football squad. Therefore, playing football was an *incident* of the employment, and the injury arose out of and in the course of his employment.

Whether the school is receiving reasonable value for the remuneration it gives constitutes another criterion the court might use in deciding whether there is an employer-employee relationship. Thus, if it appears that the jobs assigned were shams (the value of the scholarship being disproportionate to the services rendered), it could be inferred that *participation in the sport* is the real purpose of the arrangement and *is* an incident of the employment.

To summarize, the courts in two situations have allowed recovery under workmen's compensation acts to the student-recipient of an athletic scholarship. *First,* where a contract of employment to play a sport can be established; and *second,* where there is employment to perform certain tasks, which employment is dependent upon the student playing the sport.

In *Van Horn* an employer-employee relationship was found to have arisen of which, very likely, the coach, student, and school were all unaware. This holding might result in athletic scholarships becoming an expensive proposition for colleges, considering the number of permanent injuries and deaths which result from contact sports. The Industrial Accident Commission remarked in its denial of the application for death benefits that "to hold that decedent was an employee would impose a heavy burden on institutions of learning and would discourage the granting of scholarships."[17] This may be true and could cause a reduction in scholarships, but it is the natural result of calling a spade a spade where one finds a hole in the ground.

Joe N. Turner

FELONY-MURDER — SURVIVING CO-FELONS ARE PUNISHABLE FOR FIRST DEGREE MURDER UNDER CALIFORNIA PENAL CODE SECTION 189 FOR THE KILLING OF A CONFEDERATE BY THE OWNER OF THE STORE WHICH THEY WERE ROBBING. *People v. Hand,* (San Diego July 22, 1963).

In the process of executing a planned robbery of a store, one of four robbers was killed by the owner. The store had been previously robbed and the owner was waiting for such a recurrence.

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17 33 Cal. Rtpr. at 174.

Held, on demurrer to the indictment,[1] the surviving felons were punishable for first degree murder because the legislature intended this fact situation to be within the purview of section 189 and because of a strong public policy as a deterrent to violent felonies. *People v. Hand,* Crim. No. 5471, Super. Ct., San Diego (July 22, 1963).

The California statute,[2] like that of several other states,[3] includes in its definition of first degree murder: "All murder . . . committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem . . . is murder of the first degree." Murder is defined as: ". . . the unlawful killing of a human being, with malice aforethought."[4] Malice is defined as either express or implied: ". . . It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[5]

In holding the surviving felons punishable for first degree murder, the court in the *Hand* case construed murder in section 189 to mean *any killing* which was a foreseeable consequence of the defendants' act and which occurred during the commission of one of the enumerated felonies. To support this proposition reliance is placed upon an editorial note following section 189 of the 1872 edition of the annotated Penal Code[6] which cites *People v. Sanchez*[7] as standing for this interpretation. The court goes on to state that application of Penal Code section 189 is justified as a deterrent to violent felonies, conceding, however, that the felon probably is not aware that he might be charged with murder if his confederate is killed while committing the felony. The decision concludes that the legislature intended the statute to apply in such cases and that to limit application would be an improper exercise of the court's power.

The problem in applying the felony-murder doctrine is that malice must be imputed to the person charged so that the *killing* will

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1 After a holding that the felons could be prosecuted under § 189, defendants pleaded guilty; one to second degree murder, one to robbery, and the other to conspiracy to commit robbery.

2 CAL. PEN. CODE § 189. Derivation: STATS. 1850, ch. 99, p. 231, § 21; amend. STATS. 1856, ch. 139, p. 219, § 2. Amendments in 1872 added *mayhem* and in 1949 *any acts punishable under Pen. Code* § 288.

3 This formula, variously worded, is found in the statutes of Alabama, Arizona, Arkansas, Colorado, Connecticut, Idaho, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia and West Virginia.

4 CAL. PEN. CODE § 187.

5 CAL. PEN. CODE § 188.

6 HAYMOND & BIRCH ED. 82 (1872).

7 24 Cal. 17, 29 (1864).

amount to *murder* as required by the statute.[8] Where the felon's act is the direct cause of the killing, imputation of malice has caused little difficulty.[9] But where the lethal blow is not produced in this manner, the rationalization is more acute and the reported decisions reach confusing and divergent results.[10]

Certain factual situations which have confronted courts may be classified thusly:

Group A

This grouping has three variations:

1. The felon does the actual killing.[11]

2. Co-felon is held for an accidental killing by his co-conspirator committed within the scope of the conspiracy.[12]

3. The felon's act is a direct cause of the death, e.g., where he used the victim as a shield.[13]

Group B

A non-participant kills another non-participant at the scene of a felony. In the usual case a person in a defensive action accidentally kills a bystander.[14]

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8 People v. Milton, 145 Cal. 169, 172, 78 Pac. 549, 550 (1904). ". . . and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit."

9 A survey of the reported California decisions reveals that in all but two cases the felon was the direct cause of the death.

10 *Those applying*:
Commonwealth v. Thomas, 382 Pa. 639, 117 A. 2d 205 (1955); Commonwealth v. Almeida, 362 Pa. 596, 68 A. 2d 595 (1949); Letner v. State, 156 Tenn. 68, 299 S.W. 1049 (1927); Keton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900); Wilson v. State, 188 Ark. 846, 68 S.W. 2d 100 (1934); Commonwealth v. Bolish, 381 Pa. 500, 113 A. 2d 464 (1955); Commonwealth v. Moyer, 357 Pa. 181, 53 A. 2d 736 (1947); People v. Podolski, 332 Mich. 508, 52 N.W. 2d 201 (1952), *cert. denied*, 344 U.S. 845 (1952).
Those rejecting:
People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Butler v. People, 125 Ill. 641, 18 N.E. 338, 8 Am. St. Rep. 423 (1888); Commonwealth v. Campbell, 7 Allen 541 (1863); State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924); People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920); Commonwealth v. Redline, 391 Pa. 486, 137 A. 2d 472 (1958); People v. Austin, 370 Mich. 12, 120 N.W. 2d 766 (1963); People v. La Barbera, 159 Misc. 177, 287 N.Y.Supp. 257 (1936); *Note*: This is not a complete survey of all the fact situations arising in *Groups B, C & D*, but it is a fair indication that the reported decisions are equally divided.

11 The most frequent situation is where the felon kills during the commission of a robbery, 25 CAL. JUR 2D *Homicide* § 77.

12 People v. Bauman, 39 Cal. App. 2d 587, 103 P. 2d 1020 (1940); People v. Cabaltero, 31 Cal. App. 2d 52, 87 P. 2d 364 (1939).

13 For comprehensive survey of the *Shield* cases see: Letner v. State, 156 Tenn. 68, 299 S.W. 1049, 1050-1051 (1927).

14 *Non-participant* used in this sense means that neither actual killer or victim is one of the felons. People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959); Commonwealth v. Almeida, 362 Pa. 596, 68 A. 2d 595 (1949).

Group C

A non-participant kills one of the co-felons within the *res gestae* of a felony as in the *Hand* case.[15]

Group D

One of the co-felons accidentally kills himself while committing the felony.[16]

The ultimate problem, in considering cases arising in the above groupings, is in determining what limits the legislature intended when they specified that the *killing* must amount to *murder.*

It is a fundamental principle that a code represents the law as it exists or should be at the time of adoption.[17] An 1857 California case held that the statute defining murder ". . . is but an enunciation of the common law definition of the crime."[18] The question now becomes: what was the felony-murder rule under the common law at the time the California Penal Code was adopted in 1850?

Probably the first formal statement of the felony-murder doctrine appears in *Lord Dacre's* case[19] in 1535. Since that time numerous cases and authorities have stated the common law rule as: *Any killing by one in the commission of a felony is guilty of murder.*[20]

Although the early common law cases use broad language—*any killing,* it is interesting to note that these cases all involved facts characterized within some subdivision in *Group A.*[21] A widely accepted and quite plausible explanation for this expansive language is that at early common law *all* felonies were punishable by death. Thus, it was of little concern whether the felon was executed for the original felony or for the accidental killing resulting therefrom.[22] Keeping in mind that under common law any killing *by one* engaged in the commission of a felony is chargeable with murder, then the logical inference is that the legislature, when it said all *murder,* substituted a word for the rule.

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15 Commonwealth v. Redline, 391 Pa. 486, 137 A. 2d 472 (1958); People v. Austin, 370 Mich. 12, 120 N.W. 2d 766 (1963).

16 People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928); People v. La Barbera, 159 Misc. 177, 287 N.Y.Supp. 257 (1936); Commonwealth v. Bolish, 381 Pa. 500, 113 A. 2d 464 (1955).

17 BLACK, LAW DICTIONARY 323 (4th ed. 1951), "A code implies a compilation of existing laws, systematically arranged . . . and generally to clarify and make complete . . . Gibson v. State, 214 Ala. 38, 106 So. 231, 235 (1925)."

18 People v. Moore, 8 Cal. 90, 92 (1857).

19 72 Eng. Rep. 458 (K.B. 1535).

20 3 COKE, INSTITUTES 66 (1797); 1 HALE, PLEAS OF THE CROWN 424-503 (1st Am. ed. 1847); BLACKSTONE, COMMENTARIES § 192-93, 200-01; 3 STEPHENS, *A History of the Criminal Law of England,* 57, 75 (1883).

21 A search of the early common law cases indicates the felony-murder rule was only applied to facts arising in *Group A.*

22 HITCHLER, *The Killer and his Victim in Felony-Murder Cases,* 53 DICK L. REV. 3 (1948).

It is generally conceded that the common law rule was intended to apply to *Group A* facts. Two early cases had refused to apply the rule to *Group B* facts.[23] In *Group A* there is little problem imputing malice. The earlier line of California decisions in *Group A* held that the statute created a *conclusive presumption of premeditation;*[24] hence, the malice requirement was satisfied. This rationale survived until 1946 when it was recognized that the conclusive presumption approach was confusing. An even more spurious doctrine was substituted, *viz.,* such a killing was murder by force of the statute.[25] Now the court is saying that malice is implicit from the very nature of the initial felony, not as a result of the accidental killing by the felon. This was undoubtedly the common law rule, but with one *caveat*: malice was imputed only to brand the accidental killing as murder when the felon *actually* caused the death, *Group A.* There is some authority for the position that a killing by one engaged in the commission of a felony is murder, not by imputation of malice, but rather as a matter of the Common Law.[26]

A survey of California appellate decisions reveals only two cases which have decided cases involving facts not in *Group A*: *People v. Ferlin* (1928)[27] *Group D,* and *People v. Harrison* (1959)[28] *Group B.* In *Ferlin* the California Supreme Court declined to hold the surviving felon liable for the death of a confederate who had accidentally killed himself. The case involved a disgruntled lessor who hired an arsonist to burn down a building in order to oust his lessee. In carrying out his task, the arsonist bungled, setting fire to himself as well as the building, thus causing his death. Refusing to hold the lessor liable for first degree murder under Penal Code section 189, the court stated that the death was not in pursuance of a common design of the conspiracy, and "It would not be seriously contended that one accidentally killing himself while engaged in the commission of a felony was guilty of murder. If the defendant herein is guilty of murder because of the accidental killing of his co-conspirator then it must follow that Skala (the deceased) was also guilty of murder, and, if he had recovered from his burns, that he would have been guilty of an attempt to commit murder."[29] The

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23 Commonwealth v. Campbell, 7 Allen 541 (1863); Butler v. People, 125 Ill. 641, 18 N.E. 338, 18 Am. St. Rep. 423 (1888).

24 People v. Sanchez, 24 Cal. 17 (1864); People v. Anderson, 1 Cal. 2d 687, 37 P. 2d 67 (1934); People v. Petro, 13 Cal. App. 2d 245, 56 P. 2d 984 (1936).

25 People v. Valentine, 28 Cal. 2d 121, 169 P. 2d 1 (1946); People v. Lindley, 26 Cal. 2d 780, 161 P. 2d 277 (1945); People v. Cabaltero, 31 Cal. App. 2d 52, 87 P. 2d 364 (1939).

26 PERKINS, CRIMINAL LAW, 76 (1957).

27 203 Cal. 587, 265 Pac. 230.

28 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959).

29 265 Pac. at 234.

court was pointing out that if the deceased could not be guilty of murder, then neither could the surviving co-felon.

The other case, *People v. Harrison,* decided in the Second District Court of Appeal, applied the doctrine where the victim of the robbery accidentally killed his employer in a gun battle with the felons, *Group B.* This is the first California decision holding that Penal Code section 189, applies if the killing is a *foreseeable consequence,* even though actually committed by a non-participant. In other words, if the result is foreseeable, malice will be imputed because the felon has breached his duty of care in committing a felony. To arrive at this result the court in the *Harrison* case relies heavily upon the language of the earlier California cases in *Group A* and upon two Pennsylvania decisions, *Commonwealth v. Moyer*[30] and *Commonwealth v. Almeida*[31] which hold the surviving felon for first degree murder under an identical statute[32] and similar facts.

The inherent weakness of the *Harrison* decision rests upon several grounds.

1. The court neglected to accurately determine the rule at common law as it existed immediately prior to the adoption of the code.[33]

2. In citing early California decisions, the court did not concede that the decisions might be limited by their precise facts.[34]

3. The only California Supreme Court decision involving *Group D* facts had rejected application of the doctrine.[35]

4. The two Pennsylvania cases, *Moyer* and *Almeida,* which applied the doctrine under an identical statute and similar facts were questionable authority in Pennsylvania when cited in *Harrison.* The *Harrison* opinion makes no reference to *Commonwealth v. Redline,*[36] decided after *Almeida* but a year before *Harrison. Redline* refused to impute malice to a surviving co-felon who was charged with murder as a result of the killing of his confederate by a police officer. The decision does not expressly overrule *Moyer* and *Almeida* but the court states in conclusion: "The limitation which we thus

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30 357 Pa. 181, 53 A. 2d 736 (1947).
31 362 Pa. 596, 68 A. 2d 595 (1949).
32 18 PA. STATS. ANN. § 4701 (1963).
33 The court discusses to some extent the historical development of the rule, but cites text writers who were not considering a specific statute such as PEN. CODE § 189; see 176 Cal. App. 2d at 333-5.
34 The California cases cited, with the exception of People v. Ferlin, are characterized in *Group A.* This is not mentioned.
35 The Ferlin decision is distinguished by reference to People v. Cabaltero, *Group A,* which distinguishes Ferlin on the theory that ". . . an examination of the factual situation therein shows it is entirely different from the one here presented . . ." 176 Cal. App. 2d at 342.
36 391 Pa. 486, 137 A. 2d 472 (1958).

place on the decision in the Almeida case renders unnecessary any present reconsiderations of the *extended* holding in that case. It will be time enough for action in such regard if and when a conviction for murder based on facts similar to those presented by the Almeida case (both as to the performer of the lethal act and the status of its victim) should again come before this court."[37] (Emphasis added.) The court clearly indicates, however, that any extension in *Group C* would be judicial legislation.[38]

The court in *Hand* relies upon the *Harrison—Almeida—Moyer* line of thinking to sustain its position. These cases utilize the doctrine of proximate cause to justify their conclusion. *Hand,* like *Harrison,* makes no attempt to distinguish *Ferlin, Redline,* or *People v. Austin,*[39] a recent Michigan Supreme Court decision in *Group B* which follows *Redline.*

Underlying this theory of holding a felon liable for the foreseeable consequences of his act is the desire to punish the felon for any death he might have reasonably foreseen when he participated in a violent felony. Although desire to reach a utilitarian result is admirable, it should not be accomplished by judicially rewriting the statute. "A judicial decision which is founded simply on the impulse that 'something should be done' or which looks no further than to the 'justice' or 'injustice' of a particular case, is not likely to have lasting influence . . . Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case."[40]

The *Hand* decision indicates the willingness of a trial court to give preference to a ruling of the District Court of Appeal and to distinguish the only Supreme Court decision which does not support its position. Even when the trial court instructs that the doctrine applies in *Groups B, C* and *D,* juries are prone to acquit.[41] It is a difficult task to convince a jury that a surviving co-felon is guilty of first degree murder when his confederate is killed by someone else during the commission of the felony.

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37 *Id.* 137 A. 2d at 483.
38 *Id.* at 474.
39 370 Mich. 12, 120 N.W. 2d 766 (1963).
40 Address by John M. Harlan, Associate Justice, Supreme Court of the United States, at the American Bar Center, Chicago, August 13, 1963. Reported in 49 A.B.A.J. 943 (1963).
41 People v. Jones, 177 Cal. App. 2d 420, 17 Cal. Rptr. 252 (1961), provides a good illustration. S and J were charged with murder, burglary, robbery and conspiracy for the killing by a police officer of their accomplice. The police officer had been advised of the planned robbery and killed one of the felons during the attempt. The jury acquitted the defendants of murder and burglary, but convicted of robbery and conspiracy.

Because of the inconsistency in its application, the felony-murder doctrine needs to be legislatively re-examined in California, as it has been elsewhere.[42] If, when the legislature says *all murder* it means *any killing,* it should so express itself. "If predominant present-day thinking should deem it necessary to the public's safety and security that felons be made chargeable with murder for *all deaths* occurring in and about the perpetration of their felonies—regardless of how or by whom such fatalities came—the legislature should be looked to . . ."[43] In a speech before the California State Bar in September 1963, California's Chief Justice Phil S. Gibson indicated his dissatisfaction with recent applications of the doctrine stating ". . . a strong case may be made for at least limiting the scope of the rule."[44]

It is axiomatic that the court should not rewrite a statute to accomplish a particular result. That is the function of the legislature.[45] "The only constitutional power competent to define crimes and prescribe punishment therefore is the legislature, and the courts do well to leave the promulgation . . . to the people's chosen legislative representatives."[46]

Robert C. Baxley

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42 The rule has been abolished in England, § 1 HOMICIDE ACT, 1957, 59 ELIZ 2, c. 11; substantially modified in Wisconsin, WIS. STAT. ANN. § 940.03 1958; limited in New York to a killing ". . . by a person engaged in the commission . . . of a felony," N.Y. PEN. LAW § 1044.

43 Jones, C. J., majority opinion, Commonwealth v. Redline, 137 A. 2d at 474.

44 San Francisco, September 1963.

45 Duart v. Arton-Cross, 19 Conn. Supp. 188, 110 A. 2d 647, 649 (1954).

46 Commonwealth v. Redline, 137 A. 2d at 473.