatization, with the imposition of either an indeterminate, that is life sentence, or a determinate sentence.

Writing on the problem of concealed homicides, Radzinowicz and King have said,

> "In a survey of deaths in English hospitals in 1958 it was found that in nearly half of them there was disagreement between the physicians who had certified the deceased and those who subsequently carried out autopsies. There are still too many individual cases of death originally attributed to accident or suicide but subsequently discovered to be murder to avoid the conclusion that still more exist." 14.

The problem can be illustrated by the following case:

Case 76. The accused had previously been committed to a State Hospital following an appearance in court on a charge of culpable homicide, when he was found to be feeble-minded. At the time of the present offence he was living with his father, who was aged 81 and in very poor health, having only recently returned home from hospital. There was evidence of discord between father and son, and of frequent quarrels between them. When the father was found dead in bed, however, his own doctor was unable to attend and a doctor unacquainted with his case certified him dead. His own doctor later signed a death certificate, on the basis of the deceased's previous medical history, giving the cause of death as myocardial infarction, coronary arteriosclerosis, general arteriosclerosis, senile dementia and Parkinsonism. The following day the accused told various relatives, at different times and in different places, that he had caused his father's death. He was not believed, however, because of his mental history, and it was only when he telephoned the police and told them that he had killed his father that suspicions were aroused. When he was cautioned he stated that he had put a pillow over his father's face and suffocated him in order to end his suffering, after which he had gone and told his sister that he had found his father dead. The post-mortem established that the only external signs of violence on the deceased were an area of

haemorrhage on the tip of the nose, a superficial scratch on one finger and a single petechial haemorrhage in the right eye. The internal examination found a small number of petechial haemorrhages in the back of the tongue and in the linings of the larynx and epiglottis. The conclusion was that the deceased had died of asphyxia, although he was also suffering from advanced heart and arterial disease which could have caused his death naturally at any time. Because of his age and general poor health, very little pressure would have been required to ensure his death. The accused was found to be sane and fit to plead on psychiatric examination, and to be of below average intelligence, but not mentally defective. He was charged with murder, but a plea to culpable homicide was accepted on the basis that his previous mental history denoted a degree of diminished responsibility.

2. MURDER

Murder, then, is defined as being a death that results from either an intention to kill or from such a display of wicked recklessness as denotes a complete disregard as to whether the victim lives or dies. Even within this definition, however, murder still covers a very wide spectrum of human acts, thoughts and motivations; from the premeditated, intentional killing to the death that is more the result of a momentary rage or panic than any depravity or intent. As Blom-Cooper observed:

> "Murder is a crime of infinite variability. Each murder springs from such completely distinct and peculiar psychological conditions that it is impossible to classify murderers in groups on the basis of any essential common characteristics." 1.

The only characteristic that they do share, once they have been convicted, is that the Crown, the courts and juries have chosen, for one reason or another, to regard them as being murderers rather than as being guilty of the lesser offence of culpable homicide. However, some of them may share certain characteristics, both in themselves and in the nature of the homicide, that to some extent may distinguish them from those accused and homicides for whom the Crown, the courts and juries have decided that reduction is applicable (see chapter 5).

Although it has no practical effect, the law also divides murder into voluntary and involuntary murder, the first committed with an intention to kill and the other unintentionally. Voluntary murder embraces both the premeditated killing, which is also by definition intentional, and the intentional killing, which is not premeditated insofar as the intention to kill was only formed in the accused's mind at the time of the assault. Premeditated murder forms only a very small proportion

of homicide cases, and of the 124 cases resulting in a conviction of murder in this sample only five, or four percent, could be described as being premeditated, although there may have been a few more cases where the premeditation was not apparent.

The inference of premeditation does not solely rely, or even necessarily on any prior intimation or statement by the accused to that effect, although it is sometimes stated in an indictment that the accused did previously evince malice and ill-will towards the deceased. Instead his prior actings, and the nature of the death of the deceased, are considered in order to see whether they denote a deliberately planned intent to kill. The following two cases illustrate a premeditation by the accused that was accepted as such by the court.

Case 88. The accused and deceased were married, but the marriage was essentially unhappy. The deceased ate a casserole prepared by the accused and found it to have an unusual taste. The accused, however, explained that this must have been due to her having used too many herbs. During the night the deceased felt ill and started suffering from vomiting and diarrhoea. The following day his condition deteriorated and a doctor was telephoned. Despite receiving medication his condition continued to worsen and he was taken to hospital before being transferred to a Poisoning Treatment Centre, where a urine test showed that he was suffering from paraquat poisoning. Heroin was administered and the deceased died eleven days after his admission to hospital, with a post-mortem showing that death was due to pulmonary fibrosis as a result of paraquat poisoning. Despite the accused maintaining that the paraquat must have accidentally splashed into the casserole dish as she was emptying its container down the sink, she was found guilty of murder.

Case 171. The accused and the deceased were married but at the time of the homicide were living apart from one another, there being allegations that the accused was a very heavy drinker and that he had assaulted his wife on numerous occasions when they were staying together. After making inquiries as to where his wife was staying, the accused arrived at her house with a can of petrol. As there were some people visiting his wife at the time, he ordered them out of the house before splashing petrol around the room, igniting it and then attacking his wife. The deceased was overcome by smoke and flames but the accused managed to escape through a window. A post-mortem established that the deceased had died from inhalation of fire fumes and the accused was found guilty of murder. There was evidence that the accused had previously stated that when he found his wife he would set fire to the house and burn to death with her.

The element of planning and preparation in premeditated murder provides the necessary evidence of the intention of the accused to kill. It is far more difficult, however, to infer the intention when it is alleged to have only been formed at the time of the assault. Homicides are normally associated with heightened states of emotional and physical activity, so that the accused himself does not normally have the time or ability to analyse what his true intention was at the time of the killing. He cannot use hindsight to compensate for this ignorance because he cannot rationalize what he would normally acknowledge was an irrational act on his part, if indeed he acknowledges the act at all. Instead, it is submitted, he may reason that he must have intended to kill as that was the result of his actions, although with murder the law does not accept that a person necessarily intends the

natural results of his actions. Equally, it is not necessarily murder if the deceased was suffering from a physical infirmity that meant that he could not survive an assault that a normal, healthy person would have been able to. Thus if he had a thin skull that fractured on a blow that would have had no effect on a skull of normal thickness, it would probably not be regarded as murder unless the accused had known of the deceased's weakness and knew that that amount of violence was sufficient to fracture the skull. It could, however, be considered to be murder if the deceased's weakness was a patent one, such as extreme youth or age, where it was obvious that minimum violence would be fatal. On the other hand, a person may be so appalled at what he has done that he simply refuses to acknowledge that the result was what he had intended. Reliance, therefore, cannot be placed on the accused's own interpretation of his intentions at the time of the killing, quite apart from the question of whether the accused was being honest or not as regards the recollection of his intention. There can also be, I believe, a significant difference between what a person desires in a moment of crisis and what he intends should be the long term result of his actions. Hatred, fear or panic, for example, can produce a state of stress in a person as a result of which he "loses the heid". In this state of mind he may desire to kill or to blindly strike out at the person who he considers to be the cause of his predicament. Even if he desires to kill though, it may be that the desire is limited to that moment of time, that the stress that has been engendered by the crisis prevents him from being able to contemplate the results of his actions, namely the death of the deceased.

It is also misleading to confuse intention with motive, the intention being inferred from what is seen as the immediate objective of the killing. Anscombe has written that,

> "Nevertheless there is even popularly a distinction between the meaning of 'motive' and the meaning of 'intention'. E.g. if a man kills someone, he may be said to have done it out of love and pity, or to have done it out of hatred; these might indeed be cast in the forms 'to release him from this awful suffering' or 'to get rid of the swine', but though these are forms of expression suggesting objectives, they are perhaps expressive of the spirit in which the man killed rather than descriptive of the end to which the killing was a means - a future state of affairs to be produced by the killing. And this shows us part of the distinction that there is between the popular senses of motive and intention. We should say: popularly, 'motive for an action' has a rather wider and more diverse application than 'intention with which the action was done.'" 2.

We cannot measure an accused's intention solely from what we can only regard as being a momentary impulse or motive. Certainly he might have clearly formed an intention to kill but we do not possess the criteria by which this can unequivocably be attributed to the accused, especially since we are considering extremes of emotion, environment and violence of which the majority of people have only, at most, an indirect experience. Laing, for example, has observed:

> "One person investigating the experience of another can be directly aware only of his own experience of the other. He cannot have direct awareness of the other's experience of the 'same world'. He cannot see through the other's eyes and cannot hear through the other's ears. The only true voyage, Proust once remarked, would be not to travel through a hundred different lands with the same pair of eyes, but to see the same land through a hundred different pairs of eyes. All one 'feels', 'senses', 'intuits', etc. of the other entails inference from one's own experience of the other to the other's experience of one's self." 3.

As we cannot see the killing through the accused's eyes, we have to attempt to infer his intentions from his actions, but these can frequently be ambiguous. The fact that the accused used a weapon, for

example, can also be explained by saying that he simply wanted to injure or disfigure the deceased, or by the fact that he was in reality defending himself. The injury of a vital organ can be explained by accident or mischance. The considerable number of fatal stab wounds to the heart that occur, for example, can be partially accounted for by the fact that since the majority of people are right handed and the heart is situated slightly to the left of the midline, a direct knife thrust by the accused will, if the deceased is standing directly in front of him, probably enter the deceased in the general area of the heart and the major arteries, without there necessarily being an intention by the accused to injure or kill the deceased in this way. Multiple injuries can also be the result of panic, horror or despair rather than intentional, so that the accused continues the assault long after the victim has been rendered defenceless, unconscious or dead because he does not know what he is doing and continues the assault on the basis of an almost involuntary repetition of his previous acts. There is also the question of whether he appreciates the seriousness of the injuries that he is inflicting on the deceased. Thus Fanon, considering the criminological myths that were propagated in French colonial Algeria, stated some examples that are not entirely alien to Scotland today:

> "A certain number of magistrates go so far as to say that the reason why an Algerian kills a man is primarily and above all in order to slit his throat. The savagery of the Algerian shows itself especially in the number of wounds he inflicts, some of these being unnecessary once the victim has been killed. Autopsies establish the fact incontestably: the murderer gives the impression by inflicting many wounds of equal deadliness, that he wished to kill an incalculable number of times."

This is not to deny that some, or possibly many, murders are intentional, but we are rarely, apart from in the question of premeditated murders, in a position to unequivocably attribute this judgement to the accused, even though the standard of proof that is required to distinguish murder from culpable homicide is one that is beyond a reasonable doubt. This is also little point, in practical terms, in being able to distinguish the intentional killing from that which is wickedly reckless, since if the accused did not intend to kill then it can be argued that he had displayed a wicked recklessness so as to be regardless of the consequences, and in this event the accused is as guilty of murder as if he had clearly intended it. In other words a murder conviction can be justified on the basis that if he did not intend to kill he must have been wickedly reckless, and if he had not been wickedly reckless then he must have intended to kill. Thus in Cawthorne v H.M.A.,[5] which was concerned with a charge of attempted murder, Lord Cameron stated:

> "There are necessarily three elements in murder as defined in our law, (first) proof of death resulting from certain acts, (second) that these acts should be the wilful acts of the accused, and (third) proof of the necessary criminal intent. This intent can be established in the law of Scotland either by proof of deliberate intention to kill, or by inference from the nature and quality of the acts themselves, as displaying, in the classic words of Macdonald, "such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences". Such reckless conduct, intentionally perpetrated, is in law the equivalent of a deliberate intention to kill and adequate legal proof of the requisite mens rea to constitute that form of homicide which is in law murder." [6.]

With the penalty for both voluntary and involuntary murder being the same, there is no need to delve too deeply into their respective principles, and debate is normally reserved for the distinctions between involuntary murder and culpable homicide, since it is only

with the latter offence that a lesser penalty can be achieved.

Writing on the principles of involuntary murder, Gordon has said:

> "They are not easily susceptible to logical analysis, and very few if any of the judicial dicta on the matter are the result of such analysis. The principles are vague and flexible, or perhaps one should say commonsense and non-technical, and their application has tended to be very much an ad hoc matter." 7.

Although the murder has to be committed unintentionally, it has to be shown that the accused intended some harm to the deceased and that it was a foreseeable consequence that this harm could prove to be fatal. What is required to commit involuntary murder is the intention to commit an assault coupled with a wicked recklessness as regards the possible results. Thus Gordon writes:

> "Recklessness is therefore not so much a question of gross negligence as of wickedness. Wicked recklessness is recklessness so gross that it indicates a state of mind as wicked and depraved as the state of mind of a deliberate killer. To say that "A is guilty of murder when he kills with wicked recklessness" means only "A is guilty of murder when he kills with such recklessness that he deserves to be treated as a murderer." And the recklessness may consist in actual foresight or in a grossly wicked lack of foresight - there is no suggestion in the authorities that the jury must determine that A realised that his assault might be fatal, far less that he carried on with his assault in that knowledge and content that such a result might occur." 8.

It is ironic though, that juries are normally instructed prior to retiring to consider their verdict that they must not be swayed in their judgement by any sympathy that they might feel for the victim of the homicide, nor any revulsion or pity that they might feel for the accused. In order to judge whether an accused has been wicked and depraved, however, a jury has to consider the respective sympathies and aversions that they feel for the accused and the deceased. There is no standard by which wickedness and depravity can be measured, and although a jury can decide that an accused has exhibited these

qualities on the basis of the acts that they believe he committed, they cannot describe what they mean by wicked and depraved apart from by the use of examples or synonyms. The only means by which they can justify this attribution to the accused is for them to say that they had felt a complete revulsion for the accused and for what he had done, and this is precisely what they were told not to do, and yet the only means by which they can judge whether he has been wicked and depraved.

Insofar as the law cannot offer a definition of what constitutes wickedness and depravity, it remains a question that has essentially to be left to the discretion of the jury. All that the Crown and the Court can do before the question goes to the jury is to decide whether there is sufficient evidence to justify it going to them, and if they decide that there is to then point out to the jury the facts that might denote wickedness and depravity, as well as the facts that would tend to discount this notion. Asked by the Royal Commission on Capital Punishment whether it would be murder where an assault occurs where it could reasonably be assumed that it would prove to be fatal, Lord Cooper replied,

> "That is a narrow point, I am afraid. That is the sort of point you leave to the jury, whether the circumstances on the evidence as a whole carry to your mind the conviction beyond a reasonable doubt that the man, if he did not intend to kill, did not care whether he killed or not. That is not so much a legal question as a question for the jury, and dependent upon a narrow examination of the circumstances.... If a man fires a revolver at another man's head and hits him, the law will infer that he intends to kill or does not care whether he kills or not. But I can figure types of assault in regard to which the law would make no assumption, and it would leave it to a jury to make a decision what the inference was." 9.

The element of reasonable doubt in the question can never be properly explained apart from in broad generalisations. Eggleston, for example,

has written that,

> "The word 'reasonable' is designed to exclude such doubts as are merely philosophic or fanciful; but the most that one can safely say is that the doubt the jury entertains must be a reasonable one, not merely a fanciful one." 10.

In other words we can only resort to the truism that a reasonable doubt is one that is reasonable in the circumstances. The standard that is applied to the question can differ according to the seriousness of the charge and the possible consequences if a doubt is ignored. Walls has written:

> "There is however one last question which persists in coming up in my non-legal mind: does 'beyond a reasonable doubt' mean with the same rigour of proof whatever the crime? Does a serious crime require a more rigorous standard than a trivial offence? If a probability of, say, 0.99 was sufficient to 'prove' a minor traffic offence, would a murder require a figure of, say, 0.999? I throw the question out; I offer no opinion." 11.

It is submitted that the standard of reasonable doubt does vary and that certainly when the death penalty was prevailing any sort of doubt was normally sufficient to prevent a jury finding an accused guilty of murder. It is also possible that different standards apply to murder and culpable homicide, and that a doubt that is sufficient to prevent a conviction of murder might not necessarily be sufficient to prevent a conviction of culpable homicide. There is also the factor that in finding the accused guilty of murder the jury are also determining his sentence, in that there is a mandatory life sentence for murder, but in returning a finding of culpable homicide the jury can avoid having to have any responsibility for the sentencing of the accused.

Wehther or not an accused has displayed wicked recklessness can be indicated to some extent by the nature of the injuries that the

deceased has sustained and what weapons were used. The nature of the injuries, however, can only serve as a rough guide to the degree of depravity of the accused, for whilst they can serve to illustrate the amount of violence that has been employed they do not necessarily illustrate the state of mind of the accused at the time, and do not necessarily show either the presence or absence of wicked recklessness. This can only be taken in conjunction with the various other facts that can be ascertained about the homicide, so that it can be seen whether the violence was out of all proportion to the circumstances of the assault, and whether the use of violence itself could be excused in any way. It can be said though, that if extreme violence had been used in the assault and that this could be shown by the injuries sustained by the deceased, then it would be indicative, if not of an intent to kill, at least of wicked recklessness.

The use of weapons can similarly serve to illustrate the intent or recklessness of the accused, but again they are only indicative and not definitive, and again their use or absence has to be considered in conjunction with all the other factors of the homicide. For any weapon that can be used to kill is a lethal one, from patently offensive weapons, such as knives and guns, to articles that are only transformed into weapons by the nature of their use as such, such as bricks, bottles and pieces of wood. It has also to be remembered that hands and feet can be used to kill just as effectively as any weapon. Thus the use of weapons does not necessarily denote wicked recklessness, although again it would be indicative of an intention to kill or wicked recklessness.

The following cases are examples of wicked recklessness, although in some of them it is ambiguous whether or not there was in reality an intent to kill, but in the absence of any clear evidence they

have been ascribed simply as examples of wicked recklessness ending in a conviction of murder.

Case 219. The accused was leaving a football ground ahead of some of his friends, and on looking back saw that one of his friends was arguing with a youth who had been jostled in the crowd. The accused went back and told the youth to "get to fuck", whereupon the youth threw a cup of bovril at him. At this the accused pulled out a knife and stabbed the youth, who was taken to hospital. Despite receiving plasma and oxygen, together with artificial respiration and an endotracheal tube being used to enable artificial ventilation, the youth died, the cause of death being given as a stab wound of the heart.

Case 220. The accused was separated from his wife but seeing her on a fairly regular basis. After spending the night drinking with her, they had returned to her home with a "carry out", where they started to argue. When the accused's brother-in-law intervened in the argument he and the accused decided to have a "square go", there having been a history of previous friction between them. The accused produced a steak knife and stabbed the deceased, who was later found staggering about by the police and taken to hospital suffering from a stab wound of the chest. He was X-rayed and a chest drain inserted, but he became aggressive and pulled the drain out. A fresh drain was inserted, as were subsequent ones. Three days later a left thoracotomy was performed with an empyema, a collection of pus in the space between the lung and the outer wall of the chest, being drained, together with an evacuation of a haemothorax, a decortication of the lung and a spleenectomy. Eight days later a laparotomy was carried out and a biopsy of liver taken, as the liver was grossly enlarged. More drains were inserted and the

deceased was then placed on a ventilator, as well as being treated with antibiotics for the chest infection. The deceased died fourteen days later as the result of bronchopneumonia and empyema due to a stab wound of the chest. The histology of liver biopsy revealed an area of hepatocellular necrosis which appeared to be relatively well localised. A significant polymorph infiltrate was also noted, which probably represented an inflammatory reaction to the necrosis. There was no evidence of fatty infiltration or cirrhosis, and the appearance was consistent with traumatic hepatocellular necrosis.

Case 112

The deceased had been drinking and met the two accused while he was on his way to see his girlfriend. An argument started after some gang slogans were exchanged, and the deceased was alleged to have butted one of the accused in the face. Some witnesses separated the two antagonists, but they continued to shout abuse at each other and the fight was resumed. The other accused then joined in the attack on the deceased, and at this juncture one of the two accused stabbed the deceased. The deceased was taken to hospital but found to be dead, the post-mortem establishing that he had been stabbed from behind, the wound transfixing the left lung and causing the deceased to bleed to death.

Case 36

The deceased's wife had left him, after receiving numerous beatings, and at the time of the homicide was co-habiting with the accused. Apparently the deceased had been troubling his wife and the accused, and two days prior to the homicide he had kicked in the door of their house and assaulted his wife, for which he had been charged by the

police with assault. On the day of the homicide the accused and the deceased's wife had been out drinking, and when they returned home they found the deceased drinking with some people who were staying there. The deceased and his wife started to argue and she began to hit him. Some of the others in the house intervened and separated them, but whilst the deceased was being restrained the accused ran from the kitchen and stuck a knife into his back. The accused had previously declined to have a "square go" with the deceased, of whom he was afraid. The deceased was dead by the time he reached hospital, the cause of death being a stab wound of the heart.

Case 244. The deceased had associations with a local gang, and when walking along the street after drinking he was attacked by the two accused, who were members of a rival gang. He was struck and kicked about the face, head and body, and died of a skull fracture and cerebral contusions.

The question of whether an accused has displayed wicked recklessness can also be implied from the motive that prompted the homicide, whether it was gratuitous, avaricious, sexual or domestic, or whether the events culminating in the homicide originated outside the accused's volition. In the case of rape, for example, Lord Cooper was asked by the Royal Commission on Capital Punishment:

> "The crime of rape itself connotes the existence of unlawful violence; the act of rape involves violence. May I suggest, therefore, two alternative illustrations? A man may rape a child and that child may die from the violence thereby involved and the shock to its system. Another man may rape a girl or woman of mature years, but may render his crime easier to commit by committing upon her body what I will call extraneous violence, such as hitting her on the head with a brick. Would you regard both these cases as murder?"

Lord Cooper replied,

> "I think the second would be charged as, and might lead to a conviction of, murder. It would depend on circumstances whether the first one would either be charged or go to the jury as murder. I have never witnessed such a case." 12.

Consequently he took the view that a homicide in the course of a rape would not automatically be murder. Gordon took a similar view, stating:

> "It is submitted that murder is committed only where the violence used is such as to imply a wicked recklessness and that such recklessness will not normally be present where the violence used is inseparable from the act of rape itself." 13.

Relying on this statement, however, Mason has written:

> "In Scotland, death during rape would be murder only if the cause of death was unrelated to the act of rape." 14.

That though, is neither the law of Scotland nor what Gordon stated. The act of rape in itself will not normally be fatal unless there is some element of accident or mischance involved, and so the act has to be accompanied by excessive or extrinsic violence for it to come into the category of wicked recklessness. The completion of the rape is also sometimes followed by murder, either through intent or wicked recklessness, and in that case the act of killing would be regarded as being separate from the act of rape. The rape of a child by an adult male, however, where a real attempt is made at penetration, might very well result in gross tearing to the vagina and perineum, leading to pain, haemorrhage and shock, which can in turn lead to the possibility of reflex vomiting and asphyxia due to inhalation of vomit. Such a case, it is submitted, would clearly have shown sufficient wicked recklessness to constitute murder, since the vulnerability of the child to such an assault would have been patent.

Homicides occurring in the course of a robbery, unless it can be shown that the death was more the result of a mischance, occupy a special position in the law of homicide, for robbery is defined as theft accomplished by means of violence or intimidation. Thus the reckless use, or propensity to use, violence in this context is often taken as being sufficient to imply wicked recklessness. Lord Wheatley, for example, in taking away from the jury the question of a possible verdict of culpable homicide, declared in the case of Miller and Denovan in 1960:

> "If Miller hit Cremin over the head with this large piece of wood to overcome his resistance in order to rob him, was that not such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences? If in perpetrating this crime of robbery a person uses serious and reckless violence which may cause death without considering what the result may be, he is guilty of murder if the violence results in death although he had no intention to kill." 15.

The fact that robbery should be regarded as being a special case receives support from Gordon:

> "But it is submitted that Miller and Denovan should be restricted to robbery - the robbery aspect looms large in the case and in Lord Wheatley's charge, and earlier cases show that robbery does occupy a special place in this branch of the law. There is no sufficient warrant in earlier cases of the law for treating the wicked recklessness in simple assault cases so objectively as to make it a question of law for the judge in each case." 16.

Consequently murder can be committed either intentionally or by such wicked recklessness as to be regardless of the consequences, but although in 1953 Lord Cooper thought that the situation had been reached where practically only intentional killing was murder in Scotland[17], the abolition of the death penalty has meant that cases that would formerly have been dealt with as culpable homicide are

now often regarded as involuntary murder (see chapter 4). The result is that the limits of murder are now blurred, so that although general principles can be stated, they are not categorical, but flexible and discretionary. It is difficult enough to be able to clearly show or imply an intent to kill; in the case of involuntary murder, however, with the various indices of injuries, weapons, motives and other factors, none of which can necessarily be regarded as being conclusive on their own, all that can be said is that all of the factors of the homicide have to be considered before wicked recklessness is inferred and the accused convicted of murder rather than culpable homicide. In theory there is a clear distinction between the two offences, but in practice the distinctions are so flexible and vague that they become muted and often obscure.

3. CULPABLE HOMICIDE

Culpable homicide is divided into the two categories of voluntary and involuntary culpable homicide. The first is distinguished from murder on the basis of liability to punishment as a result of a mitigating factor being present in the homicide, so that although it is averred that the killing was intentional, it is also acknowledged that the killing does not merit the opprobrium of being regarded as murder. This contrasts with involuntary culpable homicide, which is an unintentional killing resulting from either the negligence or recklessness of the accused in circumstances in which the law again does not consider deserves the full opprobrium of the courts, and which differs from murder on the question of responsibility.

Again it has to be stressed, however, that the law on culpable homicide was developed at a time when the death sentence was mandatory for murder, and it was felt that certain cases, even though they came under the category of homicide, did not warrant a capital penalty. It was also recognised that the cases coming under the classification of culpable homicide differed widely in the degree of negligence and recklessness shown in them, as well as showing a wide divergence in the acts that brought about the death. Consequently there was never a fixed penalty attached to culpable homicide, it being left to the courts to impose whatever penalty was considered appropriate in the circumstances, from life imprisonment to an absolute discharge. Thus Hume observed:

> "Punished he ought to be, that he may stand corrected, and others be taught the lesson of patience by his example; but there is no reason why he should seal his repentence with his blood, which in civilized times, neither the frequency of the offence, nor the public opinion will demand." 1.

The death penalty both provided the reason for the existence of culpable homicide, and also the indicator by which the offence could be contrasted with murder, the one offence attracting the implementation of the death penalty, and the other a lesser penalty. Since the abolition of the death penalty, however, we no longer have this criterion, and instead have to rely on general principles that are so flexible that it often seems that they are:

> "a custom
> More honoured in the breach than the observance." 2.

The case authorities on culpable homicide, as is inevitable, have been concerned with elucidating principles of the most patent and flagrant of cases, where doubt has centred not on the actual facts of the case, but on the interpretation and significance of those facts. The majority of homicide cases though, contain ambiguities and singularities that do not easily lend themselves to a direct comparison with the authorities, and so all that can be done is to use the resulting principles as a rough guide, to be followed or dispensed with according to the particular case in question.

In voluntary culpable homicide then, the unofficial mitigating categories occur in the following circumstances:

1. Infanticide (see chapter 11), where a mother kills a child within the first year of its birth as a result of not having recovered from the effects of having given birth to the child or lactation. Strictly speaking the Crown should be satisfied that the killing was the result of diminished responsibility before proceeding with culpable homicide, but in practice this is a presumption that is always made by the Crown in regard to

the woman. Asked by the Royal Commission on Capital Punishment whether there was a case for always charging certain categories of homicide as culpable homicide or whether they should sometimes be charged as murder, Lord Cooper replied,

> "Of the three cases you give, infanticide, or child murder we would call it, the suicide pact and the "mercy killer", the first does arise, but the second and third have never arisen in recent years. If they arose, they would never in Scotland be charged as murder - never go to the court as murder." 3.

2. Euthanasia, or mercy killing, would fall into a similar category, although in his evidence to the Royal Commission Lord Keith saw no reason why such a case should not be charged as murder.

3. The survivor of a suicide pact will in practice only be charged with culpable homicide, although in strict terms it would be murder if he had killed his partner.

4. Cases in which there had been necessity or coercion would normally be regarded as culpable homicide.

5. A soldier or policeman, or somebody in a similar position of authority, who kills whilst exercising that authority in the belief that he is carrying out his duties would be guilty of culpable homicide if he had acted hastily or used more violence than was justifiable in the circumstances. If the excessive violence was gross, however, it could be regarded as murder.

6. Where death is the result of pure omission, such as in child neglect or where a child is deserted, there is a tendency to regard it as culpable homicide, although these will often be the result of involuntary killings.

The legal categories of mitigation consist of diminished responsibility (see chapter 8) and provocation (see chapter 7).

As involuntary culpable homicide is an unintentional killing resulting from the accused's acts or omissions, where the degree of recklessness is regarded as being less than that exhibited in murder, it differs from voluntary culpable homicide on the question of mens rea; whilst the actus reus is governed by the factor of the directness of the deceased's death to the accused's actions or omissions rather than its foreseeability. It also has to be considered in the context of homicide in the course of lawful conduct, homicide in the course of assault and homicide in the course of other forms of unlawful conduct.

The concept of homicide in the course of lawful conduct was largely developed in the course of the 19th century, a development that was partially necessitated by the need to consider the fatal contingencies of industrialisation. Thus the relevant cases can be seen to contain a significant proportion of examples of carelessness by persons lawfully storing and using explosives, conducting building operations, operating mines and quarries, using machinery, driving engines and boats, and concerned with the running of railways systems. The actual principle, however, that anyone in a position in which his actions can affect the safety of other people whether or not he is aware that they are thereby exposed to such risks, is culpable if they are killed as a result of his failing to maintain the standard of care and competence which the situation and common-sense demand, had already been established prior to the Industrial Revolution in cases involving such examples as guns, horses and carriages. The applicability of the law of homicide in the course of lawful conduct

has largely been reduced by the more recent development of legislation to regulate the workings of factories, mines and the other components of modern industrial society. This has meant that when a death results from somebody's negligence he would be prosecuted under the appropriate statute rather than under the common law crime of culpable homicide. It would still be quite proper, however, to bring a charge of culpable homicide in such a case, but there would be obvious difficulties in securing a conviction. The complexity of modern industrial plants and processes and the diffusion of responsibility makes it very difficult to be able to actually locate the negligent individual. Most of the early cases on this point were concerned with patently crude derelictions of duty and care. Today, however, fatalities occur in the context of sophisticated processes and machinery, which are normally accompanied by complex safety measures, where the common law is not entirely congruous and it is thought that statutory provisions are more appropriate. There is also the factor that the consensus of public opinion today would probably neither consider the negligent factory manager or train driver as, nor that he should be regarded as being, in the same category as those convicted of murder and culpable homicide.

There is an exception to this rule, however, in the case of traffic cases, in practice confined to road traffic cases where death is the result of the accused driving in a reckless manner. In this case it would be open to the Crown to either proceed under the common law crime of culpable homicide or under section 1 of the Road Traffic Act 1972, as amended, or to libel them as alternative charges, it then being left to the court and jury to decide of

which of the two offences the accused should be convicted. In order to secure a conviction of culpable homicide it would have to be shown that there was a wicked and criminal element in the offence, which is something more than is normally found in the statutory offence, and is in practice usually restricted to cases of drunken driving.

In regard to homicide in the course of an assault, which forms the most significant proportion of cases of involuntary culpable homicide, there is a distinction between the law of murder and the law of culpable homicide, in so far as in the latter the accused takes his victim as he finds him, whilst in murder this does not necessarily follow. Thus in cases of culpable homicide the physical condition of the deceased is taken into account, so that if he had any physical weakness, whether latent or patent, then the likelihood of the assault proving to be fatal will be estimated in the light of this knowledge. Consequently an assault that would be relatively mild if inflicted on a normal healthy individual would be regarded as being foreseeably fatal if the deceased's physical condition was such that it proved to be fatal. Thus in the unreported case of Robertson and Donoghue in 1945, Lord Justice-Clerk Cooper declared:

> "Now, it cannot be sufficiently emphasised....that if an intruder or aggressor, acting from some criminal intent or in pursuance of some criminal purpose, makes a violent attack upon any man or woman he must take his victim as he finds him. It is every whit as criminal to kill a feeble and infirm old man, or a newborn infant as it is to kill an adult in the prime of life." 4.

This is a pragmatical approach designed to circumvent the unacceptable situation of an accused being able to avoid responsibility for the homicide on the basis that he did not know, and could not have known, of the deceased's latent weakness or disability. Lord Cooper said,

again in Robertson and Donoghue,

> "It would never do for it to go forth from this court that housebreakers or robbers, or others of that character should be entitled to lay violent hands on very old or very sick or very young people and, if their victim died as a result, to turn round and say that they never would have died if they had not been very old or very weak or very young." 5.

This rule, however, is not confined to patent weaknesses and disabilities, nor to assaults accompanying or in furtherance of some other offence, but to homicides in the course of an assault in general. The justification for this approach is that with a patent condition it is reasonably foreseeable that the assault could be fatal, similarly if it was a latent condition then it is reasonably foreseeable that an assault upon a person with such a condition could be fatal, even if the accused did not know that his particular victim suffered from such a latent condition, and even if the deceased himself had not known of his condition.

Case 134 The two accused went into a sub-post office, produced a knife and a pistol and ordered the sub-postmaster to hand them the contents of the money tin. He started to scuffle with them in an attempt to force them out of the door, and when his wife, on hearing the commotion, came in she started to throw various objects at the two accused, whereupon they ran away. The sub-postmaster was looking extremely unwell at this stage and had to sit down. His wife was alarmed and telephoned for help, but when the police arrived her husband was found to be dead. The post-mortem showed that he had died as a result of ischaemic heart disease, it being known that individuals with narrowing of the coronary arteries can die suddenly and unexpectedly, and that such deaths can be precipitated by a burst

of unaccustomed exercise or stress, such as is occasioned during an assault. The two accused were originally charged with murder but the indictment was reduced to culpable homicide.

In practice, however, not every assault resulting in a death is regarded as being a criminal homicide, since there are occasions when the assault and the resulting injury, although fatal, are so minor in themselves that the accused will not be regarded as having been sufficiently reckless or negligent to warrant it being categorized as criminal homicide. An example of this would be if somebody was wolfing their food and was suddenly slapped on the back, causing him to accidentally attempt to swallow a mass of food and death being caused by either asphyxiation or vagal inhibition. Similarly, assaults committed in the context of a sport, such as boxing or rugby, and resulting in death, are regarded as casual homicides even though in law the consent of the victim is irrelevant, and a death resulting from a "square go" would be regarded as criminal homicide. Thus it was declared in McDermott v H.M.A.[6] that:

> "Homicide is the killing of another, and where death is brought about by an unlawful act, including an assault upon the victim, it is always homicide and it is always culpable." 7.

The situation was also considered in the subsequent case of Smart v. H.M.A.,[8] where it was stated:

> "Before parting with the case we wish to make one final observation. It is said that the consent was to have a 'square go'. There is no definition, classical or otherwise, of the phrase, and it seems unlikely that any normal person would consent to a fight which could legitimately involve what is contained in the charge, but for the purposes of the argument we accepted that Wilkie did so. We are only too aware of the prevalance of what is alleged to be a 'square go' in one form or another, often leading to serious assaults. Accordingly, apart from the private interests involved in this case, it is in the public interest that it should be decided and made known that consent to a 'square go' is not a defence

to a charge of assault based on that agreed combat." 9.

Thus in practice the law requires some element of wickedness in the recklessness or negligence of the accused before treating it as a criminal homicide. The ambiguities in this area of law are the result of the conflicting objectives in Scots criminal law of certainty and pragmatism. Asked by the Royal Commission on Capital Punishment whether the law of murder could be put into the framework of a definition, Lord Cooper replied,

> "The one outstanding thing I should like to stress is... that the Scottish law of crime never approaches a problem like this in the abstract. The approach is always from the other end and any attempt to imprison such conceptions within the framework of a definition would be, in my judgement, inevitably disastrous, and would gravely embarrass, even cripple, the administration of the law for an indefinite period." 10.

This pragmatic approach was more valuable when the penalty for murder was death, than it is today, but it is still thought to be desirable that murder and culpable homicide should not be confined within rigid definitions that must fail to take account of the idiosyncrasies of each case. The result is that only the general principles can be stated and the question of whether these principles are to be carried to their logical conclusion in any particular case has to be left to the discretion of the Crown, the courts and the jury.

Gordon [11] has suggested three ways in which the liability of the accused for culpable homicide could be limited within the general framework of assault cases in modern law. The first is that in the absence of any negligence by the accused, culpable homicide should be confined to cases of assault and robbery, and perhaps assault and rape, by analogy with the law of murder.

Secondly, it could be regarded that in assault cases ordinary negligence would be sufficient to constitute culpable homicide, so that the law would be as stated by Lord Moncrieff in H.M.A. v Delaney:[12]

> "It may be that those who offer violence, especially violence which is subject to be followed by death, have not had in view the taking of life. They, however, are not accidental in their use of violence. They are responsible for the violence they use so far as the violence is concerned, and, if consequences follow which they did not anticipate or apprehend, they are also responsible for these consequences. One cannot say 'I chose to exercise violence against a person against whom I thought I had a grievance, and it was merely accidental that a probable consequence of that violence followed." 13.

Finally it could be said that culpable homicide was always constituted when death resulted from an assault and robbery or rape, and where it was caused negligently in the course of an ordinary assault, which would involve constructive mens rea, where the mens rea involved in the intent to commit one offence is construed as being sufficient to constitute the mens rea for any resulting homicide.

The following are examples of cases appearing in court as murder and then being reduced to culpable homicide.

Case 230 The accused and his father were staying with the accused's uncle and aunt. They had been out drinking separately, and on returning to the house had started to argue and then to fight. They were separated by the accused's aunt and brother and the accused was taken by his aunt into the kitchen, whilst his brother took his father into a bedroom so as to enable them both to calm down. Suddenly the accused picked up a knife, ran through to the bedroom and stabbed his father. The father was found to be dead of a stab-wound of the neck.

Case 236 The deceased was sleeping when the accused broke into his house in the course of a house-breaking. Waking up, the deceased left his bed and challenged the accused, who stabbed him before escaping. The deceased had been drinking, and, not realising that he had been stabbed, went back to his bed. It was only when he discovered that he was bleeding that he went to his next door neighbour for help. He was taken to hospital and an abdominal laparotomy was carried out. A bleeding vessel in the gastric mucosa was ligated and a perforation in the anterior body of the wall of the stomach closed. Unfortunately, it was not realised that the stomach had been transfixed and that the posterior wall had also been perforated. The wounds were sutured and the deceased was returned to a ward. Post-operatively he began to show signs of delirium tremens, and was given dosages of largactil and valium. He died two days after admission to hospital. His death was ascribed to multiple stab wounds, but there was some dispute over the precise cause of death and the significance of the various wounds. He had received three stab wounds, two of which were inflicted on the anterior abdominal wall and the third entering the chest cavity from the back. The two abdominal wounds had pierced the liver and transfixed the stomach. Although neither the liver nor the posterior stomach wound had been sutured, however, there was no inflammatory reaction to the wounds apart from early healing stages to the liver, and in particular there was no indication of peritonitis, which would have been expected to follow on an abdominal injury.

Case 107 The accused and his brother were arguing over the brother's inability to find any employment. The argument then developed

into a fight, during which the accused had his nose fractured. The accused picked up a knife and stabbed his brother, following which he summoned help and the deceased was taken to hospital. Despite receiving resuscitation the deceased was pronounced dead, the post-mortem showing that his heart had been transfixed and that he had bled to death.

Case 38 The accused had been living with a woman, but she had left him to go and live with the deceased. There were several meetings between her, the deceased and the accused, with the accused trying to persuade her to come back to him. At the last meeting they met in a pub and she again refused to return to the accused. He then left and went into the public bar of another pub; the deceased and the woman later going into the lounge bar of the same pub. The accused saw them, and showed a knife to somebody in the bar who then went through and warned the deceased and the woman. The deceased came through to see the accused and they started to argue. They then both made for the interconnecting door between the two bars, which was also an exit to the street, and the accused stabbed the deceased. The deceased was taken to hospital and an operation was performed to drain away the free blood, with deep stitches being made into the lung and a chest drain inserted. During this the deceased had a cardiac arrest, which necessitated cardiac massage, internal cardiac massage and intubation being instituted. The deceased was later taken back to the operating theatre for a resection of the lower lobe of the left lung, but during the operation he went into profound shock and cardiac arrest. The post-mortem showed that this had been due to the inhalation of blood from the damaged left lung into the intact right lung, so that the deceased had basically drowned in his own blood.

Although culpable homicide can occur in the course of other unlawful employment, it is no longer the law that any death caused by negligence in the course of unlawful employment is culpable. Gordon has suggested[14] that the classic criterion of "unlawful employment" should be replaced by that of "unlawful act", namely a "criminal act". In this way the situation of somebody negligently causing a death whilst he was engaged in unlawful employment, but the actual act causing the death was extraneous to the unlawful employment, would be avoided. It would also be possible to divide criminal acts into those involving an intention to cause physical harm from those which do not.

Acts which are intended to cause physical harm would probably be regarded as being analogous to a death caused by an assault. Thus if somebody surreptitiously administered a drug to the deceased in order to render her unconscious, but as a result of this she died it would be culpable homicide. In the case of other crimes involving non-negligent culpable homicide, where the death was caused by a criminal act without there being any intent to cause physical harm, Gordon[15], although there are no reported cases on the point, has contended that constructive culpable homicide as is found in assault cases, should not be extended beyond such cases. Otherwise any death caused by a criminal act, however innocuous, would have to be held to be culpable homicide. A contravention of a statutory offence of a basically technical kind that caused a death would also have to be shown to be wickedly negligent before the death could be regarded as culpable homicide.

A recent Australian appeal case[16], allowing an appeal, considered the test to be applied in a case of manslaughter by criminal neg-

ligence. It held that it had to be shown that the accused had acted consciously and voluntarily, and that although there was no intention to cause death or grievous bodily harm, the circumstances were such that there had been a great falling short of the standard of care which a reasonable man should have exercised when there was such a high risk that death or grievous bodily harm could result from his actions. The accused had burned a woman to death whilst setting fire to himself.

4. THE DEATH PENALTY

Murder has always been regarded as the most serious of crimes, both by the law and the general public, and has consequently always attracted the highest penalty available to the law, which today means an indeterminate life sentence, with or without any minimum sentence being recommended by the trial judge. Prior to 1965 of course, the maximum sentence open to the courts, in an appropriate murder case, was the death penalty, and for centuries the idea that the appropriate punishment for murder had to be the death penalty had been sacrosanct. The death penalty, however, had also for a long time attracted the concern of philosophers, humanitarians and social reformers, but it was not until after the multitude of crimes to which the death penalty pertained had been pruned, largely in the 19th century, that it began to be questioned whether it should still be applicable even for murder.

This was, in fact, a complete reversal of the problems with which legislators and courts of previous centuries had been confronted. In the debates prior to 1965 the problem was what would happen to convicted murderers in the absence of capital punishment; previous centuries were concerned with how, with the ultimate sanction being so freely available, atrocious cases of murder could be punished with a greater severity, both as retribution against the crime itself and as a deterrent against murder. The solution, as Hume observed, was that,

> "The pains of law for murder, are the pains of death, and confiscation of moveables. In atrocious cases, it has been usual for the judge to award some further suffering or indignity, the better to mark the public detestation of

> the crime; such as striking off the hand before execution; the hanging of the dead body in chains; the quartering of the body, and affixing of the head and limbs on conspicuous places, to keep up the memory and terror of the example." 1.

Aggravated murders, as they were termed, were concerned with the act of killing itself and the situation in which the killing occurred. Thus Murder under Trust, for example, which came into being under a Statute of 1587, was regarded as an aggravated murder. It was concerned with those killings where the deceased had placed himself in the murderer's power, and the killing occurred in breach of the trust which the deceased had placed in his murderer.[2] The prime example of this was where the relationship existing between the accused and the deceased was so acrimonious that a pledge of safety was required before the deceased would have exposed himself to the dangers presented by the murderer, and indeed the statute was passed following on just such a case. Before the statute had been repealed in the reign of Queen Anne, however, it had sometimes been extended to cover general situations of trust, such as those existing between husband and wife, and parent and child.

In 1751, however, a further means of distinguishing the death penalty to be imposed on murderers was implemented with "An Act for better preventing the horrid crime of Murder", now known as the Murder Act 1751. The preamble of the Act read:

> "Whereas the horrid crime of Murder has of late been more frequently perpetrated than formerly and particularly in and near the Metropolis of this Kingdom, contrary to the Known Humanity and natural genius of the British Nation: And whereas it is thereby become necessary, that some further Terror and peculiar Mark of Infamy be added to the Punishment of Death, now by law inflicted on such as shall be guilty of the said heinous offence....." 3

The particular terror introduced by the Act was specified in section 3:

> "...and the body of the murderer shall be delivered to such surgeons as the judge shall direct, in order to be dissected and anatomised; unless it be a part of the sentence that the criminal shall be hung in chains; but that in no case is the body to be buried, till it be dissected and anatomised as aforesaid...." 4.

For various reasons, moral, religious and superstitious, dissection was regarded with anathema by the general public, for as Linebaugh observed:

> "Except for a minority of surgeons and sympathetic observers, dissection was considered less as a necessary method for enlarging the understanding of homo corpus than as a mutilation of the dead person, a form of aggravating capital punishment....And so dissection by the Surgeons and public exposure of the corpse was added to the punishment of death by hanging. Although the Parliament's sole interest in the law was in making the death sentence terrifying, the Company of Surgeons, happy at this coincidence between the interests of criminal deterrence and its own, immediately appointed a Committee to aid the legislature in its intentions." 5.

Even though marks of infamy had disappeared by 1949, however, the death sentence was still mandatory on a conviction for murder when the accused had been aged over 18 at the time of the offence. In that year though, the Government appointed a Royal Commission to consider whether capital punishment for murder should be modified or limited, but not, it should be noted, whether it should be abolished. The Royal Commission reported in 1953, concluding that there was little point in attempting to limit the scope of capital punishment for murder. The issue therefore became whether capital punishment should be retained or abolished for murder, and

in fact Lord Cooper, in giving evidence to the Royal Commission, had prophetically stated:

> "As you know, and as statistics show, the execution of the death penalty is already confined within very narrow limits in Scotland. I do not very well see how you could confine it within narrower limits, without abolishing it altogether." 6.

Despite the Royal Commission's endeavours and recommendations though, the Homicide Act 1957 was passed, to be greeted with suspicion and later condemnation. The Act divided murders into two classes, capital and non-capital murder, with the former attracting a mandatory death sentence and the latter a mandatory life sentence. A capital murder was one committed in one or more of the following circumstances:

a) any murder committed in the course of furtherance of theft;

b) any murder committed by shooting or by causing an explosion;

c) any murder committed in the course, or for the purpose of resisting or avoiding or preventing, a lawful arrest, or of effecting or assisting an escape or rescue from legal custody.

d) any murder of a police officer while he was acting in the execution of his duty or of a person who was assisting a police officer so acting;

e) the murder of a prison officer acting in the execution of his duty, or of a person assisting a prison officer so acting, by a prisoner.

The death sentence was also mandatory when a person was convicted of two or more murders committed on different occasions, or when he had previously been convicted of murder:

T.B. Smith stated at the time:

> "It may be doubted whether the 1957 Act will in fact make any appreciable difference in the numbers of persons executed in Scotland; and, if this proves to be the case, it is particularly regrettable that the Act was ever extended to Scotland." 7.

This view was to be repeated by Barbara Wooton, who later wrote:

> "The 1957 Act was an outstanding example of the inability of the British ever to reach a sensible conclusion except by way of an illogical compromise." 8.

It was thought that the Act contained too many illogicalities and anomalies for it to be tolerated for very long.

A premeditating murderer who poisoned his victim would escape the death penalty, whilst somebody who used a firearm to kill their spouse during a domestic quarrel would be liable for the death penalty. By the time the Murder (Abolition of Death Penalty) Act 1965 was passed then, there was a general dissatisfaction with the way in which the 1957 Act had operated. The situation had in fact been reached when in a House of Lords debate on the abolition of the death penalty in 1965, Lord Parker, the then Lord Chief Justice of England, would declare,

> "I am in favour of abolition, not I am afraid on any moral ground, but merely because of the working of the Homicide Act 1957. I confess, looking back eleven years, that if anybody had said that I should come out as a full-blooded abolitionist I should have been surprised." 9.

The 1965 Act abolished the death penalty for capital murder, sub-

stituting a mandatory life sentence of imprisonment, as well as the categorisations of capital and non-capital murder. It should be noted though, that the 1965 Act was not the first to abolish the death penalty for murder, as the 1957 Act had already removed the death penalty from non-capital murders, and the 1965 Act simply removed the remaining categories of murder that were liable to capital punishment. The 1965 Act was only to remain in force for five years, after which it would expire unless it were renewed by affirmative resolutions in both Houses of Parliament. In December, 1969, however, both the House of Commons and the House of Lords passed such a resolution, and thereby ensured the Act an indefinite future life.

The populist notion that the abolition of the death penalty has itself caused an increase in the number of homicides is outside the consideration of this study.

What the following tables and graphs do show, however, is that since 1965 there has been a very rapid increase in the number of killings considered to be murders rather than culpable homicides.

This, it is submitted, is due to the fact that the abolition of the death penalty has removed the reluctance of the Crown, the courts and juries to regard a killing as being murder. The combination of the 1957 and 1965 Acts has meant that murder is no longer a special crime. Prior to abolition it would have been natural enough if the preparation of a murder case had been conducted with the utmost scrupulousness in order to see whether it could be reduced before it went to trial; that a judge would have normally ensured that the jury were aware of every factor that could justify their returning a verdict of culpable homicide; and that a jury would not have wanted, apart from in extreme cases, to return a verdict that would require the death sentence being passed on the accused. With such care being taken not to have to sentence the accused to death it is not surprising that there were a relatively small number of persons proceeded against for murder, as opposed to culpable homicide, and that there were even fewer, and often none at all in a given year, convicted of murder. The 1957 and 1965 Acts, however, changed all this, for whereas the death penalty had previously existed as a gulf between the two offences, they have now drifted towards each other and lost their respective distinctions. It is no longer possible to decide of what offence the accused should be convicted on the basis of "Does he deserve to hang for what he has done?", for it is one thing to say that somebody shall hang for what he has done, and something else entirely to say that if it were possible to hang him, then he ought to be hung for what he has done. It is an academic exercise, and it would be surprising if many people today would support the idea that in 1976 forty-one people, the number of people convicted of murder in the High Court of Justiciary in

that year, should have had to have been sentenced to death by the courts.

Capital punishment has been abolished for murder, and people are aware of this in their deliberations on whether a person should be convicted of murder or culpable homicide. With the practical effects of the two results commonly being held to be minimal, it is not surprising if the distinctions between the two offences are also regarded as being minimal. This would certainly explain the trend shown in the following tables and graphs. These show that since 1965 there has been a pronounced convergence between the respective numbers of persons proceeded against and convicted of murder and culpable homicide. It is submitted, however, that a considerable number of the cases that have been judged to be murder since 1965, would have been considered to merit reduction prior to the abolition of the death penalty, precisely because of the existence of the death penalty. The continuums of the reducing factors, which will justify whether a case will be reduced or not, remain, but the points which divide those cases to be regarded as murder from those regarded as culpable homicide have shifted, so that cases that would formerly have been regarded as culpable homicide can now be regarded as murder.

Figures 1 and 2 are the number and percentage distribution of homicides made known to the police, that is murders and culpable homicides being compared on a per centage basis for every year, and compiled, as are all the graphs and tables, from the annual Criminal Statistics for Scotland. Homicides made known to the police are those known at the end of every year, that is at 31st

December, and will show either the result of any judicial determination, failing which the charge on which the accused is awaiting trial, or if there has not been an arrest the character of the crime as judged by the facts so far known to the police. The numbers of murders and culpable homicides represent the number of completed acts of murder and culpable homicide, irrespective of the number of persons killed. Consequently if more than one person is killed at the same time, or in a succession of immediately consecutive acts, then that will be regarded as one completed act of either murder or culpable homicide.

Figures 3 and 4 are concerned with the number and percentage distribution of persons proceeded against for murder or culpable homicide, not the number of murders and culpable homicides. If, however, a person is proceeded against for murder, but ultimately convicted of culpable homicide, then they will appear in the figures for culpable homicide.

Figures 5 and 6, persons convicted of murder and culpable homicide, include all persons against whom a charge of murder or culpable homicide was proved, apart from in the years 1939 - 45 for which the figures for culpable homicide are not available.=

Figure 7 takes the 1898 numbers of murders, culpable homicides, and their total, and compares them on a percentage basis with the numbers for every subsequent year up to 1976.

It will be seen that all the figures show the same general trend in regard to the distribution of homicides between murder and culpable homicide. There is a marked separation between the incidences of culpable homicide and murder, as well as prosecutions

and convictions, prior to the Second World War, with the majority of homicides being regarded as culpable homicides. This is followed by a closer proximity of the two crimes between 1945 and the mid-1960's when, with the abolition of the death penalty, there has been a marked increase in the number of homicides regarded as murder as opposed to culpable homicide. Occasionally there have been anomalies though, and so it will be seen, for example, that following the end of the Second World War there was a significant increase in the number of homicides regarded as murder, both in the number of homicides made known to the police, and in the number of persons proceeded against for, and the number convicted of, murder. This can be explained, however, by Lord Cooper's comment that the courts were adopting a more deterrent attitude towards crimes of violence, as a result of the increase in crimes of violence in Scotland:

> "It is difficult to put it more precisely than I am endeavouring to, but twice over in my own professional experience - first in the early '20s after the first war, and again around about 1945 or 1946 after the second war - it was very difficult not to be conscious of a sense of outraged propriety on the part of the community as the result of a large number of rather horrifying crimes of violence, and Judges and juries, I think, become very sensible of the fact that such a sense exists and should receive attention." 10.

It is also striking that in 1921 57% of the persons proceeded against for homicide should have been proceeded against for murder, whilst the number of persons proceeded against for culpable homicide remained relatively stable. The incongruity is heightened since the figure is neither explained by the number of homicides made known to the police nor reflected in the number and distribution of persons

convicted of homicide. Again reference should be made to Lord Cooper:

> "They were both characterised by what is commonly called gang warfare in the West of Scotland, a phenomenon which is difficult to describe in any detail, except to say that it is characterised by gangs of young men, generally wearing badges or distinguishing emblems, and armed with savage weapons engaging in street fights and conducting sometimes murderous assaults upon innocent citizens, who have nothing to do with them or their affairs. Public opinion becomes very much stirred at these episodes." 11.

I would therefore suggest that the increase in the number of persons proceeded against for murder could be accounted for by an increase in the number of killings involving gangs rather than individuals. As such killings normally involve questions of fact rather than law, it would have been left to the courts and juries to ascertain which of the various accused were responsible for the killing. This would consequently mean that whereas there were a large number of persons proceeded against for murder, there would also have been a large number of persons acquited once the responsibility for the individual killings had been ascertained by the courts and juries. This would then explain why there was no significant increase in the number of persons convicted of homicide at the time.

It will also be seen that the incidence of homicide has fluctuated over the years, both in regard to individual years and in periods of time. Thus in the period 1898 to 1936 there were 1,874 homicides made known to the police, an average of 48.1 per year; in the period 1937 to 1957, 666, an average of 31.7; and between 1958 and 1976, 1,255, an average of 66.1. Although there have been individual yearly fluctuations within these periods, there is

a discernable pattern of a relatively stable homicide rate from the beginning of the century to the mid-1930s, followed by a reduction from then until the end of the 1950s, when the incidence of homicide steadily began to rise again, to reach a peak in 1976. Whether the incidence of homicide will remain at this level or whether it will fall, as it has done in the past after previous peaks, can only be a matter of conjecture. As the homicide rate is subject to so many variable factors, however, it is quite possible that a reduction will occur, either without it being possible to isolate the factor or factors that have brought this about, or because of some identifiable change in social conditions and values.

What can be said though, is that in recent years there has been a sharp increase in the number of homicides regarded as murder compared to those regarded as culpable homicide. The major reason for this has been the abolition of the death penalty. Courts are now in a position to be able to adopt, when they choose to do so, a deterrent policy and convict of murder, whereas they would previously have been constrained from doing so, apart from in exceptional circumstances, by their reluctance to have to impose the death penalty. Abolition has also meant that an accused can now plead guilty to a charge of murder, whilst prior to 1965 the court would never accept such a plea to a capital charge.

In fact, prior to 1965 there were very few people convicted of murder in Scotland, and even fewer executions. Thus it will be

seen that between 1936 and 1944 nobody was convicted of murder, and that between 1928 and 1944 there were no executions in Scotland. Speaking of this latter period, Lord Cooper has said,

> "You will see from the figures that quite a lot of people were charged with murder during that period and quite a number found guilty of culpable homicide. I think myself that the situation swung too far in the direction of clemency during that period, partly due to what can never be excluded, namely, the personal equation of the Judges of the day, and partly, perhaps, to the Secretaries of State of the day." 12.

There never were many executions in Scotland though, as in the period 1898 to 1965 only 34 persons were executed, whilst in the same period a total of 141 persons were convicted of murder. The difference between the two figures is accounted for by either the Secretary of State having granted a reprieve, the accused having been under the age of eighteen at the time of the offence, the accused having successfully appealed against the conviction or the accused having been convicted of a non-capital murder between 1957 and 1965. Consequently although the existence of the death penalty has had a profound influence on whether homicides will be regarded as murders or culpable homicides, the death penalty itself has been imposed on very few occasions. The aura that it was able to impose over murder trials for so long should never, however, be underestimated.

Homicides made known to the police

Year	Murder	Culpable Homicide	Total	Year	Murder	Culpable Homicide	Total
1898	14	33	47	1938	15	23	38
1899	8	27	35	1939	8	22	30
1900	10	58	68	1940	8	27	35
1901	8	34	42	1941	11	19	30
1902	14	37	51	1942	15	29	44
1903	8	46	54	1943	8	18	26
1904	13	26	39	1944	12	18	30
1905	19	43	62	1945	24	14	38
1906	10	48	58	1946	18	19	37
1907	11	50	61	1947	16	14	30
1908	11	39	50	1948	14	20	34
1909	10	28	38	1949	14	10	24
1910	9	32	41	1950	21	14	35
1911	6	32	38	1951	9	12	21
1912	11	40	51	1952	13	14	27
1913	10	31	41	1953	18	23	41
1914	8	31	39	1954	14	18	32
1915	12	45	57	1955	11	24	35
1916	9	44	53	1956	13	16	29
1917	6	23	29	1957	12	14	26
1918	9	23	32	1958	18	24	42
1919	12	38	50	1959	14	20	34
1920	18	41	59	1960	16	19	35
1921	17	35	52	1961	14	23	37
1922	12	33	45	1962	27	31	58
1923	12	32	44	1963	16	30	46
1924	12	33	45	1964	27	24	51
1925	17	42	59	1965	32	31	63
1926	10	35	45	1966	30	56	86
1927	13	51	64	1967	41	29	70
1928	19	41	60	1968	41	32	73
1929	9	46	55	1969	31	51	82
1930	13	32	45	1970	29	54	83
1931	8	29	37	1971	45	26	71
1932	10	29	39	1972	47	38	85
1933	16	32	48	1973	43	34	77
1934	12	37	49	1974	38	40	78
1935	16	25	41	1975	47	31	78
1936	19	32	51	1976	63	43	106
1937	10	14	24				

TABLE 1.

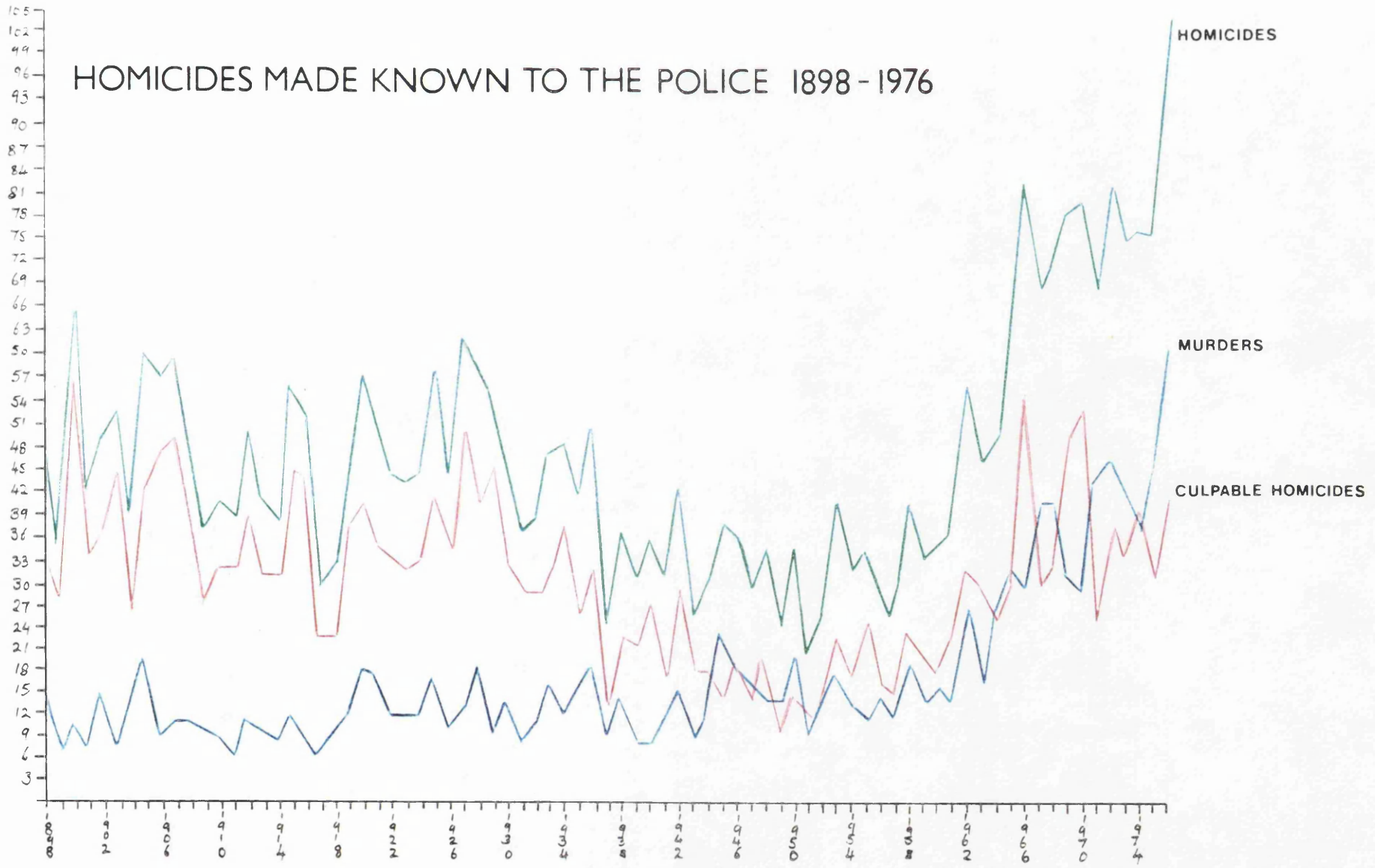

HOMICIDES MADE KNOWN TO THE POLICE 1898 - 1976
HOMICIDES
MURDERS
CULPABLE HOMICIDES

Fig. 1

Per Centage Distribution of homicides made known to the police

Year	Murder	Culpable Homicide	Total	Year	Murder	Culpable Homicide	Total
1898	30%	70%	100%	1938	39%	61%	100%
1899	23	77	100	1939	27	73	100
1900	15	85	100	1940	23	77	100
1901	19	81	100	1941	37	63	100
1902	27	73	100	1942	34	66	100
1903	15	85	100	1943	31	69	100
1904	33	67	100	1944	40	60	100
1905	31	69	100	1945	63	37	100
1906	17	83	100	1946	49	51	100
1907	18	82	100	1947	53	47	100
1908	22	78	100	1948	41	59	100
1909	26	74	100	1949	58	42	100
1910	22	78	100	1950	60	40	100
1911	16	84	100	1951	43	57	100
1912	22	78	100	1952	48	52	100
1913	24	76	100	1953	44	56	100
1914	21	79	100	1954	44	56	100
1915	21	79	100	1955	31	69	100
1916	17	83	100	1956	45	55	100
1917	21	79	100	1957	46	54	100
1918	28	72	100	1958	43	57	100
1919	24	76	100	1959	41	59	100
1920	31	69	100	1960	46	54	100
1921	33	67	100	1961	38	62	100
1922	27	73	100	1962	47	53	100
1923	27	73	100	1963	35	65	100
1924	27	73	100	1964	53	47	100
1925	29	71	100	1965	51	49	100
1926	22	78	100	1966	35	65	100
1927	20	80	100	1967	59	41	100
1928	32	68	100	1968	56	44	100
1929	16	84	100	1969	38	62	100
1930	29	71	100	1970	35	65	100
1931	22	78	100	1971	63	37	100
1932	26	74	100	1972	55	45	100
1933	33	67	100	1973	56	44	100
1934	24	76	100	1974	49	51	100
1935	39	61	100	1975	60	40	100
1936	37	63	100	1976	59	41	100
1937	42	58	100				

TABLE 2.

PER CENTAGE DISTRIBUTION OF HOMICIDES MADE KNOWN TO THE POLICE 1898 - 1976

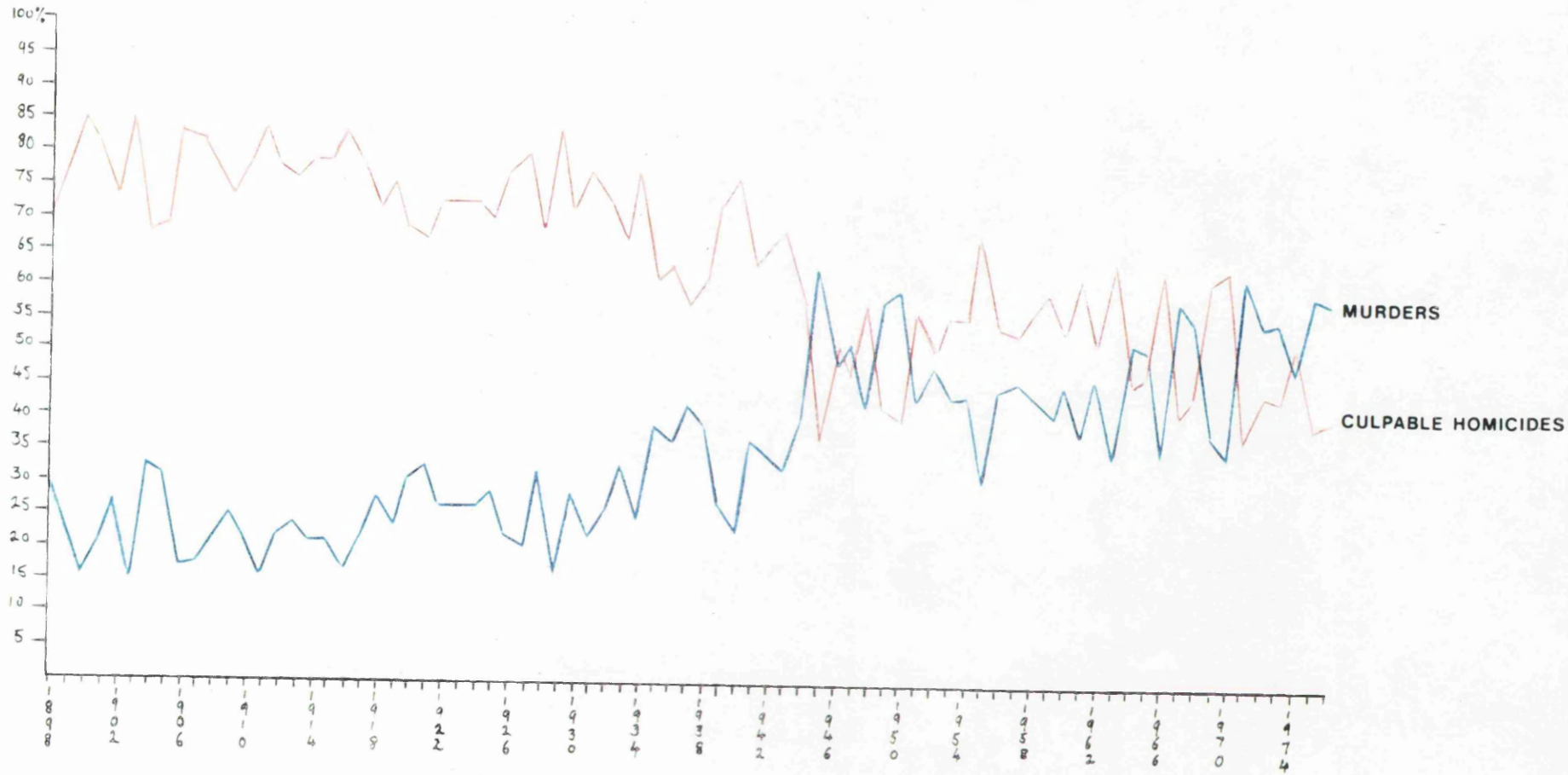


Fig. 2

Number of persons proceeded against for homicide in the High Court of Justiciary and Sheriff Court.

Year	Murder	Culpable Homicide	Total	Year	Murder	Culpable Homicide	Total
1898	12	32	44	1938	9	17	26
1899	8	31	39	1939	7	30	37
1900	9	56	65	1940	4	21	25
1901	5	37	42	1941	10	16	26
1902	12	42	54	1942	8	23	31
1903	7	48	55	1943	7	21	28
1904	10	30	40	1944	4	15	19
1905	13	40	53	1945	16	18	34
1906	9	52	61	1946	22	23	45
1907	5	60	65	1947	10	13	23
1908	9	49	58	1948	6	21	27
1909	8	36	44	1949	8	6	14
1910	6	35	41	1950	16	9	25
1911	6	32	38	1951	7	11	18
1912	7	40	47	1952	5	12	17
1913	8	31	39	1953	12	14	26
1914	7	33	40	1954	7	16	23
1915	10	49	59	1955	7	25	32
1916	7	44	51	1956	13	13	26
1917	5	27	32	1957	6	10	16
1918	6	23	29	1958	14	17	31
1919	8	40	48	1959	10	18	28
1920	12	52	64	1960	16	24	40
1921	47	36	83	1961	8	16	24
1922	17	33	50	1962	24	20	44
1923	10	34	44	1963	9	24	33
1924	9	33	42	1964	24	18	42
1925	11	42	53	1965	22	22	44
1926	5	34	39	1966	44	36	80
1927	12	51	63	1967	35	26	61
1928	14	39	53	1968	33	26	59
1929	9	44	53	1969	30	43	73
1930	7	40	47	1970	30	50	80
1931	4	29	33	1971	53	18	71
1932	7	24	31	1972	46	32	78
1933	9	30	39	1973	40	42	82
1934	12	36	48	1974	41	34	75
1935	5	30	35	1975	42	28	70
1936	9	32	41	1976	57	48	105
1937	7	16	23				

TABLE 3.

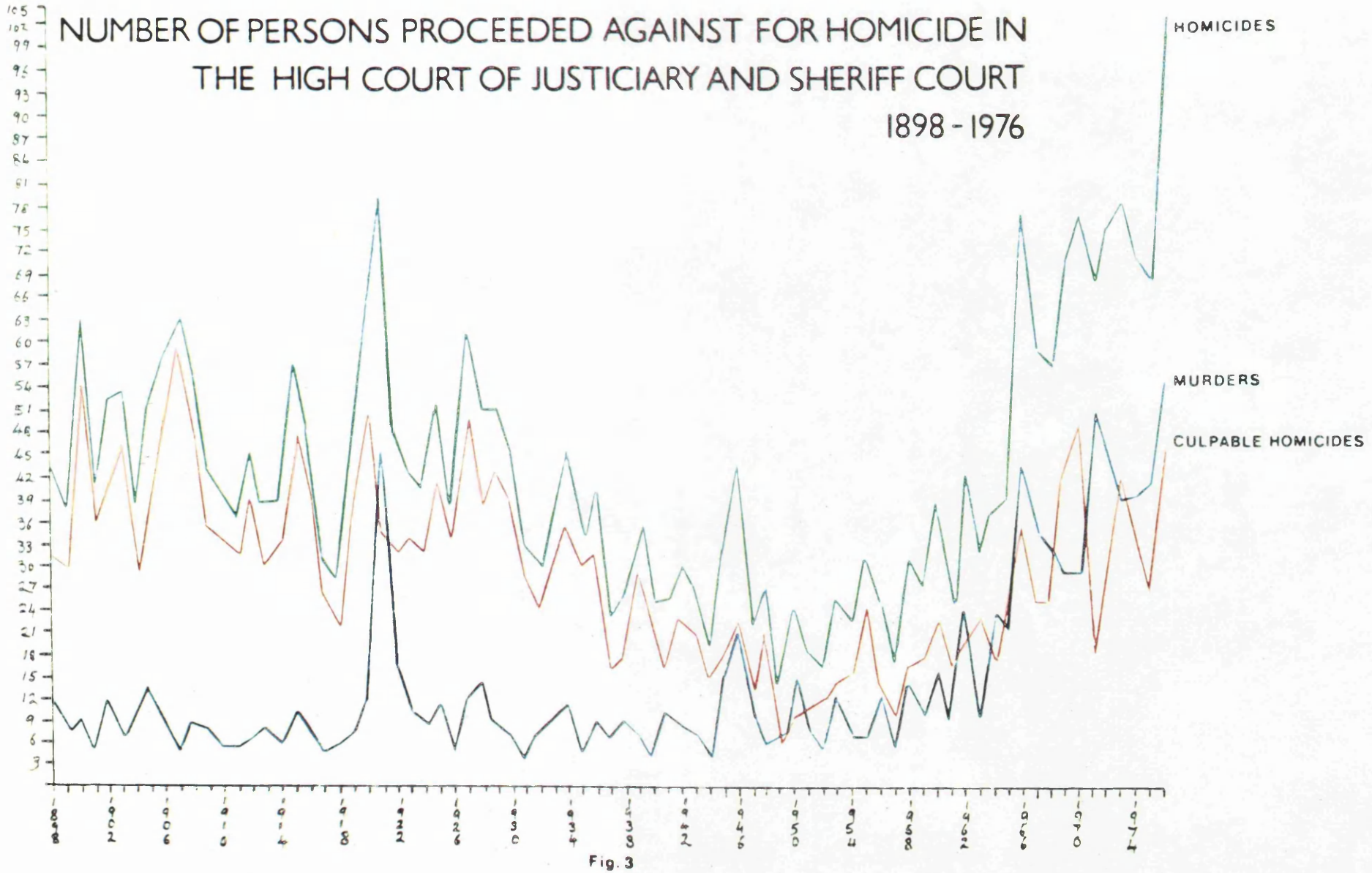

NUMBER OF PERSONS PROCEEDED AGAINST FOR HOMICIDE IN
THE HIGH COURT OF JUSTICIARY AND SHERIFF COURT
1898 - 1976
HOMICIDES
MURDERS
CULPABLE HOMICIDES

Fig. 3

Percentage distribution of persons proceeded against for homicide in the High Court of Justiciary and Sheriff Court.

Year	Murder	Culpable Homicide	Total	Year	Murder	Culpable Homicide	Total
1898	27%	73%	100%	1938	35%	65%	100%
1899	21	79	100	1939	19	81	100
1900	14	86	100	1940	16	84	100
1901	12	88	100	1941	38	62	100
1902	22	78	100	1942	26	74	100
1903	13	87	100	1943	25	75	100
1904	25	75	100	1944	21	79	100
1905	25	75	100	1945	47	53	100
1906	15	85	100	1946	49	51	100
1907	8	92	100	1947	43	57	100
1908	16	84	100	1948	22	78	100
1909	18	82	100	1949	57	43	100
1910	15	85	100	1950	64	36	100
1911	16	84	100	1951	39	61	100
1912	15	85	100	1952	29	71	100
1913	21	79	100	1953	46	54	100
1914	18	83	101	1954	30	70	100
1915	17	83	100	1955	22	78	100
1916	14	86	100	1956	50	50	100
1917	16	84	100	1957	38	63	101
1918	21	79	100	1958	45	55	100
1919	17	83	100	1959	36	64	100
1920	19	81	100	1960	40	60	100
1921	57	43	100	1961	33	67	100
1922	34	66	100	1962	55	45	100
1923	23	77	100	1963	27	73	100
1924	21	79	100	1964	57	43	100
1925	21	79	100	1965	50	50	100
1926	13	87	100	1966	55	45	100
1927	19	81	100	1967	57	43	100
1928	26	74	100	1968	56	44	100
1929	17	83	100	1969	41	59	100
1930	15	85	100	1970	38	63	100
1931	12	88	100	1971	75	25	100
1932	23	77	100	1972	59	41	100
1933	23	77	100	1973	49	51	100
1934	25	75	100	1974	55	45	100
1935	14	86	100	1975	60	40	100
1936	22	78	100	1976	54	46	100
1937	30	70	100				

TABLE 4.

PER CENTAGE DISTRIBUTION OF PERSONS PROCEEDED AGAINST FOR HOMICIDE IN THE HIGH COURT OF JUSTICIARY AND SHERIFF COURT 1898-1976

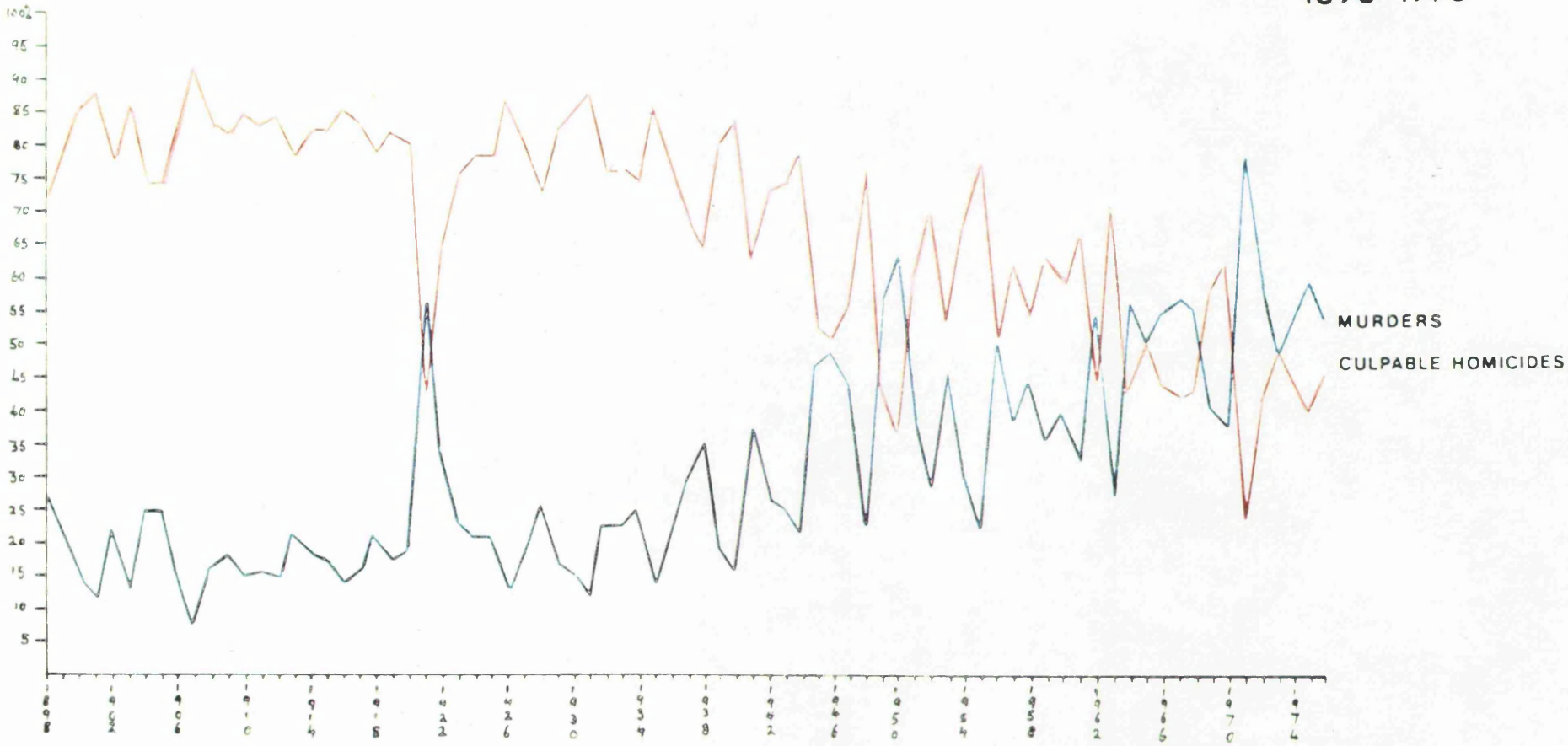
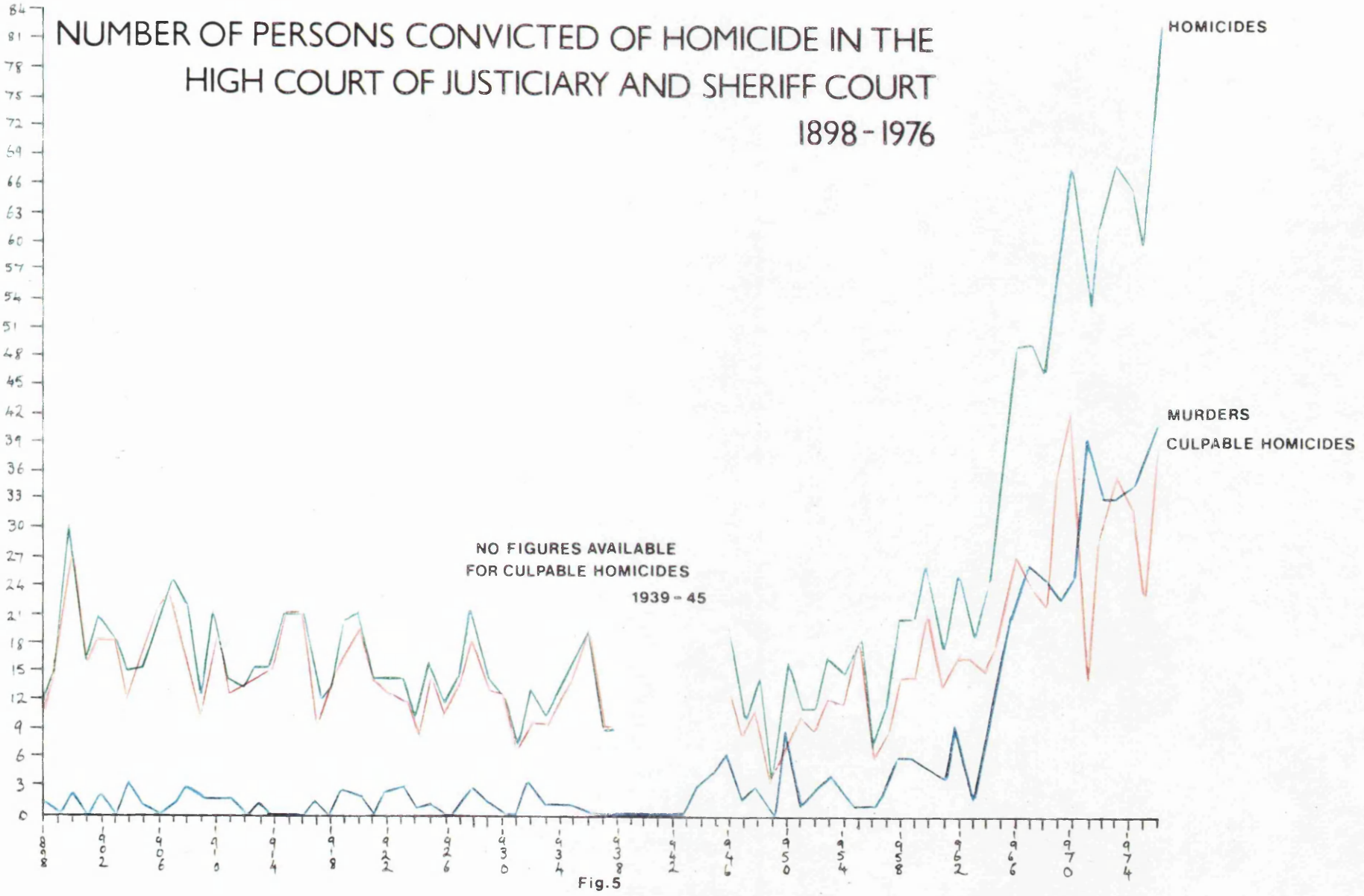


Fig. 4

Number of persons convicted of murder and culpable homicide in the High Court of Justiciary and Sheriff Court.

Year	Murder	Culpable Homicide	Total	Year	Murder	Culpable Homicide	Total
1898	1	10	11	1938	0	9	9
1899	0	14	14	1939	0	No	
1900	2	28	30	1940	0	figures	
1901	0	16	16	1941	0	available	
1902	2	18	20	1942	0	for	
1903	0	18	18	1943	0	culpable	
1904	3	12	15	1944	3	homicide	
1905	1	15	16	1945	4	1939 - 45.	
1906	0	21	21	1946	6	13	19
1907	1	23	24	1947	1	8	9
1908	3	18	21	1948	3	11	14
1909	2	10	12	1949	0	2	2
1910	2	19	21	1950	9	7	16
1911	2	12	14	1951	1	10	11
1912	0	13	13	1952	3	8	11
1913	1	14	15	1953	4	12	16
1914	0	15	15	1954	3	11	14
1915	0	21	21	1955	1	18	19
1916	0	21	21	1956	1	5	6
1917	1	9	10	1957	2	8	10
1918	0	13	13	1958	6	14	20
1919	3	17	20	1959	6	14	20
1920	2	19	21	1960	5	21	26
1921	0	14	14	1961	4	13	17
1922	2	12	14	1962	9	16	25
1923	3	11	14	1963	2	16	18
1924	1	8	9	1964	8	15	23
1925	1	14	15	1965	15	18	33
1926	0	10	10	1966	22	27	49
1927	1	13	14	1967	26	23	49
1928	3	18	21	1968	25	21	46
1929	1	13	14	1969	22	36	58
1930	0	12	12	1970	25	42	67
1931	0	6	6	1971	40	13	53
1932	4	9	13	1972	33	29	62
1933	1	9	10	1973	33	35	68
1934	1	12	13	1974	34	32	66
1935	1	14	15	1975	37	22	59
1936	0	19	19	1976	41	42	83
1937	0	9	9				

TABLE 5.


NUMBER OF PERSONS CONVICTED OF HOMICIDE IN THE HIGH COURT OF JUSTICIARY AND SHERIFF COURT 1898 - 1976
HOMICIDES
MURDERS
CULPABLE HOMICIDES
NO FIGURES AVAILABLE FOR CULPABLE HOMICIDES 1939 - 45
84
81
78
75
72
69
66
63
60
57
54
51
48
45
42
39
36
33
30
27
24
21
18
15
12
9
6
3
0
98
02
06
10
14
18
22
26
30
34
38
42
46
50
54
58
62
66
70
74
Fig.5

Percentage distribution of persons convicted of homicide in the High Court of Justiciary and Sheriff Court

Year	Murder	Culpable Homicide	Total	Year	Murder	Culpable Homicide	Total
1898	9%	91%	100%	1938	0%	100%	100%
1899	0	100	100	1939		No	
1900	7	93	100	1940		figures	
1901	0	100	100	1941		available	
1902	10	90	100	1942		for	
1903	0	100	100	1943		culpable	
1904	20	80	100	1944		homicides	
1905	6	94	100	1945		1939 - 1945	
1906	0	100	100	1946	32	68	100
1907	4	96	100	1947	11	89	100
1908	14	86	100	1948	21	79	100
1909	17	83	100	1949	0	100	100
1910	10	90	100	1950	56	44	100
1911	14	86	100	1951	9	91	100
1912	0	100	100	1952	27	73	100
1913	7	93	100	1953	25	75	100
1914	0	100	100	1954	21	79	100
1915	0	100	100	1955	5	95	100
1916	0	100	100	1956	17	83	100
1917	10	90	100	1957	20	80	100
1918	0	100	100	1958	30	70	100
1919	15	85	100	1959	30	70	100
1920	10	90	100	1960	19	81	100
1921	0	100	100	1961	24	76	100
1922	14	86	100	1962	36	64	100
1923	21	79	100	1963	11	89	100
1924	11	89	100	1964	35	65	100
1925	7	93	100	1965	45	55	100
1926	0	100	100	1966	45	55	100
1927	7	93	100	1967	53	47	100
1928	14	86	100	1968	54	46	100
1929	7	93	100	1969	38	62	100
1930	0	100	100	1970	37	63	100
1931	0	100	100	1971	75	25	100
1932	31	69	100	1972	53	47	100
1933	10	90	100	1973	49	51	100
1934	8	92	100	1974	52	48	100
1935	7	93	100	1975	63	37	100
1936	0	100	100	1976	49	51	100
1937	0	100	100				

TABLE 6.

PER CENTAGE DISTRIBUTION OF PERSONS CONVICTED OF HOMICIDE IN THE HIGH COURT OF JUSTICIARY AND SHERIFF COURT 1898-1976

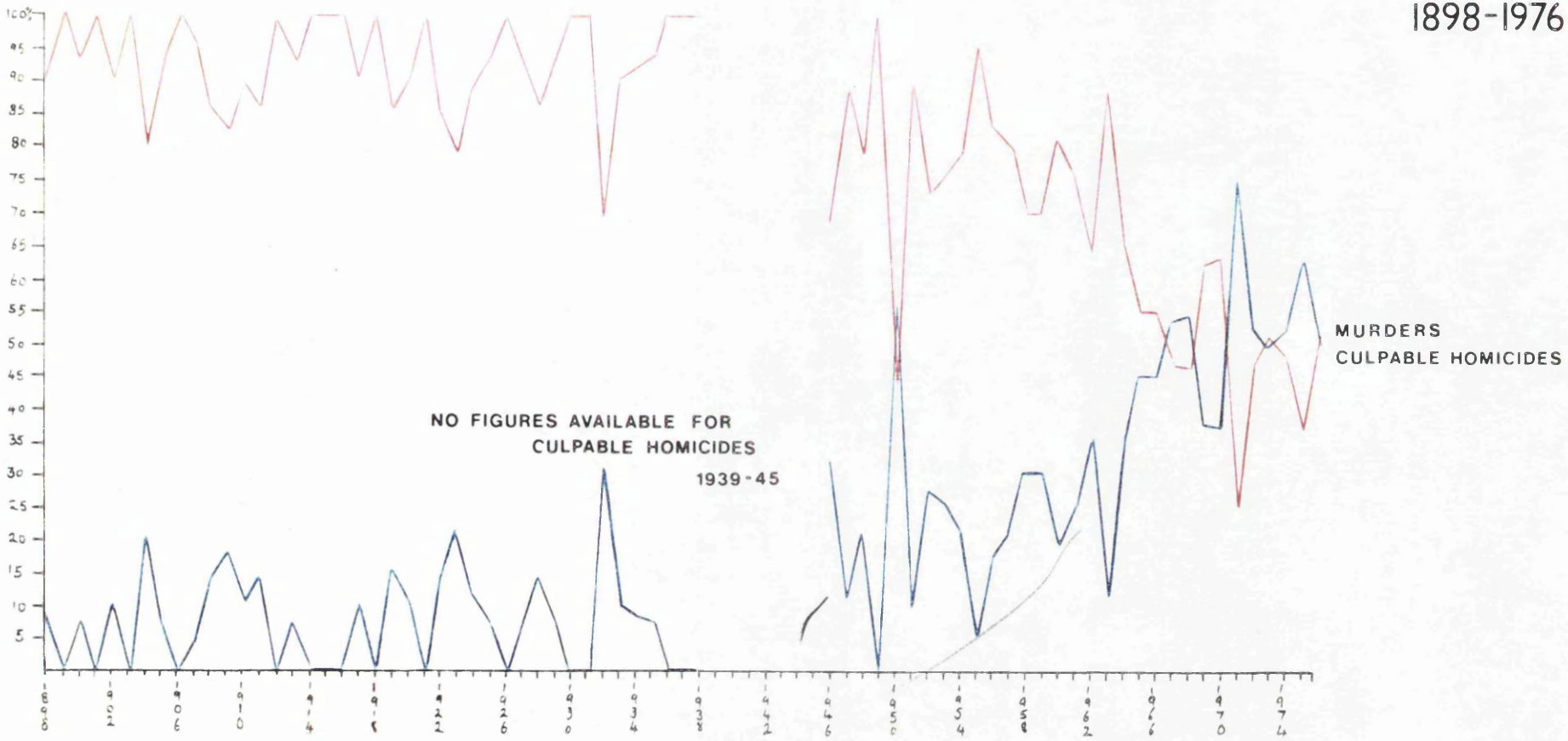


Fig. 6

Number of persons executed in Scotland 1898 - 1965

Year	Male	Female	Year	Male	Female
1898			1932		
1899			1933		
1900			1934		
1901			1935		
1902	1		1936		
1903			1937		
1904	1		1938		
1905	1		1939		
1906			1940		
1907			1941		
1908	2		1942		
1909	1		1943		
1910			1944		
1911			1945	1	
1912			1946	2	
1913	1		1947		
1914			1948	1	
1915			1949		
1916			1950	2	
1917	1		1951	1	
1918			1952	3	
1919	1		1953		
1920	2		1954	2	
1921			1955		
1922	1		1956		
1923	2	1	1957		
1924			1958	1	
1925	1		1959		
1926			1960	1	
1927	1		1961		
1928	2		1962		
1929			1963	1	
1930			1964		
1931			1965		
				33	1
				34	

TABLE 7.

Per centage fluctuations of homicides made known to the police 1898 - 1976

Year	Murder	Culpable Homicide	Homicide	Year	Murder	Culpable Homicide	Homicide
1898	100%	100%	100%	1938	107%	70%	81%
1899	57	82	74	1939	57	67	64
1900	71	176	145	1940	57	82	74
1901	57	103	89	1941	79	58	64
1902	100	112	109	1942	107	88	94
1903	57	139	115	1943	57	55	55
1904	93	79	83	1944	86	55	64
1905	136	130	132	1945	171	42	81
1906	71	145	123	1946	129	58	79
1907	79	152	130	1947	114	42	64
1908	79	118	106	1948	100	61	72
1909	71	85	81	1949	100	30	51
1910	64	97	87	1950	150	42	74
1911	43	97	81	1951	64	36	45
1912	79	121	109	1952	93	42	57
1913	71	94	87	1953	129	70	87
1914	57	94	83	1954	100	55	68
1915	86	136	121	1955	79	73	74
1916	64	133	113	1956	93	48	62
1917	43	70	62	1957	86	42	55
1918	64	70	68	1958	129	73	89
1919	86	115	106	1959	100	61	72
1920	129	124	126	1960	114	58	74
1921	121	106	110	1961	100	70	79
1922	86	100	96	1962	193	94	123
1923	86	97	94	1963	114	91	98
1924	86	100	96	1964	193	73	109
1925	121	127	126	1965	229	94	134
1926	71	106	96	1966	214	170	183
1927	93	156	136	1967	293	88	149
1928	136	124	128	1968	293	97	155
1929	64	139	117	1969	221	155	174
1930	93	97	96	1970	207	164	177
1931	57	88	79	1971	321	79	151
1932	71	88	83	1972	336	115	181
1933	114	97	102	1973	307	103	164
1934	86	112	104	1974	271	121	166
1935	114	76	87	1975	336	94	166
1936	136	97	109	1976	450	130	226
1937	71	42	51				

TABLE 8.

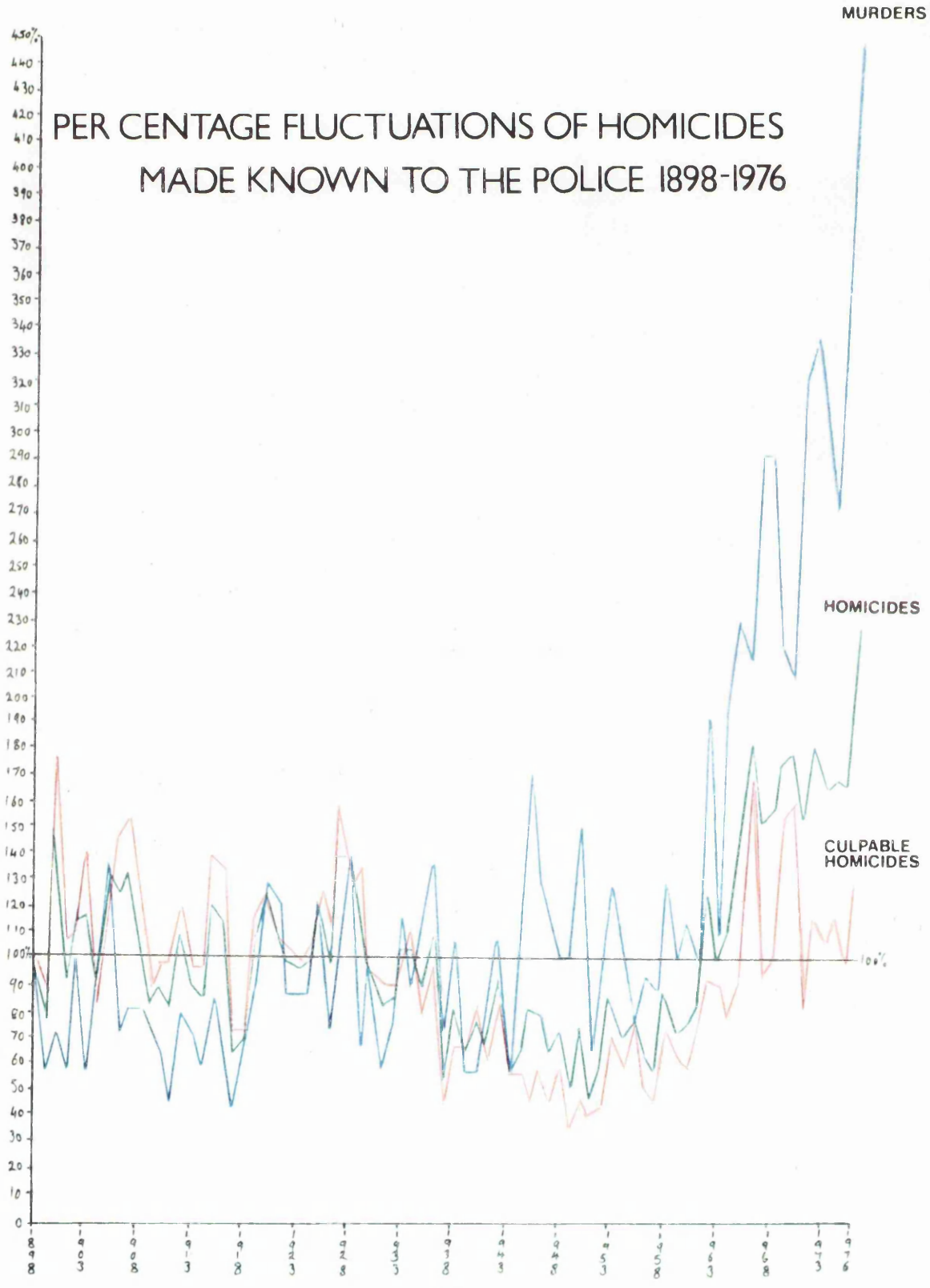

PER CENTAGE FLUCTUATIONS OF HOMICIDES
MADE KNOWN TO THE POLICE 1898-1976
MURDERS
HOMICIDES
CULPABLE HOMICIDES
100%

Fig. 7

5. REDUCTION OF MURDER TO CULPABLE HOMICIDE

> "This is abstract thinking: to see nothing in the murderer except for the abstract fact that he is a murderer, and to annul all other human essence in him with this simple quality." 1.

That observation was made by George Hegel, but in the question of whether a charge of murder will be reduced to one of culpable homicide, there is no place for abstract thinking. The personal characteristics of the accused, as will be seen later, play a significant part in influencing whether the homicide of which an accused is charged with having committed is regarded as being one in which reduction is appropriate or not. Unfortunately, at the present time, there is a very wide gulf between the legal considerations of homicide, which are concerned with the factors of guilt, innocence and culpability, and the criminological, which are basically concerned with the aetiology of the phenomenon, and which have consequently failed to take account of the legal classifications of homicide. In mitigation of the latter's deficiency, Mannheim has written that,

> "The fact that the same term manslaughter covers acts so different in character as voluntary and involuntary killing has particularly added to the present confusion. The scope of the concept of 'murder' too, differs so widely that criminologists might not be blamed for trying to study it as a socio-psychological entity rather than in strictly legal terms." 2.

The crime of homicide covers such a wide spectrum of killings that it inevitably involves a multitude of diverse acts and individuals that do not easily lend themselves to criminological analysis. Certainly there have been criminological studies of homicide, but they have normally been concerned with some specific aspect of the homicide, and not with the problem of how and why we choose to differentiate

murder and culpable homicide, nor with whether this differentiation is still relevant. In order to try to understand the phenomenon of homicide, however, it is necessary to consider the criminological aspects of homicide in the context of its legal classifications. Thus Matza, writing in another context but concerned with the same problem, wrote,

> "The image of the delinquent I wish to convey is one of drift; an actor neither compelled nor committed to deeds nor freely choosing them; neither different in any simple or fundamental sense from the law abiding, nor the same; conforming to certain traditions of American life while partially unreceptive to other more conventional traditions; and finally, an actor whose motivational system may be explored along lines explicitly commended by classical criminology - his peculiar relation to legal institutions." 3.

In regard to prosecutions for homicide, the Lord Advocate has complete discretion as to whether or not to prosecute, and, if he decides to prosecute, with whether the individual or individuals concerned will be charged with murder or culpable homicide. In practice, however, most of these decisions will be taken by [illegible] the Advocates-Depute on his behalf. Equally it can be decided that a charge of murder will be reduced to one of culpable homicide before the trial, and the Advocate-Depute can accept a reduced plea, or reduce the charge on his own initiative, during the trial if he considers that the evidence warrants such a course. At the conclusion of a trial for murder the judge will direct a jury as to whether or not on the evidence that has been presented to the court it is open to them to consider the alternative crime of culpable homicide, and if the alternative is left open to them, then the jury can bring in a verdict of either murder or culpable homicide, or alternatively acquit the accused. It is also possible for an

appeal court to reduce a conviction of murder to one of culpable homicide, although that is something that is outside the realms of this study.

Thus reduction can occur either at the petition stage, in the interval between the serving of the petition and the indictment, including any amended petitions and indictments, or during or at the conclusion of the trial. When the accused first appears on petition he is invariably charged with murder, since although in theory it is possible to charge an accused with culpable homicide at this stage and to charge him with murder at a later date, it would be distinctly frowned upon and in practice rarely, if ever, occurs. It frequently happens, however, that a person charged with murder will have the charge reduced at some later stage of the proceedings. Thus only in the most obvious of cases would an accused appear on petition charged with culpable homicide, and this normally occurs when there is sufficient time for the procurator-fiscal to consider fully the facts of the case and to take instructions from the Crown Office prior to the accused being served with the petition. Examples of this occur when the accused has already been arrested in connection with another, very possibly related, offence, and there is a sufficient ambiguity in the homicide to justify a delay in serving the petition. This will also occur in cases which are considered delicate or controversial, such as the death of a child where one or both parents is thought to have caused the death. In this case it is obviously desirable to ascertain the precise cause of death and the circumstances in which it occurred before inflicting the trauma of a homicide charge on a possibly distraught, and possibly innocent, parent. The following two cases are examples of cases where the accused appeared on

petition charged with culpable homicide and was subsequently convicted of culpable homicide.

Case 64: The accused was committing a housebreaking when the deceased unexpectedly returned with some friends. There was a brief struggle that ended with the accused being restrained by the deceased and his friends. The deceased then started to run to a neighbours house in order to telephone the police when he suddenly collapsed, and in the ensuing confusion the accused escaped, taking with him some articles belonging to the deceased. An attempt was made to resuscitate the deceased but he was found to be dead. At post-mortem the deceased was found to be suffering from ischaemic heart disease as a result of severe coronary artherosclerosis, with the cause of death being given as a myocardial infarction that was most probably brought on by the strain involved in the struggle with the accused and the added effort of running. The accused was apprehended and charged with theft before appearing on petition charged with culpable homicide.

Case 45. The accused was delivering a load of whinestone for a service road at a factory and was asked by the deceased to spread the load as he was dumping it, as this made it easier to spread later. Instead, the accused simply dumped the entire load on the one spot, and as a result of this the deceased refused to sign the delivery line. The accused climbed back into his lorry and started to drive away, but the deceased threw a brick at the lorry and the accused stopped and attacked the deceased with a wheelbrace. Before driving away again the accused told someone that the deceased had had an accident. The deceased was taken to hospital and had stitches inserted in the lacerations in his head. He was detained

in hospital and nine days after admission required a tracheotomy and a burr-hole operation. Following this he regained consciousness, and although he required assistance in walking and there was a marked immobility of his left side, requiring nursing care and physiotherapy, he did regain his speech to some extent and his prognosis was good. Two weeks after admission, however, he suddenly died as a result of a pulmonary embolism due to femoral venous thrombosis that was attributable in causation to the fracture of the skull and contusion of the brain that he had originally sustained. The accused had in the meantime appeared on petition charged with attempted murder, but following the post-mortem he was charged with culpable homicide.

As the Crown has complete discretion in the prosecution of the homicide it can reduce the charge at any time of the proceedings, but this is normally only done when the actual facts of the homicide are not disputed and these facts would support a reduction of the charge on the basis of the law of homicide. In the same way the Crown will reduce a charge once they have accepted psychiatric opinion that the accused was in a state of diminished responsibility, or post-mortem findings that the cause of death did not indicate any intent or wicked recklessness on the part of the accused. Alternatively the accused may offer to plead guilty to culpable homicide and the Crown consider it in the public interest that such a plea be accepted, with the facts of the case being used to justify the decision. The public interest, although a fairly nebulous concept, will embrace the factors of availability of witnesses, the difficulty of proving the Crown's case in court, and any difficulties in concluding the trial within the time limits laid down by section 101 of the Criminal Procedure (Scotland) Act 1975.

If the facts of the case, or the interpretation of them, are in dispute, however, the matter will go to trial for the jury to decide which facts or interpretations they are prepared to accept.

The question of beyond a reasonable doubt obviously enters into these considerations. It is therefore noteworthy that in one study of the concept of beyond a reasonable doubt and the level of probability that would have to be reached before all reasonable doubt could be excluded, with the probability being expressed in terms of a scale ranging from zero, denoting impossibility, to one, representing certainty, it was found that:

> "In an investigation conducted by Miss Bridget Walsh, one-third of the subjects fixed a level below 0.7, one-third thought that the level should be at least 0.9, and the remainder chose a level between those figures." 4.

Individual members of a jury will adopt different standards of proof, and juries themselves will often come to surprising findings and interpretations, but however perverse these may sometimes appear to be, they have to be accepted as being inherent within the jury system. If people can envisage themselves being in the same position as the accused they can more easily be persuaded that reduction is justifiable; when they lack this empathy with the accused, however, whether it is because his culture and environment are totally alien to them or because they consider he has been wickedly depraved, the chances of reduction occurring are diminished.

These tendencies were even more pronounced when there was a question of capital punishment. Thus when Lord Cooper submitted his memorandum to the Royal Commission he stated:

> "Juries are invariably directed by the presiding judge with regard to the indispensable elements of murder and the alternative, if open, of a conviction of culpable homicide; and in a large proportion of trials juries have taken the course, rightly or wrongly, of returning the lesser verdict. Experience has shown that, wherever there is a possibility of the lesser verdict, a Scottish jury will not convict of murder." 5.

When examined by the Royal Commission, however, Lord Cooper amended his view slightly and stated that a jury would only return the lesser verdict when there was a "just possibility"[6] of doing so. This point was pursued though, and in view of its importance it is worth considering both the question and Lord Cooper's answer:

> "What I had in mind in asking you that question was not so much the heads of the juries as their hearts, and I was wondering whether there was any evidence to support the idea that juries in Scotland, being naturally reluctant to take any share in sending a man to his death, clutch at anything which would enable them to return a different verdict? - I do not think so. I think it is quite common to have one person on a jury of fifteen of that type of sentiment, in which case you get a majority of fourteen to one, but broadly speaking the Scotsman's head is stronger than his heart." 7.

That, it is submitted, was not a true representation of the situation pertaining in Scotland at the time of the Royal Commission, especially in view of the increase of murder convictions that has occurred since the abolition of the death penalty (see chapter 4). Certainly in the 19th century contrary views had been expressed on this matter. Thus, considering the Glasgow circuit in 1841, Lord Cockburn had written:

> "We had three capital cases, a murder, a rape and a robbery. But though each was as clearly proved as if the commission of the fact had been actually seen, and each was a very aggravated case of its kind, such is the prevailing aversion to capital punishment, that no verdict inferring such a penalty could be obtained, and these horrid culprits were only transported. It can't be helped as yet, perhaps, but this want of sympathy between law and the public is very unseemly. The public is wrong." 8.

Whichever reducing factors were used to justify reduction in the past, however, the following table shows the apparent reason for the homicide being regarded as culpable homicide in the cases composing this sample. It has to be stressed, however, that even though the factor bringing about reduction was obvious in some of the cases, in others it was not so obvious and the reason for the reduction could only be inferred. It will also be seen that it was not unusual to have two of the reducing factors present in the one case, although it is not known whether it was the predominance of one of the factors or their combination that secured the reduction.

Table 9. Apparent reason for reduction from murder to culpable homicide.

	Cases appearing on petition as culpable homicide	Cases appearing on indictment as culpable homicide	Cases appearing on indictment as murder & resulting in a conviction of culpable homicide.
Diminished responsibility	1	12	10
Provocation	0	3	11
Lack of intent	6	21	24
Dim. Resp. /Provocation	0	1	1
Dim Resp./Lack of intent	0	0	1
Provocation/Lack of intent	0	9	14
Total	7	46	61

The total sample under analysis consists of 261 accused and 231 deceased, and for analytical purposes they are now divided into three groups. The first, always coming under column 1 in the tables, consists of those cases resulting in a conviction of murder. The second, column 2, consists of those cases appearing on indictment as murder but ending in

a conviction of culpable homicide. Finally, column 3 consists of those cases appearing on petition as murder, with the charge being reduced prior to the serving of the indictment. This latter group will also contain some accused who were acquited at their trial, but these have been included in the group on the basis that the Crown had decided that although there was a case for the accused to answer in court, they also recognised that this only amounted to culpable homicide. It was basically an interpretation of the facts that were at issue in these cases and it is therefore relevant that the Crown should have been prepared to reduce at this stage of the proceedings. There was a fourth group, consisting of seven deceased and ten accused, comprising homicides that appeared on petition as culpable homicides, but these numbers were numerically too small for statistical purposes and have consequently been ommitted. Thus the sample consists of the following number and percentage of cases.

Table 10. Breakdown of sample on basis of accused.

	1	2	3	Total
No.	147	63	51	261
%	56	24	20	100

Table 11. Breakdown of sample on basis of deceased

	1	2	3	Total
No.	124	61	46	231
%	54	26	20	100

Chi square testing was then applied to the personal factors of the accused (see Appendix A) and to the details obtained on the deceased and the homicide (see Appendix B), in order to see whether there was a statistically significant variation between the expected distribution of the factor and the observed distribution of the factor in the question of reduction. From the results that were obtained I was able to reject the null-hypothesis, that the individual factors were not unevenly distributed amongst the three columns, in regard to the following factors:

Sex of accused

Age of accused

Marital status of accused

Sex of deceased

Connection between accused and deceased

Locus of homicide.

Motive of homicide

Cause of death

Use of weapon

All the factors were very significant ($p = 0.001$) apart from the factors of the age of the accused and the sex of the deceased, although they were still significant ($p = 0.01$). In contrast, the factors of the previous convictions and employment of the accused, the age of the deceased and the day of the week on which the homicide had occurred did not appear to be significant.

As it was possible that there was a connection between some of the factors that appeared to be significant that produced these results, a further test was applied. The 255 cases of which this sample is

composed were taken and, after excluding certain cases, the factors that had appeared to be significant in the question of reduction were extracted from them and compared with one another (see Appendix C). Chi square testing was then applied to them in order to see whether there was a significant variation between the distribution of the factors with one another, with whether, for example, accused under the age of 25 had significantly different motives for their killings than those aged 25 and over. The excluded cases consisted of 36 cases in which the accused were acquited of the homicide, four in which they were found to be insane, 19 in which there was an unknown or inappropriate factor, and 28 in which there was more than one person convicted or more than one deceased, the last category being excluded on the basis that to have included them would have involved a duplication of factors. This then left 168 cases of homicide to which chi square testing, of the various factors involved, could be applied. The cause of death of the deceased was not compared with the other factors, on the basis that to have done so would have involved a duplication of the results obtained from the factor of the use of weapons in homicides. Similarly the relationship between the motive and the locus of the homicide, the connection between accused/deceased and locus, and the connection between accused/deceased and motive were not compared because the high incidence of domestic killings in the mutual home precluded a valid analysis. The factors that appeared to be significant in the question of reduction will now be considered individually in order to see whether the observed distribution of the factors is either greater or lesser than would have been expected . . .

with a random distribution. Once this has been done, the relationship of the various factors with one another will be discussed.

Sex of accused (see table 13)

1. More males, and fewer females, were convicted of murder.
2. Fewer males, and more females, had the charge reduced prior to going to trial.
3. Fewer males, and more females, killed in the mutual home.
4. Fewer males, and more females, were related to their victim.

Marital Status of Accused (see table 15)

1. Fewer accused who were married or co-habiting, and more who were single, were convicted of murder.
2. More accused who were married or co-habiting, and fewer who were single, had the charge reduced prior to going to trial.
3. There were fewer accused who were married, co-habiting, divorced or separated and more who were single, aged under 25.
4. There were more accused who were either married or co-habiting, and fewer who were single, involved in domestic killings.
5. More accused who were married or co-habiting, and fewer who were single, were related to their victim.
6. Fewer accused who were married or co-habiting, and more who were single, were either acquainted or strangers to their victim.
7. More accused who were married or co-habiting, and fewer who were single, killed their victim in the mutual home.
8. Fewer accused who were married or co-habiting, and more who were single, killed their victim in the street.

Connection between Accused and Deceased (see table 20)

1. Fewer accused who were related to their victim, and more who were either acquainted or strangers, were convicted or murder.
2. More accused appeared at their trial charged with murder but were convicted of culpable homicide when they were related to their victim, and fewer when they were strangers.
3. More accused had the charge reduced prior to going to trial when they were related to their victim, and fewer when they were either acquainted or strangers.
4. Fewer males, and more females, were killed by somebody to whom they were related.
5. More males, and fewer females, were killed by somebody to whom they were acquainted.
6. Fewer accused under the age of 25, and more aged 25 and over, were related to their victim.
7. More accused under the age of 25, and fewer aged 25 and over, were either acquainted or strangers to their victim.
8. More accused who were married or co-habiting, and fewer who were single, were related to their victim.
9. Fewer accused who were married or co-habiting, and more who were single, were either acquainted or strangers to their victim.
10. Fewer males, and more females, killed somebody to whom they were related.

Locus of Homicide (see table 21)

1. Fewer accused who had killed in the mutual home, and more who had killed in the deceased's home, were convicted of murder.
2. More accused who had killed in the mutual home had the charge reduced either prior to going to trial or went to trial charged

with murder but were convicted of culpable homicide.

3. Fewer male accused, and more female accused, had killed in the mutual home.
4. Fewer killings in the mutual home were committed by accused aged under the age of 25, and more by those aged 25 and over.
5. More killings in the street were committed by accused aged under 25, and fewer by those aged 25 and over.
6. More killings in the mutual home were committed by accused who were married or co-habiting, and fewer by those who were single.
7. Fewer killings in the street were committed by accused who were married or co-habiting, and more by those who were single.
8. Fewer males, and more females, were killed in the mutual home.
9. More males, and fewer females, were killed in the street.

Motive (see table 22)

1. More accused were convicted of murder when the motive was sexual or robbery, and fewer when it was domestic.
2. More accused appeared at trial charged with murder but were convicted or culpable homicide when the motive was domestic.
3. Fewer accused under the age of 25, and more aged 25 and over, were involved in domestic killings.
4. More accused who were married or co-habiting, and fewer who were single, were involved in domestic killings.
5. Domestic killings involved fewer male victims, and more female victims, as did sexual killings.

Use of Weapons (see table 25)

1. Where there had been no weapon used in the killing more charges were reduced prior to going to trial, and there were less convictions of murder.

2. Where a knife had been used in the killing fewer charges were reduced prior to going to trial, and more reduced at the trial.
3. More male victims were attacked with knives, and fewer female victims.
4. There were fewer male victims who were attacked without resort to a weapon, and more female victims.

Age of Accused (see table 14)

1. More accused under the age of 25, and fewer aged 25 and over, were convicted of murder.
2. Fewer accused under the age of 25, and more aged 25 and over, had the charge reduced prior to going to trial.
3. Fewer accused under the age of 25, and more aged 25 and over, were married or co-habiting.
4. Fewer accused under the age of 25, and more aged 25 and over, were divorced or separated.
5. More accused under the age of 25, and fewer aged 25 and over, were single.
6. More accused under the age of 25, and fewer aged 25 and over, had killed a male victim.
7. Fewer accused under the age of 25, and more aged 25 and over, had killed a female victim.
8. Fewer accused under the age of 25, and more aged 25 and over, were related to their victim.
9. More accused under the age of 25, and fewer aged 25 and over, were acquainted or strangers to their victim.
10. Fewer accused under the age of 25, and more aged 25 and over, were involved in domestic killings.
11. Fewer accused under the age of 25, and more aged 25 and over, killed their victim in the mutual home.

12. More accused under the age of 25, and fewer aged 25 and over, killed their victim in the street.

Sex of the deceased (see Table 19)

1. More accused were convicted of murder when the victim was female, and fewer when they were male.
2. More accused appeared at trial charged with murder but were convicted of culpable homicide when the victim was male, and fewer when they were female.
3. More males, and fewer females, were killed by accused aged under 25.
4. Fewer males, and more females, were killed by accused aged 25 and over.
5. Fewer males, and more females, were killed by accused who were married or co-habiting.
6. More males, and fewer females, were killed by accused who were single.
7. Fewer males, and more females, were killed by somebody to whom they were related.
8. More males, and fewer females, were killed by somebody to whom they were acquainted.
9. Fewer males, and more females, were killed in domestic killings.
10. Fewer males, and more females, were killed in the mutual home.
11. More males, and fewer females, were killed in the street.
12. More male victims, and fewer female victims, were attacked with knives.
13. More females, and fewer males, were killed in homicides not involving the use of a weapon.

Taken individually therefore, the factors that appeared to be significant in the question of reduction do not in themselves necessarily account for the reduction of a charge from murder to culpable homicide, since the factors are interrelated with one another. Thus it will have been seen that the relationship between the factors is such that no one factor can be isolated to account for reduction, or the lack of it. To say that, however, is to ignore the question of premeditation, but as premeditated murders occur so rarely they can be discounted for the purposes of this analysis. The factors can consequently be considered in groups, with the significance of the individual factor being accounted for by the factor itself and its relationship with the other factors with which it appeared to have had statistically significant differences. These can be summarised for the individual factors as follows:

Sex of Accused: locus-connection between accused and deceased.

Marital status of Accused: age of accused - connection between accused and deceased - locus - motive - sex of deceased.

Connection between Accused and Deceased: sex of accused - marital status of accused - sex of deceased.

Locus: sex of accused - marital status of accused - age of accused - sex of deceased.

Motive: age of accused - sex of deceased - marital status of accused - use of weapon.

Use of Weapon: sex of deceased - motive.

Age of Accused: marital status of accused - connection between accused and deceased - motive - sex of deceased - locus.

Sex of Deceased: motive - use of weapon - age of accused - connection between accused and deceased - locus - marital status of accused.

From the foregoing analysis it is possible to divide homicides into two basic groups, namely those killings occurring in the private sector and those occurring in the public sector. The only exceptions to this are those killings which, because of their nature, are always regarded as culpable homicide (see chapter 1) and those killings where intent or wicked recklessness were apparent. Certain of the factors will be found in both groups; but from the sample under analysis it is discernible that there is a clear tendency for homicides in the public sector to culminate in convictions of murder, whilst those in the private sector are regarded as culpable homicides. Those in the private sector are essentially the result of close relationships, normally with the accused and the deceased having been related, whilst those in the public sector involve 'dangers' to society as a whole. Thus you have the contrast of the attitudes taken toward domestic killings, which are more likely to be regarded as culpable homicides, and killings where the motive was sexual or robbery, which are more likely to end in convictions of murder. The latter killings, however, are often regarded as being sufficiently imbued with wicked recklessness, insofar as there is a propensity to use violence inherent within them, for them to be regarded as murders. The other point that should be mentioned in this connection is that whereas a person who commits a domestic killing is thought to have killed in peculiar circumstances which are unlikely to be repeated, a person who is involved in a gratuitous or avaricious killing is regarded as having a tendency to violence. Whether this is true or not, however,

the legal definitions of murder contain no mention of the likelihood of a future repitition of the offence, and so such considerations should not enter into the deliberations of whether the homicide should be regarded as murder or culpable homicide.

The killing can also be imbued with wicked recklessness by the use of a weapon in the homicide. Thus reduction is more likely to occur where no weapon is used, even though it was also found that there were more likely to be female victims in killings not involving a weapon, and there was a tendency for homicides involving female deceased to be regarded as murder. The reason why more females were killed in circumstances not involving a weapon is presumably that, as weapons are employed in order to overcome the resistance of the victim, there was less physical resistance to be overcome in the case of females. Equally, however, there were more female victims in domestic killings, which were more likely to be regarded as culpable homicides. Thus when you have the two factors of the non-use of a weapon, which tends towards reduction, and a female deceased, which tends to prejudice reduction, the whole circumstances of the homicide have to be considered. If the killing is not perceived as being wickedly reckless though, it will probably depend on whether it is regarded as being in the public or private sector as to whether reduction will occur or not.

Killings in the private sector were essentially domestic, involving accused who were aged 25 or over, related to the victim and married, and with the killing occurring in the mutual home. In contrast, killings in the public sector involved a variety of motives, with the accused being more likely to be aged under 25, single and either

acquainted or a stranger to the deceased. There is no absolute division between killings in the private sector and those in the public sector, since factors tending toward reduction will still be found in homicides in the public sector, and factors tending against reduction will also be found in killings in the private sector. Consequently some killings in the private sector will be regarded as murder, whilst some killings in the public sector will conclude as culpable homicides. The more factors in the homicide indicating that it was in the private sector and the result of the relationship existing between the accused and the deceased, however, then the more likely it will be regarded as a culpable homicide. If, however, the killing is regarded as having been in the public sector and involving an 'innocent' victim, with the various factors supporting such a conclusion, then it will probably be regarded as murder. That, however, is to discount the questions of intent and wicked recklessness, since if it is thought that either of these factors is present, then that will be sufficient for the homicide to be regarded as murder. Killings in the public sector though, will often be regarded as being sufficiently imbued with wicked recklessness for them to be regarded as murder anyway, as the motive will more often be sexual or robbery, and the accused unknown to the deceased. On the other hand, if it appears that there has been a lack of wicked recklessness, if, for example, the medical evidence suggests that death was caused by a fall during the course of an assault, the killing will probably be regarded as culpable homicide.

Consequently, consideration will only be paid as to whether the killing was in the public or private sector when intent or wicked

recklessness, or the lack of them, are not apparent, but this occurs in a substantial number of homicide cases. The result is that those cases which are regarded as being in the private sector will probably be regarded as culpable homicides, and those in the public sector as murders. This is borne out by the fact that of the seventy cases in the original sample where the accused and the deceased were related, only twenty ended in a conviction of murder. The breakdown of the relationships was as follows:

Table 12. Relationship of Accused to Deceased

	1	2	3	Total
Husband	8	4	7	19
Wife	2	3	4	9
Son	1	6	2	9
Co-habitee	1	2	2	5
Cousin	0	1	0	1
Son-in-law	1	2	0	3
Mother	0	1	6	7
Brother	0	3	2	5
Nephew	1	1	0	2
Brother-in-law	3	1	0	4
Step-father	0	0	1	1
Other	3	1	1	5
Total	20	25	25	70

Scotland is not alone in having this distinction, however, for Lundsgaarde found in regard to homicide in Houston that:

> "First, however, it is necessary to restate the killer-victim relationships in terms of positions on a hypothetical continuum; that is killers and victims who are relatives, friends, or associates occupy one end of the continuum and killers and victims who are strangers occupy the other end. The relationships, at the two extremes, respectively, fall within either "private" or "public" domains. Killings among intimates fall in the private domain and killings among strangers fall in the public domain. This hypothesis can be restated to incorporate both notions. The severity of penalty for an act of homicide varies directly with the placement of an offence within domains on a continuum."

It can, therefore, be stated that reduction will generally occur in certain circumstances, namely when the killing is regarded as having occurred in the private sector and when there is nothing in the character of the homicide to imbue it with wicked recklessness. Again, however, the justification for reduction will be on the basis of that part of the continuums of either diminished responsibility, wicked recklessness or provocation that the case is deemed to occupy.

6. WICKED RECKLESSNESS

As murder is defined as being a killing that is either intentional or wickedly reckless, the absence of these factors will reduce the killing from murder to culpable homicide. The difficulties involved in ascribing intent and wicked recklessness have already been discussed. As so often happens, however, when the law encounters difficulties in formulating standards, it turns once again to the concept of the reasonable man. It is ironical, though, that the reasonable man should be used as the standard by which to judge the unreasonable use of violence and the infliction of death. Irrespective of this though, in the absence of other evidence denoting a lack of intent or wicked recklessness, the accused will be assumed to have foreseen the possible fatal consequences of his actions if it is accepted that the reasonable man would have foreseen the risks. Psychiatric evidence can be used to show that the mental state of the accused was such as not to be the same as that of the reasonable man, and that he was either insane or his responsibility substantially diminished at the time of the offence. If that evidence is not forthcoming then the court will consider all of the evidence and if there is nothing to show the state of mind of the accused at the time, then the standard of the reasonable man will be applied. It will not be sufficient for the accused to say that he did not intend to kill, or that he did not know that the injuries that he was inflicting on the deceased could cause his death, if he is regarded as having been wickedly reckless. This can either be in ignoring or discounting the possible fatal consequences, or of not realising that the assault might be fatal. Post-mortem evidence, however, can show that the injury or death of the deceased would not have been reasonably expected, as the

following case illustrates.

Case 183. The accused was a Roman Catholic married to a Protestant. There were difficulties in the marriage, which had been punctuated by a number of brief separations, and between the accused and his father-in-law. On the day of the assault the accused collected hisson from his mother-in-law and went to a pub where his father-in-law was drinking. The accused called his father-in-law across to the door of the pub and stabbed him in the head. The deceased was taken to hospital and a right frontal craniotomy was performed in order to remove a right intra-cerebral haematoma. A frontal lobotomy was also carried out as far back as the sphenoid ridge, and a dural tear repaired. Despite this treatment, however, the deceased died five days after his admission to hospital. At post-mortem it was found that the deceased had suffered a 4" penetrating wound that had entered through the side of the left nostril, passing upwards and to the right, piercing the cribriform plate, a very thin layer of bone, and entering the right frontal lobe of the brain. Death was due to the resulting brain swelling and bronchopneumonia. He was also found to have acute ulceration of the duodenum, but this was regarded as being of no consequence as it is a common complication of head injuries. The accused was charged with murder but pleaded guilty to culpable homicide at his trial, and this plea was accepted.

In general though, the whole circumstances of the case have to be considered in order to arrive at a conclusion as to whether the killing had been intentional or wickedly reckless. Hume wrote that,

> "There is thus no just and general rule but one, that the intent must be gathered from the whole circumstances of the case; by the court, when judging of the relevancy, according as the story is related in the libel, which at that period is held for true; and by the jury, according as the fact appears upon the evidence. With respect to which, even though the panel bring no proof in exculpation, such indicia (or tokens as they were once called) may appear on the prosecutor's proof, as shall justify the jury in acquitting of the higher offence." 1.

The wicked recklessness, if any, of the accused has to be inferred in the same way, and thus Lord Justice-Clerk Cooper directed the jury in the case of Robertson and Donoghue that,

> "In judging whether....reckless indifference is present you would take into account the nature of the violence used, the condition of the victim when it was used, and the circumstances under which the assault was committed." 2.

This point is illustrated by the following case.

Case 35. The accused wasmanager of a hotel and regarded the deceased and some of his friends as being members of a local gang. Words were exchanged one night in the hotel, and the accused told the deceased and his friends that they were barred. They duly went down the stairs leading from the hotel, but the deceased then decided to return to the hotel. The accused was standing at the top of the stairs, but it is not known whether the deceased intended to speak to him or assault him. Irrespective of this, the accused hit the deceased, causing him to fall back down the six steps, and striking his head against either the steps or the wall on the way. Picked up by his friends, the deceased was taken away from the hotel but abandoned when his friends saw the police. The deceased was taken to hospital by the police, where a right temporal burr hole was made. There was no extra-dural haemorrhage, but the

dura was bulging and a substantial amount of fluid was sucked out before the wound was closed. The deceased died the following day as a result of a fracture of the skull, contusion of the brain and subdural haemorrhage. The accused was charged with murder, but this was reduced prior to the serving of the indictment. On pleading guilty the accused received an absolute discharge, it being thought that he was 'more sinned against than sinning'.

Wickedness and depravity are treated in the same manner as intention because they are all regarded as being equally dangerous to the public, which the criminal law is supposed to protect. An antinomian will not escape being regarded as a murderer because he does not feel himself constrained by man made laws. Neither will a person callous and depraved enough not to care what injuries he inflicts on other people, and what possible consequences might result from these injuries, be allowed to say that he could not foresee his victim's death if that was a reasonable consequence of the assault.

The concept of the reasonable man, however, provides only a minimum standard of foreseeability, and not a maximum. Thus if it were averred that the accused possessed specialist knowledge that he utilized in killing the deceased by, for example, unarmed combat or drugs, then a stricter standard of reasonable foreseeability would presumably be applied for those particular circumstances, so that the standard to be applied would be that of a reasonable man possessing the specialist knowledge and experience of the accused. This would be an exceptional case though, and the concept of the reasonable man is ordinarily used to establish an ordinary standard by which to judge the accused's behaviour. Thus in the absence of

any credible evidence being offered by the accused it will be presumed that his state of mind at the time of the killing was such as would have been possessed by a reasonable man, and that what a reasonable man would have foreseen, he would have foreseen.

7. PROVOCATION

The majority of killings are the result of some form of provocation, there being relatively few gratuitous killings, but Scots law will only take cognizance of a special form of provocation, so that it can be said of the accused that,

> "he is not stirred to the deed by wickedness of heart, or hatred of the deceased, but by the sudden impulse of resentment, excited by the provocation of high and real injuries, and accompanied with terror and agitation of spirits." 1.

It will obviously not be sufficient for the accused to say that the deceased had been wearing the wrong football colours or that he did not like the way that he was looking at him, even though he himself regarded that as provocative. The law will, however, recognise that there will be occasions when the accused will be driven by the provocative acts of the deceased to lose all self-control, and a resulting killing will be regarded as culpable homicide rather than murder. Consequently a continuum can be constructed with at one end those actions of the deceased that can reasonably be regarded as being innocuous or merely irritating, and which are therefore not sufficiently provocative to justify reduction, and at the other end those actions of a deceased that would have been sufficient to cause anybody to lose their self-control. In between these two extremes there will be a multitude of cases with varying degrees of provocation that can be set down on the continuum, with it depending on which point of the continuum that they are set whether the homicide will be regarded as murder or culpable homicide. There is no absolute standard, and so the dividing point on the continuum between the two offences will vary according to the

circumstances of the particular case and the general climate of opinion pertaining at the time. Consequently all that the law of homicide can do is to provide a general framework in which the problem can be considered, and general guidelines which may or may not be followed.

The provocation must have been recent, eliciting an immediate response from the accused, and thereby preventing him from having the time to regain his self-control. The provocation must also basically consist of a single act, so that the cumulative effect of provocation over a period of time, possibly even over years, will not of itself be sufficient to satisfy the legal criterion of provocation unless there were some final provocative act by the deceased that caused the accused to lose all self-control. Strictly speaking this final act of provocation should be something exceptional, because if it were simply a repitition of previous similar acts the court could take the view that the accused should have been inured to its effects. In practice, however, this rule is more flexible to the particular circumstances of the case and the courts and juries can take a more lenient attitude. Thus, for example, if a woman had received frequent beatings and general ill-treatment from her husband over a number of years and finally killed him during one of these beatings, there being no question of self-defence, reduction could still occur on the basis of provocation, the courts basically implying that the deceased had received what he deserved. In such a case there could also be the element of the accused suddenly realising that the deceased's behaviour was going to continue in the same way over the coming years, and that this realisation was so intolerable that it was sufficient to cause her to lose all self-control.

In considering the types of provocation that are sufficient to reduce the offence, it is convenient to adopt the three types of situation that Gordon has used.[2] These occur where it is alleged that the killing has been in self-defence, but it is held to have been unjustifiable, where somebody is attacked but not to the danger of his life, and where there has been no serious attack on the accused but he has lost all self-control because of the behaviour of the accused or of somebody else.

In order to constitute a defence of self-defence, which if successful would result in acquittal, it is necessary to be able to show that the accused was in fear of his life, that he was unable to escape from the deceased and that the violence used was not excessive in the circumstances. If any or all of these factors are missing then the accused will not be able to successfully plead self-defence. It may be possible, however, to argue that as a result of the murderous attack of the deceased, the accused lost all self-control, and thereby allow reduction to take place on the basis of the provocation of the deceased. Provocation in this respect is the same as where the accused is the victim of a serious assault, as long as it is accepted that the accused lost all self-control because of the provocation. This also applies to the situation where the accused had initiated the violence, and although he cannot successfully plead self-defence he might be able to have the offence reduced on the basis of provocation. This area of the law is intrinsically bound in with cultural values, and will consequently be different at various times and in different cultures. Article 1225 of the Texas Penal Code, for example, allows a person to stand his ground

and if necessary kill somebody who attacks him, irrespective of the fact that he could have easily escaped from his assailant, a situation that would invalidate any defence of self-defence in Scotland.

Where the accused has suffered a serious, but not murderous, assault and kills, provocation will allow reduction to take place if the accused had lost all self-control. Juries frequently have provocation defined to them in terms of a passage from Macdonald, that was adopted in H.M.A. v Kizileviczius[3] as:

> "Being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without thought of what I was doing."

As Gordon[4] has stated, however, it is not necessary that the accused did not know what he was doing, for he might well know all too clearly what he was doing, and what he wanted to do, namely to kill the deceased. For loss of self-control can involve either the accused not knowing what he is doing or being engulfed by a murderous rage so that he can think of nothing else but killing the deceased. The ideas of self-defence again run through this area of law, because since the accused's life was not in danger, the killing was a form of unjustifiable self-defence. Despite this, however, if the accused was suffering a serious assault from the deceased and killed him, the retaliation not being grossly excessive, the provocation may be sufficient to allow reduction. The whole circumstances of the case have to be considered though, including who started the assault and whether the accused or the deceased accelerated the violence. It is also possible for an accused to plead provocation where he has killed the deceased under the provocation of the latter's attack on somebody else.

Case 16. The accused, the deceased and another friend had been drinking together and returned to the accused's home with a "carry-out". They continued drinking until the deceased became objectionable and started to shout and swear at the accused. A fight then started between the accused and the deceased, but ended with the deceased sustaining a superficial cut on his face. The deceased left the room, only to re-appear with a kitchen knife with which he attacked the accused. They both fell to the floor, and when the accused's wife tried to pull the knife away from the deceased she sustained a cut on her hand. The accused managed to wrest the knife from the deceased and then stabbed him repeatedly. The police were later phoned by the accused, but the deceased was found to be dead. A post-mortem established that he had received four serious stab wounds, one on his neck and three involving his chest and abdomen. He had also sustained a number of other stab and incised wounds, numbering twenty in all. The accused pleaded guilty to culpable homicide by means of the procedure under section 31 of the Criminal Procedure (Scotland) Act 1887, now section 102 Criminal Procedure (Scotland) Act 1975, and the plea was accepted on the basis of the provocation shown by the deceased.

The situation of the accused being provoked other than by a murderous or serious assault is more difficult, since the law has to recognise some limit to provocation, otherwise nearly every accused could plead provocation on the part of the deceased. Writing of the delinquents attitude in America, Matza said,

> Provocation, verbal or physical, need not be taken lightly; but neither must they be retaliated. The subcultural delinquent, as usual has options which he may exercise. Depending on context and mood, his response to appellations like 'chicken', 'maricon' or 'mother-fucker' may be indifference, playful re-buttal, angry retaliation, threat of assault, or explosive violence. Similarly, his response to being struck or a threat thereof may include chickening out, running to get his boys, friendly jousting, angry jousting, or a sudden flashing of the the ante - flashing a weapon.
>
> The idea that he must respond by retaliating because of compulsive aggressiveness or sub-cultural regulation is another of the current criminological fancies that may be dispelled by the most cursory observation of delin-quents. Provocations need not be taken lightly, but they may be. In many circumstances one is entitled to take offense if he wishes to exercise that option. This does not mean, however, that the subculture of delinquency has no sense of proportion. The precepts of the subculture do not claim that a member may do anything he wishes just because someone called him a 'punk'. If a member attempts to murder someone for calling him a punk, his companions are likely to think he has 'heart'. But they also will feel, like the rest of us, that he is "out of his fuck'n head." 5.

That description, it is submitted, is applicable to Scotland, with the proviso that in Scotland the delinquency may extend well beyond the juvenile stage and the situation complicated by the factor of drink. Thus the law has to try to achieve a balance between the two extremes of recognising every provocative act, however trivial, as being mitigating, and the other extreme of failing to recognise that practically anybody can be driven beyond the limits of self-control by the actions of somebody else, and that if in these circumstances someone then kills his tormentor he should only be regarded as being guilty of culpable homicide. Again, however, the abolition of capital punishment has served to lessen the impor-tance of the distinctions of murder and culpable homicide, as Gordon has pointed out, although he probably exaggerates the importance of his qualification:

> "It must allow for the fact that it is not in accord with ordinary moral attitudes to brand the person who kills under extreme provocation as a murderer, a consideration perhaps weakened by the abolition of capital punishment, but still strong since it will continue to be felt that the law should recognise the inappropriatness of classing such a person with deliberate murderers." 6.

The most important element in considering whether reduction will occur on the basis of provocation is whether the killing is regarded as wicked and depraved, and if it is not so regarded then reduction will probably occur and the accused receive an appropriate sentence. If, however, it is thought that the accused too easily lost his self-control, or did not in fact try to retain it, then the law might well adopt a deterrent attitude. One situation where it is always accepted that the provocation will allow reduction though, is where a husband finds his wife committing adultery and kills her or her paramour, or both, as a result of the provocation.[6a] Thus Hume wrote,

> "If the husband find the adulterer in the act, and kill him on the spot, he is excusable for this sudden transport of sudden rage on such an injury: but if he confine him till next day, and then kill him, or if he force him to swallow a dose of poison, or if he castrate him, and the person die of the operation; in all these cases he has lost the privilege which is allowed to human infirmity." 7.

The qualifications given at the end of the above quotation are concerned with the fact that if a man has indeed lost all his self-control, he would not be able to think of how to kill. Instead he would simply assault the deceased being unable to formulate any particular plan of attack because of the loss of his self-control. The special case of adultery has also been extended to cover the situation of where a wife confesses her adultery to her husband.

Case 92. The accused and the deceased were married and had arranged to spend the night at their respective parents. The wife later changed her mind and went home, before going out to the pub. In the meantime the husband had also changed his mind and gone to stay with his wife's parents, only to be told that she had gone home. He then returned to his own home but found the door locked. When he knocked on the door, it was opened by a young man who the husband chased down the street. Entering the house he was met by his wife, who was naked, and he started to assault her. He later phoned the police but his wife was found to be dead, the cause of death being internal haemorrhage due to a rupture of the liver. The accused was charged with murder but this was later reduced and he was convicted of culpable homicide.

Provocation can also be constituted by a minor assault, but it is obviously more difficult for the accused to satisfy the court and the jury that he lost all self-control as a result of the provocation.

Case 197. The accused and a friend drove up on a motor-cycle to a fish and chip shop, where the deceased and some of his friends were standing around after having been drinking. The accused's friend went into the shop while the accused waited outside, where one of the deceased's friends started to argue with him. The accused was punched in the face, but when his friend came out of the shop they both mounted the motor-cycle. At this point the deceased ran forward and kicked the accused, who then dismounted, pulled out a knife and stabbed the deceased in the leg. The accused and his friend then drove away. The deceased was taken

to hospital where he was found to have stopped breathing, but resuscitation revived him. An operation was then carried out to suture the femoral artery and vein and the external iliac veins. A hole in the bladder was also sutured and drains inserted. After the operation, however, the wound continued to bleed and a second operation was required to repair the iliac vein, it being decided at the same time to tie off the femoral vein. The deceased later had difficulty in breathing, and despite ventilation and an intra cardiac injection of calcium gluconate, the deceased was pronounced dead the day following his admission to hospital. The post-mortem showed that his death was due to haemorrhage from the main vessels of the left leg as a result of injuries consistent with a stabbing by a knife. It was also noted, as a probable contributing cause, that the clotting system of the blood would have had a decreasing effectiveness as a result of the enforced massive replacement of the blood by transfusion. The accused appeared in court charged with murder but was convicted of culpable homicide as a result of severe provocation.

The question of whether provocation can, apart from in the special case of adultery, be constituted by anything other than blows, that is by words, gestures or other actings by the deceased, is more difficult. Due to the flexible nature of provocation, however, there would be nothing to prevent a charge being reduced from murder to culpable homicide if the deceased's behaviour was regarded as having been so atrocious that it justified such a reduction. It would require exceptional circumstances for this to occur, however, but if they did occur the law would probably take a pragmatic view,

and if it was decided that the accused should be convicted of murder, then he would be convicted of murder, the justification being supplied by the point on the continuum on which the provocation was placed. On the other hand if it was decided to reduce then this can equally be justified on the basis of the continuum of provocation. In this way, it is possible to avoid the complications inherent in any totally subjective or objective approach to provocation.

The law of Scotland, unlike that of England, has never had to consider the problem of whether the reasonable man test as regards provocation should be a subjective or objective one. If it is an objective one then the standard will be that of the reasonable man, of whether in the circumstances the reasonable man would have been driven to lose his self-control by the actions of the deceased. Thus if somebody were jeered at for being impotent then it would only be regarded as being provocative if it was accepted that the reasonable man would have been similarly provoked. The subjective test, on the other hand, would approach the problem by asking whether it was reasonable that the individual accused should have been driven to lose all self-control. Thus only with the latter approach will the temperament of the individual accused be considered.

If the nature of the provocation over a period of time was such that it induced in the accused a state of insanity or diminished responsibility though, then the law would regard the accused in the same way as it would regard any other accused who pleaded insanity or diminished responsibility.

Consequently, if provocation is regarded as being on a continuum it is possible to judge whether reduction should take place or not.

For it must be borne in mind that,

> "...in examining the social and psychological aspects of the victim - killer relationship it is abundantly clear that homicide 'out of the blue', in which the victim is struck down without reacting in any way, is exceptionally rare. Almost invariably there are words or actions (frequently recognised by the law as legitimate, and wholly approved by the community at large) which provoke the killer into the use of force or - in the instance of attempted rape - into still greater force." 8.

8. DIMINISHED RESPONSIBILITY

When Lord Deas died 'The Scotsman' newspaper wrote as an obituary:

> "He was indeed - and we state the chief if not the only blot in his judicial character when we say so - too eager for conviction and in questions of guilt and innocence a little too ready to assume his own omniscience and that of doctors and detectives not half as scrupulous as himself. Still be it also set down to his credit that he often manifested a singular kindly consideration for respectable men and good-looking women who did not belong to the criminal classes and who had been landed in the dock by one sudden explosion of passion or by one false step." [1.]

It was the latter characteristic that had been demonstrated in 1867, however, when he had established the doctrine of diminished responsibility in Scots law in the case of HMA v. Dingwall[2]. Prior to this case the institutional writers had already acknowledged that it was possible for a person to be, whilst not insane, not entirely responsible for his actions either, but in capital cases it was thought that the correct procedure was to find the accused guilty of murder and to then recommend him to the royal mercy because of his infirmity of mind. Dingwall, known locally as "the wud laird" (that is, "the mad laird"), was an alcoholic who had had repeated attacks of delirium tremens, and who had killed his wife at Hogmanay after an argument about a bottle of whisky and money. In his charge to the jury Lord Deas pointed out that there was no question of idiocy or insane delusions, but,

> "There remained the question whether the offence was anything short of murder....It was very difficult for the law to recognise it as anything else. On the other hand, however, he could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence..." [3.]

He then went on to point out the factors that were favourable to the accused; that the attack had been unpremeditated, that the accused had apparently been kind to his wife when he was sober, and that there had been only one stab wound. It also appeared that the accused had had sun stroke in India and that this, coupled with his alcoholism and delirium tremens, could have effected his mental constitution, and thereby raised the question of weakness of mind in the accused:

> "His Lordship had anxiously considered that question, and had come to the conclusion that the element was not inadmissible. Culpable homicide, in our law and practice, included what in some countries was called 'murder with extenuating circumstances.' Sometimes the crime of culpable homicide approached the very verge of murder; and sometimes it was a very minor offence. The state of mind of a prisoner might, his Lordship thought, be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity; and he could not therefore exclude it from the consideration of the jury here, along with the whole other circumstances, in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or of culpable homicide." 4.

The jury were out for only half an hour before unanimously finding the accused guilty of culpable homicide. Nigel Walker has noted that,

> "The effect of Lord Deas' innovation was to achieve by means of the jury's verdict what had normally been left to the royal prerogative of mercy - the substitution of a lesser penalty than death." 5.

For the most important result of this innovation was that when it was successfully pled it ensured the avoidance of the death penalty, and it is to be doubted whether the doctrine would ever have been formulated but for the existence of capital punishment and a fixed

penalty for murder. It is for the same reason that Barbara Wootton, commenting on the introduction of diminished responsibility into England under section 2 of the Homicide Act 1957, wrote,

> "the concept of diminished responsibility is simply an attempt to escape from the shackles of a penalty that is rigidly fixed by statute." 6.

Diminished responsibility is, like provocation, a mitigating factor that, when judged to be present, will justify reduction from murder to voluntary culpable homicide, which is the same crime as murder but for the presence of a mitigating factor. It would be possible to plead diminished responsibility in a case of involuntary homicide, although to do so would merely be in reference to sentence, since reduction would be on the basis of the lack of wicked recklessness. As there has been a significant increase in the number of homicides judicially determined as murder since the abolition of the death penalty, however, it is probable that the courts are taking a more stringent attitude to the question of wicked recklessness. If this is in facthappening, then it is possible that diminished responsibility would have to be pleaded in order to obviate the inference of wicked recklessness, whereas prior to 1965 it would have been more likely that the courts would not have regarded the accused's recklessness as being wicked and depraved, which would have justified a conviction of murder.

The classic definition of diminished responsibility was provided by Lord Alness in HMA v. Savage,[7] when he said,

> "It is very difficult to put in in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility - in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied....that there must be some form of mental disease."

The largely tautologous definition supplied by Lord Alness is best illustrated by examples.

Case 82. The accused had been taking phenobarbitone and drinking rum before attacking his mother and pushing her down a flight of stairs. He then assaulted her with a hammer and tried to strangle her. Realising what he had done, he tried to clean her wounds but collapsed whilst doing so. A neighbour found the deceased and she was taken to hospital, where she was X-rayed and found to have skull fractures and pneumocephaly, air between the brain and the skull. She was also experiencing respiratory distress and had multiple scalp lacerations. The scalp wounds were cleaned and sutured and she received help for her respiratory difficulties, but she went into cardiac arrest and died seven days after being admitted to hospital. The post-mortem established the cause of death as a respiratory infection associated with a severe head injury in the presence of congestive cardiac failure. On psychiatric examination the accused was found to be suffering from depression, which had been exacerbated by the mixing of phenobarbitone and rum. He was also found to be suffering from a duodenal ulcer and to have been worried by debts. As a result of this his responsibility was considered to be substantially diminished and the charge of murder was accordingly reduced to one of culpable homicide.

Case 79. The accused was married to the deceased, but the marriage was unstable. There were allegations that he had hit her, as well as there having been arguments over his erratic work record. She had previously left him on four occasions, but had always returned when he had begged her to do so. Several weeks before she was killed, the deceased had again left the accused, and although he had begged her to return she started to make plans for a divorce. The accused brooded over this, and apparently decided that if he could not live with her, then nobody else would. He obtained a shotgun and went to her parent's house, where she was staying. Finding the door open, he went inside and found the deceased in her bedroom. A struggle took place and he shot her; once in the leg as they struggled and once in the chest. A post-mortem found that death was due to a laceration of the heart resulting from a gunshot wound inflicted by a smooth-bore weapon. When the accused was examined by psychiatrists, however, they found that his responsibility was substantially diminished as a result of his abnormal personality, aggressive tendencies and general immaturity. He was considered to be suffering from a chronic and severe personality disorder with schizoid manifestations, which did not amount to insanity and would not benefit from treatment. His personality disorder had also been exhibited in his bad work record and his faulty relationships with his wife and former employers. As a result of the psychiatric reports the charge against the accused was reduced from murder to culpable homicide.

Case 121. The accused had been married for a number of years and had two children aged seven and five. Some months before the

homicide, however, she began to feel depressed. She was irritable with her children, argued constantly with her husband, lost all interest in sex, felt generally unhappy and guilty all the time, and was labouring under a sense of failure, both as a wife and as a mother. Convinced that she was betraying her family, she left them but was persuaded to return. Eventually she did go to her doctor and was given anti-depressant tablets, but she discontinued them herself. By this time she had become less conscientous about her appearance and home, and was convinced that people were speaking about her behind her back. Obsessed with the idea that she and her husband should separate, she eventually persuaded him to reluctantly agree to a trial separation. He took her and their children to her parents and left them there, supposedly for a month. The following morning, however, alone in the house with her children, she decided to kill herself with a knife. Before doing so though, she ran a bath and, calling her children in one by one, she drowned them. She then phoned her father and asked him to come home. Committed to a hospital under section 25 of the Criminal Procedure (Scotland) Act 1975, she was found tohave an amnesia of the event and to be suffering from a depressive illness, which did not amount to insanity, as the degree of depression was insufficient. Her memory gradually returned without abreaction having to be used, and she was able to describe what had happened. It was accepted that on the day of her children's death she had clearly decided to commit suicide, but had impulsively decided to take her children with her. It was considered that at the time she must have been in a severe depressive state, and was unable to see any other logical way out of the situation that she felt was happening to her and her family. After the children's death, however, it was thought that she must

have gone into a state of inertia, and that having used up her affect in killing the children she was left completely apathetic and unable to go through with killing herself. It was also possible that she had killed her children whilst in a state of fugue. She pleaded guilty to culpable homicide and a hospital order was made under section 175 of the Criminal Procedure (Scotland) Act 1975.

Obviously some cases of diminished responsibility will elicit nothing but sympathy for the accused, but whereas the 19th century saw a consolidation of the doctrine, the 20th century cases have shown an increasing distrust for the concept. As early as HMA v. Higgins[9] in 1913, Lord Johnstone had reflected,

> "To say that that man is mentally capable of murder and this man only mentally capable of culpable homicide, that that man is capable of a capital offence but this one only of an offence not capital is a proposition which would, I think, unsettle the administration of criminal law....I can understand limited liability in the case of civil obligation, but I cannot understand limited responsibility for a criminal act. I can understand irresponsibility, but I cannot understand limited responsibility - responsibility which is yet an inferior grade of responsibility." 10.

The doctrine was also attacked by Lord Justice-General Normand in Kirkwood v. HMA,[11] when he declared:

> "The defence of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible." 12.

This growing dissatisfaction with the doctrine, and especially with what some saw as the subversion of judicial determination by psychiatric diagnoses, came to fruition with the case of Carraher v HMA in 1946,[13] the background of which was described to the Royal Commission on Capital Punishment by Lord Cooper:

> "At the time of the Carraher judgement the lawyers had become alarmed at a flood of psychological or psychiatric evidence introducing, or attempting to introduce, as new special defences all kinds of psychological and mental abnormalities with names which were unknown to us and to the man in the street....It was in reaction to that, I think, that the Carraher decision was pronounced." 14.

Coupled with this attitude of regarding psychiatrists as encroaching on the courts' functions was the fear that had been engendered by an increase in crimes of violence in the west of Scotland, and a reluctance to accord what was clearly seen as criminal behaviour with psychiatric terminology. In regard to this last point, Lord Normand declared,

> "The court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility." 15.

The importance of Carraher v HMA was that it was a Full Bench decision, and that it appeared to settle irrevocably the questions of whether a psychopathic personality was sufficient to constitute diminished responsibility, and whether diminished responsibility itself was still open to expansion as a doctrine. Carraher was recognised as having a psychopathic personality, and having been found guilty of murder it had been contended in a subsequent appeal that the jury had been misdirected in respect that they had not been allowed to consider the evidence of drink along with the medical evidence of his psychopathic personality. The appeal was dismissed and he was hanged. In dismissing the appeal, however, Lord Normand had said,

> "I am of opinion that the plea of diminished responsibility, which, as was said in Kirkwood's case, is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions." 16.

It has been generally thought though, that the categories of diminished responsibility cannot be closed in this way, otherwise diminished responsibility would have to be regarded as being ossified at the stage of psychological and psychiatric knowledge known in 1946. Consequently developments in psychological and psychiatric knowledge will, it is submitted, be recognised and taken account of by the courts in considering any extension of the categories of diminished responsibility if the medical evidence is sufficiently strong to support such an extension. In the same way it is possible that in a future case a psychopathic personality might be regarded as substantially diminishing an accused's responsibility. Thus T.B. Smith has written,

> "Carraher, it is thought, is not authority for the view that "psychopathic personality" or "character disorder" can never be accepted in Scotland as justifying the defence of diminished responsibility. In 1946, however, the judges were not convinced that this condition was sufficiently capable of medical diagnoses ab ante; and their rejection of Carraher's defence was presumably without prejudice to the possibility of accepting in future cases of psychopathic personality evidence of verified medical experience regarding this condition....It will be open to the Scottish courts to accept this view in the future by judicial development of the law, but such an extension does not seem imminent." 17.

The psychopathic personality is one of the most controversial areas of psychiatry, and it is therefore not surprising that the courts refused to consider it as a category of diminished responsibility in 1946, when even today the subject excites so much argument and controversy. Barbara Wootton, for example, in discussing the

psychopath and his lack of any psychiatric syndrome or mental disorder independant of his objectionable behaviour, wrote,

> "In his case no such symptoms can be diagnosed because it is just the absence of them which causes him to be classified as psychopathic. He is, in fact, par excellence, and without shame or qualification, the model of the circular process by which mental abnormality is inferred from anti-social behaviour while anti-social behaviour is explained by mental abnormality." 18.

The debate that Barbara Wootton's views provoked has been an extremely extensive one, with Nigel Walker perceptively pointing out that,

> "we must consider the body of sceptical opinion which in effect demands firmer evidence that there is something which differentiates psychopaths from people who are merely wicked...The question assumes that 'being wicked' and 'being psychopathic' are two mutually exclusive states, like 'being tired' and 'being fresh', so that it makes just as much sense to ask 'Is he wicked or psychopathic?' as to ask 'Are you tired or fresh?'. It seems much more plausible, however, to regard 'psychopathic' and 'wicked' as belonging to two distinct sets of terms which are no more mutually exclusive than terms dealing with physical beauty and those dealing with physical health." 19.

Whether the psychopath exists as a psychiatric entity or not is basically irrelevant as the courts have refused to recognise the condition as justifying a defence of diminished responsibility in Scotland, and will continue to do so until such time as the psychopathic behaviour can be distinguished from behaviour that is simply considered to be criminal. If this were not the case, then, as has repeatedly been pointed out, the more repugnant an accused's behaviour had been, the more vehemently it could be argued that he was suffering from a psychopathic personality and that the charge should therefore be reduced. If that were the case, then one of Nietzsche's aphorisms could be regarded as having been prophetic:

> "The lawyers defending a criminal are rarely artists enough to turn the beautiful terribleness of his deed to his advantage." 20.

It may in the future be able to distinguish the psychopath on the basis of some brain, hormone, or genetic abnormality, but at the moment Lindner's comment is still appropriate:

> "Those searchers of the soul - psychiatrists and psychologists - have wasted much fine paper in vain attempts to attach a single group of signs to the disorder, unfortunately neglecting to extend their scientific objectivity to the proposition that psychopathic behaviour is relative to the culture in which it flourishes and can be measured by no other rule than that of the prevailing ethic and morality." 21.

The psychopathic personality is relative, though, and as Croft pointed out,

> "First one should note that psychopathic disorder is itself only the extreme variation of personality deviations, of which minor degrees are very common in the community." 22.

In the same way diminished responsibility can be regarded as occupying the middle of the continuum of mental life and behaviour and which, when it is present to a substantial degree, will justify the reduction of a charge of murder to one of culpable homicide. As it was originally developed as a means of avoiding the death penalty, however, its relevance today has been reduced, especially as homicide is a crime normally committed by psychiatrically normal persons. Hunter Gillies, for example, in a study of the 400 psychiatric examinations he had made of persons accused of murder between 1953 and 1974 found that:

> "The normality of these Scottish accused was further shown by the finding that in the decade 1965 and 1974 no material psychiatric abnormality was seen in 90% of the males examined." 23

Whether the doctrine of diminished responsibility will continue in its present form, or whether it will be expanded or constricted, is debatable, although even in 1967 Gordon was able to say,

> "The abolition of capital punishment for murder may result in the whole attitude of the law to diminished responsibility being reconsidered." 24.

9. VOLUNTARY INTOXICATION

Despite having its beneficial effects espoused by Plato[1], voluntary intoxication has never enjoyed an amicable relationship with the law. Indeed Aristotle, who had studied under Plato, declared:

> "Indeed they punish the offender for his ignorance, if he is thought to be responsible for it. E.g. penalties are doubled for committing an offence in a state of drunkenness, because the source of the action lay in the agent himself: he was capable of not getting drunk, and his drunkeness was the cause of his ignorance." 2.

During the course of the 19th and the first half of the 20th century, however, difficulties arose between the desire to maintain the principle of Scots law that involuntary intoxication did not mitigate or exculpate a crime of murder, and a reluctance to impose the rigours of the death penalty. Thus in 1840 Lord Cockburn was to bemoan the fact that,

> "There was one capital conviction, for murder. But even this was commonplace; the common Scotch case of a brute, excited by his own liquor, and pretending to be provoked by that of his wife, and finding himself alone in his own house with his helpless victim, proceeding to beat her to death. This man seemed to think it a sort of defence that it was a Saturday night, when "he was always worst, it being his pay day". His wife was perfectly sober, and though "she could take a dram", was not of dissipated habits generally, and was never known to show any violence towards her husband. Yet though the proof could not have been clearer if the jury had seen him murder her, they unanimously recommended him to mercy on the grounds of provocation, of which there was not a tittle, either in evidence or in truth. Such is the modern aversion to capital punishment." 3.

This desire on the part of juries to avoid the death penalty was given a further opportunity to be expressed when the House of Lords decision in DPP v. Beard[4] was imported into Scotland in the cases of HMA v. Campbell[5] and Kennedy v. HMA.[6] According to these cases

it was the law of Scotland that if a person accused of murder was able to show that he was incapable, as a result of self induced intoxication, of forming an intention to kill or to do serious injury to the deceased, then he would be guilty only of culpable homicide. This was the position when HMA v Aitken came to be considered in 1975. Aitken had been charged with attempted murder but had put forward a special defence that he was insane at the time as a result of being under the influence of L.S.D. During the trial the charge was reduced to assault by stabbing and cutting with a knife or similar instrument, but in his charge to the jury Lord Stewart said,

> "Even if the drug, in this case L.S.D., was taken voluntarily, for no proper therapeutic purpose, as was apparently the case here, yet, nevertheless, if the act charged was committed by the accused while he was insane through the effect of the drug he is entitled to an acquittal at your hands..." 8.

In McGowan v HMA, however, the appeal court upheld a conviction for murder and rejected a plea of insanity at the time as a result of intoxication through a mixture of alcohol and valium. In their unofficial opinion, the appeal court, considering insanity through drink and/or drugs, said,

> "The time may well come when, in an appropriate case, we shall have to consider them with care. Until that time arrives we feel bound to express here and now the grave doubt we all entertain as to the soundness of the charge delivered in the case of HMA v Aitken." 10.

The opportunity of considering this area of the law fell to a Bench of seven Judges in the case of Brennan v. HMA.[11]

Brennan had been convicted of murdering his father by stabbing him in the chest with a knife during a quarrel over a gramophone record.

He had lodged a special defence of insanity, on the basis that at the time of the offence he had been so intoxicated as to be insane within the meaning of the law, but the trial judge had withdrawn this defence from the consideration of the jury. The trial judge had directed the jury that a verdict of culpable homicide was not open to them, and it was on this direction, together with the withdrawal of his special defence, that Brennan had lodged his appeal. It was not disputed that during the courseof the day of the killing Brennan had consumed between 20 and 25 pints of beer, and that about half an hour before the killing he had taken a microdot of L.S.D. It was also accepted that he had done this being fully aware of the probable and unpredictable effects that this combination of drink and drugs would induce.

In regard to the question of insanity, the appeal court quoted Hume's stricture:

> "But however this may be, certain it is, that the law of Scotland regards this wilful madness with a quite different disposition from the other, which is the visitation of Providence, and if it does not consider the intemperance as an aggravation in the case, at least sees very good reason why it should not be admitted as an excuse for the offender, to save him from the ordinary pains of his transgression." 12.

Insanity is more of a legal designation than a medical term, and as such the question of its definition will be resolved by legal policy, taking cognizance of current psychological and psychiatric knowledge, but not being determined by it. This was not a case though, involving brain damage through excessive indulgence of alconol, and if it had been such a case the questions of diminished responsibility and insanity could have been raised on the basis of the resulting mental disease. The Brennan case was concerned with

the transitory effects of alcohol and L.S.D. that had been deliberately consumed in order to produce intoxication. If Brennan's submission that he was insane at the time, and therefore free from any criminal responsibility, had been accepted, then it would have been in complete contradiction of Hume's stricture. The appeal court though, found that,

> "We have no doubt that the law as stated by Hume is, and has always been the law of Scotland and neither our own researches, nor those of the learned Solicitor General and Senior Counsel for the appellant have revealed that the accuracy of Hume's statement has ever been called in question. On the contrary it has constantly been accepted and applied, and with the increasing misuse of drugs in these times it wouldbe wholly irresponsible to alter or modify it in any way." 13.

Lord MacDonald's charge to the jury in HMA v John McDonald[14] was consequently quoted with approval, as showing the consistency that had been applied to Hume's statement of the law as regards voluntary intoxication:

> "A defence of insanity can only be supported by proof that the prisoner was actually of unsound mind at the time. It is said that he had taken so large a quantity of ardent spirits that he was insane. Now, a man who is merely drunk is not held by the law to be insane merely because he is drunk. On the contrary, if a man when sober has no signs of insanity about him, gets himself into a state of intoxication, the presumption is that any abnormal acts he may commit when in that state, are attributable to the effects of the drink he has taken, and not to mental disease of which there has been no indication previously.

Consequently the appeal court found that,

> "In short, insanityin our law requires proof of total alienation of reason in relation to the act charged as the result of mental illness, mental disease or defect or unsoundness of mind and does not comprehend the malfunctioning of the mind of transitory effect, as the result of deliberate and self induced intoxication." 15.

They also dismissed the idea that diminished responsibility could be

brought about by voluntary intoxication, quoting with approval Lord Hill Watson in HMA v. McLeod:[16]

> "If a man is not known by the evidence to be within the category of diminished responsibility when sober, he cannot place himself within the category of diminished responsibility by taking drink." 17.

The appeal court therefore declared that,

> "In the law of Scotland a person who voluntarily and deliberately consumes known intoxicants, including drink or drugs, of whatever quantity, for their intoxicating effects, whether these effects are fully foreseen or not, cannot rely on the resulting intoxication as the foundation of a special defence of insanity at the time nor, indeed, can he plead diminished responsibility." 18.

The court then went on to consider the Scottish law of murder, and to conclude that what had been said in Beard's case in regard to the effect of self induced intoxication in relation to a charge of murder was not, and never had been, the law of Scotland. The Scottish cases that had followed the rule in Beard's case had therefore been stating the law incorrectly. They further concluded that self induced intoxication coupled with the use of violence and resulting in the death of the victim could amount to criminal recklessness. They therefore refused the appeal.

It has been impossible to estimate the significance of alcohol in murders and culpable homicides, since there was no record of how much the accused had had to drink before committing the offence. It can be said though, that in the majority of cases the accused had had some alcohol to drink before the offence, and so it can be said that alcohol, to a greater or lesser extent, is a factor in the majority of killings. Given this fact, and the increasing

incidence of drug abuse in recent years, it is not surprising that the courts wanted to prevent an accused being able to plead, either in mitigation or exculpation, that he was intoxicated at the time of the killing, with the resulting difficulty of then having to try to gauge the extent of the intoxication, and also whether the accused had formed an intention to kill prior to becoming intoxicated.

10. NOVUS ACTUS INTERVENIENS

As Wittgenstein observed,

> "Death is not an event in life: we do not live to experience death." 1.

In recent years, however, this is no longer so true, since with the development of life support systems it is now possible to prolong life almost indefinitely, if life is taken to be the antithesis of death, which used to be defined as complete and persistent cessation of respiration and circulation. That definition is obviously no longer appropriate to the developments of medical science, however, for, as Professor Camps pointed out,

> "Under such circumstances, it would be legally murder to switch off the respirator in a case of Poliomyelitis but a matter of doubt in a person whose brain might be so damaged that consciousness could never be regained. The latter conclusion, unless it is faced up to, must otherwise lead to the unrealistic requirement that a headless body would have to be kept from putrefication by mechanical means, to the detriment of other conscious persons." 2.

This problem, of when to regard a person on a life support system as being dead, and thereby allowing the system to be switched off, was also regarded as being a possible complication in the law of homicide. For it was thought that if the victim of an assault was put on a life support system and was subsequently taken off it, on being pronounced dead, it might be possible for an accused to plead that a novus actus interveniens had occurred, and that he was therefore not responsible for the deceased's death.

A novus actus interveniens is an event that "breaks" a causal chain, which in the case of homicide exists between the infliction of the

initial injury and the deceased's death. Such an event, however, would have to be regarded as being so remote from the accused's intentions and what a reasonable person would have seen as being a foreseeable consequence of the original injury that the direct line of causation between the assault and the death was broken. Thus if the deceased had been taken to a hospital after being assaulted and there contracted typhoid, of which he died, the direct line of causation would have been regarded as having been broken, the cause of death being too remote from the original injury. If though, the deceased had incurred head injuries, and he subsequently died of bronchopneumonia, the line of causation would not have been broken, as that is a common complication of head injuries.

Hume considered that if,

> "In a combat between John and James, John receives a wound of that sort which may or may not prove mortal, and James flies for his safety and leaves John upon the field, to the care of his own friend. If in these circumstances they are surprised by ruffians, who strip and rob John, and beat out his brains; no charge of homicide will on that account lie against James, whose act has indeed given occasion to the catastrophe, but is not the act by which John has been killed." 3.

Gordon[4] has questioned whether this would still be the case today, but considering the developments that have taken place in pathology since 1797, the imprecision in "that sort which may or may not prove mortal" may be avoided today, and if it was decided that either wound could have proved to be fatal, then both James and the ruffians could be convicted of homicide. There are no Scots cases on this point however.

In the case of the deceased being taken to hospital and receiving medical treatment, but subsequently dying, it would probably depend on the nature of the treatment whether a novus actus interveniens would be regarded as having occurred. If the treatment was accepted as being the normal one to be applied in such a case, then the death would be regarded as being due to the original injury. Similarly if there was negligent treatment due to the inexperience of the doctor, since it was foreseeable that the deceased might not have received prompt medical treatment or that the doctor treating him might not have had the requisite skill or experience to apply the appropriate treatment for his injury. It would consequently probably require a grossly improper form of treatment, or a form of negligence bordering on criminal negligence, for a novus actus interveniens to be constituted. The question is one of directness and foreseeability in the course of the causation flowing from the original injury, and in this will be included some measure of human fallibility. Thus if the deceased for some reason did not seek medical attention for his wounds, which were serious, and dies, then his death can still be regarded as a homicide but,

> "If a person receives some slight injury, in itself nowise dangerous nor difficult to be cured, but which by the great obstinancy and intemperance of the patient, or by rash and hurtful applications, degenerates in the end into a mortal sore; for the man here has killed himself, and the first injury is nothing more than the occasion of his deed."[5]

The distinction between the two cases is that if the wounds were serious in themselves then they are the direct cause of death, irrespective of the fact that if he had received medical treatment his life might have been saved. If the wound was slight, however, and it was due to the obstinancy of the deceased that it was

exacerbated, then this will be regarded as a novus actus interveniens. Thus if somebody were assaulted and incurred head injuries, but mistakenly thought that a night's sleep would cure him of the symptoms, and died during the night as a result of the head injuries, then his assailant would still be culpable. If, however, as in the case of Jos. and Mary Norris[6], a trivial wound was exacerbated by the deceased going drinking, exposing himself to the cold, and taking off his bandages so that he contracted tetanus and died, it would have to be asked whether the tetanus would have developed if his conduct had not been so imprudent. Consequently, the case was concerned with the foreseeability of the deceased contracting tetanus, whether it was a direct result of his original injury or whether an event had occurred to interrupt the chain of causation.

Despite a contrary view being taken in the case of Heinrich Heidmeisser[7] it is probably still the law that if,

> " a person of a weakly habit receives a wound, of which, after some space of time he is cured; but owing to the pain and confinement, he is taken ill of a consumption or other malady incident to a state of weakness; and of this he dies. It may be very true, that the author of this calamity has great cause of compunction and distress of mind; but it is only in that sort of suffering that his punishment in this world must lie." 8.

For in such a case the cause of death would be regarded as arising from a new disease rather than from a complication of the original injury. In 1797, however, consumption was probably still used as a generic term, covering the various diseases affecting the lungs and causing loss of weight, so that its use by Hume is probably intended to cover those cases where the deceased simply wasted

away after seemingly having recovered from his original wounds. Now that the aetiology of disease processes is betterknown though, it is possible to attribute various medical complications to having been caused by the original wound. Thus it is now known that pneumonia can result from a period of complete immobilization in bed, and consequently if the accused's actions necessitated the deceased being bedridden, as a result of which he contracted pneumonia and died, then the accused would probably be regarded as having caused his death. Consequently Hume's observations have to be read in the light of current medical knowledge, and it is only a fresh disease, not directly caused by the original injury, that would be regarded as a novus actus interveniens.

What does not suffer much change, however, is the nature of fatal wounds. Thus the Hippocratic treatises, written in the fourth and third centuries B.C., contain the aphorism

> "Deep wounds of the bladder, brain, heart, diaphragm, of any of the delicate entrails, the stomach or liver are fatal." 9.

Glaister's 'Medical Jurisprudence and Toxicology", in the thirteenth edition published in 1973, similarly states:

> "Wounds involving the following structures are the cause of many deaths within short periods after their infliction:
> The heart and large blood-vessels.
> The brain and upper part of the spinal cord.
> The lungs
> The stomach, liver, spleen, and intestines." 10.

Whereas the nature of fatal wounds has not changed, the means of maintaining respiration and circulation have, so that it is now possible to maintain life almost indefinitely, if the definition

of life is accepted as being the maintenance of respiration and circulation. This obviously raises difficulties in the cases of assault victims. In an unreported English case in 1963, R.V. Potter, the deceased had been admitted to hospital with severe head injuries following a fight. Fourteen hours after being admitted he stopped breathing and was placed on an artificial respirator for a further period of 24 hours. At the end of this time a kidney was removed for transplantation, the deceased's wife having given her consent. After the nephrectomy the respirator was switched off, and as there was no spontaneous respiration or circulation the deceased was pronounced dead. A Coroner's jury returned a finding of manslaughter against the deceased's assailant, but he was only convicted of common assault, as by traditional definitions of death the deceased was still alive until the respirator was switched off. The switching off of the machine was therefore a novus actus interveniens. There were also questions about the ethics involved in removing his kidney for a transplant, since if he was still alive then his wife was not in a position to give her consent to an operation that was not beneficial to her husband.

In Scotland the matter remained unresolved until the case of Finlayson v. HMA[11] in 1978. Finlayson had been convicted of culpable homicide as a result of recklessly injecting the deceased with a mixture of morphine and diazepam. It was accepted that this injection had caused such serious brain damage to the deceased that brain death had occurred, necessitating his being put on a life support machine in order to maintain by artificial means his

respiration and circulation. As it was decided that there had been complete and irreversible brain damage, so that the deceased had brain-stem death, a decision was taken to switch off the machine after consultations between the consultants involved with the deceased's case and his parents. The life support machine was accordingly switched off and the deceased subsequently pronounced dead. It was contended on Finlayson's behalf that irrespective of whether the deceased would have died from the injection if he had not been placed on the machine, once he was placed on it his physical life could have been maintained indefinitely. Consequently it was the discontinuation of the machine that had caused the deceased's death, and thereby broken the chain of causation between the reckless injection and the deceased's death. This being so, the trial judge should have directed the jury to bring in a verdict of not guilty on culpable homicide.

The appeal court rejected these contentions, accepting that the deceased would have been placed on the life support system in order to be able to ascertain whether there were any prospects of recovery of brain function, and that when it became apparent that there were none, it was a reasonable decision to switch the machine off. They continued,

> "Far less can it be said that the act of disconnecting the machine was either unforeseeable or unforeseen and it certainly cannot be said that the act of disconnecting the machine was an unwarrantable act."

Consequently, as the medical treatment and procedure had been a reasonable and correct one in the circumstances, it followed that there had been no novus actus interveniens.

Thus if an assault victim has a life support machine switched off, then the chain of causation will not be broken, if the decision to switch it off is a reasonable one. For, unfortunately, we still do not have a legal definition of death, so that it could be argued in a future case that the prognosis of the consultants was wrong, and that if the deceased had been allowed to continue on the machine he might well have recovered brain functions. In such a case a novus actus interveniens might be deemed to have occured.

> "Professor Sir Michael Woodruff of Edinburgh pointed out that it is necessary to distinguish between an actual definition of death and the technical criteria by which that condition can be diagnosed today." 12.

Until such time as there is a legal definition of death, and established medical criteria of recognising death, the question of novus actus interveniens in life support system cases may not have been settled irrevocably.

For there is an important distinction between brain stem death and death of only one area of the brain, which may lead to a vegetative existence. Brain stem death[13] will always be followed by the death of the remainder of the brain and of the other organs of the body, for the brain stem is concerned with maintaining the basic features of life, namely respiration and circulation. As brain stem death is irreversible, a person who is taken off a life support system in that condition will not be able to achieve spontaneous respiration and circulation. On the other hand, a person who is in a 'persistent vegetative condition' as a result of brain damage, not including the brain stem, is capable of spontaneous respiration, even though at times he may require mechanical assistance.

It is therefore curious that the Finlayson Appeal did not consider the earlier unreported case of Gavin Lafferty.[14] In that case, in which three Appeal court judges sat, including Lord Emslie who gave the opinion in the Finlayson Appeal, it was declared,

> "As we see it death was an inevitably consequence of the assault. The doctors were just keeping death at bay and they took a good and proper decision not to try to continue life further."

Lafferty had been convicted of the culpable homicide of his six month old daughter by striking her head against her cot. The child had been taken to hospital and put on an artificial respirator, but was later taken off it and pronounced to be dead. A doctor admitted that if the support system had not been withdrawn the child would still have been alive, but "more or less a vegetable" because of brain damage. In rejecting the Appeal the Appeal Court had therefore preceded their own later judgement by five years.

11. CHILD MURDER

Writing of a large increase in the number of cases of newly born children being killed by their mothers, Hume wrote,

> "It appears that this evil had been much felt in the years 1680 and 1681; of which period there are very numerous trials for child murder and these, for the greater part, of the kind above described, in which a jury could not convict, with proceeding on such presumptions as are not very desirable to be trusted, in a matter of life and death. To repress, therefore, the growing frequency of the crime, and, as far as might be, to relieve juries from so painful an exercise of judgement, the Legislature added an enactment to the statute book, the Act 1690, c.21, which is framed on the like plan that had been followed in some other countries, and authorises, or rather obliges, a jury to convict, on proof of certain indicia or presumptions of guilt, without direct evidence of murder....Even before the passing of this act, juries in many instances, though not invariably, had been in the use of attending to these presumptions." 1.

The Scottish legislation adopted as models French legislation of 1556 and the English Concealment of Birth of Bastards Act 1623. By the Act of 1690 it became a capital offence for a woman to conceal the fact of her pregnancy during the whole of its course, and to them give birth without calling for, or making use of, any available assistance, with the child later being found either dead or 'amissing', the presumption being that the mother had murdered her own child. The Act was strictly enforced, which led Hume to write,

> "I here close my analysis of this rigorous edict. Yet it is difficult to dismiss the subject, without taking notice of the great number of capital sentences which had been pronounced, and I am afraid executed, on the statutory evidence alone." 2.

By 1809, however, it was felt that the "Act anent murthering of children" was too rigorous in its insistence on the death penalty,

and accordingly the Concealment of Birth (Scotland) Act 1809 was passed. This Act maintained the presumptions of the 1690 Act, but substituted a maximum penalty of two years imprisonment for the death penalty. At the time the Act was passed, however, child murder was almost regarded as being equivalent to a contraceptive measure in some sections of society, and it was this practice that it was hoped that the Act would curtail. For although the law does not differentiate between the murder of a child and the murder of any other person, there were obvious difficulties in proving the murder of a newly-born child, and the Act was intended to circumvent these difficulties by creating a separate crime which would serve as an alternative charge to murder or culpable homicide. Thus if certain conditions were satisfied it was presumed that the mother had murdered the child, and the onus was then on her to refute the presumption.

The woman must have concealed her pregnancy, not necessarily hiding away, but failing to disclose, either in words or actions, that she was pregnant. A single disclosure, for whatever reason it was made, would probably be sufficient to prevent a contravention of the Act. Thus Scott had his amateur lawyer in 'The Heart of Midlothian', which dealt with such a charge, exclaim,

> "if we could but find ony ane to say she had gien the least hint o' her condition, she wad be brought aff wi' a wat finger." 3.

Similarly, a woman would not be prosecuted if a pregnancy did not go to its full term, as long as it is accepted that the pregnancy had not lasted long enough for a live birth to be possible. The Act also requires that at the time of the birth the mother neither

calls for, nor makes use of,any help. If she successfully delivers the child herself, however, and then reveals that she had been pregnant, then there is no contravention of the Act. What is required is that the birth of the child should remain unknown until such time as the child is found dead or 'amissing', the latter occurring when the mother is unable to produce the child, when it is inferred that she must have been pregnant and that the pregnancy must have come to an end. If, however, the mother was able to show that the child had been still born, then she would probably not be prosecuted if it was accepted that no amount of help or assistance could have saved the child.

If it was accepted that the child had been born alive and then killed by the mother, irrespective of whether the pregnancy and birth had been concealed, it would still be open to the Crown to charge the woman with murder of culpable homicide. As an abortion does not constitute a homicide, which requires the destruction of a self-existent human life and which in law only comes about once the child has breathed, medical evidence will have to be produced to show that the child had been born alive. With a greater precision now possible in forensic evidence as regards whether the child had been born alive, Lord Cockburn's experience is unlikely to be repeated:

> "There was a child murder at Dumfries, where doctors differed as to their scientific "tests" of the child having been born alive. But its throat was found crammed full of bits of coal, and there were the marks of a thumb and two fingers on the outside of the neck. These practical tests had little effect upon medical opinion, but as mothers don't generally throttle children who are dead, they were quite satisfactory to the jury. This was said to have been the fourth illegitimate that she had disposed of by violence. A tall, strong, dour, ogress. Still, hanging is at such a discount now, that, clear it was, the prosecutor would

> have got no conviction unless he had restricted. Whenever any of the murderous appearances, such as fingermarks on the neck, was put to one of the doctors in defence, the scientific gentleman, after parading his vast experience, always stated that however these things might startle the ignorant, they were of no consequence to a person of great practice, and that he had seen hundreds of children born with these very marks. "Ay, but, doctor," said an agrestic-looking juryman, "did ye ever see ony o' them born wi' coals i' their mooth,"

Although the terms of the Infanticide Act 1938 do not apply to Scotland, it is the practice of the Crown to charge culpable homicide in a case that in England would be charged as infanticide. The requirements are that the child must have been under the age of twelve months, and that at the time she killed the child the mother had had the balance of her mind disturbed by reason of her not having fully recovered from the effects of giving birth to the child or of the effects of lactation consequent upon the birth. It has to be questioned, however, whether it is logical to restrict such a reduction to the death of a child under the age of twelve months, since the mother's animosity, as a result of having given birth, could be directed against another child of the family. Section 178 of the New Zealand Crimes Act 1961, for example, stated that infanticide was constituted when a woman killed any of her children under the age of ten years, if at the time that she did so the balance of her mind was disturbed as a result of her not having fully recovered from the effect of giving birth to that child, or to any other child.

Carol Smart has also questioned, considering English law,

> "Whether the exclusion of men from the offence category of infanticide is in fact a case of discrimination against men is debatable. Certainly infanticide is an offence which is looked upon more leniently than child destruction

> or murder but unfortunately men do not have the opportunity of claiming that the trauma of birth affects them also. This is because the psychological disturbance that women suffer after childbirth is seen as mainly physiologically (hormonally) induced rather than culturally produced. Should this post-natal physiological disturbance be understood as a consequence of the shock of parenthood and the parent's perception of a totally changed life-style it might be feasible to argue that both parents are vulnerable to psychological disturbance of this kind."

Certainly in one study by Kempe[6], he found that the ratio of battering mothers to battering fathers in a Denver public hospital serving a population with high paternal employment was 4:1, with 80 mothers and 20 fathers. In contrast, the ratio for another Denver public hospital serving an area of high paternal unemployment, where there was therefore an increased exposure of unemployed fathers to small children, the ratio was 1:1. The sample though, would have included children over the age of twelve months.

Despite these criticisms, however, it has to be stressed that as the Crown has complete discretion in Scotland over whether to charge an accused with murder or culpable homicide, these factors can, if it is thought appropriate, be considered when deciding whether to charge the accused with murder or culpable homicide, and with whether a charge of murder will be reduced at some later stage of the proceedings.

12. CONCLUSION

The essential feature of Scots law on murder and culpable homicide is that it is pragmatic, as a result of which it has been able to evolve general principles to distinguish murder from culpable homicide that are both vague and flexible. There were two reasons for their possessing these qualities. The first is that homicide covers a large number of disparate acts and intentions which differ in the degree of wickedness and depravity with which they are regarded. Consequently it is desirable that the law should not become so rigid that it cannot distinguish between those cases meriting reduction from those that do not. The second reason lies in the history of the death penalty. Murder and culpable homicide were distinguished from one another by the fact that the former was punishable with a mandatory death sentence, whilst with the latter punishment was discretionary with the court. With such a rigid distinction in punishment, it was therefore sought to establish general principles which could be followed, but which were sufficiently vague that the Crown and the courts were not bound to always, and at times hardly ever, follow them to their logical conclusion, and thereby have to impose the death sentence in cases that were not considered to warrant it. The Crown have always had complete discretion in the prosecution of homicide, of whether it was to be charged as murder or culpable homicide and, if charged as murder, whether it was to remain as such. Similarly the courts and juries, if it is allowed to go to them on that point, have had the power to reduce a charge of murder to one of culpable homicide. Writing of a case of provocation, Gordon has said,

> "It must also, it is submitted, be read in its historical context, the context of Glasgow High Court in the 1930's when judges and juries were extremely loth to convict anyone of murder." 1.

That is not to say, however, that judges disapproved of the death penalty as such. Of Lord Cooper's thirteen colleagues at the time that he submitted his Memorandum to the Royal Commission on Capital Punishment, for example, he was able to say that eleven of them concurred with his views, that the death penalty should be retained, one thought capital punishment should be restricted and only one, Lord Guthrie, was in favour of abolition. There was a dichotomy between the desire, especially on the part of juries, to avoid having to impose the death penalty, and it being thought that the power to impose it should be retained so that it could be used as an instrument of public policy or in an extreme case of what was regarded as wicked depravity. Thus Lord Cooper said in his Memorandum to the Royal Commission:

> "But these extreme cases do arise; and following the First and Second World Wars their prevalence in certain areas, notably on Clydeside, would have created a very ugly situation but for the salutary sanction of the death penalty." 2.

The general principles consequently evolved in such a way that nearly every case of homicide could be regarded as a murder or as a culpable homicide, depending on the interpretations and weightings that were made of the various facts of the homicide. A murder can be reduced to culpable homicide on the basis of either diminished responsibility on the part of the accused, provocation on the part of the deceased or because the recklessness of the accused is not considered to amount to wicked recklessness. All of these factors can be considered to be on continuums, and in nearly every

case of homicide one or more of these factors, it can be argued, will be present. Hardly anybody is totally free from some psychiatric symptom, however mild; most homicides are provoked by something that the deceased does, however trivial; and as, it is submitted, the majority of homicides are involuntary, it can be argued, whether it is true or not, that they lack the degree of wicked recklessness necessary to constitute murder. Consequently the law has to regard certain parts of the continuums as justifying reduction and the other parts as preventing it. We are talking in terms though, of 'wicked' recklessness, 'substantial' diminished responsibility and 'reasonable' provocation. All of these qualifying terms are relative, there is no absolute standard, and so any conviction, whether it is of murder or culpable homicide, can be justified on the basis of that part of the continuum on which the particular case is deemed to occupy. Prior to the abolition of capital punishment, given the reluctance of the Crown, the courts and juries to impose the death penalty, the majority of cases were considered to occupy those parts of the continuums that would justify reduction. At the same time, however, the law had evolved in such a way that it would have been equally justifiable to regard a lot of those cases as murder.

With the abolition of the death penalty for murder in 1965, however, the restraints that it had formerly imposed on the courts from convicting of murder were removed. The courts therefore started to convict of murder in cases that would formerly have been regarded as culpable homicide, and they were justified in doing so because of the relative nature of the reducing factors and because of the discretionary element of the general principles of Scots law

on homicide. The result has been an increase in the number of homicides regarded as murder rather than culpable homicide, although there has also been an increase in the total number of homicides. Consequently, writing of the number of convictions of murder, one report in 1969 said,

> "This increase was disproportionate both to the number of cases of murder and to the number of persons charged with murder. The tendency during the period for convictions of murder to rise and the proportion of convictions of the lesser charge of culpable homicide to fall, together with the fact that only 10 of the 34 persons charged with capital murder were convicted of capital murder, lends some support to the view that the association of the death penalty with conviction of murder had some effect (now diminished) in restricting convictions for murder. (It is to be noted that this effect, the extent of which cannot be estimated may in turn affect the comparability of the statistics in cases of murder, since cases which previously resulted in convictions for culpable homicide and thus were excluded from the figures for murder may now result in convictions of murder and remain in those figures.)" 3.

This tendency, of the legislature being able to effect criminal statistics, had already been noted by Marx:

> "The apparent decrease in crime, however, since 1854, is to be exclusively attributed to some technical changes in British Jurisdiction; to the juvenile offenders' act in the first instance, and, in the second instance, to the operation of the Criminal Justice Act of 1855, which authorises the Police Magistrates to pass sentences for short periods with the consent of the prisoners. Violations of the law are generally the offspring of the economical agencies beyond control of the legislator, but, as the working of the Juvenile Offenders' Act testifies, it depends to some degree on official society to stamp certain violations of its rules as crimes or as transgressions only. This difference of nomenclature, so far from being indifferent, decides on the fate of thousands of men, and the moral tone of society. Law itself may not only punish crime, but improvise it." 4.

Although the law itself has not changed, its application to questions of murder and culpable homicide has, in that it can now be more

strictly interpreted in favour of the former. With the abolition of the death penalty though, the distinction of murder from culpable homicide is now an artificial one. Both are now punishable with imprisonment, a mandatory life sentence in the case of murder and a discretionary sentence in the case of culpable homicide, although that sentence can amount to anything up to life imprisonment. As a life sentence is indeterminate, however, it is possible for somebody to serve a lesser sentence for murder than for culpable homicide. Consequently there is, it is submitted, now no reason why we should continue to try to distinguish one crime from the other. In a dissenting judgment in an English case[5] in the House of Lords, Lord Kilbrandon declared,

> "My Lords, it is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and distinguishing from it the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for, and was called for immediately upon the passing of the Act of 1965. Until that time the content of murder - and I am not talking about the defence of murder - was that form of homicide punishable with death. (It is not necessary to notice the experimental period during which capital murder and non-capital murder existed side by side). Since no homicides are now punishable with death these many hours and days have been occupied in trying to adjust a defence of that which has no content. There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished and the single crime of unlawful murder substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentence downwards from life imprisonment. It is no longer true, if it ever was true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide." 6.

In a subsequent lecture on 'The Criminal Justice System in a Changing Society', Lord Kilbrandon repeated,

> "It is curious how deeply the substantive law can be affected by what one would have expected to be a peripheral matter, that is, the imposition of a mandatory penalty for the crime of murder. When that penalty was death, there were even more side-effects, such as technical rules of procedure and evidence which can perhaps be characterised as devices adopted by the judges, not always consonant with good sense or convenience, which, like the semi-perverse verdicts of juries, had an object purely humane. But now that the mandatory penalty is the same as the maximum penalty for a number of other crimes, it may be that the time has come to do away with it. The simple and economical way to do that would be to abolish the crime of murder itself, and to substitute unlawful homicide....I cannot off-hand name any judge who agrees with it, and many do not. On the other hand, it has some support in other equally respectable quarters." 7.

Two committees, one Scottish[8] and one English[9], have considered the problem of whether the two crimes should be abolished and replaced by a single crime. They both thought that the distinctions between the two crimes should be maintained, largely on the basis that it was necessary to retain the stigma-associated label of murder. As Morris and Blom-Cooper have pointed out, however, writing about the 1957 Act,

> "The fact that the commonest punishment for murder is now life imprisonment has in one respect reduced the status of murder to that of other crimes punished by imprisonment. By and large, the community is not nearly as interested in murder trials which are no longer dramatised by the shadow of the gallows." 10.

The 1965 Act, it is contended, has completed the removal of the stigma associated with murder. In the past, when only extreme cases of homicide were regarded as murder, the death penalty served as the emphatic denumciation of the crime of murder. People were therefore able to identify murder as being the heinous crime to which the death penalty applied. Today, however, murder no longer has this distinction, insofar as it is punished in the same manner as culpable homicide, namely with imprisonment. In

addition, because so many homicides are now regarded as murder, there is no longer the distinctive aura that applied in the public mind to the crime of murder. Homicides will now be regarded as murders even though they do not arouse the wrath of society, but these cases tend to detract from the extreme cases which still evoke public repugnance.

As has been seen, killings in the private sector are more likely to be regarded as culpable homicides, and killings in the public sector as murders, but these distinctions are not necessarily in concordance with public opinion. For it is often domestic violence that will evoke public anger, whilst killings among strangers in the public sector, apart from when it involves a rape or a robbery, will often be regarded by the public as requiring the incarceration of the offender from the point of view of the public safety, but not simply from the view of retribution. As in this case retribution is punishment of the offender for what he has done, irrespective of whether he is likely to offend again.

Thus, if there were to be a single crime of criminal or unlawful homicide it would then be possible to sentence the offender to an appropriate term of imprisonment, taking into account the nature of the homicide he has committed and the likelihood of his offending again. Although in theory a person sentenced to life imprisonment can be released on parole once he is judged to have 'reformed', the imprecise nature of 'reformation' can lead to difficulties as to when 'reformation' has taken place, both from the point of view of the prison administration and from the additional strain that

is thereby imposed on the prisoner. Equally, there will be some cases of murder where a life sentence is inappropriate, such as where the killing has been the result of a sudden rage in special circumstances which are unlikely to pertain again. If the mandatory aspect of life imprisonment on a conviction of murder were to be removed though, it would merely abolish the only remaining distinction between murder and culpable homicide.

It is therefore to be recommended that there should be a single crime of criminal or unlawful homicide, both from a practical point of view and from the need to avoid the theoretical lucubrations that abound in regard to the existing distinctions between murder and culpable homicide. Such an idea would not be exactly novel, however, for Godwin had already written by 1793, four years before Hume's 'Commentaries' had appeared:

> "...how complicated is the iniquity of treating all instances alike, in which one man has occasioned the death of another? Shall we abolish the imperfect distinctions, which the most odious tyrannies have hitherto thought themselves compelled to admit, between chance-medley, manslaughter and malice prepense? ...But suppose...that we were to take the intention of the offender, and the future injury to be apprehended, as the standard of infliction. This would no doubt be a considerable improvement. This would be the true mode of reconciling punishment and justice, if, for reasons already assigned, they were not, in their own nature, incompatible." 11.

The additional advantage to be derived from having a single crime of criminal or unlawful homicide is that the criminal statistics of murder could no longer be distorted by fluctuations in the distribution of homicide between murders and culpable homicides. Too often recourse is made to the statistical increase of murder

in order to justify a 'law and order' stance, and the fact that there has been a radical change in the distribution of homicide between murders and culpable homicides ignored. This is not to deny that there has been an increase in the number of homicides as a whole. What has happened, however, is that the significance of the increase of the incidence of murder has been distorted. As Ryle pointed out:

> "A myth is, of course, not a fairy story. It is the presentation of facts belonging to one category in the idioms appropriate to another. To explode a myth is accordingly not to deny the facts but to re-allocate them." 12.

One example of this occurred in 1977, when Jimmy Anderson, a former convenor of the Glasgow police committee, announced that in the first seven weeks of that year Strathclyde region had had eighteen murder inquiries, which was only one fewer than the number of killings in Northern Ireland for the same period. A report in 'New Society'[13], however, diluted the significance of this statement by revealing that twelve of those killings were 'domestic', and were therefore more likely to conclude as culpable homicides. Anderson had also made the statement in order to launch Teddy Taylor's Committee on crime in Glasgow. The 'New Society' report was therefore able to say:

> "In other words, it was not so much the street as the hearth which was flowing with blood...In other words, the renewed interest in Glasgow as a 'violent city' is the result of a publicity stunt." 14.

Unfortunately such statements tend to mislead the public and lead to periodic demands for the re-introduction of the death penalty. This study has been concerned with too short a time span to be able

to categorically deny that the incidence of murder has been influenced by the abolition of the death penalty. In one study of murder in England and Wales between 1957 and 1977[15] by Terence Morris and Louis Blom-Cooper, however, it was found that,

> "The penalty for the crime of murder has no discernible influence upon the rate at which murder is committed. That well-documented criminological fact is endorsed in our study of all those indicted for murder during the past 20 years in England and Wales....The results of the study strongly suggest that, insofar as any penalty is relevant to the murder rate, the death penalty provides no greater control over the incidence of murder than does the mandatory penalty of life imprisonment." 16.

That well-documented fact has never entered the public consciousness, though, however often it is repeated. For murder occupies a special position in the public consciousness. It is the ultimate crime[17], and as such provides the indicia for the state of crime as a whole. People can accept increases in the number of assaults, housebreakings and motoring offences with comparative equanimity, but given an apparent increase in the incidence of murder and there are vociferous demands for the re-introduction of the death penalty. The fact that murders are comparatively rare in this country, and that the death penalty has never been shown to have a deterrent effect are ignored. An increase in the incidence of murder is seen, however, illogically, as denoting a breakdown of "law and order" in general, which in turn allows a 'law and order' stance to be adopted by politicians.

This is also reflected in the different attitudes that the courts adopt to killings in the public and private sectors, excluding cases which are regarded as being either wickedly reckless or intentional. Killings in the home involving relations and close associates are not considered to endanger society as a whole. It is generally

the killings in the public sector that evoke public and judicial wrath, since it is those killings which are perceived as being a threat to society, as opposed to simply the individual[18]. The fact that different attitudes are taken to killings in the public and private sectors is ignored, however, and instead the death penalty, or some other form of stricter punishment, is seen as being the panacea for murder, and indirectly for the violence and crime in society as a whole. As Marx and Engels observed in 'The German Ideology' though,

> "The most superficial examination of legislation, e.g., poor laws in all countries, shows how far the rulers got when they imagined that they could achieve something by means of their "dominant will" alone, i.e. simply by exercising their will." 19.

APPENDIX A

Statistics on Accused in relation to reduction of the offence

In the following tables column 1 consists of those cases resulting in a conviction of murder.

Column 2 consists of those cases appearing on indictment as murder but ending in a conviction of culpable homicide.

Column 3 consists of those cases appearing on petition as murder, but with the charge being reduced prior to the serving of the indictment.

Where chi square testing is being applied to the tables the observed figures appear unbracketed and the expected figures bracketed.

Table 13. Sex of Accused

	1	2	3	Total
Male	143(135.2)	56(57.9)	41(46.9)	240
Female	4(11.8)	7(5.1)	10(4.1)	21
Total	147	63	61	261

Chi square = 15.61 chi square with 2 degrees of freedom = 13.82 (p = 0.001)

Table 14. Age of Accused

	1	2	3	Total
Under 25	95(84.8)	36(36.6)	20(29.6)	151
25 and over	51(61.2)	27(26.4)	31(21.4)	109
Total	146	63	51	260

Chi square = 10.37 One not known in column 1 excluded.

Chi square with 2 degrees of freedom = 9.21 (p = 0.01)

Table 15. Marital Status of Accused

	1	2	3	Total
Married/co-habiting	37(47.2)	18(21.4)	31(17.3)	86
Divorced/separated	21(18.1)	10(8.2)	2(6.7)	33
Single	81(73.6)	35(33.4)	18(27.0)	134
Total	139	63	51	253

Chi square = 21.5 Eight accused, all in column 1, have been excluded because they are either not known or not applicables.

Chi square with four degrees of freedom = 18.47(p = 0.001)

Table 16. Previous convictions of Accused

	1	2	3	Total
Previous conviction, involving violence and custodial sentence.	46(41.5)	17(17.6)	10(13.9)	73
Previous conviction involving violence but no custodial sentence.	11(12.5)	7(5.3)	4(4.2)	22
Previous conviction not involving violence but custodial sentence.	27(25.0)	9(10.6)	8(8.4)	44
Previous conviction not involving violence or custodial sentence	34(38.1)	21(16.2)	12(12.8)	67
No previous conviction	28(29.0)	8(12.3)	15(9.7)	51
Total	146	62	49	257

Chi square = 9.1

Chi square with 8 degrees of freedom = 15.51 (p = 0.05)

Four not knowns, one in column 1, one in column 2 and two in column 3 have been excluded.

Table 17. Employment of Accused

	1	2	3	Total
Employed	62(63.2)	23(27.6)	26(20.1)	111
Unemployed	73(71.8)	36(31.4)	17(22.9)	126
Total	135	59	43	237

Chi square = 4.73

Chi square with 2 degrees of freedom = 5.99 (p = 0.05)

Twenty four accused, twelve in column 1, four in column 2 and eight in column 3, have been excluded because the classification is not applicable.

Appendix B

Statistics on the Homicide in relation to reduction of the offence.

In the following tables column 1 consists of those cases resulting in a conviction of murder.

Column 2 consists of those cases appearing on indictment as murder but ending in a conviction of culpable homicide.

Column 3 consists of those cases appearing on petition as murder, but with the charge being reduced prior to the serving of the indictment.

Where chi square testing is being applied to the tables the observed figures appear unbracketed and the expected figures bracketed.

Table 18. Age of Deceased

	1	2	3	Total
Under 16	13(15.6)	4(7.6)	12(5.8)	29
16 - 36	61(59.8)	30(29.0)	20(22.2)	111
37 - 60	35(34.0)	17(16.4)	11(12.6)	63
Over 60	15(14.6)	9(7.0)	3(5.4)	27
Total	124	60	46	230

Chi square = 10.94
Chi square with 6 degrees of freedom = 12.59(p = 0.05

One not known, in column 2, has been excluded.

Table 19. Sex of Deceased

	1	2	3	Total
Male	75(84.3)	51(41.5)	31(31.3)	157
Female	49 (39.7)	10 (19.5)	15(14.7)	74
	124	61	46	231

Chi square = 10.02
Chi square with 2 degrees of freedom = 9.21(p = 0.01)

Table 20. Connection between Accused and Deceased

	1	2	3	Total
Related	20(37.3)	25(18.5)	25(14.2)	70
Acquaintance	56(49.0)	23(24.3)	13(18.6)	92
Stranger	45(34.6)	12(17.2)	8(13.2)	65
Total	121	60	46	227

Chi square = 28.02
Chi square with 4 degrees of freedom = 18.47(p = 0.001)

Four not knowns, three in column 1 and one in column 2, have been excluded.

Table 21. Locus of Homicide

	1	2	3	Total
Mutual Home	10(25.2)	19(12.4)	18(9.4)	47
Deceased's home	28(20.9)	8(10.3)	3(7.8)	39
Accused's home	8(7.0)	2(3.4)	3(2.6)	13
Street/road	24(27.4)	17(13.5)	10(10.2)	51
Other	54(43.5)	15(21.4)	12(16.1)	81
Total	124	61	46	231

Chi square = 34.01
Chi square with 8 degrees of freedom = 26.13(p = 0.001)

Table 22. Motive

	1	2	3	Total
Sexual	19(11.5)	2(6.0)	1 (4.5)	22
Robbery	24(16.7)	3(8.7)	5 (6.6)	32
Domestic	17(27.2)	23(14.1)	12 (10.7)	52
Argument after or whilst drinking	9(10.5)	7(5.4)	4 (4.1)	20
Other	45(48.1)	24(24.9)	23(19.0)	92
Total	114	59	45	218

Chi square = 28.95
Chi square with 8 degrees of freedom = 26.13 (p = 0.001)

Thirteen not knowns, ten in column 1, two in column 2 and one in column 3 have been excluded.

Table 23. Cause of Death

	1	2	3	Total
Asphyxia/strangulation	20(18.7)	8(9.3)	7(7.0)	35
Stab wounds	48(49.7)	37(24.7)	8(18.6)	93
Multiple injuries	14(9.6)	4(4.8)	0(3.6)	18
Head injuries	28(29.4)	9(14.6)	18(11.0)	55
Other	13(15.5)	3(7.7)	13(5.8)	29
Total	123	61	46	230

Table 23 (Contd.)

Chi square = 37.13
Chi square with 8 degrees of freedom = 26.13(p = 0.001)

One not known, in column 1, has been excluded.

Table 24. Analysis of Stab Wounds

	1	2	3	Total
Multiple stab wounds	10	5	1	16
Stab Wound of chest	17	15	3	35
Stab wound of abdomen	5	3	1	9
Stab wound of heart	13	5	3	21
Stab wound of heart and abdomen	1	3	0	4
Stab wound of neck	1	3	0	4
Stab wound of groin	1	0	0	1
Stab wound of head	0	1	0	1
Stab wound of brain	0	1	0	1
Stab wound of leg	0	1	0	1
Total	48	37	8	93

Table 25. Use of Weapon

	1	2	3	Total
Knife	50(50.8)	36(25.2)	9(19.0)	95
Blunt Instrument	21(16.0)	4(8.0)	5(6.0)	30
Other weapon	24(18.7)	7(9.3)	4(7.0)	35
None	28(37.4)	14(18.6)	28(14.0)	70
Total	123	61	46	230

Chi square = 34.49
Chi square with 6 degrees of freedom = 22.46(p = 0.001)

One not known, in column 1, has been excluded.

Table 26. Day of Homicide

	1	2	3	Total
Sunday	18(14.1)	4(6.7)	4(5.1)	26
Monday	11(12.5)	6(6.0)	6(4.5)	23
Tuesday	10(10.3)	3(4.9)	6(3.8)	19
Wednesday	18(15.8)	6(7.5)	5(5.7)	29
Thursday	15(16.9)	7(8.0)	9(6.1)	31
Friday	26(27.2)	17(12.9)	7(9.9)	50
Saturday	26(27.2)	16(12.9)	8(9.9)	50
Total	124	59	45	228

Chi square = 10.88
Chi square with 12 degrees of freedom = 21.03 (p = 0.05)

Three not applicables or not knowns have been excluded, two in column 2 and one in column 3.

APPENDIX C.

Statistics on Relationship of the factors involved in Homicides

Where chi square testing is being applied to the tables the observed figures appear unbracketed and the expected figures bracketed.

Table 27. Sex of Accused and Motive

	Male	Female	Total	Accused
Sexual	13(11.7)	0(1.3)	13	
Robbery	23(20.7)	0(2.3)	23	
Domestic	40(44.0)	9(5.0)	49	
Argument after or whilst drinking	18(16.2)	0(1.8)	18	
Other	57(58.4)	8(6.6)	65	
Total	151	17	168	

Chi square = 9.89
Chi square with 4 degrees of freedom = 9.49 (p = 0.05)

Table 28. Sex of Accused and Locus

	Male	Female	Total	Accused
Home	29(36.9)	12(4.1)	41	
Deceased's home	26(23.4)	0(2.6)	26	
Accused's home	11(10.8)	1(1.2)	12	
Street/road	31(30.6)	3(3.4)	34	
Other	54(49.4)	1(5.6)	55	
Total	151	17	168	

Chi square = 24.0
Chi square with 4 degrees of freedom = 18.47 (p = 0.001)

Table 29. Sex of Accused and Age of Accused

	Male	Female	Total	Accused
Under 25	80(78.2)	7(8.8)	87	
25 and over	71(72.8)	10(8.2)	81	
Total	151	17	168	

Chi square = 0.16
Chi square with 1 degree of freedom = 3.84 (p = 0.05)

Table 30. Sex of Accused and Marital Status of Accused

	Male	Female	Total	Accused
Married/Cohabiting	54(58.4)	11(6.6)	65	
Divorced/separated	24(21.6)	0(2.4)	24	
Single	73(71.0)	6(8.0)	79	
Total	151	17	168	

Chi square = 6.5
Chi square with 2 degrees of freedom = 5.99 (p = 0.05)

Table 31. Sex of Accused and Connection between Accused/Deceased

	Male	Female	Total	Accused
Related	48(55.7)	14(6.3)	62	
Acquaintance	59(55.7)	3(6.3)	62	
Stranger	44(39.5)	0(4.5)	44	
Total	151	17	168	

Chi square = 17.4
Chi square with 2 degrees of freedom = 13.82 (p = 0.001)

Table 32. Sex of Accused and Sex of Deceased

	Male	Female	Total	Accused
Male	100(100.7)	12(11.3)	112	
Female	51(50.3)	5(5.7)	56	
Total	151	17	168	

Chi square = 0.1
Chi square with 1 degree of freedom = 3.84 (p = 0.05)

Table 33. Sex of Accused and Use of Weapon

	Male	Female	Total	Accused
Knife	60(62.0)	9(7.0)	69	
Blunt instrument	16(14.4)	0(1.6)	16	
Other	26(27.0)	4(3.0)	30	
None	49(47.6)	4(5.4)	53	
Total	151	17	168	

Chi square = 3.2
Chi square with 3 degrees of freedom = 7.82 (p = 0.05)

Table 34. Age of Accused and Marital Status of Accused

	Under 25	25 and over	Total	Accused
Married/cohabiting	20(33.7)	45(31.3)	65	
Divorced/separated	6(12.4)	18(11.6)	24	
Single	61(40.9)	18(38.1)	79	
Total	87	81	168	

Chi square = 38.9
Chi square with 2 degrees of freedom = 13.82 (p = 0.001)

Table 35. Age of Accused and Sex of Deceased

	Under 25	25 and over	Total	Accused
Male	67(58.0)	45(54.0)	112	
Female	20(29.0)	36(27.0)	56	
Total	87	81	168	

Chi square = 8.7
Chi square with 1 degree of freedom = 6.64 (p = 0.01)

Table 36. Age of Accused and Connection between Accused/Deceased

	Under 25	25 and over	Total	Accused
Related	18(32.1)	44(29.9)	62	
Acquaintance	41(32.1)	21(29.9)	62	
Stranger	28(22.8)	16(21.2)	44	
Total	87	81	168	

Chi square = 20.4
Chi square with 2 degrees of freedom = 13.82 (p = 0.001)

Table 37. Age of Accused and Use of Weapon

	Under 25	25 and over	Total	Accused
Knife	43(35.7)	26(33.3)	69	
Blunt Instrument	7(8.3)	9(7.7)	16	
Other	14(15.5)	16(14.5)	30	
None	23(27.4)	30(25.6)	53	
Total	87	81	168	

Chi square = 5.3
Chi square with 3 degrees of freedom = 7.82(p = 0.05)

Table 38. Age of Accused and Motive

	Under 25	25 and over	Total	Accused
Sexual	8(6.7)	5(6.3)	13	
Robbery	16(11.9)	7(11.1)	23	
Domestic	11(25.4)	38(23.6)	49	
Argument after or whilst drinking	11(9.3)	7(8.7)	18	
Other	41(33.7)	24(31.3)	65	
Total	87	81	168	

Chi square = 24.4
Chi square with 4 degrees of freedom = 18.47 (p = 0.001)

Table 39. Age of Accused and Locus

	Under 25	25 and over	Total	Accused
Home	12(21.2)	29(19.8)	41	
Deceased's home	15(13.5)	11(12.5)	26	
Accused's home	7(6.2)	5(5.8)	12	
Street/road	25(17.6)	9(16.4)	34	
Other	28(28.5)	27(26.5)	55	
Total	87	81	168	

Chi square = 15.3
Chi square with 4 degrees of freedom = 13.28 (p = 0.01)

Table 40. Marital Status of Accused and Sex of Deceased

	Married/ cohabiting	Divorced/ separated	Single	Total	Accused
Male	38(43.3)	13(16.0)	61(52.7)	112	
Female	27(21.7)	11(8.0)	18(26.3)	56	
Total	65	24	79	168	

Chi square = 7.6
Chi square with 2 degrees of freedom = 5.99 (p = 0.05)

Table 41. Marital Status of Accused and Use of Weapon

	Married/ Cohabiting	Divorced/ Separated	Single	Total	Accused
Knife	18(26.7)	10(9.9)	41(32.4)	69	
Blunt instrument	6(6.2)	3(2.3)	7(7.5)	16	
Other	13(11.6)	4(4.3)	13(14.1)	30	
None	28(20.5)	7(7.6)	18(24.9)	53	
Total	65	24	79	168	

Chi square = 10.2
Chi square with 6 degrees of freedom = 12.59 (p = 0.05)

Table 42. Marital Status of Accused and Motive

	Married/ cohabiting	Divorced/ separated	Single	Total	Accused
Sexual	5(5.0)	3(1.9)	5(6.1)	13	
Robbery	6(8.9)	3(3.3)	14(10.8)	23	
Domestic	30(19.0)	9(7.0)	10(23.0)	49	
Argument after or whilst drinking	6(7.0)	0(2.6)	12(8.5)	18	
Other	18(25.1)	9(9.3)	38(30.6)	65	
Total	65	24	79	168	

Chi square = 24.8
Chi square with 8 degrees of freedom = 20.09 (p = 0.01)

Table 43. Marital Status of Accused and Connection between Accused/Deceased.

	Married/ cohabiting	Divorced/ Separated	Single	Total	Accused
Related	39(24.0)	9(8.9)	14(29.2)	62	
Acquaintance	15(24.0)	9(8.9)	38(29.2)	62	
Stranger	11(17.0)	6(6.3)	27(20.7)	44	
Total	65	24	79	168	

Chi square = 27.4
Chi square with 4 degrees of freedom = 18.47 (p = 0.001)

Table 44. Marital Status of Accused and Locus

	Married/ cohabiting	Divorced/ Separated	Single	Total	Accused
Home	30(15.9)	2(5.9)	9(19.3)	41	
Deceased's home	6(10.1)	8(3.7)	12(12.2)	26	
Accused's home	4(4.6)	2(1.7)	6(5.6)	12	
Street/road	7(13.2)	5(4.9)	22(16.0)	34	
Other	18(21.3)	7(7.9)	30(25.9)	55	
Total	65	24	79	168	

Chi square = 33.9
Chi square with 8 degrees of freedom = 26.13 (p = 0.001)

Table 45. Connection between Accused/Deceased and Sex of Deceased

	Related	Acquaintance	Stranger	Total
Male	33(41.3)	49(41.3)	30(29.3)	112
Female	29(20.7)	13(20.7)	14(14.7)	56
Total	62	62	44	168

Chi square = 9.3
Chi square with 2 degrees of freedom = 9.21 (p = 0.01)

Table 46. Connection between Accused/Deceased and Use of Weapon

	Related	Acquaintance	Stranger	Total
Knife	23(25.5)	29(25.5)	17(18.1)	69
Blunt instrument	2(5.9)	8(5.9)	6(4.2)	16
Other	12(11.1)	7(11.1)	11(7.9)	30
None	25(19.6)	18(19.6)	10(13.9)	53
Total	62	62	44	168

Chi square = 10.1
Chi square with 6 degrees of freedom = 12.59(p = 0.05)

Table 47. Sex of Deceased and Motive

	Male	Female	Total	Deceased
Sexual	0(8.7)	13(4.3)	13	
Robbery	14(15.3)	9(7.7)	23	
Domestic	25(32.7)	24(16.3)	49	
Argument after or whilst drinking	18(12.0)	0(6.0)	18	
Other	55(43.3)	10(21.7)	65	
Total	112	56	168	

Chi square = 44.7
Chi square with 4 degrees of freedom = 18.47 (p = 0.001)

Table 48. Sex of Deceased and Locus

Deceased	Male	Female	Total
Home	22(27.3)	19(13.7)	41
Deceased's home	17(17.3)	9(8.7)	26
Accused's home	8(8.0)	4(4.0)	12
Street/road	32(22.7)	2(11.3)	34
Other	33(36.7)	22(18.3)	55
Total	112	56	168

Chi square = 15.7
Chi square with 4 degrees of freedom = 13.28 (p = 0.01)

Table 49. Sex of Deceased and Use of Weapon

Deceased	Male	Female	Total
Knife	61(46.0)	8(23.0)	69
Blunt instrument	11(10.7)	5(5.3)	16
Other	20(20.0)	10(10.0)	30
None	20(35.3)	33(17.7)	53
Total	112	56	168

Chi square = 34.5
Chi square with 3 degrees of freedom = 16.27 (p = 0.001)

Table 50. Use of Weapon and Motive

	Knife	Blunt Instrument	Other	None	Total
Sexual	0(5.3)	2(1.2)	2(2.3)	9(4.1)	13
Robbery	7(9.4)	6(2.2)	6(4.1)	4(7.3)	23
Domestic	20(20.1)	2(4.7)	8(8.8)	19(15.5)	49
Argument after or whilst drinking	11(7.4)	2(1.7)	1(3.2)	4(5.7)	18
Other	31(26.7)	4(6.2)	13(11.6)	17(20.5)	65
Total	69	16	30	53	168

Chi square = 30.1
Chi square with 12 degrees of freedom = 26.22 (p = 0.01)

Table 51. Use of Weapon and Locus

	Knife	Blunt Instrument	Other	None	Total
Home	13(16.8)	1(3.9)	7(7.3)	20(12.9)	41
Deceased's home	8(10.3)	6(2.4)	4(4.5)	7(7.9)	25
Accused's home	5(5.3)	1(1.2)	3(2.3)	4(4.1)	13
Street/road	20(14.0)	2(3.2)	6(6.1)	6(10.7)	34
Other	23(22.6)	6(5.2)	10(9.8)	16(17.4)	55
Total	69	16	30	53	168

Chi square = 18.8
Chi square with 12 degrees of freedom = 21.03 ($p = 0.05$)

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