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DEATH BY DEFINITION

MELVIN F. WINGERSKY

BLACKSTONE, following Sir Edward Coke, stated with deceptive conceptual simplicity that common law murder is when "a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." That recordation in the Commentaries is a social communication objectifying proscribed and punishable behavior. What Blackstone reported partially defines the term "murder," not a murder; his expression denotes a situation, and it is impersonal. When some American States early adapted and promulgated such a communication in the indicative mood, the description was elevated to the status of universal legal validity within the particular community. The punishment to be imposed under such legal prescription frequently is death.

In the course of his trenchant dissent reported as part of Fisher v. United States, Mr. Justice Frankfurter tells us:

The division of murder into degrees arose from the steadily weakened hold of capital punishment on the conscience of mankind. . . . The crime of murder was divided into two classes, in some States very early, in recognition of the fact that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. It is this consideration that has led most of the States to divide common law murder into two crimes. . . .

Grading the common law offense of murder by categorizing it into two degrees—a dichotomy unknown at English common law—was first accomplished by legislative action in Pennsylvania during 1794.

Murder has never been defined by statute in Pennsylvania; it appears to remain "common law murder," following substantially the Blackstone definition. Malice, express or implied, is the criterion and indispensable element of common law murder.

Under the Pennsylvania statute, a killing


2 328 U.S. 477, 483-84 (1946). Footnotes of the Court omitted.

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... committed in the perpetration of, or [while] attempting to perpetrate any arson, rape, robbery, burglary or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree.³

This statutory provision regarding "felony-murder," so-called, underlies seven significant Pennsylvania cases decided between 1947 and 1958.

Having long since forbidden murder through common law and statutory mandates, society entrusts assorted persons, acting in its name and on its behalf, with the complex problem of categorizing human behavior patterns of a past particular moment to ascertain whether such behavior is to be punished. Neither the moment nor the specific behavior can be recaptured with absolute certainty. The fact finders neither observe nor experience (nor do they need to) the event upon which they will pass judgment. Personal categories, theoretically divested of status, are replaced by protocol statements about murder for the official purpose of reaching a verdict on the guilt or innocence of the accused person. By drawing inferences from evidence introduced at a trial under an indictment for murder, it is presupposed that there are adequate applicable standards for assessing multiple external facts. Actually, conclusions of the fact finders concern a combination of external happenings and the inferences drawn from them, measured by the yardsticks of common law, statute and case law.

Constructive malice, vague in concept but drastic in application under common law, is a decisive cue for categorizing as murder homicides occurring during perpetration of certain felonies (at least those involving violence), or in resisting an officer. The constructive malice theory declares that the accused person's intent to commit the felony or resist the officer manifests the malice required in the definition of murder. Clearly the felony-murder doctrine facilitates the conviction of persons accused of murder because of two aspects: (1) the prosecution's case is legally implemented by the implication of malice; and (2) instructions couched in terms of the doctrine probably aid in achieving persuasion of guilt beyond a reasonable doubt in instances where the jury might otherwise hesitate to convict for murder. A jury, it would seem, is easily convinced that it is convicting an accused

³See Appendix A.

Murder in Pennsylvania was first judicially defined in Com. v. Drum, 38 Pa. 9, 15 (1868). See the memorandum submitted by Professor L. B. Schwartz, Punishment of Murder in Pennsylvania, to the Royal Commission on Capital Punishment, 11 Memoranda and Replies 776 (1952).
for his voluntary behavior, though in numerous instances the actual fatal act is performed by a co-conspirator, co-felon or a third person, because of the resemblance of the doctrine to automatic or strict liability for murder. There is, unfortunately, an attractive and convenient rationalization, especially appealing to laymen, resting on the theory that having intended to commit a felony an accused should be responsible as a matter of law for all results.

To discover the practical effects of the common law conception of murder this article focuses on Commonwealth v. Moyer,4 Commonwealth v. Almeida,5 Commonwealth v. Lowry,6 Commonwealth v. Bolish,7 Commonwealth v. Thomas,8 Commonwealth v. Redline,9 and Commonwealth v. Bolish,10 all cases impressed with the felony-murder doctrine, and from each of which the operative facts are stated later. Before reaching those factual situations several elementary principles must be recalled. Consider first the charge of murder lodged against these defendants, stated in the indictments, and for the proof of which the prosecution has the initial burden of going forward with evidence to make its case against them. Assuming, of course, the corpus delicti is established, and the state’s evidence demonstrates a hold-up (except in the two Bolish cases where the felony charged was arson), was in perpetration, or had been perpetrated, there remains the vital point of proving the defendant killed the deceased and with malice, express or implied. Theoretically, what scope a jury will give the word killed depends on instructions about how much and what, as a matter of law based on the evidence, they may attribute and impute to the defendant for engaging in a felony of violence when the homicide occurred. A charge to the jury, limited in terms, leaving them with the impression that if they find the accused was perpetrating a felony when the homicide occurred responsibility attaches through application of the felony-murder doctrine, would equate to directing a verdict of guilt. For if the only question left to the jury amounts to having it determine whether there was a hold-up, the question of causation is ignored. In this situation the jury would be finding malice, but not causation, and

9 137 A. 2d 474 (Pa., 1958).
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when pressed further, if a jury is uninstructed on causation a verdict of guilt amounts to punishing such defendants for their state of mind alone, the malice being supplied solely by the independent felony. By finding malice, without instructions on causation, simply means reaching a conclusion by conjecture. It is the difference between fastening responsibility on an accused merely because a death follows his violent act, and finding his responsibility because his act caused the death. The felony-murder doctrine can easily supplant theories, and questions of causation, and bring about automatic responsibility for a homicide merely by perpetrated a violent felony. A sounder view would require, as suggested in substance by Jones, J., during his dissent to the Almeida majority, determining “if the homicidal act is connected with the initial maliciously motivated offense.” On the other hand, peremptory liability for any homicide can be attached to a defendant simply because he perpetrated a robbery, under the majority reasoning reported in Almeida and Thomas.

But if the opposing views sponsored by Justice Jones when dissenting in Almeida are dissected, the theory of liability is clarified and stripped of mechanical reasoning. His approach requires dividing the problem into two parts: (1) causation; and (2) felony-murder. What he puts forward as the basis for Almeida’s liability can be restated in the following fashion. An accused is not responsible for the death of another unless the fatal harm was caused by the defendant’s own act or by those persons acting in concert with him. The resultant harm can be imputed to the defendant only if it is the proximate consequence of his act; and it is also elementary that a person is presumed to intend the natural, probable and reasonable consequences of his own act. Inextricably woven into all this is the reasonable man’s foreseeability of the consequences of his behavior. Accordingly, in a case such as Almeida the question whether a “chain of events” existed continuously unbroken from the robbery to the death of Officer Ingling is one of fact for the jury. Causation, then, fastens the result on the defendant; but the sufficiency of evidence to support the jury’s finding of causation is a question of law. This means that there must be substantial evidence from which the jury may properly draw their inferences concerning the “chain of events”; absent such quantum of evidence and their verdict rests on the shifting sands of speculation and conjecture—that is, they convict simply because Almeida engaged in a robbery and a person was killed. But given substantial evidence on
the issue of causation, and appropriate instructions, then the resultant fatality might be imputed to the defendant; and under such proof and reasoning the second phase consists of supplying malice through application of the felony-murder doctrine. In other words, an evidentiary showing establishing causation does not, without more, indicate the malice requisite for murder. The result is imputed to the defendant and then, if appropriate, the felony-murder doctrine is the fiction for supplying malice. Conceivably causation might lead to a verdict of manslaughter if felony-murder is excluded or rejected by a jury. But all of this requires recognition of the dangers lurking in assuming causation flows automatically from the initial felony, and, indeed, that is what happens when a trial judge indicates in his charge to the jury that causation is present as a matter of law. If the foregoing reasoning is sound, the province of the jury has been invaded, and in the last analysis a verdict of guilty has been virtually directed. Jones, J., was urging that the Almeida jury should have been instructed to decide first whether the homicidal act was connected with the felony or whether the chain of causation was broken and, if they were satisfied on the issue underlying continuity they could then turn to the felony-murder doctrine for the malice element.

It must, however, be constantly borne in mind that in some of these Pennsylvania cases under consideration there are instances where the killing was not actually committed by the felons or their accomplices. In the following fact situations the critical question is whether a finding of murder is warranted solely by application of the felony-murder doctrine without a showing and adjudication, as Jones, J., puts the proposition, of causal connection between the perpetrators of the felony and the homicide. 11

Commonwealth v. Moyer.—Moyer and Byron were jointly tried for the murder of Zerbe and convicted by a jury which imposed the death penalty. The judgments were affirmed.

Having mutually agreed to rob a filling station, Moyer and Byron

11 "Whether the acts of Almeida and his confederates were sufficient to constitute the proximate cause of the killing was a question of law but whether they did constitute the proximate cause was a question of fact for the jury. . . . The jury should have been instructed that, in order to find the defendant guilty of murder, it was not only necessary for them to find the killing to have been coincidental with the perpetration of a felony in which the defendant was at the time participating but that they would also have to find that the fatal shot was fired by one of the felons, or, if not fired by one of them, that the conduct of the defendant or his accomplices set in motion a chain of events among whose reasonable foreseeable consequences was a killing such as actually occurred." Jones, J., Com. v. Almeida, 362 Pa. at page 643, 68 A. 2d at page 618 (dissent).
armed themselves, and in a car stolen for the purpose, drove to a gasoline station owned by Shank. When Zerbe, an employee-attendant for Shank, approached the car Moyer got out and pressing an automatic against Zerbe ordered him to march toward the station where Shank, momentarily unseen by Moyer, was standing. Upon noticing Shank, Moyer immediately fired at him and missed him. Shank, who had armed himself before the hold-up, fired five shots at Moyer. Two bullets hit Moyer, who fired twice more at Shank while retreating to the car in which Byron waited. Nearing the car Moyer fired again, as did Byron. Moyer's last shot was aimed at Shank, but the Commonwealth contended that Moyer fired the bullet which struck and killed Zerbe who was in the line of fire. Moyer and Byron escaped from the scene.

Moyer was armed with a .32 caliber automatic pistol; Byron had a .32 caliber revolver; and Shank was firing a .38 caliber revolver. A .32 caliber bullet was found under Zerbe's body and a ballistics witness testified this bullet could "only" have come from Moyer's automatic pistol. The reviewing court stated that it was immaterial whether the fatal shot was fired by Moyer or by Shank.

From the Bolish opinion comes this line: "[O]ne of Shank's [the station owner] shots accidentally struck and killed a gasoline attendant [Zerbe]." This, of course, fails to square with the factual account stated by the Moyer court, and subsequent judicial comment in Pennsylvania opinions underscores the immateriality of the point. Yet Moyer is frequently cited as an instance of felony-murder in which a killing resulted from a bullet fired by the hold-up victim in self-defense. However, the significance of which weapon fired the fatal shot seems to have attained importance later in Pennsylvania.

Commonwealth v. Almeida.—A jury found Almeida guilty of first degree murder, fixed the penalty at death, and on review this judgment was affirmed.

Almeida and two companions, Hough and Smith, all armed, robbed a supermarket in Philadelphia. Almeida and Hough entered the market with drawn guns, emptied several cash registers; Almeida robbed a customer, and fired a shot at the store manager. On leaving the market, Almeida and Hough went to the automobile which Smith was by then backing away from the curb. At this same time Ingling, a police officer off duty, was returning to his automobile in which his wife and children were sitting. Cries of "hold-up" brought police-
men and two police cars to the scene. When the prowl car in which
police officers Waters and Fox were riding came abreast of the get-
away car, Hough shot at the officers and Waters returned his fire.
Mrs. Ingling testified, in substance, that as Hough attempted to get
into the get-away automobile her husband grabbed Hough by the
back of the neck, Smith then fired three consecutive shots, the first
of which hit Officer Ingling. The Ingling children also testified that
Smith fired the fatal shot.

Prior to Almeida's trial, Hough\textsuperscript{12} pleaded guilty to the murder of
Ingling and was sentenced to die in the electric chair. At Almeida's
trial Hough testified that Almeida killed Ingling.

Smith was tried eleven days after Almeida, and was convicted of
first degree murder by a jury which set his penalty at life imprison-
ment.

During the course of its opinion reviewing Almeida's conviction
the Pennsylvania Supreme Court noticed, in passing, that his counsel
pointed to certain facts which he urged as demonstrative of a strong
inference that the fatal shot was fired mistakenly by a policeman. But
it was not until a petition for a writ of habeas corpus was filed in
the United States District Court for the Eastern District of Pennsyl-
vania that the grave question of whether deliberate suppression by
the Commonwealth of Pennsylvania of evidence of the fatal bullet
in a capital case was violative of due process. Pennsylvania appealed
from the lower federal court's grant of the writ and on appeal the
Third Circuit, affirming that judgment, brought out into the open
several significant facts.

Against the backdrop of that evidence, the extract being reprinted
in the marginal note for such purpose, the impact of the testimony
given during Almeida's trial by Hough, Mrs. Ingling and her chil-
dren is not only obvious but indicative of prosecution tactics. In
other words, although the trial judge instructed the jury that it mat-
ters not who fired the fatal shot, evidence pointing to Almeida had
been carefully adduced by the prosecutor. Indeed, Chief Judge
Biggs, speaking for the panel of judges in United States ex rel. Al-

\textsuperscript{12} Hough's conviction on his plea is reviewed in Com. v. Hough, 358 Pa. 247, 56 A. 2d
84 (1948): "[T]he killing was murder in the first degree. As to that, there is not the
slightest room for doubt. The homicide was a felonious killing with malice aforethought
and, therefore, murder; and the statute makes a murder committed in the perpetration
of, or attempting to perpetrate, a robbery murder in the first degree. . . ."
*meida v. Baldi*\(^\text{13}\) held that the suppression of this evidence favorable to Almeida was denial of due process:

In the court below as in this court the Commonwealth contended that the question of who fired the fatal shot was irrelevant to the issue of whether Almeida was or was not guilty of first degree murder, citing the decisions of the Supreme Court of Pennsylvania in Almeida's case and in the Moyer case. With this we agree. But the Commonwealth has never given any answer as to why the evidence to which we have referred, suppressed as the court below found it to have been, was not pertinent as to the issue of the penalty to be imposed by the jury on Almeida. Putting it bluntly, there is no answer for it

\(^{13}\) 195 F. 2d 815 (C.A. 3rd, 1952).

"The grant of the writ will not keep Almeida from being tried again for he cannot successfully plead double jeopardy ... [cases collected]." Id. at 825.

Speaking of Almeida's motion for a new trial in the Pennsylvania Court of Oyer and Terminer, the Third Circuit opinion notes: "At any rate the issue of deliberate suppression of evidence was not before the Court." Id. at 817.

"We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice." Id. at 820.

"There is no doubt that the police were armed with .38 caliber Smith and Wesson revolvers. From the evidence at Almeida's trial it appears that Smith was armed with a .22 caliber revolver; Hough with a .45 and Almeida "with a large pistol." It is also conceded that Almeida fired the only shot or shots which were fired within the supermarket.

"At Almeida's trial, the Commonwealth put a number of bullets in evidence but not a .45 caliber bullet dug from between the roof and the ceiling of the market. This bullet proved that Almeida was armed with a .45. Within a few minutes after Ingling had been killed Ahrndt, a police detective, found on the pavement in front of the market and about a dozen feet back of the place where Ingling's body had lain, a .38 caliber bullet stained with blood. This bullet was not introduced in evidence.

"Smith was tried ... after Almeida. Smith's counsel, in a way not clear from the record, learned of the existence of the .38 caliber bullet and brought out many pertinent facts as to how Ingling had been killed. This evidence showed that Almeida was armed with a .45 caliber 'horse' pistol. Hough with a .45 caliber automatic revolver, and Smith with a .22; that Hough's .45 caliber automatic and Smith's .22 were recovered by the police while Almeida's .45 caliber revolver was not recovered; that Almeida was the only one of the robbers who fired inside the market and that a .45 caliber bullet was found between the wall and the ceiling of the market. The evidence at Smith's trial showed also that all the police officers (save perhaps Ingling, who was off duty) were armed with .38 caliber Smith and Wesson revolvers; that the .38 caliber bullet found on the pavement in front of the market and back of the place where Ingling's body had lain would fit the police revolvers; that a .45 caliber bullet is 11.4 millimeters in diameter and that the diameter of the entering wound on Ingling's head was 10 millimeters as measured by the Coroner's physician; that a .38 caliber bullet is 9.6 millimeters in diameter and would fit the entering wound in Ingling's head almost perfectly and that while a bullet from Smith's .22 would have gone through the hole Smith's weapon had not been fired. The evidence further disclosed, as we have stated, that the .38 caliber bullet found on the pavement was bloodstained, and that Detective Harry Morris of the Philadelphia Police Homicide Squad had taken a written statement from Officer Mark McGinley that he had fired a shot outside the market and that a man had fallen to the ground; that no other man fell." Id. at 816-17.

is obvious that in weighing penalty the jury would have to consider whether Almeida intended to kill Ingling.

There could be no avoidance of this issue and there was none. This is why the Commonwealth endeavored to prove that Almeida or one of his confederates shot Ingling and why Almeida's counsel tried to show that Ingling came to his death by a bullet fired by a member of the police force. Much of the trial judge's charge was directed to this specific point and to the imposition of a penalty by the jury. The jury might not have been impressed by the suppressed evidence and could still have imposed the death penalty on Almeida but it cannot be assumed that the jury would have done so.\(^1\)

It should also be borne in mind that the Supreme Court of Pennsylvania decided *Almeida* on a record devoid of the evidentiary material relied on in the Third Circuit opinion. Indeed, in their subsequent opinions analyzing *Almeida*, and discussed later in this paper, the opinion of the United States Court of Appeals is unmentioned.

*Commonwealth v. Lowry.*—On appeal Lowry’s conviction of first degree murder was affirmed.

On an evening in May 1950, Chapasco and Pearson went to a food market for the purpose of committing a robbery. While lurking behind a building they were discovered. They then seized the owner and two employees of the market, lined them up along a wall of the building, struck and knocked them to the ground. Pearson shot and killed Sklar while he was lying on the ground; Chapasco misfired and dropped his gun. They ran from the scene to the front of the building, jumped into Chapasco’s car, which was driven by Lowry who lived in and was familiar with the neighborhood where the market was located. Lowry drove them, with lights out, rapidly away toward Philadelphia. Prior to the hold-up, the defendant had been seen frequently in the vicinity of the market.

*Commonwealth v. Bolish (No. 1).*—Convicted of murder in the first degree by a jury which fixed the penalty at death, Bolish appealed. The judgment was reversed and a new trial awarded.

One Flynn died as the result of burns received in a flash fire and explosion, in an empty house, which he ignited in pursuance of a plan to commit arson probably entered into with Bolish. Circumstantial evidence indicated the involvement of Bolish with Flynn in a plot to burn the house, in which Flynn was burned, to defraud an insurance company. Bolish was prosecuted on the theory he was the instigator of Flynn, and accordingly responsible for his death under the felony-murder doctrine.

Commonwealth v. Bolish (No. 2).—On retrial Bolish was again convicted of murder in the first degree and this time the jury set his penalty at life imprisonment. From the evidentiary aspects in this second opinion it appeared that Flynn was possibly burned when he placed a glass jar, containing volatile substance on a live electric hot plate located in one of the rooms of the subject house. "There was no direct evidence . . . [Bolish], by his own hand committed the arson which resulted in the death of his accomplice. There was . . . direct and circumstantial evidence showing the presence of Bolish in the . . . house . . . at the time of the explosion." But Musmanno, J., in his dissent insisted "no evidence whatsoever remotely substantiates such an assertion." In any event the majority affirmed the judgment of sentence.

Commonwealth v. Thomas.—This was an appeal by the Commonwealth from the trial court's ruling sustaining defendant's demurrer to the prosecution's evidence at the Thomas murder trial. Reversed and new trial ordered.

Thomas and Jackson, the deceased, entered the grocery store of Cecchini and ordered him to open the cash drawer. Jackson pointed his revolver at Cecchini. Thomas took some money, and he and Jackson ran from the store—Jackson running one way and Thomas the other. Cecchini secured his own pistol and chased Jackson, and in the exchange of shots Cecchini killed Jackson.

When the Thomas case reached the trial court, on remand, the district attorney moved for leave to nolle prosequi the murder and manslaughter indictments and such disposition15 was made of each charge with the approval of the trial judge. With Thomas saved from further risk of the death penalty, the Pennsylvania Court could, and expressly did, overrule the Thomas decision, without any qualms, for the reason that it currently thought Thomas was "an unwarranted judicial extension of the felony-murder rule." Of course, reaching a reversal in Redline's appeal drove the Court to upset their Thomas opinion, decided roughly two and one-half years earlier, because that decision rested uneasily on automatic guilt by association. For malice, the Thomas majority had used the underlying robbery, mentioned a little about liability flowing from conspiracy, quoted from Almeida, Moyer, Bolish, and concluded, inter alia:

15 This disposition was noted by the redline majority and by Musmanno, J., in his dissent to the second Bolish majority opinion.
That the victim, or any third person such as an officer, would attempt to prevent the robbery or to prevent the escape of the felons, and would shoot and kill one of the felons was “as readily foreseeable” as the cases where an innocent bystander is killed, even unintentionally, by the defendant’s accomplice, or where the victim of the robbery is slain, or where a pursuing officer is killed. The killing of the co-felon is the natural foreseeable result of the initial act. The robbery was the proximate cause of the death. We can see no sound reason for distinction merely because the one killed was a co-felon. It was a killing in the perpetration of a robbery which was “unquestionably contemplated and callously ignored by the defendant, who most certainly intended to commit a crime which he knew might well give rise to it.”

Commonwealth v. Redline.—Found guilty of murder in the first degree, Redline moved for a motion in arrest of judgment and a new trial, both of which motions were discharged [overruled] by the lower Court. On appeal judgment of sentence was reversed and the cause remanded with instructions to reinstate and grant the motion in arrest of judgment.

Redline was indicted and tried for the murder of Worseck committed in the perpetration of robbery. The evidence produced by the Commonwealth showed that the defendant together with Worseck perpetrated robbery at gun point upon certain persons in a restaurant. During the course of the robbery two police officers were disarmed and held captive in the establishment. Upon leaving the scene of the robbery the defendant and his accomplice, Worseck, compelled one Hershman to accompany them. Redline was the first to leave the building, behind him was Hershman and behind Hershman was Worseck. As they were leaving, uniformed police officers were approaching the premises. When Redline observed one of them, Sergeant Palm, he shouted to him, “The man you want is in there.” With that Redline pointed a .45 caliber gun at the police officer and fired. At the time Redline fired he was approximately 15 to 20 feet from Sergeant Palm. There had been no shooting whatever prior to his shot. Sergeant Palm returned the defendant’s fire and a gun battle ensued. Several police officers, Redline and Worseck were involved. During the gun play two officers were seriously wounded. Redline was wounded as was Worseck. Worseck’s wound, inflicted by a policeman’s bullet, proved fatal.

Commonwealth v. Moyer was resolved by application of principles underlying the doctrine of proximate cause laid down in three early civil cases, with special emphasis falling on the “Squib Case.”

short, it was held that the Moyer-Byron felonious invasion of Shank's business place was the proximate cause of the resulting fatality. Nothing whatever is mentioned in the opinion concerning the victim's status as a felon or non-felon; this aspect emerges in Redline. In several places in the Moyer opinion that Court underscores its position on the question of who fired the fatal bullet as immaterial to the decision point, and on another phase concludes:

It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act. For any individual forcibly to defend himself or his family or his property from criminal aggression is a primal human instinct. It is the right and duty of both individuals and nations to meet criminal aggression with effective countermeasures. Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance. Any robber or burglar who carries deadly weapons (as most of them do and as these robbers did) thereby reveals that he expects to meet and overcome forcible opposition.

To be sure there are statements in the Moyer opinion regarding evidence indicating that Zerbe was shot in the back, and that the bullet under his body was one fired from an automatic pistol, yet again this opinion states: "If in fact one of the bullets fired by Shank in self-defense killed Zerbe, the responsibility for killing rests on Moyer and his co-conspirator Byron. . . ." Elsewhere this Court flatly stated:

Every robber or burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible.

Moyer is the base case threaded through all the opinions under examination, and remained unchallenged and unimpaired until Redline. Obviously, Moyer presented a judicial stumbling block, especially since the Almeida court, after expressly stating Moyer-Byron was authority for the decision it was then making, continued by explaining:

Our decision in the Moyer-Byron case was an application of the long established principle that he whose felonious act is the proximate cause of another's death is criminally responsible for that death and must answer to society for it

17 Compare this instruction: "[I]f you would be of the opinion under all of the evidence in this case that it was an accidental killing of Zerbe by Shank, it is possible that these defendants may not be found guilty of murder in the first degree, or may not be found guilty at all. . . ." Com. v. Moyer, 357 Pa. at page 187, 53 A. 2d at page 740."
exactly as he who is negligently the proximate cause of another's death is civilly responsible for that death and must answer in damages for it.

That inconvenient passage was seized upon by the Redline majority, as though nothing else had been said in Almeida concerning proximate cause. In Redline the majority thought the Almeida rationale stemmed from adapting proximate cause to the common law requirement of felony causation for application of the felony-murder rule, and about which they said:

[T]he "causation" requirement for responsibility in a felony-murder is that the homicide stem from the commission of the felony. Obviously, the assumed analogy between that concept and the tort-liability requirement of proximate cause is not conclusive. If it were, then the doctrine of supervening cause, which, for centuries, courts have recognized and rendered operative on questions of proximate cause, would have to be considered and passed upon by the jury. But that qualification, the Almeida case entirely disregarded.

... [T]he decision in the Moyer and Byron case was in no sense authority for the ruling in Almeida. And, the same can be said for the decisions in Commonwealth v. Guida, Commonwealth v. Doris, Commonwealth v. Sterling. In each of these cases the death dealing act was committed by one participating in the initial felony.

Several matters require immediate attention despite considerations of sequence. It must be remembered that Almeida was not overruled in Redline, but delimited through this chimerical approach:

In short, the Almeida case was concerned with the killing, during the perpetration of a felony, of an innocent and law-abiding person by someone other than the felons or ones acting in aid of their criminal conspiracy. The evidence warranted a finding that it was an accidental killing by an officer of the law, but the felons were held accountable nonetheless on the basis of proximate causation regardless of who fired the fatal shot. In the present instance, the victim of the homicide was one of the robbers who, while resisting apprehension in his effort to escape, was shot and killed by a policeman in the performance of his duty. Thus, the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person? The mere statement of the question carries with it its own answer.

It is, of course, true that the distinction thus drawn between Almeida and the instant case on the basis of the difference in the character of the victims of the homicide is more incidental than legally significant so far as relevancy to the felony-murder rule is concerned. ... In other words, if a felon can be held for murder for a killing occurring during the course of a felony, even though the death was not inflicted by one of the felons but by someone acting in hostility to them, it should make no difference to the crime of murder who the victim of the homicide happened to be. However, the factual difference, so noted, admits of a recognizable distinction with respect to a felon's responsibility for an

incidental killing (which another has committed), depending upon whether the homicide was justifiable or excusable, and such distinction serves the useful purpose of thwarting further extension of the rule enunciated in Commonwealth v. Almeida that it is immaterial who fires the fatal shot so long as the accused was engaged in a felony.

The limitation which we thus place on the decision in the Almeida case renders unnecessary any present reconsideration of the extended holding in that case. It will be time enough for action in such regard if and when a conviction for murder based on facts similar to those presented by the Almeida case (both as to the performer of the lethal act and the status of its victim) should again come before this court.

A check for logical consistency in those quoted passages is doomed to failure from the outset. The constriction of *Almeida* and the reversal of *Redline* exhibit some influence of the phrase "unlawful killing of another" embedded in the common law definition of murder. The *Redline* majority back into their solution by starting with

### TABLE 1

**Judicial Evaluation of Fatal Shooting**

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<th>Stage of Defendant's Behavior When Fatal Action Occurred</th>
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<td>Moyer</td>
<td>Non-felon</td>
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19 Almeida, Moyer and Bolish are relied upon in Peo. v. Wilburn, 314 P. 2d 290, 295 (Calif., 1957) where the Court said: "There may be some good reasons for the divergence of views and opinions as to the theoretical approach in the 'felony-murder rule,' one set of decisions following the 'proximate cause' theory, and another the 'furtherance of the felony' doctrine, and still others not following any rule at all, but in any event it would appear certain that courts should not belabor themselves in too fine distinctions in terms and otherwise which results in the protection of armed robbers, who by their course of conduct with malice, start and continue with actions which ultimately result in the violent death may be imposed upon the armed robber, and of innocent victims."

20 The classification is found in the majority opinion of the Redline case.

the lawful act of the police officer in shooting Redline's co-felon and, then reasoning substantially along the line that this justifiable homicide fails in supporting Redline's conviction because: (1) it is a superseding defensive act breaking the chain of causation and (2) malice cannot be imputed from that lawful act. Such reasoning obviously must begin at the point when Redline committed a felonious assault by shooting at that officer who was standing 15 feet away from Redline when Redline was fleeing the robbery scene. It is unclear whether the majority envisage felony-murder as indicative of an accused person's intent to kill or whether responsibility is imputed to an accused without troubling about establishing an intent to kill. All of the Pennsylvania cases manifest varying applications of tort theories of liability in patterns of foreseeability of proximate cause. Excluding Bolish, they may be recapitulated as shown in Table 1.

The majority opinion in Almeida is bottomed on words familiarly used when discussing causation.21 To the Almeida court Moyer-Byron contained the identical fact issue, yet in Redline the majority insist Moyer-Byron was "in no sense authority for the ruling in Almeida." Almeida, whatever is said about it, underscores the fact that the shooting by the police officers was a normal response to the stimulus of the situation created by the felons. People v. Garippo22 and Commonwealth v. Campbell were treated by the majority as inapposite in Almeida only to later appear as authority for the Redline majority.

Thomas, now abandoned, epitomized an accused person's vulnerability to suffer the death penalty because the mental element present

21 "In his charge the trial judge said: 'If that [fatal] shot were fired by anyone, even anyone removed from these three participants, and that shot was fired in the perpetration of a robbery, members of the jury, that is murder; that is murder in the first degree.... If one or more persons set in motion a chain of circumstances out of which death ensues, those persons must be held responsible for any death which by direct, by almost inevitable sequence, results from such unusual criminal act.... So, if the death of Officer Ingling was the inevitable consequence of the unlawful act, or acts, of the defendant, or the continuation of the unlawful act, or acts, of the defendant, acting in concert—for every one who does an unlawful act is considered by the law as the doer of all that follows—if that act is a killing, members of the jury, that killing is murder.'" Com. v. Almeida, 362 Pa. at page 601, 68 A. 2d at page 598.

22 Professor Beale correctly pointed out that Com. v. Campbell, 7 All. (Mass.) 541 (1853) was not in banc, but at the trial of a case. "The decision," he said, "has unfortunately been followed," citing Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Com. v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905), all of which are invoked by the majority in Com. v. Redline. Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633, 649 (1920). But compare The English Homicide Act of 1957, in Appendix B to this paper.
in his intentional act of robbery apparently satisfied the requirement of malice; malice was imputed to Thomas because of his contemporaneous participation in the felony of robbery; a result attained by unduly pressing the doctrine of constructive malice. It should be noted in passing that during the Thomas trial counsel stipulated that no bullet from the defendant's gun touched his accomplice, and admitted that the fatal wound was inflicted by a bullet from the storekeeper-robbery-victim's weapon. 23 Yet the Thomas majority went on to say:

The felon's robbery set in motion a chain of events which were or should have been within his [Thomas'] contemplation when the motion was initiated. He therefore should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.

That is a wide net of causation to cast over an accused if the theorem actus non facit reum nisi mens sit rea retains any vitality.

Thomas and Almeida were heavily, and understandably, relied upon by the Commonwealth in the Redline appeal 24 pivoting as it did on the defense contention that there could be no criminal responsibility for Redline's accomplice's death since it was a justifiable homicide by a policeman who fired the fatal shot in the line of official duty.

That such reliance was unavoidably misplaced was quickly dispelled by a determined and sharply divided court. Possibly haunted by the suppressed bullet episode lurking in Almeida's conviction, the Red-
majority diluted the impact of that opinion observing, among other things, that "it was a radical departure from common law criminal jurisprudence; and the ruling should not be extended by still further judicial enlargement." Thomas, on the other hand, was expressly repudiated.

Far from envisaging any disturbance of prevailing Pennsylvania case law, the Redline majority claim their attitude restores order for they thought if felons are to be responsible for all deaths "occurring in and about the perpetration of their felonies—regardless of how or by whom such fatalities came" that was a matter for the legislature. Just why Thomas was treated judicially rather than with felicity toward the legislative branch of government is, perhaps wisely, left undisussed.

To put together indications, reflected in the Redline majority opinion, of the basis for it, is a task for which there are a few examples but no principles; there is wanting any firm logical structure. There are, to be sure, fragments of familiar themes which soften rather than sharpen the more they are read for this opinion is at its best an announcement of policy rather than a completely legalistic solution of controverted issues. It is a solution of the appeal not of the problem. The content eludes analysis; it is not the type of meaningful content that withstands even congenial appraisal. What has been done is to implement the majority opinion with the buttress of allusion to, and argumentative shuttling back and forth between common law and statute. Beginning with common law for the premise that an accidental or unintentional homicide committed in perpetration, or during an attempted perpetration, of felony is murder, the argument picks up malice as an indispensable element of that offense and shows how it is supplied, or applied, by the independent felony

25 In Redline the trial judge instructed the jury inter alia: "For your information so that you will understand the whole sequence of what murder is under the statute, as well as the common law, I have defined first degree, told you what that is under the Act, and as the Act said, all other murder is murder of the second degree. Murder of the second degree consists of an unlawful killing with malice but without a deliberate intent to kill. However, in this case counsel have stipulated of record that insofar as this case is concerned, it being charged that this murder took place during the perpetration or attempt to perpetrate a felony; namely, robbery, that this defendant is either guilty of first degree murder or not guilty; that the other provision of the murder statute so far as second degree murder is not applicable. That has been agreed and stipulated by counsel in this case, so I will say no more about second degree murder." Brief for Appellant, p. 4, Com. v. Redline, 137 A. 2d 474 (Pa., 1958).

26 Sir James Fitzjames Stephen when charging the jury in Reg. v. Serné, 16 Cox C.C. 311 (1887) expressed this position: "In my opinion the definition of the law which
linked with the homicide. In any event the Pennsylvania Court emphasizes that in felony-murder it is the malice which is imputed and not the act of killing, the malice from the initial offense attaching to whatever else an accused person may do. But mere coincidence of felony and homicide is insufficient for invocation of the felony-murder doctrine. Not all homicides occurring in the perpetration of felonies are classed as first degree murder, or, stated another way, the Pennsylvania degree statute expressly restricts all felony-murder other than homicides committed in the perpetration of arson, rape, robbery, burglary or kidnapping to murder in the second degree. From this line of reasoning the Court concludes, as though it had been contested:

Logically, therefore, the basic determination of the fact of murder is to be made according to the rules of the common law, including the felony-murder theory of imputed malice, and, upon a finding of guilt, the degree statute automatically raises the murder to first degree if it happened, inter alia, to have been committed in the perpetration of arson, rape, robbery, burglary or kidnapping.

Redline, manifesting as it does judicial reluctance to approve automatic liability through application of the felony-murder doctrine for any killing whatever cropping up in the course or furtherance of a violent felony, bears some affinity for the attitudes toward limiting or modifying liability to suffer the death penalty for murder reported by the Royal Commission on Capital Punishment, convened during 1949-1953, and Parliament’s effort, based on adjustments of conflicting interests, to articulate some of the Commission’s views through the 1957 English Homicide Act. The sponsors of the Bill underlying the Act intended to retain the death penalty, but sought some limitation on behavior patterns making an accused vulnerable to capital punishment. What homicides should amount to the “supreme” crime of murder comprised the working formula used in drafting the Act. English law was changed by taking some homicides out of the murder

makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed. . . . I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder. . . .”

category, and, also, by eliminating the death penalty for some homicides categorized as murder under the Act.

The Act is divided into five major parts, portions of which are reprinted in Appendix B. Part I amends the English law as "to the fact of murder." Liability to the death penalty is provided for in Part II. Part III contains amendments as to the form and execution of the death sentence in England and Wales, and the effective date and short title are set out in Part V.

By mandating the requirement of malice aforethought (despite absence of meaningful content for that phrase), section 1.—(1) and (2) eliminates common law constructive malice. Malice will no longer be supplied merely because the homicide occurred in the course or furtherance of another offense. Clause 1, in its current form, is of little aid in solving legal problems involving the quality of the unlawful act, i.e., whether restricted to felonies of violence. Resisting lawful arrest had been consistently singled out for particular attention by English common law for applications of constructive malice, and apparently clause 2 is intended to avoid any judicial exclusion of such cases from the purposes of clause 1.

Section 5 is a legislative attempt at grading murder through the device of specifying with particularity what homicides constitute capital murders, coupled with restricted retention of the death penalty. Of interest here, against the backdrop of the Pennsylvania cases sketched out above, are the provisions of §§ 1.—(1), 5.—(1) (a), (c), (d), 5.—(4) and 5.—(5) (g). Yet at the same time the undue vagueness permeating the English Act must be taken into account. "Theft" and "stealing" are sweeping terms and could complicate homicide cases arising in connection with petty theft, though constructive malice is abolished through § 1.

Section 5.—2 was probably drafted in the hope of restricting liability for the death penalty to only common law principals in the first degree—the actual perpetrator of the fatal blow—and for the

28 "Malice in its legal sense exists not only where there is a particular ill will, but also when ever there is a wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind regardless of social duty. Legal malice may be inferred and found from the attending circumstances...."

29 "If there was an unlawful killing with (legal) malice, express or implied, that will constitute murder even though there was no intent to injury or kill the particular person who was killed and even though his death was unintentional or accidental." Com. v. Bolish, 381 Pa. at page 510, 113 A. 2d at page 471.

20 Cmd. No. 8932 at 29 and 445 (1953).
purposes of excluding from liability to suffer the death penalty those who remain absent from the scene of perpetration, for example, accessories before the fact and co-conspirators. However, the test of foreseeability remains intact and certainly it would be capital murder where A intends the death of X and incites and procures B to kill X in A's absence. The Act has not abrogated all common law theories of liability.

Pennsylvania's first degree provision, containing the word "murder" averts the odd result reached through expressly listing the means of taking life in the English Act, for as members in the House of Commons declared, during the debates on the Bill, if a man shoots his wife he will hang, if he kills her by slow poison he will be imprisoned; if an accused stabs a fireman he will not hang, but he will for stabbing a policeman.

Section 5.—(2) apparently restricts imposition of the death penalty to common law principals in the first degree—the person kills with his own hand, or by an inanimate agency, or innocent human agent. Common law principals in the second degree are, it would seem, intended as excluded from capital murder, especially if they are only constructively present. Even if viewed in the modern American approach that all participating at the scene are principals, section 5.—(2) requires, for capital murder, a showing of particularly described behavior on the part of the accused. As this section reads that if there are two felons, a murder by one will not be readily nor automatically be imputed to the other, unless there is sufficient evidentiary showing of malice in each of them, and it must be remembered, constructive malice has been abolished in England.

When the Pennsylvania degree statute (Appendix A) is compared with the Homicide Act of 1957 it is obvious that in England the death penalty is not imposed for all behavior that is first degree murder in Pennsylvania. What chiefly emerges is the fact that the English Act abolishes the death penalty for murder in all situations except those expressly enumerated in section 5, which omits mention of arson, rape, or kidnapping, as does the Pennsylvania statute. In the latter statute, when referring to such felonies, the phrase used is "in the perpetration of, or attempting to perpetrate," and in the English

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30 64 Hansard, Parliamentary Debates, House of Commons 454 (5th Series, 1957).
Act it is "in the course or furtherance of." Neither Act defines the scope or meaning of that phraseology, leaving the familiar questions as elusive as before.

If Bolish were tried under the English Act its exclusion of constructive malice and the omission of arson [unless a contention prevailed that he "caused" an explosion within the meaning of § 5.—(1) (b)] it might be argued, he was not subject to the death penalty. If tried or reviewed under the English Act, all the other Pennsylvania cases would, it appears, have to be decided without application of the felony-murder doctrine.

The Homicide Act of 1957 leaves much to be desired in the way of clarity, draftsmanship, and content, yet it reflects a significant move toward updating some antiquated and unrealistic notions and grounds supporting conviction leading to the death penalty, bringing them more in line with ethical thinking.

Perhaps Fisher v. United States supra, influenced the drafters of this Act, for diminished responsibility is approved as an operative fact for reducing murder to manslaughter. Similarly provocation, as a mitigating factor in reducing murder to manslaughter, is enlarged by providing for provocation by words. Section 4 alters the responsibility of survivors of suicide pacts.

A murder trial resembles a game played with human pieces, offering pleasant excitement since no one involved risks his life except the accused. Eventually, the game ends by strangulating or electrocuting the "bad" man. Love for fellow men runs subjectively; it can neither be objectified nor legislated into existence; but this does not constitute the warrant for dehumanizing law. State approval and enforcement of the death penalty quickly replaces personal ethics with sterile impersonal ethics of society.

Despite euphemistic wording executions carried out under and pursuant to law are killings of human beings. Justifiable homicide is a more pleasant term, suggesting an absence of any responsibility by the individual members of the community. Community self-defense, on the other hand, is connected with the death penalty by the belief it prevents murders. Each reason offered in support of capital punishment must be separately examined in order to ascertain whether or not it is valid. Many of such reasons, or opinions, lost ground during the study made by the Royal Commission on Capital Punishment.

Certainly some of the Pennsylvania cases, mentioned in this article,
show the relative guilt vulnerable to absolute punishment. The pattern of those decisions varied with the changing membership of the Court (see Appendix C) and quite possibly, Redline is admittedly the end-product of judicial legislation. There is a singular coincidence between the tolerant views of the Redline Court and the adoption of the English Homicide Act.

A reading of the Pennsylvania cases and the examination of the Homicide Act of 1957 should persuade one of the uncertainty permeating the homicide area in criminal law. The death penalty cannot be viewed in isolation, or merely as another criminal sanction. This irrevocable (part of the reason it transcends the legal framework) penalty must call forth something more in its support than legal authority to punish, bottomed on unproved claims of deterrence and notions of community self-defense. Without reliable usable statistics demonstrating the deterrent value of the death penalty, the arguments of protagonists rest upon speculation, conjecture, and wishful thinking. Utilitarian theories sheltering the death penalty, while more economical for taxpayers supporting prisoners incarcerated for life, are shocking when put in the proper setting. Killing a convicted murderer, under court order, as a deterrent and example to other persons, makes use of the condemned person as a means.

"Coddling criminals" is the common-place automatic response triggered by even casual mention of abolishing capital punishment. That two word blockade of ideas is repeatedly implemented by conglomerate illustrations of rapists, war, and self-defense. Mentally finger-painting pictures of such punishment abolished invariably blurs the jagged edges of the death penalty, leaving the desired uneasy impression that some how all convicted murderers will run unpunished as massacres of the population become imminent. Stale polemics urged, always vigorously, by protagonists of the death penalty all too fre-


quently betrays a terrible urge for vengeance and a vague notion of the duty to punish with death. Blood vengeance rooted in ancient instincts, only partially sublimated by the shift of force to the state, is regularized through criminal law which, also provides excitement for the general population.

Criminal law reaches men from the outside and any collision with subjective attitudes is quickly overridden by social pressures; individual conscience is appeased by the anonymity of the executioner and the remote location where he kills the condemned man.

APPENDIX A

THE PENNSYLVANIA STATUTE

Purdon's Pennsylvania Statutes Annotated (1945), Title 18, Chapter 2

§ 4701. Murder of the first and second degree:

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. If such person is convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence so fixed, as in other cases. In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. The clerk of the court wherein such conviction takes place shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

Whoever is convicted of the crime of murder of the second degree is guilty of a felony, and shall, for the first offense, be sentenced to undergo imprisonment by separate or solitary confinement not exceeding twenty (20) years, or fined not exceeding ten thousand dollars, or both, and for the second offense, shall undergo imprisonment for the period of his natural life.

§ 4710. Assault with intent to kill:

Whoever administers, or causes to be administered by another, any poison or other destructive thing or stabs, cuts or wounds any person, or by any means causes any person bodily injury, dangerous to life, with intention to commit murder, is guilty of felony, and shall on conviction, be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment, by separate or solitary confinement at labor, not exceeding seven (7) years, or both.
DEATH BY DEFINITION

APPENDIX B

THE ENGLISH HOMICIDE ACT

HOMICIDE ACT, 1957, 5 & 6 ELIZABETH 2, CHAPTER 11

CHAPTER 11

An Act to make for England and Wales (and for courts-martial wherever sitting) amendments of the law relating to homicide and the trial and punishment of murder, and for Scotland amendments of the law relating to the trial and punishment of murder and attempts to murder.

[21st March, 1957]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I. AMENDMENTS OF LAW OF ENGLAND AND WALES AS TO FACT OF MURDER

1. (1) 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.

(2) For the purposes 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.

2. (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 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.

3. 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.

4. (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 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.

PART II. LIABILITY TO DEATH PENALTY

5.—(1) Subject to subsection (2) of this section, the following murders shall be capital murders, that is to say,—
(a) any murder done in the course or furtherance of theft;
(b) any murder by shooting or by causing an explosion;
(c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;
(d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;
(e) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting.

(2) If, in the case of any murder falling within the foregoing subsection, two or more persons are guilty of the murder, it shall be capital 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 of 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.

(3) Where it is alleged that a person accused of murder is guilty of capital murder, the offence shall be charged as capital murder in the indictment, and if a person charged with capital murder is convicted thereof, he shall be liable to the same punishment for the murder as heretofore.

(4) In this Act “capital murder” means capital murder within subsection (1) and (2) of this section.

(5) In this section—
(a) “police officer” means a constable who is a member of a police force or a special constable appointed under any Act of Parliament, and “police force” has the same meaning as in section thirty of the Police Pensions Act, 1921 (as amended by the Police Act, 1946) or, as regards Scotland, the same meaning as in section forty of the Police (Scotland) Act, 1956;
(b) “prison” means any institution for which rules may be made under the Prison Act, 1952, or the Prisons (Scotland) Act, 1952, and any establishment under the control of the Admiralty or the Secretary of State where persons may be required to serve sentences of imprisonment or detention passed under the Naval Discipline Act, the Army Act, 1955, or the Air Force Act, 1955;
(c) “prison officer” includes any member of the staff of a prison;
(d) “prisoner” means a person who is undergoing imprisonment or detention
in a prison, whether under sentence or not, or who, while liable to imprisonment or detention in a prison, is unlawfully at large;

(e) "theft" includes any offence which involves stealing or is done with intent to steal.

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

(2) Where a person is charged with the murder of two or more persons, no rule of practice shall prevent the murders being charged in the same indictment or (unless separate trials are desirable in the interests of justice) prevent them being tried together; and where a person is convicted of two murders tried together (but done on different occasions), subsection (1) of this section shall apply as if one conviction had preceded the other.

7. No person shall be liable to suffer death for murder in any case not falling within section five or six of this Act.

8.—(1) The foregoing provisions of this Part of this Act shall not have effect in relation to courts-martial, but a person convicted by a court-martial of murder (or of an offence corresponding thereto under section seventy of the Army Act, 1955, or of the Air Force Act, 1955) shall not be liable to suffer death, unless he is charged with and convicted of committing the offence under circumstances which, if he had committed it in England, would make him guilty of capital murder.

(2) An accused so charged before a court-martial under the Naval Discipline Act may, on failure of proof of the offence having been committed under such circumstances as aforesaid, be found guilty of the murder as not having been committed under such circumstances.

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

(2) Accordingly paragraph (a) of subsection (3) of section seventy of the Army Act, 1955, and of the Air Force Act, 1955, and the first paragraph of section forty-five of the Naval Discipline Act, shall each be amended by the addition, at the end of the paragraph, of the words "or, in a case of murder not falling within section eight of the Homicide Act, 1957, imprisonment for life."

(3) In section fifty-three of the Children and Young Persons Act, 1933, and in section fifty-seven of the Children and Young Persons (Scotland) Act, 1937, there shall be substituted for subsection (1)—

"(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed, nor shall any such person be sentenced to imprisonment for life under section nine of the Homicide Act, 1957; but in lieu thereof the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Secretary of State may direct."

(4) The provisions of the First Schedule to this Act shall have effect with respect to procedural and other matters arising out of sections five to seven of this Act, and with respect to the convictions which may be taken into account under section six. . . .
## APPENDIX C

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M—Majority; Mo—Author majority opinion; C—Concurring with majority; D—Dissent.