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recklessness which amounts to murder, namely the repeated taking of risks with others' lives. We should distinguish between a person who uncharacteristically drinks too much at a party and tragically causes a fatal crash, and one who habitually drinks enormous amounts of alcohol on a regular basis and then drives, in spite of repeated arrests and even accidents. It is argued that drunk drivers kill, they maim, they seriously injure and sometimes they get away with it. Many people argue for stiffer penalties for drunk driving on grounds of deterrence. But will stiffer penalties ever deter the habitual heavy drinker even though he may not be an alcoholic. This paper examines the contentious area of drunk driving and asks "Is Killing By Drunken Driving "A Socially Acceptable Form of Vehicular Suicide"?"

Is Killing By Drunken Driving A Socially Acceptable Form Of Vehicular Homicide?(Part 1)

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Introduction

The law has always had difficulty with the intoxicated offender – especially the drunk driver. On the one hand it has recognized a strong public interest in not permitting offenders who commit serious criminal offences to escape responsibility for their actions by reason of self-induced intoxication. On the other hand it has struggled with the reality that such offenders may not actually have the blameworthy intent that is otherwise required for a finding of guilt. To hold them responsible as if they had that blameworthy intent is arguably to punish their intoxication rather than their crime.¹ A number of rules governing the treatment of persons who are accused of committing crimes while intoxicated have been developed in common law. The rules have been codified in Canada, and when needed, it is to Canadian law that we shall appeal for statements of the rules and their rationale. The intoxication rules have three broad components, depending upon the causes or degree of intoxication: involuntary intoxication, voluntary intoxication which may be advanced but is not extreme and extreme intoxication. Our treatment of intoxicated offenders is inconsistent across these categories and offends important principle of criminal justice and legality Vehicular homicide is a crime that involves the death of a person other than the driver as a result of either criminally negligent or murderous operation of a motor vehicle. In cases of criminal negligence, the defendant is commonly charged with unintentional vehicular manslaughter. Vehicular homicide is similar to the offense, in some countries, of "*dangerous driving causing death.*" The victim may be either a person not in the car with the offending motorist (such as a pedestrian, cyclist, or another motorist), or a passenger in the vehicle with the offender.² Drunk drivers kill, they maim, they seriously injure and sometimes they get away with it.

MAAD

¹ Sackerdote, Bruce, Gaeser Edward, (2003). "*Sentencing in Homicide Cases & the Role of Vengeance*". Journal of Legal Studies. 32 (2) 363-382. doi: 10 1086/374707

Drunk drivers kill, they maim etc. is the message from Mothers against Drunk Drivers (MADD), a group to change laws as well as the attitudes of judges, juries and the public. MADD' primary goal is to prevent crashes and deaths by getting drunk drivers off the road. However, they also want drunk drivers who cause death to be justly punished. They contend that such drivers are guilty not merely of criminal negligence or even of manslaughter but guilty of the serious crime of committing murder. It is argued that significant classes of drunk drivers who cause death often get away with murder. Even though the drunk driver doesn't mean to kill anyone, to engage in an activity as dangerous as driving while severely intoxicated is so risky as to evidence extreme indifference to the value of human life, and therefore may constitute the malice necessary for a second-degree murder conviction. It is also argued that, since some drunk drivers who cause death are often alcoholics who cannot help drinking, it's unfair to hold them responsible and punish them for doing what they cannot control. Many right minded people would consider this a bad argument but there are those who ask whether it is fair to hold a drunk driver responsible for his action as opposed, say, an insane one. While the alcoholic may not be responsible for his intake of alcohol, his decision to drink, then drive in full knowledge

Recklessness in Law Means Mens Rea

In the United Kingdom, there is no offense of "*vehicular homicide*". Where a vehicle has been used as a weapon as part of a deliberate assault; and the intention was to kill or cause serious injury; and that assault resulted in the death of the victim then the driver may be charged with murder contrary to the Common Law.³ Where death is the result of driving that falls short of a deliberate assault, the *Road Traffic Act 1988 (RTA 88)* governs the disposal of the case.⁴

The offenses created by this Act relating to road deaths are as follows:

- "*Causing death by dangerous driving*" - **Section 1 RTA 88**, the only points for the prosecution to prove are that death was caused and the driver of the vehicle that caused the death was driving dangerously.

³ In Law, Common Law is the body of law derived from judicial decisions and similar tribunals. The defining characteristic of "Common law" is that it arises as precedent. In cases where the parties disagree on what the law is, a Common law court looks to past precedential decisions of relevant courts.

⁴ *Governs the disposal of the case*: UK Govt. "The Road Traffic Act (RTA) 1988 (as amended). HMSO. Retrieved 17 March 2015.

Causing death by dangerous driving is a statutory offence in England, Wales, Scotland and Northern Ireland. It is an aggravated form of dangerous driving and is currently created by the above Act.

- *Causing death by careless, or inconsiderate, driving* - **Section 2B RTA 88**, deals with cases similar in scope to Section 1 but while the standard of the driving remains reprehensible the lapse(s) alleged are considered to fall short of being actually dangerous.
- *"Causing death by driving: unlicensed, disqualified or uninsured drivers"* - **Section 3ZB RTA 88**, it is a requirement under UK law for the drivers of motor vehicles to be properly licensed and for them to hold third party insurance for their vehicle. This section was inserted to the **RTA 88** to deal with road death cases where there was no provable lapse in driving standards but nevertheless the driver should not in law have been driving and :
- *"Causing death by careless driving while unfit through alcohol/over prescribed limit"*, **Section 3A RTA 88**.

The Road Traffic Act 1988 introduced the simple concept of dangerousness by removing the offence of "reckless driving" as the concept of recklessness in Irish and UK law requires a *Mens rea*.⁵ This had been difficult to prove in court. C. M. V. Clarkson,⁶ an advocate of vehicular homicide offenses, opines that while people's perceptions are that death resulting from a motor vehicle is in a different "family" to other killings, *"in terms of fault there can be little distinction between those who kill through the dangerous operation of their cars and those who kill with machines, trains, etc."*^{7 8}

⁵ Mens Rea is the mental element of a person's intention to commit a crime; or knowledge that one's action or lack of action would cause a crime to be committed. It is a necessary element of many crimes.

⁶ C.M.V. Clarkson (2000). *"Context and Culpability in Involuntary Manslaughter: Principle or Instinct"*. In Andrew Ashworth; Barry Mitchell (eds.) *Rethinking English Homicide Law*. Oxford University Press. pp.148-150, 164. isbn 0-19- 829915-x

⁷ RTA 1988. Office of Public Sector information.1988.

⁸ C.M.V. Clarkson (2000). *"Context and Culpability in Involuntary Manslaughter: Principle or Instinct"*. In Andrew Ashworth; Barry Mitchell (eds.) *Rethinking English Homicide Law*. Oxford University Press. pp.148-150, 164. isbn 0-19- 829915-x

In addition to the above there also exists the option of charging offenders with causing bodily harm by wanton or furious driving.⁹ Originally framed in the era of horse-drawn vehicles this legislation is now applied where offences involving motorized vehicles take place outside the provisions of the *Road Traffic Act 1988* (on private land, when driving off-road or in pedestrianized areas) and in the small number of serious cases involving non-motorized collisions such as the few that involve cyclists and result in severe injury or loss of life, typically of pedestrians.

Malice & Murder

Drunk driving takes an enormous toll, in lost lives and property, in injuries and human suffering. It contributes to approximately half of all highway deaths in the United States, killing about 25,000 people every year, and injuring many more. Despite this carnage, the drunk driver runs little risk of being arrested.¹⁰ Even if he injures or kills someone, plea bargaining and loopholes in the law make it unlikely that he will be convicted of a serious crime, and sentences tend to be light. Clarence Busch, the man who inadvertently launched Mothers Against Drunk Drivers (MADD) when he killed thirteen-year-old Cari Lightner in a hit-and-run accident, had three previous drunk driving convictions, but had spent only forty-eight hours in jail. The killer of four-year-old Kelly Schuett pleaded no contest to driving while intoxicated and was given a suspended five-day jail sentence and fined \$284. Thomas and Dorothy Sexton recall going to court to witness the trial of the man whose blood alcohol content was .26 when he killed the Sexton's 15-year-old son - Tom. They saw a car thief sentenced to two years in jail, while their son's killer-who pleaded guilty to homicide by a motor vehicle-was sentenced to two years' probation and fined \$200.^{11 12} Such facts have led some to call drunk driving a "*socially acceptable form of murder.*"¹³

This might be thought to be at best rhetorical hyperbole and, at worst, a serious misunderstanding of the crime of murder, indeed of the entire moral basis of Anglo-American law. That moral basis is expressed in the slogan, "*non facit reum nisi mens sit rea*" or, roughly, "*There is no crime*

⁹ Causing bodily harm by wanton and furious driving is a statutory offence in England, Wales and Northern Ireland. It has been abolished in Ireland.

¹⁰ H. Laurence Ross, *Deterring the Drinking Driver*. (Lexington, MA: Lexington Books, 1882), p 22.

¹¹ H. Laurence Ross, *Deterring the Drinking Driver* (Lexington, MA: Lexington Books, 1982), p. 22.

¹² "The War Against Drunk Drivers," *Newsweek*, 13 September 1982, p. 37.

¹³ *Ibid.*, p. 34.

without a guilty mind." The *Mens rea* required for murder is the intent to cause death. Thus, it may seem that to speak of murder where there is no intent to cause death is to misunderstand the nature of murder and, worse, to threaten a reversion to a primitive system of strict liability which ignores subtle differences in culpability based on psychological factors, such as intention and awareness. One might argue that to cause death by drunk driving may be criminally negligent homicide, or even manslaughter, but it cannot be murder, since the drunk driver does not mean to kill anyone. (Some writers suggest that a significant proportion of drunk drivers may actually be trying to commit suicide, but no one suggests that they are out to get the rest of us.) However, this argument provides an oversimplified view of the "malice" required for a murder conviction. It is not necessary that one intends to cause death in the ordinary, narrow sense of "intend" which implies conscious desire or plan. The man convicted of the murder of Vicki Morgan,¹⁴ the mistress of Alfred Bloomingdale, is reported to have told the police that he did not mean to kill her, but just wanted to stop her talking. From a legal perspective, it is irrelevant whether or not he beat her in order to kill her or merely to get her to stop talking, so long as he knew he was beating her, and was aware that beatings cause serious injury. The common-law rule is that a person who intentionally inflicts grievous bodily injury is guilty of murder, if death results. So, if either death or really serious injury is certain, or even highly probable result of the defendant's act, there can be a conviction for murder. Therefore, one could ask, does a drunken driver who kills as a result of being intoxicated guilty of vehicular homicide, and does he have the *Mens Rea* at the time of driving? Or prior to driving, does he realize that to drive in an intoxicated state had the potential to inflict serious bodily harm to another road user. The following is a well known case - *Hyam v. Director of Public Prosecutions (1975)*^{15 16} and even though not related to drunk driving, it illustrates the *Mens Rea* for murder and whether there was an intention. Mrs. Hyam was jilted by her lover for another woman and set fire to the house where the woman lived. Her intention, she said, was to frighten the woman into leaving the neighborhood. As it happened, two of the woman's children were killed, and Mrs. Hyam was convicted of murder. The trial judge instructed the jury that the accused intended death or serious bodily

¹⁴ *Beautiful Bad Girl: The Vicki Morgan Story* by Gordon Basichis. Published 1 October 2000. goodreads.com

¹⁵ [1975] AC55, [1974] 2 All ER 41.

¹⁶ ¹⁶ *Hyman v Director of Public Prosecutions*. 4 [1975] AC 55, [1974] 2 All ER. 41.

harm (the *mens rea* for murder) if she knew, when she did the act that it was highly probable that it would cause death or serious bodily harm.^{17 18} The conviction was upheld by the Court of Appeal and the House of Lords. Did Mrs. Hyam in fact foresee that it was highly probable that someone would be killed or seriously injured as a result of the fire? Lord Hailsham held that the question was not one of foresight of probability but whether there was an intention "*willfully to expose a victim to the serious risk of death or really serious injury.*" However, the act must be aimed at a particular person or persons (not necessarily the actual victim) to constitute murder. Thus, if Mrs. Hyam had set the fire to collect insurance money, rather than to frighten her rival, the killing of the children probably would not have been murder, even if the risk to life was exactly the same.¹⁹

(If for example, an individual set a bomb to go off at a certain time in a public street, he intends to injure someone. The fact that he was not certain that anyone would be around at the time the bomb went off is irrelevant, the fact is that he intended to cause some sort of injury which is sufficient. In the case at bar (above), it was apparent to the court that setting fire to a dwelling during the early hours of the morning when individuals were likely to be present (in bed) was sufficient to demonstrate an intent to do grievous bodily harm Ed.)

"Homicide By Excessive Risk Taking"

American law has developed differently, with a more straightforward recognition of murder without actual intent to kill. Lord Hailsham's insistence that the dangerous act be aimed at a particular person reflects his conviction that mere recklessness can never constitute the malice necessary for murder. By contrast, American courts have allowed that an extremely dangerous act with no social utility, such as shooting into an occupied house or moving train, can be murder.

For instance, on August 1, 1983, Joseph Miller and Kenneth Baird were convicted in Albany County, New York, of the murder of a 6-month-old baby, Robert Homsey, who died in a fire they set on March 9 out of vengeance. The two men had intended to burn the structure next to the house where the baby lived with his parents, but set fire to the Homsey house by mistake. They did not intend to kill Robert Homsey or anyone

¹⁷ *Ibid.*, p. 34.

¹⁸ 1 AC 55, [1974] 2 All ER 41. This content downloaded from 169.226.11.193 on Thu, 10 Oct. 2013 08:29:17

¹⁹ See J. C. Smith & Brian Hogan, eds. *Criminal Law*. (London: Butterworth's, 1978) pp. 286-87.

else. They were nevertheless convicted of second-degree murder and sentenced to the maximum prison term of twenty-five years to life. These cases are both examples of what has been termed "homicide by excessive risk taking."²⁰ If such homicide can constitute second-degree murder, the question arises, what is "excessive" risk taking? Not every risk to life is considered unjustifiable or wrongful. Many social ventures, from the building of bridges to the use of highways to the mining of coal, involve a serious risk to human life. In fact, we can predict with fair accuracy just how many lives will be lost as the result of such activities. The justification for engaging in activities which will surely result in injury and death is social utility. Modern life would be impossible without roads and bridges and coal; therefore we tolerate the unavoidable loss of life. However, at the same time, we are morally required to minimize avoidable losses, by improving safety devices, or by developing alternatives (e.g. the use of solar energy, rather than coal, would prevent mining accidents and black lung disease). Safety precautions and the development of alternatives invariably cost money. The question then becomes: given a socially useful activity, how much money are we morally required to spend to reduce injuries and deaths? And when injuries and deaths do occur, who should bear the loss? Such questions are fascinating and important, and are relevant.²¹

Murder – Greatest Crime Off All

Murder is the most serious offense against the person. Indeed, it is the greatest crime of all, unless its treason which threatens the very existence of the state itself. No other social interest is more important than that of safeguarding the lives and limbs of the individual members of the community even when driving.

This social interest has given rise to the common-law crimes of murder and manslaughter, and in a few jurisdictions to an additional statutory crime of negligent homicide. All of these offenses have one common element and hence it is important to speak first of homicide. Homicide is the killing of a human being by another human being.²² The older authorities gave this

²⁰ George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978), p. 259

²¹ See, for example, Guido Calabresi's classic study, *The Costs of Accidents* (New Haven: Yale University Press, 1970).

²² *Kinsey v State* 49 Ariz.201 65 p.2nd 1141 (1937)

definition: homicide is the killing of a human being by a human being.²³ The difference between the two is that suicide is excluded by the first but included in the second. The problems of self-destruction are so different from those involved in the killing of another that it is desirable to use "suicide" and "homicide" as mutually exclusive terms, and the modern trend is in this direction. It is not homicide for a man to kill an animal or for an animal to kill a man. An animal might be used as a means of committing homicide, as if one man on horseback should purposely run down another on foot with fatal consequences; but in such a case the law attributes the killing to the human rider and declares it to be homicide for this reason. In fact, whether a certain loss of life was brought about by a human being is a problem of fact rather than law except as a matter of causation. By an arbitrary rule, the law will not recognize a homicide unless the death has resulted within a year and a day from the time of the act which is alleged to have caused the death.²⁴ The New York court has held that this rule has been abrogated by statute in that state;²⁵ but the rule of the common law, still in effect in most jurisdictions, is that death cannot be attributed to a blow or other harm which preceded it by more than a year and a day. In such a case the loss of life is attributed to natural causes rather than to the human act which occurred so long ago.²⁶

Intoxication & Culpability

Self-induced drunkenness is not itself an excuse or a defense to a criminal charge. If I kill someone, and my only excuse is that I was drunk at the time and didn't know what I was doing, surely I am guilty of at least manslaughter.²⁷

I am responsible for what I did, although I would not have done it if I had not been drunk, since I drank voluntarily; that is, I was not forced into drinking. In fact, far from being a defense to a criminal charge, drunkenness is sometimes an aggravating factor. A drunken physician who causes the death of a patient is not merely negligent, but is guilty of manslaughter: his having treated a patient while drunk is regarded as being intrinsically reckless.²⁸ The same reasoning applies to the drunken driver,

²³ Bracton, Henry de Consuetinibus, Angliae (London) New Haven, Yale University Press 1940 edit. By Woodbine, George E. p.340 (f.120b).

²⁴ *Head v State*, 68 Ga. App. 759, 24 S.E. 2nd 145 (1943).

²⁵ 265, N.Y. 100, 191 N.E. 850(1934).

²⁶ *State v Moore* 196 LA. 617, 199 So. 661 (1941).

²⁷ *Blackwell v. State*, 34 Md. 547, 369 A2d 153 (1977).

²⁸ Perkins, p. 894. 23. Ibid., p. 893.

and is reflected in the statutory law of some jurisdictions. ²⁹ Such laws recognize that it is dangerous to do certain things while intoxicated, and put on notice those who do those things while drunk, that they will be held responsible for the consequences. In effect we refuse to accept the excuse, "*It was an accident,*" from the drunken person because the chance of causing an accident while intoxicated is so much more increased. It might be said that, whatever the culpability of a person who voluntarily becomes intoxicated, an alcoholic is an addict, the victim of disease. He cannot be said voluntarily to become intoxicated, or even voluntarily to drink; he is compelled. But his compulsion to drink is irrelevant: it is not his drinking that is culpable, but his drinking and driving. I know of no compulsion to drink and drive. However, it might be objected that, while there is no "compulsion" to drive after drinking, alcohol affects both judgment and self-control. (*Alcohol depresses the central nervous system. Ed.*) ³⁰ One might be fully aware when sober that one ought not to drive after drinking heavily and yet, once drunk, fail to appreciate the degree of one's impairment or just drive anyway, against one's better judgment. As consumption of alcohol does affect judgment and control, shouldn't "*I was drunk*" constitute a mitigating factor which, while not completely absolving the driver of responsibility, nevertheless make causing death by drunk driving something less than murder? Often we do accept "*I was drunk*" as an excuse. Someone who behaves boorishly at a party might later apologize to the host, saying "*I was drunk; I didn't know what I was doing.*"

Behaviour which otherwise might be inexcusable if done while sober, may be excused if the person was inebriated. So one might argue that the very condition that makes one's driving dangerous impairs one's ability to make a responsible decision about whether to drive or not. The drunk driver may not be "compelled" to drive, but neither is he completely responsible for his decision to drive. However, even good excuses wear thin if used too often. If someone gets drunk regularly and beats up his wife every time, we begin to lose sympathy with the excuse "*I was drunk.*" If one knows that one's behavior is going to be harmful at a later time, when one will have little or

²⁹ Bonnie Steinbock. *Philosophy & Public Affairs*, Vol 4, No 3 (Summer 1985) pp.278-295. <https://www.jstor/stable/2265351>

³⁰ Alcohol can affect several parts of the brain, but, in general contracts brain tissues, destroys brain cells as well as the central nervous system. Excessive drinking over a prolonged period of time can cause serious problems with cognition and memory. *The affects of alcohol on the central nervous system.* Futures Recovery Healthcare. futuresrecoveryhealthcare.com

no control over what one does, then it is one's obligation to take steps to prevent the situation from occurring.

“Malum in se”

Death resulting from an offense of *malum in se* is not excusable – if not murder - in the absence of some special statutory excuse³¹ even if no substantial element of human risk seem to be involved.³² Some courts have agreed, in cases where the drunken driving was exceptionally reckless. The reasoning has been that drunk driving itself can be so dangerous as to be “*malum in se*,”³³ quite apart from any additional wrongdoing, and so can supply the criminal intent for murder in the second degree.³⁴ It is not, however, essential that there should have been an actual intent upon the part of the operator to kill the deceased. The necessary malice may be inferred or implied where the driver acts so recklessly or wantonly as to manifest a depravity of mind and disregard of human life ... for example, one who, when in an intoxicated condition, drove an automobile at a reckless speed along a principal street of a village, into a collision with another car, which results in the death of its occupant, may be found guilty of murder in the second degree. ...³⁵

Does one have to be driving at great speed, or on the wrong side of the road, to display a recklessness manifesting extreme indifference to human life? It is not the standard of one's driving while intoxicated that matters; it is the fact that one drove after drinking heavily, when incapable of controlling a motor vehicle. Consider the case of William Rowan. Rowan was once sentenced to 45 days in jail, a mild sentence for a California driving record that carried six convictions for drunk or reckless driving, two for hit and run. After leaving a downtown Santa Anna bar, Rowan drove onto a sidewalk, killing four-year-old David Gunderman, who was waiting for the ice-cream man. After hitting the child, Rowan casually slumped in his seat and lit a cigar. Police measured his blood alcohol

³¹ *Regina v Porter*, 12 Cox C.C.444 (1873)

³² *State v Weisengoff*, 85 W. Va.276 101 S.E. 450 (1919).

³³ Latin words referring to an act that is “wrong in itself,” in its very nature being illegal because it violates the natural, moral or public principles of a civilized society. In criminal law it is one of the collections of crimes which are traditional and not just created by statute, which are “malum prohibitum.” Example: murder, rape, burglary and robbery are malum in se, while violations of the Securities and Exchange Act or most “white collar crimes” are malum prohibitum.

³⁴ A 1964 study I2. See, for example, *Hardin v. State*, 210 Tenn. ii6, 355 S.W.2d I05 (i962); *Staggs v. State*, 210 Tenn. I75, 357 S.W.2d 52 (i962); *Shiflet v. State*, 2i6 Tenn. 365,392 S.W.2d 676 (i965); *Farr v. State*, 59I S.W.2d 449 (i979).

³⁵ American Jurisprudence, vol. 5, p. 929; cited in *Cockrell v. State*, footnote 11 above.

content at .27.³⁶ This case is an example of what has been termed "*homicide by excessive risk taking*." If such homicide can constitute second-degree murder, the question arises, what is "excessive" risk taking? It is illegal in most US states to drive with a blood alcohol content of .10 percent or higher. To give some idea of how much alcohol Rowan must have consumed: to reach a level of .20 percent, an average-sized man must drink, over the course of a couple of hours, twelve beers or a quart of wine or six or seven martinis. Nor is Rowan atypical.

Consuming a Dozen Vodkas...

A 1964 study^{37 38} found that 46 percent of New York drivers responsible for fatal accidents had blood levels at .25 percent or higher.³⁹ Research indicates that the probability of having a serious accident increases dramatically, the more alcohol is consumed: the more one drinks, the greater the risk to human life. Driving after consuming a dozen vodkas or a dozen pints of beer is inherently reckless, because it is virtually impossible to drive with due care in that condition.

The same reasoning applies to anyone who drives when incapacitated, not only to those whose incapacity is caused by intoxication. A diabetic who goes into frequent comas, or has hypoglycemic episodes⁴⁰ unpreventable by medication, but nevertheless drives is as reckless as the drunk driver: both are equally incapable of driving safely, both are equally aware of the danger they pose to others. Such a diabetic who insisted on continuing to drive might reasonably be convicted of second-degree murder, if he killed someone. Admittedly, experts disagree as to the exact nature of the risk caused by the inebriated driver. Some regard drinking drivers as a highly dangerous group. They point out that the drinking driver runs into others four times as often as he is run into; 44 per cent of the drivers killed in a

³⁶ "The War Against Drunk Drivers," p. 36.

³⁷ See, for example, *Hardin v. State*, 210 Tenn. 116, 355 S.W.2d 105 (1962); *Staggs v. State*, 210 Tenn. 175, 357 S.W.2d 52 (1962); *Shiflet v. State*, 216 Tenn. 365,392 S.W.2d 676 (1965); *Farr v. State*, 591 S.W.2d 449 (1979).

³⁸ See, for example, *Hardin v. State*, 210 Tenn. 116, 355 S.W.2d 105 (1962); *Staggs v. State*, 210 Tenn. 175, 357 S.W.2d 52 (1962); *Shiflet v. State*, 216 Tenn. 365,392 S.W.2d 676 (1965); *Farr v. State*, 591 S.W.2d 449 (1979).

³⁹ I5. Gordon McKay Stevenson, Jr., "*The Emergence of Non-Skid-Row Alcoholism as a 'Public Problem,'*" in Brian Freeman, ed., *Drunk Driving Cases: Prosecution and Defense* (New York: Practising Law Institute, 1970), p. 64.

⁴⁰ Diabetic shock occurs when blood sugar levels drop dangerously low. Diabetic shock is not a medical term, but people often use it to describe a state of severe hypoglycemia that requires another person's help.

crash for which they are not responsible are killed by drinking drivers.⁴¹ Other studies indicate that the relative probability of a drinking driver's causing an accident is 45 times greater than that of a driver who has not been drinking if his blood alcohol level is .18 percent. Drinking drivers kill themselves at a higher rate than they kill the rest of the population, but they are still highly dangerous.

Homicide by Reckless Driving – Manslaughter?

In cases of homicide by excessive risk taking, what distinguishes manslaughter from murder? The usual test is that murder requires evidence of “*extreme indifference to the value of human life*” and of course the Mens Rea element.⁴² Arson, and shooting into a crowded room are clear examples of dangerous behaviour with no social utility⁴³ or justification. Courts have been more reluctant to treat homicide by reckless driving as manslaughter or murder, partly because driving is seen as an ordinary activity, with social utility, while arson and shooting are not. However, whatever the utility for driving, drunken driving has no social utility. It presumably has utility to the drunk⁴⁴ otherwise, he wouldn't drive.

However, it has no social utility; that is; it is not an activity which benefits society as a whole, or one which we as a society have any reason to encourage. The ordinariness of driving should not blind us to the dangerousness of drunk driving. A related point is that a car, unlike a gun, is not thought of as a lethal weapon: the decision to wield a gun may itself be thought to betray a wicked purpose, and so to be worse than mere recklessness. This is apparently the reasoning of Rollin M. Perkins, who classifies homicide by reckless driving as manslaughter, but shooting into a house or train “just for kicks” as murder, even though both may be equally hazardous. “*The difference is that in the act of the shooter there is an element of viciousness-an extreme indifference to the value of human life-that is not found in the act of the motorist.*”⁴⁵ The first point to note is that

⁴¹ Freeman, p. 159

⁴² Model Penal Code, §210.2(1)(b). 9. Relevant cases include *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924) and *Banks v. State*, 85 Tex. Crim. 165, 211 S.W. 217 (1919).

⁴³ This means that a risk may be justified if it served a higher purpose. A common example is driving over the speed limit to save someone's life. In cases where the **social utility** (the benefit to society) of an act outweighs the probability and magnitude of the risk, a standard of care will be lowered.

⁴⁴ See, for example, Guido Calabresi's classic study, *The Costs of Accidents* (New Haven: Yale University Press, 1970).

⁴⁵ Perkins on Criminal Law (Mineola, NY: The Foundation Press, Inc., 1969), p. 37.

a car has the potential to be as lethal as a gun. Certainly there is no difference where the driver or gunman intends to kill or inflict grievous bodily harm. Even where there is no such specific intent, a car can be used as a means of frightening pedestrians "just for kicks." In such cases, courts have not hesitated to convict of murder if any death results, holding that such behaviour exhibits such a high degree of recklessness and disregard for the rights of others that a jury is justified in inferring malice. As the judge wrote of the defendant in one such case, ". . . *he was possessed of a heart regardless of social duty and fatally bent on mischief.*" It may be thought that the crucial distinction between manslaughter and murder, in cases of homicide by excessive risk taking, is and should be whether the defendant had a heart fatally bent on mischief. However, it could be argued that extreme indifference to the rights and lives of others can be shown equally by a decision to engage, without justification, in extremely risky behavior. The drunk driver does not want to hurt or frighten anyone; he nevertheless puts lives at risk.

Perhaps he is not as morally bad as one who drives recklessly in order to frighten people, but absence of malevolent motive (as, for instance, in cases of mercy killing) does not itself bar a murder conviction: what makes homicide by a drunk driver an appropriate subject for a murder conviction is not the wickedness of the behavior, but its recklessness.⁴⁶

Extreme Indifference to Human Life

For tolerance of injury and death for the sake of social utility is acceptable only in the case of accidents. The fact that we, as a society, are willing to tolerate the accidental loss of life resulting from socially useful activities is consistent with forbidding negligence, recklessness, and the intentional infliction of harm. In many cases, causing death by drunk driving is not a tragic accident, but tantamount to the intentional infliction of harm, comparable to shooting into a crowded room, or setting a house on fire. If

⁴⁶ *Cockrell v. State*, 135 Tex. Crim. 218, 177 S.W.2d 105 (1938). This content downloaded from 169.226.11.193 on Thu, 10 Oct 2013 08:29:17 AM All use subject to JSTOR Terms and Conditions 284
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these are reasonably viewed as second-degree murder, when death results, so should some (though not all) cases of causing death by drunk driving. In cases of homicide by excessive risk taking, what distinguishes manslaughter from murder? The usual test is that murder requires evidence of "*extreme indifference to the value of human life*".⁴⁷ Arson or shooting into a crowded room-these are clear examples of dangerous behavior with no social utility or justification.⁴⁸

Werewolf at Full Moon?

There is nothing unreasonable or unfair about expecting the chronic heavy drinker to make other travel arrangements when he is going to drink. He could have given away his keys, or got a ride, or called a taxi. His recklessness lies in his failure to do any of these things. The capacity to plan in advance for his future incapacity differentiates the alcoholic from the insane person. Both are, by hypothesis, incapable of controlling their behaviour at the time they cause harm.

But the alcoholic has sober moments in which he can take precautions; the insane person does not, as he has no reason to believe he will become insane, or that he will cause harm at that time. The situation of an insane person becomes more analogous to the drunk driver if the insanity consists of repeatable periods in which dangerous, uncontrollable behavior occurs: say, he becomes a werewolf at full moon. If you know you're going to attack people if you go outside when the moon is full, then you ought to take precautions to ensure you don't go outside then. Lock yourself in. Alert the police. Commit yourself voluntarily to a mental hospital. After all, lives are at stake. A werewolf who does none of these things, who attempts to persuade himself that this time it won't happen, or he'll control himself, is guilty of murder when he kills someone. So is the alcoholic drunk driver. Of course, this assumes that our drunk driver is capable of making rational plans during his sober moments. If, however, alcohol has so damaged his brain that he cannot make rational plans, then of course he cannot control his behaviour, and he is no more responsible than a lunatic. Unlike many lunatics, he is not harmless. He is a menace, and for that reason should be institutionalized, though not punished. Therefore, although the alcoholic has less (or no) control over his drinking than the

⁴⁷ Model Penal Code? 2Io. 2(I) (b). 9. Relevant cases include *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924) and *Banks v. State*, 85 Tex. Crim. i65, 2II S.W. 217 (1919).

⁴⁸ 9. Relevant cases include *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924) and *Banks v. State*, 85 Tex. Crim. i65, 2II S.W. 217 (1919).

ordinary social drinker, intoxication is even less of an excuse for him than for the inexperienced inebriate, just because he knows that he will become intoxicated and that he endangers others by driving. If he has the capacity to act rationally when not intoxicated, he is morally required to take steps to ensure that he does not drive after he gets drunk. Given the absence of adequate public transportation in many parts of the country, what is the alcoholic to do? If he stops driving, he may lose his job, his livelihood. The point of this objection is not that drunks ought to be allowed to drive, if doing so is required by their jobs, any more than alcoholic surgeons should be allowed to perform surgery. The point is rather that it seems hard to blame someone severely for doing something dangerous when he had very little choice. Is it not unreasonable to expect the alcoholic to make alternative transportation arrangements when these are limited in many areas? And does this not mitigate his blame somewhat? In the first place, there is no inconsistency in acknowledging that there ought to be more and better public transportation, and insisting that people who drive be capable of driving carefully.

Deterrence

Many people argue for stiffer penalties for drunk driving on grounds of deterrence. Belief in deterrent efficacy is implicit in the claim that judges should give tougher sentences in order to protect us from drinking drivers. It seems intuitively obvious that, if a given behavior has severe penalties attached to it, people are more likely to think twice about doing it. If one risks losing one's license, or even going to jail, surely one will be less likely to drink and drive. This has been the reasoning behind drunken driving legislation in Scandinavia, where drunk drivers have faced revocation of their licenses and mandatory jail sentences since the 1930s. The Scandinavians claim that this has worked to reduce the number of automobile fatalities. In the words of one Norwegian writer:⁴⁹

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“The awareness of hazards of imprisonment for intoxicated driving is in our country a living reality to every driver, and for most people the risk seems too great. When a man goes to a party where alcoholic drinks are likely to be served, and if he is not fortunate enough to have a wife who drives but does not drink, he will leave his car at home or he will limit his consumption to a minimum. It is also my feeling although I am here on uncertain grounds-that the legislation has been instrumental in forming or sustaining the widespread conviction that it is wrong, or irresponsible, to place oneself behind the wheel when intoxicated”.

There is another problem with attempts to deter drinking drivers by increasing the penalties for doing so, even if the laws are enforced. It is that the drivers responsible for the great bulk of alcohol-related crashes constitute a minority of drivers. They are the alcoholics or problem drinkers who have typically consumed a vast quantity of alcohol before driving. Stiffer penalties and social disapproval are unlikely to have much effect on these drivers.

So the drivers who are the problem are by and large undeterrable, while the drivers who may be deterred by tough legislation are not the primary cause of the problem.⁵⁰ In Great Britain, the charge of *Causing Death by Dangerous Driving* - Section 1 Road Traffic Act 1988, (amended 1991) and *Causing Death by Dangerous Driving under the influence of drink or drugs* (Section 3A Road Traffic Act - is a much more serious charge than *Causing Death by Careless Driving*, with a maximum penalty of 14 years in prison, but its definition differs in only one word: it can be brought when driving '*fell far below the standard expected of a careful and competent driver*'. A similar charge of *Causing Death by Careless Driving* when under the influence of drink or drugs carries the same maximum penalty. These charges should be brought when there are provable aggravating factors, such as excessive speeding above the limit, overtaking on a blind bend, or driving over the legal limit for alcohol. In most cases, however, the sentence meted out by the courts is much lower than the maximum, unless there are many aggravating factors and multiple deaths. In addition, the tiny difference in definition between this charge and the charge of death by careless driving means in many cases the more serious charges are not

⁵⁰ This dilemma is not unique to drink driving. Garry Wills makes a similar argument about the deterrent effectiveness of prison sentences in general. See his review of Tom Wicker's: "*A Time to Die*" in the New York Review of Books. 3 April 1975, p.-7.

brought, and the lesser charge is brought instead, with its greater chance of conviction, but far lower penalties. An equivalent, under Republic of Ireland traffic laws, to causing death by dangerous driving, is "*dangerous driving causing death*". The maximum period of imprisonment, for such a conviction, is 10 years. The minimum licence suspension is 5 years. Both the UK and Republic of Ireland are parties to the *1998 EU Convention on Driving Disqualifications (98/C 216/01)* and therefore convictions for dangerous driving causing death in the UK are counted on a person's Republic of Ireland driving record.

Drunken Driving a 'fait accompli'

Drivers who take a life through inexcusable recklessness are sometimes merely fined. We must recognize that some "unintentional" killings are morally worse than some intentional ones, and should be punished accordingly. Those who intentionally kill are sometimes tormented beyond breaking point by those they kill; the victims of drunk drivers are invariably innocent strangers.

Consider the case of seventeen-year-old Richard Jahnke who shot and killed his father, who had severely beaten him, and sexually abused his sister, throughout their childhood.⁵¹ The authorities Richard approached could not believe the violence he reported could take place in such a comfortable middle-class home. Can it seriously be maintained that Richard's crime is worse than that of Clarence Busch, or that his sentence of five to fifteen years in jail is fair, compared with the typically light sentences given those who commit vehicular homicide? If justice is to be done, it must be seen to be done and we must recognize drunk driving for the dangerous and antisocial activity it is. Drunk drivers who kill must no longer be allowed to hide behind excuses, such as that they were too drunk to know what they were doing, or that they cannot help drinking. Habitual drinkers who drive after drinking to excess take unjustifiable risks with the lives of the rest of us. It could be argued that when they cause death by drunken driving, they murder.⁵² As with many non-traffic crimes, there are recurrent campaigns to increase penalties for drinking-driving. These are efforts to make the image of the drinking-driver more pointedly deviant

⁵¹ "*When Kids Kill Their Parents*," Newsweek, 27 June 1983, p. 35.

⁵² See, for example, William Gaylin, *The Killing of Bonnie Garland: A Question of Justice* (New York: Simon and Schuster, 1982).

and thus place the act further outside the social order, as not typical of good citizens or approvable and acceptable. In such campaigns the image of the offender as the potential "killer-drunk" is given prominence. Advocates point to instances of innocent victims of drunken drivers and demand a tougher policy. *"How many of us could be the grieving survivors, or indeed the victims of an irresponsible fool that is let loose on our streets and highways with a potentially dangerous weapon"* ⁵³ As most law-abiding and right-minded people will agree, when a person knowingly drinks and becomes inebriated, then drives and kills an innocent person or persons, they are guilty of causing death by drunken driving; they then murder or are at the very least guilty of vehicular manslaughter. Was Rowan (above) guilty of vehicular homicide and his ridiculous 45 day jail sentence?

Nearer to home and in view of the increasing number of drunken driving offences committed each year throughout the European Community, one has to ask whether self-induced drunkenness followed by drunken driving is a *fait accompli*, and whether it is becoming a socially acceptable form of vehicular homicide or at least vehicle manslaughter. Bear in mind, the drunken physician who causes the death of a patient is not merely negligent, but is guilty of manslaughter: his having treated a patient while drunk is regarded as being intrinsically reckless.

Conclusion

In many cases, causing death by drunk driving is not a tragic accident, but tantamount to the intentional infliction of harm, comparable to shooting into a crowded room, or setting a house on fire. If these are reasonably viewed as second-degree murder, when death results, so should some (though not all) cases of causing death by drunk driving. Many people argue, notwithstanding, that becoming intoxicated is necessarily reckless conduct. Some people rest their view on the fact that it is widely known that intoxication is inherently dangerous. But we have not emphasized (enough) to the public not to consume alcohol or pharmaceuticals because of the risk of criminality, nor have we made prior rules against such behavior. To the contrary, members of our society are inundated with advertisements extolling the pleasures and benefits of alcohol and

⁵³ (Los Angeles Times, 27 October 1973, Letter to the Editor, pt. 2, p. 4), 31

promoting the ideal of better living through certain pharmaceuticals. We certainly have not pointed, with a few notable exceptions such as impaired driving, to specific dangers that consuming intoxicants might produce. A person is accountable for what he wills. When in the exercise of the power of free choice, when a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by criminal law, he must accept the sanctions the law has provided for the purpose of discouraging such conduct. If justice is to be done, it must be seen to be done and we must recognize drunk driving for the dangerous and antisocial activity it is. Justice demands no less. Perhaps we should take a leaf out of the US system where vehicular manslaughter while intoxicated is known as a “wobbler” offense and can be filed as either a felony or a misdemeanour. The penalty for a Class C Felony (vehicular manslaughter) by drunken driving in states like North Dakota can be a life sentence without parole and in Alaska the penalty can be one to 99 years in prison.

Many will argue that the penalties in some US states are extreme and should be modified, but how do you convince the grieving relatives of a drunken driving victim to agree with reduced penalties. Even though there is an increase in drunken driving offences in some jurisdictions, vehicular homicide - which is a heinous crime - can never be socially acceptable by all law-abiding and responsible citizens. As a judge wrote of the defendant in one such case, “. . . *he was possessed of a heart regardless of social duty and fatally bent on mischief.*” The actions of a chronic alcoholic, who drives to a bar, gets loaded, then drives and kills a child standing on the footpath is inexcusable. That child (David Gunderman above) was not “lying in wait” to be killed but innocently standing on the footpath and waiting for the ice-cream man. The drunk driver does not have to drive; he chooses to. And his choice seems, in the circumstances, to manifest extreme indifference to the value of human life. Finally, do you think that justice is well served when a car thief is given a significant jail sentence but someone (like Rowan above) who has taken a life through inexcusable drunken and reckless driving is merely given a 45 day prison sentence and a paltry financial penalty? You decide. And as Lamar C. J. pointed out in the Canadian case of ***R v Penno [1990]***: “*intoxicated offenders are not completely blameless*”.⁵⁴

⁵⁴ *R v Penno* [1990] 2 SCR 865.

