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TORAH AND MURDER: THE CITIES OF REFUGE AND ANGLO-AMERICAN LAW

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I. INTRODUCTION

The Model Penal Code makes killing a human being murder if the killer purposes to kill or knows he is killing.[1] But the Model Penal Code equally makes killing a human being murder if the killer kills "recklessly under circumstances manifesting extreme indifference to the value of human life."[2] Any murder—whether purposed, known, or grossly reckless—may send the murderer to death row.[3] The Code establishes a penal equivalence at the highest level of punishment for killings that do not share equivalent levels of mens rea. Why?[4]

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[1] MODEL PENAL CODE § 210.2(1)(a) (1962).

[2] *Id.* § 210.2(1)(b). "Recklessly" finds its definition in section 2.02(2)(c):

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id. § 2.02(2)(c).

[3] *Id.* § 210.2(2).

[4] It could be simply that the Code has punishment "maxing out" at homicide with gross recklessness, no greater punishment being available for still greater offenses. Or it could be that the Code leaves it to sentencing authorities to distinguish among the range of murders that section 210.2 embraces. *See id.* § 210.6. Either way, the Code ranks the homicides described in section 210.2 as one and the same offense, with one and the same sentencing

The answer to this question derives in part from history, for the Model Penal Code here largely restates the Anglo-American law of murder. That law has developed through undulation between standards of higher and lower mens rea, sometimes requiring premeditated intent to kill for capital murder, sometimes apparently requiring only unlawfulness in the act that leads to death. It also has developed through changes other than those having to do with mens rea directly.

In a recent example of this latter category of change, the United States Supreme Court has constructed rules for procedures and standards in capital cases.[5] These rules confine capital punishment to specific categories of especially heinous murders (or murderers) and permit the sentence only if the sentencing authority considers everything in mitigations that the murderer cares to offer. Similarly, the Court has constructed rules limiting the use of presumptions, including a presumption traditionally used in trying murder cases, that "one is presumed to intend the natural and probable consequences of his acts."[6] The upshot of these judicial initiatives has been to restrict the incidence of capital punishment for murder.

The same upshot attended an earlier change in the American law of murder. In 1794, the Commonwealth of Pennsylvania adopted the statute creating degrees of murder.[7] Only first degree murder or murder "which shall be perpetrated by means of poison, or by laying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary" was considered a capital offense. Though the statute immediately was taken to mean "killing with intent to kill" where the actual words were "wilful, deliberate and premeditated killing,"[8] both the text of the statute and its usual interpretation narrowed the class of murders susceptible to capital punishment to one considerably smaller than that under the common law. The measure had raised the mens rea level for capital homicide.

The level of mens rea sufficient under common law to send a homicide to the gallows is not simple to describe. Basically, however, by the time the 1794 Pennsylvania statute had been enacted, the common

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classification. Presumably it would not do so did it not view all section 210.2 homicides as somehow deserving of the same name and range of punishment.

[5] *See infra* notes 113 and accompanying text.

[6] *See infra* notes 115-19 and accompanying text.

[7] *See infra* text accompanying note 109.

[8] *See infra* text accompanying note 112.

law required capital punishment for all murders, or killings "with malice aforethought, either express or implied by law."[9] The development of the malice aforethought standard, both before and after 1794, is itself in large measure a history of the development of the doctrine of mens rea. The gradual refinements, and confusions, in the understanding of malice aforethought embraced not only changes in levels of mens rea, but also changes in the very concept of mens rea.

This history of common law, American statute, Supreme Court decisions, and the many alterations and developments in the Anglo-American law of murder, came to pass in a culture the religion of which speaks specifically to the law of murder. That the Anglo-American law of murder should lack a connection to the biblical law of murder is beyond belief.[10] Instead, one would expect the biblical law to inform the Anglo-American law. In fact, knowledge of the biblical law of murder

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[9] A. Singleton Cagle, Note, *The Intentional Murder at Common Law and Under Modern Statutes*, 38 KY. L.J. 424, 428 (1949) (footnote omitted).

> After the passage of [a statute adopting malice aforethought as this distinction between murder (as capital offense) and manslaughter (not necessarily capital)] "malice aforethought" was used in its popular sense; malice was an ill will expressing an enmity of heart. The malice was required to exist before the act which took the life of another person, and to give expression to this idea the word aforethought was employed. The definition of murder was, therefore, the unlawful killing of another with malice aforethought. However, as the common law expanded, the original meaning of malice aforethought was altered. There came before the courts cases of homicides for which no excuse or palliation was proved, and a large class of cases where there was no actual intention to effect the death of the person killed; nor was there evidence of ill will or personal enmity. The courts were faced with choosing one of two alternatives; one was to revamp the traditional definition of murder and abandon the phrase malice aforethought. The other was to justify a conviction under the old definition by the employment of artificial meanings attached to the words malice aforethought, by which they would be made to qualify the taking of human life in all cases where sound policy, or the demerits of the offender, required that he be subjected to capital punishment. This change from the conventional meaning of the phrase, to one of "art," with its resultant ramifications of "express" and "constructive" or "implied" malice, or as it is sometimes called, "malice in law" and "malice in fact", brought about the confusion with which the definition of murder now abounds.

Id. *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES 198-201 (discussing express and implied malice).

[10] *See, e.g.*, David Flaherty, *Law and the Enforcement of Morals in Early America*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 203, 205-08 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) ("Sin and crime, divine law and secular law, the moral law and the criminal law were all closely intertwined.").

helps render our own law more intelligible, helps explain its principles and development.

This article suggests important connections between the biblical and Anglo-American laws of murder. The first part describes the biblical law. The second part describes the development of the Anglo-American law with an eye towards how it reflects the biblical law. Three aspects of the law of murder will figure prominently in this account: the mens rea sufficient to establish murder, the presumption of mens rea from actus reus, and the incidence of capital punishment. The Bible speaks to all three aspects, and repeatedly Anglo-American jurists have heard its voice.

II. THE CITIES OF REFUGE

The first precept the Bible records for the justice to be exacted of humans by humans is God's command:

> And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man's brother will I require the life of man. Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man.[11]

Having protected the first murderer from (human) capital punishment,[12] and having later exacted (divine) capital punishment upon all mankind but for Noah's family,[13] the Lord God now promises no reprise of the latter while requiring humans themselves to shed the blood of those who shed blood. God made man in His own image. Man is therefore competent to serve as God's minister of justice. Furthermore, the shedding of man's blood is unique. Only the shedding of one man's blood suffices to do justice to the shedding of another man's blood.

The command of *Genesis* 9:6 was to be for all mankind, a command for Noahides in the context of the Noahic Covenant. When Israel received her law in the context of the Sinaitic Covenant, the Lord God ordained rules of civil justice for the shedding of human blood.

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[11] *Genesis* 9:5-6. Bible translations are from the Authorized (King James) Version unless otherwise noted. In this translation, italicized words are those without verbal equivalents in the original languages.

[12] *Genesis* 4:15.

[13] *Genesis* 6:5-8:22.

Since Israelites are (like all humans) Noahides, the Sinaitic civil justice elaborating the Noahide command is Noahide as well. That is to say, the Lord God does not prescribe to one people a law contrary to the law he has prescribed to all peoples.

The homicide law for Israel is most explicitly set forth in the passages on the Cities of Refuge. These passages establish six cities to which a killer could flee, and where he could remain in safety if the killing he had caused was not worthy of the death penalty. If the killing he had caused was worthy of the death penalty, the court would deliver him up to the avenger of blood for capital punishment.[14] Though the prescribed mechanism for adjudicating and punishing homicides is surely marked by wisdom and prudence, considering its author, there is no sense that this mechanism is prescribed for all Noahides, for all human civil government. Rather, this mechanism is for Israel, and for Israel as she dwells in the Holy Land.[15] What does speak to the Noahide law itself is not the procedural, but instead the substantive, law of homicide. *Genesis* 9:6 demands capital punishment for shedders of blood. The Cities of Refuge law specifies what is this "shedding of blood" that calls for capital punishment. Unless the Cities of Refuge law for Israel were to contradict the Noahide law, the rules of the former dividing capital from noncapital homicide should harmonize with and elucidate the latter.

The Cities of Refuge law is given in four biblical passages. The first appears in *Exodus* 21, the chapter immediately following the giving of the Ten Commandments:

> He that smiteth a man, so that he die, shall be surely put to death. And if a man lie not in wait, but God deliver *him* into his hand; then I will appoint thee a place whither he shall flee. But if a man come presumptuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die.[16]

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[14] The "avenger of blood" or "revenger of blood" of the Authorized Version translates a Hebrew phrase better understood as "redeemer of blood," meaning one who restores the murder victim, taking back his blood, a role typical of God's own role in redeeming souls from the death of sin. DAVID DAUBE, STUDIES IN BIBLICAL LAW 39-73, 124 (1969).

[15] *See, e.g., Numbers* 35:10-11.

[16] *Exodus* 21:12-14.

The passage describes three types of killings. The first is simply a fatal smiting.[17] For this, the killer must be put to death.[18] Contrariwise, if the killer had not lain in wait to kill, but rather God had arrayed the circumstances so as to lead to the victim's death in some way involving the killer, the killer was eligible for the protection of what later would be established as Cities of Refuge.[19] The description of these two types of killings leaves many other types of killings untreated. And the opposition of "smite" to "lie not in wait" raises questions of its own. Why not "smite" versus "not smite," or "lie not in wait" versus "lie in wait"? The third type of killing the passage describes introduces still other circumstances, "com[ing] presumptuously upon" the victim, "to slay him with guile," for which the killer is to die. These circumstances seem more heinous than a fatal smiting, but perhaps not as heinous as lying in wait.[20] Perhaps the best understanding of this passage reads the first verse as an epitome establishing capital punishment for some homicides. The next two verses provide two more epitomes, the first of which is a killing, not to be punished capitally, in which the killer plays some minor causal role. The second killing, to be punished capitally, an intentional killing in presumption and with guile.[21]

The most complete exposition of the Cities of Refuge law is the next, found in *Numbers* 35. First the passage commands that the six cities be established among the forty-eight cities to be given to the Levites:

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[17] BENNO JACOB, THE SECOND BOOK OF THE BIBLE: EXODUS 631 (1992).

> "Anyone who *strikes*" – the blow occurs *willfully* and with *intent*. The wish to strike another person's body was involved; it directed the hand, with or without a weapon. The death sentence was mandated only when the blow could have brought death and actually did so. The blow, therefore, had to be directed toward a vulnerable area of the body, and with such force, or such an instrument, that death would have resulted, even if no intent to kill could be proven. If the original act had been wrong and prohibited, one has to reckon with a possible sad conclusion.

Id.

[18] *Id.*

[19] "In our case the killer was not aiming at the other person but nevertheless hit him. Another factor, not human, but divine, was involved. . . . The victim was so guided that his steps took him into the path of the missile and he was struck by it . . . ." *Id.* at 634.

[20] Of course, the very notions of the relative heinousness of the various circumstances of killing themselves likely reflect complex moral judgments, that, in the case of Anglo-Americans at least, draw upon the biblical grading of these circumstances. *See infra* note 72.

[21] Some commentators take this passage to establish the biblical line separating capital from noncapital homicides as that between intentional and accidental killings. *See* MAURICE FLUEGEL, SPIRIT OF THE BIBLICAL LEGISLATION 31 (1893); 2 THE EXPOSITOR'S BIBLE COMMENTARY 432 (1990).

> And among the cities which ye shall give unto the Levites *there shall be* six cities for refuge, which ye shall appoint for the manslayer, that he may flee thither; and to them ye shall add forty and two cities. . . . And the Lord spake unto Moses, saying, Speak unto the children of Israel, and say unto them, When ye be come over Jordan into the land of Canaan; Then ye shall appoint you cities to be cities of refuge for you; that the slayer may flee thither, which killeth any person at unawares. And they shall be unto you cities for refuge from the avenger; that the manslayer die not, until he stand before the congregation in judgment. And of these cities which ye shall give six cities shall ye have for refuge. Ye shall give three cities on this side Jordan, and three cities shall ye give in the land of Canaan, *which* shall be cities of refuge. These six cities shall be a refuge, *both* for the children of Israel, and for the stranger, and for the sojourner among them: that every one that killeth any person unawares may flee thither.[22]

These verses establish yet another standard to distinguish capital from noncapital killings: "unawares."[23] The core meaning of the term is "by mistake, in error." Often it is rendered "unintentionally,"[24] presumably to reflect the sense that the error involved pertains to the result of death and that one does not intend results that are not known to follow upon one's acts. For this reason, Aristotle, and Aquinas after him, labeled as "involuntary" the unexpected results of one's acts.[25] To hold such

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[22] *Numbers* 35:6, 9-15.

[23] The word means "an inadvertent error or mistake," with the sense that the actor was conscious of his act, but not of the untoward consequences of that act. 4 NEW INTERNATIONAL DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS 42 (Willem A. Van Gemeren ed., 1997). The root of the word has the meaning "of 'inadvertence,' i.e., the act was intentional, but not known to be sinful." TIMOTHY R. ASHLEY, THE BOOK OF NUMBERS 286 (1993).

[24] *See infra* note 31. The Septuagint renders the word *akousiōs*, "unwillingly," and similarly the Vulgate, "*nolens*," "unwilling."

[25] *See* Thomas Aquinas, *The Summa Theologica*, *in* INTRODUCTION TO SAINT THOMAS AQUINAS 481, 493-94 (Anton C. Pegis ed., 1948) ("For instance, a man, after taking proper precaution, may not know that someone is coming along the road, so that he shoots an arrow and slays a passer-by. Such ignorance causes what is involuntary absolutely."); W.D. ROSS, ARISTOTLE 197-98 (5th ed., rev. 1949) (exploring Aristotle's doctrine on the ignorance that renders action involuntary); Aristotle, *Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE 964-67 (Richard McKeon ed., 1941) (establishing that an act done ignorantly is involuntary). *See also* DAVID DAUBE, ROMAN LAW 134-36 (1969) (discussing

results unintended, however, does not itself entail holding, conversely, that expected results, results flowing not "by mistake" or "in error" from one's acts, are "intentional." If "intentional" means "purposed, actively willed," then results known to follow one's acts need not be intentional. An air force pilot need not intend that the operators of an antiaircraft missile launcher perish when he destroys the launcher, though he knows very well that they will perish. But if "intentional" means "knowingly brought to pass by one's willed acts," then results known to follow one's acts are intentional. For the passage so far, then, it seems safest to understand the text simply as allowing refuge to killers "that killeth any person unawares."

But the text continues:

> And if he smite him with an instrument of iron, so that he die, he *is* a murderer; the murderer shall surely be put to death. And if he smite him with throwing a stone, wherewith he may die, and he die, he *is* a murderer; the murderer shall surely be put to death. Or *if* he smite him with an hand weapon of wood, wherewith he may die, and he die, he *is* a murderer: the murderer shall surely be put to death. The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him.[26]

Instead of killings "at unawares," these killings follow smitings—intentional strikings—with deadly objects.[27] All these killers are murderers, and are to be put to death. The verb "smite" strongly suggests that the *act* of striking the victim is not "at unawares." What of the death, however? Might that *result* have been "at unawares"? (One thinks, for instance, of a foolish but well-meaning burglar smiting his

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the two types of error that for Aristotle and the Cities of Refuge law rendered deeds and harm "involuntary").

[26] *Numbers* 35:16-19. The "so that he die" of the first scenario is a result clause, not a purpose clause.

[27] *See* SANHEDRIN 519 (Jacob Schachter & H. Freedman trans., Oxford Univ. Press 1935) (from the Talmud):

> Samuel said: why is '*hand*' not mentioned in connection with iron?—Because iron can kill no matter what its size. It has been taught likewise: Rabbi said; It was well known to Him who spake and the world came into being that iron, no matter how small, can kill; therefore the Torah prescribed no size for it. This however, is only if one pierced therewith:

(footnotes omitted).

colleague overzealously with a crowbar in hopes of killing the tarantula on his chest, but killing his colleague instead.) If so, the "at unawares" that earlier in the passage spares the killer must refer to the *act* that causes death and not the *result* of death itself. Killers that deserve death could be "unaware" that death could result, though aware that they were smiting. Such a reading would plainly disallow rendering the standard distinguishing noncapital from capital homicides as "unintentional" versus "intentional" killings.

The "unintentional" versus "intentional" killing standard would be more appropriate to this passage if the intentional act—smiting with a deadly instrument—were taken to give rise to the presumption of an intentional *result*—killing—as well. The error of the accused then would refer to the killing itself, a reading more easily harmonized with the earlier "killeth . . . unawares." But then what of our well-meaning but fatally stupid burglar? Is he nevertheless to suffer capital punishment despite his error and lack of intent with respect to the death? If the presumption that these killings are not "at unawares" is conclusive, a presumption of law properly so called,[28] the burglar dies. A presumption of this sort might stand for the proposition that the distinction between (1) killers intending an act in its nature likely to take life, and (2) killers intending to take life, is not significant for penal consequences—even deadly ones.[29] Or a presumption of this sort might stand for the proposition that the distinction between killer (1) and killer (2) is beyond the capacity of civil justice to discern.[30] As shall appear,

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[28] *See infra* note 118 and accompanying text.

[29] *Cf.* 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 56 (London, MacMillan 1883) ("As far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury, and reckless indifference whether it is inflicted or not."). Such a proposition would support one American category of depraved heart murder. See *infra* notes 101-02 and accompanying text.

[30] *See* DAUBE, *supra* note 25, at 164:

> It is a dogma that, in dealing with homicide, not only does early law equate the unwitting doer with the witting, but this course is taken from blindness or indifference to what separates the two. In reality, full equation occurs much more rarely than the prevalent view has it, and where it does occur it is a *pis aller*, resorted to because of the unsurmountable practical obstacles in the way of determining which side of the line a given case falls: by treating as a murderer, say, anyone who kills by a direct blow or anyone who kills with a piece of iron, justice is done in the vast majority of incidents though, now and then, an innocent person gets trapped. The alternative would be for the law to abdicate altogether.

this proposition (and perhaps some of the former as well) is advanced in support of the old and newly disapproved common law presumption that each intends the natural and probable consequences of his acts.[31] Either way, the irrebuttable presumption is tantamount to having "at unawares" refer to the blow and not to the death.

The reading that wholly preserves the sense that "at unawares" refers to the result of death and not the deadly act is the reading that these three smitings with deadly instruments are illustrative examples of typical killings not "at unawares," and that an inference against their being "at unawares" will arise in such killings.[32] The issue in such cases would remain, however, whether the killing itself was "at unawares."

> In the *Pentateuch*, both stages - death to whoever kills by a direct blow and death to whoever kills with a piece of iron - are preserved. [Citing *Exodus* 21:12 and *Numbers* 35:16] The latter statute is part of a legislation avowedly concerned with confining the rigour of the law to those who deserve it. But the former too is designed to get at *dolus* - the *dolus* being objectivized, established by the external situation.

See generally Craig A. Stern, *Crime, Moral Luck, and the Sermon on the Mount*, 48 CATH. U. L. REV. 801 (1999) (locating in the biblical doctrines of limited civil authority and of divine providence the sources for the rule that complete attempts are punished less severely than complete offenses).

[31] *See infra* notes 116-120 and accompanying text.

[32] Several commentators preserve the standard as, fundamentally, intentional versus unintentional killings and take the illustrative scenarios as giving rise only to the inference of intentional killing. *See* 3 JOHN CALVIN, COMMENTARIES ON THE FOUR LAST BOOKS OF MOSES ARRANGED IN THE FORM OF A HARMONY 62-64 (photo. reprint 1981) (Charles William Bingham trans., 1847) (footnote omitted):

> *And if he smite him with an instrument of iron.* God appears to contradict Himself, when, a little further on, He absolves involuntary murderers, although they may have inflicted the wound with iron or with a stone; whilst here He absolutely declares that whosoever shall smite another with wood, or iron, or a stone, shall be guilty or death; but this is easily explained if we consider his meaning; for, after having pardoned the unintentional act (*errori,*) lest any should misconstrue this as affording impunity for crime, He at once anticipates them, and again inculcates what has been said before. By the express mention of iron, wood, and stone, He more clearly explains that no voluntary murders are to be pardoned; else, as laws are wont to be evaded by various subtleties, they would have endeavoured, perhaps, to limit what had been said respecting the punishment of murderers to one single species of murder, viz., when a person had been slain with a sword. It is not, then, without cause that God condemns to death every kind of murderer, whether he have committed the crime with a weapon (of iron,) or by throwing a stone, or with a club; since it is sufficient for his condemnation that he had conceived the intention to do the evil act . . . . Here, therefore, God had no other object than to cut off from

> murderers all handles for subterfuge, if they should be convicted of a wicked intention, especially when it resulted in an actual attempt; since there was no difference whether they had made use of a sword, or a mallet, or a stone.

Id.

JACOB MILGROM, THE JPS TORAH COMMENTARY: NUMBERS 292 (1990) (footnote omitted):

> The distinction is one of intention, evidence for which is the nature of the instrument and the manslayer's state of mind. The distinction is made not by abstract definition but by concrete examples, six for deliberate homicide (vv. 16-18, 20-21) and three for involuntary homicide (vv. 22-23). Their arrangement is chiastic, ABB'A', as follows: Intentional—Implements (vv. 16-18), Intentional (vv. 20-22); Accidental-Intentional (v. 22), Implements (v. 23). The words that recur in AA' are "stone that could cause death" and in BB', "hate, hurled, on purpose, pushed." The burden of proof is always on the slayer. If, for example, he uses a murderous instrument, he must prove his lack of intention.

Id.

2 THE EXPOSITOR'S BIBLE COMMENTARY 1003-04 (1990):

> Similarly, as we think of the inordinately complicated system of modern jurisprudence concerning criminal, homicide law, the provisions of this section are rather clear and straightforward. They are based on the notions of evident intent. The manner of a man's death may be suggestive of willful intent or not. If the man was killed by a lethal instrument, then there is a presumption of guilt on the part of the one who killed him. Those instruments might be iron (v. 16), a (heavy) stone (v. 17), or a wood implement (v. 18). In these cases the party was presumed guilty, as the means of death seem purposeful.
>
> Further, if the person died by a physical blow that was made by hatred or in the context of an ambush (v. 20), then the party is guilty and must die. For such a one is a killer, not just an inadvertent man-slayer.
>
> The cities of refuge were to be established for the person who had committed an act of involuntary manslaughter. But such cases are not always simple to determine, then or now. The killing of an individual by a lethal weapon brings a presumption of guilt on the slayer. Yet it is quite possible that this death was quite inadvertent. In cases of doubt, judgments would have to be made by the people (v. 24), presumably by their town elders (the term "assembly" can refer to the whole nation or to any grouping within the nation). The text is not specific, but it would seem that the judgment would be made in the city in which the death occurred. If the council would decide the death was premeditated and deserving of death, then the guilty party would be delivered over to the blood avenger. But if the decision was for his innocence of malice aforethought, then the slayer would have to go to the asylum city to be protected from the avenger.

Id.

But see THE PRINCIPLES OF JEWISH LAW 475 (Manachem Elon ed., 1975) (presenting a traditional Jewish view taking the scenarios as raising conclusive presumptions of capital murder).

The next part of the passage poses similar questions:

> But if he thrust him of hatred, or hurl at him by laying of wait, that he die; Or in enmity smite him with his hand, that he die; he that smote *him* shall surely be put to death; *for* he *is* a murderer: the revenger of blood shall slay the murderer, when he meeteth him.[33]

These two verses comprise three scenarios of capital murder. Instead of intentional strikings with deadly instruments, here acting "of hatred," "in enmity," or "by laying of wait" is given to categorize killings as other than "at unawares." Ill will or ambush here supplies what the lethal nature of the smiting supplied in the previous verses. And again, for the most part as with the previous verses,[34] the understanding of this text and its relation to "at unawares" will differ as one takes the scenarios for conclusive presumptions or for rebuttable inferences. Here too, as with the previous verses, the understanding that takes them for inferences is easiest to harmonize with the general formulation that killings "at unawares" are not capital.

The third set of three fatal scenarios, somewhat parallel to some of the preceding, presents killings that do not merit capital punishment:

> But if he thrust him suddenly without enmity, or have cast upon him any thing without laying of wait. Or with any stone, wherewith a man may die, seeing *him* not, and cast *it* upon him, that he die, and *was* not his enemy, neither sought his harm: Then the congregation shall judge between the slayer and the revenger of blood according to these judgments: And the congregation shall deliver the slayer out of the hand of the revenger of blood, and the congregation shall restore him to the city of his refuge, whither he was fled: and he shall abide in it unto the death of the high priest, which was anointed with the holy oil.[35]

In these three situations, there is no enmity, no preparation, and in the case of a deadly instrument, in addition to the absence of enmity and

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[33] *Numbers* 35:20-21. The "that he die" clauses are result, not purpose, clauses.

[34] But not extending to the connection with the presumption that one intends the natural and probable consequence of one's acts.

[35] *Numbers* 35:22-25. A Christian interpretation would find a type of Christ in the high priest, whose death frees the exiled offender.

preparation, it is a mistake that leads to the blow itself. All these are killings "at unawares." The third situation manifests "at unawares" most clearly, for here the killer knew neither that the stone would strike nor that the victim would die. The first two situations, however, present familiar questions. If fatally "thrust him of hatred" is not "at unawares," how is fatally "thrust him suddenly without enmity" "at unawares"? Again a presumption or an inference must arise that in the capital case, unlike the noncapital, the killer knew death was to result. Likewise with the pair "hurl at him by laying of wait" and "cast upon him [the Hebrew is identical] any thing without laying of wait." Though the killer in these two earlier capital cases may very well have known the blow was to befall the victim, and known indeed that the victim would perish, killings under the circumstance described in the latter text were to be taken as "at unawares," either conclusively or prima facie.[36]

In *Deuteronomy*, the Cities of Refuge law finds yet another restatement:

> When the Lord thy God hath cut off the nations, whose land the Lord thy God giveth thee, and thou succeedest them, and dwellest in their cities, and in their houses; Thou shalt separate three cities for thee in the midst of thy land, which the Lord thy God giveth thee to possess

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[36] The rest of chapter 35 of *Numbers* explains more of the procedure for the Cities of Refuge law, emphasizing that no composition shall be permitted to replace a capital sentence or exile to a City of Refuge, and sheds light on some of the moral consequences of homicide:

> But if the slayer shall at any time come without the border of the city of his refuge, whither he was fled; And the revenger of blood find him without the borders of the city of his refuge, and the revenger of blood kill the slayer; he shall not be guilty of blood: Because he should have remained in the city of his refuge until the death of the high priest: but after the death of the high priest the slayer shall return into the land of his possession. So these *things* shall be for a statute of judgment unto you throughout your generations in all your dwellings. Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses: but one witness shall not testify against any person *to cause him* to die. Moreover ye shall take no satisfaction for the life of a murderer, which *is* guilty of death: but he shall be surely put to death. And ye shall take no satisfaction for him that is fled to the city of his refuge, that he should come again to dwell in the land, until the death of the priest. So ye shall not pollute the land wherein ye *are*: for blood it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it. Defile not therefore the land which ye shall inhabit, wherein I dwell: for I the Lord dwell among the children of Israel.

Numbers 35:26-34.

> it. Thou shalt prepare thee a way, and divide the coasts of thy land, which the Lord they God giveth thee to inherit, into three parts, that every slayer may flee thither. And this *is* the case of the slayer, which shall flee thither, that he may live: Whoso killeth his neighbour ignorantly, whom he hated not in time past; As when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down a tree, and the head slippeth from the helve, and lighteth upon his neighbour, that he die; he shall flee unto one of those cities, and live: Lest the avenger of the blood pursue the slayer, while his heart is hot, and overtake him, because the way is long, and slay him; whereas he *was* not worthy of death, inasmuch as he hated him not in time past.[37]

"Ignorantly" would seem very close to "at unawares."[38] But in this passage, the emphasis seems more upon "hated not in times past" than upon "ignorantly" as the mark of noncapital homicide.[39] The killing in the illustrative scenario could satisfy any of the standards set in the *Exodus* or *Numbers* passages to qualify a killer for life in a City of Refuge rather than death by capital punishment. Notwithstanding, the text here explains that this killer is "not worthy of death, inasmuch as he hated [the victim] not in time past." For the avenger of blood to execute such a killer would be to "shed" "innocent blood."[40] The counterexample scenario also would lead to the same judgment, whichever of the standards be applied:

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[37] *Deuteronomy* 19:1-6. The passage continues:

> Wherefore I command thee, saying, Thou shalt separate three cites for thee. And if the Lord thy God enlarge thy coast as he hath sworn unto thy fathers, and give thee all the land which he promised to give unto thy fathers; If thou shalt keep all these commandments to do them, which I command thee this day, to love the Lord thy God, and to walk ever in his ways; then shalt thou add three cities more for thee, beside these three: That innocent blood be not shed in thy land, which the Lord thy God giveth thee *for* an inheritance, and *so* blood be upon thee.

Id. 19:7-10.

[38] The Septuagint renders both terms as *akousiōs*, "unwillingly." *See also* JEFFREY H. TIGAY, THE JPS TORAH COMMENTARY: DEUTERONOMY 181 n.23 (1996) (rendering the word the equivalent of the Hebrew at unawares, *i.e.*, "unintentionally").

[39] "'Without malice aforethought' is a good translation for the literal Hebrew: 'he did not hate him in the past.'" 3 THE EXPOSITOR'S BIBLE COMMENTARY 348 (1992).

[40] *Deuteronomy* 19:10.

> But if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally that he die, and fleeth into one of these cities: Then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die. Thine eye shall not pity him, but thou shalt put away *the guilt of* innocent blood from Israel, that it may go well with thee.[41]

Here the "hate" and "lie in wait" supply the element "hated" "in time past." If so, the "time past" apparently need not be long past. To "lie in wait" with hatred suffices. Nevertheless, for the killer to hate in times past seems to be the overarching factor for distinguishing capital from noncapital killings for this Deuteronomic Cities of Refuge passage.[42]

The last passage on the law of the Cities of Refuge is *Joshua* 20:

> The Lord also spake unto Joshua, saying, Speak to the children of Israel, saying, Appoint out for you cities of refuge, whereof I spake unto you by the hand of Moses: That the slayer that killeth *any* person unawares *and* unwittingly may flee thither: and they shall be your refuge from the avenger of blood. And when he that doth flee unto one of those cities shall stand at the entering of the gate of the city, and shall declare his cause in the ears of the elders of that city, they shall take him into the city unto them, and give him a place, that he may dwell among them. And if the avenger of blood pursue after him, then they shall not deliver the slayer up into his hand; because he smote his neighbour unwittingly, and hated him not beforetime. And he shall dwell in that city, until he stand before the congregation for judgment, *and* until the death of the high priest that shall be in those days: then shall the slayer return, and come unto his own city, and unto his own house, unto the city from whence he fled. And they appointed Kedesh in Galilee in mount Naphtali and

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[41] *Id.* 19:11-13.

[42] Notwithstanding, at least one commentator holds that these verses support the distinction between capital and noncapital homicide as that between intentional and accidental killings, harmonizing the verses with those from *Exodus* and *Numbers*. *See* TIGAY, *supra* note 38, at 179-82.

> Shechem in mount Ephraim and Kirjatharba, which *is* Hebron, in the mountain of Judah. And on the other side Jordan by Jericho eastward, they assigned Bezer in the wilderness upon the plain out of the tribe of Reuben, and Ramoth in Gilead out of the tribe of Gad, and Golan in Bashan out of the tribe of Manasseh. These were the cities appointed for all the children of Israel, and for the stranger that sojourneth among them, that whosoever killeth *any* person at unawares might flee thither, and not die by the hand of the avenger of blood, until he stood before the congregation.[43]

The passage lacks a scenario illustrating a killing. Instead, the passage includes three slightly differing articulations of the standard to be used to distinguish capital from noncapital homicides: "unawares *and* unwittingly," "unwittingly, and hated him not beforetime,"[44] and "at unawares." Again, "unawares" and "unwittingly" are more or less synonymous, the first term suggesting the presence of error, the second, the absence of knowledge.[45] The "hated him not beforetime" recalls the emphasis of the Deuteronomic passage, though here this factor is less prominent. Nevertheless, the passage does explain that the one who killed "unawares *and* unwittingly" shall be kept from the avenger of blood "because he smote his neighbour unwittingly, and hated him not beforetime."[46] Though strictly speaking, these two factors—the one speaking to ignorance and knowledge, the other to enmity and time—are independent of each other, they likely coincide, and that may be why the other two statements in this passage of the standard for exile to a City of Refuge omit the second factor.

These four passages from *Exodus*, *Numbers*, *Deuteronomy*, and *Joshua*, each separately have within them their own tensions, and when taken together and of a piece, the tensions are greater still.[47] How can

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[43] *Joshua* 20:1-9.

[44] "[N]ot beforetime" is the same in Hebrew as the "not in time past" of *Deuteronomy*.

[45] Though in previous passages the Septuagint renders both those terms as *akousiōs*, "unwillingly," and supplies this one word for "unawares *and* unwittingly," it does render "unwittingly" when it occurs alone in verse five as *ouk eidōs*, "not knowingly."

[46] "[S]mote" here is a variant of the same word used in *Numbers* 35 and there taken to mean an intentional blow. Here the "unwittingly" again probably refers to the resulting death and not to the blow itself.

[47] Scholars differ as to whether the various Cities of Refuge texts describe contemporaneous law or diverse stages of development. *Compare* 1 THE INTERPRETER'S DICTIONARY OF THE BIBLE 638-39, 735-36 (1962) ("Our present data . . . are hardly adequate to speak of an evolution of criminal law during the biblical period."), *with* ANTHONY PHILLIPS, ANCIENT

these tests and the illustrative scenarios be harmonized? Does meeting any one test or resembling any one scenario describing a capital killing render a killing capital? Or must all tests be met, all scenarios be matched or surpassed?[48] What indeed is the standard that divides capital from noncapital homicide for the Cities of Refuge?

Interpreters generally have taken the overall, common standard of the Cities of Refuge law to be "intentional" or "deliberate" killing as worthy of capital punishment,[49] a standard never explicitly mentioned in the passages.[50] The various tests and illustrative scenarios, then, stand for presumptions.[51] Taking the standard as such does have in its favor

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ISRAEL'S CRIMINAL LAW 99-101, 106-09 (1970) (adopting the documentary hypothesis to describe a gradual development of homicide law through the Cities of Refuge texts). Regardless, the study of the historical influence of the Cities of Refuge texts and their normative value prescinds from a resolution of these differences.

[48] Another way to analyze these questions is to rephrase them using the terms "conjunctive" and "disjunctive." Construing the tests and scenarios that trigger capital punishment conjunctively would require that they all be met before a killing was capital. Construing them disjunctively would require that only one need be met. This analysis facilitates incorporating the tests and scenarios that establish eligibility for exile in a City of Refuge: the conjunctive construction of the capital "markers" entails the disjunctive construction of the noncapital "markers," and the disjunctive construction of the capital entails the conjunctive construction of the noncapital.

[49] *See, e.g.*, Albert Lévitt, *The Origins of the Doctrine of Mens* Rea, 17 U. ILL. L. REV. 117, 123-28 (1922) (finding the biblical distinction to be between intentional and unintentional killings). *See also infra* note 50. *But see* BERNARD S. JACKSON, ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 91 (1975) (arguing that "premeditation" and not "intention" denotes murder for the Bible).

[50] *But see supra* note 24-25, 32 and accompanying text.

[51] Perhaps most comprehensive in English is Haim H. Cohn's treatment of the Cities of Refuge law in THE PRINCIPLES OF JEWISH LAW (Menachem Elon ed., 1975). Cohn, sometime Vice President of the Israeli Supreme Court, explains the law, relying upon the scriptural text and the Talmud, in a set of articles he wrote for this encyclopedic reference. In the article on Penal Law, Cohn renders *shogeg* (the "unawares" of the Authorized Version) as describing an "unintentional . . . offender . . ., the latter category comprising . . . those who by accident or misadventure achieved any criminal result without intending it . . . or who achieved any result (however criminal) different from the criminal result they intended to achieve . . . ." *Id.* at 473-74.

Discussing the Cities of Refuge law in more detail, Cohn explains in his Homicide article:

> Killing is prohibited as one of the Ten Commandments (Ex. 20:13; Deut. 5:17), but the death penalty is prescribed only for willful murder (Ex. 21:12, 14; Lev. 24:17, 21; Num. 35:16-21; Deut. 19:11), as distinguished from unpremeditated manslaughter or accidental killing (Ex. 21:13; Num. 35:22; 23; Deut. 19:4-6). In biblical law, willfulness or premeditation is established by showing either that a deadly instrument was used (Num.25:16-18) or that the assailant harbored hatred or enmity toward the victim (Num. 35:20-21; Deut. 19:11). The willful murderer is executed, but the accidental killer finds asylum in a

> city of refuge. . . . Where death ensues as a result of assaulting a man "with stone or fist," though without intent to kill, the killing is regarded as murder (Ex. 21:18 *e contrario*; cf. also Mekh. *Mishpatim*, 6).

Id. at 475-76. After describing Talmudic law that filled the gap between capital willfulness or premeditation and noncapital absence of intent or accident, he continues:

> Talmudic law also further extended the principle that premeditation in murder is to be determined either by the nature of the instrument used or by previous expressions of enmity. While there are deadly instruments, such as iron bars or knives, the use of which would afford conclusive evidence of premeditation (Maim. Yad, Roze'ah, 3:4), the court will in the majority of cases have to infer premeditation not only from the nature of the instrument used, but also from other circumstances, such as which part of the victim's body was hit or served the assailant as his target, or the distance from which he hit or threw stones at the victim, or the assailant's strength to attack and the victim's strength to resist (*ibid.* 3:2, 5, 6). Thus, where a man is pushed from the roof of a house, or into water or fire, premeditation will be inferred only where in all the proven circumstances - height of the house, depth of the water, respective strengths of assailant and victim - death was the natural consequence of the act and must have been intended by the assailant (*ibid* 3:9).

Id. at 476. In this article, then, Cohn places the line dividing capital from noncapital homicides between willful and accidental killings. He also explains that the scenarios given as examples of capital homicide offer conclusive presumptions of premeditation, "though [the fatal assault was] without intent to kill."

In the article *Blood-Avenger*, Cohn states:

> It was laid down that only murder with malice aforethought (Num. 35:20-21; Deut. 19:11-13) or committed with a murderous instrument (Num. 35:16-18; for further examples, see Maim, Yad, Roze'ah u-Shemirat Nefesh 6:6-9), gave rise to the avenger's right (see Mak. 12a, Sanh. 45b); the unintentional manslayer was entitled to refuge from the avenger (Num. 35:12, 15; Deut. 19:4-6) and was liable to be killed by him only when he prematurely left the city of refuge (Num. 35:26-28).

Id. at 530. Later in the same article, he gives the standard as "premeditated or not." *Id.* Similarly, in the City of Refuge article, Cohn writes, "Should the court find him guilty of premeditated murder, he would be executed; if found guilty of unpremeditated manslaughter, he would be returned to the city of refuge to stay there until the death of the then officiating high priest . . . ." *Id.* at 532.

Altogether, it appears that Cohn summarizes an understanding of the Cities of Refuge law that requires for capital homicide either the intent to kill or the use of a deadly instrument. Though using terms like willful, premeditated, and malice aforethought, the overall impression is that premeditation is to be taken in the typical American understanding with respect to first degree murder, that premeditation need last only a split second. Only unintentional homicides would find lasting safety in a City of Refuge.

Similarly, other scholars have drawn the line between "wilful murders" and "those who had taken life unintentionally," 4 A DICTIONARY OF THE BIBLE 214 (James Hastings ed., 1902), and "between intentional and unintentional homicide," 2 ENCYCLOPAEDIA BIBLICA 1746 (T.K. Cheyne & J. Sutherland Black eds., 1901), with the presumption of "murder" "when a lethal weapon has been used with fatal effect. From the dangerous character of the weapon, murderous intention is inferred." 3 ENCYCLOPAEDIA BIBLICA 2723 (T.K. Cheyne & J. Sutherland Black eds., 1902).

that it harmonizes somewhat with the lex talonis, the general biblical principle of civil justice.[52] Those that intentionally take life shall have their lives intentionally taken. Those that take life unintentionally shall suffer exile until the (presumably) unintentional death of the High Priest.

Whatever truly may be the Cities of Refuge standard to distinguish capital from noncapital homicides, the Cities of Refuge law seems to have exerted great influence upon Anglo-American law. This influence has gone beyond the reception of a standard for capital homicide, and has reached also the definition of murder (whether capital or not) and the doctrine of presumptions. In some measure, our history of these three legal matters appears to be a commentary on the Cities of Refuge law.

Like Cohn in his employment of a variety of standards, Anthony Phillips assigns to the capital category killings with premeditation ("previous hostility being the main criterion") and also those with intent to kill (including, for example, presumed intent from the overzealous beating of a slave or the use of a deadly instrument). ANTHONY PHILLIPS, ANCIENT ISRAEL'S CRIMINAL LAW 83-109 (1970). To the noncapital he assigns accidental, unpremeditated, unintentional, and inadvertent killings. *Id.* What a lawyer is to do with this theologian's categories is difficult to discern.

Unlike Cohn, THE INTERPRETER'S DICTIONARY OF THE BIBLE, *supra* note 47, has the Cities of Refuge available for accidental killers. *Id.* at 449, 638, 734-35, 738 (this last also using the terms "unintentional" and "involuntary"). Yet, the Cities of Refuge would not be available for killers with intent or purpose to *harm*. *Id.* at 738. In addition to this different standard for capital homicide, this source also understands the scenarios *not* to give rise to conclusive presumptions:

> When a homicide was committed personally and with intent to harm, the killer was a murderer . . . and must be put to death. Intent was presumed if (*a*) the killer lay in wait (Exod. 21:13; Num. 35:20, 22; Deut. 19:11); (*b*) there was enmity between the parties (Num. 35:20-21; Deut. 19:11); (*c*) a murderous implement was used (Num. 25:16-18; note the increase in the detail of the law from JE to D to P). The presumption established by *c*—and surely that of *b* as well—could be defeated by proof of accident.

Id.

Writing in 1935, one commentator finds that the Cities of Refuge law adopts the same standard to distinguish capital from noncapital homicides as that adopted by the American law of his own day. EDWARD J. WHITE, THE LAW IN THE SCRIPTURES 70-71, 120-21 (1935).

[52] *See* VERN S. POYTHRESS, THE SHADOW OF CHRIST IN THE LAW OF MOSES 125-125, 130-131 (1991) (describing talionic justice in the deliberate killing of the deliberate killer and in exile in the city of refuge until the death of the high priest, "pointing to the promise of restoration of all things, including the restoration of life," for the accidental killer). *See also* MILGROM, *supra* note 32, at 510 ("In this way the punishment is made to fit the crime: The deliberate homicide is deliberately put to death; the involuntary homicide who took life by chance must await the chance of the High Priest's death in order to be released from the asylum city.") (footnote omitted).

III. THE CITIES OF REFUGE IN THE DEVELOPMENT OF ANGLO-AMERICAN LAW

Law is religious, expressing presuppositions on human nature, responsibility, and value. Even were it not, the law of a people is bound to reflect the religion of that people. And in the case of Anglo-American criminal law, many have described the debt to such ecclesiastic sources as the penitentials and the canon law.[53] In the case of the law of homicide, almost above all, one could expect the civil law to reflect the Christian revelation on that subject.[54] The law of the Cities of Refuge, comprising God's commands to Israel on a matter entrusted to all nations, surely must have found its way into the law of England and, consequently, America.

Some of the most ancient English law extant incorporates the most explicit references to the Cities of Refuge law. The Law of King Alfred sets forth part of that law verbatim.[55] "Whether these re-enactments of the Mosaic law were practically more than a kind of denunciation of homicide on religious grounds, or whether they were actually executed as law, it is now of course impossible to say . . . ."[56] Possibly, the statute set forth the Cities of Refuge law only to establish the authority and principles for the civil punishment of homicide. The Cities of Refuge law stood for the authority of civil officers to punish homicide by law, and by law that distinguishes among homicides for appropriate treatment. The Christian monarch understood the Cities of Refuge law to have normative force for his own law. In this, the Laws of

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[53] *See, e.g.*, 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 53, 258-59 (1923); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 476-77 (2d ed. 1968); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 980, 983-84 (1932). "By [the twelfth century] the influence of church law was becoming dominant. The canonists had long insisted that the mental element was the real criterion of guilt and under their influence the conception of subjective blameworthiness as the foundation of legal guilt was making itself strongly felt." *Id.* at 980. Little is owed to Rome in the Anglo-American criminal law. *See* 3 STEPHEN, *supra* note 29, at 23 ("The Roman law on the subject of homicide . . . . has had little influence on the law of England on the subject at any part of its history, and has, as it seems to me, little intrinsic merit, as it recognizes few of the distinctions inherent in the subject."). The doctrine of mens rea itself derives from church sources. *See* Lévitt, *supra* note 49.

[54] At least three penitentials include provisions drawn from the Cities of Refuge law. *See* MEDIEVAL HANDBOOKS OF PENANCE 91, 107, 187 (John T. McNeill & Helena M. Gamer trans., 1938) (using such terms as "killed him suddenly and not from hatred" and "malice aforethought").

[55] 3 STEPHEN, *supra* note 29, at 24.

[56] *Id.*

Alfred supply a condign beginning for the influence of the Cities of Refuge law upon the Anglo-American law of homicide.

Though the rich and complex history of the Anglo-American law of homicide in its comprehensive aspect lies beyond this article,[57] much of it is essential to our topic, for example, the history of "murder" proper as originally understood. "Murdrum," from the Old English "mirth" for secret, originally denoted a secret killing.[58] The crown asserted jurisdiction over killings that peculiarly threatened its reign—the secret assassination of a member of the ruling class by a member of the subject class. So Danish kings punished the secret killings of Danes when Anglo-Saxons were suspected of the killing.[59] Edward the Confessor adopted a similar statute. Most important was the rule based upon Edward's after his successor took the throne. William the Conqueror protected his Norman fellows by assessing Saxon shires for Norman bodies done to death within their bounds.[60] The shire could escape liability for a secret killing only by "presentment of Englishry," proving the body to have belonged to an Englishman and not to a Norman. Such was the law until 1340.[61]

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[57] Perhaps most conspicuously absent from the account given in this article is the history of voluntary manslaughter, intentional killing under legally sufficient and reasonable provocation in the sudden heat of passion. Voluntary manslaughter probably has roots in sources other than the Cities of Refuge Law. *See* David H. Wrinn, *Manslaughter and Mosaicism in Early Connecticut*, 21 VAL. U. L. REV. 271, 276-80 (1987). *But see* GEORGE BUSH, NOTES, CRITICAL AND PRACTICAL, ON THE BOOK OF NUMBERS 470 (photo. reprint 1981) (1858) (commenting on *Numbers* 35:16-23, "if . . . the outrage were apparently committed in a sudden fit of passion, without premeditation or antecedent threat, grudge or malice, then it was to be pronounced mere manslaughter . . . ."); 1 MATTHEW HENRY, COMMENTARY 803-04 (1706) ("And some have thought it would be a completing of that instance of reformation [of English law towards a more biblical rule] if the benefit of clergy were taken away for man-slaughter, that is, the killing of a man upon a small provocation, since [biblical] law allowed refuge only in case of that which our law calls chance-medley [a precursor of the modern voluntary manslaughter]."); THE PRINCIPLES OF JEWISH LAW, *supra* note 51, at 530 (Justice Cohn mentioning a Jewish interpretation that suggests "that Scripture itself recognized the [blood] avenger's 'hot anger' (Deut. 19:6) as negating premeditation (Redak to II Sam. 14:7)" if he should kill a killer after trial but before conviction. Such a killing therefore was held to be unlawful but not to be murder). Also absent is consideration of many technical details in the history, details often little understood or even little discerned. *See, e.g.*, J.M. Kaye, *The Early History of Murder and Manslaughter*, 83 L. Q. REV. 365 (1967) (explaining a complicated and controversial history).

[58] 2 POLLOCK & MAITLAND, *supra* note 53, at 487; *see also* 3 STEPHEN, *supra* note 29, at 25-26.

[59] *See* Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 759 n.1 (1949).

[60] *See generally* 2 POLLOCK & MAITLAND, *supra* note 53, at 487; 3 STEPHEN, *supra* note 29, at 25-31.

[61] *See* 3 STEPHEN, *supra* note 29, at 40.

All this is not to suggest that "murder" was the only punishable homicide. Most homicides likely received local justice by way of the old "wer" (payment to family) and "wite" (penal payment), with the former, but not the latter, due for simply accidental killings.[62] But another brand of homicide early on fell within royal jurisdiction. Beyond vindicating the deaths of his retainers, the king was also eager to vindicate the security of his highway. Likewise, he was eager to vindicate the peace, the safe conduct, he might grant for passage through his realm. The king exercised jurisdiction over killings as felonies for his court when pleaded to have occurred by ambush on his highway and perpetrated on one to whom he had granted his peace.[63] Eventually, the secrecy of the ambush (rather than the secrecy of the killing itself) came to stand for the secret aspect of murder, especially once the original understanding of murder fell into desuetude and the presentment of Englishry lapsed.

The formulation "ambush" that was to become a mark of murder likely derives from the Cities of Refuge law. As we have seen, "laying of wait" figures prominently in that law. The Cities of Refuge category was a convenient formula that not only marked the enormity of the killing, but also fit well within the jurisdictional parameters forged by the old "murder" and the royal concern with royal highways. Politics allied with moral judgment led to the selection of this one standard from all those included in the Cities of Refuge law. As shall appear, there was to be another reason for the favored position of "laying of wait."

The pleadings necessary to invoke the king's courts in cases of homicide became incontrovertible.[64] By fiction, crown law displaced the older, local delictual remedies.[65] All homicides became punishable as felonies, and as felonies were punishable by death. Unless a killing were on the king's own authority—as in war or in the execution of judicial sentence—it was a capital offense.

Such a regime would ill-accord with the Cities of Refuge law, the purpose of which is to distinguish the capital from the noncapital among homicides. But alongside the draconian penalty for all homicides existed

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[62] *See* Sayre, *supra* note 53, at 981-82.

[63] *See* FREDERIC WILLIAM MAITLAND, *The Early History of Malice Aforethought*, *in* 1 COLLECTED PAPERS 304, 311-12, 317-18 (1897) (describing development of royal jurisdiction under both theories).

[64] *See* MAITLAND, *supra* note 63, at 316-18 (describing how the charge of felony, and that every highway had become the king's highway, and that to all had been given the king's peace, became incontrovertible).

[65] *See id.*, at 313-15.

the system of royal pardons. Pardons—originally of grace and not of right—might be had for killings by those insane or underage. They also might be had for self-defense.[66] For this last type of pardon, the application to the crown would recite that the killer lacked malice aforethought, this possibly being the first recorded use of the term in English law.[67] With the enactment of the Statute of Gloucester, an effort to restrict the crown's pardon power, applications for pardons required that the jury have found the grounds for the pardon sought.[68] So, juries returned verdicts finding the lack of malice aforethought.[69] In 1389, the first statutory use of the term explicitly required that juries find a lack of "malice purpense" to support an application for a pardon on *se defendendo*.[70]

The term "malice aforethought"[71] stood for an element in a killing that would not be worthy of pardon. Malice aforethought, however much we are used to the term to denote a particularly vicious killing, does not a priori signify the most evil sort of homicide. The concept is absent from many other legal systems.[72] It appears likely that,

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[66] *See* 2 POLLOCK & MAITLAND, *supra* note 53, at 479-82.

[67] *See* 3 STEPHEN, *supra* note 29, at 41. *But see* MAITLAND, *supra* note 62, at 308 (recounting an assault from 1270 in which the defendant was compelled to swear lack of malice aforethought, apart from any self-defense and in a situation more like voluntary manslaughter).

[68] *See* MAITLAND, *supra* note 63, at 304-305.

[69] *See* 3 STEPHEN, *supra* note 29, at 41.

[70] *See* MAITLAND, *supra* note 63, at 323; 3 STEPHEN, *supra* note 29, at 42-44.

[71] "Malice aforethought" has otherwise been called "malice purpensed," "malice prepense," "*praecogitata malitia*," "premeditated malice," "malice purpense," and the like. *See* MAITLAND, *supra* note 63. Kaye, though admitting that ancient cases often carefully recorded the prior enmity of a defendant towards his victim, argues that malice aforethought meant deliberately or wickedly, and not necessarily with actual premeditation. Kaye, *supra* note 57, at 372-77.

[72] *See* MAITLAND, *supra* note 63, at 327-28:

> We are wont to think, or to speak as if we thought that premeditated manslaying is the worst type of manslaying, and are perhaps rather surprised when Sir James Stephen points out that this is no universal truth. But whatever may be natural to us, we ought not to suppose that in the eyes of our remote ancestors the fact of premeditation would naturally have aggravated the guilt of manslaughter. The curious agreement between French and English law as to the necessity of obtaining a pardon in a case of excusable homicide, must suggest that this usage, for which Hale and Blackstone made half-hearted apologies, and which may have owed its long continuance partly to texts in the Old Testament, partly to the fees payable by those who sought a pardon, had its origin not in any accident, or in any desire to extort money, but in the utter incompetence of ancient law to take note of the mental elements of crime. Of this incompetence there is plenty

whereas the "lying in wait" drawn from the Cities of Refuge law was adopted to trigger the jurisdiction of the crown court over felonious killing, "malice aforethought," drawn from the "in enmity," and "was his enemy in times past," and "hated in time past," of the Cities of Refuge law, was adopted to mark felonious homicide beyond the reach of the king's pardon. Perhaps it was thought that these latter marks of capital homicide were the more important, overarching marks that ought to trump the single mark of "lying in wait," a fictive jurisdictional element by then in any event.[73]

The link between malice aforethought, "lying in wait," and the Cities of Refuge is still more demonstrable from the origin of the present common use of "malice aforethought." Though all felonies were capital offenses, not all felons suffered capital punishment. From the days of the Papal Revolution and the jurisdictional strife between crown and church—and especially between Henry II and St. Thomas à Becket—grew the "benefit of clergy."[74] The benefit of clergy originally operated to commit "criminous clerks" to their bishop or abbot for discipline rather than to the king's executioner for hanging.[75] Gradually, the

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> of other evidence. The rank of the slayer, the rank of the slain, the rank of their respective lords, the sacredness of the day on which the deed was done, the ownership of the place at which the deed was done—these are the facts which our earliest authorities weigh when they mete out punishment; they have little indeed to say of intention or motive. When they do take any account of intention or motive, then we may generally suspect that some ecclesiastical influence has been at work, as when, for example, the compiler of the Leges Henrici borrows from Gratian and St Augustine that phrase about *mens rea* which has found a permanent place in our law books. Secrecy, or rather concealment, it may be allowed, was from of old an aggravation of manslaughter, so was the taking of an unfair advantage. Of this we see something in the definition of foresteal already quoted; it is foresteal to lie in wait for one's enemy and to attack him on the flank; it is not foresteal to call him back and have a fight with him. But in the days of the blood feud, such days for example as are represented by the story of Burnt Njal, mere deliberation or premeditation cannot have been thought an aggravation of the crime; a man was entitled to kill his enemy provided that he was prepared to pay the price or bear the feud, but he was expected to kill his enemy in a fair, open, honest manner, not to take a mean advantage, not to fall upon him like a thief in the dark.

But see JACKSON, *supra* note 49, at 91 ("Biblical law is not unique in having drawn a distinction between premeditated and all other homicide. There is a wealth of comparable rules from other early systems, and the distinction has survived into modern French and German law.") (footnotes omitted).

[73] *See* MAITLAND, *supra* note 63, at 322-23.

[74] *See* HAROLD J. BERMAN, LAW AND REVOLUTION 255-69 (1983).

[75] *See* Wrinn, *supra* note 57, at 273 n.5.

benefit extended to all who could read the "neck verse," and led to the branding of the brawn of the thumb with the initial letter of the offense—for at first the benefit of clergy was available to a person only once and the brand would help enforce this rule—and a short imprisonment.[76] Consequently, the most heinous homicide might receive slight punishment. The combination of the rule that ordinarily sent all homicides to the gallows with the benefit of clergy yielded a law of homicide that trampled not only the Cities of Refuge law but also the more fundamental biblical principle of equality before the court of civil justice.[77]

Relief came in the sixteenth century with statutes removing the benefit of clergy from certain homicides.[78] Clergy henceforth would not avail killers who committed "murder of malice prepensed."[79] So began the distinction, alive still in our time, between murder and manslaughter, the former originally capital, the latter usually noncapital, with malice aforethought classically the distinguishing mark of murder. If "malice aforethought" derives from the Cities of Refuge law, the English law of homicide shall have been made to resemble the biblical very closely indeed.

In fact, Frederic Maitland has explained the close link between the malice aforethought of these sixteenth century English statutes and the Cities of Refuge law. A Scottish statute of 1469 disallowed church sanctuary to any killer who was "*Incediator [insidiator] viarum et per Industriam.*"[80] This Latin formula embedded within a statute in the vernacular tongue must refer to the City of Refuge law at *Exodus* 21:14, in the Vulgate, "*Si quis per industriam occiderit proximum suum, et per insidias, ab altari meo evelles eum, ut moriatur.*" The protection of the church cannot extend to any murderer who may "come presumptuously upon his neighbor, to slay him with guile" because such a one is to be taken from God's own "altar, that he may die." Such a limitation would extend to the benefit of clergy, as well as to sanctuary. For Maitland, apparently, this conjunction of City of Refuge law with European criminal law cements a link going back to the days when canon law first had its influence on royal law.[81] In England, the development of murder

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[76] *See id.*; Sayre, *supra*, note 53, at 996-97.

[77] "Ye shall not respect persons in judgment . . . ." *Deuteronomy* 1:17.

[78] *See* William Coldiron, *Historical Development of Manslaughter*. 38 KY. L.J. 527, 533 (1949); MAITLAND, *supra* note 63, at 304; 3 STEPHEN, *supra* note 29, at 45.

[79] 3 STEPHEN, *supra* note 29, at 45; *see also* MAITLAND, *supra* note 63, at 304.

[80] *See* MAITLAND, *supra* note 63, at 324-25.

[81] *Id.* at 326-28.

from secret killing to ambush ("*praemeditatus assultus*," a concept latter to be converted to "*praecogitata malitia*," malice aforethought itself), likely helped by the Cities of Refuge law that emphasizes enmity and hatred in time past, also reflects the commanding influence of the Cities of Refuge law on the English law of homicide.

After the sixteenth century statutes made malice aforethought the mark of murder, a capital offense, in distinction to manslaughter, a clergyable and eventually noncapital offense, the common law of murder dedicated itself to identifying the elements of malice aforethought.[82]

> [A killer described by *Exodus* 21:14] the clergy could hardly protect, for this was not merely a text of the Bible, it was a text of the Canon Law. I imagine that this text had a most important influence on the criminal law of mediaeval Europe. It draws a line between two kinds of culpable homicide, and sanctions the belief that insidiae, waylaying, guet-apens, are the distinctive marks of the worse kind. There are other passages in the Pentateuch which in their Latin guise make *odium* as well as *insidiae* characteristic of that manslaughter which is beyond the privilege of sanctuary. It may be conjectured that these passages helped not a little to establish the notion that the real test is subjective, and to supplant premeditated waylaying by malice aforethought [citing the *Numbers* and *Deuteronomy* Cities of Refuge passages].
>
> It is not impossible that the texts in the Vulgate about *insidiae* are the root of the whole matter, the cause why the old notion that murder is slaying in secret, or slaying with concealment, was after the formation of the Canon Law replaced by the theory that the differentia of the worst homicide is guet-apens, premeditatus assultus. I imagine, however, that at least a co-operative cause was the fact that waylaying, "force faite en real chimin," was an infringement of the king's own rights, "un cas royal," an ancient plea of the crown, for that the highway was the king's, and they that walked therein enjoyed his peace.
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> In the fact therefore that premeditation became an element in the definition of murder, there is, as it seems to me, something that requires explanation, and towards such an explanation we have made some advance when we see that ambush or waylaying is an offence against the King, and that the book of Exodus excepts him who has slain another *per insidias* from the privilege of sanctuary.

Id. (footnotes omitted).

[82] *See* Sayre, *supra* note 53, at 997. *See generally* J.M. Kaye, *The Early History of Murder and Manslaughter*, 83 L. Q. REV. 569 (1967) (detailed technical account of developments in the concept of "malice prepense"). Malice aforethought was not the exclusive mark of murder. For example, the Statute of Stabbing, 1604, forbade benefit of clergy to homicide by blade in certain circumstances. *See* 3 STEPHEN *supra* note 29, at 47-49. The Statute expressly declared that the absence of malice aforethought was of no moment if the conditions of the Statute were met. Eventually, however, malice aforethought would become the exclusive mark of murder. As judges rather than Parliament molded the law of capital homicide, the

Here too the Cities of Refuge law helped shape English law, even as "malice aforethought" left behind its plain, common-sense meaning to become a term of art to be understood in its technical sense. That process is evident as early as 1610, in the work of Lumbard.[83] Lumbard explained that malice aforethought surely meant what the words convey in common parlance, very much like the enmity, hatred in times past, of the Cities of Refuge law.[84] But he also explained that malice aforethought could be implied from the circumstances of a killing. To strike with a deadly weapon itself imports malice aforethought. As might be expected in a legal system that disallowed the testimony of the accused himself,[85] the circumstances of a killing would supply the chief evidence of the mens rea of the accused. The Cities of Refuge law stood ready to supply such rules of implied malice aforethought. The many scenarios and even the alternative statements of the rules and principles of the Cities of Refuge law are easily taken to provide presumptions or at least inferences of the presence of the element(s) that make(s) a homicide a capital offense. If so, that malice aforethought would include cases of implied malice seems supported by the biblical texts.

With the nearly contemporaneous Edward Coke, oracle of the common law, English homicide law appears to diverge significantly from the Cities of Refuge law. Beyond summarizing the law as given before in treatises and cases, Coke seems to add a novel category of malice aforethought.[86] From the canon law, Coke borrowed the concept termed *versari in re illicita*, "to be involved in an unlawful matter."[87] This concept holds one responsible for all the evil that befalls should that evil come about as a result of one's unlawful act.[88] Coke took the concept to mean that malice aforethought attended any death traceable to an

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formula became a term of art all inclusive for murders while losing its nontechnical, common sense meaning to fictions and technical interpretations that included within its ambit killings without "hatred in times past."

[83] *See* 3 STEPHEN, *supra* note 29, at 49-51.

[84] *See id.* at 50-51.

[85] Accused persons were not permitted to testify at their own trials until 1898. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 437 (5th ed. 1956).

[86] *See* 3 STEPHEN, *supra* note 29, at 57-58. (finding the doctrine "astonishing" and "entirely unwarranted by the authorities [Coke] quotes").

[87] *See* H.D.J. Bodenstein, *Phases in the Development of Criminal Mens Rea*, 36 S. AFR. L.J. 323, 339, (1919). The maxim may be given more fully: "'versari in re illicita imputantur omnia quae sequuntur ex delicto.' (One who traffics in the illicit is responsible for all wrongs that ensue)." Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 376 n.19 (1997).

[88] *See supra* note 87.

unlawful act of the defendant.[89] However slight the unlawfulness and however safe in the normal course of affairs, should death follow upon an unlawful act the actor is a murderer with malice aforethought.

The canon law had used *versari in re illicita* not for homicide, but for the discipline of priests in liturgical matters.[90] Further, the rule was

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[89] 3 EDWARDO COKE, INSTITUTES OF THE LAWS OF ENGLAND 56-57 (1797).

> Homicide by misadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death.
>
> *Unlawfull.* If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A. had not intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of the arrow, this had been homicide by misadventure, and no felony. So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium:* for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.
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> *Without any evil intent.* If a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slaine.

Id. at 56-57 (footnotes omitted). Perhaps Coke was misled by Bracton here, for Bracton held that one would be blamed for a death he caused while employed in unlawful work, but without distinguishing between murder and manslaughter inasmuch as that distinction was yet to be developed. ROY MORELAND, THE LAW OF HOMICIDE 99-100 (1952).

As to homicide *per infortunium* it may be of interest to note that Blackstone later would use the Cities of Refuge passage from *Deuteronomy* to illustrate this homicide and not manslaughter. Homicide *per infortunium* is an excusable nonfelonious homicide "deserving of some little degree of punishment." 4 WILLIAM BLACKSTONE, COMMENTARIES *182. Among the examples of this homicide, Blackstone lists "as where a man is at work with a hatchet, and the head thereof flies off and kills a stander by." *Id.*

[90] Bodenstein, *supra* note 87, at 336-37.

> The rule was used to decide the question whether a priest, who had been the cause of the death of a person (or of some other forbidden effect) was still entitled to officiate as such. If, *e.gr.*, a priest, when hunting, should unintentionally kill someone, say by shooting at a hare, then, if he was entitled to hurt as he did, it would be enquired into whether the accident could have been foreseen and avoided by him or not. If he were in no way to be blamed for the death, he would not become irregular. If, however, he had been poaching, the question whether he could in any manner have foreseen the accident and avoided it, was not gone into at all. The mere fact that he originally

generally taken to support responsibility for an evil triggered by an unlawful act, not to support the presence of a mens rea in the actor. So, applying the principle to the criminal law of homicide, and in such a way as to supply malice aforethought and not just manslaughter liability, was no subtle nuance in Coke's exposition of the law of homicide. It was a major alteration of the law.

Even so, biblical law, if not the Cities of Refuge law, in some sense likely lies behind Coke's doctrine.[91] A—perhaps *the*—classic statement of the principle of *versari in re illicita* is given by St. Thomas Aquinas in the *Summa Theologiae*. One will be responsible for a homicide if he removes an obstacle that would otherwise prevent its occurrence, if he was under a duty not to remove that obstacle.[92] One way to do this deed is to engage in illicit activities.[93]

In support of his conclusion,[94] Aquinas cites *Exodus* 21:

> If men strive, and hurt a woman with child, so that her fruit depart *from her*, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges *determine*. And if *any* mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for

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> acted unlawfully was sufficient to impute to him the subsequent death and to render him irregular.
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> Compared with the primitive stage, in which the consequence of the act only were looked at, this doctrine is a step in advance, in so far as it requires *culpa* on the part of the wrongdoer when the act willed was lawful. In so far as it did not require specifically a blameworthy connection between the state of mind of the offender and the forbidden consequences, but was content with the fact that the original act intended was unlawful, it maintained the old principle of liability for the consequences merely. This part of the rule is commonly explained as a concession of the church to popular opinion at a time when people were inclined to attach more importance to the effect caused than to the state of mind of the wrongdoer towards the effect.

Id.

[91] Coke's legal writings manifest his thorough familiarity with the Bible. *See* D. SEABORNE DAVIES, THE BIBLE IN ENGLISH LAW 10-14 (1954).

[92] J.M.B. CRAWFORD & J.F. QUINN, THE CHRISTIAN FOUNDATIONS OF CRIMINAL RESPONSIBILITY 136 (1991) (quoting and analyzing the passage from SUMMA THEOLOGIAE, II-II, q.64, a.8.).

[93] *Id.* at 137.

[94] *Id.* at 138-39.

> hand, foot for foot, Burning for burning, wound for wound, stripe for stripe.[95]

The *Exodus* passage is not easy to understand, and especially so in harmony with the texts that explicitly set forth the Cities of Refuge law.[96] To exact life for life (whether for the life of a child prematurely born or for the life of a mother delivered of such a child) when the death ensues from hurting a pregnant woman while striving with another man seems irreconcilable with the distinction between smiting with a deadly weapon or in hatred, on the one hand, and thrusting suddenly or chopping with a ill-attached axe-head on the other. Unless life for life includes the "life" given by exile until the death of the High Priest, or unless the harm to the pregnant woman really is equivalent to the smiting with a deadly instrument, tantamount to a killing with "hatred in time past," this passage imports a standard different from that of the Cities of Refuge law proper, a standard perhaps not to be applied generally to homicides so as to alter the Cities of Refuge law.

Coke's use of the *versari in re illicita* principle to expand the scope of malice aforethought did not pass unmodified into the common law. Matthew Hale expounded on malice aforethought, including presumed malice from unprovoked killings.[97] Not mentioning the killings in the course of unlawful acts introduced into the malice aforethought category by Coke, Hale instead included within the malice aforethought category killings in the course of efforts to cause grievous injury.[98] Again, especially with mute defendants, this category resembles the life-threatening smitings that under the Cities of Refuge law would lead to the judgment of capital homicide.

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[95] *Exodus* 21:22-25.

[96] *See* JACKSON, *supra* note 49, at 75-107. In a chapter entitled "The Problem of Exodus 21:22-25," the author describes, among other problems, the "clear conflict between *Ex.* 21:23 and *Ex.* 21:13," *Id.* at 92.

[97] Stephen summarizes Hale's approach:

> First, *malice prepense* is half accidentally made the test of murder. It is then defined to mean a deliberate premeditated design to kill or hurt. This being found too narrow a definition, it is enlarged by the remark that killing without apparent provocation raises a presumption in fact of concealed motive. This being still too narrow, the presumption, in fact, becomes a presumption of law applying to all cases of unprovoked killing, even if, in fact, premeditation is disproved.

3 STEPHEN, *supra* note 29, at 63. Hale also began the doctrine that malice aforethought was absent when the killer was provoked, a separate category of manslaughter from the long-standing chance medley. *See id.* at 62-64.

[98] *See id.* at 66-67.

The *versari in re illicita* concept did develop into a branch of the law of murder largely embraced to this day: felony murder.[99] In a day when felonies generally were life threatening, if for no other reason than that the death penalty looming over the felon might inspire him to kill in order to escape the gallows, this more limited version of Coke's *versari in re illicita* approximated the Cities of Refuge category of the deadly smite. Committing a felony, especially when someone died in consequence, could be seen to be very like an intentional act "wherewith one may die." The recent move towards eliminating or limiting the felony murder role to intrinsically life-threatening felonies or to killings more tightly connected causally to the felony reflects something like the desire to keep snug the analogy between felony murder and this Cities of Refuge category, especially as felonies, almost all noncapital, have multiplied to punish all manner of behavior far from life-threatening.

It is possible that the two branches of the modified adoption of the *versari in re illicita* doctrine, modified the better to accord with the law of the Cities of Refuge, were joined and thereby mutually reinforced the rule that intending grievous bodily harm (and eventually also intentionally or recklessly risking death) supplies malice aforethought. Probably to do justice to dueling, Lord Ellenborough's Act of 1803 made a felony of assault with the intent to commit grievous bodily harm. To this felony the felony murder doctrine would attach. Consequently, any killings committed by acts intended to cause grievous bodily harm would have the malice aforethought of murder.[100]

The law of murder today differs jurisdiction to jurisdiction both as elements have become statutory and as understandings of the

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[99] Already, in Holt, a hundred years after Coke, one finds a definition of malice aforethought that "would exclude the monstrous doctrine which Coke put forward and which Hale and Foster (in a slightly mitigated form) repeat, that malice is always implied from an unlawful act which occasions death." 3 *id.* at 71. Though perhaps less widespread than the felony murder doctrine, the misdemeanor manslaughter doctrine also survives to embody the *versari in re illicita* principle, as do also, perhaps, the moral and legal wrong doctrines that hold defendants liable for an offense for which they technically lack the mens rea because the actus reus they committed in conjunction with the wrongful state of mind they did harbor was in any event an unlawful act. *See* Kadish, *supra* note 87, at 376. These doctrines, for reasons similar to those raised in criticism of the felony murder doctrine, appear to be in decline.

[100] *See* Hyam v. Dir. of Pub. Prosecutions, 1975 App. Cas. 55 (appeal taken from Eng.) (discussing whether intention that serious bodily harm will result suffices for murder). *See also* Darry v. New York, 10 N.Y. 120 (1854) (discussing malice aforethought and the common law rules that established it in the use of deadly force and in the intent to cause great bodily injury).

common law have diverged. As might be expected, this divergence is most clearly to be noted with reference to killings at the lower end of the mens rea range, the further one descends from intentional killings towards killings merely reckless.

Some American jurisdictions punish "depraved-heart murder," killings committed in grave recklessness.[101] Following suit, the Model Penal Code punishes as murder homicide "committed recklessly under circumstances manifesting extreme indifference to the value of human life."[102] Again, one is reminded of the deadly smite of the Cities of Refuge law, and the Model Penal Code focus on "circumstances manifesting extreme indifference" may be seen to reflect even the style of the Cites of Refuge scenarios, in which circumstances bespeak the enmity or hatred in time past.

Even closer to the Cities of Refuge scenarios is the more traditional depraved-heart murder formulation of the Commonwealth of Virginia, for example. In Virginia, extreme recklessness does not suffice for malice aforethought.[103] Rather, what is required is an intentional act that threatens death. This measure of malice aforethought even more closely resembles the deadly smite of the Cities of Refuge law.

English law, apparently like that of Virginia, holds extreme recklessness insufficient for murder, and also has dispensed with felony murder.[104] The celebrated *Smith* case—a murder conviction upheld in

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[101] *See generally* MODEL PENAL CODE § 210.2 cmt. 4 (rev. 1980) (discussing common law, illustrative cases, and statutory modifications).

[102] MODEL PENAL CODE § 210.2(1)(b) (1962).

[103] *See, e.g.*, Essex v. Virginia, 322 S.E.2d 216, 220 (Va. 1984).

> [T]he victim must be shown to have died as a result of the defendant's conduct, and the defendant's conduct must be shown to be malicious. In the absence of express malice, this element may only be implied from conduct likely to cause death or great bodily harm, wilfully or purposefully undertaken. Thus, for example, one who deliberately drives a car into a crowd of people at a high speed, not intending to kill or injure any particular person, but rather seeking the perverse thrill of terrifying them and causing them to scatter, might be convicted of second-degree murder if death results. One who accomplishes the same result inadvertently, because of grossly negligent driving, causing him to lose control of his car, could be convicted only of involuntary manslaughter. In the first case the act was volitional; in the second it was inadvertent, however reckless and irresponsible.

Id.

[104] *See* Hyam v. Dir. of Pub. Prosecutions, 1975 App. Cas. 55 (appeal taken from Eng.).

the presence of an act directed towards the victim, by which act the killer negligently caused death[105]—met with statutory overruling.[106] In England, murder comprises killings if the killer intended that death or grevious bodily harm would be caused by his acts, or intentionally acted in a manner he knew would expose another to the risk of such harm.[107]

With capital punishment abolished, the distinction between murder and other homicides in England is no longer the distinction between capital and noncapital killings. Even in American jurisdictions that do preserve capital punishment for some homicides, not all murders are capital. Long before the United States Supreme Court decided that the Constitution prohibits punishing all murders with death,[108] American jurisdictions began adopting rules that selected only a subset of murders for capital punishment.

Very likely, the move towards selecting only some murders for capital punishment reflected the teaching of the Cities of Refuge law. The beginning of this move, a move that eventually embraced most states in some form or other,[109] was a 1794 statute of the Commonwealth of Pennsylvania:

> WHEREAS the design of punishment is to prevent the comission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And whereas it is the duty of every government to endeavour to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety: Therefore,
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> Sect. I. Be it enacted by the SENATE and HOUSE OF REPRESENTATIVES of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That no crime

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[105] Dir. of Pub. Prosecutions v. Smith, 1961 App. Cas. 290 (appeal taken from Eng.).

[106] MODEL PENAL CODE § 210.2 commentary at 27 n.64 (1962) (amended 1980). *See also* Frankland v. The Queen, [1987] 1 App. Cas. 579 (P.C.) (appeal taken from Isle of Man) (concluding *Smith* wrongly decided).

[107] *See Hyam*, 1975 App. Cas. at 55.

[108] *See infra* note 114.

[109] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 7.7 at 692 (3d ed. 2000).

> whatsoever, hereafter committed (except murder of the first degree) shall be punished with death in the state of Pennsylvania.
>
> Sect. II. And whereas the several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment: *Be it further enacted by the Authority aforesaid*, That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.[110]

Interestingly, the statute hearkens back to the earliest days of the English law of murder in selecting "lying in wait" as a mark of capital homicide.[111] Even more striking, however, is the use of the terms "wilful, deliberate and premeditated." These terms seem chosen to recapture the original common-sense meaning of malice aforethought. It is as if the Pennsylvania legislature intended to restore the ancient and far more limited definition of murder in its effort to restrict the imposition of capital punishment to accord with what it considered to be a more faithful adherence to the Cities of Refuge law.[112] If that law means that lying in wait and hatred in time past are the key distinctives of capital homicide, then the Pennsylvania statute establishing degrees of murder does indeed restore a more faithful adherence to the Cities of Refuge law.

The interpretation the courts of Pennsylvania lent to the statute beginning the very year of its enactment departed from the most obvious

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[110] *Quoted in* Keedy, *supra* note 59, at 772-73.

[111] *See supra* notes 63-64 and accompanying text. *See generally* Merrill K. Albert, Note, *Criminal Law: Homicide: Murder Committed by Lying in Wait*, 42 CAL. L. REV. 337 (1954) (discussing history and modern doctrine).

[112] The use of "wilful" and "premeditated" probably derived from an earlier Pennsylvania statute that itself cited in support "the Law of God." Keedy, *supra* note 59, at 761, 771. The words "wilful," "premeditated," and "deliberate" "were used advisedly and . . . it was intended they should be given their literal meaning, in sharp contrast with 'malice aforethought.'" *Id.* at 771-72 (footnote omitted).

literal interpretation.[113] The deliberation and premeditation of the sort to supply the elements of first degree murder became simply the intent to kill. An impulse developed a split second before the killing makes it deliberate and premeditated enough to be capital murder. Such an intepretation accords with a reading of the Cities of Refuge law that finds most important the factor of enmity, and sees the requirement of more as illustrative only, and the scenarios of less as presumptive only. The interpretation might also suggest that now that defendants may testify in their own defense, the illustrative and presumptive elements of the Cities of Refuge law ought not be permitted to shape substantive criminal law itself.

This Article has noted already that the United States Supreme Court has itself reformulated the law of capital homicide, departing in several respects from both the common law and the law of the Cities of Refuge. It has altered the capital elements in the killing, supplied elements from the character and history of the killer, and rendered the death sentence dependent upon the discretion of the sentencing authority.[114] The fruit of this redesign of capital murder has been questionable.[115]

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[113] *See* Keedy, *supra* note 59, at 773-74.

[114] The Court has struck down mandatory death penalty statutes. *See* Sumner v. Shuman, 483 U.S. 66 (1987) (murder by inmate serving life sentence); Roberts v. Louisiana, 431 U.S. 633 (1977) (murder of on-duty police officer). It has approved a statute requiring the finding of one of ten aggravating circumstances and requiring the sentencing authority to consider any mitigating circumstances. *See* Gregg v. Georgia, 428 U.S. 153 (1976). The sentencing authority must be able to consider both the defendant and the offense in considering mitigation. Lockett v. Ohio, 438 U.S. 586 (1978). All of these rulings depart from the standard of the Cities of Refuge law that mandate the death penalty for all murders, irrespective of the degree of heinousness of the act and of the character and history of the actor.

[115] Sir William Blackstone wrote this regarding the punishment of murder:

> Murder; a crime at which human nature starts, and which is, I believe, punished almost universally throughout the world with death. The words of the Mosaical law (over and above the general precept of Noah, (p) that "whoso sheddeth man's blood, by man shall his blood be shed"), are very emphatical in prohibiting the pardon of murderers. (q) "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it." And therefore our law has provided one course of prosecution (that by appeal, of which hereafter), wherein the king himself is excluded the power of pardoning murder; so that, were the king of England so inclined he could not imitate that Polish monarch mentioned by Puffendorf; (r) who thought proper to remit the

Perhaps slightly less questionable has been the Court's redesign of the law of presumptions in criminal cases.[116] The Cities of Refuge law likely supports some version of the classic common law rule that one intends the natural and probable consequences of one's acts.[117] The smiting with a deadly instrument gave rise to a presumption, or at least an inference, that a killing was not "at unawares" but instead intended.[118] If it gave rise to an irrebutable presumption, it was tantamount to a rule of substantive criminal law; if to a rebuttable inference, it was a rule of evidence.[119] Though not free of criticism, and

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> penalties of murder to all the nobility, in an edict, with this arrogant preamble, "*nos, divini juris rigorem moderantes.*"

4 WILLIAM BLACKSTONE, COMMENTARIES *194-195 (footnotes omitted). One cannot help wonder whether the current difficulties and controversies regarding capital punishment have not been exacerbated by the Court's rules. A regime that selects only certain murders as heinous enough for capital punishment, and requires the consideration of any evidence offered in mitigation, is unlikely to foster equality before the law.

[116] *See* Sandstrom v. Montana, 442 U.S. 510 (1979) (holding unconstitutional the instruction in a "deliberate homicide" case "that '[t]he law presumes that a person intends the ordinary consequence of his voluntary acts'"). A sharply divided Court reaffirmed this holding in *Francis v. Franklin*, 471 U.S. 307 (1985).

[117] Simon Greenleaf cites *Numbers* 35:16-17 as in agreement with the proposition that "a sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and, therefore, the intent to murder is conclusively inferred from the deliberate use of a deadly weapon." 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 18, at 113 (John Henry Wigmore rev., 16th ed. 1899) (footnote omitted).

[118] *See, e.g.*, Regina v. Macklin, 168 Eng. Rep. 1136, 1136 (1838) ("If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death . . . ."); Rex v. Grey, 84 Eng. Rep. 1084, 1084 (1666) (declaring that fatally striking a servant with an iron bar is murder, "for a piece of iron or a sword, or a great cudgel, with which a man probably may be slain, are not instruments of correction"). *Cf.* Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 550 (1934) (approving the expression "The deliberate selection and use of a deadly weapon is a circumstance which *indicates* a formed design to kill, in the absence of evidence showing a contrary intent") (quoting Delaware v. Galvano, 154 A. 461, 465 (Del. 1930) (emphasis added)).

[119] Herbert Weschler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 710 n.34 (1937).

> [T]he standard employed in proving state of mind is always external, most obviously so in the days before defendants could testify in their own defense. This is perhaps all that is involved in the so-called presumption that men intend the natural and probable consequences of their acts. With respect to this "common maxim which is sometimes stated as if it were a rule of law," Stephen observed: "I do not think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." 2 HISTORY OF THE CRIMINAL LAW 111, see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 374-5; Reg. v. Doherty, 16 COX 306 (1887); Reg. v. Macklin, 2 Lewin 225 (1838).

confusion,[120] the result of the Court's decision that the due process clauses prohibit the presumption but permit the inference is consistent with one reading of the Cities of Refuge law.

Though not often cited directly,[121] the Cities of Refuge law appears to brood not too far from the Anglo-American law of homicide.

> Holmes [citing THE COMMON LAW (1881)] treats this matter as if the "presumption" were conclusive, as is the case with "implied malice." Thus in Com. v. Pierce, 138 Mass. 165, 180 (1884), . . . he comments: 'When the jury are asked whether a stick of a certain size was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was." It must be conceded that the language of some American cases supports this view. See, *e.g.*, Com. v. Webster, 5 Cush. 295, 306 (Mass. 1850): State v. Grant, 152 Mo. 57, 64, 65, 53 S.W. 432, 433 (1899); Anderson v. State, 133 Wis. 601, 614, 114 N.W. 112, 116 (1907). But *cf.* King v. Meade, [1909] 1 K.B. 895, 899, 900: "A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man, in many ways; (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted." See also Allen v. United States, 164 U.S. 492, 496 (1896); State v. Bell, 21 Del. 192, 194, 62 Atl. 147, 148 (1904); State v. Silk, 145 Mo. 240, 249, 44 S.W. 764, 766 (1898); Note (1912) 38 L. R. A. (N.S.) 1054, 1081.

Id. See also Paul Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 24 (1930):

> But slight reflection will serve to demonstrate that as a general proposition the conclusive presumption of law, like the so-called presumption of fact, is not, properly speaking, a presumption at all. It is not a part of the law of evidence, but is instead a rule of the substantive law of the legal field in which it operates. This seems to be true of all conclusive presumptions regardless of their authorship.

Id.

[120] *See* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 355-58 (1980) (criticizing *Sandstrom*); Ronald J. Allen & Lee Ann DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1, 12-16, 27-30 (1982) (criticizing *Sandstrom* and exposing its confused sequelae); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 654-56 (1984) (noting an "absurd" apparent implication of *Sandstrom*).

[121] Some reported cases have cited the Cities of Refuge law. *See, e.g.* Mullis v. Alabama, 62 So.2d 451, 452-53 (Ala. 1953) (citing the law as if a modification to the lex talionis); North Carolina v. Casey, 161 S.E. 81, 89 (N.C. 1931) (citing the law as analogous to that enabling the governor to reprieve, commute, and pardon); Robbins v. Ohio, 8 Ohio St. 131, 174-75 (1857) (citing the law to support the argument that capital punishment is wrong "for a homicide neither malicious nor voluntary"); South Carolina v. Burton, 98 S.E. 856, 859 (S.C. 1919) (citing the law as discussed in a part of the trial court's charge to the jury, the charge being free of reversible error); South Carolina v. Workman, 17 S.E. 694 (S.C. 1893) (citing

The occasions in the history of our law of homicide when the biblical law clearly appears stand as indicators of the deep influence the Cities of Refuge law has likely had on the development of the Anglo-American law of murder, capital homicide, and presumptions.

IV. CONCLUSION

The Bible is a source both for the doctrine of the sanctity of human life and for the doctrine that human civil justice is to reflect, and in some measure execute, divine justice.[122] In the Cities of Refuge law, the Bible prescribes directly the contours of the rules for capital homicide. From the earliest times, the Anglo-American law of capital homicide seems to have developed in response to this prescription, so much so that our law is far more intelligible in the light of the Cities of Refuge law. To the extent the Bible continues to be received as authority, the continued development of our law likewise should reflect the law of the Cities of Refuge.

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the law as discussed in a part of the trial court's charge to the jury in response to a biblical argument of defendant's counsel, none of the justices concluding that to be reversible error); Bratton v. Tennessee, 29 Tenn. 103 (Tenn. 1849) (citing the law in support of the holding that transferred intent cannot establish first degree murder).

[122] *See supra* note 11, and accompanying text (quoting *Genesis* 9:5-6); *Romans* 13:4 ("For [the ruler] is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil.").