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Robert W. Crabtree

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CRIMINAL RESPONSIBILITY FOR DEATH OF CO-FELON

On October 2, 1962 James Edwards Washington participated in the robbery of a service station in Los Angeles County. While Washington was outside, his accomplice, Ball, entered the office with his gun drawn and confronted the owner. The owner responded by producing a weapon of his own with which he shot and killed Ball. Washington was convicted of robbery and first degree murder. The conviction was affirmed by the district court of appeal in *People v. Washington*.¹ The court reasoned that Washington's act in committing the robbery was the proximate cause of the death of Ball; therefore he could be found criminally responsible for that death. The crime was determined to be murder by the felony murder rule.

The court considered *People v. Harrison*² to be the controlling authority. In that case, the defendants attempted to rob a cleaning establishment. Harrison slugged the owner and shot at an employee across the room. The employee fired back and accidentally killed the owner. The defendants were convicted of murder in the first degree. In *Harrison* the court reviewed many authorities and concluded that the doctrine of proximate cause was applicable in criminal proceedings in determining responsibility for a person's acts.

Where it reasonably might or should have been foreseen by the accused that the commission of or the attempt to commit the contemplated felony would be likely to create a situation which would expose another to the danger of death at the hands of a nonparticipant in the felony, the creation of such situation is the proximate cause of the death³

Harrison holds that when the victim of an attempted robbery employs defensive force which kills an innocent bystander, the robber is guilty of murder. The rationale is that the robber's initial act (attempted robbery) caused a foreseeable response (defense) which resulted in the death. This same result has been reached by other courts on similar facts.⁴

Washington holds that when the victim of an attempted robbery employs defensive force which kills one of the robbers, the other robber is guilty of murder. The only other case reaching this result is *Commonwealth v. Thomas*.⁵ The facts and reasoning were the same as in *Washington*. Only three years later however, the Pennsylvania Supreme Court overruled *Thomas* in a case on similar facts.⁶

To determine whether the decision in *Washington* is sound, two questions must be answered:

- (1) Is the rationale of *Harrison* sound?
- (2) If so, is the same legal problem presented in both *Harrison* and *Washington*, or is there a valid factual distinction between them that justifies an opposite result?

¹ 230 A.C.A. 351, 40 Cal. Rptr. 791 (1964).

² 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959) (supreme court denied hearing).

³ *Id.* at 345, 1 Cal. Rptr. at 425.

⁴ *Hornbeck v. State*, 77 So. 2d 876 (Fla. Sup. Ct. 1955); *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201, *cert. denied*, 344 U.S. 845, 344 U.S. 888 (1952); *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595, *cert. denied*, 339 U.S. 924 (1949); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

⁵ 382 Pa. 639, 117 A.2d 204 (1955).

⁶ *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

Before considering these questions, the scope of the discussion must be limited. *Harrison* and *Washington* are both cases of murder in the first degree involving the felony murder rule. The main problem involved in this discussion is, however, that of proximate causation. The matters of murder, the felony murder rule, and the degree statute⁷ are only collaterally involved. In order to avoid confusion, it may be wise to briefly review these matters.

Murder is defined in California as "the unlawful killing of a human being, with malice aforethought."⁸ Malice, which distinguishes murder from other grades of homicide,⁹ may be express or implied.¹⁰ This statutory definition of murder has been held to be "substantially in the language of the common law."¹¹

The felony murder rule is used to imply the malice necessary for a conviction of murder in certain situations where there is no express malice, *i.e.*, where there is a killing in the perpetration or attempt to perpetrate a felony.¹² The felony need not be one of those enumerated in the degree statute.¹³

The degree statute comes into operation only after murder has been established. It designates certain murders as first degree and makes all the rest second degree.

When analyzing a particular fact situation such as *Washington* or *Harrison*, the rules of proximate causation determine whether the accused is to be responsible at all for the death. If he is found to be responsible, the rules of murder, felony murder, the degree statute, etc., are applied to determine the nature of the responsibility.

Is Harrison Sound?

The result reached in *Harrison* has been criticized by the Pennsylvania Supreme Court¹⁴ and described as "a radical departure from common law criminal jurisprudence."¹⁵ That court attempted to justify this criticism by a review of the "relevant authorities." Many of the cases cited¹⁶ can be traced to the early decision of *Commonwealth v. Campbell*.¹⁷ In that case the defendant participated in a riot at an armory to protest the Civil War draft. The mob in the street and the soldiers in the armory fired at each other, and a bystander was killed. On an indictment for murder, the Massachusetts Supreme Court held that the jury must be instructed that unless they find the deceased was killed by a shot fired by the

⁷ CAL. PEN. CODE § 189.

⁸ CAL. PEN. CODE § 187.

⁹ *People v. Mears*, 142 Cal. App. 2d 198, 204, 298 P.2d 40, 43 (1956); *People v. Teixeira*, 136 Cal. App. 2d 136, 150, 288 P.2d 535, 543 (1955); *People v. King*, 30 Cal. App. 2d 185, 204, 85 P.2d 928, 940 (1938).

¹⁰ CAL. PEN. CODE § 188.

¹¹ *People v. Foren*, 25 Cal. 361, 363 (1864).

¹² *People v. Coefield*, 37 Cal. 2d 865, 868, 236 P.2d 570, 572 (1951).

¹³ *People v. Pulley*, 225 A.C.A. 473, 37 Cal. Rptr. 376 (1964); *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017 (1904); *People v. Olsen*, 80 Cal. 122, 22 Pac. 125 (1889).

¹⁴ *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

¹⁵ *Id.* at 489-90, 137 A.2d at 473.

¹⁶ *E.g.*, *People v. Garippo*, 292 Ill. 293, 127 N.E. 75 (1920); *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924).

¹⁷ 89 Mass. (7 Allen) 541 (1863).

defendant or one of the other rioters, the defendant must be acquitted. The court reasoned that

no person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose.¹⁸

The reasoning of the *Campbell* case is sound as far as it goes, but it fails to deal with the whole problem. What act should be called the cause of death? Was it merely the firing of the fatal shot by a soldier; or was it the defendant's riotous actions which caused both the shots and the death; or was it the Civil War which made a draft necessary, that caused the riot and the death. The actual causes of the death extend indefinitely into the past. The legal liability however, is limited to those causes which are close enough on the continuum of causation to be called proximate. The rules of proximate causation are used to determine where this point is. The *Campbell* case is an inadequate appraisal of the situation since the important element of causation was not even discussed.¹⁹ Consequently the result of *Campbell* and cases blindly following it is open to question.

In criticizing *Harrison*, the Pennsylvania court did not include in its discussion of "relevant authorities" the many cases which apply the principle of proximate cause to homicide.²⁰ In *Letner v. State*²¹ the defendant shot at a boat, frightening one of the occupants, who jumped out. The boat capsized and two other occupants were drowned. The court held that the shot was the proximate cause of the two drownings and found the defendant guilty of homicide. In another case it was held to be murder to free the hands of a lunatic who was being arrested by an officer, enabling him to kill the officer.²² In each case the defendant's act caused a foreseeable response from another person which resulted in the death of a third person. This is the situation in *Harrison*. The fact that the felony murder rule is involved in *Harrison* does not alter the causation problem. The rules of causation are applied to felony murder cases as well as to others.²³ The principles of causation and felony murder are applied successively, not concurrently.

¹⁸ *Id.* at 544.

¹⁹ See PERKINS, CRIMINAL LAW 631 (1957) (criticizes the court for ignoring the causation problem); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 631, 649 (1920) (calls the decision questionable).

²⁰ E.g., *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *People v. Manriquez*, 188 Cal. 602, 206 Pac. 63 (1922); *People v. Fowler*, 178 Cal. 657, 174 Pac. 892 (1918); *People v. Lewis*, 124 Cal. 551, 57 Pac. 470 (1899); *State v. Leopold*, 110 Conn. 55, 147 Atl. 118 (1929); *State v. Block*, 87 Conn. 573, 89 Atl. 167 (1913); *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925); *Belk v. People*, 125 Ill. 584, 17 N.E. 744 (1888); *Spies v. People*, 122 Ill. 1, 12 N.E. 865, 17 N.E. 898 (1887); *Reddick v. Commonwealth*, 17 Ky. L. Rep. 1020, 33 S.W. 416 (1895); *Hendrickson v. Commonwealth*, 85 Ky. 281, 3 S.W. 166 (1887); *State v. Schaub*, 231 Minn. 512, 44 N.W.2d 61 (1950); *State v. Glover*, 330 Mo. 709, 50 S.W.2d 1049 (1932); *State v. Badgett*, 87 S.C. 543, 70 S.E. 301 (1911); *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961, 63 S.W. 330 (1900).

²¹ 156 Tenn. 68, 299 S.W. 1049 (1927).

²² *Johnson v. State*, 124 Ala. 70, 38 So. 182 (1905).

²³ E.g., *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *People v. Manriquez*, 188 Cal. 602, 206 Pac. 63 (1922); *State v. Glover*, 330 Mo. 709, 50 S.W.2d 1049 (1932); *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961, 63 S.W. 330 (1900).

Thus it is seen that the common law consists of two lines of cases: those that follow *Campbell* and apply only the rules of parties to crime, and those that apply the principle of proximate causation. *Harrison* follows the latter cases and therefore is not a "radical departure from common law criminal jurisprudence," as stated by the Pennsylvania court. The question remains, however, whether proximate cause was correctly applied to the particular situation presented in *Harrison*.

If we assume for the moment that the prior application of proximate cause to criminal cases has been, on the whole, a valid exercise of legal principles, then the question of whether it should be applied to *Harrison* immediately raises a more basic question. Should a finding of proximate cause vary according to the nature of the situation or is it a constant concept which applies uniformly to any set of facts? The answer to this requires an appraisal of the whole concept of proximate causation.

Factual causation is a function of the physical nature of things. The legal concept of proximate causation is an instrument of social policy. There are no natural laws that prescribe when a cause is proximate. This is determined by men and depends on a variety of factors. One factor is the expectation of legal proceedings.²⁴ The court will not waste valuable time tracing the causes of an occurrence indefinitely into the past. Another factor, perhaps the most important, is the attempt to achieve a fair and just result.²⁵ In light of these factors which underlie the policy of proximate cause, it is difficult to see how any inflexible standard could apply to all cases.²⁶ It is, in fact, generally recognized that proximate causation is not a consistent standard and that it reaches further in some cases than in others. It reaches further as the act committed becomes more reprehensible.²⁷ It reaches further in cases of intentional harm than it does in those based on negligence.²⁸ Does it differ according to whether the case is civil or criminal? Some courts which have applied proximate cause to criminal cases would take the concept from tort law, apply it directly to the criminal law, and use tort cases as precedents.²⁹ The Pennsylvania court feels that "the tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide and more direct causal connection is required . . ."³⁰ This court thought that the concept of proximate cause in tort liability was much too broad to be applied to criminal liability. For illustration it referred to a case where a truck was double parked in

²⁴ Beale, *supra* note 19, at 640.

²⁵ McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 (1925).

²⁶ "[A]ll attempts hitherto made at laying down universal tests of a more definite and more specific nature have resulted in propounding rules which are demonstrably erroneous." Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303, 317 (1912).

²⁷ "[A]s the wrongful act which is alleged to have caused the damage increases in moral obliquity or in illegality, the legal eye reaches further and will declare damage to be proximate which in other connections would be considered to be remote." 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 111 (1906), quoted in Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 223, 232-33 (1912).

²⁸ RESTATEMENT, TORTS §§ 279-80 (intentional torts), §§ 430-53 (negligent torts) (1934). See especially § 279, comment c.

²⁹ *Letner v. State*, 156 Tenn. 68, 78-80, 299 S.W. 1049, 1052 (1927) (the famous squib case, *Scott v. Shepherd*, 2 Wm. Blackstone's Rep. 892, 96 Eng. Rep. 525 (K.B. 1773), was held to be "direct authority" for the court's decision).

³⁰ *Commonwealth v. Root*, 403 Pa. 571, 580, 170 A.2d 310, 314 (1961).

violation of the law. A girl walked around it and was struck by a passing car. The truck owner was held liable for damages.³¹ If the girl had been killed and tort causation was applicable, the truck driver would be guilty of involuntary manslaughter. This would obviously be an unjust result. It should be clear that the problem of proximate causation is different in criminal cases than it is in civil cases.

In tort, the aim of the law is compensation. This is accomplished by requiring the one responsible for an injury to transfer a sum of money to the injured party. In criminal law, the object is to restrict human conduct to socially acceptable limits. This is accomplished by inflicting punishment on those who do not conform. In any case, the concept of proximate causation should be considered in light of the policy that is applicable. In the case of the double parked truck, it was deemed fair and just that the owner be held liable in tort for the pedestrian's injuries. The court recognized the double parked truck as the proximate cause of the accident. On the other hand it would not be fair and just to hold the driver guilty of manslaughter if the girl was killed, so for purposes of criminal law the truck would not be the proximate cause of the accident.

The Pennsylvania court is undoubtedly correct when they say that the tort liability concept of proximate cause has no place in criminal prosecutions. But this does not prevent application of a criminal concept of proximate cause to criminal prosecutions.³² Proximate cause was originally a tort concept and its principles were developed in tort cases.³³ When the criminal law began to use it, some courts failed to consider the different policies involved and used criminal and tort proximate cause interchangeably.³⁴ While the results of these decisions may have been defensible, the basis was defective. This retarded the development of criminal proximate causation and left the door open to possible unjust results. The Pennsylvania court recognized the problem and seems to have set the record straight.

Considering now the social policy behind the criminal law, should Harrison, in fairness and justice, be held responsible for the death that resulted from his action? It seems that he should. Whether looked at from the standpoint of vengeance, the protection of society from this one individual, or the deterrent effect it may have on others, the punishment should be roughly proportional to the harm caused. A robbery resulting in the death of a human being is more harmful to society than a mere robbery, therefore the punishment should be greater.³⁵

There is room for reasonable men to disagree on the question of how much more punishment a defendant should receive when a death results from his robbery. Harrison was convicted of first degree murder. A conviction of this degree,

³¹ *Marchl v. Dowling & Co.*, 157 Pa. Super. 91, 41 A.2d 427 (1945).

³² A note on *Commonwealth v. Root* in 7 VILL. L. REV. 297 (1962) seems to conclude that the case abolished all proximate cause considerations from future Pennsylvania criminal cases.

³³ See, e.g., *Scott v. Shepherd*, 2 Wm. Blackstone's Rep. 892, 96 Eng. Rep. 525 (K.B. 1773).

³⁴ Note 29 *supra*.

³⁵ Even the Pennsylvania case that questioned the result of *Harrison* agreed that the defendant in such a situation should be held on a serious criminal charge—but not for murder. *Commonwealth v. Redline*, 391 Pa. 486, 491, 137 A.2d 472, 474 (1958).

however, did not result from his being found responsible for the death by the rules of proximate causation, but was required by the joint operation of the common law felony murder rule and the degree statute.

The existence of these two latter ingredients presents a seemingly insoluble problem to a court that believes that fairness and justice requires Harrison to be held responsible for the death, but that it is unjust to convict him of first degree murder. Some may feel that a just solution is to convict Harrison of a lesser degree of homicide, *e.g.*, manslaughter.³⁶ But this result is impossible, for once Harrison is held responsible for the death, the felony murder rule makes it murder, and the degree statute makes it first degree murder. The only way to avoid first degree murder is to say that he is not responsible for the death at all. Neither alternative seems entirely fair and just.

It is the felony murder doctrine that causes the perplexing problem. It is ironic that a rule of law, supposedly designed to promote justice, has the effect of frustrating justice. Many writers have suggested abolition or at least a re-examination of this old common law doctrine.³⁷ In most cases where the doctrine is applied, it is not really needed. In *Harrison* the facts probably would have sustained a finding that the defendant was acting in "wanton and wilful disregard of unreasonable human risk."³⁸ If so, the felony murder rule was not needed to convict Harrison of murder.³⁹ England has recognized that the felony murder rule is no longer needed for the efficient administration of justice and has abolished the rule.⁴⁰ A thorough study of this ancient doctrine with an eye toward abolition is justified.

The California court in *Harrison* evidently believed that standards of fairness and justice were met by the conviction of first degree murder. This position can easily be defended. Harrison, by shooting at the people in the store and actually wounding one of them, demonstrated that he was so heedless of loss of life, that a conviction of murder was justifiable. *Harrison* is sound, though the court was unfortunately bound by the felony murder rule.

Is There a Valid Distinction Between Harrison and Washington?

The Pennsylvania court would distinguish the *Washington* situation from the *Harrison* situation on the ground that the homicide was excusable in the latter and justifiable in the former.⁴¹

A justifiable homicide is one commanded or authorized by law, *e.g.*, execution of a condemned criminal by the executioner, to prevent a felony or in self defense.⁴² An excusable homicide is one committed by accident or misadventure while doing a lawful act, *e.g.*, one lawfully correcting a child, with ordinary caution, causes its death; one lawfully shooting at a felon, kills an innocent by-

³⁶ See Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 68 (1956).

³⁷ See, *e.g.*, Packer, *The Case for Revision of the Penal Code*, 13 STAN. L. REV. 252, 259 (1961); Note, 71 HARV. L. REV. 1565, 1566 (1958).

³⁸ PERKINS, *op. cit. supra* note 19, at 32.

³⁹ *Ibid.*

⁴⁰ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11.

⁴¹ Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

⁴² See CAL. PEN. CODE §§ 196, 197; PERKINS, *op. cit. supra* note 19, at 28; 26 AM. JUR. Homicide § 102 (1940).

stander.⁴³ In the early common law, the distinction between excusable and justifiable homicide was important. In the case of excusable homicide, the slayer, while not executed, suffered a forfeiture of his goods and was not discharged until he received a pardon. In the case of justifiable homicide, the slayer was wholly free from blame and suffered no forfeitures.⁴⁴ The distinction is, however, no longer adhered to as it has no practical importance. Whenever a killing is found to be excusable or justifiable today, the accused is entitled to an acquittal.⁴⁵ The determination of which label applies to a given case is purely academic.

It is argued that there can be no murder conviction when the killing was justifiable.⁴⁶ This is true only if the *accused* had justification to kill. In a case like *Washington*, it must be determined who is justified in killing the felon. The service station owner who killed Washington's accomplice was justified because he was preventing a felony and also defending his life. But this defense is personal to him.⁴⁷ It does not insulate Washington from conviction.

The ancient distinction between excusable and justifiable homicide should not be revived unless there is a good reason for doing so. The Pennsylvania court, though realizing there was no real basis for the distinction,⁴⁸ felt that there was a good reason for reviving it because "such distinction serves the useful purpose of thwarting further extension of the rule [that perpetrators of a felony are guilty of murder when their victim employs a defensive force which results in the death of an innocent bystander]."⁴⁹ The California court, unlike the Pennsylvania court, does not question the validity of the rule. Even the dissenting justice in *Washington* expressly accepts *Harrison* as good law.⁵⁰ Therefore, in California at least, there is no valid distinction between *Harrison* and *Washington* on the basis of whether the killing was excusable or justifiable.

The major factual difference between *Harrison* and *Washington* is in the character of the deceased. An innocent bystander in the former and a co-felon in the latter. This difference has emotional appeal, but is it really a distinction that the law should recognize? One California case indicates that it is,⁵¹ but this case is basically unsound. Ferlin hired Skala to burn a building. Skala accidentally burned himself to death in the fire. The California Supreme Court reversed a conviction of murder, reasoning that if Ferlin is guilty of murder then Skala must be also because they were conspirators.⁵² The court found it hard to reach a decision that

⁴³ See CAL. PEN. CODE § 195; PERKINS, *op. cit. supra* note 19, at 29; 26 AM. JUR. *Homicide* § 102 (1940).

⁴⁴ *Erwin v. State*, 29 Ohio St. 186 (1876).

⁴⁵ *Ibid.*; CAL. PEN. CODE § 199.

⁴⁶ See *Commonwealth v. Redline*, 391 Pa. 486, 493, 137 A.2d 472, 483 (1958); *Commonwealth v. Thomas*, 382 Pa. 639, 641-42, 117 A.2d 204, 221-25 (1955) (dissenting opinion of Musmanno, J.).

⁴⁷ See *Morris*, *supra* note 36, at 56.

⁴⁸ *Commonwealth v. Redline*, 391 Pa. 486, 509-10, 137 A.2d 472, 483 (1958).

⁴⁹ *Ibid.*

⁵⁰ *People v. Washington*, 230 A.C.A. 351, 357, 40 Cal. Rptr. 791, 795 (1964) (dissenting opinion by Files, J.).

⁵¹ *People v. Ferlin*, 203 Cal. 587, 265 Pac. 230 (1928).

⁵² This has been described as "rather specious reasoning" in Focht, *Proximate Cause in the Law of Homicide—With Special Reference to California Cases*, 12 So. CAL. L. REV. 19, 43 (1938).

would make a man guilty of his own murder. The court, being overly cautious, thus found Ferlin innocent in the death of his co-felon. Other cases have shown that one may be guilty of a crime he could not himself perpetrate.⁵³ The court, relying on the *Campbell* line of cases,⁵⁴ took a very narrow view of what the conspiracy was meant to accomplish.⁵⁵ By relying solely on this authority, the court "missed the point entirely by overlooking the problem of causation."⁵⁶

The Pennsylvania court, in an identical fact situation, reached a much sounder result.⁵⁷ That court approved the conviction of first degree murder on the theory that the commission of the felony (arson) was the proximate cause of the death of the co-felon.⁵⁸

The dissenting justice in *Washington* would distinguish that case from *Harrison* on the basis of the "vast difference between the culpability" of a robber who causes the death of a bystander and one who causes the death of a confederate.⁵⁹ He argues that malice, while validly implied against a bystander, cannot be implied against a co-felon. He must find some difference in status between a co-felon and an innocent bystander. There are several differences between the co-felon and the bystander. Which one is relied upon?

Is it that the co-felon is an evil man while the bystander is presumably a good citizen? This should be irrelevant because "all men . . . are under the equal protection of the law, and it in no degree excuses or palliates the taking of human life that the person slain was of bad character or reputation . . ."⁶⁰

Is it that the co-felon is committing a crime and the bystander is not? There is a right to kill to prevent the commission of a felony.⁶¹ This does not allow the killing of one committing a felony for a different reason. The reason must be to prevent the felony. The service station owner was preventing the felony and therefore had the right to kill Ball, but *Washington* was furthering the felony and therefore had no right to kill Ball.

⁵³ *E.g.*, *Bompensiero v. Superior Court*, 44 Cal. 2d 178, 281 P.2d 250 (1955) (one not a public official found guilty of acceptance of a bribe by a public official); *People v. Haywood*, 131 Cal. App. 2d 259, 280 P.2d 180 (1955) (woman guilty of rape).

⁵⁴ These cases hold that an act cannot be imputed to the accused unless committed by someone acting in concert with him or in the furtherance of a common design. See notes 16-19 *supra* and accompanying text.

⁵⁵ "It cannot be said from the record in the instant case that defendant and deceased had a common design that deceased should accidentally kill himself." *People v. Ferlin*, 203 Cal. 587, 597, 265 Pac. 230, 235 (1928). Should the court have found the common design to have been the burning of the building?

⁵⁶ *PERKINS, op. cit. supra* note 19, at 632 n.55.

⁵⁷ *Commonwealth v. Bolish*, 381 Pa. 500, 113 A.2d 464 (1955). See also *State v. Leopold*, 110 Conn. 55, 147 Atl. 118 (1929); *Moesel, A Survey of Felony Murder*, 28 *TEMP. L.Q.* 453, 463 (1955) (approves *Bolish*).

⁵⁸ The conviction, however, was reversed on the ground that admission into evidence of a certain tape recording deprived defendant of a fair trial.

⁵⁹ *People v. Washington*, 230 A.C.A. 351, 357, 40 Cal. Rptr. 791, 795 (1964).

⁶⁰ *People v. Lamar*, 148 Cal. 564, 573, 83 Pac. 993, 996 (1906). See also *People v. Cancino*, 10 Cal. 2d 223, 73 P.2d 1180 (1937); *People v. Murray*, 10 Cal. 309 (1858).

⁶¹ CAL. PEN. CODE § 197.

Is it that the co-felon has voluntarily assumed the risk that he may be killed whereas the bystander has no choice? This can have no bearing because even if the deceased *consents* to being killed, it is no defense to the killer.⁶² This applies a fortiori if the deceased only assumes the risk of being killed.

Is it that the co-felon is a confederate of the defendant and the bystander is not? There is no rule that one may not be guilty of the murder of a confederate. If Washington had deliberately shot Ball he would certainly be guilty of murder.

It seems that there is no difference in the status of a co-felon and a bystander that should make Washington immune from conviction of murder.

The only difference between *Harrison* and *Washington* that could have any significance is that Harrison entered the store with his gun drawn and began shooting, while Washington merely waited outside while Ball entered the office. Is this slight difference sufficient to justify a finding that Washington deserves less punishment than Harrison? It may be. Washington was not acting with quite the same degree of maliciousness as was Harrison. Social policy therefore may not justify the same degree of punishment, although it should require some additional punishment beyond a robbery conviction. Just how much more would be an interesting question for a court to explore. Unfortunately, there is almost no chance that such a question will be discussed for, as previously noted,⁶³ the existence of the felony murder rule precludes any result except a conviction of first degree murder or an acquittal on all grades of homicide. The California Supreme Court has granted a hearing to Washington.⁶⁴ It is extremely unlikely that the court will abolish or disregard the felony murder rule. Therefore, if it decides that it is not just and fair to convict Washington of first degree murder, it has no choice but to reverse the conviction and hold that he is not criminally responsible for Ball's death.

Conclusion

The concept of proximate causation is a complicated but useful device in reaching fair and just conclusions in light of prevailing public policy. Its prior development in tort law has caused confusion about its application to criminal law. It should be recognized that, although the tort concept of proximate cause is inapplicable because based on different considerations, the general principle of proximate cause can be of use in effectuating the policies of criminal law. Proximate cause, to be workable and productive of consistently just results, should always be considered an instrument of social policy rather than a mechanical rule. Considering this social policy and the facts of *Harrison*, it was fair and just to hold that Harrison's acts were the proximate cause of the death, and the conviction of first degree murder was proper. The conviction of Washington is somewhat harder to rationalize. There is no valid distinction between the two cases on the basis of the status of the deceased or the fact that the killing was excusable in one case and justifiable in the other. If Harrison is to be held responsible for the death, so should Washington. But it seems that Washington's acts were somewhat less reprehensible. But for the felony murder rule, the punishment could more

⁶² *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139 (1908).

⁶³ See text accompanying note 36 *supra*.

⁶⁴ *People v. Washington*, Crim. No. 8528, Cal. Sup. Ct., Dec. 14, 1964.