Comparative Aspects of the English Homicide Act of 1957

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I. INTRODUCTION

The English Homicide Act of 1957, which will henceforth be referred to simply as the Homicide Act, while introducing in England the division of murder into capital and non-capital, has also changed the homicide law there in other important respects. As will be discussed in the further course of this study, it outlaws the two rules designated as constructive malice aforethought (including the felony-murder rule), introduces the doctrine of diminished responsibility, enlarges the concept of that provocation which makes a homicide manslaughter rather than murder and removes homicide pursuant to a suicide pact from the category of murder. However, these additional features are merely riders to the capital punishment provisions, since the statute owes its origin to the "abolition issue," which was brought about by the split in opinion between the "abolitionists"—those urging the abolition of capital punishment for murder—and the "retentionists"—those opposing such a change of the law. That intellectual and political cold war had assumed a high degree of emotionalism for about a decade prior to the Homicide Act.

In 1948 a Government bill tending to outlaw capital punishment for murder for an experimental period of five years had passed the House of Commons, but had been rejected by the House of Lords. Thereupon a Royal Commission on Capital Punishment was appointed in 1949, with broad terms of reference which included the question of limiting the use of the death penalty in murder cases, but did not include the question of whether capital punishment for murder should be abolished or retained.

1. 5 & 6 Eliz. 2, c. 11.
2. Symptomatic of this emotionalism is the temper running through KOESTLER, REFLECTIONS ON HANGING (1957).
4. Silverman, Afterword to KOESTLER, REFLECTIONS ON HANGING 209 (1957) [hereinafter referred to as SILVERMAN]. The following is the full text of those terms of reference: "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
The report of the Commission, based upon elaborate research, was submitted in 1953. While the Commission did not make a recommendation directly facing the abolition issue, the facts presented in its report were widely understood to be of such a nature as to support the cause of the abolitionists. And although it recommended that murder not be divided into degrees, it suggested that murder should not automatically carry the capital penalty, but rather the applicability or non-applicability of that sentence should in each case lie within the discretion of the jury. Three years after receiving this report, the Government introduced a new bill recommending certain changes in the homicide law, but not proposing the abolition of the death penalty, to which however, an abolitionist amendment was introduced by what is called in England a private bill. The vote in the House of Commons was adverse to the Government bill, but in favor of the abolition bill. The latter, however, was defeated in the House of Lords. It was then that the Government introduced that Homicide Bill which, with minor changes, passed through both legislative bodies, received Royal assent on March 21, 1957 and thus became the Homicide Act of 1957.

It has been ably analyzed by British authors, both in English and American law reviews. The present coverage, however, is different from those previous writings, to which, of course, due consideration has been

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 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...." (Emphasis added.) Royal Commission on Capital Punishment (1949-1953), Cmd. No. 8932 at III [hereinafter referred to as Cmd. No. 8932].


9. Silverman 211.


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given. This is due particularly to its mainly comparative, especially Anglo-American, approach and its broader analysis of the criminal law matters which are affected by the new English law.

II. DEMISE OF CONSTRUCTIVE MALICE AFORETHOUGHT

The first section of the Homicide Act, which, like certain other parts of the act, had its inspirational source in a recommendation of the Royal Commission on Capital Punishment,12 is marginally entitled "Abolition of 'constructive malice.'" Its first subsection, which abolishes the felony-murder rule, provides that

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

The second subsection adds that

for the purpose of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence,13 thereby, in a roundabout way, outlawing the second of the two rules embraced by the concept of constructive malice aforethought.

A. Malice Aforethought in General

To appraise what is achieved by thus abandoning constructive but retaining express and implied malice aforethought, the total concept of malice aforethought must be examined. It is a heterogeneous aggregate which defies any attempt to describe it by way of a simple and concrete rather than cryptic and abstract definition.14 However, whether or not there is an element common to all the three forms of malice aforethought—express, implied and constructive—and what that common element may be, is of

12. Cmd. No. 8932 at 45.
13. 5 & 6 Eliz. 2, c. 11, pt. I, § 1(1)-(2).
14. See PERKINS, CRIMINAL LAW 38, 40 [hereinafter referred to as PERKINS], stating that "since malice aforethought is neither a self-explanatory phrase, as used in the law, nor one which designates any single and invariable frame of mind, it is probably wise to employ a phrase to which a meaning may be assigned quite arbitrarily," and proposing the following definition: "Malice aforethought is an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind."
merely academic interest. The important fact is that, pursuant to the common law, any of those forms is sufficient to qualify a homicide as murder, and that murder, pursuant to its common law definition, cannot be committed without malice aforethought.15 It is this element that under common law distinguishes murder, a legal concept of Teutonic origin,10 from the minor homicidal crime of manslaughter.

It may be mentioned in this connection, that while a distinction between the two types of homicide, corresponding to the common law dichotomy between murder and manslaughter,27 is contained in the criminal law not only of common law countries, but also of countries belonging to the civil law system of jurisprudence, the criterion for that distinction has been changed in the course of legal history,18 and is not the same in each country. For instance, in Austria, a homicide is murder if committed with the intent to kill a human being;19 under the German law, as it existed prior to the Nazi legislation of 1941,20 a homicide was murder if committed with a premeditated intent to kill;21 and under the Napoleonic Penal Code of France, which as mentioned before has a different nomenclature,22 the

15. "Murder is homicide committed with malice aforethought." PERKINS 30. See also CAL. PEN. CODE § 187 (1955), providing that "murder is the unlawful killing of a human being, with malice aforethought," and an identical definition in the federal criminal code, 18 U.S.C. § 1111(a) (1958).

16. According to Blackstone, "The name of murder was ancienly applied only to the secret killing of another (which the word moerda signified in the Teutonic language). . . ." CHASE, THE AMERICAN STUDENTS BLACKSTONE 941 (3d ed. 1908) [hereinafter referred to as CHASE]; EHRLICH, EHRLICH'S BLACKSTONE 841 (1959) [hereinafter referred to as EHRLICH].

17. In Austria and Germany the etymologically corresponding terms Mord and Totschlag, respectively, designate the major and the minor homicide crime. However, in the Penal Code enacted in France under Napoleon, I., meurtre (murder) is the minor homicide crime (CODE PENAL, art. 295), whereas the major homicide crime is designated as assassinat (CODE PENAL, art. 296), a French word that has the same general meaning as the English "assassination."

18. Under the Teutonic law, the criterion distinguishing murder from manslaughter was originally that the killer attempted to prevent discovery of the homicide by concealing the traces thereof—his conduct after the killing—but was later changed to whether the killing was a secret and insidious one—his manner of perpetrating the homicide. BRUNNER, GRUNDDRISSE DER DEUTSCHEN RECHTSGESCHICHTE 20, 80 (6th ed. Munich and Leipzig 1943). See also PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 394-95 (2d ed. 1936), sketching what he calls the "devious history" of the word "murder," and mentioning that "its original sense is the particularly heinous crime of secret slaying."

19. AUSTRIAN PENAL CODE § 134.

20. For 1941 change of definition of murder, see BRITISH FOREIGN OFFICE, 2 MANUAL OF GERMAN LAW 96 [hereinafter referred to as MANUAL OF GERMAN LAW].

21. GERMAN PENAL CODE § 211, as it read prior to 1941 amendment, and is covered along with the latter amendment in U.S. WAR DEP'T, THE STATUTORY CRIMINAL LAW OF GERMANY 128 (1946).

22. See note 17 supra.
major homicidal crime, "assassination," distinguishes itself from the less severely punishable *meurtre* (murder) by the alternative criterion of being committed with premeditation or by means of lying in wait. At variance with those continental European countries, the common law jurisdictions have in their concept of "malice aforethought" a general test for separating murder from manslaughter. This is an apparent but not an actual uniformity, however, since only the meaning of one part of that aggregate concept—namely express malice aforethought—is settled, whereas the meaning of its other parts is a matter affected by differences in judicial rulings and statutory definitions. Moreover, only "express" and "implied" malice aforethought, both appearing in Coke's definition of murder which is referred to by Blackstone, are standard common law terminology with a technical meaning in England as well as in other common law jurisdictions. The term "constructive" malice aforethought is rarely used in this country, and then not as a distinct term, but rather as a synonym for "implied" malice aforethought. Although the makers of the Homicide Act, as Section 1 and the marginal title thereof indicate, obviously considered "constructive" and "implied" malice aforethought as two different concepts, and although "constructive" malice aforethought seems sometimes to have been used in England as a distinctly separate designation for felony-murder and murder in resistance of or escape from lawful detention, it has also frequently been used interchangeably with "implied" malice aforethought.

1. Express Malice Aforethought

As mentioned before, the meaning of express malice aforethought is settled. It is the first of the categories of malice aforethought listed in Stephen's classical Digest, which he described as follows: "An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not." In referring to this definition, two distinguished American experts stated that "no one can question the accuracy of his [Stephen's] statement with regard to the first category." Under this assumption even express malice aforethought does

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24. Chase 941; Ehrlich 841; 3 Coke, Institutes 47 (1680).
25. 40 C.J.S. Homicide § 13 (1944), explains the meaning of "Constructive Murder."
26. Prevezer 626; Elliott, supra note 11, at 282-83.
27. Turner 15; Hughes 523; Armitage, supra note 11, at 183-84.
29. Wechsler & Michael, A Rationale of the Law of Homicide: I, 37 Colum. L. Rev. 701, 703 (1937) [hereinafter referred to as Wechsler & Michael]. While thus the common law criterion for distinguishing express and implied malice aforethought...
not require a homicidal intent; this is at variance with the civil law system where such an intent is generally required for the major homicidal crime. Under the Napoleonic Penal Code this intent is required even for the minor homicidal crime, there designated as meurtre (murder).

2. Implied Malice Aforethought

Not easily described, since not settled, is the essence of implied malice aforethought. It has been referred to by a contemporary American scholar as a state of mind involving "such a wanton and wilful disregard of an unreasonable human risk as to constitute malice aforethought even if there is no actual intent to kill or injure." There are variations in the proposed definitions of the concept and corresponding differences of opinion as to its exact meaning. It is listed by Stephen as the second category of malice aforethought, and described by him as "knowledge that the act which causes the death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or bodily harm is caused or not, or by a wish that it may not be caused." However, Holmes, elaborately dealing with the problem, challenged Stephen's requirement of "knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person." He believed

is the kind of mens rea of the perpetrator, certain opinions of American courts relate the distinction to the kind of proof of malice aforethought. See, e.g., People v. Scalis, 324 Ill. 131, 150, 154 N.E. 715, 722 (1926), where it is said: "One difference between express malice and implied malice is the manner by which they may be shown to exist. Implied malice may be inferred from the act or manner of committing the homicide, but express malice can only be proven by evidence of facts outside the homicide itself which show the existence of the inward intention."

30. Perkins 31. However, this common law situation has been changed by statutory provisions in American jurisdictions. See N.Y. Pen. Laws § 1046 (homicide, if not within the definition of first degree murder, is murder only if committed with a "design to affect the death of the person killed, or of another. . . ."); Ohio Rev. Code Ann. § 2901.5 (Baldwin 1959) (one must "purposely and maliciously" kill to be a murderer); and Texas Penal Code Ann. art. 1256 (1948) ("whoever shall voluntarily kill any person within this State shall be guilty of murder").

31. Code Penal, art. 285 defines meurtre as a homicide committed "voluntarily." Under the pre-1941 German legislation even an intentional killing was merely manslaughter if the homicidal intent was not conceived with premeditation. See note 21 supra and accompanying text. While the 1941 amendment eliminated the requirement of premeditation, it provided, in effect, that intentional homicide was merely manslaughter if not committed with any of the intents or in any of the manners specified in the amended § 211 of the Penal Code. U.S. War Dep't, op. cit. supra note 21, at 129.

33. Perkins 32.
34. Stephen, op. cit. supra note 28.
that, even in the absence of the perpetrator's knowledge of the danger of death or grievous bodily harm to a human being, the actor's knowledge of such facts attending his act as "a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm" would be sufficient for a conviction of murder if death actually resulted from a deed committed with such knowledge.\(^{35}\)

Early writers, less concrete in their description of what implied malice aforethought meant, rather befogged the concept by a vague generality of the language used in defining it. They saw its essence as a state of mind evincing a "heart regardless of social duty and fatally bent on mischief."\(^{36}\) While these early definitions were obviously not of a nature to clearly demarcate the area of implied malice aforethought, those of Stephen and Holmes seem to have the following in common as the characteristic feature of that concept: It is a state of mind or \textit{mens rea} which falls short of an intent to kill or to inflict grievous bodily harm, but evinces a reckless failure to consider the probability that the death of, or grievous bodily harm to, a human being may be the result of the act undertaken for another purpose. Stephen's version, in addition, requires that the actor must have been aware of that likelihood. Holmes, however, argued that even if the actor had no such awareness, but in the light of the reasonable man standard should have had it, this would still be implied malice aforethought. Radically different, however, from both Stephen's and Holmes' versions is the isolated theory of a contemporary English scholar who, in discussing a case decided after the Homicide Act had gone into effect, challenges the traditional equalization of danger to life and danger of grievous bodily harm. He claims that a person who unintentionally committed a homicide can only be held to have committed it with implied malice aforethought if, when acting as he did, he realized that he was endangering human life and consciously took this risk into account.\(^{37}\)

In termination of the consideration of implied malice aforethought,

\(^{35}\) Holmes, \textit{The Common Law} 56 (1881).

\(^{36}\) Wechsler & Michael 703 & n.7. Similarly vague is the definition of implied malice aforethought in certain American jurisdictions. For instance, \textit{Cal. Pen. Code} § 188 provides that malice aforethought is implied when no considerable provocation appears, "or when the circumstances attending the killing show an abandoned and malignant heart."

a similar jurisprudential proposition, that has been vividly discussed in Germany as well as in Austria, warrants some attention. It is the doctrine of *dolus eventualis*,\(^{38}\) which literally means contingent intent, but actually means indirect intent.\(^{39}\) In the writer's own words the theory is that if a person intends and carries out an unlawful act to accomplish a certain purpose desired by him, but foresees the possibility that there may be, instead or in addition, another result which he does not desire or intend to bring about and he takes this possibility or risk recklessly into account in order to accomplish what he actually intends, he is, as a matter of law (or constructively) considered as having intended also that other or additional undesired result.\(^{40}\) The soundness of this doctrine and especially the propriety of its application in determining whether homicide has been committed with an intent to kill is highly controversial. Even more challenged, although incorporated in the Austrian Penal Code's general definition of criminal intent, is the similar, but technically different, doctrine of *dolus indirectus*, which also amounts to a theory of indirect intent, as its Latin name expressly indicates.\(^{41}\)

3. Felony-Murder

What has come to be known as the "felony-murder rule,"\(^{42}\) could not have been so designated when that doctrine began to develop. According to the earliest expositors of it not only homicide committed in the course or furtherance of a felony, but also homicide committed in the course or furtherance of an offense not amounting to a felony constituted murder.\(^{43}\) It is obviously only as a matter of legislative precaution that the first subsection of the Homicide Act, in abolishing the doctrine, refers to that ancient

38. LAMMASCH, CRUNDRISS DES STRAFRECHTS 29-30 (4th ed. Leipzig 1911) [hereinafter referred to as LAMMASCH]; STOSS, LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS 89-91 (2d ed. Vienna & Leipzig 1913) [hereinafter referred to as STOSS].

39. 2 Manual of German Law 78 renders *dolus eventualis* by "indirect intent." It should not be confused, however, with the *dolus indirectus* or indirect intent which is mentioned infra.

40. Utterly inadequate are the definitions by Schwenk, Criminal Codification and General Principles of Criminal Law in Germany and the United States—A Comparative Study, 15 Tul. L. Rev. 541, 554 (1941), where it is said that "dolus eventualis is present if the accused realizes the possibility of the perpetration of a crime and approves its possible result"; and 2 Manual of German Law 78 where it is said that *dolus eventualis* "embraces the case where the perpetrator has foreseen and decided to run the risk of some though not necessary consequences of his act."

41. LAMMASCH 30-31; STOSS 93-97.
42. PERKINS 33-36.
43. PERKINS 33; Cmd. No. 8932 at 29.
version thereof\textsuperscript{44} which had long ago ceased to represent the prevailing law.\textsuperscript{45} Whereas there are, in other respects, substantial as well as minor differences concerning the scope of the doctrine as variously formulated by scholarly writers, judicial rulings and, in this country, statutory provisions, it is inherent in all those versions that only a felony can be the basis for the doctrine's applicability.\textsuperscript{46} Moreover, the scope of the doctrine was further narrowed by not applying it to any felony in the course or furtherance of which a homicide was committed, but applying it only where the basic felony was of a certain kind.

Nothing corresponding to the common law felony-murder rule exists in the civil law system of criminal jurisprudence;\textsuperscript{47} also neither this rule nor the other branch of "constructive malice aforethought" is recognized in Scotland,\textsuperscript{48} one of those parts of the British Commonwealth that has a mixed or hybrid system of jurisprudence.\textsuperscript{49}

One American writer has branded the felony-murder doctrine as one of the "cruelties" of our law.\textsuperscript{50} Such cruelty, if any, was not conspicuous

\textsuperscript{44} 5 & 6 Eliz. 2, c. 11, pt. I, \S\ 1(1), quoted in text preceding note 13 \textit{supra}.
\textsuperscript{45} Under the English law as it prevailed prior to the Homicide Act, only a felony could be the basis for an application of the doctrine, and not any felony, but only a felony involving violence. Armitage, \textit{supra} note 11, at 183; Elliott, \textit{supra} note 11, at 282-83; Hughes 522, the latter adding, however, that the significance, in this connection, of "violence" was "obscure." See also Cmd. No. 8932 at 30-31.
\textsuperscript{46} This was assumed by Stephen when, in his \textit{Digest}, he defined the third category of malice aforethought as "an intent to commit any felony whatever." \textit{Stephen, op. cit. supra} note 28, at 211. Subsequently, however, he expressed doubt regarding the accuracy of that statement. Wechsler & Michael 703, 713. The editor of the most recent edition of the \textit{Digest} suggests that a correct statement would be, "an intent to commit any felony of such a kind that the actual commission thereof would involve the use or at least the threat of force against the person killed." Cmd. No. 8932 at 27.
\textsuperscript{47} Cmd. No. 8932 at 43.
\textsuperscript{48} Cmd. No. 8932 at 34.
\textsuperscript{50} Seagle, \textit{Law: The Science of Inefficiency} 120 (1952). See also Hall, \textit{General Principles of Criminal Law} 234, 235, 456 (1947) declaring the felony-murder doctrine to be inconsistent with the fundamental principle that criminal liability should not depend on bare chance results of the deed charged, but on what was intended, or at least foreseeable; and 1 WHARTON, CRIMINAL LAW 686-87 (12th ed. Ruppenthal 1932), thereinafter referred to as \textit{Wharton} declaring this "old common law rule" to be inconsistent both with logic and humanity and suggesting that because of its obsolescence in the light of modern principles of criminal law it should not be applied except where there is a statutory enactment prescribing its application. Compare the different position taken both with regard to felony-murder and the other branch of constructive malice aforethought by Holmes, \textit{op. cit. supra} note 35, at 59, and by some of the American experts who expressed their opinions before the Royal Commission on Capital Punishment, Cmd. No. 8932 at 42.
during that period of the English criminal law which is frequently referred to as the time of the "Bloody Code,"\(^1\) when the death penalty was attached to a shockingly great number of felonies, including offenses which are nowadays classified as misdemeanors.\(^2\) At that time it did not mean the difference between life and death to the accused whether he was convicted of manslaughter or of murder for the unintended homicide which was an incident of the intended felony.\(^3\) The meaning to the accused was radically different when the "Bloody Code" had ceased to exist and apart from treason only murder was a capital crime in England. It then became apparent that the doctrine was bound to result in curious quillets of the law\(^4\) if it was to be applied irrespective of the nature of the underlying felony.\(^5\) There then began a trend which reached the point of practically eliminating the doctrine. However, the movement stopped short of that, and was even reversed, according to a scholarly authority.\(^6\) The final result, at least as a matter of "living law," to use the term of Eugen Ehrlich,\(^7\) though perhaps not as a matter of theory,\(^8\) was settled by a decision of the House of Lords which held that the doctrine of felony-murder should be applied only in the case of a felony of violence.\(^9\)

Generally the attitude of the American judiciary\(^10\) was similar. It did

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52. "[F]rom the stealing of turnips to associating with gipsies, to damaging a fishpond, to writing threatening letters, . . . to cutting down a tree, . . . and so on, through 220-odd items." Id. at 7. See also the statement by Cardozo that "our descendants will look back upon the penal system of today with the same surprise and horror that fill our own minds when we are told that only about a century ago one hundred and sixty crimes were visited under English law with the punishment of death, and that in 1801 a child of thirteen was hanged at Tyburn for the larceny of a spoon." Address by B. N. Cardozo, What Medicine Can Do for Law, before the New York Academy of Medicine, November 1, 1928, in Cardozo, Selected Writings of Benjamin Nathan Cardozo 381 (Hall ed. 1947).
53. 1 Wharton 586.
54. The use of the phrase "quillets of the law" to refer to strange results of legalistic, but unrealistic, application of rules of law is borrowed from the title of Desmond, Sharp Quillets of the Law (1944). The book does not, however, contain any case of application of the felony-murder doctrine.
55. In Reg. v. Serne, 16 Cox Crim. Cas. 311, 313 (1887) Judge Stephen made this statement: "it was said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law . . . ."
58. Cmd. No. 8932 at 31, 32.
60. Perkins 33-36, epitomizing his analysis of the development in England as well as in this country, proposes that in the absence of statutory changes the
not apply the doctrine indiscriminately to any felony, but made its application dependent on the kind of felony involved, and placed emphasis on the principle that only such a felony which is independent of the homicide can justify the application of the doctrine.61 However, at variance with England where, prior to the Homicide Act, there had not been any statutory interference with the common law definition of murder, the American judges are, of course, bound by pertinent statutory provisions in those jurisdictions where such provisions exist. In certain Pennsylvania cases, where the doctrine was directly or indirectly involved, the strange results were reached that a felon was guilty of murder of one of the intervening policemen even when the latter was killed by a bullet fired by another policeman; a felon was guilty of murder of a co-felon when the latter was killed by the victim of the felony; and a felon was guilty of murder of his co-felon when the carrying out of the felony happened to become fatal to that co-felon.62 Finally, in some jurisdictions American courts have failed to make use of the opportunity given by the applicable homicide statute to construe it so as to reach the result that a homicide cannot be murder merely on the basis of the felony-murder doctrine, but can be murder only if it falls per se within the legislative definition of murder. The meaning of this last statement can be better understood after an examination of the homicide legislation in this country.

felony-murder rule should be stated as follows: "Homicide is murder if the death ensues in consequence of the perpetration or attempted perpetration of some other felony unless such other felony was not dangerous of itself and the method of its perpetration or attempt did not appear to involve any appreciable human risk."

62. Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949) (first degree murder conviction was warranted irrespective of whether the bullet which killed the policeman had been fired by one of three robbers or by one of the fellow-policemen repelling robbers' assault and attempting to frustrate their escape); Commonwealth v. Thomas, 382 Pa. 659, 117 A.2d 204 (1955) (where, in holdup of store, storeowner had killed one of holdup men, other holdup man was guilty of felony murder); Commonwealth v. Bolish, 391 Pa. 550, 138 A.2d 447 (1958) (where defendant and co-felon had been engaged in crime of arson on which occasion co-felon had received fatal burns, defendant had committed first degree murder of co-felon). See Morris, The Felon's Responsibility for the Legal Acts of Others, 105 U. Pa. L. Rev. 50 (1956/1957). Compare Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958) (where defendant and co-felon, during commission of armed robbery, had been engaged in gunbattle with police, and co-felon had been killed by police bullets, defendant was not guilty of first degree murder of co-felon) which expressly overruled Commonwealth v. Thomas, supra, and distinguished Commonwealth v. Almeida, supra.
Most American homicide statutes contain a legislative definition of murder, either substantially similar to or substantially deviating from the common law. Only a few of those statutory definitions include a provision in the nature of the felony-murder rule. But those statutes which do not contain it, when dividing murder into degrees, usually provide either that a "murder" committed in the perpetration of any of certain listed felonies, or a "homicide" so committed, is first degree murder. Such legislation poses an interesting problem of construction to which little attention has been paid so far in the pertinent literature and to which the courts have reached divergent solutions. Where the statute prescribes that "murder" committed in the perpetration of any of the listed felonies is of the first degree, the correct construction, it has been pointed out, would be that for this provision to be applicable the homicide must in the first place be "murder," that is, that it must have been committed with that mens rea which, according to the statutory definition in the jurisdiction involved, distinguishes murder from manslaughter. But only a few jurisdictions with such a statute have taken this approach. In one of the cases to this effect, the opinion also mentions that without that mens rea there cannot be even second degree murder merely because the homicide was committed in the perpetration of a felony. In what is probably the majority of the jurisdictions with such a statute the courts have taken the view that a homicide committed in perpetration of any of the felonies specified in the first degree murder provision is thereby murder. And in at least one state, California, it has even been held that a homicide committed in perpetration of a felony not listed in the first degree provision, while not

63. See, however, § 559.020, RSMo 1949 which provides that "all other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree." (Emphasis added.)

64. See U.C.M.J. art. 118, subd. 4; La. Rev. Stat. § 14:30(2) (1950); Miss. Code Ann. § 2215(c) (1942); Wis. Stat. § 940-03 (1958) (third degree murder).


66. See, e.g., N.Y. Pen. Laws § 1044(2)-(3); Ohio Rev. Code § 2901.01 (Baldwin 1959).

67. 1 Wharton 747-51.


69. State v. Campbell, supra note 68.


71. E.g., People v. Olsen, 80 Cal. 122, 22 Pac. 125 (1889); People v. Milton, 145 Cal. 169, 78 Pac. 549 (1904); Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934); Farmer v. State, 296 S.W.2d 879 (Tenn. 1956).
murder of the first degree, is second degree murder;\textsuperscript{72} the rule thus being settled in California that an abortion\textsuperscript{73} with a fatal outcome is murder of the second degree.\textsuperscript{74}

A different approach has been taken in Ohio. It is provided there by statute that anyone purposely committing a homicide in the perpetration of any of the listed felonies is guilty of first degree murder.\textsuperscript{75} However, since an intent to kill is required in Ohio even for second degree murder,\textsuperscript{76} it is settled there that a homicide committed in the perpetration of any of the felonies listed in the first degree provision can nevertheless not be first degree murder if it is not murder at all, since not committed with an intent to kill.\textsuperscript{77}

4. Resistance or Escape Murder

The clumsily phrased second subsection of Section 1 of the Homicide Act\textsuperscript{78} abolishes what in Stephen's Digest is elaborately defined as the fourth category of malice aforethought.\textsuperscript{79} This category may be roughly described as the common law rule that a homicide committed in resistance of lawful arrest or in perpetration or attempted perpetration of escape from lawful detention is murder per se, that is, irrespective of the presence or absence of a \textit{mens rea} satisfying either the concept of express or implied malice aforethought. The applicability of this rule is in many cases eclipsed by the simultaneous applicability of the doctrine of implied malice aforethought or of the felony-murder rule, or both.\textsuperscript{80} This occurs where the act of resistance or escape evinces a reckless disregard of danger for human life or bodily in-


\textsuperscript{73} Not one of the felonies listed in \textit{Cal. Pen Code} § 189 (1955).

\textsuperscript{74} People v. Wright, 167 Cal. 1, 138 Pac. 349 (1914); People v. Powell, 34 Cal. 2d 196, 208 Pac. 2d 974 (1949); People v. Northcott, 45 Cal. App. 706, 189 Pac. 704 (Dist. Ct. App. 1920).

\textsuperscript{75} \textit{Ohio Rev. Code} § 2901.01 (Baldwin 1959).

\textsuperscript{76} \textit{Ohio Rev. Code} § 2901.05 (Baldwin 1959) (killing must have been "purposely and maliciously").

\textsuperscript{77} Robbins v. State, 8 Ohio St. 131 (1857); State v. Farmer, 156 Ohio St. 214, 102 N.E.2d 11 (1951); Turk v. State, 48 Ohio App. 489, 194 N.E. 425 (1934). See also 21 \textit{Ohio Jurisprudence} 47 (1932).

\textsuperscript{78} 5 & 6 Eliz. 2, c. 11, pt. 1, § 1(2), see text accompanying note 13 \textit{supra}, commented on as "a rather clumsy way of saying that the doctrine of constructive malice is abolished in these cases also," Williams 381.

\textsuperscript{79} \textit{Stephen, op. cit. supra} note 28, at 211. For application of this doctrine in American jurisdictions see 26 \textit{Am. Jur. Homicide} § 307 (1940); 40 \textit{C.J.S. Homicide} §§ 20, 102 (1944).

\textsuperscript{80} For difficulties of analysis presented by this overlapping, see Cmd. No. 8932 at 29-30.
tegrity, is a felony in its own right81 or where both features are present. Such frequent overlapping probably explains the fact that this branch of constructive malice aforethought has been given less attention than the felony-murder rule both in the pertinent literature and in the Royal Commission's discussion of constructive malice aforethought.82 The resistance or escape rule also had a very broad scope originally; however, it was gradually narrowed.83 What it finally meant in England seems to be a matter of some uncertainty, according to the respective part of the Royal Commission's report.84 In this country its applicability is, of course, subject to any applicable statutory provisions.

B. Appraisal of Achievement Inherent in Section 1 of the Homicide Act

From what has been discussed so far it would seem to be clear that Section 1 of the Homicide Act has eliminated, in England, the theretofore existing legal possibility that a defendant could be found guilty of murder although he had had neither the intent to cause death or grievous bodily harm, nor an awareness of a likelihood that the act intentionally done by him might, as an incidental result, cause death or grievous bodily harm. The extent of this effect of Section 1 will, of course, depend on how far future judicial rulings will stretch or limit the concept of implied malice aforethought, which was not abolished but expressly recognized by the Homicide Act. But, at any rate, a homicidal result which was not intrinsically related to the defendant's intentional act, but was more or less accidental and reasonably unforeseeable, cannot any more be the basis of his conviction as a murderer in England. This is certainly a sound legislative reform, and, in the writer's opinion, it should be the death knell for such rules still prevailing in American jurisdictions which allow the antiquated principle of absolute criminal responsibility for a felony86 to have a stronghold in the law of murder.86 It is believed, however, that, although

81. While in American jurisdictions the offense of escape is either a felony or a misdemeanor, depending on the applicable statute, the common law distinguished between "breach of prison" and "escape" so called, the latter being only a misdemeanor. PERKINS 429.
83. Ibid.; PERKINS 37-38.
85. That absolute liability is sanctioned by the felony-murder rule may technically, but hardly realistically, be contested on the ground that the mens rea in committing the basic felony is, as a matter of law, carried over into the collateral homicide.
86. Illustrative of this is People v. Vasquez, 49 Cal. 560 (1875). In that case there was a conspiracy to commit a robbery, the common design not including, however, the taking of life (rather, one of the conspirators urged the others not
the Royal Commission advised against replacing the common law theory by a statutory definition of murder, it is regrettable that the Homicide Act does not contain such a definition. The opportunity has thus been missed not only to clarify certain features of the common law with regard to which there is some uncertainty, but, most importantly, to jettison the phrase “malice aforethought” which is not only cryptic but also hypocritical since, as used in the law, it does not mean what it says. Murder could instead have been defined in plain terms, easily understandable to a layman as well as to a lawyer, and thus apt to greatly facilitate the task of a judge who must instruct a jury on what “murder” means in the law.

The writer furthermore believes that should, in the future, a statutory redefinition of murder be decided upon, it could well be considered whether the mens rea sufficient for murder should not be limited to an intent to kill or to an awareness of likelihood to cause death of a human being, thereby shifting intent to cause grievous bodily harm and awareness of a likelihood
to do this). Nevertheless, another one, in furtherance of the robbery, took life. The court held that the first mentioned conspirator is as much guilty of murder in the first degree as if by his own hand he had committed the homicide. While this was an early case, Commonwealth v. Bolish, 391 Pa. 550, 138 A.2d 447 (1958), wherein an even more startling result was reached (summarized in note 62 supra), was a case of rather recent date. The California supreme court took a different approach from that manifested in People v. Vasquez, supra, and Commonwealth v. Bolish, supra, in People v. Felin, 203 Cal. 587, 265 Pac. 230 (1928), where a first degree murder conviction of one who had been an accomplice to the felony of arson in the course of perpetration of which his co-felon had received burns and died therefrom, was set aside. The opinion rationalizing this holding contains the following passage: “It cannot be said from the record in the instant case that defendant and deceased had a common design that deceased should accidentally kill himself. Such an event was not in furtherance of the conspiracy, but entirely opposed to it.” Id. at 597, 265 Pac. at 235.

87. Cmd. No. 8932 at 167. Compare Turner 15, stating that it “caused surprise to many people” that despite the theretofore existing alternative use of “implied” and “constructive” malice aforethought in reference to the same concept, the Homicide Act, abolishing “constructive” but expressly recognizing the continued existence of “implied” malice aforethought, does not define what is now to be understood by the latter term.

88. This seems to be demonstrated by the whole contents of Mr. Turner's article, especially since its author is one of the contemporary leaders of criminal law scholarship in England. See also the statement in Cmd. No. 8932 at 26, that “the meaning of ‘malice aforethought,’ which is the distinguishing criterion of murder, is certainly not beyond the range of controversy.”

89. Neither of the two words “malice” and “aforethought,” when in combination used as a legal term, has its ordinary meaning, rather both are by a jural legerdemain, as it were, deprived thereof. Cmd. No. 8932 at 26-27; Perkins 30-31. The prevailing theory is well stated in the U.S. Army, Manual for Courts Martial 231 (1949), by the following proposition: “Malice does not necessarily mean hatred or personal ill-will. The use of the word ‘aforethought’ does not mean that the malice must exist for any particular time before the commission of the act. It is sufficient that it exist at the time the act is committed.”
to cause such harm from the *mens rea* of murder to that of manslaughter. Although this would be contrary to common law tradition, the law of Scotland has practically reached this point. Homicidal intent is also required for murder in a minority of the American jurisdictions, as it is required in most continental European countries.

III. *M'Naghten Rules Neither Abolished nor Supplemented by Homicide Act*

By its provisions on diminished responsibility the Homicide Act opens the door for avoiding a murder conviction and instead resorting to a manslaughter conviction in a case where the "right and wrong test" of the so-called M'Naghten Rules compels the finders of fact to adjudge the defendant criminally responsible for his deed despite their belief, if any, that he should be free from criminal responsibility therefor in view of the abnormal condition of his mind when he committed the homicide. The Homicide Act does not provide, however, anything that would make it technically correct to proceed in such a case with an acquittal, since it has left the M'Naghten Rules intact. There remains therefore the temptation, in such a case, to pay, at best, lip service to those Rules, but actually to disregard them, a temptation that is well understandable in view of their inadequacy to serve as the sole test of mental capacity to commit a crime. It is indeed hard to obey the legal duty of finding a person criminally responsible for a homicide if one believes that in committing it he was not a criminal but a madman. That negative feature of the Homicide Act—its failure to take any action with regard to the M'Naghten Rules—is there-

90. See a statement made, with some reservations, by the L.J. General of Scotland, Cmd. No. 8932 at 34.
91. For the Ohio view see note 76 *supra* and accompanying text. See also Tex. Pen. Code art. 1256 (1948) which defines a murderer as one who "shall voluntarily kill any person within this State."
92. For instance Belgium, France, Italy, the Netherlands, Norway, Sweden and Switzerland, whose respective laws are summarized in Cmd. No. 8932 at 436-37. See also Cmd. No. 8932 at 164, where the statement, "In all the countries of Western Europe about which we made enquiry, the statutory provisions make intent to kill a necessary element in murder or intentional homicide," is followed by a qualifying comment.
93. 5 & 6 Eliz. 2, c. 11, pt. I, § 2, discussed in IV., *infra*.
95. Hughes 526; Williams 383.
97. "Then Hamlet does it not, Hamlet denies it. Who does it, then? His madness..."
*Shakespeare, Hamlet*, Act 5, Scene II.
fore no less important in evaluating its achievement than are the affirmative provisions which it contains.

A. The Pre-M'Naghten Law

As in any other country, so also in England, the legal relation between criminal responsibility and that state of mind which was formerly designated as madness has changed in the course of history. In England, as in any other country, the principle of absolute liability, which was not concerned with *mens rea* but looked merely to the element of causation governed almost exclusively in the early stages of legal development. In the light of this approach it was only logical, in determining criminal responsibility, to pay no attention at all to the question of whether the accused had been in an abnormal state of mind when he committed the deed, nor, consequently, to be concerned with the kind or degree of any such abnormality.\(^8\) About the thirteenth century there developed in England a kind of intermediated attitude that a criminal deed which was committed out of "madness" did not result in an acquittal, but in a post-conviction grant of a royal pardon.\(^9\) Only in the seventeenth century did England begin to consider "madness" as a complete defense to a criminal charge.\(^10\) In the eighteenth century there appeared what is nowadays called the "wild beast test." Pursuant to it a defendant was not free from criminal responsibility unless he had been so totally deprived of reason, understanding and memory that he did not know any more about what he was doing than would "‘an infant, than a brute or a wild beast.’"\(^11\) It is apparent from this definition of the "wild beast test" that it considered only intellectual, not volitional, abnormalities of the mind, a limitation which is also inherent in the M'Naghten Rules.

B. M'Naghten Case and Rules

In 1843, Daniel M'Naghten, a madman, whose persecution mania included the insane belief that he was a victim of persecution by the famous statesman, Sir William Pitt, intending to kill Pitt, but mistaking Pitt's secretary for the intended victim, shot at and killed the secretary, Mr.

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\(^8\) 3 Holdsworth, History of English Law 371 (5th ed. 1942); Perkins 738.
\(^9\) 2 Stephen, History of the Criminal Law of England 151 (1883); Perkins 738.
\(^10\) Glueck, Mental Disorder and Criminal Law 125 (1925); Perkins 739.
Edward Drummond. He was tried for murder but found not guilty by reason of insanity. This was the final termination of the case, but the starting point of the legal trouble which arose as its aftermath. Since, as Mr. Koestler writes, "the oracles of the day thought that M'Naghten ought to have been hanged," the House of Lords placed before the High Court Judges an elaborate questionnaire. The answers given by the Judges were printed in the report of the case and are usually referred to as the "M'Naghten Case."

The answer of the Judges to questions II and III contains the following significant passage:

the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. . . .

This is what is usually meant by reference to the "M'Naghten Rules," at least in this country; however, the test is frequently stated in terms of lack of mental capacity to distinguish between right and wrong, and therefore is also called the "right and wrong" test.

The present concern lies not with that part of the classic formula which deals with the burden of pleading and of proof of mental incapacity, but it may be mentioned that under the law prevailing in England proof beyond any reasonable doubt is not required, proof by "a balance of probabilities" being sufficient. In some American jurisdictions a preponderance of the evidence, and in others even less, is enough. Only in Oregon is proof beyond any reasonable doubt required under a statute which has been upheld by the United States Supreme Court.

102. Koestler, Reflections on Hanging 71 (1957); Perkins 746.
103. Koestler, op. cit. supra note 102, at 71.
105. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (K.B. 1843). There are numerous different spellings of M'Naghten's name, "at least 10," according to Cmd. No. 8932 at 75 n.2.
106. Perkins 746.
108. 40 C.J.S. Homicide § 4(c) (1944); Perkins 748-49.
The trouble point of the quoted formula is the limitation of the test of mental incapacity to intellectual, as distinguished from volitional, abnormality. This limitation, as mentioned before, was inherent already in the eighteenth century "wild beast" test and may have been in harmony with that period's measure of psychiatric knowledge. The M'Naghten Rules, announced about the middle of the nineteenth century, crystallized that eighteenth century limitation, and their present day application compels the finders of fact to disregard what we now know about the human mind. It is nowadays elementary that abnormality of the human mind may be volitional as well as intellectual; not only incapacity to distinguish between right and wrong, but also incapacity or lack of will power to act in accordance with what the actor knows is wrong, may be a form of mental abnormality. Therefore, in certain American jurisdictions the M'Naghten Rules have been supplemented by the "irresistible impulse" test. A similar position is taken by certain continental European codes, for instance that of Switzerland which, according to the report of the Royal Commission, defines a person as mentally incompetent to commit a crime if he is "incapable of appreciating the unlawful nature of his act or of acting in accordance with such appreciation." In the District of Columbia even the supplementation of the "right and wrong" test by the "irresistible impulse" rule, which had been the law there, was held insufficient in 1954 and replaced by the so-called "product" rule, also called, after the case wherein it was announced, the Durham test, and also referred to as the New Hampshire test.

While the "irresistible impulse" test does not deviate in method of approach from the M'Naghten Rules, in that it adds only another specifically described kind of mental abnormality, volitional, to that specified by the M'Naghten Rules, the "product" test takes a radically different ap-

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113. Cmd. No. 8932 at 110, 413. Similarly, Italy's Penal Code, art. 85, quoted in Cmd. No. 8932 at 412.

114. Perkins 763.


116. This nomenclature evolved because of a similar position taken by the Supreme Court of New Hampshire as early as 1870. See State v. Pike, 49 N.H. 399 (1870); State v. Jones, 50 N.H. 369 (1871); Weidhofen, The Flowering of New Hampshire, 22 U. Chi. L. Rev. 355 (1955).
proach in that it dispenses with any specific description of the abnormality that may result in mental incapacity to commit a crime. It is, in that re-
spect, similar to certain continental European codes. An example is the
Napoleonic Penal Code which excludes criminality if the defendant was
in a state of *démence* (insanity) at the time of his action, a broad formula
that, of course, includes any kind of insanity.117

The attack on the M'Naghten Rules started shortly after their an-
nouncement.118 Although they have found distinguished defenders119 even
in modern times, the wave of the future, as it were, seems to run against
them. A strong illustration of this is the fact that in the very country
where that orthodox test originated it has been condemned as unsatisfactory
by an almost unanimous vote of the Royal Commission on Capital Punish-
ment.120 That neither of its alternative recommendations121 has so far
been carried out, especially not in the Homicide Act, is not believed to be
an indication of a contrary trend, but merely a symptom of the difficulty
in a conservative country, as England generally is, to put through a radical
departure from tradition. It may be added that of the 12 distinguished
members of the Royal Commission122 only one expressed the opinion that
the M'Naghten Rules should remain intact.123 Moreover, according to a
professor of law at the University of Aberdeen, the M'Naghten Rules
"have never been part of the law of Scotland."124

The "irresistible impulse" test is recognized in numerous American
states,125 was before the introduction of the "product" rule applied in the

117. Art. 64, quoted in Cmd. No. 8932 at 411, where "demence" is rendered
by "madness." For construction of "demence" as meaning mental derangement of
any kind, including intellectual as well as volitional, see Cmd. No. 8932 at 412. Similarly
without any specification of the kind of mental abnormality that may be
considered is the code of Denmark which provides that "acts committed by per-
sons who are irresponsible on account of insanity or a comparable condition, or
suffer from gross mental deficiency are not punishable." Cmd. No. 8932 at 411.

118. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 480 (1947); Cmd. No. 8932
at 79, 398.

119. Cmd. No. 8932 at 86, 284. In view of the title of the following article,
917 (1956), it should be noted that Professor Hall in his book HALL, GENERAL
PRINCIPLES OF CRIMINAL LAW 536 (1947), admits that the M'Naghten Rules are
vulnerable by not considering volitional abnormality.

120. Cmd. No. 8932 at 102.


122. Sir Ernest Arthur Gowers was Chairman. Cmd. No. 8932 at III.


124. "True, they were quoted in Gibson (1844) 2 Broun 332 just after
McNaghten's Case, but they have not taken root in Scotland." Smith, Diminished
Responsibility, 1957 CRIM. L. REV. (Eng.) 354, 355 [hereinafter referred to as
Smith].

125. Their number was 14 in 1955. PERKINS 762.
District of Columbia, 126 and prevails in this country's military jurisdiction. 127 As intimated before, it does not amount to an abrogation, but merely to a supplementation of the "right and wrong" test of the M'Naghten Rules. What arises from this supplementation is thus stated in an official Army publication: "A person is not mentally responsible in a criminal sense unless he was, at the time, so free from mental defect, disease or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right." 128 An instruction in a similar sense, given in a Michigan case, 129 was the inspiration for the pertinent part of the best-seller, Traver, Anatomy of a Murder. 130 Where "irresistible impulse" is recognized, a successful defense on that ground results in an acquittal. It is therefore important to note that irresistible impulse, which in a legal sense presupposes an abnormal condition of mind as its cause, is actually a technical name for volitional abnormality. It must not be confused with what is inexacty referred to as "irresistible impulse" or "emotional insanity" when used with regard to a defendant who was mentally normal at the time of his criminal deed, but committed it in a highly emotional state of mind due to extraordinarily exciting circumstances, for instance when a husband surprises his unfaithful wife and her accomplice in the act of adultery. This is not "irresistible impulse" as understood by the law 131 and is nowhere a legal ground for an acquittal, 132 although a successful defense raised on this basis may result in a conviction of manslaughter rather than murder. 133 On the other hand,
Despite the word "impulse" the legal concept of "irresistible impulse" includes not only impulsive action, but also action by a mentally abnormal person that was considered by him some time before, a fact that is sometimes overlooked.

The Royal Commission on Capital Punishment, by a unanimous vote, recommended that should the M'Naghten Rules not be abrogated, they should be supplemented by the addition of the "irresistible impulse" test. Strongly influenced in this respect by a proposal of the British Medical Association, but modifying its wording, the Commission espoused the following provision: "The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it." (Emphasis added.)

No less than nine of the twelve members of the Commission took a more radical position. They voted for the alternative recommendation "that a preferable amendment of the law would be to abrogate the Rules and to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible." Prominent sponsorship was thus given to the "produce" rule which "is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The only legal element in that rule is that of the requirement of causal connection between mental abnormality and unlawful deed. The rationale offered for the rule is that even if the "right and wrong" test is supplemented by the "irresistible impulse" test, the fact

134. Perkins 762; Cmd. No. 8932 at 110 ("may be coolly and carefully prepared; yet it is the act of a madman").
135. "We find that the 'irresistible impulse' test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection. . . ." Durham v. United States, supra note 115, at 874.
136. Mr. Fox-Andrews (see note 123, supra) dissented only from an additional part of that recommendation, namely "that it would be better to amend" the M'Naghten Rules "in that way than to leave them as they are." Cmd. No. 8932 at 116.
137. Cmd. No. 8932 at 111.
139. Durham v. United States, supra note 115, at 874-75. The observation in Seagle, Acquitted of Murder 237 (1958), that "while this test could be stated in a single sentence, it possessed the virtue neither of clarity nor simplicity" is startling, to say the least in this respect.
remains that criminal irresponsibility is made to rest on specific kinds of mental abnormality; the fact finder is thus not allowed to consider all information advanced by the science of psychiatry, but rather is compelled to apply an entirely obsolete concept of the nature of the human mind.\textsuperscript{141} Modern medical science, it is pointed out, considers the human mind as an integrated entity,\textsuperscript{142} rather than several compartments—the intellect, the emotions and the will; it considers that insanity distorts and impairs the action of the mind as a whole.\textsuperscript{143}

Attacks on the “product” rule\textsuperscript{144} are less concerned with the soundness or unsoundness of its rationale than with the allegedly too large degree of discretion which it gives to the jury and the absence of anything in the way of law that may prevent the jury from basing its determination on mere conjecture.\textsuperscript{145} In the writer’s opinion this argument is not persuasive. The writer believes, however, that, for practical purposes at least, the addition of the “irresistible impulse” test is sufficient to remove the nuisance effect, as it were, of the exclusiveness of the “right and wrong” test, and that therefore the “product” rule is likely to remain the law of only a very small number of American jurisdictions.

\section*{IV. Diminished Responsibility}

Section 2 of the Homicide Act contains the following provisions:

(1) 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 causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

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

(3) A person who but for this section would be liable, whether

\begin{itemize}
  \item \textsuperscript{141} Durham v. United States, supra note 115.
  \item \textsuperscript{142} See Jung, The Integration of Personality (1940).
  \item \textsuperscript{143} Cmd. No. 8932 at 113, quoted in Durham v. United States, supra note 115.
  \item \textsuperscript{144} Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 779, 789 (1956); Hall, op. cit. supra note 119, at 536; Wechsler, supra note 140, at 369. Compare the favorable appraisal of the rule in Sobeloff, Insanity and the Criminal Law: From McNaughten to Durham, and Beyond, 41 A.B.A.J. 793 (1955).
\end{itemize}
as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.146

The term "diminished responsibility" which, as a designation of the quoted provisions, appears marginally in the statute, is a misnomer as, with regard to the corresponding German phrase verminderte Zuordnungs-
fäehigkeit, has been pointed out by Austrian scholars.147 While medically there are not only various kinds, but also various degrees of mental abnormality148 (where this is denied with regard to "insanity" the latter term is not used in a medical, but in a legal sense149), "responsibility," in a legal sense, does by its very nature not admit of gradations. Under the law a person is either responsible or not responsible for the unlawful act committed by him. He may, however, as a matter of law, be regarded as less culpable and therefore less punishable if he committed the deed in an abnormal state of mind than if he would have committed it in a normal mental condition even though this abnormality did not measure up to that legally required for mental incapacity. This is what "diminished responsibility" refers to when the term is used in those jurisdictions150 where that defense, if successful, procures the defendant the benefit of an extraordinary mitigation of his sentence151 or, in a case of homicide, of being found guilty of manslaughter and not of murder. Thus analyzed, "diminished responsibility," as

146. 5 & 6 Eliz. 2, c. 11, pt. I, § 2(1)-(4).
147. LAMMASCH 26; STOESS 85; VARGHA, DIE ABSCHAFFUNG DER STRAFFKNECHT-
sCHAFT: STUDIEN ZUR STRAFFRECHTSLEREFORM 482 (Austria 1896) (logically untenable to consider one who is admittedly responsible, as not fully responsible, or as merely partially or merely half responsible).
148. WERTHAM, CIRCLE OF GUILT 74 (1956) ("Modern psychiatry and psychana-
lysis have shown that the absolute contrast between normal and abnormal cannot be maintained."); CARDOZO, SELECTED WRITINGS OF BENJAMIN NATHAN CAR-
dozo 387 (Hall ed. 1947) ("Conceivably the twilight zone between sanity and insa-
unity is so broad and so vague as to bid defiance to exact description . . . ."); STOESS 84 (numerous intermediate and transitional phases between sanity and insanity).
149. Holloway v. United States, 148 F.2d 665, 667 (D.C. Cir. 1945) ("[T]he psy-
istatist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. . . . For the purposes of conviction there is no twilight zone between abnor-
ality or insanity. An offender is wholly sane or wholly insane . . . .").
150. Including, in addition to certain continental European states, Cmd. No. 8932 at 414-16, certain countries outside of Europe, Cmd. No. 8932 at 413. See also GLASER, INFRACTION INTERNATIONALE 133, 134 n.55 (Paris 1957).
a legal term, actually means diminished accountability or diminished punishability.\textsuperscript{152} In most of those countries where the doctrine of "diminished responsibility" is recognized, it applies to all crimes and not only to murder.\textsuperscript{153} By limiting it, in the Homicide Act, to murder, it was intended to follow what was believed to be the law existing in Scotland\textsuperscript{154} established by way of judicial rulings.\textsuperscript{155} This assumption, underlying the pertinent discussion and conclusion of the Royal Commission on Capital Punishment, is claimed to be erroneous by an expert on Scottish law.\textsuperscript{156} However this may be, the Royal Commission, while favorably commenting on the doctrine, expressed the belief that it would be arbitrary to introduce it with the limitation which the Commission believed to prevail in Scotland. The Commission, for this technical reason, recommended that it not be included in a legislative reform of merely the homicide law.\textsuperscript{157} Nevertheless the Homicide Act introduces the doctrine with that limited applicability, but provides that Part I, thus also Section 2 thereof, shall not extend to Scotland.\textsuperscript{158} There may thus be certain differences in the operation of the doctrine in England and Scotland.\textsuperscript{159} This need not be the case, however, since, despite the fact that Section 2 of the Homicide Act is not a statute effective in Scotland and the doctrine of "diminished responsibility" was taken over into England from Scottish cases,\textsuperscript{160} the possibility cannot be excluded that Scottish

\begin{enumerate}
\item[152.] LAMMASCH 26; STOESS 75. "Whether the phrase is partial responsibility, or as seems preferable, diminished or partial capacity, the problem usually is whether or not mental disease or defect insufficient to require an acquittal may call for conviction of some lesser grade or degree of crime than would otherwise be the case." (Emphasis added.) PERKINS 770.
\item[153.] THE STATUTORY CRIMINAL LAW OF GERMANY, op. cit. supra note 151, at 45.
\item[154.] 560 H.C. DEB. 1254 (1956).
\item[155.] First accepted in Scotland by Lord Deas in Dingwall, 5 Irv. 466 (1867). Smith 356. See also Cmd. No. 8932 at 392-96 for pertinent pronouncements of later dates, and Cmd. No. 8932 at 131-32, for a discussion of the development of the doctrine in Scotland. Whether it is applicable there to psychopaths, seems to be doubtful. Cmd. No. 8932 at 132; Smith 359, 360, 363. If the defense is successful, its effect in a homicide case is conviction of the defendant of merely "culpable homicide," the Scottish equivalent to manslaughter. Smith 356.
\item[156.] Smith 354, 357, citing early cases of Scottish application of the doctrine to crimes other than homicide.
\item[157.] Cmd. No. 8932 at 144.
\item[158.] 5 & 6 Eliz. 2, c. 11, pt. IV, § 13(1).
\item[159.] Smith 363.
\item[160.] "Formerly there were only two classes of prisoners—those who were completely responsible and those who were completely irresponsible. Our law has now come to recognize in murder cases a third class . . . namely those who, while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide . . . ." H. M. Advocate v. Savage [1923] Just. Cas. 49 (Scot.), quoted in Cmd. No. 8932 at 392. "[T]he defense of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and if
courts, in future rulings, though not bound to, may as a matter of judicial policy follow the provisions of the English statute. For instance, although the Scottish courts seem to have been reluctant in the past to apply the doctrine where merely psychopathy was involved, the fact that, as will be discussed presently, Section 2 of the Homicide Act does not prevent the new defense to be invoked on behalf of a psychopath may induce the Scottish courts to adopt the same position.

In view of the wording of the principal provision of Section 2(1) and the lack of any direct or indirect reference to the M'Naghten Rules, it appears that mental abnormality in order to be a basis for the defense of diminished responsibility need not be intellectual, or related to the ability to distinguish right from wrong, but must have a substantial causal connection with the defendant's criminal deed. The applicability of the statute to psychopaths at a time when there was not yet a judicial ruling thereon, was considered as "clear" by one writer, and as "unlikely" by another. However, this question has been settled by an appellate court holding that where in the case of a psychopath the defense of diminished responsibility had been raised, there was evidence in support thereof and no evidence to the contrary, error was committed in finding the defendant guilty of murder rather than of manslaughter. While this decision probably implies that the

not sane, is not responsible. It is a modern variation of that doctrine . . . . The mental weakness, or weakness of responsibility, is regarded by our law as an extenuating circumstance, and it has effect as modifying the character of the crime, or as justifying a modification of sentence, or both . . . ." Kirkwood v. H. M. Advocate [1959] Just. Cas. 36 (Scot.), quoted in Cmd. No. 8932 at 384. See also H. M. Advocate v. Braithwaite [1945] Just. Cas. 55, especially the passage quoted in Cmd. No. 8932 at 394.


162. See also Cmd. No. 8932 at 135-40 where, after a discussion of the medical and criminological problems presented by that vague category which is generally designated as psychopathy, it is said that "in many cases the responsibility of psychopaths can properly be regarded as diminished."

163. First sentence in quotation accompanying note 146 supra.

164. The term is "sometimes used in so wide and loose a sense as to justify the observation of an American commission that it has 'been used for many years as a convenient psychiatric waste-basket for cases otherwise difficult to classify' . . . ." Cmd. No. 8932 at 39 citing New Jersey Commission on the Habitual Sex Offender Rep. (1950).

165. Prevezer 641 ("Whether or not psychopathy constitutes a disease . . . it is clearly a mental abnormality arising from an inherent cause.").

166. Williams 383.

proof with which the defense is burdened by Section 2 of the Homicide Act\(^{168}\) need not be beyond any reasonable doubt, it has been held earlier that the proof need not be beyond any reasonable doubt, only proof by a balance of probabilities being required.\(^{169}\)

The relation of Section 2 of the Homicide Act to certain other statutes is of importance in England,\(^{170}\) but of no sufficient comparative law interest, and will therefore not be covered herein. Reference must, however, be made to the somewhat startling decision of an appellate court that a judge, in instructing a jury on diminished responsibility, does enough by rendering in his charge the statutory provisions, without explaining any of the terms contained therein, and that this applies also where the prosecution has argued that the statute is not applicable to merely volitional abnormality.\(^{171}\)

The pragmatic effect of Section 2 of the Homicide Act will be only summarily considered here since part of that subject has been covered in introducing the discussion of the M'Naghten Rules.\(^{172}\) By the new statute the jury is given a broad scope of discretion to pass a "merciful verdict,"\(^{173}\) that is to abstain from finding the defendant guilty of murder, and thus, in a capital murder case,\(^{174}\) to save him from being sentenced to death, if he committed the homicide in an abnormal condition of mind, although that abnormality, either in kind or in degree, did not measure up to that which under the M'Naghten Rules would warrant an acquittal. In accordance with the British genius for compromise, a half way house has thus been erected, in fact, though not in theory, between leaving and not leaving the M'Naghten Rules intact.

While it cannot be denied that even this is a progressive step, it will not satisfy those who feel that when the homicide committed by a defendant was a product of his madness, although he was aware of the difference

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168. Second sentence in quotation accompanying note 146 supra.
172. See III., supra.
173. "The purpose of section 2(1) was to enable the jury to find a merciful verdict if they thought the accused was almost, but not quite, mad." Observation by Lord Goddard, C.J., according to note in 1958 Crim. L. Rev. (Eng.) 190-91.
174. For distinction between capital and non-capital murder, see VII., infra.
between right and wrong, he should not be convicted at all, not even of manslaughter. However, the potentiality of a mitigation of an unjust result of the exclusive application of the “right and wrong” test is only a by-product and not the primary purpose of the diminished responsibility rule. The philosophy behind the rule is independent of the soundness or unsoundness of the prevailing test of mental incapacity. The idea is that if the defendant, at the time of his unlawful act, was not in such a condition of mind as to entitle him to the benefit of an acquittal, but his mental abnormality substantially contributed to the perpetration of the crime, he should not be treated with the same severity as a defendant who acted in a normal state of mind. This, it is believed, is a sound approach and one that does not lose its merits in a jurisdiction where the M’Naghten Rules are supplemented by the “irresistible impulse” test or replaced by the “product” rule. It is therefore the writer’s opinion that in each American jurisdiction it would be a wise move to introduce legislation framed after the pattern of Section 2 of the Homicide Act.

V. LEGISLATIVE REVISION OF THE RULE OF PROVOCATION

Section 3 of the Homicide Act is related to the so-called “rule of provocation,” that is, the rule generally applied in Anglo-American jurisdictions in determining what effect provocation as inducement to a killing has on the criminality of the homicide thus committed. The pertinent provision reads:

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 by 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 that 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.

It is elementary in Anglo-American law, and has never been questioned, that in the case of a homicide committed by a person possessed of mental capacity to commit a crime, provocation, however great, can never

175. See III., supra.
176. Perkins 43.
177. Cmd. No. 8932 at 45; 26 Am. Jur. Homicide §§ 19-31 (1940); 40 C.J.S. Homicide § 42 (1944). The law of Texas is exceptional in that the crime of manslaughter has been abolished there by statute in 1927. Wechsler & Michael 720 n. 76.
178. 5 & 6 Eliz. 2, c. 11, pt. I, § 3.
be an absolute defense, that is, never a legal basis for an acquittal. A defense of provocation can, at best, only result in a conviction of manslaughter rather than murder, and can have even that limited effect only if the provocation was adequate.\(^{179}\) In this field, however, there are two controversial points: whether it is proper to apply the "reasonable man" test in determining the adequacy of provocation; and whether it is sound law to consider provocation by words alone as inadequate.

A. The "Reasonable Man" Test

The idea that what a "reasonable man"\(^ {180} \) would have done in the given situation is the standard for appraising the propriety of what actually has been done is one of the favorite ideas of the common law.\(^ {181} \) With reference to the question of adequacy of the provocation to commit homicide, this test was for the first time applied in 1869.\(^ {182} \) It has thereafter become a regular feature in pertinent opinions of English courts\(^ {183} \) as well as American ones.\(^ {184} \) However, in the course of time the soundness of applying the "reasonable man" formula in the determination of adequacy of provocation has come to be questioned. The criticism is mostly concerned with the merits of the question involved;\(^ {185} \) some of it, at best, goes to the designation of the test, but does not touch what it actually means.\(^ {186} \)

\(^ {179} \) Cmd. No. 8932 at 45-46.

\(^ {180} \) For an ingenious satire see Herbert, The Reasonable Man in The Uncommon Law 1 (1955).

\(^ {181} \) "It is impossible to travel anywhere or to travel for long in that confusing forest of learned judgments which constitutes the Common Law of England without encountering the Reasonable Man. . . . There has never been a problem, however difficult, which His Majesty's judges have not in the end been able to resolve by asking themselves the single question, 'Was this or was it not the conduct of a reasonable man?' and leaving that question to be answered by the jury." Herbert, op. cit. supra note 180, at 2.

\(^ {182} \) Reg. v. Welsh, 11 Cox Crim. Cas. 336 (1869); see Cmd. No. 8932 at 51.


\(^ {184} \) Hart v. United States, 130 F.2d 456 (D.C. Cir. 1942); People v. Hurtado, 63 Cal. 288 (1883); People v. Logan, 175 Cal. 45, 164 Pac. 1121 (1917); People v. Wells, 10 Cal. 2d 610, 76 F.2d 493 (1938); People v. Valentine, 28 Cal. 2d 121, 169 P.2d 1 (1946); People v. Danielly, 33 Cal. 2d 362, 202 P.2d 18 (1949); State v. Porter, 208 S.W.2d 240 (Mo. 1948); State v. Fisko, 58 Nev. 65, 70 P.2d 1113 (1937). See also Cmd. No. 8932 at 456.


\(^ {186} \) For instance, although obviously extraordinary circumstances may be so provocative as to induce even a "reasonable man" to act in an unreasonable way, it has been said: "how can it be admitted that that paragon of virtue, the reason-
In the course of the investigation by the Royal Commission, the proposal to abolish the "reasonable man" test was strongly opposed by members of the English judiciary, but also had distinguished sponsors. The Commission's report, finding force in the arguments against as well as for the retention of the test, suggests that there should be no change of the law in this respect. This conclusion is based more or less on the ground that even if the test should be unsound no serious harm could result from its retention. 187 While such a recommendation is hardly persuasive where a matter of principle is involved, the Homicide Act not only fails to contain a provision abolishing the "reasonable man test," but recognizes the test in statutory form so that any future change of the pertinent law will require legislative action. However, somewhat surprisingly in view of the fact that a legal question is involved, the Act also provides that if there is evidence of provocation, the question of whether the provocation meets the "reasonable man" test is one exclusively for the jury. 188 The latter is thereby, practically, though not technically, given the power to disregard the "reasonable man" rule if it feels that the application of that test would result in unjust hardship. Moreover, as a result of that provision the judge cannot now withdraw the determination of the issue of provocation from the jury on the ground that the evidence of provocation does not meet the "reasonable man" test, 189 but can do this only where there is no evidence tending to prove provocation.

The reasonable man test would not be wrong if the foundation on which it stands were solid. However, the soundness of that part of the law which is implied in the test and which it further develops, appears to be questionable, as will be seen presently.

It is settled that there is a dual requirement for provocation to warrant classifying a homicide as manslaughter: There must have been causal connection between the provocation and the homicide 190 and that provocation must have been adequate to have this causal effect. 191 The "reasonable

188. 5 & 6 Eliz. 2, c. 11, pt. I, § 3.
190. It is essential "that provocation produce the passion and the passion the homicide." Wechsler & Michael 718.
191. "There must not only be provocation, but provocation of such a nature as to be recognized by law as adequate for this purpose." PERKINS 43. Compare the following illustration given by Blackstone in discussing homicide being merely

https://scholarship.law.missouri.edu/mlr/vol25/iss2/1
man” test is a further development of the last mentioned requirement. It has been variously formulated by the courts, but through all those versions there runs the principle that an objective standard must be applied in determining whether or not the provocation was adequate. Hence, although the provocation was apt to inflame a person of the kind the killer actually was, it must be disregarded if the provocation would not have caused the same reaction in that average kind of person which American slang designates as a “regular guy.” Not the provocability of the defendant, but the provocablity of that ideal homunculus of the common law, the “reasonable person,” is the criterion of the adequacy of the provocation.

It is believed that if the adequacy requirement is sound, its objective construction makes good sense since it would otherwise lose any independent meaning and would be hardly more than a duplication of the requirement of causal connection between the provocation and the defendant’s loss of self-control. The problematic point, however, and that which is eclipsed by the controversy about the “reasonable man” test, is whether that preliminary rule, the adequacy requirement, is good law, or, as the writer believes, is questionable. In an attempt to justify the latter view, the following is submitted.

The potential effect of provocation to qualify what would otherwise be murder as manslaughter is merely collateral to the cardinal policy of the law that a homicide committed in the heat of passion deserves a less severe

manslaughter because committed under the impact of provocation: “So, also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor . . . .” (Emphasis added.) Chase 939; Ehrlich 839. With reference thereto it is said by Lord Simon in his judgment in Holmes v. Director of Public Prosecution, [1946] A.C. 588, 600: “I should doubt very much whether such a view should necessarily be taken nowadays.” Cmd. No. 8932 at 50.

192. In the case where the reasonable man test was for the first time applied to provocation, Reg. v. Welsh, 11 Cox Crim. Cas. 336, 338 (1869) the following charge appears: “The question, therefore, is—first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury whether it was such that they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man.” In a case decided under the Homicide Act, R. v. Fantle (Sept. 25, 1958), reported with only this citation in 1959 Crim. L. Rev. (Eng.) 584-87, the summing up by the judge contained this passage: “Provocation is anything done or said by the dead man to the accused which would cause in any reasonable person, and actually caused in the accused, a sudden and temporary loss of self-control so that for the moment he was not master of his mind.”

193. “The rule is that provocation, in order to be sufficient, must be such as is calculated to produce hot blood, or irresistible passion in the mind of a reasonable man or of an average man of ordinary self control.” Hart v. United States, 130 F.2d 456, 458 (D.C. Cir. 1942).
punishment than a slaying without that emotional ingredient. While this policy finds its technical expression in a difference in classification of the two kinds of homicide, the underlying idea is that of recognizing a mitigating circumstance. In view of this basic philosophy the important question with regard to the effect of provocation should be whether it caused the killer involved to act in the heat of passion, and not whether it would have caused loss of self-control in a person of a different kind.\textsuperscript{194} Another way of saying this is that the effect which the provocation actually had on the defendant should be the essential fact, not whether, from an objective point of view, the provocation was adequate to produce that passion which, as a matter of fact, it did arouse in him. If the foregoing is true, the adequacy requirement is unsound since inconsistent with the rationale of the distinction between homicide committed in the heat of passion and homicide committed without such emotional prompting. And, of course, if the adequacy requirement should fall, the "reasonable man" test is bound to fall too, since the one is the foundation of the other. However, even if the law should be changed in this sense, the proportion between the kind of provocation and the kind of reaction thereto would not become irrelevant, but would have an evidentiary bearing, though not conclusive, on the finding of whether the provocation actually caused the defendant to act in the heat of passion or whether the defense of provocation is merely an attempt to make appear as a \textit{crime passioné} what was in reality nothing but cold-blooded murder.

\textbf{B. Provocation by Words}

The traditional Anglo-American rule governing the adequacy of the form (as distinguished from the degree) of provocation is usually stated to be that neither words nor gestures alone are sufficient to reduce a homicide from murder to manslaughter.\textsuperscript{195} There have been only a few cases, however, in which the legal sufficiency of provocation merely by gestures was involved.\textsuperscript{196} Also, the pertinent part of the report of the Royal Commission on Capital Punishment is almost exclusively concerned with the problem of provocation by words.\textsuperscript{197}

In one of Justice Holmes' flashes of genius, he made the following state-

\textsuperscript{194} "After many years of hiding behind the reasonable man, it is time that the law recognize the fact that the crucial issue in every homicide case is the state of mind of the slayer. . . ." M.D.G., \textit{supra} note 185, at 1040.
\textsuperscript{195} 1 \textit{Wharton} § 584.
\textsuperscript{196} Perkins 51.
\textsuperscript{197} Cmd. No. 8932 at 53, 56.
ment: "The life of the law has not been logic; it has been experience." It is highly dubious, however, whether the common law rule that "provocative words are not recognized as adequate provocation to reduce a willful killing to manslaughter, however abusive, aggravating, contemptuous, false, grievous, indecent, insulting, opprobrious, provoking, or scurrilous they may be," is supported by either logic or experience. If the basic idea is that a homicide committed in the heat of passion does not deserve the same punishment as one committed in cold blood, and if, consequently, it is not the objective nature of the provocation, but whether it actually had the effect of causing the defendant to lose his head, which is essential, then this rule cannot be logical. Nor is the rule in accordance with experience. The undeniable fact that words do arouse passion and thereby occasion homicide is recognized even in judicial opinions which nevertheless stick to that rule. A masterful illustration of how words may enrage a person into blindly emotional action is the manner in which Shakespeare's Othello reacts to the oral intrigues of Iago.

There are only a few cases in which the English courts have admitted that a merely oral provocation may reduce a homicide from murder to manslaughter. The rule to the contrary developed during an early period of the common law, and, with a certain qualification, prevailed in

198. HOLMES, THE COMMON LAW 1 (1881). Compare the statement in 1 COKE, INSTITUTES § 138, at 97(b) (1670): "[R]eason is the life of the law, nay the common law itself is nothing else but reason."

199. PERKINS 49.

200. "The suggestion is not new that the ancient rule excluding words and gestures from the scope of 'reasonable provocation' is itself unreasonable. The question was raised as long ago as 1839 in the Fourth Report of the Commissioners on Criminal Law, who observed that 'words or gestures may often be infinitely more irritating and provoking than a personal injury of a trivial nature'. . . ." Cmd. No. 8932 at 53-54.

201. "We have no doubt that cases from time to time occur where words are grossly provocative and ought to be accepted as provocation sufficient to reduce murder to manslaughter." Cmd. No. 8932 at 55.

202. "Legal provocation reduces homicide to the degree of manslaughter. Words or conduct which are not legal provocation, but which are well calculated to arouse, and do arouse, sudden passion, will modify a homicide to murder in the second degree." (Emphasis added.) North Carolina v. Gosnell, 74 Fed. 734, 736 (W.D.N.C. 1896).

203. Reg. v. Rothwell, 12 Cox Crim. Cas. 145, 147 (1871) where Blackburn, J., told the jury that "if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill her, it might be manslaughter." See Cmd. No. 8932 at 481, citing also the similar ruling in R. v. Jones, 72 J.P. 215 (1908), but mentioning that those cases were overruled by the judgment of the House of Lords in Holmes v. Director of Public Prosecution, [1946] A.C. 588.

204. PERKINS 49, quoting the following passage from Huggett's Case, Kel. 59, 60, 84 ENG. REP. 1082 (1666): "[I]f one called another son of a whore, and giveth
England until the passing of the Homicide Act. It is not followed in Canada, nor in certain other parts of the British Commonwealth. But it is generally recognized by the courts in this country. There is only a sprinkling of American cases in which a different judicial attitude appears. The rule is also followed in the Court Martial jurisdiction of the United States Army, along with the adequacy requirement and the reasonable man test. There is, however, no analogy in the continental European jurisprudence for either the adequacy requirement, the reasonable man test or the exclusion of words from the kind of provocation that may have a mitigating effect. It must be mentioned in this connection that continental European codes generally do not treat heat of passion, caused by provocation, as a circumstance bearing on the classification of the homicide, but generally consider it as a mitigating circumstance that may warrant more lenient punishment than would otherwise be applicable.

Among the expert opinions canvassed by the Royal Commission on Capital Punishment there were many, including that of Lord Justice Denning, which favored changing the law so as to remove the exclusion of provocation by words alone from the scope of potentially adequate provocation. The Commission's conclusion adopting this view contains the following: "Where the jury are satisfied that the accused killed the deceased upon provocation, that he was deprived of his self-control as a result of

him the lie, and upon those words the other kill him that gave the words, this notwithstanding those words, is murder . . . ."

205. "[I]n no case ... save in circumstances of a most extreme and exceptional character . . . ." Holmes v. Director of Public Prosecution, [1946] A.C. 588, 600; Cmd. No. 8932 at 52.


207. 1 Wharton § 584; see Cmd. No. 8932 at 54, 456.


209. U.S. ARMY, MANUAL FOR COURTS MARTIAL 232, 233 (1949), where it is said: "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by provocation, and not by malice, he may strike a fatal blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if the killing were done with malice aforesaid. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man, and the act of killing must be committed under and because of the passion. . . . Instances of inadequate provocation are: insulting or abusive words or gestures. . . ."


211. Cmd. No. 8932 at 451, 458, 459, mentioning the Swiss Code as an exception.

212. Cmd. No. 8932 at 54, 459. The Danish Code is exceptional in this respect since it allows dispensing with punishment altogether when the homicide was committed under quite extraordinary mitigating circumstances. Cmd. No. 8932 at 457.

that provocation and that a reasonable man might have been so deprived, the nature (as distinct from the degree) of the provocation should be inmaterial and it should be open to them to return a verdict of manslaughter. . . . We therefore recommend that the law should be amended to provide that where the jury are satisfied that the accused was deprived of his self-control by such provocation as might have deprived a reasonable man of his self-control, they may return a verdict of manslaughter notwithstanding that the provocation was by words alone.” 216 The phrasing is slightly ambiguous in that the first quoted sentence seems to suggest the abolition of any kind of distinction according to “the nature (as distinct from degree)” of the provocation, which may mean that provocation by mere gestures should also be considered as potentially adequate, whereas the other quoted sentence specifically refers to provocation “by words alone.”

That recommendation bore fruit. Section 3 of the Homicide Act 218 contains, after the word “provoked,” the parenthetical insertion “whether by things done or by things said,” thus making it clear that provocation by words alone may be a legally adequate provocation. One thing, however, is uncertain: Are gestures “things done” in terms of Section 3? That point has so far not been raised, but will have to be decided should the rare case of a homicide committed under the impact of provocation only by gestures reach an English court.

In conclusion of this discussion it should be mentioned that while the defense of provocation, at variance with that of diminished responsibility, 217 may be raised on behalf of a person who was neither insane nor close to insanity at the time he committed the homicide, it may, of course, also be raised on behalf of a person who allegedly acted in a not fully normal state of mind; in other words, it may be raised cumulatively with the defense of diminished responsibility. 218 If in such a case the jury finds the defendant guilty of manslaughter, it has been judicially suggested that the judge should ask whether that verdict was based on both or only one of those two defenses, and in the latter contingency, the defense accepted should be specified. 219

216. Quoted in text accompanying note 178 supra.
217. See IV., supra.
VI. Suicide Pact as Bearing on Classification of Homicide

Although there may be a suicide pact between more than two persons, the usual suicide pact is an understanding between two persons that there should be a termination of their lives in a manner agreed upon. It has been pointed out that a distinction must be made between an agreement pursuant to which each party is supposed to commit suicide (double suicide pact), and an understanding that one party should first kill the other and then commit suicide (murder suicide pact).220 There is, however, also a third possibility, that of an agreement between the parties to a suicide pact that they be killed by a third person. Where a defendant in a homicide case alleges to have done the killing pursuant to a suicide pact, this may be a sham allegation made in view of the usually existing difficulty in disproving it.221 Even where there was actually a suicide pact it may not have been a genuine one in that only one party honestly meant what was agreed upon, whereas for the other it was merely a device to bring about the death of and be the survivor of the other party. Finally, though the pact be honest on both sides, the party who killed the other may, because of a subsequent change of mind, or for any other reason, fail to commit suicide, either without even attempting it, or by not doing anything more to carry out the pact after a first attempt to commit suicide was unsuccessful. Section 4 of the Homicide Act contemplates all these possibilities in providing as follows:

(1) 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 be a party to the other killing himself or being killed by a third person.

(2) Where it is shown that a person charged with the murder of another killed the other or was a party to his killing himself or being killed, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him and the other.

(3) For the purposes of this section 'suicide pact' means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his

221. A similar difficulty of rebuttal frequently arises where one charged with murder does not allege a suicide pact, but alleges that suicide was the cause of death of the person whom he is accused of having killed. However, in the case that inspired Dreiser, American Tragedy, this defense was most forcibly disproved by circumstantial evidence. People v. Gillette, 191 N.Y. 107, 83 N.E. 680 (1908).
own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.222

A. Suicide and the Criminal Law: A Comparative View

The ethical appraisal of the phenomenon of suicide has been a controversial subject throughout the ages of recorded history of mankind. Old too, though not as old, is the difference of opinion on whether suicides and suicide attempts, or at least suicide attempts, should be treated as crimes.223 During the greater part of the eighteenth century the law of England and that of continental Europe had the following in common: both suicides and suicide attempts were crimes; in a case of suicide post mortem punishment was imposed;224 and in a case of a suicide attempt criminal punishment was imposed upon the perpetrator. Post mortem punishment has been abolished everywhere when enlightened ideas began to enter the field of criminal law.225

The following principles prevail everywhere. In the absence of a statutory provision to the contrary, the fact that a homicide was committed upon the request or with the consent of the person killed does not make any difference in the classification of the crime thus perpetrated. Nor does it, in the absence of a statute to the contrary, make any difference in the classification of the crime that the homicide was committed because of humanitarian motives, in other words, was a mercy killing or an act of euthanasia.226 Therefore, in the absence of a statute to the contrary, it is in-

222. 5 & 6 Eliz. 2, c. 11, pt. I, § 4(1)-(3).
224. The English law, at the time when Blackstone wrote his Commentaries, prescribed ignominious burial of the suicide’s body and forfeiture of his property to the King. Chase 939; Ehrlich 838. In Austria, the Constitutio Criminalis Theresiana, a penal code of 1769, in article 93, provided that the body of a suicide should be disposed of like that of a wild beast. Stooss 166.
225. N.Y. PEN. LAW § 2301 states: “Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed.”
226. For discussions of the proposals to give mercy killing a privileged treatment, especially if committed in the exercise of the medical profession, see Williams, op. cit. supra note 220, at 311; Silving, supra note 223, at 351; Kamisar, Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation, 42 MINN. L. REV. 969 (1958). For Hitler’s euthanasia order see Koessler, Euthanasia in the Hadamar Sanatorium and International Law, 43 J. CRIM. L., C. & P.S. 735, 736-40 (1953).
relevant that the killing of one person by another was done pursuant to a suicide pact in so far as classification of the crime committed by the killer is concerned.

However, the following difference developed and still exists between the common law approach and that of continental Europe. Under the leadership of France, continental Europe eliminated from penal legislation any direct or indirect reference to suicide as a crime and any provision penalizing a suicide attempt. This, in combination with the fact that continental-European jurisprudence recognizes only statutory crimes, resulted in the principle that there neither suicide nor a suicide attempt is criminal.227 The underlying view is that the successful perpetrator of suicide is beyond the reach of human punishment. Also, if a suicide attempt were made punishable it would not achieve the deterrent purpose of punishment, since one who attempts suicide contemplates immediate death and therefore does not care what punishment is in store for him should his undertaking be a failure.228 The last mentioned consideration obviously does not apply to a person who induces or aids another person's suicide.229 There are, therefore, certain continental European statutes of rather modern origin which make assistance in suicide, or both inducement of and assistance in suicide, special crimes.229 In the absence of such a specific statutory provision, neither inducement of nor assistance in suicide is, under continental-European law, criminal as such,230 although an act of assistance is criminal if it falls within the scope of a statutory crime.232 For instance, the killing of one party to a suicide pact by the other is homicide, and classified as

228. Stooss 167. For similar propositions of American writers see Perkins 68; Larremore, supra note 223, at 340.
229. The argument that punishability of a suicide attempt can only stiffen the perpetrator's will to succeed at the first attempt "does not operate in favor of one who did not himself intend to commit suicide . . . ." Williams, op. cit. supra note 220, at 308. See also the statement by Williams, op. cit. supra note 220, at 304-05, that in the Soviet Union suicide and attempted suicide are not crimes, but that for a person to influence another person who is in a position of dependency upon him to commit or attempt to commit suicide is punishable.
230. See Austrian Penal Code § 139(b) (as amended 1934). For the respective code provisions of Denmark, Italy, Netherlands and Switzerland see Cmd. No. 8932 at 450-51. The Swiss provision is particularly interesting since it limits the criminality of inducement of or assistance in suicide to acts done from "selfish motives," thus excluding mercy motivated acts. Cmd. No. 8932 at 451. For comments on that Swiss law, see Williams, op. cit. supra note 220, at 304, 309.
231. Thus neither of these two forms of participation was criminal in Austria prior to 1934. Strooss 260. However, in 1934 a provision rendering both inducement and assistance a special crime was enacted as § 139(b) of the Penal Code.
232. Lammasch 66; Williams, op. cit. supra note 220, at 309.
murmur or manslaughter pursuant to the definition of each in the particular jurisdiction.  

Under the common law of England, one who commits suicide is a *felo de se*. He commits a felony whereby he victimizes himself, a crime which is sometimes referred to as self-murder. The collateral legal consequences of this theory remained operative even after their primary effect—post mortem punishment of suicide—had been abolished. This is still the theory of the English law although the Draft Code of the Criminal Code Bill Commission of 1879, which has been adopted in a number of Commonwealth countries, suggested the abolition of the criminal status of suicide and the report of the Royal Commission on Capital Punishment admits that "there are strong arguments in favour of this view." In this country the common law concept of suicide as a crime has found an echo in certain cases, both civil (where that question was incidental to an insurance issue), and criminal; it has been rejected in other civil and criminal cases. Particularly firm in taking the latter position in criminal cases are the courts of Texas.

233. Under French law, in the case of suicide proper, all the participants are free from punishability, but in the case of homicide pursuant to a suicide pact, the surviving killer of the other party is guilty of murder, as consent of the victim is no justification for voluntary homicide. WILLIAMS, op. cit. supra note 220, at 304.

234. PERKINS 65-66; Mikell, supra note 223, at 387; Larremore, supra note 223, at 334-35.

235. WILLIAMS, op. cit. supra note 220, at 298. According to Blackstone, the crime of suicide "admits of accessories before the fact as well as other felonies; for if one persuades another to kill himself and he does so, the adviser is guilty of murder." CHASE 937; EHRlich 837. See also the statement in McMahan v. State, 168 Ala. 70, 74, 53 So. 89, 90 (1910), that "collateral consequences may and do, upon occasion, depend upon the feloniousness of self-murder."

236. Cmd. No. 8932 at 62.

237. "[B]ut we doubt whether our Terms of Reference would justify us in making a recommendation to this effect." Cmd. No. 8932 at 62. As a matter of fact, the Commission did not make such a recommendation.

238. Southern Life & Health Ins. Co. v. Wynne, 29 Ala. App. 207, 194 So. 421 (1940); Life Ass'n of America v. Waller, 57 Ga. 533 (1876).


241. State v. Campbell, 217 Iowa 848, 251 N.W. 717 (1933); Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903).

242. "It is not a violation of any law in Texas for a person to take his own life. Whatever may have been the law in England, or whatever that law may be now with reference to suicides, and the punishment of persons connected with the suicide, by furnishing the means or other agencies, it does not obtain in Texas. So
As a corollary of the common law concept of suicide, under the law of England a suicide attempt is an attempt to commit a crime, thus under the common law rule on the classification of criminal attempts243 punishable as a misdemeanor,244 though not, under the Offences Against The Person Act of 1861,245 as an attempt to commit murder.246 The law of Scotland, however, considers neither suicide nor a suicide attempt as criminal.247 Only a few American statutes define a suicide attempt as a special crime.248 It would seem that in the absence of such a statutory provision, in jurisdictions which recognize only statutory crimes, as do most American jurisdictions, a suicide attempt is not criminal.249 American cases in which, despite the absence of a specific statutory provision requiring this, a suicide attempt was held to be criminal250 represent "distinctly a minority position," according to a well informed English writer.251

In so far as the criminality of one person's intellectual or physical participation in another person's suicidal undertaking is concerned, the respective common law may be summarized as follows: One who as a party to a suicide pact kills the other party is a principal in the crime of murder;252 a person who induces another person's suicide is punishable

far as the law is concerned, the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law.253 Grace v. State, 44 Tex. Crim. 193, 195, 69 S.W. 529, 530 (1902); accord, Sanders v. State, 54 Tex. Crim. 101, 112 S.W. 68 (1908).

245. 24 & 25 Vict., c. 100.
248. Perkins 68, n.13, 14, citing N.D. Rev. Code § 12-3302 (1943) and Wash. Rev. Code § 980.020 (1951). In one state, a statutory provision of this kind has been repealed, N.Y. Sess. Laws, 1919, c. 414, repealing former sections 2302, 2303, of the Penal Law.
249. See State v. Campbell, 217 Iowa 848, 251 N.W. 717 (1933); Prudential Ins. Co. of America v. Rice, 222 Ind. 211, 52 N.E.2d 624 (1944); May v. Pennell, 101 Me. 516, 64 Atl. 885 (1906); Commonwealth v. Wright, 26 Pa. County Ct. 666 (1902).
251. Williams, op. cit. supra note 220, at 289.
252. Cmd. No. 8932 at 60; Williams, op. cit. supra note 220, at 296 (If the wife was the survivor of a suicide pact between her and her husband, before Parliament abolished the presumption of coercion in 1925, she could not be successfully charged with murder of her husband because she was shielded by that presumption.).
as a principal in murder if he was present at the fatal event, but merely punishable as an accessory to murder if it occurred in his absence.\textsuperscript{253} The distinction in the latter situation lost its practical importance when the common law rule that an accessory could not be tried before the trial of the principal was abolished by statute.\textsuperscript{254} Before that change of the law, an accessory to the suicide committed by another person, though guilty of a felony, escaped punishment since, of course, the principal had by his self-inflicted death withdrawn himself from the possibility of a criminal prosecution.\textsuperscript{255}

Under the continental-European law, the common law of England and the prevailing law in this country, a homicide otherwise qualifying as murder is not given a different classification merely because it was a mercy killing.\textsuperscript{256} Nor do the statute books of England, other parts of the British Commonwealth (except one) or this country contain a provision that, like certain continental-European legislation, would give killing upon request or with consent of the person killed a privileged status within the law of homicide.\textsuperscript{257} The exception is the Penal Code of British India which adopted a provision of this kind\textsuperscript{258} under the influence of Macauley.

The Draft Code of the English Criminal Code Bill Commission of 1879 suggested that counseling or procuring and aiding or abetting suicide be made a special statutory offense; this suggestion has, in certain parts of the British Commonwealth, including Canada, New Zealand and certain Australian states, been adopted by the enactment of statutes of this kind.\textsuperscript{259} In California, both inducement of and assistance in suicide are special statutory offenses.\textsuperscript{260} A similar statute, but limited to assistance, exists in Wisconsin.\textsuperscript{261} In Missouri, assistance in suicide is by statute declared to be

\textsuperscript{253} Perkins 65, 66, 585-86.
\textsuperscript{254} 11 & 12 Vict., c. 46, § 1; 24 & 25 Vict., c. 94, § 1. This statutory change of 1861 was not immediately, but only some time later, applied to accessories to suicide. Williams, op. cit. supra note 220, at 297.
\textsuperscript{255} Williams, op. cit. supra note 220, at 297; Perkins 585.
\textsuperscript{257} For instance: AUSTRIAN PENAL CODE § 139(a) (as amended in 1934); GERMAN PENAL CODE § 216 (as amended in 1943, and rendered in THE STATUTORY CRIMINAL LAW OF GERMANY, op. cit. supra note 21, at 129).
\textsuperscript{258} Williams, op. cit. supra note 220, at 299.
\textsuperscript{259} Cmd. No. 8932 at 447-48.
\textsuperscript{260} CAL. PEN. CODE § 401, providing that every person who deliberately aids, advises or encourages another to commit suicide is guilty of a felony.
\textsuperscript{261} WIS. STAT. § 940.12 (1958), providing: "Whoever with intent that another take his own life assists such person to commit suicide may be imprisoned not more than 10 years."
manslaughter.265 In New York both inducement and assistance are either manslaughter in the first degree or a special statutory felony, depending on whether the result was suicide or merely an attempt at suicide.266 In Texas, where no such specific legislation exists, it is settled that one assisting another person in committing suicide does not thereby commit a criminal act,267 but does so only if the act of assistance goes so far as to amount to homicide.268 An utterly different approach has been taken, however, in certain other American jurisdictions.269

B. Insufficiency of Legislative Reform

The provisions of Section 4 of the Homicide Act, in so far as classification of homicide pursuant to a suicide pact is concerned, are more liberal than the recommendation of the Royal Commission on Capital Punishment270 in that they reduce the classification of that crime from murder to manslaughter if the specified statutory conditions are proven to exist.271 The Homicide Act is, however, even less liberal than the Commission's recommendation in so far as the classification of the crime of instigating or aiding or abetting suicide is concerned, in that, by being silent as to this matter, it fails to render such secondary parties guilty only of a special offense, as the Commission suggested;272 rather, it leaves the law as it stood before—they are guilty as accomplices to murder. The Commission made no recommendation concerning the problem of criminality of suicide attempts and the Homicide Act is also silent in this respect. Suicide attempts have thus remained criminal in England. In accordance with the recommendation of the Royal Commission,273 which was based on a hardly

262. § 559.080, RSMo 1949, provides: "Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter."
263. N.Y. PEN. LAWS §§ 2304, 2305.
266. Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903) (one who aids and abets suicide is guilty of murder); Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904) (applying common law theory).
267. "[I]f the survivor of a suicide pact himself killed the other party he should remain liable to be convicted of murder." Cmd. No. 8932 at 275.
268. 5 & 6 Eliz. 2, c. 11, pt. I, § 4. The Act is silent on the degree of proof required, which is probably "balance of probabilities," as believed by Hughes 530, and not "beyond all reasonable doubt," as assumed by Prevezer 647.
269. "The law of England should be amended to provide that any person who aids, abets or instigates the suicide of another person should be guilty not of murder, but of that offense, and should be punishable with imprisonment for life ...." Cmd. No. 8932 at 275.
270. Cmd. No. 8932 at 64, 275.
persuasive reason,\textsuperscript{271} nothing in the Homicide Act presents a legislative solution of the problem of mercy killing. All this would seem to justify the conclusion that little, if any, progress has been achieved in this part of the English law by the enactment of the Homicide Act.

VII. Non-Capital Murder

Should human justice, in punishing unlawful homicide, resort to legal homicide? If so, should this be done in all or only in certain cases of murder; and if the latter, which types of murder should be selected for capital punishment? The answer which the English legislation of 1957 has given to those three questions appears from the following provisions of the Homicide Act.

No person is liable to suffer death for murder in a case that does not fall within any of the statutory specifications of capital murder,\textsuperscript{272} except that a person convicted of murder who (prior to or after the Homicide Act) has been convicted of another murder, committed on a different occasion, both murders having been committed in Great Britain, is subject to the same punishment as one convicted of capital murder.\textsuperscript{273} Where two or more persons are guilty of murder of a type specified as capital murder, it is capital murder only in the case of any of them who by his own hand caused the death, inflicted or attempted to inflict grievous bodily harm on the victim or used force on that person in the course or furtherance of an attack on him.\textsuperscript{274} Capital murders are: (a) any murder done in the course or furtherance of theft; (b) any murder by shooting or causing an explosion; (c) any murder committed in the course of 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 committed 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

\textsuperscript{271} "No satisfactory definition can be framed of 'mercy killings,' which would allow 'mercy killers' to be convicted of an offense other than murder." Cmd. No. 8932 at 275.

\textsuperscript{272} 5 & 6 Eliz. 2, c. 11, pt. II, § 7. For definition of "capital murder" see \textit{id.} at § 4/5(4).

\textsuperscript{273} 5 & 6 Eliz. 2, c. 11, pt. II, § 6(1). Where a person is convicted of two murders tried together, but committed on different occasions, the provision in § 6(1) applies as if one conviction had preceded the other. 5 & 6 Eliz. 2, c. 11, pt. II, § 6(2).

\textsuperscript{274} 5 & 6 Eliz. 2, c. 11, pt. II, § 5(2).
officer so acting.\textsuperscript{275} One who has been found guilty of murder, but under the Homicide Act cannot be given a death sentence, must be sentenced to imprisonment for life.\textsuperscript{276}

By the foregoing provisions, the Homicide Act, disregarding the pertinent conclusion of the Royal Commission on Capital Punishment,\textsuperscript{277} adopts in substance, though not in terms, the division of murder into degrees.\textsuperscript{278} An attempt has thus been made to take care of the observation of the Royal Commission that “the outstanding defect of the law of murder is that it provides a single punishment for a crime widely varying in culpability.”\textsuperscript{279} Not followed, however, was the Commission’s recommendation that the jury should be empowered to decide in each case whether punishment by imprisonment for life can properly be substituted for the death penalty.\textsuperscript{280} Instead, the pre-existing English law—that the kind of punishment for murder is absolutely prescribed—has remained unchanged, except that the absolute penalty is no longer death in all cases, but is death in capital and life imprisonment in non-capital murder.\textsuperscript{281}

It is questionable whether in capital murder the jury should not have the discretionary power recommended by the Commission,\textsuperscript{282} a system that in various forms exists and works well in certain American jurisdictions.\textsuperscript{283}

\textsuperscript{275} 5 & 6 Eliz. 2, c. 11, pt. II, § 5(1). Capital murder “in the course of” theft is committed by one who, after completion of the theft, strikes a fatal blow to escape detection. R. v. Jones, (1959) 2 Weekly L.R. 190, noted in 75 L.Q. Rev. 164 (1959), and critically commented on by Williams, Murder in the Course of Theft, 22 Modern L. Rev. 426 (1959).

\textsuperscript{276} 5 & 6 Eliz. 2, c. 11, pt. II, § 9(1).

\textsuperscript{277} “It is impracticable to find a satisfactory method of limiting the scope of capital punishment by dividing murder into degrees—a proposal which is moreover open to other objections.” Cmd. No. 8932 at 278. For those “other objections” see Cmd. No. 8932 at 189. See also Jesse, Murder and Its Motives 12-13 (1924), opposing the division of murder into degrees on the curious ground that in the United States “the practical result of this rule has been that a man guilty of an abominable killing can save the State time and expense by pleading guilty to second-degree murder, and so escape with his life if his plea is allowed—as it generally is.”


\textsuperscript{279} Cmd. No. 8932 at 274.

\textsuperscript{280} Cmd. No. 8932 at 278. See also Cmd. No. 8932 at 198-208.

\textsuperscript{281} Hughes 531.

\textsuperscript{282} See note 280 supra.

\textsuperscript{283} Cmd. No. 8932 at 205-07. See, e.g., 18 U.S.C. § 1111 (1958) which provides that whoever is guilty of murder in the first degree shall suffer death unless the jury qualifies its verdict by adding thereto “without capital punishment,” in which event he shall be sentenced to imprisonment for life, and the provision in Cal. Pen. Code § 190 that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the court or jury trying him.
In certain countries such a discretionary power is given to the judge.\textsuperscript{284} However, the Royal Commission believed that the alternative of giving it to the jury was the only one that could be recommended.\textsuperscript{285}

Another question is whether the Homicide Act's classification of the types of murder that are capital is a satisfactory one.\textsuperscript{286} It is both by exclusion and inclusion different from the usual American definition of first degree murder.\textsuperscript{287} It has been the subject of critical comments by English writers\textsuperscript{288} because it does not include murder by poisoning or in the course of rape,\textsuperscript{289} while it does include any murder committed in the course or furtherance "of even the pettiest of larcenies"\textsuperscript{290} (by use of merely the word theft\textsuperscript{291}) instead of confining the death penalty to murders in the course or furtherance of burglary or housebreaking.\textsuperscript{292} Also the provision imposing the death penalty in the case of repeated murder\textsuperscript{293} has been criticized,\textsuperscript{294} though not on the ground which appears highly questionable to the writer, namely, that it applies only if both murders have been committed in Great Britain.\textsuperscript{295} Nor has the provision determining when a participant in capital murder is or is not subject to capital punishment\textsuperscript{296} been free from attack.

\textsuperscript{284} Cmd. No. 8932 at 204-05.
\textsuperscript{285} Cmd. No. 8932 at 278.
\textsuperscript{286} According to Prevezer 649, the provisions defining capital murder are, "for the most part, either directed against the professional criminal or aimed at according some additional protection to police or prison officers."
\textsuperscript{287} For instance, under \textit{Cal. Pen. Code} § 190 first degree murder is all murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under § 288, which refers to crimes against children committed by lewd or lascivious acts. Closely similar is the first degree murder definition of the federal criminal code, 18 U.S.C. § 1111(a), (1958).
\textsuperscript{288} Including, Williams, \textit{supra} note 10, reprint pp. 8-10.
\textsuperscript{289} \textit{Id.} at reprint p. 9; \textit{Silverman} 213; Prevezer 650-51.
\textsuperscript{290} \textit{Silverman} 213.
\textsuperscript{291} 5 & 6 Eliz. 2, c. 11, pt. II, § 5(1)a.
\textsuperscript{292} Hughes 531.
\textsuperscript{293} 5 & 6 Eliz. 2, c. 11, pt. II, § 6, marginally entitled "Death penalty for repeated murders."
\textsuperscript{294} Hughes 531, believing that this provision does not reflect "any rational distinction in the gravity of the crime." See also the observation by Prevezer 652, that pursuant to the Homicide Act, "like the dog who is entitled to his first bite, a murderer may have a second chance."
\textsuperscript{295} 5 & 6 Eliz. 2, c. 11, pt. II, § 6(1).
\textsuperscript{296} "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 murder 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." 5 & 6 Eliz. 2, c. 11, pt. II, § 5(2).
It has been said that the provision is unjust in that the instigator of capital murder carried out by an accomplice escapes the death penalty which his accomplice suffers, and that pursuant to it "a minor assault is enough to justify conviction of capital murder where one's companion succeeds in a major assault and death results." Obviously, however, any shortcomings that may be inherent in the pertinent provisions of the Homicide Act will not prevent them from achieving what they are intended to achieve—a compromise between total abolition and total retention of the death penalty for murder.

VIII. Final Observations

The writer fully agrees with the conclusion of an English writer that the Homicide Act has certain defects, but "is none the less a very welcome mollification of an unduly severe law of murder." By eliminating the concept of constructive malice, and thus throwing out the felony murder rule, and by removing the exclusion of provocation by words, it has achieved a remarkable progress that deserves to be a pattern for similar developments in this country. While it regrettably leaves the M'Naghten Rules as the sole test of mental incapacity to commit a crime, it mitigates the practical result of this unsatisfactory law by the doctrine of diminished responsibility. Its provisions on homicide pursuant to a suicide pact deserve to be commended. On the whole it is a good start on the way toward reform of the English homicide law, though it should not remain the terminus of the move in that direction.

It has eliminated a certain paralyzing effect which the issue of "Abolitionism v. Retentionism" had for a certain time in England due to the fact

297. Hughes 531.
299. Hughes 532.
300. Stromire & Westman, Why Not Bury M'Naghten's Moldy Ghost?, 12 U. FLA. L. REV. 184, 194 (1959), quoting from a letter of Judge Doe—the intellectual father of the abandonment in New Hampshire of the M'Naghten Rules—which states that retaining those rules is a similar error as would be committed by astronomy in still believing that the earth is flat and that the sun passes over it. For the text of that letter and other interesting material concerning the origin of the New Hampshire Rule, see Reik, The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease, 63 YALE L.J. 183, 191 (1953). See also the following statements by Cohen, Criminal Responsibility and the Knowledge of Right and Wrong, 14 U. MIAMI L. REV. 30, 34, 56 (1959): "It is time that the M'Naghten Rule be scrapped . . . For, as it has been shown here at length, confusion, mistake, inconsistency and injustice are the natural consequences of approaching the problem of the responsibility of the mentally disordered by asking about the defendant's knowledge of the difference between right and wrong."
that, since August 1955 the execution of death sentences had been administratively stopped by way of commutation to life sentences.\textsuperscript{301} By cutting the Gordian knot in retaining capital punishment for some, but abolishing it for all other types of murder, it has encouraged the government to bring capital punishment from a nude formula back to the reality of execution,\textsuperscript{302} and thus to restore the alleged deterrent effect which has always been the main argument of those opposing its abolition.

Whether it was wise or unwise not to abolish capital punishment in all cases of murder is a question identical with a problem that has been a subject of discussion all over the world since, in 1764, Beccaria gave the impetus by his famous essay on \textit{Crimes and Punishments}.\textsuperscript{303} Profound as well as superficial, logical as well as humanitarian arguments have been used in attacking the death penalty. In certain jurisdictions, including certain American states, it does not exist any more; in some it has been abolished, reintroduced, and again abolished; in some it has never ceased to be in force. It seems to the writer that the reaction to this important problem is generally not one of logic, but one of emotion, varying according to whether a murder has been committed which is most shocking\textsuperscript{304} or which, because of the attending circumstances, evokes sympathy not only with the victim, but also with the perpetrator. A different idea is, however, expressed by the following passage written by Sir Ernest Gowers after the termination of his function as Chairman of the Royal Commission on Capital Punishment: "Before serving on the Royal Commission I, like most other people, had given no great thought to this problem. If I had been asked for my opinion, I should probably have said that I was in favor of the death penalty and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study of the subject gradually dispelled that feeling. In the end I became convinced that the abolitionists were right in their conclusions—though I could not agree with their arguments—and

\begin{itemize}
  \item \textsuperscript{301} \textsc{Silverman} 214.
  \item \textsuperscript{302} The first person to be executed in England after the going into effect of the Homicide Act, was John Wilson Vickers, Note, 20 Modern L. Rev. 633 (1957), citing R. v. Vickers, [1957] 3 Weekly L.R. 326.
  \item \textsuperscript{304} "If for most of us . . . there is some crime so monstrous that human wrath—that is, a plain desire for vengeance—erupts through the thickest crust of civilization." Bishop, Jr., Book Review, 69 Yale L.J. 193, 196-97 (1959).
\end{itemize}
that so far from the sentimental approach leading into their camp and the rationale into that of the supporters, it was the other way about.\textsuperscript{305}

Turning away from that thorny problem of the death penalty, and concluding the commentary on the Homicide Act, the writer submits the following as its key idea: Tradition is a proper element in determining the speed of progressive development in the field of law; but if tradition is considered as the paramount consideration, it is made an enemy of the progress from positive law to better law.

\footnotesize{305. Gowers, A Life for a Life 8 (1956), quoted by Sellin, op. cit. supra note 278, at 81-82.}