Recording Murder: Videos depicting homicide and the law.
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This chapter does not look at the substantive law of homicide but instead focuses on what the legal liability should be in respect of those who record or disseminate footage of a homicide. The chapter will consider the legal liability of all those within the chain of production (ie producer, distributor and possessor). It will consider whether the existing law tackles such videos, whether there is a need for the law to tackle such videos and ultimately whether the law is in need of reform.

The recording of homicides is a controversial issue. For many years, there has been a folk-lore of the so-called 'snuff video', which was the recording of a real killing, supposedly produced for the purposes of sexual gratification.[1] Parliament ultimately criminalised the possession of such videos,[2] although little evidence was adduced about their existence. Indeed, there has always been doubt as to whether snuff videos exist.

The Internet has arguably changed this. Whilst there undoubtedly remains scepticism about whether 'snuff' videos exist, there are undoubtedly videos that do show the killing of a person. The most notable of these are perhaps the videos that have been posted by terrorists, such as Daesh,[3] particularly at the turn of the decade when hostages were shown being executed.[4]

There are also videos that are not related to terrorism. Whilst few in number, there are some that are particularly notable. One of the most well-known concerned Steve Stephens, who posted a video on Facebook that showed him killing Robert Godwin in Cleveland, Ohio.[5] The reason behind posting this video is unclear, but nonetheless it showed him killing his victim. It was almost two hours before Facebook eventually removed the video.[6] Perhaps the most infamous is that entitled '1 Lunatic 1 Icepick'. This showed the torture and ultimate killing of Jun Lin by Luke Magnotta. The video has gained notoriety because it was picked up by so-called 'Gore' websites.[7] These are websites that host extreme material. Often described as 'real news' or 'uncensored news', they host videos that show life and death in an unfiltered way.

This chapter will consider the issue in three parts. The first two will consider whether the law currently criminalises the production, distribution or possession of videos of murder. In doing so, it will draw a distinction between non-terrorist and terrorist-related killings. The reason for doing so is that it is widely acknowledged that (most) terrorism is dealt with by distinct laws, and that these laws tend to be more intrusive than traditional criminal laws.[8] The justification for this distinction is sometimes contested, but it is commonly thought that the state has the right to protect itself and its citizens from attacks for political or ideological reasons.[9] The third part will

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1 E. Jonson and E. Schaefer 'Soft core/hard gore: Snuff as a crisis in meaning' (1993) 45 *Journal of Film and Video* 40-59.

2 *Criminal Justice and Immigration Act 2008*, s.63.

3 For a commentary on the impact of this see S.M Friis ' "Beyond anything we have ever seen": beheading videos and the visibility of violence in the war against ISIS' (2015) 91 *International Affairs* 725-746.

4 For a discussion on

5 See, for example, http://www.independent.co.uk/news/world/americas/cleveland-ohio-facebook-killer-shooter-steve-stephens-robert-godwin-a7686771.html (last accessed 19.11.17).

6 See, for example, http://www.nydailynews.com/news/national/facebook-examining-policy-video-robert-godwin-murder-article-1.3066572 (last accessed 19.11.17).

7 M. Alverez 'Online spectatorship of death and dying: Pleasure, purpose and community in Bestgore.com' (2017) 14 *Participations: Journal of Audience & Reception Studies* 1-21.

8 See the first chapter of C. Walker *Blackstone's Guide to the Anti-Terrorism Legislation* (3rd Edn. 2014, Oxford: OUP).

9 *Ibid.*, pp.1-4.

consider why some seek to criminalise these videos and whether this should be the subject of the criminal law.

Non-Terrorist Killings

There is scant evidence that there are UK-based homicide videos in circulation, although that is partly due to luck rather than intention. In *R v Skeggs and Field*[10] the appellants were two of a group of four men who attacked a man sleeping in a bus shelter. The Court of Appeal holding that the attack 'was simply for the pleasure of inflicting injury, coupled with the decision to film what was to be done'.[11] As it happened, the victim did not die although the Court of Appeal noted 'it was a matter of chance whether or not he died'.[12] Whilst therefore, this did not lead to a homicide video, it is clear that the defendants did not care whether the victim had died or not, and therefore it was a matter of pure luck that it did not record a homicide. It serves as an exemplar, however, that people are prepared to record attacks that could lead to death.

Recording Homicide

The first issue is the creation of a recording of a killing. Is making such a recording illegal? If so, under what law? The difficulty with this question is that there are lots of different reasons why a murder could be recorded. For our purposes, let us consider three situations:

> **Scenario A**
> S is walking along with a group of friends. They spot V, someone they intensely dislike and they all chase after him. X and Y grab V and start to punch him. S records all of this. V records this, and records X pulling a knife and stabbing V twenty times. V dies.
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> **Scenario B**
> S is out for a walk when he witnesses a fight. He watches X and Y fighting. He sees X grab a knife and stab V to death. He keeps the footage.
>
> **Scenario C**
> S hears a noise outside his house. He looks out of the window and sees X and Y fighting. He starts to record the footage. He realises that X has a knife in his hand and he records Y being stabbed to death. He keeps the footage.

For these purposes, let us assume that in none of these instances does S either telephone the police or alert them to the fact that he has the footage. Is there any liability?

Arguably the easiest scenario to deal with is scenario A. As S is part of a group that has led to a killing, the question is whether S could be guilty of murder through joint enterprise. Following *R v Jogee*,[13] there is now only one form of joint enterprise and that is that the parties engage in a common enterprise, with the secondary party intending to assist or encourage the principal. If we assume in Scenario A that S was aware that X and Y were going to attack V, and S's inclusion in the chase and subsequent recording was part of the plan, then S is culpable for murder, in the same way that X and Y are. Indeed, Scenario A is akin to *R v Skeggs and Field*[14] discussed above. It does

10 [2009] EWCA Crim 439.
11 *Ibid.*, at [5].
12 *Ibid.*, at [6].
13 [2017] AC 387.
14 [2009] EWCA Crim 439.

not matter that X and Y were the ones who committed the *actus reus* of the murder, it suffices that S was aware of this, participated in this and encouraged the homicide.

What of scenario B? Here, it can be assumed that S, X and Y do not know each other, and therefore it is unlikely that there could be a common purpose, ruling out joint enterprise. However, it is not necessarily possible to rule out complicity immediately. Section 8, *Accessories and Abettors Act 1861* criminalises the aiding, abetting, counselling or procuring of an offence. 'Abet' means, *inter alia*, to encourage the commission of the offence.[15] In scenario B, there is no evidence that S has directly encouraged the commission of the offence (eg by urging X and Y to attack V), but the more interesting question is whether there can be implicit encouragement through presence and the recording?

In *R v Coney*[16] the courts held that mere presence does not demonstrate encouragement:

> Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury.[17]

Secondary liability requires actual encouragement. A jury must be sure that D was encouraged and, indeed, that S intended to encourage. *Coney* indicates that where S's presence is non-accidental, the jury should consider the circumstances as to how S was present, and decide whether that makes it more likely that there was encouragement. This was taken further in *Wilcox v Jeffrey.*[18] The *Aliens Order 1920* permitted restrictions to be placed on foreign citizens coming to the UK. In this case, Hawkins, a famous saxophonist, came to the country but his visa did not permit him to work. Hawkins entered the UK with the intention of playing a show. The defendant (Wilcox) was the proprietor of a jazz periodical and so knew of this and attended the show.

Wilcox paid an entrance fee and later wrote a review. The latter is, to an extent, something of a red-herring because encouragement must be at the time of the act and not afterwards. However, the fact that Wilcox knew of the show meant that he undoubtedly fell within the second limb of the dictum in *Coney*. Lord Goddard CJ upheld Wilcox's conviction for aiding and abetting the breach of the Order, noting that because of Wilcox's knowledge of the show, an intention to encourage Hawkins to play and to produce 'copy' for his periodical was present.[19] Clearly the presence of an individual would provide actual encouragement, and thus both elements were satisfied.

Perhaps the most definitive statement was put forward in *R v Clarkson.*[20] Clarkson and two others were members of the Army based in Germany. Upon returning to their barracks, they heard a noise in a room. They entered the room and watched as a teenage girl was raped by a number of soldiers. They were charged[21] with aiding and abetting the rapes. The Court held that there was no evidence[22] that Clarkson had undertaken any positive act to assist or encourage. However, the prosecution sought to argue that his presence encouraged the principals to commit rape.

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15 See *Attorney-General's Reference* No 1 of 1975) [1975] QB 773.
16 (1884) 8 QBD 534.
17 (1884) 8 QBD 534 at 540 per Cave J.
18 [1951] 1 All ER 464.
19 *Ibid* at 466.
20 [1971] 1 WLR 1402.
21 As they were on a military base, English law applied even though the base was on German soil.
22 Although interestingly Megaw LJ, giving the judgment of the Court, expressly qualifies this by saying 'no admissible evidence' [1971] 1 WLR 1402 at 1404.

The court conceded that the presence of people observing the rape could act as encouragement, but the Court emphasised the *mens rea* requirement:

> In a case such as the present… it was essential that that element should be stressed; for there was here at least the possibility that a drunken man with his self-discipline loosened by drink, being aware that a woman was being raped, might be attracted to the scene and might stay on the scene in the capacity of what is known as a voyeur; and, while his presence and the presence of others might in fact encourage the rapers or discourage the victim, he himself, enjoying the scene or at least standing by assenting, might not intend that his presence should offer encouragement to rapers and would-be rapers or discouragement to the victim…[23]

This quote is directly relevant to the issue of murder videos where S comes across the killing of another. The question that has to be asked is whether S *intended* to encourage P to commit the crime. In many instances it would presumably be difficult to prove or show this. The recording may be for some other reason; including the fascination of S or the desire to share the footage (akin to the voyeur in *Clarkson*). It is not enough for S to realise that recording it *might* constitute encouragement: that would be recklessness and the law is clear that it is intent. For that reason, save for situations such as Scenario A, it is unlikely that secondary liability could apply.

In the absence of secondary participation, the most likely alternative offence would be the common-law offence of outraging public decency. In its modern guise, this is an offence that is most commonly used in respect of sexual conduct, but it has been used more broadly in the past,[24] and indeed in recent history.[25]

The contemporary definition of the offence was set out in *R v Hamilton*[26] as requiring two elements:

1. The act was of such a lewd character as to outrage public decency; this element constituted the nature of the act which had to be proved before the offence could be established;
2. That it took place in a public place and must have been capable of being seen by two or more persons who were actually presented…This constituted the public element of the offence which had to be proved.[27]

The first point to note is the offence requires an act and not an omission. The recording of a murder must be an 'act' even if the failure to summon help is an omission. The question will become whether stopping to watch and record a murder could constitute an act that could cause outrage. Depending on the circumstances, this might be possible. It was noted earlier that urinating on a war memorial was deemed to cause public outrage, presumably because people expect greater respect for the fallen. Perhaps the same could be true of recording a murder. People may be outraged by the fact that someone consciously stopped to record the killing of another.[28] Let us take an example:

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23 [1971] 1 WLR 1402 at 1406.

24 See Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com CP No. 193, 2010) at para 3.2 for examples of conduct beyond sexual activity.

25 Philip Laing, a 19-year-old student pleaded guilty to outraging public decency when he urinated on a war memorial (http://news.bbc.co.uk/1/hi/england/south_yorkshire/8342191.stm (last accessed 31.10.17)).

26 [2008] QB 224.

27 *Ibid*., at 235.

28 On this see M.G. Antony and R.J. Thomas ' "This is citizen journalism at its finest": YouTube and the public sphere in the Oscar Grant shooting incident' (2010) 12 *New Media & Society* 1280-1296 who recounts the outrage that appeared online when footage of the killing of a person by law enforcement agents was uploaded by bystanders.

Scenario D

D is walking and notices that a man is strangling his wife in the downstairs of a property. D records the footage, intending to host this online on a 'gore website'.

Would such actions outrage public decency? In *R v Lynn*,[29] it was held that the benchmark was 'common decency',[30] with the test being whether:

> such an act of a lewd obscene or disgusting nature…constitutes an outrage to public decency involving great disgust and annoyance of divers of Her Majesty's subjects.[31]

It will be remembered that it is not the murder that must be lewd, obscene or disgusting, it is the act that would constitute outraging public decency, ie the recording. That said, it is submitted that in situations such as Scenario D, it is quite likely that the public would be outraged by somebody who simply stands and records a murder. What then is the test for outrage? The Law Commission stated that 'the offence caused must be strong enough to amount to shock or disgust: mere distaste or embarrassment would not seem to be enough'.[32] Whilst it will differ depending on the context of the video, it is easy to conceive of situations (such as in Scenario D) where shock or disgust would be caused by a person recording a homicide. To that extent, the 'outraging' aspect of the offence may be satisfied.

The second aspect that must be satisfied is the so-called 'public' element of the offence. It is not enough that something is done which would outrage the public, it must be done in such a way that it can be witnessed. In *Knuller (Publishing, Printing and Promotions) Ltd v DPP*[33] the House of Lords made clear that the act must take place in a public space. This does perhaps act as a significant limiting factor since it means that a murder that took place away from a public space (eg in a house, hotel or private car[34]) would not suffice. That said, it is clear that so long as the public can see the area then it can be considered a public space.[35] Therefore woodland, for example, may be considered a public space even if few members of the public actually visit. Indeed, it has been noted that a private dwelling could be the subject of an offence if it took place in front of the window,[36] although presumably not if the curtains were shut.

The second part of the public element is that it must be capable of being witnessed by more than one person. As the Law Commission notes, 'the requirement is not that two persons saw the act, but that two persons could have seen it'.[37] Again, we must be clear by what 'the act' means. It is not the murder, it is the recording of the murder. In *Rose v DPP*[38] it was made clear that the viewing must take place at the time of the act. The defendant in that case was involved in an act of oral sex in the foyer of a bank, to which members of the public would be able to gain access through

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29 100 ER 394 (1788).

30 *Ibid.* at 395.

31 *R v Mayling* [1963] 2 QB 717 at 726 per Ashworth J.

32 Law Commission, n 25 above, at para 3.21.

33 [1973] AC 435.

34 Whilst a bus has been considered a public place for these purposes (*R v Holmes* (1853) 1 Dears CC 207) a private car is probably not considered to be a public place unless it is deliberately placed somewhere where the public have access. Some support for this statement can probably be found in the *Regulation of Investigatory Powers Act 2000* which considers a private vehicle to be akin to residential premises for the purposes of state surveillance (*Regulation of Investigatory Powers Act 2000*, s.26(5)(a)).

35 Law Commission, n 25 above, at para 3.25.

36 *Ibid.*

37 Law Commission, *Simplification of Criminal Law: Public Nuisance Outraging Public Decency* (Law Com No 358, 2015) at 2.50.

38 [2006] 1 WLR 2626.

swiping their bank cards. The area was monitored by (recorded) CCTV. Whilst there was little doubt that had someone come into the foyer that the act could have been seen, there was no evidence that anybody was in the foyer at the time of the act. The bank staff saw the footage the next day but the High Court ruled that this did not constitute an offence because the 'offence was committed when it is committed',[39] meaning that the observation would have to take place at the time the act took place, not later.

In *R v Hamilton*[40] the Court of Appeal stated:

> The public element in the offence is satisfied if the act is done where personare present and the nature of what is being done is capable of being seen; the principle is that the public are to be protected from lewd, obscene or disgusting acts which are of a nature that outrages public decency and which are capable of being seen in public.[41]

People must be present and not merely *capable* of being present.[42] Thus it is necessary to show that more than one person was present at a location close to the murder who would be capable of seeing that D was recording the murder. It is submitted that in some instances this will simply not be satisfied, although it is conceded that it may in others. However, this brings about an inconsistency in criminalisation. The same action (recording a murder) will result in two different results in terms of criminal liability depending on who was present at the scene. This problem is made worse by the inconsistency of public space. Accordingly, whilst some recordings would be caught by this offence, many would not.

Distributing videos

The next stage in the cycle is distribution. Digital communication technologies mean that uploading camera footage to the Internet, or sending it to others, is simple. This poses further challenges to the law, particularly in deciding whether such dissemination should be permissible?

The most obvious relevant legislation is the *Obscene Publications Act 1959* (OPA). Whilst commonly thought to apply only to sexualised materials, the OPA 1959 has a much broader reach. Section 2(1), OPA 1959 criminalises, *inter alia*, '…any person who, whether for gain or not, publishes an obscene article'. The test for obscenity for the purposes of the Act is:

> ….an article shall be deemed to be obscene if its effect…is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[43]

Thus the test for the OPA 1959 differs from the common-law definition of obscenity.[44] That obscenity is not restricted exclusively to sexual matters is demonstrated by some of the cases that have been tried under the Act. In *R v Calder & Boyars Ltd*[45] a publishing company was convicted under the OPA 1959 for publishing 'Last Exit to Brooklyn', a book that focuses on drug use and

39 *Ibid.*, at 2632.
40 [2008] QB 224.
41 *Ibid.*, at 243 per Thomas LJ.
42 *R v F* [2010] EWCA Crim 2243.
43 *Obscene Publications Act 1959*, s.1(1).
44 That is best thought of as offending contemporary standards of propriety: see *R v Stanley* [1965] 2 QB 327.
45 [1969] 1 QB 151.

violence, and which is now considered a literary classic.[46] Whilst this decision was reversed on appeal, it was not because the content was not considered capable of constituting obscenity, but rather that the judge had not properly directed the jury as to whether it was possible for the defence of artistic merit to be raised in this case.[47] Similarly, in *John Calder (Publications) Ltd v Powell*[48] a bppl that glorified drug taking was considered capable of being obscene, and in *DPP v A and B. C. Chewing Gum Ltd*[49] a set of 'chewing gum' cards that depicted scenes of battles were considered capable of being obscene.[50]

In *Calder & Boyers* the Court of Appeal stated that the essence of 'deprave and corrupt' was whether a person was morally corrupted by the article.[51] It was also noted that the test relates to the likely reader and not every conceivable reader.[52] This can be important. The book in the *Calder & Boyers* was an expensive publication, meaning only serious (interested) readers were likely to purchase the book.

Accessibility has become a key battle-ground in respect of the Internet. Whilst the World Wide Web is considered to be an open resource, this is not always the case, and sometimes material can be hidden in such a way that only few can access it. The first-instance decision in *R v Darryn Walker*[53] is illustrative. D was charged under the OPA 1959 for publishing an article that imagined the kidnap, rape and murder of the members of 'Girls Aloud', a popular female singing band. Central to the prosecution case was that 'Girls Aloud' was popular with teenagers, and therefore there was a risk that they would find this material and be depraved or corrupted by it. The defence commissioned expert evidence to show that it was difficult to find the piece without knowing where to look, meaning it would only appeal to a select audience. The prosecution offered no evidence and Walker was acquitted. Similar logic can be found in *R v Perrin.*[54] A website provided access to pornographic content focusing on, *inter alia*, coprophilia and coprophagia. Two counts were proffered at first-instance. The first related to material on the 'preview' page (ie to which anyone had access). The second count related to content that was to be found behind a 'pay-wall', meaning that people would have to pay to view the footage. The returned a guilty verdict for count one but an acquittal for count two. The logic must be that those who paid for the footage were not being corrupted.

Whilst the courts have stated that it is possible for corrupted people to continue to be corrupted,[55] presumably because a failure to do so would lead to the position whereby once a person had been corrupted they could be freely supplied with material that would otherwise be considered illegal, they have also noted that if material is so obscene as to repel people rather than tempt them, then there can be no corruption.[56] That said, this is subject to a limitation. It was made clear in *DPP v Whyte*[57] that corruption is not all or nothing. Lord Wilberforce stated that the OPA 1959 'equally

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46 At the time of the appeal, it was noted that the book had received literary praise from critics: see [1969] 1 QB 151 at 165.

47 [1969] 1 QB 151 at 172.

48 [1965] 1 QB 509.

49 [1968] 1 QB 159.

50 The appeal in that case concerned whether expert evidence could be tendered by the prosecution to show the psychological effect the cards could have on children. That evidence was only relevant if the cards were, at the very least, capable of being obscene.

51 [1969] 1 QB 151 at 167.

52 *Ibid.*, at 168.

53 (2009), Newcastle Crown Court.

54 [2002] EWCA Crim 747.

55 *DPP v Whyte* [1972] AC 849 at 863 per Lord Wilberforce.

56 This is known as the aversion argument and is perhaps best articulated by Lord Widgery CJ in *R v Anderson* [1972] 1 QB 304 at 315.

57 [1972 AC 849.

protects the less innocent from further corruption'.[58] Whilst would many perhaps take issue with the suggestion that the OPA 1959 is a preventative piece of legislation, the argument is probably sound. Corruption is not a switch: you are not either corrupted or not corrupted. That said, it must be accepted that some people who view material would not be further corrupted and, if they are the likely viewers, then an acquittal must follow.[59] This returns us to the point in *Walker* and *Perrin* above. Culpability is likely depend on where footage is hosted, how it is described and who the likely audience is.

If the OPA 1959 does not apply then the only other alternative would be to rely on the *Communications Act 2003*. Section 127 of this Act creates the (summary) offence of, *inter alia*, sending by means of a public electronic communications network a message that is 'grossly offensive, or of an indecent, obscene or menacing character'.[60] It would be difficult to argue that posting or otherwise distributing a video that depicted a murder would not be grossly offensive or obscene,[61] and thus culpability is likely.

Possession of Murder videos

The final stage of the cycle of production is possession. This is perhaps a relatively easy issue to deal with. The general rule of obscenity is that personal possession is not criminalised. Child pornography was the first illicit material where simple possession was criminalised,[62] but this is thought to be justified on the basis that possession harms a child, partly through secondary victimisation.[63]

There is no current statute that criminalises the simple possession of murder videos in their own right. The only piece of legislation that could criminalise certain videos of homicide would be the *Criminal Justice and Immigration Act 2008* which criminalises the possession of extreme pornography.[64] However, illicit material for these purposes bears a very particular definition. To come within the offence, it must be both pornographic and extreme.[65] 'Extreme' includes 'an act which threatens a person's life'.[66] Whilst it refers to 'threatening', the wording must also include actual killings. However, the principal difficulty will be the requirement that the footage is pornographic. This means 'it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal'.[67] It will be remembered that there is considerable doubt as to whether snuff videos exist, but, in any event, the kind of footage that would be obtained in scenarios A-D would simply not meet this criterion. Accordingly, simple possession is not currently illegal.

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58 *Ibid.*, at 863.

59 In *R v Commissioner of the Police of the Metropolis, ex parte Blackburn and Another (No 3)* [1973] QB 241 Lord Denning MR suggested that this had taken the form of trickery where its skilful advancement would lead to an acquittal (at 250). His Lordship suggested that the definition of 'obscene' needed amending although this has not happened.

60 *Communications Act 2003*, s.127(1)(a).

61 The latter does not bear the OPA 1959 definition of obscenity but rather the common-law definition that it offends against recognised standards of propriety.

62 *Criminal Justice Act 1988*, s.160.

63 See S. Ost 'Children at risk: Legal and societal perceptions of the potential threat that the possession of child pornography poses to society' (2002) 29 *Journal of Law & Society* 436-460.

64 *Criminal Justice and Immigration Act 2008*, s.63.

65 *Ibid.*, s.63(2).

66 *Ibid.*, s.63(7)(a).

67 *Ibid.*, s.63(3).

Terrorist Killings

The second part of this chapter will look at the same stages, but in the context of terrorism killings. Terrorism is defined as:

> The use or threat of action where:
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> (1) It:
> (a) involves serious violence against a person;
> (b) involves serious damage to property;
> (c) endangers a person's life (other than the person committing the act).
> (d) creates a serious risk to the health or safety of the public, or a section of the public, or
> (e) is designed to seriously interfere with or seriously to disrupt an electronic system.
> (2) the use of threat is designed to influence the government or international governmental organisation, or to intimidate the public or a section of the public, and
> (3) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.[68]

For our purposes we need not critique this definition[69] as we are simply examining the current law. As with the previous section, let us use an example to assist our examination:

> **Scenario E**
> S, A and B travel to a shopping centre. They grab a victim (V) and decapitate her in the presence of everyone, making clear whilst doing so that this is in support of their cause. A held V down whilst B killed her. S recorded the whole incident.

Assuming 'the cause' is political, religious, racial or ideological (and it would be difficult to think of many causes that would not fit within this definition), then this would clearly meet the definition of terrorism.

Recording a Killing

Unlike the discussion that took place in the first part of this chapter, it is unlikely that complicity would be particularly difficult to prove in respect of Scenario E. Quite clearly S is aware of what is going to happen and this would appear to be a classic example of joint enterprise. S is clearly intending to encourage the killing and both A and B will be encouraged by S's actions.

What would the position be if S was arrested *en route* to where the murder was to take place? Section 1(4), *Criminal Attempts Act 1981* precludes an attempt to aid, abet, counsel or procure an offence. Given S would not be the person who would kill V, then even if proximity could be shown,[70] she could not commit the offence of attempted murder. A more relevant offence would be s.5, *Terrorism Act 2006* which criminalises the preparation of terrorist acts. This states:

> A person commits an offence, if with the intention of-

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68 *Terrorism Act 2000*, s.1(1) when read in conjunction with s.1(2).

69 Although others have. Most notably, David Anderson QC, when serving as the Independent Reviewer of Terrorism Legislation (D. Anderson *The Terrorism Acts in 2012* (2013, HMSO: London). For academic critiques see, most notably, Walker, n 9 above, pp.7-19.

70 An attempt requires more than 'merely preparatory steps' (*Criminal Attempts Act 1981*, s.1(1)).

(a) committing acts of terrorism, or
(b) assisting another to commit such acts,

he engages in any conduct in preparation for giving effect to his intention.[71]

The offence is punishable by a maximum sentence of life imprisonment,[72] and thus it is clearly a serious crime. It has been noted that the offence is deliberately broad[73] and thus almost any act will suffice. There is the intention that the act is done with the intention of furthering terrorism, and in light of the fact that acts could include otherwise innocuous actions this is perhaps the most important part of the offence. However, in many instances this will not be problematic to prove as terrorists tend to leave plenty of evidence as to their motives.[74] Returning to scenario E, if S were to be arrested before she went to the shopping centre then, subject to proof of intent, there would be no difficulty in showing breach of s.5 as the act of travelling (and carrying the equipment to record the attack) would suffice.

Distribution of the footage

The next stage in the production cycle is the distribution. So, in respect of Scenario E, what would the position be if S passed the footage onto T, who then uploaded it onto the Internet?

The OPA 1959 does not seem an appropriate vehicle for criminalising the mischief of what S and T have done. It is not that they have decided to post something obscene: they have posted something that they believe will either terrorise the public or encourage people to take up their cause, and thus terrorism legislation becomes relevant.

The most likely offence would be the dissemination of terrorist publications contrary to s.2, *Terrorism Act 2006*. The basics of this offence are as follows:

> A person commits an offence if he engages in conduct falling within subsection (2) and, at the time he does so-
>
> (a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;
>
> (b) he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or
>
> (c) he is reckless as to whether his conduct has an effect mentioned in (a) or (b).[75]

The relevant conduct in subsection (2) is:

(a) distributes or circulates a terrorist publication;
(b) gives, sells or lends such a publication;
(c) offers such a publication for sale or loan;

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71 T*errorism Act 2006*, s.5(1)
72 *Ibid.*, s.5(3).
73 Walker, n 9 above, at 227.
74 For example, notes, recordings or other postings explaining the reasoning behind the attack.
75 *Terrorism Act 2006*, s.2(1).

(d) provides a service to others that enables them to obtain, read, listen or look at such a publication, or to acquire it by means of a gift, sale or loan;
(e) transmits the contents of such a publication electronically; or
(f) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).

For our purposes, realistically paragraphs (a), (e) and (f) will be most suitable. Indeed, it is interesting that any subsequent paragraphs are required since 'distributes' within paragraph (a) would presumably cover everything other than (f). Presumably, this is simply an example of ensuring that there are no loopholes and that all forms of dissemination are considered culpable.

What then is a 'terrorist publication'? It is a publication that contains matter that is likely:

(a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or

(b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them.[76]

Realistically it is paragraph (a) that would be most relevant. Encouragement and inducement includes glorifying the commission or preparation of the terrorist conduct.[77] Whether the conduct is terrorism must be determined at the time of the conduct, and having regard both to the contents of the publication and the circumstances in which the conduct occurs.[78] It is submitted that the recording in Scenario E is unlikely to be problematic, and the posting of such footage is likely to be considered the glorification of the original act of terrorism. 'Publication' is defined as including any 'matter to be looked at or watched',[79] and therefore the video itself would suffice.

The *mens rea* for section 2 is that the dissemination takes place either with the intent, *inter alia*, to directly or indirectly encourage others to commit acts of terrorism, or being reckless as to whether this happens. In Scenario E, proving intent is unlikely to be problematic. What of the situation where somebody sees the footage online in a niche area and reposts it to a gore site? It is unlikely that the intent to encourage terrorism would be present. That person may not be reckless either given where it is posted. Is a person consciously taking an unjustified risk that a person may be encouraged, directly or indirectly, to commit terrorism? If it is posted to a gore site, then perhaps not.[80] Where it is posted elsewhere, including in more mainstream areas of the Internet, it may be reckless. However, there is a defence for a person to prove that the publication was not his views or had his endorsement, and that it was clear in all the circumstances, that this did not have his endorsement.[81]

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76 *Terrorism Act 2006*, s.2(3).
77 *Ibid.*, s.2(4).
78 *Ibid.*, s.2(5).
79 *Ibid.*, s.2(13)(c).
80 On this see *R v Roddis* [2009] EWCA Crim 585 where it was noted that possession of a video may be for 'morbid curiosity', meaning no offence would take place (at [13]). The same logic can be applied to s.2 because it would mean that where someone posts a video to those who seek out murder videos, then the purpose would not be terrorism but rather morbid curiosity, meaning the *Terrorism Act 2006* should not apply.
81 *Terrorism Act 2006*, s.2(9).

Withholding the footage

An interesting issue arises about what would the position be if a person simply records the footage by chance, so for example, S in scenarios B and C outlined in the first part of this chapter? English law famously does not have a Good Samaritan rule,[82] and thus S would be under no obligation to pass the recorded footage onto the police. The same is not true, however, where the killing is as a result of terrorist action. Section 38B, *Terrorism Act 2000* criminalises a person who 'has information which he knows or believes might be of material assistance' in 'securing the apprehension, prosecution or conviction of another person' where it relates to the commission or instigation of an act of terrorism.[83]

Footage of a murder would unquestionably be material information that *might* be of assistance in the apprehension or prosecution of the suspects, and thus S would need to surrender this footage to the police. A failure to do so is an either-way offence, punishable by up to five years' imprisonment.[84] A defence exists for the defendant to prove that he had a reasonable excuse as to why the information was withheld,[85] but it is unlikely that in most instances this would be relevant for those who simply remain quiet about the fact that they have recorded footage.

Possession

What of the simple possession of these videos? It will be remembered that for non-terrorist killings there is no specific offence that would criminalise those who possess the footage. For terrorism, the most likely offence would be s.58, *Terrorism Act 2000* which, *inter alia*, criminalises those who possess a 'document or record' of a kind likely to be useful to a person committing or preparing an act of terrorism.[86] A recording is undoubtedly a 'document or record',[87] but the question is whether it would be likely to be useful to a person committing or preparing an act of terrorism?

At first sight it would seem difficult to argue that recorded footage of a killing could meet this test. Whilst the press have stated that the downloading of extremist videos can constitute an offence,[88] the courts have been more cautious. In *R v K*[89] the then Lord Chief Justice rejected a suggestion that propaganda is within this offence. Lord Philips stated:

> A document or record will only fall within section 58 if it is of a kind that is likely to provide practical assistance to a person committing or preparing an act of terrorist. A document that simply encourages the commission of acts of terrorism does not fall within section 58.[90]

Whilst *R v K* was later doubted by the House of Lords,[91] this was on different grounds,[92] and thus this comment remains good law. A video such as that envisaged in scenario E, would not provide assistance in the commission or preparation of an act of terrorism, and accordingly would not fall within s.58, meaning that its simple possession would not be an offence. Where the video goes further – for example, stating 'this is how you behead someone with a knife' or 'this is the best

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82 See, for example, A. Ashworth 'The scope of Criminal Liability for Omissions' (1989) 105 LQR 424.
83 *Terrorism Act 2000*, s.38B(1): paragraph (b) being the most pertinent for these purposes.
84 *Ibid.*, s.38B(5).
85 *Ibid.*, s.38B(4).
86 *Ibid.*, 58(1)(b).
87 Defined as including an electronic record (*Terrorism Act 2000*, s.58(2)).
88 See, for example, http://www.independent.co.uk/news/uk/politics/terrorist-propaganda-criminal-offence-new-law-amber-rudd-streaming-watching-extremist-material-isis-a7979986.html (last accessed 19.11.17).
89 [2008] QB 827.
90 *Ibid.*, at 834.
91 See *R v G* [2010] 1 AC 43.
92 The meaning of the statutory defence contained within *Terrorism Act 2000,* s.58(3).

way to stab someone' – then this could come within the scope of s.58 and simple possession would be prohibited. That is a different type of video from that discussed in this chapter.

Should murder videos be the subject of criminal law?

The preceding sections have identified that the recording of a murder and the dissemination or possession of the footage, is not necessarily illegal. Whilst it may be in some instances, it cannot be said that it is always illegal. Some of the distinctions are difficult to justify. For example, take the offence of outraging public decency, it would be odd to say that X should be culpable for recording a murder within the front room of a house, but Y should not, because it took place behind the curtains. In both situations, a murder occurred, and footage was recorded. Either both should be illegal or neither should. Similarly, it would seem odd that the culpability of the dissemination of murder videos should be primarily based on its location on the web rather than the fact that it was distributed.

If it were decided that murder footage should be prohibited, then on what basis should the law act? It is commonly accepted that harm is the most appropriate justification for the criminal law,[93] but who is harmed here? It would seem unlikely that the dead person can be harmed, since harm would suggest damage to an individual. However, the dead are no longer individuals. They are former individuals. Do the dead have rights? From a practical perspective, the European Court of Human Rights has held that an action need not be struck out because the claimant died.[94] That, however, is a very different proposition to initiating action on behalf of the dead. The Court has accepted the notion of 'indirect victims',[95] which are those who are indirectly affected by the alleged breach. Whilst that makes sense in the context of Article 2,[96] it does not follow that this applies to all rights. Any restriction on the footage of a murder would need to be based on Article 8,[97] and yet this is the paradigm of an individual right, excluding indirect victims.[98]

Rosenblatt notes that the dead have certain rights, principally concerned with protecting the remains from interference,[99] but he notes that is very different to granting them universal human rights. He argues that 'living people have responsibilities to the dead, but these are ultimately based on the rules and rights that are best for the living community…the dead body itself has no rights, makes no claims over the future'.[100] What of the concept of dignity, that is often associated with death? Dias has suggested that there should be legally recognised dignity after death,[101] although that was restricted to the remains of the dead. It is notable, however, that there is controversy over even that. Rosenblatt notes that prescribing rights to the dead based on dignity would require it to take into account the diversity of humanity,[102] in other words as each culture and religion differs about what the status of the dead are, and indeed what the status of the body is, whose approach is adopted as being determinative? He argues, 'the dead are often treated with respect and

93 Most famously articulated by J.S. Mill *On Liberty* (1859, J.W. Parker & Son: London).

94 D.J. Harris et al *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd Edn, 2014: Oxford, OUP) at 94.

95 *Ibid.*, at 91.

96 The Right to Life. This includes various procedural rights. If an indirect victim could not initiate action under Article 2 then death through excessive force could never be litigated.

97 Right to respect for private life. This has included, inter alia, a right to privacy, confidence and autonomy: see Harris et al, n 95 above, at 541-543 (moral, physical and psychological integrity) and 551-557 (privacy).

98 Harris et al, n 95 above, at 93.

99 A. Rodenblatt 'International forensic investigations and the Human Rights of the Dead' (2010) 32 *Human Rights Quarterly* 921-950 at 927.

100 *Ibid.*, at 931.

101 M. Dias 'Dignity after Death and Protecting the Sanctity of Human Remains' (2015) *Voices in Bioethics*, 21 May. vailable online at: http://www.voicesinbioethics.net/newswire/2015/05/21/dignity-after-death (last accessed 12.11.17).

102 *Ibid.*, at 940.

consideration, but they do not have inherent dignity'.[103] Without inherent dignity then it would be difficult to see how one could encapsulate a right that respected the victim. Whilst a living person has the right not to be degraded,[104] this is premised on the dignity inherent in any individual, the very thing it is said that the dead do not possess.

If the dead cannot be harmed, what of harm to others? Farmand suggests that the existence of murder videos 'provide new incentive for people to kill'[105] although little evidence is adduced to substantiate this point. It would seem unlikely that many people commit murder because there is an off-chance that someone will record it and they will become famous. Where a person records themselves killing, that will be culpable as homicide, and the recording should be an aggravating factor in sentencing.[106] This does not justify a new offence. The same is true of those who assist a killer by recording the death. As noted in the first section, this would be treated as secondary participation, and S would be sentenced accordingly. Farmand's belief does not justify either recordings or the distribution of the footage.

What of the rights of the families of the deceased? Farmand notes that the families of the murder victim can suffer, due to the knowledge that people are using the footage of the death for their own gratification.[107] This is an interesting point. In respect of child pornography, the impact that is caused by a victim knowing that others are using the footage of their sexual assault for sexual gratification is recognised as harm.[108] However, this is a different proposition. First, this secondary victimisation is considered to amplify the primary victimisation that they suffer from the (original) sexual abuse.[109] For obvious reasons, the victim of a homicide cannot suffer secondary (psychological) victimisation. Whilst parents may conceivably be distressed by the knowledge of the footage, mere distress is not often considered to be harm for the purposes of the law.[110]

If criminalising on the basis of harm is not possible, then perhaps we need to look towards offence. Feinberg states:

> To be forced to suffer an offense, be it an affront to the senses, disgust, shock, shame, annoyance, or humiliation, is an unpleasant inconvenience, and hence an evil, even when it is by no means harmful… it is morally legitimate for the criminal law to be concerned with their regulation.[111]

Not all offence should lead to criminal sanction. Feinberg refers to 'wrongful offense', which he suggests is rights-violating.[112] Whilst not a harm, he is drawing an analogy to harm and suggesting that it is not merely about regulating morality. 'Wrongful' offence requires a causal link between the actions of the offender and the offence caused, including a requirement that the victim feels resentful that it has happened.[113] Even then, it is not all offence that should be criminalised, it must

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103 *Ibid.*, at 941.

104 Perhaps most famously encapsulated in Article 3, *European Convention of Human Rights* but which is also encapsulated under Article 8 where it is less severe: see, for example, Harris et al, n 95 above, at 271.

105 M.K. Farmand 'Who watches this stuff: videos depicting actual murder and the need for a federal criminal murder-video statute' (2016) 68 *Florida Law Review* 1915-1942 at 1918.

106 In the same way that this is now accepted for non-fatal offences and sexual offences (see, for example, Sentencing Concil *Sexual Offences: Definitive Guideline* (2013) at 10).

107 Farmand, n 104 above, at 1918.

108 *R v Beaney* [2004] EWCA Crim 449 and see A.A. Gillespie *Child Pornography: Law and Policy* (2011, Abingdon: Routledge) at 38-39.

109 Gillespie, n 107 above, at 38.

110 See, for example, *R v Dhaliwal* [2006] EWCA Crim 1139 at [20] et seq.

111 J. Feinberg *Offense to others: the moral limits of the criminal law* (1985, New York: OUP) at 49.

112 *Ibid.*, at 2.

113 *Ibid.*, at 3.

be serious offence (which he refers to as profound offence[114]), but it is also about balance, with Feinberg arguing that the law must 'weigh…the seriousness of the offense caused by to unwilling witnesses against the reasonableness of the conduct'.[115]

Does the offence principle apply to murder videos? Certainly, the recording and dissemination of footage of a murder could be considered offensive depending on what it portrays. Feinberg himself noted that the dead arouse strong feelings of sympathy because they resonate with our lives.[116] However, he argues that any offence must go beyond the individual family to be actionable under the criminal law.[117] This perhaps returns us to the question of how the public would react if a person simply stands by and records footage, rather than trying to seek help or provide assistance. Whilst the rule of omissions does not require them to seek help, the *act* of recording is separate from the omission to summon help. As discussed previously, it is quite possible that some will be disgusted by the fact that S simply recorded the footage, although that is likely to depend on the context and what S intended to do with the footage.[118]

What of distributing the footage? It will be remembered that Feinberg thought the justification was the offence caused to *unwilling* witnesses, and he accepts that some will deliberately seek out the act that could lead to offence, either because they are curious or because they seek pleasure from it.[119] This perhaps returns us to the discussion about the current rules on obscenity. Where material is stored in locations that are difficult to find, then it would seem unreasonable to object to that which people have deliberately sought out. However, that does not assist in ensuring certainty as to conduct. Distributing the same video could be culpable depending on who sees it (or has the potential to see it). That would seem odd, but it is perhaps justified by Feinberg's insistence that personal offence is insufficient. The next of kin of the victim portrayed in the footage is unlikely to be impressed by people looking at the murder for entertainment or gratification purposes, even if hidden from public view. However, as that is neither harmful or a matter of (public) offence, it would seem difficult to justify criminalisation.

What of morality? Whether morality can justify criminal action has been discussed for many years, with the classic protaganists being Lord Devlin and Hart. Ashworth and Horder note that a difficulty with Devlin's argument was that it was based on a dubious definition of 'morals'.[120] The central issue with morality is identifying whose moral judgment the law should be based on. Ashworth and Horder note that leaving it to individuals carries with it the risk that it is based not on morality but on prejudice.[121] A community standard is similarly problematic as it will shift, but more than this, individuals need not conform with a homogenous standard. Freedom of speech to conform with the consensus is not worth having. Ashworth and Horder also note that paternalism, which must be a moral concept irrespective of whether it purports to act on the basis of harm, can only be justified for the vulnerable.[122] It is difficult to argue that the dead are

114 *Ibid.*, at 51 et seq.

115 *Ibid.*, at 26.

116 *Ibid.*, at 57.

117 Feinberg believed that where the offence was individual then it would be left to the civil law. He provides the example of a scientist who procures a corpse to perform an experiment that disfigures the face of the deceased. He notes that this will be profoundly distressing to the next of kin, but suggests that as a personal feeling, this is best left to the civil law. However, as more learn about the experiment, there may be public distress, justifying the imposition of criminal penalties (Feinberg, n 000 above, at 70).

118 If S recorded the footage because she believed that it would assist the police in identifying the perpetrator, it is likely that this would be considered differently to someone who records it because they wish to profit from it (for example, by selling the footage) or who posts it to the internet for the purposes of entertainment.

119 *Ibid.*, at 26.

120 A. Ashworth and J. Horder *Principles of Criminal Law* (7th Edn, 2013, Oxford: OUP) at 35.

121 *Ibid.*, at 36.

122 *Ibid.*

vulnerable. The physical corpse may be,[123] but the deceased, that is to say the embodiment of who that person was, is not. If it is the risk that the vulnerable may see the footage, then that raises different issues. First, it would not by itself justify the recording of the footage, nor its simple possession.[124] Second, it would, once again, mean that criminalising the dissemination of footage is not focused on what the footage shows, but rather who sees it. That is unlikely to appease the next of kin of the person portrayed who wishes to prevent the death from being exploited.

It would seem therefore difficult to encapsulate a justification for criminalising murder videos. That said, it must be acknowledged that our legislators do not seem worried about the philosophical underpinning of criminal offences, and are happy to act on the basis of the 'common good' or 'morality'.[125] That being the case, legislation could conceivably seek to tackle such issues. However, in doing so, the law would need to identify how it draws a distinction between 'bad' murder videos and 'newsworthy' murder videos. The assassination of President John F. Kennedy was captured on film, and has been shown on television.[126] This must be one of the most famous murders captured on film and it is freely accessible on mainstream internet sites. How does the law draw a distinction between this and '1 Lunatic 1 Ice pick'? Is it the status of the victim? What of footage of those who perished in the 9/11 attacks in New York? Again, there is footage that clearly shows victims dying. Again, this must be murder, but we do not seek to control such footage. Perhaps the argument is to include a defence of 'public good' but such a defence has not worked particularly well for the *Obscene Publications Act 1959*,[127] and the same would probably prove true here. Is the solution based on exploitation? That we seek to tackle those images that exploit the death of the individual? That may be more certain as a test but it raises interesting questions about who is being protected from exploitation if the dead have no rights.

Conclusion

Unlike the myth of the 'snuff video', there is clear evidence that videos depicting homicide are now appearing on the internet. This raises interesting questions for the law as to how such footage should be dealt with by the law. Most footage of homicides is gruesome and horrifying. However, is that sufficient justification to warrant prohibition? There is a long history of death being captured in film, including violent deaths, and this has not previously been criminalised.

There is perhaps a stronger justification for criminalising the distribution of the material. The offence principle permits people to go about their business without being caused undue offence. The footage that is being discussed in this chapter is such that it is likely to cause disgust and

123 In that it cannot defend itself from attack, being disinterred or experimented on.

124 Just because footage is recorded does not mean that it has to be disseminated. Thus if X, who is not vulnerable, records footage then there is no danger that a vulnerable person will see the footage unless X distributes it, but that is a separate act.

125 Contemporary examples of this would include the prohibition of the possession of extreme pornography (*Criminal Justice and Immigration Act 2008*, s.63) which would seem to be based on morality (C. McGlynn and E. Rackley 'Criminalising extreme pornography: a lost opportunity' (2009) Criminal Law Review 245-260. Note McGlynn and Rackley believe that potential societal harm was missed (at 256 et seq.), and also the prohibition of possession of so-called virtual child pornography (more properly known as 'prohibited images of children' (*Coroners and Justice Act 2009*, s.62)) which again appears to be based on morality (see S. Ost 'Criminalising fabricated images of child pornography: a matter of harm or morality? (2010) 30 *Legal Studies* 230-256.

126 Admittedly, it was not shown on US networks until 1975 (see https://www.usnews.com/news/articles/2013/11/14/how-john-f-kennedy-assassination-changed-television-forever (last accessed 19.11.17)).

127 Perhaps best summarised by the Court of Appeal in *R v Commissioner of the Police of the Metropolis, ex parte Blackburn* [1973] QB 241 where Lord Denning MR concluded that the 'defence of public good…has got out of hand' (at 254) and which Phillimore LJ said, 'section 4 has been the source of much confusion and difficulty' (at 257) before suggesting that s.4 needed amending (at 258).

distress to many who see it. However, does that justify a blanket ban? Probably not. It would seem more likely that any law would need to tackle dissemination that poses the risk that the community could be offended. Where, however, there can be no offence, because, for example, people realise what they are looking at, then it may be more difficult to justify criminalisation. In essence this is the existing law of obscenity, but this law is considered to be ineffective and arbitrary.

Ultimately the difficulty with the law is that whilst morally we believe that there should be dignity in death, we have never identified how such a concept could be translated into law. As the dead do not have human rights, it is difficult to justify the use of the criminal law to protect their representation (as distinct from their remains).