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THE ENGLISH HOMICIDE ACT OF 1957

The Capital Punishment Issue, and Various Reforms in the Law of
Murder and Manslaughter

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England, where a new Homicide Act¹ has just been passed, has a reputation for splendid murders. Out of its mild, damp climate has sprung a crop of celebrated killers, peculiarly horrifying in their depravity. When such raw material is fed into the magnificent process of the English criminal trial it is very natural that the English murder should have acquired an international audience. But never has there been such a pitch of public interest in homicide as in the last ten years in Britain. One reason for this has been the concentration of hideously sensational killings—the convictions and executions of Heath, the sexual killer; Haigh, who killed for money and dissolved his victims in an acid bath; Christie, who with his mild manner but inexorable purpose made a long career of murdering lonely women; and the psychopath, Straffen, who escaped from a criminal lunatic asylum and killed a child. Then there have been the feverish but unsuccessful agitations for a reprieve from execution for the youthful robber, Bentley, and for the tormented Mrs. Ellis who in a paroxysm of jealousy shot her lover dead. The executions of Bentley and Mrs. Ellis, together with the discovery that it was, to say the least, possible that Christie had committed a murder for which another man had earlier been hanged² sent a wave

of uneasiness through the British public about the operation of the death penalty.

Side by side with this surfeit of slayings there have been continuous agitation and two unsuccessful attempts by the House of Commons to abolish capital punishment. In 1948, the Labor majority in the House, acting against the advice of its cabinet, included a measure for the abolition of capital punishment in the Criminal Justice Act.³ The House of Lords, exercising its constitutional privilege, vetoed that clause, but for a few months, before the Lords' veto was pronounced, the capital sentence was in fact not executed in England. The constitutional embarrassment created by this lordly evasion of the vote of the popular assembly was glossed over by the Government's appointing the Royal Commission on Capital Punishment, which produced in 1953 its brilliant and now celebrated Report.⁴ The mandate of the Royal Commission had expressly confined its jurisdiction to review of the possibilities of modifying the law of murder with respect to the liability to suffer the death penalty. The Commission took this to mean that they were precluded from a frank expression of opinion on the merits of total abolition,⁵ but most critics have viewed the vast body of evidence assembled and the luminous discussions offered by the Commission as indicating that there is no convincing proof of the effectiveness of capital punishment as a deterrent to homicide. In any event a Government motion in 1956 for the retention of the death penalty was

¹ 5 & 6 Eliz. 2, c. 11. General Discussions of the new statute are to be found in ARMITAGE, *The Homicide Act, 1957*, CAMBRIDGE L. J. (1957) 183; ELLIOTT, *The Homicide Act, 1957*, CRIMINAL L. REV. (1957) 282; FIELD FISHER, *The Homicide Bill*, 106 F. J. 788 (1956); HALL WILLIAMS, *The Homicide Bill* 9, HOWARD JOURNAL 285 (1957); HALL WILLIAMS, *Legislation: The Homicide Act, 1957*, 20 MODERN L. REV. 381 (1957); PREVEZER, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624 (1957).

² See EDDOWES, *THE MAN ON YOUR CONSCIENCE* (1955).

³ 11 & 12 Geo. 6, c. 58.

⁴ REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, Cmd. 8932, hereafter referred to as REPORT OF THE R. C.C.P.

⁵ REPORT OF THE R. C.C.P., par. 13.

surprisingly defeated in the House of Commons,⁶ now with a Conservative majority, and this was followed later in the year by the successful passage in the Commons of a private member's bill, introduced by Mr. Silverman, for the abolition of capital punishment for homicide.⁷

Once again the Lords vetoed the bill, exercising their undoubtedly lawful powers of delay and obstruction in a way which scandalized a large section of public opinion. The twice expressed will of the popularly elected Commons could not for long be flouted in this way. The most proper solution would have been for the Government to have given time in the Commons for the reintroduction of the abolition bill, thus nullifying the Lords' veto which can be overturned by such a proceeding. This the Government would not do but instead introduced a compromise bill, limiting capital punishment in effect to six special cases of murder. It was this bill which became law in March, 1957, as the Homicide Act.

SCOPE OF THE ACT

The half-way measure in the new Act with respect to capital punishment is a compromise that cannot fully please either the convinced retentionist or the passionate abolitionist. It is a compromise that may indeed in the next few years be swept away by total abolition. But the importance of the Act goes far beyond this temporary truce. For the new Act joins with the restriction of the death penalty the passage of several important reforms in the law of murder which had been the subject of discussion by the Royal Commission on Capital Punishment.

The conceptual nature of the crime of murder is a subject that cannot be profitably debated without constant reference to the penalty. There can be no doubt that it was the inexorably open arms of death waiting to receive the convicted murderer that gave such passionate bitterness to the attacks on the law of homicide in England.⁸ Although for purposes of exposition the portions of the Act dealing with reforms in the substantive law of murder must be severed from the sections dealing with the restriction of the death penalty, a constant mental cross-reference will be necessary to appreciate the full impact of the new legislation.

⁶ 584 HOUSE OF COMMONS DEBATES 2536, 2655.

⁷ The history of these matters is given more fully by PREVEZER *op. cit. supra* note 1.

⁸ See *e.g.* KOESTLER, REFLECTIONS ON HANGING (1957).

FELONY 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.

§ 1 (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.

This section is, of course, designed to abolish the felony murder rule as it operated in England. Before the Homicide Act the scope of the felony murder rule was not entirely clear in England. It was commonly said that it did not apply to killings or deaths caused in the course of the commission of any felony, but only to deaths in the course of felonies of violence.⁹ But the significance of violence here was obscure. It was thought to mean that the felony must be one which by its very nature involved violence to the person, as rape, but this view was discredited by the then Lord Chief Justice, Lord Goddard, who was willing to apply the rule to a case of larceny in a dwelling house.¹⁰ As a matter of fact, however, the rule had little currency in England outside cases in which there was an actual use of violence in the perpetration of a felony, its operative effect being to impose liability for murder where death ensued after the use of such violence as might not be sufficient to show the malice demanded in cases where there was no involvement in a felony. The rule was thus in England little more than a useful auxiliary weapon, invoked in cases where there was an actual use of violence but where an intention to kill or cause grievous bodily harm could not be proved beyond a reasonable doubt. One might go further than this and say that the cases in which the felony murder rule operated to secure a conviction where the verdict must have been different in the absence of the rule were very few indeed.

Occasionally the harsh case came up. The strongest example of the rule in operation in Eng-

⁹ REPORT ON THE R.C.C.P., pars. 80-90.

¹⁰ REPORT OF THE R.C.C.P. par. 100 and Reg. v. Grant 38 CRIM. APP. REP. 107 (1954).

land is perhaps the case of *Jarman* in 1945.¹¹ There the defendant had held up the cashier of a filling station at the point of a gun. The gun went off and the cashier was killed. The accused's story was that the gun had gone off accidentally while he was changing it from one hand to the other. The trial judge had directed the jury that even if the accused's story were true, he would still be guilty of murder, because he had killed in the course of a felony of violence (the violence here being presumably the assault involved in the levelling of a gun). The Court of Criminal Appeal confirmed this view of the law and upheld the conviction.¹² But there has never been any suggestion in the English courts that the felony murder rule might be pushed to cover the accidental death of an accomplice or the accidental slaying of a spectator by a bullet from a policeman's gun, as the courts have held or suggested in at least one American jurisdiction.¹³ The only extension of the rule which was to be found in England is the situation now covered by §1 (2) of the Homicide Act *supra*, a killing in the course of resisting an officer of the law or while resisting a lawful arrest. But again this provision had very little impact on the English law of homicide. It certainly did not seem that a modern court would have taken it to cover the extreme case of the police officer who, while chasing the escaping defendant, trips and breaks his neck. The very few modern cases on this point of law in England made it clear that the rule only applied when real violence was used against the arresting officer.¹⁴ Its effect was therefore limited, as with the major branch of the felony-murder rule, to ensuring a conviction for murder in the case where the violence used might fall short of that necessary to make out a convincing case of ordinary malice.

However restricted these rules were in their operation, they are now gone in England. Following the recommendation of the Royal Commission on Capital Punishment¹⁵ the Homicide Act has swept felony murder into the bin of history. But the statutory language used in effecting this abolition has itself posed a grave problem of interpretation for the English courts. The marginal note to § 1 (1) runs "Abolition of 'constructive malice' ",

¹¹ 31 CRIM. APP. REP. 39 (1945).

¹² But *Jarman* was revived.

¹³ See *Commonwealth v. Bolish*, 381 Pa. 500, 113 A.2d 464 (1955).

¹⁴ *Reg. v. Porter* 12 COX CRIM. CASES 444 (1873); *R. v. Appleby* 28 CRIM. APP. REP. 1 (1940), discussed in REPORT OF THE R.C.C.P. par. 79 and Appendix 7 (h).

¹⁵ REPORT OF THE R.C.C.P., pars. 121-123.

and the language of § 1 (1) itself says that a killing shall not amount to murder "unless done with . . . malice aforethought (express or implied)". Before the Act, "constructive malice" or "implied malice" were often used interchangeably to refer to felony murder. Now it appears that constructive malice is the correct term to use in this connection, and implied malice remains a live possibility in the law of murder. If implied malice can still hang a man it is well to know precisely what it is. In this way the Homicide Act has indirectly forced the English courts to come out with a review of the nature of the *mens rea* of murder which, astonishingly as it might seem, was not at all a clear topic before the Act.

An intention to kill a human being has always clearly amounted to a sufficient malice (express). So too has the doing of an act inherently very likely to cause death but without proof beyond a reasonable doubt of a desire to bring about death. This foresight of the high possibility of death without a desire to cause it reveals a recklessness towards the taking of life that the common law has always been willing to regard as an sufficient malice. But beyond this there has often been talk in the common law of an intention to cause grievous bodily harm as being a sufficient *mens rea* for murder, if death ensues.¹⁶ A great deal turns here on the meaning of "grievous bodily harm." If taken to refer only to the kind of harm of which death is a very possible or probable result, then it adds nothing to the category of recklessness. But, if it means something less than this, then it adds a good deal and becomes in itself a sort of additional variety of constructive murder. The drawing of sharp lines and clear distinctions in this field had been successfully avoided by the English courts until the Homicide Act, with its clear contrasts between constructive and implied malice on the one hand and express and implied malice on the other hand, made such a disentanglement inevitable. The case in which the matter came to a head was *Reg. v. Vickers*.¹⁷

THE VICKERS CASE

The accused had broken into a house to commit a burglary and had been discovered by the householder, a woman of seventy-two. He struck her many blows, apparently to prevent her recognizing him, and there was some evidence, though the accused denied it, that he had kicked her in the

¹⁶ *Ibid.* pars. 470-475.

¹⁷ [1957] 3 W.L.R. 326

face. The woman died as a result of the attack, though the medical evidence was that the injuries suffered by her could have been inflicted with only a moderate degree of violence. The trial judge had directed the jury that the accused was guilty of murder if he had struck the woman with an intention to do her grievous bodily harm. "Murder", said the judge "is with the intention to kill or to do grievous bodily harm . . . Malice will be implied, if the victim was killed by a voluntary act of the accused—and here is the importance of what I am going to say—done with the intention either to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim."¹⁸

The accused was convicted of murder and appealed to the Court of Criminal Appeal. The main ground of the appeal was the contention that causing grievous bodily harm is in itself a separate offence and that by virtue of § I (1) of the Homicide Act killing in the course of another offence is not *per se* murder. Therefore, the accused argued, the necessary malice aforethought for murder must be established independently from an intention to cause grievous bodily harm which is merely the *mens rea* of another and lesser offence. The Court of Criminal Appeal, sitting as usual with three judges, did not reach unanimity on its first hearing of the case and the Lord Chief Justice accordingly summoned a fuller court of five judges, as is sometimes done in England when it is felt that the case involves a point of exceptional importance.¹⁹ This fuller court reached unanimity and in a judgment delivered by the Lord Chief Justice the directions of the trial judge were upheld. The Court regarded the matter as having been "thoroughly explored" and expected their decision to be a "guidance to courts in the future."²⁰

The flaw in the appellant's argument was, the court felt, that the "furtherance of some other offence" mentioned in Section 1 (1) of the Homicide Act must refer in the circumstances of this case to the burglary and not to the causing of grievous bodily harm. Thus the effect of the statute was that not all acts of violence done in the course

of a burglary would amount to murder if death ensued. If, therefore, the accused, as the trial judge had rightly pointed out to the jury, had killed the woman "without intending her any harm, or only trifling harm" (the Lord Chief Justice's example of this was "a push to get her out of the way") he would have been guilty of manslaughter only.²¹ But if he intended to cause her grievous bodily harm it was murder, for "the 'furtherance of some other offence' must refer to the offence he was committing or endeavouring to commit other than the killing, otherwise there would be no sense in it".²² The court summed up its opinion in the following passage: "Murder is, of course, killing with malice aforethought, but 'malice aforethought' is a term of art. It has always been defined in English law as, either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied, where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim and the victim died as the result. If a person does an act which amounts to the infliction of grievous bodily harm he cannot say that he only intended to cause a certain degree of harm. It is called *malum in se* in the old cases and he must take the consequences. If he intends to inflict grievous bodily harm and that person dies, that has always been held in English law, and was at the time this Act was passed, sufficient to imply the malice aforethought which is a necessary constituent of murder."²³

The Homicide Act has thus compelled the English courts to embark on a clarification of the *mens rea* of murder at common law. The nature of the clarification in the *Vickers* case is, however, one that has called down a good deal of criticism. The judgment of the Court of Criminal Appeal has been strongly assailed in a paper by one of England's leading jurists of the criminal law, Mr. J. W. Cecil Turner.²⁴ Mr. Turner objects in the first place to the court's easy dismissal in the *Vickers* case of the argument that causing grievous bodily harm is itself an offence and that therefore the proof of killing in the course of this offence cannot by virtue of the Homicide Act amount *per se* to murder. In Mr. Turner's view this argument has a good deal

¹⁸ At 330.

¹⁹ The English Court of Criminal Appeal consists of any three judges of the Queen's Bench Division, usually including the Lord Chief Justice who acts as President. But the Court may consist of any uneven number of judges.

²⁰ [1957] 3 W.L.R. at 327-328.

²¹ At 330.

²² At 329.

²³ At 328.

²⁴ TURNER, *Malice Implied and Constructive*, CRIMINAL L. REV. (1958) 15. Mr. Turner repeats his argument in his latest (17th) edition of KENNY'S OUTLINES OF CRIMINAL LAW (1958), 148-154.

to commend it and the court's dismissal of it seems to him to amount almost to saying "a felonious assault constitutes implied malice because it is not 'some other offence' and it is not some other offence because it constitutes implied malice."²⁵ Again Mr. Turner is disturbed by the clear implication in the *Vickers* case that the meaning of "grievous bodily harm" as a test for the *mens rea* of murder is identical with its meaning in the felony of causing grievous bodily harm under the Offences Against the Person Act of 1861,²⁶ i.e., as the trial judge told the jury in the *Vickers* case, a harm that need not be permanent, but must seriously interfere with the health or comfort of the victim. If this is so, Mr. Turner believes that as a result of the *Vickers* case "the law of murder has now been made more severe than in effect it was prior to the new Act. For, according to the above *dicta*, if a man, in circumstances which made it clear that he did not intend to imperil another man's life but did intend to assault that person, were to strike a man with his fist intending to make his nose bleed or to blacken his eyes or cause a superficial laceration, or should hit his hand with a stick and thereby break a finger, such hurt would constitute a grievous bodily harm within the Offences Against the Person Act, 1861, and should death ensue (due to some unknown constitutional weakness or unexpected infection) the attacker would be guilty of murder."²⁷

The language of the Court of Criminal Appeal in the *Vickers* case stating that where the accused inflicts grievous bodily harm "he cannot say that he only intended to cause a certain degree of harm", certainly seems to suggest some sort of strict liability for murder of the sort which Mr. Turner deplors. One can only hope that this particular sentence was an unguarded *dictum* by the court which it will later qualify. Otherwise the elimination of felony murder by the Homicide Act will have been more than counter-balanced by the greater strictness of the approach to the common law concept of malice. It would perhaps have been best if the framers of the Homicide Act had undertaken to codify the *mens rea* of murder and embody it in the new Act. They preferred to leave the common law undisturbed and to complicate the picture by their unconventional use of the term "implied malice". Left with the necessity of discriminating between express and implied malice in the absence

of the felony-murder rule, it is perhaps not surprising that the courts should so readily have buttressed and enlarged the concept of intent to cause grievous bodily harm. Mr. Turner suggests an alternative solution, viz. that "express malice" might be taken to refer to an intention to kill and "implied malice" to circumstances in which there was recklessness towards human life without proof of a desire to bring about death.²⁸ In this way the *mens rea* of murder would never lack the essential constituent of an awareness, a foresight in the accused of the life-endangering quality of his act. If it was hoped that this was the principle which the new Homicide Act would establish in English law, this expectation has been unhappily defeated by the decision of the Court of Criminal Appeal in the *Vickers* case.²⁹

DIMINISHED RESPONSIBILITY

§ 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 (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.

§ 2 (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.

§ 2 (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.

This second section of the Act represents the official reply to the long standing attacks on the

²⁵ *Ibid.* at 30.

²⁶ The very danger of such a principle as seems to have been established by the *Vickers* case was pointed out by the REPORT OF THE R.C.C.P., par. 472: "There is no statutory definition of 'grievous bodily harm' but it has been held that it need not be permanent or dangerous but only 'such as sensibly to interfere with health or comfort'. We find it difficult to believe that the intentional infliction of such an injury necessarily involves 'wilful exposure of life to peril'; and we are therefore disposed to think that it is too wide a criterion to support a charge of murder."

²⁵ CRIMINAL L. REV. (1958) 27.

²⁶ 24 & 25 Vict., c. 100.

²⁷ CRIMINAL L. REV. (1958) 28-29.

adequacy of the M'Naghten Rules as a defence. The M'Naghten Rules in England, at any rate in the theory of the law, are severe and narrow in their application. They do not cover irresistible impulse which the English judiciary has resolutely rejected as an excuse,³⁰ and the knowledge of wrongfulness necessary for a conviction is taken to mean mere knowledge of the illegality of the act.³¹ Though juries might take in practice a more lenient attitude in some cases,³² the state of the law of insanity as a defence had not advanced at all from the time when Lord Bramwell was forced to admit that "nobody is hardly ever really mad enough to be within it"³³

The Homicide Act does not at all abrogate the M'Naghten Rules. The Rules are preserved, so that insanity is as much a complete defence as before the Act. What the Act does, however, is to introduce a *supplementary* doctrine of "diminished responsibility." Under this doctrine, a "substantially impaired" mind (less than "insanity" under the M'Naghten Rules) affords a killer a reduction of his offence from murder to manslaughter. The doctrine is professedly borrowed from Scottish law which has applied it since the middle of the nineteenth century. The Scottish doctrine operates at common law while the English version will of course be controlled by the statutory language, but it is highly probable that the English courts will for some time refer to Scottish decisions for guidance in the application of the concept.³⁴ The nature of the doctrine as it operates in Scotland is revealed in the following extracts from leading Scottish decisions:

"It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a

mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease."³⁵

"It will not suffice in law for the purpose of this defence of diminished responsibility merely to show that an accused person has a very short temper or is unusually excitable and lacking in self control."³⁶

"The evidence of one of the witnesses was to the effect that he was inclined to place the accused in the category of a psychopathic personality The Court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility."³⁷

So the Scottish doctrine, while couched in broad and general terms, does seem to demand proof of some form of mental disease and apparently excludes from its embrace that vague congerie of misfits who are sometimes called psychopaths. The Homicide Act, it will be noticed, inserts the qualification that the "abnormality of mind" must arise from "a condition of arrested or retarded development of mind or any inherent causes" or must be "induced by disease or injury". The leader of the movement for the abolition of capital punishment in the House of Commons, Mr. Silverman, resisted the inclusion of this qualification and it seems probable that its purpose was to give a ground for the exclusion from the scope of the section of those whose only manifestation of disease of the mind is their anti-social behavior.

Once evidence is offered of the kind of abnormality indicated by the section the question is for the jury. And the question is whether the "mental responsibility" of the accused was "substantially impaired". More than perhaps any other question that a jury is called upon to answer, this is one that calls for a free emotional response to the total

³⁰ See *R. v. Kopsch*, 19 CRIM. APP. REP. 50 (1925).

³¹ See *R. v. Codere*, 12 CRIM. APP. REP. 21 (1916) and *Reg. v. Windle*, 36 CRIM. APP. REP. 85 (1952).

³² The extent to which juries ignored the Rules was a matter of dispute between experienced witnesses before the R.C.C.P. See REPORT OF THE R.C.C.P., pars. 232-243.

³³ MINUTES OF EVIDENCE OF SELECT COMMITTEE ON THE HOMICIDE LAW AMENDMENT BILL, 1874, Q. 186. Lord Bramwell, however, finished this sentence by saying that the Rules offered a "logical and good definition".

³⁴ In *Reg. v. Dunbar* [1957] 3 W.L.R. 330, the Court of Criminal Appeal in discussing the defence of diminished responsibility relied heavily on the Scottish decision of *H.M. Advocate v. Braithwaite*, 1945 J.C. 55.

³⁵ *H.M. Advocate v. Savage*, 1923 J.C. 49, 50-51.

³⁶ *H.M. Advocate v. Braithwaite*, 1945 J.C. 55, 58.

³⁷ *Carraher v. H.M. Advocate*, 1946 J.C. 108, 117-118. Fuller extracts from the Scottish decisions are given in REPORT OF THE R.C.C.P., Appendix 8 (b); and see T. B. SMITH, *Diminished Responsibility*, CRIMINAL L. REV. (1957) 354.

situation. For responsibility is not a quality inherent in the accused but rather an attribute that is ascribed to him. The M'Naghten Rules, however harsh, did offer a structure for rational adjudication; the defence of diminished responsibility does not even profess to do this but allows the jury a free exercise of compassion. This of course is not necessarily a demerit.

The burden of proof here is said by Section 2 (2) of the Act to be on the defence, as it always was with the M'Naghten Rules. Under the English rule this burden is discharged by establishing a preponderance of probabilities.³⁹

IMPACT ON THE M'NAGHTEN RULES

A question of great importance, the answer to which is not at all clear, is the impact which the new doctrine of diminished responsibility will have on the working of the M'Naghten Rules. In theory the Rules are left untouched, but will they in fact have any real significance in the future? During the debate in the House of Commons on the Homicide Act the Attorney-General commented on this point as follows: "I think that the strict answer to that [i.e., whether the diminished responsibility doctrine would in fact abrogate the M'Naghten Rules] is that it will not, but I do not suppose that many accused persons will put forward a defence of insanity. I should perhaps make this clear. If the defence raises any question as to the accused's mental capacity, and evidence is called to show that he is suffering from a serious abnormality of mind, then, if the evidence goes beyond a diminution of responsibility and really shows that the accused was insane within the M'Naghten Rules, it would be right for the judge to leave it to the jury to determine whether the

accused was, to use the old phrase, 'guilty but insane' or to return a verdict of manslaughter on the basis that, although not insane, he suffered from diminished responsibility."³⁹

In England a verdict of "Guilty but Insane", which is the form used when the M'Naghten Rules are applied,⁴⁰ results in the committal of the accused by the court to detention in a criminal lunatic asylum, detention which may be for a long period and will sometimes be for life. The possibility held out by the Homicide Act of a conviction for manslaughter on the ground of diminished responsibility, followed by a term of imprisonment of probably not an intolerable length, is clearly more attractive to the defence. This seems to raise the horrid prospect that those defendants with serious mental derangements will under the new statute be convicted of manslaughter and will be treated as normal prisoners. Such a lamentable outcome is, however, unlikely. It can be avoided in the first place by the power which the judge possesses of putting the issue of insanity to the jury in terms of the M'Naghten Rules once the defence has led any evidence of mental abnormality. And if this power should on occasions fail and the accused, who is clearly in an advanced state of mental illness, be sentenced to a term of imprisonment for manslaughter, it is still possible to remove him to a criminal lunatic asylum by a process of certification.⁴¹

But, although the practical outcome may not be disastrous and is indeed an improvement on the previously unchallenged M'Naghten Rules, the state of the law under the new Act is scarcely elegant. The Royal Commission on Capital Punishment, in fact, expressly rejected the device of diminished responsibility as practised in Scotland, though on the somewhat curious ground that it would be too radical an amendment of the law of England to be justified for such a limited purpose.⁴² A more cogent objection is surely that the whole notion of diminished responsibility makes very little sense. The idea that one may be so mentally abnormal as not to be accountable for a killing in the sense that one ought to be sentenced to death, but yet may remain so accountable as to be sen-

³⁹ Reg. v. DUNBAR [1957], 3 W.L.R. 330, 333-335.

In Reg. v. Matheson [1958] 1 W.L.R. 474, [1958] 2 All. E.R. 87, there was unanimous medical testimony to the effect that the accused was a feeble-minded psychopath. Nevertheless the jury rejected the defence of diminished responsibility, no doubt moved by the revolting circumstances of the killing. The Court of Criminal Appeal found the jury's verdict to be unsupported by the weight of the evidence and substituted, as may be done under the English practice, a verdict of guilty of manslaughter on the ground of diminished responsibility. This case, decided by a full court, is of great importance as it shows that a psychopath of feeble mind may be covered by the defence. In the earlier case of Reg. v. Spriggs [1958] 2 W.L.R. 162, it was held by the Court of Criminal Appeal that a jury had properly rejected the defence of diminished responsibility where the accused had been described as of psychopathic personality but was admittedly of high intelligence. On these cases see Hall Williams, *Note*, 21 MODERN L. REV. 544 (1958).

³⁹ 560 HOUSE OF COMMONS DEBATES, 1254.

⁴⁰ The special verdict in this form was created by S.2 (1) of the Trial of Lunatics Act, 46 & 47 Vict., c. 38 (1883).

⁴¹ These points are made by GRIEW, *Diminished Responsibility and the Trial of Lunatics Act, 1883*, CRIMINAL L. REV. (1958) 521.

⁴² REPORT OF THE R.C.C.P., par. 413.

tenced to a term of imprisonment is difficult to support. This is, of course, exactly the situation with the doctrine of provocation and what has now happened in England is that diminished responsibility has been added to provocation as a supplementary doctrine of extenuating circumstances which may justify a lesser punishment. Now the only sense that can be made of the doctrine of provocation is that we are ready to punish people for not controlling themselves as we think they should have, but since we are all uncomfortably aware of our own propensities to behave unreasonably we mitigate the penalty. (This is not, of course, the conventional justification of the doctrine but is surely the only one that makes sense.) Those who are unlucky enough to lose self-control in circumstances which result in their taking a life must suffer for the sake of communal expiation. This is a primitive notion and it is now matched by an identically unhappy and irrational attitude to those who suffer from mental abnormality. We are now to say that those who are mentally abnormal may be partially responsible for killing. We are becoming sensitive enough to be shocked at the thought of executing them, but are still insensitive enough to send them to prison. This is a most uneasy compromise in which society consumes its cake of guilt by tossing morsels in contrary directions. We cannot altogether abandon talk of punishment; these people are too like us for us not to punish them. At the same time we cannot call them murderers and hang them. Again they are too like us.

The Royal Commission on Capital Punishment recommended (with three dissentients) that the best amendment of the law of insanity as a defence to crime would be a complete abrogation of the M'Naghten Rules and the submission to the jury of the general question 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.⁴³ This recommendation was criticized as leaving the matter in altogether too vague and imprecise a formula and it was not pursued. Its unpopularity was no doubt due to the ruthless way in which it deprives the unclear mind of the delightful solace of having things both ways, a comfort which is obviously the chief attraction of diminished responsibility. For under the Royal Commission's proposal there is insistence on the single choice between recogniz-

ing mental abnormality as a matter which removes the accused from the field of crime and punishment and places him in the category of sickness and treatment, and, on the other hand, the rejection of the relevance of the mental condition. There is a lot more sense in this than in the Erewonian attitude of the diminished responsibility doctrine which seems to regard mental abnormality as something in itself deserving moderate punishment. But, in so far as the new doctrine means that mentally sick persons who would previously have been hanged will now be saved in England, it is, of course, vastly welcome.

PROVOCATION

§ 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.

The law of provocation in England, a mitigating circumstance which reduces murder to manslaughter, had over the last hundred years become hardened into a series of rigid sub-rules. So it had become settled that the provocation must be such that it not only caused the accused to lose his self-control but would have caused the reasonable man to lose his self-control⁴⁴ (the folly of punishing people for behaving reasonably apparently not having been perceived), and again that mere words cannot amount to provocation.⁴⁵ In the operation of this restricted doctrine the judge played a controlling role. He decided as a question of law whether the allegations of the defence could amount to provocation with respect to the reasonable man; the jury's only function was then to decide, if the questions were put to them, whether the provocation was in fact enough to act on a

⁴⁴ *R. v. Alexander*, 9 CRIM. APP. REP. 139 (1913); *R. v. Lesbini* [1914] 3 K.B. 1116; *Bedder v. Director of Public Prosecutions* [1954] 1 W.L.R. 1119.

⁴⁵ *Holmes v. Director of Public Prosecutions* [1946] 2 All E.R. 124. The House of Lords in this case did recognize that words alone might amount to provocation in "circumstances of a most extreme and exceptional character", but such a holding was tantamount to excluding them.

⁴³ *Ibid.*, par. 790, §15-20.

reasonable person and whether the accused did in fact act under its stress.⁴⁶

The Homicide Act seeks to amend the law by leaving both questions to the jury and at the same time removing the restriction that words alone cannot be an adequate provocation. These are desirable reforms but it is to be regretted that the concept of the reasonable man, who seems to have accidentally blundered into this area of law where he is not at all at home, should have been preserved.⁴⁷ Together with the introduction of diminished responsibility, this section of the new Act has considerably broadened the doctrine of extenuating circumstances in the English law of homicide.

SUICIDE PACTS

§ 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.

§ 4 (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.

§ 4 (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 the pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

In England suicide is a crime akin to murder. The consequence of this was that where two persons entered into a suicide pact the survivor would be guilty of murder as a principal in the second degree, if he were actually present while the other committed suicide, or of murder as an accessory before the fact if he were not present.⁴⁸

⁴⁶ See the discussion in *Holmes v. D.P.P.*, *supra* note 45, at 126.

⁴⁷ See TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* (17th ed. 1958) 157-161.

⁴⁸ *R. v. Croft*, 29 Crim. App. Rep. 161 (1944); *REPORT OF THE R.C.C.P.*, pars. 164-176.

As the Royal Commission on Capital Punishment put it: "If two thwarted lovers decide to drown themselves but one is rescued, or if two old people resolve to end a life of poverty or sickness by gassing themselves or by taking poison, but only one of them dies, the survivor is liable to be charged with and convicted of murder."⁴⁹

The Royal Commission proposed that a new offence of aiding, abetting or instigating suicide should be created, with a maximum sentence of imprisonment for life.⁵⁰ This would bring the law into line with practice, which, in such harrowing cases as those instanced by the Royal Commission, had always been to commute the death sentence and to inflict a short term of imprisonment. The Homicide Act has effected the same result by treating the abetting or instigating of suicide under a suicide pact as a form of manslaughter, which in England is an offence carrying a maximum penalty of imprisonment for life. It is suggested that here the statute has taken a course preferable to that advocated by the Commission. There are cases where instigation to suicide seems equally heinous as the more conventional forms of murder. The Commissioners themselves cite the kind of case in which "an older man persuades a young girl pregnant by him to commit suicide and has no real intention of doing so himself."⁵¹ Under the statute such cases would remain cases of murder as there could be no satisfaction of the conditions demanded by the statute as constituting action in pursuance of a suicide pact. On the other hand, in one respect the statute goes beyond the proposals of the Royal Commission, for the Commission confined its recommendation to the aiding, abetting or instigating a suicide, while the statute covers the case of the accused's himself killing the other party to the pact. For both these reasons the statute seems to offer a better protection for the genuine participant in the suicide pact than the proposal of the Commission.

It will be noticed that the statute does not cover the ordinary case of the mercy killing or euthanasia in which the one who kills has no intention of taking his own life. There is still no general doctrine of mitigation for homicide with consent. The burden of showing that the accused acted in pursuance of the suicide pact is on the defence. Presumably

⁴⁹ *REPORT OF THE R.C.C.P.*, par. 164.

⁵⁰ *Ibid.*, par. 173.

⁵¹ *Ibid.*, par. 168. A fictional instance is to be found in GRAHAM GREENE'S *BRIGHTON ROCK*.

this will be a burden of establishing a balance of probabilities.⁵²

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;

§ 5 (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 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 (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.

§ 6 (1) A person convicted of murder shall be liable to the same punishment as heretofore, if before conviction of that murder he

has, whether before or after the commencement of this Act, been convicted of another murder done on a different occasion (both murders having been done in Great Britain).

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

So the death penalty is now confined to the five special cases set out in Section 5 (1) and the case of repeated murders as provided in Section 6 (1). The preservation of the death penalty in Section 5 (1) is evidently not because of the aggravated moral condemnation that is thought to attend such cases, for one may easily imagine cases of poisoning or killing in the course of rape or after a kidnapping which are more revolting than some murders by shooting or in the course of theft. The criterion for distinction is rather the utilitarian one that these are felt to be the categories in which the deterrent power of the death penalty is still necessary to restrain the professional criminal and protect the officers of the law in their ordinary duties.⁵³ It is easy to understand the feelings of a Government, which was unconvinced of the merits of abolition, in its efforts to cling on to the noose in those cases where killing is likely to be the work of the dedicated criminal; but the discrimination between capital and non-capital murder is perhaps the most sensitive of all policy questions and there are grave objections to this solution. Killing in anger with a gun in circumstances which fall short of provocation is now to be capital murder, while a slowly plotted and executed poisoning for financial gain is not to be capital. Of course the power of the executive to commute the death sentence is retained and will presumably be exercised in cases where the application of the death sentence seems harsh, but one of the chief hopes of a new homicide statute was that it would largely remove such vital questions from the discretion of the Home Secretary.

The provision relating to murders in the course of theft is worthy of special notice. It must, of course, be understood that this is not a reenactment of felony-murder. The Act speaks of *murders* and not *killings* in the course of theft as being capital, and thus the *mens rea* of murder in the sense of malice aforethought must always be shown. But we have seen from the *Vickers* case what this may in fact amount to. And the nature

⁵² Though PREVEZER, *op. cit. supra* note 1 at 647 thinks it will be a burden of proof beyond a reasonable doubt. He does not advance any reasons for this belief but seems to regard a strict burden as desirable to lessen the chance of fraud. But this seems a heavy task to place on the defence. The case in which a suicide pact is genuine is the very case in which the parties are not likely to make out affidavits or tape record their intentions.

⁵³ This seems to emerge from the statements of the Home Secretary in the House of Commons. See PREVEZER, *op. cit. supra* note 1, 648-649.

of theft in English law hardly provides any very satisfactory criterion. Section 5 (5) (e) tells us that for the purposes of the Homicide Act "theft includes any offence which involves stealing or is done with intent to steal". It will thus presumably be confined to larceny and will not include embezzlements or cases of obtaining by false pretences. The reason for applying the capital sentence to such murders is then supposedly that theft is the typical crime of the professional criminal and the preservation of the death sentence is likely to restrain him in the manner in which he goes about his work. If this is the rationale it would seem more logical to have confined the death penalty to murders in the course of burglary or housebreaking rather than in the course of larcenies generally.

The phrase "in the course or furtherance of theft" will no doubt raise problems of interpretation. Will it be applied to a murder done while escaping from the scene of a theft (assuming that the facts are such that they would not be covered by Section 5 (1) (c))? The American cases on felony-murder clearly cover such a situation.⁵⁴

Section 5 (2) is particularly difficult to understand. The desire to discriminate, when creating categories of capital murder, between those who are truly involved in the capital character of the murder and those who are not is a laudable one, but this section does a very poor job of discriminating. As it stands, the criminal who instigates and plots a murder of a capital kind which is then carried out by his accomplice is not guilty of capital murder (though he is of course guilty of murder), while the criminal, not himself intending to kill, who uses any force on the victim, will be guilty of capital murder if the victim is killed by his accomplice in circumstances which render the murder capital. To find the second man guilty of capital murder is justifiable, but the exemption of the instigator is then clearly not justifiable. This is merely to encourage the clever abstention from that degree of involvement which renders the murder capital. The death sentence here will often be the penalty for stupidity or chance.

In addition to the five categories of capital murder set out in Section 5 (1), there is also the case of repeated murders as specified in Section 6 (1). Why should a second murder especially deserve the death penalty? It cannot be because such a killer has demonstrated that imprisonment is an

ineffective deterrent, because this applies to all murderers. Every killing points to the ineffectiveness of all existing deterrents in that particular case. Nor can it be because such a man is a particular menace to society in the future; this he may be but life imprisonment is equally effective for the protection of society as the death penalty. The only explanation that makes sense is that here we have passed outside the utilitarian approach that characterizes Section 5 (1) and are in the realm of ethical judgments, the judgment presumably being that to poison a whole family in one fell swoop is less reprehensible than to murder them piecemeal. For to invoke this clause the murders must have been done on different occasions. This is clearly a highly vague phrase which may lead to grave problems of interpretation, but whatever interpretation may be accorded to it, it is scarcely conceivable that it can reflect any rational distinction in the gravity of the crime which would make the death penalty peculiarly appropriate.

NEW PUNISHMENT

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

The old mandatory sentence of death is thus replaced in England by a mandatory sentence of life imprisonment, except in cases of capital murder. Here it must be pointed out that the sentence of life imprisonment in England has never meant anything remotely like what it says. Sentences of life imprisonment are subject to review by the Home Secretary and the maximum period served is likely to be fifteen years and is very often much less than that. Before the Homicide Act, murderers whose death sentence had been commuted by executive action often served very short terms of imprisonment.⁵⁵ Under the mechanism of the new Act it is probable that the average terms actually served will increase, as murderers in prison may now include those less likely to command sympathy than those who were reprieved before the passage of the Act, but fifteen years will no doubt still be an exceptional and maximum term.

CONCLUSION

The Homicide Act, by curtailing the scope of murder, has greatly enlarged the area of the

⁵⁴ See e.g. *State v. McCarthy*, 160 Or. 196, 83 P.2d 801 (1938); *State v. Metalski*, 116 N.J.L. 543, 185 A. 351 (1936).

⁵⁵ REPORT OF THE R.C.C.P., pars. 644-646.

crime of manslaughter in England. By reason of the Act, verdicts of manslaughter will now be appropriate in cases of diminished responsibility, suicide pacts, and sometimes in cases which were formerly ones of felony-murder. Also the scope of the doctrine of provocation has been somewhat enlarged, again increasing the possibility of a manslaughter verdict. A difficulty that suggests itself here is that the judge may sometimes not know on what ground the jury has returned a manslaughter verdict. Such information is of the greatest need on a question of sentencing, and it is perhaps regrettable that, at any rate in the case of diminished

responsibility, a special form of verdict is not called for by the statute.⁵⁶

By thus enlarging the crime of manslaughter the harshness of the law of murder has undoubtedly been tempered. At the same time, in the area of murder that is left the death penalty has been confined to some special instances. If in many respects the Homicide Act is badly drafted, irrational and muddled, it is none the less a very welcome mollification of an unduly severe law of murder.

⁵⁶ A suggestion made by HALL WILLIAMS, *Legislation, The Homicide Act, 1957*, 20 MODERN L. REV. 381, 383 (1957).