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Ronald H. Maudsley

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DEVELOPMENTS IN THE ENGLISH LAW OF HOMICIDE

RONALD H. MAUDSLEY*

Although the several states of the United States have made many statutory changes in the common law rules concerning crimes, the common law still remains the basis of the criminal law of nearly all American jurisdictions.¹ Even the federal courts, which rely entirely upon statutory enactments for their criminal law, take note also of common law doctrines.² It is not surprising that many of the problems which face the states in the criminal law field are similar to those which challenge the initiative of judges and legislators in England at the present time. Legislation intended to meet some of these problems was passed in England in 1957; and it may be of interest to consider the provisions of the Homicide Act of that year as an attempt to deal with such problems.

A Royal Commission was appointed to inquire into the law relating to the death penalty for murder,³ and the report was published in 1953.⁴ The Homicide Act of 1957 is the direct result of the Commission's report. The two most important aspects of the Commission's inquiry, for our present purposes, are those relating to the reform of the law of murder, and its recommendations on the retention or abolition of capital punishment. In some respects the Commission's recommendations were followed; in others, not.⁵

The government was prompted to enact the Homicide Act of 1957, when the House of Commons passed a bill which provided for the abolition of the death penalty. The latter bill was rejected by the House of Lords, who were largely influenced by the advice given them by Lord Goddard, the Lord Chief Justice.⁶ Under the British Constitution, it was necessary, until 1911, for every bill to be passed by the House of Commons, House of Lords, and to receive the assent of the Sovereign. The last requirement has long

*L.L.B., M.A., B.C.L. Fellow of Brasenose College, Oxford University. The author wishes to acknowledge the assistance given to him by W. R. Vinciguerra, a student of the Law School of the University of Miami.

1. MAY, *CRIMES* §§ 1-3 (4th ed. 1938).

2. *Morissette v. United States*, 342 U.S. 246 (1952).

3. "To consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what extent and by what means, for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison system would be required; and to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions." Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, p. 1 (1953).

4. Royal Commission on Capital Punishment, *Report*, CMD. No. 8932 (1953).

5. For summary of conclusions, see Royal Commission on Capital Punishment, *Report*, Cmd. No. 8932, para. 790, pp. 274-283 (1953).

6. *The Times* (London), July 11, 1956, p. 6.

been a formality; the royal veto has not been exercised since the reign of Queen Anne,⁷ and it was then exercised on a formal matter. It is safe to say that it will never be exercised again.

A constitutional crisis arose over a budget introduced in 1909 by the Liberal Party; and the budget was passed by the House of Commons and rejected by the Lords. It only became law after an appeal to the electorate, and after a threat by King George V to create sufficient new Liberal peers to ensure the passage of the bill through the House of Lords. The Parliament Act of 1911 provided for the presentation to the Sovereign for royal assent to a bill without, in certain cases, the concurrence of the Lords. A further crisis arose in 1949 over the bill providing for the nationalization of the steel industry. The provisions of the Parliament Act of 1911 were amended, and the powers of the House of Lords further restricted by the Parliament Act of 1949. The result of the legislation now is that a bill may be presented for the royal assent without the concurrence of the Lords:

- (1) If the Lords fail within one month to pass a bill, which having passed the Commons, is sent up endorsed by the Speaker as a "money" bill before the end of the session; or
- (2) If the Lords refuse in two successive sessions to pass a public bill, other than a bill certified as a "money" bill, and if one year has elapsed between the dates when it was read a second time in the House of Commons in the first (of the two sessions) and the date when it was read a third time in that house in the second of those sessions.⁸

In order to prevent the bill becoming law by the operation of the Parliament Acts of 1911 and 1949, the government passed the Homicide Act of 1957 through both Houses. It was a compromise on the question of capital punishment, and it followed some of the recommendations of the Royal Commission for the reform of the law of murder. This act⁹ provided in part I that certain situations which had previously constituted murder should no longer do so; they constitute manslaughter in most cases. Part II provided that, of the situations which will constitute murder, only some of them constitute capital murder for which the punishment is death, and the remainder constitute non-capital murder for which the punishment is imprisonment for life.

Part I deals with five specific matters which have long been a matter of concern to administrators and to students of criminal law, and will be discussed in turn. These matters are:

1. Felony-murder;

7. See WADE & PHILLIPS, *CONSTITUTIONAL LAW* 102 (5th ed. 1955).

8. *Id.* at 103.

9. Armitage, *The Homicide Act of 1957*, [1957] *CAMB. L.J.* 183; Williams, *The Homicide Act, 1957*, 20 *MODERN L. REV.* 381 (1957); *The Homicide Act, 1957*, 21 *J. CRIM. L.* 370 (Eng. 1957).

2. The killing of an officer for the purpose of resisting a lawful arrest;
3. Partial insanity;
4. Provocation;
5. Suicide Pacts.

Felony — Murder

The "felony-murder rule" states in general terms that "any homicide resulting from the perpetration or attempted perpetration of a felony is murder," and the rule is often so stated.¹⁰ The rule had its origin in the ancient doctrine of strict liability in crime. Coke¹¹ required that the act which caused the death should be unlawful. Hale¹² was less extreme and gave examples of some such killings which constituted manslaughter only. Foster¹³ said that an accidental killing was murder only if the act was felonious. In the late 18th and the 19th centuries there was a tendency to restrict the severity of this rule.¹⁴ Stephen, J. said in *R. v. Serne*:¹⁵ "In my opinion the definition of the law which makes it murder to kill by an act done in the commission of felony might and ought to be narrowed."

The rule had indeed been narrowed in one particular case, that of causing death as the result of procuring an abortion, and such homicide was normally held to be manslaughter only.¹⁶ This was explained on the ground that the felonious act was not one in which the death of the deceased could reasonably be within the contemplation of the accused; and of course there was no intention to cause it.

This development was consistent with the feeling of the time, and Professor Kenny in the first thirteen editions of the leading students' book on criminal law stated that the felony-murder rule should be restated, and "limited to such felonies as involve violence against an unwilling victim."¹⁷ Such a limitation would seem to be a desirable continuation of the gradual movement away from strict liability for serious crime; it would largely

10. PERKINS, *CRIMINAL LAW* 33 (1957).

11. 3 COKE, *INSTITUTES* *56.

12. 1 HALE, *PLEAS OF THE CROWN* 475 (1736).

13. FOSTER, *CROWN LAW* 258 (3rd ed. 1809); Turner, *The Mental Element in Crimes at Common Law*, in *MODERN APPROACH TO CRIMINAL LAW* 213-14 (Radzinowicz & Turner ed. 1945); RUSSELL, *CRIMES* 529 (11th ed. 1958).

14. *R. v. Hoisey*, 3 F & F 287, 176 Eng. Rep. 129 (N.P. 1862); *R. v. Lad*, 1 Leach 96, 168 Eng. Rep. 150 (Cr. Cas. 1773); *R. v. Serne*, 16 Cox Crim. Cas. 311 (Cent. Crim. Ct. 1887).

15. 16 Cox Crim. Cas. 311 (Cent. Crim. Ct. 1887); and note 17 *infra*.

16. *R. v. Gunewardene*, [1951] 2 All E.R. 290 (Crim. App.); *R. v. Lumley*, 22 Cox Crim. Cas. 635 (Cent. Crim. Ct. 1911); *R. v. Bottomley*, 115 L.T.Jo. 88 (1903); *R. v. Whitmarsh*, 62 J.P. 711 (1898).

17. *E.g.*, KENNY, *CRIMINAL LAW* 317 (1st ed. 1902), 140 (13th ed. 1929). See also Stephen, J. in *R. v. Serne*, 16 Cox Crim. Cas. 311, 313 (Cent. Crim. Ct. 1887): "I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder."

destroy the felony-murder doctrine. Nearly all the cases which such a definition would include would constitute murder by the application of other parts of the definition of "malice aforethought"; and would show either an "intention to hurt and not to kill—but to hurt by means of an act which the prisoner realized was likely to kill someone," or an "intention to do an act which the prisoner realized was likely to kill, although he had no purpose of thereby inflicting any hurt."¹⁸

Kenny's definition could not, however, stand with the dictum of Lord Birkenhead, L.C.J. in *D.P.P. v. Beard*.¹⁹ In that case the accused, while intoxicated, raped a thirteen year old girl, and, in order to overcome her struggles and stifle her cries, placed his hand over her mouth and pressed his thumb on her throat, causing her death by suffocation and shock. He was convicted at the trial, but the conviction was reversed by the court of criminal appeal and a verdict of manslaughter substituted on the ground, that, by the test of drunkenness then in operation, the crime of murder had not been committed.²⁰

The case was taken to the House of Lords in accordance with the procedure by which a further appeal will lie from the court of criminal appeal if the Attorney-General certifies that a point of law of exceptional public importance is involved.²¹ The Home Secretary had previously indicated that, whatever the result, the death sentence could not be carried out. The House of Lords reversed the decision of the court of criminal appeal, laying down a new test of drunkenness,²² and restored the conviction. Both courts accepted that this was a case in which the felony-murder rule should apply and laid down that any killing by an act of violence done in the course of, or in furtherance of, a felony involving violence was murder.

This is Foster's rule in operation again, with the further requirement that the felony must be one of violence. The rule has since been applied to killings resulting from attempted rape,²³ violent assault,²⁴ and from armed assault.²⁵ It will be seen that all the cases in which, in modern times, the rule has been applied, are cases in which there has been a violent assault upon the deceased without his consent, and that these cases would all be within Kenny's definition of fifty-five years ago; but the House of Lords laid down a wider rule.

The felony-murder rule is in general operation in the United States, and the problem has also arisen here in deciding whether it should apply

18. KENNY, CRIMINAL LAW 137 (17th ed. 1958).

19. [1920] A.C. 479.

20. Following *R. v. Meade*, [1909] 1 K.B. 895 (Crim. App.).

21. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 1(6).

22. *D.P.P. v. Beard*, [1920] A.C. 479, 499.

23. *R. v. Stone*, 53 T.L.R. 1046 (Crim. App. 1937).

24. *R. v. Ward*, [1956] 1 Q.B. 351 (Crim. App.); *R. v. Betts & Ridley*, 22 Crim. App. R. 148 (1930).

25. *R. v. Jarman*, [1946] K.B. 74 (Crim. App. 1945).

only to felonies of a violent or dangerous kind. Perkins²⁶ stated that "a study of the cases repeating the formula that homicide resulting from a felony is murder will disclose that the felony actually involved in any such case is usually one which may properly be classed as 'dangerous,' such as robbery, rape, burglary or arson." This is hardly surprising for it is rare that a non-dangerous felony causes a death. But the substantial point is, if a death should surprisingly result from the commission of a non-dangerous felony, whether such a death ought to be held murder. It may be noted in passing that, if the felony-murder rule is so applied, the law will be much stricter than the old common law because of the greater width of definition of felony.

The general rule in the United States is that a crime which is punishable by a term in the state penitentiary is a felony; this includes most, if not all, of the old common law felonies and a host of others. Common law felonies consisted of the more serious crimes of those early days and the criminal law of that time was directed particularly to the maintenance of peace and the prevention of violence. The criminal law of the modern age is concerned with a much wider variety of affairs. An extreme case may be noted. In *People v. Pavlic*,²⁷ the defendant sold liquor, under circumstances amounting to felony, to a purchaser who became drunk and died from exposure. The court refused to hold that this was murder. "Notwithstanding the fact that the statute has declared it to be a felony, it is an act not in itself or naturally dangerous to life."²⁸ The problem is to decide how to distinguish between felonies which are, and those which are not, sufficient to attract the operation of the rule. If the rule is to be retained it is submitted that it should be limited at least to felonies which existed at common law, and, preferably, limited to such of the common law felonies as raise a reasonable foresight of death.

In Florida, felony-murder is murder in the first degree only where the death is caused "in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping." Cases of killing "without any design to effect death, by a person engaged in the commission of any felony, other than those mentioned above constitute murder in the third degree."²⁹

The felony-murder doctrine has been abolished in England. Section 1(1) of the Homicide Act of 1957 provides:

Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done

26. PERKINS, CRIMINAL LAW 34 (1957).

27. 227 Mich. 562, 199 N.W. 373 (1924).

28. *Id.* at 565, 199 N.W. at 374. Perkins also gives an illustration put by the Kentucky Court in *Powers v. Commonwealth*, 110 Ky. 386, 416, 61 S.W. 735, 742 (1901): "Under our statute the removal of a corner stone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellows accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation."

29. FLA. STAT. § 782.04 (1957).

with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

It is clear that the object of the section is to abolish the felony-murder doctrine; but a few words should be said on the subject of express, implied and constructive malice. Malice aforethought, as is well-known, is a term of art³⁰ and is used to signify that form of *mens rea* which is necessary to make a killing a murder. It is not, and never has been, identical with an intent to kill. The situation in which malice aforethought existed could be divided into three groups:

- (1) where there was an intent to kill;
- (2) when a killing was done by an act which the accused could foresee was likely to kill;
- (3) where the killing was done without intent to kill or foresight of death, but was done in the course or furtherance of a felony of violence or in resisting an officer of justice in the making of a lawful arrest.

Malice aforethought existed, before the statute, in all these situations; and little is gained by dividing malice aforethought into "express, implied or constructive." To do so causes confusion between the meaning of the terms "malice aforethought" and "intent to kill." If we require an intent to kill in order to constitute the crime of murder, then the intent will sometimes be express (group 1) sometimes implied (group 2) and sometimes constructive (group 3). But these adjectives apply to the intent and not to the malice aforethought. Malice aforethought is, by definition, all three. It is unfortunate therefore that the statute law spoke of malice aforethought "express or implied." The intention of the statute clearly is to retain as murder those killings which are done with an express intent to kill and those done in circumstances where the intent cannot be proved but may be implied because death was a likely or foreseeable result of the defendant's act.

The statute excludes cases in which an intent to kill can only exist by being artificially created by the law — where the intent is constructive only. There were two such occasions at common law — (1) The felony-murder situation or (2) the killing of an officer of justice by resistance to a lawful arrest. This case was dealt with in Section 1(2) of the Homicide Act of 1957, and will be discussed below.

The adjectives should be applied to the intent, and not to malice aforethought. It is in connection with "implied malice aforethought" that difficulty under this subsection has arisen.

30. Per Lord Goddard, L.C.J., in *R. v. Vickers*, [1957] 2 Q.B. 664, 670, 41 Crim. App. R. 189, 194 (1957).

In *R. v. Vickers*,³¹ the accused broke into a shop kept by a lady who was old and deaf. She saw him and took aggressive action to induce him to leave. Vickers then attacked her and delivered several blows which were described as "moderately severe to slight," as a result of which she died. Vickers completed his mission by stealing some money and departed.³² The question was whether, on these facts, Vickers was rightly convicted of capital murder.

Vickers' counsel on appeal argued that, since the 1957 Act, there could not be a verdict of guilty if the prosecution proved no more than an intent to do grievous bodily harm; that a death following in such circumstances would have been murder before 1957 only by the operation of the felony-murder rule; and that Vickers could only be convicted if the violence used was of such a character as to be likely to cause death. The appeal was dismissed. The court of criminal appeal held that there was implied malice:

[For] the prisoner inflicted grievous bodily harm by a voluntary act, and intended to harm the victim and the victim has died as a result of that grievous bodily harm. If a person does an act on another which amounts to the infliction of grievous bodily harm, he cannot say: "I did not intend to go further than so-and-so." . . . If he intends to inflict grievous bodily harm and the injured person dies, that has always been held in English law, and was so held at the time when this act was passed, sufficient to supply the malice aforethought.

The court approved the direction to the jury by the judge below:

Malice will be implied, if the victim was killed by a voluntary act of the accused . . . — done with the intention either to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health and comfort of the victim . . .³³

This was a case, then, of "implied malice" and not "constructive malice." The "other offense" referred to in Section 1(1) of the Homicide Act was burglary. If the killing had been accidental, Vickers would have been saved by that subsection; but malice aforethought existed here independently of the felony-murder rule. The inflicting of grievous bodily harm, with intent, supplied the necessary malice aforethought, not because it is itself classified as a felony, but because it is one of those dangerous acts for which the accused must stand the consequences. It was not possible to reduce the offense to manslaughter by applying Section 1(1) of the

31. [1957] 2 Q.B. 664, 41 Crim. App. R. 189, 194 (1957).

32. The stealing is of importance because Section 5 provides that only certain specified murders shall be capital murders, and a killing in furtherance of theft is one of these, *infra* p. 372.

33. 41 Crim. App. R. 189, 196 (1957). The report in [1957] 2 Q.B. 664, 670, is worded differently.

Homicide Act if the rule is accepted that malice aforethought is "implied" whenever an assault with intent to grievous bodily harm is committed. But the rule makes the whole question depend upon the meaning of the term "grievous bodily harm" which is given no precise definition in the homicide cases; and whenever an assault with intent to do grievous bodily harm is committed without any intention or foresight of causing death, we are brought back to a situation in which the malice aforethought is artificially created — as it was in the felony-murder cases.

There is much to be said for the view that malice aforethought express or implied should now be limited to cases where the prosecution can show either an intent to kill or a wilful disregard of the likelihood of death. Most cases of intentional infliction of bodily harm would be included, but such a test would avoid an automatic association of murder with another offense. We may conclude with the view that the abolition of the felony-murder doctrine is an advance, but that the unfortunate interdependence between murder and the infliction of grievous bodily harm with intent, has been encouraged by the use of the phrase "malice aforethought" express or implied in Section 1 (1).³⁴

Resisting an Officer of Justice.

The second example of "constructive murder" was that of accidentally killing an officer of justice for the purpose of resisting arrest; and, like felony-murder, the history of the rule is one of gradual alleviation. At first, when the accused killed an officer of justice in resisting arrest, this was held to be murder, however unlikely and unexpected the death may have been.³⁵ It was realized in the nineteenth century however that proper protection was not given to officers by providing barbarous punishments for accidental killings, and the Commissioners, in their report on Criminal Law in 1839,³⁶ thought that the best course was to increase the punishment for resistance to arrest where death did not ensue and to relax the severity of the law where death followed accidentally.

34. See Royal Commission on Capital Punishment, *Report*, CmD. No. 8932, para. 472 (1953): "There is no statutory definition of 'grievous bodily harm,' but it has been held that it need not be permanent or dangerous, but only 'such as sensibly to interfere with health and comfort.' We find it difficult to believe that the intention as infliction of such injury necessarily involves 'wilful exposure of life to peril'; and we are therefore disposed to think it is too wide a criterion to support a charge of murder. . . . We should therefore prefer to limit murder to cases where the act by which death is caused is intended to kill or to 'endanger life' or is known to be likely to kill or endanger life. But we do not believe that, if this change were made, it would lead to any great difference in the day-to-day administration of the law. Our impression is that in practice the courts have been moving in this direction and that today, except in certain cases of killing while committing a felony or resisting arrest, a person would seldom, if ever, be convicted of murder unless there was evidence that he wilfully put life in jeopardy. . . . We think that in this matter further progress may be left to the courts and to the development of the common law."

35. See 1 EAST, *PLEAS OF THE CROWN* 295 (1803), for an account of much of the early law.

36. KENNY, *CRIMINAL LAW* 141 (17th ed. 1958).

A limitation on the old strict common law rule appeared in *R. v. Porter*,³⁷ where Brett, J. made a distinction between intentional and unintentional injuries. A policeman had been kicked by the accused who was resisting arrest; there appeared to be no serious injury, but the policeman died soon after. The ruling was that the accused should be convicted of murder if the kick was intentional, although death was not intended nor foreseeable, but that the verdict should be manslaughter if the kick were unintentional, as one given in the course of a struggle.

The Draft Criminal Code of 1879 provided (largely through the influence of Sir James Stephen) that the killing of a man resisting lawful apprehension should be murder only if the killer intended to kill or to inflict grievous bodily injury for the purpose of facilitating his escape.³⁸

In *R. v. Appleby*³⁹ the court refused to apply that test, and stated that "a much less degree of violence may be sufficient to justify a verdict of murder in the case of a police officer who is killed in the execution of his duty—than would suffice in the case of another person." The test here differs from that of the older cases by requiring some violence, but the difference in degree between the violence needed in this case and that needed in other cases of murder is not satisfactorily explained. Such was the position in England before 1957; and in the United States, it was similar. The courts were trying to escape from the rule that any killing in such circumstances was murder.

In *State v. Weisengoff*⁴⁰ a direction to the jury in terms of the old common law rule was held to be prejudicial error: "the defendant was entitled to have the jury determine whether his wrongful conduct in resisting a lawful arrest did, or did not, involve a substantial element of human risk."⁴¹ Again, it is not clear, even in those states which have reduced the severity of the old common law rule, exactly how great a difference there now is between the state of mind which will lead to a conviction for murder in these cases and that which is necessary in connection with killings in other circumstances.

The Homicide Act of 1957 has destroyed any distinction between killing in resisting arrest and other killings. Section 1(2) provides:

For the purpose of the foregoing subsection,⁴² a killing was done in the course or for the purpose of resisting an officer of justice or avoiding or preventing a lawful arrest, or of effecting or assisting the escape from legal custody shall be treated as a killing in the course or furtherance of an offence.

37. 12 Cox Crim. Cas. 444 (Home Cir. 1873).

38. See *State v. M'Mullen*, [1925] 2 C.L.L.R. 9 (Austl.), where the old rule in its strictest form was stated. But it was hardly necessary for the decision, for the death was caused by a bullet fired by the accused.

39. 28 Crim. App. R. 1 (1940).

40. 85 W. Va. 271, 101 S.E. 450 (1919).

41. PERKINS, CRIMINAL LAW 38 (1957).

42. Homicide Act, 1957, 5 & 6 Eliz. 2, c.11, § 1(2).

No case nor application of the subsection has yet been reported.

*Diminished Responsibility.*⁴³

Until the last few years, the American and the English courts followed a similar line of development in connection with the effect of mental incapacity upon crime. The basic test is that of understanding the difference between "right and wrong" as laid down by the English judges in *McNaghten's Case*.⁴⁴ The defense of irresistible impulse has been accepted in a minority of American states in addition to the *McNaghten* rules; it has been strenuously argued in England, but has been refused. In 1954 a new departure appeared in the District of Columbia, where the Court of Appeals for the District of Columbia laid down what is shortly called the "Product Rule";⁴⁵ this is unknown in England.

The American Law Institute⁴⁶ has recommended the introduction of a standard rather than a rule to determine responsibility for criminal conduct:

(I) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(II) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Whatever test or standard is applied, there is always the difficulty in the case of the individual who is convicted because he failed to come within the legal test of freedom from criminal responsibility, and who is clearly possessed of mentality and intellect of a low order. It seems that partial capacity, not amounting to legal insanity, may be a defense if it is such as to prevent the accused from forming the specific intent required for a particular crime. To this extent, the defense would operate like the defense of drunkenness.⁴⁷ Similarly it may be possible to show that while the mental capacity of the accused was insufficient to form the premeditation necessary for some form of first degree murder; he was capable of having malice aforethought sufficient to render him liable for conviction for murder in the second degree. This is a matter of dispute, and no such doctrine is established by a majority of the states.⁴⁸ However this may be, everyone has sympathy for the criminal whose low mental

43. Note, 21 MODERN L. REV. 544 (1958).

44. 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). On the proper spelling of the name 'Mhicneachdain,' see Note, 75 L.Q. REV. 321 (1958).

45. *Durham v. United States*, 94 App. D.C. 288, 214 F.2d 862 (1954).

46. MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

47. *D.P.P. v. Beard*, [1920] A.C. 479; *People v. Koerber*, 244 N.Y. 147, 155 N.E. 79 (1926).

48. PERKINS, CRIMINAL LAW 770-71 (1957), and cases there cited.

capacity makes him the victim of circumstances rather than of his own calculated wickedness; and there must be a large percentage of them.

The law of Scotland developed a doctrine of Diminished Responsibility⁴⁹ which has now been introduced into English law by Section 2 of the Homicide Act of 1957:

Section 2 (i) where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury)⁵⁰ as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

(ii) On a charge of murder, it shall be for the defense to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(iii) A person who but for this section would be liable, whether as principal or as accessory to be convicted of murder shall be liable instead to be convicted of manslaughter.

The further the law travels away from a simple test of mental capacity the more difficult becomes the problem of administering the law. The question whether or not the accused comes within the terms of the section is a question for the jury.⁵¹ It is they therefore who have to decide whether there existed such abnormality of mind as substantially impaired the accused's mental responsibility for his acts and omissions.

This is a serious problem and the court of criminal appeal in *R. v. Spriggs*⁵² refused to permit the matter to be further complicated by the introduction of philosophical argument. The accused had quarrelled with a barman. At 'closing time' he had left the public house, returned home and collected a gun. He returned to the public house, knocked on the door, and, when it was opened by the barman, shot him to death. His explanation was: "It was the way he shoved me about. I was mad. I collected my gun and let him have it."

The defense was based on Section 2 of the Homicide Act. The course taken by the judge was to have copies of the section prepared and handed to the jury, and he told them that it was for them to decide whether or not the accused suffered from such abnormality of mind as substantially to impair his mental responsibility. The appellant objected on the ground that there had been a dispute at the trial as to the standard to be applied

49. Royal Commission on Capital Punishment, *Report*, CmD. No. 8932, paras. 377-383 (1953).

50. *R. v. Kemp*, [1957] 1 Q.B. 399 (1956).

51. *R. v. Spriggs*, [1958] 1 Q.B. 270 (Crim. App.); *R. v. Matheson*, [1958] 1 Weekly L.R. 474 (Crim. App.); *R. v. Bastian*, [1958] 1 Weekly L.R. 413 (Crim. Ct.).

52. [1958] 1 Q.B. 270. Noted in 74 L.Q. REV. 173 (1959); 21 MODERN L. REV. 318 (1958).

and that the jury should have been directed upon this; and that too much emphasis had been placed upon the accused's intelligence and too little upon his emotions. The court referred to the Scottish cases⁵³ upon the application of the doctrine and decided to follow the Scottish practice of explaining the doctrine to the jury in general terms and of excluding metaphysical distinctions which would be meaningless to them. In dismissing the appeal, Lord Goddard, L.C.J. said:

It will be seen there that the Lord Justice Clerk (in *H.M. Advocate v. Braithwaite*)⁵⁴ is not going into nice distinctions between mind and emotion or intellect and emotion, and one has to remember after all that juries are not drawn from University Professors or University dons.⁵⁵ They are ordinary men and women, and would not it be only confusing them if we went into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort. The fact is that this section is borrowed from Scottish law and the Scottish law, as the Lord Justice Clerk points out, recognizes that a man may be not quite mad but a borderline case, and that this is the sort of thing which amounts to diminished responsibility . . . The judge put the case in the only way it can be put. . . .⁵⁶

Subsection 2 provides that the onus of proof of diminished responsibility shall be on the defense. This is the normal rule with proof of insanity in England. American courts differ on the point. The onus upon the defense however is not to prove it beyond a reasonable doubt, but merely to establish a balance of probability in his favor⁵⁷ — the standard in civil proceedings generally.⁵⁸

It has previously been stated that the decision on the question of diminished responsibility is a matter for the jury to decide.⁵⁹ It must however be a verdict based on the evidence; otherwise it will be set aside. In *R. v. Matheson*⁶⁰ the accused killed a boy in the most appalling circumstances. Evidence of mental abnormality due to arrested or retarded

53. *H.M. Advocate v. Braithwaite*, [1945] S.C.(J.) 45 (Scot.); *Muir v. H.M. Advocate*, [1933] Just. Cas. 46 (Scot.); *H.M. Advocate v. Savage*, [1923] Just. Cas. 49 (Scot.).

54. [1945] S.C.(J.) 45 (Scot.).

55. Any person holding a teaching appointment at Oxford or Cambridge is referred to colloquially as a don. A note in *Note*, 74 L.Q. Rev. 173, 174 (1958), says: "It may, perhaps, be suggested that a jury drawn from university professors would have greater difficulty than would an ordinary jury in dealing with nice distinctions, because, although they might understand the distinctions, they would never be able to agree concerning the weight to be given to them." Anyone whose duties give him experience of meetings of committee in an Oxford College would agree. I cannot speak for Cambridge.

56. [1958] 1 Q.B. 270, 276-77 (Crim. App.).

57. *R. v. Dunbar*, [1958] 1 Q.B. 1, 41 (Crim. App. R. 182 (1957)); *R. v. Carr-Briant*, [1943] K.B. 607 (Crim. App.); *H.M. Advocate v. Braithwaite*, [1945] S.C.(J.) 55 (Scot.).

58. *Cooper v. Slade*, 6 H.L.C. 746, 772, 10 Eng. Rep. 1488, 1498 (H.L. 1858).

59. *Supra* p. 365; *R. v. Spriggs*, [1958] 1 Q.B. 270 (Crim. App.); *R. v. Matheson*, [1958] 1 Weekly L.R. 474 (Crim. App.); *R. v. Bastian*, [1958] 1 Weekly L.R. 413 (Cent. Crim. Ct.).

60. [1958] 1 Weekly L.R. 474 (Crim. App.).

development was equal to that of a boy of ten. No evidence in rebuttal was offered by the prosecution; the matter was correctly put to the jury by the judge, and the jury, no doubt due to the ghastly nature of the crime, found a verdict of murder. It was set aside in the court of criminal appeal and a verdict of manslaughter substituted.

The question also arose in this case whether the prosecution should accept a plea of guilty to manslaughter on the ground of diminished responsibility. Such is the practice in Scotland;⁶¹ the court, however, held that the plea should not be accepted, but the matter always put to the jury. If the defense has asked for a verdict of manslaughter on the ground of diminished responsibility and on some other ground, such as provocation, and a verdict of manslaughter is returned the judge may, and generally should, ask the jury whether their verdict is based on diminished responsibility or on the other ground or both. This is important for the purpose of determining the appropriate punishment.

An interesting situation arose in *R. v. Bastian*.⁶² The accused was charged with murder, and the circumstances were such that he could reasonably expect a plea of insanity to prevail. He, or his advisers, thought better of this, since a successful plea of insanity renders the accused liable to be confined at Her Majesty's pleasure in an institution. He thought it would be better to be convicted of manslaughter by relying on a plea of diminished responsibility. The question then was whether or not it was the duty of the prosecution to establish the insanity of the accused. Donovan, J. held that it was their duty:

[I]f the defense put in issue the state of a man's mind to show that he was suffering from such an abnormality of mind as produced diminished responsibility, the prosecution are under a duty, if they have evidence to support it, to cross-examine the witnesses for the defense to show that the accused was insane at the time when he committed the offence, and to call evidence to that effect.⁶³

The relation between this plea and that of irresistible impulse has not yet been discussed by the courts.⁶⁴ Irresistible impulse is still not accepted in England as sufficient to establish insanity. But clearly some cases in which the accused acted under an irresistible impulse will be included within Section 2, and killings in such circumstances may be reduced to manslaughter.

Provocation.

It is an ancient rule of the common law that an intentional homicide may be held manslaughter, and not murder, if it was done under the

61. *Kirkwood v. Lord Advocate*, [1939] S.C.(J.) 36 (Scot.).

62. [1958] 1 Weekly L.R. 413 (Cent. Crim. Ct.).

63. *Id.* at 414.

64. *Armitage*, *supra* note 9.

influence of sufficient provocation. There is no specific requirement as to the form which the provocation must take; but it must be such as would cause a reasonable man to lose his self-control and such as did in fact cause the accused to lose his self-control. Provocation will usually take the form of assault and battery upon the accused. In such a situation the response of the accused must in the circumstances bear a reasonable relation to the attack. A slap on the face will not be sufficient provocation if the accused shoots his assailant; on the other hand if the attacker places the accused in mortal peril and he returns the attack and kills his attacker, he has no need to rely on the present doctrine to reduce the killing to manslaughter, for it will be justified on the ground of self-defense. It is in situations between these two extremes that the doctrine of provocation applies; the distinction between self-defense and provocation should be kept clear.⁶⁵

It is not possible to say exactly what else will or will not be sufficient provocation at common law. An attack upon a third person has been held sufficient as where a father killed his daughter's husband whom he saw beating her.⁶⁶ The classic example of a circumstance which, apart from physical attack, is sufficient, is that of a husband who finds his wife in the act of adultery,⁶⁷ and kills one of the guilty parties forthwith; and the same rule would probably apply if the wife so discovered her husband.⁶⁸ But the rule is applied strictly in England, and does not apply to persons who are merely engaged to be married or who are living together.⁶⁹

The parties must have been discovered in the act; a confession or a report of adultery will not be sufficient. Indeed Viscount Simon, L. C. J. stated in *Holmes v. D.P.P.*⁷⁰ that he thought that there were no circumstances in which words could be sufficient provocation. No insult however provocative is sufficient on its own. Words may however increase the severity of an assault and may be relevant in determining whether the assault accompanied by the words was sufficient.

American cases have been more generous in allowing words to be effective. Insults are held to be insufficient, though the soundness of this rule has been questioned;⁷¹ and in some cases altered by legislation.⁷² They may, as in England, be relevant when considered in combination with

65. *Bullard v. R.*, [1957] A.C. 635 (P.C.) (Trinidad & Tobago); *Holmes v. D.P.P.*, [1946] A.C. 588; *Mancini v. D.P.P.*, [1942] A.C. 1 (1941).

66. *R. v. Harrington*, 10 Cox Crim. Cas. 370 (Cent. Crim. Ct. 1866); *R. v. Fisher*, 8 Car. & P. 182, 173 Eng. Rep. 452 (N.P. 1837).

67. *Holmes v. D.P.P.*, [1946] A.C. 588; *Maddy's Case*, 1 Ventris 158, 86 Eng. Rep. 108 (K.B. 1672).

68. *Holmes v. D.P.P.*, [1946] A.C. 588, 598.

69. *R. v. Greening*, [1913] 3 K.B. 846 (Crim. App.); *R. v. Palmer*, [1913] 2 K.B. 29 (Crim. App.).

70. [1946] A.C. 588, 597.

71. PERKINS, CRIMINAL LAW 49, 50 (1957); *Commonwealth v. Hourigan*, 89 Ky. 305, 313, 12 S.W. 550, 552 (1889); *State v. Jarrott*, 23 N.C. 76, 82 (1840).

72. TEX. PEN. CODE ANN. art. 1248 (1925), repealed by Tex. Acts 1927, ch. 274.

provocative acts. In America they may be effective on their own, not to reduce murder to manslaughter, but to determine the degree of murder of which the accused should be convicted,⁷³ and to determine the punishment to be imposed in circumstances in which that is a matter for the court's discretion.⁷⁴

A distinction, however, is made between "informational" words and "insulting" words. Informational words making a sudden disclosure of events which have taken place, and which bring the information to the accused for the first time, may have the same effect as if the events had occurred in the presence of the accused. Thus a "killing may be manslaughter only if the deceased had just told the slayer that he had raped the latter's wife, or had committed adultery with her, or had ravished the latter's young daughter, or committed a serious battery upon his child."⁷⁵

The Homicide Act makes provision for words to be taken into account. By Section 3 it is provided:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining the question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The section is wide enough to cover insulting as well as informational words. It remains to be seen whether the courts will treat both types of words as being sufficient or whether a distinction along the lines of the American cases will be established.

Two further points should be mentioned. The section provides that the jury shall determine whether the provocation was sufficient. This provision confirms the modern English development. Until modern times, however, the question was one of law.⁷⁶ Gradually the matter was left to the jury whenever the judge decided that there was some evidence on which the jury could come to the conclusion that the provocation was sufficient. It is the judge's duty to draw the jury's attention to matters in evidence which might establish provocation, even though the defense counsel may not have found it practicable to plead provocation — where, for instance, the defense is self-defense and counsel does not risk weakening his argument on this point by also pleading provocation.

The second point is that the test for establishing the adequacy of provocation is objective. The defense must show that the provocation would

73. *State v. Robinson*, 353 Mo. 934, 185 S.W.2d 636 (1945).

74. *Keirsev v. State*, 131 Ark. 487, 199 S.W. 532 (1917).

75. *PERKINS*, *op. cit. supra* note 71, at 50.

76. *R. v. Fisher*, 8 Car. & P. 182, 173 Eng. Rep. 452 (N.P. 1837); *R. v. Carroll*, 7 Car. & P. 145, 146, 173 Eng. Rep. 64, 65 (N.P. 1835).

have led a reasonable man to act as the accused did; they must also show, of course, that the accused did in fact act under the influence of the provocation; a man whose self-control is greater than that of a reasonable man cannot claim the privilege of his weaker brothers, unless he was affected in the same way as they would have been.

The introduction of the objective test is, again, a modern development. Originally the test was subjective; but the judges referred to the standard of the reasonable man, merely as "a guide as to how the jury should marshal the evidence in their minds in order to decide a subjective point, namely, whether or not the prisoner had indeed been made to lose his power of self-control. But here again, as has so often happened, what began as a matter of evidence crystallized into a rule of law and became an objective legal test of liability."⁷⁷ There are many objections to the application of the objective test in the circumstances but there is not space to discuss them here.⁷⁸ The development by which the objective test has become applicable is now confirmed by the statute.

Suicide Pacts.

The final provision concerning the constituent elements of murder concerns a narrow point in the law of suicide. Suicide was a felony at common law; it was too late of course to visit the felon with the usual form of punishment; but the common law did its best by inflicting degradation after death. The suicide was buried in the highway with a stake through his body; and like other felons, all his goods were forfeited. All legal penalties were, however, removed during the nineteenth century. But it still remains a felony and an attempt to commit suicide is a misdemeanor.⁷⁹ A person who kills someone in the course of an attempt to kill himself is guilty of murder.⁸⁰

If two or more people enter into a suicide pact, by which they agree to die together—and one or more, but not all are killed, the survivor or survivors are guilty of murder.⁸¹ The Homicide Act of 1957 provides by Section 4 that this offense shall in the future be manslaughter:

(i) It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or to be a party to the other killing himself, to be killed by a third person.

(ii) where it is shown that a person charged with the murder of another kills the other or was a party to his killing himself or

77. KENNY, *CRIMINAL LAW* 158 (17th ed. 1958).

78. *Id.* at 157-61; Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, para. 143 (1953); *Bedder v. D.P.P.*, [1954] 1 Weekly L.R. 1119 (H.L.); *R. v. McCarthy*, [1954] 2 Q.B. 105 (Crim. App.).

79. *R. v. Mann*, [1954] 2 K.B. 107, 10 Crim. App. R. 32 (1914).

80. *R. v. Spence*, 41 Crim. App. R. 80 (1957); *R. v. Hopwood*, 8 Crim. App. R. 143 (1913).

81. *R. v. Alison*, 8 Car. & P. 148, 173 Eng. Rep. 557 (N.P. 1838); *R. v. Dyson*, Russ. & Ry. 523, 168 Eng. Rep. 930 (Cr. Cas. 1823).

being killed, it shall be for the defense to prove that the person charged was acting in pursuance of a suicide pact between him and the other.

The burden of proof in this situation will no doubt be that the accused must show a balance of probabilities in his favor.

The Death Penalty.

The automatic minimum punishment for murder at common law is death.⁸² Neither judge nor jury has any discretion in the matter. The only opportunity for mitigation is in the exercise of the royal prerogative of mercy; this is exercised in modern times by the Home Secretary on behalf of the Crown, and, when exercised, has the result of commuting the death sentence to one of life imprisonment. The prerogative is widely exercised, and during the last fifty years no fewer than 45% of the persons sentenced for murder have been reprieved.⁸³

A position had therefore been reached in which a sentence of death involved little more than an even chance of execution; and there were circumstances in which it could be reasonably certain that the formal imposition of the death sentence was nothing more than a pretense.

This situation was unseemly, and there were movements for reform in two directions. One was to reform the law so as to define murder in terms of killings which ought to be capital offenses, and the other was to abolish capital punishment entirely. The Royal Commission concerned itself with the former.⁸⁴ The Commission considered the possibility of redefining the law of murder in this way, and included, in this consideration, an examination of various jurisdictions in which the crime of murder was divided into degrees, as it is in most American jurisdictions. It also considered the possibility of giving the judge or jury a discretion to substitute a lesser sentence. Its conclusion was that it was not possible to satisfactorily define the various degrees of murder;⁸⁵ that, if capital punishment is to be retained, the only practical way of overcoming the existing defects in the law is to give this discretionary power to the jury.⁸⁶ But it was not convinced that this was the proper course to pursue, and it believed that the time had been reached "where little more can be done effectively to limit the liability to suffer the death penalty, and that the real issue is now whether capital punishment should be retained or abolished."⁸⁷

82. KENNY, *CRIMINAL LAW* 174 (17th ed. 1958).

83. Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, para. 37 (1953).

84. Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, chs. 7 and 8 (1953).

85. Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, para. 534 (1953).

86. Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, para. 595 (1953).

87. Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, para. 611 (1953).

As has been seen, the Government, in passing the Homicide Act of 1957, compromised on this issue. The bill for the abolition of the death penalty failed to pass; no-one was convinced of the correctness of various alternatives, and the Act itself limited the incidence of the death penalty by providing that murder would only be a capital offense if it were of the type mentioned in Sections 5 and 6. The relevant provisions are as follows:

5. (1) Subject to subsection 2 of this section, the following murders shall be capital murders, that is to say, —

- a. any murder done in the course or furtherance of theft;
- b. any murder by shooting or by causing an explosion;
- c. any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;
- d. any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;
- e. in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting.

(2) If, in the case of any murder falling within the foregoing subsection, two or more persons are guilty of the murder, it shall be capital in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used force on that person, in the course or furtherance of an attack on him; but the murder shall not be capital murder in the case of any other of the persons guilty of it.

6 (1) A person convicted of murder shall be liable to the same punishment as heretofore if before conviction of that murder he has, whether before or after the commencement of this Act, been convicted of another murder done on a different occasion (both murders having been done in Great Britain).

7. No person shall be liable to suffer death for murder in any case not falling within sections 5 or 6 of this Act.

9 (1) When a court (including a Court-martial) is precluded by this part of this Act from passing sentence of death, the sentence shall be one of imprisonment for life.

The selection of the categories of murder for inclusion within these sections has clearly not been made on moral grounds. The Legislature has not attempted to decide which murders are morally the most deserving of the supreme punishment. If it had worked on this principle, it would presumably have included murder by poisoning or murder in the course of rape; the latter being particularly distasteful, and the former being, in

most cases, planned and premeditated. It appears that the Legislature has decided to abolish the death penalty in all cases except those in which it fears that the safety and security of society may be endangered.

Section 5(1) (a) makes murder in the course or furtherance of theft capital; the provision does not cover murders in the furtherance of felony generally. It is thought that this is directed particularly to discourage professional criminals from the use of violence. The professional criminal is usually out for gain, and steals or intends to steal. This is a matter of particular importance to a country like England where the police are not armed. It is thought to be conducive to everyone's safety, the police included, that they should not be. For, if the police carry firearms, and are prepared to use them against criminals, the criminals will assuredly carry firearms also. In most cases of professional crime in England, neither side is armed. Occasionally an unarmed policeman is shot, and that creates a great outcry. But the view is that while the arming of the police would enable them to kill more criminals, it would also have the result of causing the death of more policemen. The abolition of the death penalty, however, would place the matter in a different light; for a criminal who is caught in the act, and who is likely to receive a long sentence, may well believe that he has little more to lose by murdering the person who apprehends him. One of the strongest arguments in the hands of the Retentionists is that the fear of the death penalty has led many criminals to decide, when they set out upon a venture, to leave deadly weapons behind. The Legislature in Section 5(1) (a) is trying to persuade criminals to continue this policy.

The same reasoning covers Section 5(1) (b), which deals with murder by shooting or causing an explosion. The other cases in Section 5*i* cover other types of murders of persons exercising lawful authority over a criminal or a suspect. Section 6 also clearly aims at the protection of society by allowing a murderer to escape death for murder on one occasion only.

In short then, Section 5(1) and Section 6 demonstrate the compromise which was reached by excluding the death penalty except in cases in which abolition was likely to lead to greater violence, and in cases in which the representatives of the law needed special protection.

It might be well at this stage to clarify one possible source of confusion between the provisions of Section 5(1) (a) (murder done in the course or furtherance of theft) and the felony-murder rule which was abolished. It should be noted that this section is not an exception to Section 1(1) which abolishes the felony-murder rule.

The significance of the act being done in furtherance of theft is not that a killing thereby becomes murder; it is that, if the killing is a murder because the necessary malice aforethought existed, the murder becomes capital because it was done in furtherance of theft. This point was discussed

in *R. v. Vickers*.⁸⁸ The question there, as we have seen, was whether a killing, affected with an intent to do grievous bodily harm was murder, and the court of criminal appeal held that it was. The fact that the killing was done in furtherance of theft did not affect that issue. But once the killing was held to be murder, then the fact that the murder was done in the course or furtherance of theft was sufficient to make it capital. The same point arises in connection with a killing done in the course or for the purpose of resisting a lawful arrest as defined in Section 1 (2).

The Act has done nothing to restrict in any way the royal prerogative of mercy. It will of course be less frequently exercised, because there will be fewer opportunities for its exercise. But it remains as a final hope for the convicted prisoner, and as a discretionary adjustment to the automatic imposition of the death penalty in cases of capital murder.

* * *

Time alone will tell how well these reforms will work. The critics generally are satisfied with Part I, but not with Part II. There is little doubt that, for all the difficulties which the defense of diminished responsibility will create, the reforms in Part I are steps in the right direction. Part II is of course a compromise; it goes some way to restrict the incidence of the capital penalty. It is likely to be just a phase in the development of the movement for abolition. My expectation is that Part II will not long remain on the statute book. Opinion in England seems to be moving in the direction of total abolition; and sooner or later the Legislature is likely to deal with this basic question and to abolish the capital penalty for all time.

88. [1957] 2 Q.B. 664, 41 Crim. App. R. 189 (1957).