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MURDER BY THE CLOCK*

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I. THE PROBLEM—ONE OF WORDS AND MIND AND MURDER

This article is, in epitome, a protest against the utter unreality with which courts and legislatures deal with spur-of-the-moment killings and a plea for a more subjective approach to the whole theme of homicide. Its problem has never been better posited than by the late Mr. Justice Cardozo in a lecture before the Academy of Medicine and now happily available to all in his *Law and Literature*. Said the Justice:

Homicide under our statute is classified as murder and as manslaughter, and murder itself has two degrees, a first and a second. "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed from a deliberate and premeditated design to effect the death of the person killed, or of another * * * ." "Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed or of another, but without deliberation and premeditation." There, you see, is the distinction, and it is at least verbally clear. Both first and second degree murder (laying aside any exceptions which I thought it unnecessary to state) require an intent to kill, but in the one instance it is deliberate and premeditated intent, and in the other it is not. * * * The difficulty arises when we try to discover what is meant by the words deliberate and premeditated. A long series of decisions, beginning many years ago, has given to these words a meaning that differs to some extent from the one revealed upon the surface. To deliberate and

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premeditate within the meaning of the statute, one does not have to plan the murder days or hours or even minutes in advance, as where one lies in wait for one's enemy or places poison in his food or drink. The law does not say that any particular length of time must intervene between the volition and the act. The human brain, we are reminded, acts at times with extraordinary celerity. All that the statute requires is that the act must not be the result of immediate or spontaneous impulse. "If there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act," there is such deliberation and premeditation as will expose the offender to the punishment of death. * * *

I think the distinction [between murder in its two degrees] is much too vague to be continued in our law. There can be no intent unless there is a choice, yet by the hypothesis, the choice without more is enough to justify the inference that the intent was deliberate and premeditated. The presence of a sudden impulse is said to mark the dividing line, but how can an impulse be anything but sudden when the time for its formation is measured by the lapse of seconds. Yet the decisions are to the effect that seconds may be enough. * * * I think the students of the mind should make it clear to the law-makers that the statute is framed along the lines of a defective and unreal psychology. If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree, when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. * * * Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death. * * *¹

Whether Mr. Justice Cardozo restricted the application of his criticism solely to the law of New York does not clearly appear from the context. Be that as it may, New York is not the only jurisdiction where the same problem has raised its head. It appears in the maelstrom of homicide law in many other jurisdic-

1. Pp. 95-101.

tions. The courts of Florida, Wisconsin, Minnesota, and Washington, whose murder statutes are drafted after the pattern of the New York laws, are likewise in a turmoil over the matter² as are the tribunals and legislatures of states that have codified the common law rules of murder,³ states that have divided murder into degrees to limit the use of the death penalty,⁴ states that have abolished the death penalty,⁵ states where murder is not divided into degrees,⁶ states that have left the meaning of first degree murder to a residuary definition,⁷ and states where the crime is not defined, the statutes merely prescribing the penalty for wilful murder.⁸

The limited task undertaken in this article is to ascertain, as objectively as the solemnity, importance, and social utility of the problem will allow, in the light of statutes and court decisions, whether there is such a thing as "spur-of-the-moment" intent; if not, whether all murders committed without "adequate time" for premeditation or deliberation, whatever that time may be, should be placed in a separate category, with respect to both the crime and the punishment, from the murders in the commission of which the time element *was* sufficient to allow for the formation in the mind of a "bona fide" intent to kill. This objective involves the broader inquiry, *viz.*, whether our whole approach to the "guilty mind" theory of homicide should not be revised.

The outcome of murder trials in America, of course, depends in large part upon the interpretation given by courts and juries to homicide statutes, and in analyzing the cases to which resort must be had for source material this primary fact has been borne in mind. However, although particular stress will be laid herein upon the proclivities of the courts to torture the will of legisla-

2. See Part II, *infra*, pp. 321-344. For a more extensive review and analysis of the homicide statutes of the various states than is set forth herein, see Michael and Weschler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 702-720; Note (1880) 18 Am. Dec. 774.

3. E. g., Georgia.

4. E. g., Pennsylvania, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Indiana, Idaho, Mississippi, Montana, Missouri, Nevada, New Mexico, New Hampshire, North Carolina, New Jersey, etc.

5. E. g., Maine, Michigan, Minnesota, Wisconsin, South Dakota.

6. E. g., Georgia, Illinois, Texas, Louisiana, Maine, Mississippi, Oklahoma, South Dakota.

7. E. g., Texas.

8. E. g., Louisiana, Kentucky. Statutory references for all these examples and for the remaining states are set forth in Michael and Weschler's article, *supra*, note 3.

tures, it is recognized that the mere misconstruction of statutes is but one sore-spot on a problem of much wider significance. Statutes may be restricted or extended to achieve socially desirable results, but such a solution would be tantamount to begging the question.

A full analysis of the problem is not possible here. This would require a study of its relation to legal history. Such a study would indicate that there were ages and places where murderers were dealt with on a subjective basis, but that as men, influenced by personal vengeance, the welfare of organized society, philosophy, and theology, grafted successive refinements on to the legal approach to the treatment of homicides, the law in point became complex and confusing. The currently espoused objective approach sprang not from its own ashes, but came as an evil from Pandora's box, and has afflicted society in the over-all treatment of its homicides ever since.

Proof of the validity of the subjective approach would also involve a study of the relationship to law of modern "sciences" of the mind and "sciences" affecting the social organism itself, including psychology, psychiatry, psycho-analysis, social psychology, sociology, and economics. Obviously, such a study cannot be made here. Suffice it to say, however, that it is now safe for men of the law, who have traditionally discounted the values to be found in the application to law of such "sciences" to make intelligent use of the findings of these cognate fields of thought. Human knowledge is not limited to hornbooks, casebooks, or legal lore.⁹

II. A FEW "SLIGHT" CASES OF MURDER

Four states, namely, Florida, Washington, Wisconsin, and Minnesota, have patterned their homicide laws directly or indirectly upon the New York statutes, which Mr. Justice Cardozo was deploring in the remarks that set the theme for this paper. Our principal efforts will be directed toward an examination of

9. The original thesis, before taking up actual cases, devotes a chapter to the history of murder law, endeavoring to ascertain how the law reached the present state of entanglement, particular emphasis being placed upon the factor of intent in all of its ramifications. The task of the third chapter is one of examining the authoritarian bases of modern psychology and related sciences, insofar as they have established governing or guiding principles for subjective analysis of the problem at hand and to try to derive from such examination a scientific method of approach to the problem in a field outside the law but definitely allied.

the time-element cases that have arisen in these four states and to compare the law they establish with the results reached in New York. Next, we shall generalize briefly on sample cases and the statutory situations of other jurisdictions and thus, on the whole, endeavor to give not only a close-up view for details but also a more diffuse perspective to show the scope of the doctrine.

A. *New York—Courts v. Legislature.* Before exploring the checkered New York situation, it may be well to point out that a serious reform movement relating to homicide statutes has been started in that state. Under orders from the governor, a Law Revision Commission has made an exhaustive study of the history of New York homicide statutes and decisions and has submitted a detailed *Communication* dealing with the existing law and its ramifications, explaining how the law was developed and making general suggestions as to its revision.¹⁰ An important section of the *Communication* takes up the type of cases with which we are here concerned; and it seems advisable here, in the interests of time and accuracy, to utilize part of the vast amount of research done by the commission, acknowledge its claim to prior exploration of the field, and adopt some of its findings, commentaries, and conclusions to bolster our own case. With so much by way of approach to the murder muddle of the Empire State, let's pull on our boots and wade in.

During the English Colonial history of the state, all positive law relating to homicide was contained in the Duke of York's Laws.¹¹ These set forth no systematic or all-inclusive definition of homicide law but merely prescribed capital punishment in certain cases, notably, for our purposes, for "any wilful and premeditated murder." Some legislation of minor consequence, passed immediately after the Revolution, merely assumed the existence of common law concepts and incorporated such technical phrases as "wilful killing," "wilful murder of malice pre-pense," "of malice aforethought," *et cetera*, as a matter of course.¹² These statutes singled out for special condemnation murders by stabbing, poison, and lying in wait, as English acts had done for generations. Together with the early cases they

10. New York Law Revision Comm'n, *Communication Relating to Homicide* (1937), hereinafter cited as *Communication*.

11. 1 N. Y. Col. Laws (1894) 20.

12. See note 44 in *Communication*.

indicate that English common law relating to homicide was continued in the Colonies almost undiminished.

Some of the language of the New York cases prior to 1829 shows that the courts even at this early day were beginning to mill about in the confusion of words that were to have such baneful effect on later New York law. An 1816 court, for instance, found in a poisoning case that the word "deliberate" was descriptive of intent required for murder and recognized the significance of "prior" quarrels, grudges, or threats to show that the intent had existed.¹³ In 1824 the same court, in a decision the subjective logic of which leans both ways at once, said: "It is clear, there was no cool, premeditated malice. There may, indeed, be murder without long meditation."¹⁴ In still another case, the same court laid objective emphasis on the violence of the force and the nature of the weapon used, saying that where there was evidence of violent force and the murder weapon was an ax, a plea of the suddenness of the affray would be unavailing.¹⁵

In 1794 Pennsylvania introduced an innovation in homicide law by dividing murder into degrees¹⁶ so as to mitigate the rigor of common law punishment with respect to the less reprehensible killings. This departure, together with certain humanitarian influences which had their happy effect on New York lawmakers, led to a revision of New York homicide statutes.¹⁷ The Revised Statutes of 1829 distinguished murder from manslaughter upon the single principle of the absence or presence of a "design to effect death." Common law terminology was abandoned, the word "design" replacing "malice" and the word "premeditated" being substituted for "aforethought." A killing became murder "when perpetrated from a premeditated design to effect the death of the person killed, or of any human being." Theretofore, "intent to kill had been declared to be the *sine qua non* of the crime of murder."¹⁸

13. *People v. Selnick* (N. Y. Oyer and Terminer 1816) 1 Wheeler's Cr. Cas. 269.

14. *People v. Anderson* (N. Y. Oyer and Terminer 1824) 2 Wheeler's Cr. Cas. 390.

15. *People v. Tuhi* (N. Y. Oyer and Terminer 1817) 2 Wheeler's Cr. Cas. 245.

16. Act of April 22, 1794, (1896) 3 Pa. Stats.-at-L. 186.

17. N. Y. Rev. Stats. (1829) p. IV, c. 1.

18. *Communication*, p. 30.

The immediate question for the courts to decide was whether the injection of the word "premeditated" added a further requirement, to wit, a requisite condition of mind or a subjective mental process. The history of the Revised Statutes indicated that the framers by using the word undoubtedly intended thereby to recognize that murders committed with intent formed suddenly were to be distinguished from those where the mental condition was engendered previous to the homicidal act and retained until its commission.

The trial courts, however, thought otherwise and held that "premeditated design" meant merely *actual intent to kill*, even though formed at the very instant of killing.¹⁹ And the Court of Appeals stamped its approval on this course of the law in two important cases in 1851 and 1852, *People v. Clark*²⁰ and *People v. Sullivan*.²¹ These two cases have not only had an important bearing on the law in point in New York ever since but have reached out into other states to entangle their laws. In both cases, the trial court had charged the jury that if they believed the fatal blow to have been struck by the prisoner with a design to effect death, it was murder, even though such design was formed only on the instant accompanying and causing the act. The Supreme Court reversed the trial court, holding that the word "premeditated" was to be construed literally, that the legislature had so intended in order to mitigate the punishment. Judge Roosevelt, in a concurring opinion, was especially liberal in his approach:

The law says that killing without authority, when perpetrated from a premeditated design to effect the death of the

19. *People v. Mulvey* (N. Y. Oyer and Terminer 1851) 2 Edm. Sel. Cas. 246. This case involved a defendant who had been ejected from a saloon for obstreperous behavior. He took two or three steps, wheeled, and fatally shot a clerk standing in the doorway. His counsel argued that "premeditated design" meant an intent formed some time before the homicide occurred, but the trial court charged the jury that the statute was not to be so construed; for if it were, it "would leave a large class of homicides untouched and unpunished by our law, namely, those cases where the intention to kill is formed on the instant * * * . Such cases * * * would not be murder, for want of premeditation to the design and would not be manslaughter, because there is present a design to effect death." The jury was therefore instructed to inquire whether, at the time the shot was fired, there was a design to effect death then existing, and it would not matter whether this intent was formed before or after the attempt to eject the defendant from the premises."

20. (1852) 7 N. Y. 385, 2 Edm. Sel. Cas. 294.

21. (1852) 7 N. Y. 396.

person killed, or of any human being is murder. Is then an intention formed on the instant a premeditated design? Consulting merely the popular conception of language, or even the dictionaries in general use, we must certainly answer that it is not. So far from being synonymous, these two forms of expression are generally employed to convey directly opposite ideas. * * * The words premeditate and design both import forethought, careful reflection, deliberately arranged purpose—ideas all involving, in their structures, the essential element of *time*. We may not perhaps be able, in every or any case, to define the precise number of hours or days; but still there must be time, reasonable time—time for reflection—time to survey the contemplated deed in all its bearings and probable results; and to contrive and arrange, if so decided, the means and method and occasion of its deadly accomplishment. How, then, can it be said, without shocking all our notions of speech, whether common or cultivated, that an intention to kill, formed on the instant of striking the fatal blow, is the same as a *premeditated* design to commit the crime of murder?²²

It is to be noticed, however, that even Judge Roosevelt bases his argument on the meaning of words in “common or cultivated” speech, and makes no attempt to justify the interpretation in any subjective manner.

The Court of Appeals, in reversing the Supreme Court, was largely influenced by the fact that the crimes of Clark and Sullivan, if not murder, could only be punishable under the definition of manslaughter in the fourth degree. The court used language that has been often cited in later cases:

If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months. It is enough that the intention precedes the act although that follows instantly.²³

Thus through the *seeming* failure of the revisers to provide for homicides committed with intent to kill formulated at the instant of killing, the word “premeditated” was construed contrary to all ordinary usage, and the death penalty was inflicted on those who had killed hurriedly in the heat of passion or in sudden com-

22. (N. Y. Sup. Ct. 1852) 1 Park. Cr. Rep. 347, 358.

23. (1852) 7 N. Y. 385, 394.

bat regardless of provocation, so long as the intent to kill had existed. The term "premeditated" lost all significance and becomes substantially equivalent to the words "actual intent."²⁴

The New York courts paid scant attention in this early day to the nature of the mental operations leading to the formation of an intent to kill. The emotional state of the killer's mind was given no consideration when it was found that intent was present. Principal stress was laid on the objective test of mere lapse of time. Subjective psychological reasoning, however, was beginning to stir in the breasts of some jurists, as is indicated by the dissenting opinion in a case where the prisoner in a frenzied fit killed his father-in-law who had accused the former's wife of unfaithfulness.²⁵ One judge in this case insisted that although premeditated design "may be matured in a minute, as well as in a day," nevertheless it was necessary to inquire whether the perpetrator was capable of premeditation, for "premeditation presupposes the consent of the will, without which human actions cannot be considered culpable." Jealousy, like intoxication, might pervade the mind "to such a degree as to unsettle the understanding and dethrone the will." It is not difficult to imagine the more orthodox judges looking disdainfully down their noses at such judicial heresy.

The harsh construction of the courts given to the Revised Statutes of 1829 led the New York Legislature in 1860 to reform radically the definition of murder, by dividing it into two degrees.²⁶ The manifest intention was to remove from the category of capital offenses the kind of homicides typified by the *Clark* and *Sullivan* cases. Not only was the word "premeditated" used to describe murder in the first degree, but the words "deliberate" and "wilful" as well. But the legislature overlooked the fact that these latter words had taken on a cargo of fixed meanings in their tortuous course through the alien seas of the common law, from which the New York courts would be loath to depart.

This attempt to reach a new result by combining in one definition a collection of outworn words, the component parts of which had been beaten into meaninglessness by centuries of ritualistic-like repetition, is a striking commentary

24. *Communication*, p. 37.

25. *People v. Sanchez* (N. Y. Sup. Ct. 1859) 18 How. Pr. 72, 4 Park. Cr. Rep. 535.

26. N. Y. Laws of 1860, c. 410.

upon the difficulty of using descriptive language to prescribe murderous intent of the highest degree.²⁷

The courts ran true to form. In 1862, a case came before the courts involving a slaying committed by a man who was being pursued by his assailant.²⁸ The trial court instructed "that if a man, being pursued by another, turns upon him, and wilfully, deliberately, and premeditatedly kills him, he is guilty of murder in the first degree; and it is a matter of no consequence whether he deliberates one minute or one hour, whether he premeditates one minute or one hour, whether he forms that design one minute or one hour before." The Supreme Court approved without comment.

The 1860 statute was repealed in 1862, and the legislature reverted to the terminology of the original Revised Statutes in the use of the phrase "premeditated design to effect the death" with certain innovations.²⁹ The definition of murder in the original Revised Statutes now became murder in the first degree except that the general felony murder provision was excluded, and a specific provision solely for arson felony murder was substituted. Second degree murder was given a negative, residuary definition, designed obviously to cover intentional homicides with extenuating circumstances.

Yet there was perplexity in the legal profession as to the exact meaning of this statute.³⁰ Indeed the courts continued to give instructions in terms of the rule of the *Clark* and *Sullivan* cases to the effect that even if the intent to kill were formed on the instant of the killing, the crime would be murder in the first degree; and these instructions were approved. The trial court in the *O'Brien* case,³¹ for instance, had declared:

If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months.

27. *Communication*, p. 41.

28. *Jefferds v. People* (N. Y. Sup. Ct. 1862) 5 Park. Cr. Rep. 522.

29. N. Y. Laws of 1862, c. 196.

30. See, *e. g.*, *People v. Waltz* (N. Y. Oyer and Terminer 1874) 50 How. Pr. 204.

31. *O'Brien v. People* (N. Y. Sup. Ct. 1867) 48 Barb. 274, *aff'd* (1867) 36 N. Y. 276, 3 Abb. Pr. (N. S.) 368. See also *McKee v. People* (1867) 36 N. Y. 113, 34 How. Pr. 230; *People v. Lewis* (N. Y. Ct. of App. 1867) 41 How. Pr. 508, 3 Abb. Dec. 535; *People v. Thompson* (1869) 41 N. Y. 1.

The General Term affirmed this definition even though it was shown that it was taken from a case handed down before the enactment of the 1862 statute,³² and the Court of Appeals expressly approved the charge of the trial court.

Again, the good intentions of the legislators were in a measure defeated by their own clumsy draftsmanship but, in the main, by the frozen attitude of the courts toward any attempt to take such words as "premeditated design to kill" from the incrustated frame of the past and give them new and deserving meaning.

It is odd that the legislators did not give up in disgust, but public opinion was apparently making manifest a feeling that something drastic should be done to separate "homicides" which were morally less reprehensible, in that they evinced a lesser degree of "wilfulness" or "deliberation" than first degree murders. The lawmakers therefore in 1873 provided with respect to intentional homicides that:

Such killing, unless it be manslaughter or excusable or justifiable homicide, as hereinafter provided, shall be murder in the first degree, in the following cases: First, when perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. * * * Such killing unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the second degree when perpetrated intentionally but without deliberation and premeditation.³³

Two years later a trial court definitely recognized that this legislation "made a wide moral difference" between "deliberated" and sudden killings.³⁴ In 1881 the legislature wrote the final chapter in the rectification of the statutes by making a slight rephrasing of the second degree murder definition.³⁵ The principal question now for the courts to decide was whether the addition of the word "deliberate" to "premeditated," which had been found of itself inadequate, would give the first degree murder definition the solo part that had so long been sought for it.

Those interested had not long to wait to ascertain the first reaction of a court that hitherto had riddled the intent of the

32. N. Y. Laws of 1862, c. 196, cited supra, note 29.

33. N. Y. Laws of 1873, c. 644.

34. *People v. Batting* (N. Y. Oyer and Terminer 1875) 49 How. Pr. 392.

35. N. Y. Penal Code (1881) sec. 184.

legislature. It was declared, in the case of *People v. Walworth*,³⁶ in 1873 that the legislature had "effected" a substantial change in the law of murder under which something more than the actual presence of intention formed at the instant of striking of the blow or firing of the shot was necessary to constitute first degree murder. It must appear that there was actual deliberation and premeditation operating upon the mind of the accused in respect to the subject matter of the offense.

"Deliberation" thus meant more than a mere limitation on time. It connoted a rational process in which the mind weighed and considered alternate courses of conduct, finally making a choice to kill. "Premeditation" meant that such rational process had to occur before the act. Thus this court, for perhaps the first time, made a conscious effort to be subjective in its reasoning. The Supreme Court at first indorsed this position of the trial court, declaring in *Leighton v. People*³⁷ that rash or hasty execution of intent was no longer allowed to be sufficient; that the execution of the guilty purpose was to be determined upon reflection, before the crime of murder in the first degree could be committed.

It may be recalled that the common law had taken a strictly objective view with respect to the question as to what mental processes were necessary to identify the accused as a murderer in the first degree. Subjective approaches had been rarely attempted and by the majority of courts looked upon as entirely abandoned. The early cases under the Penal Code of 1881 indicated that there was a desire on the part of the New York courts to take a subjective approach to the matter of intent. Two opinions of the Court of Appeals³⁸ indicated that it had been persuaded by this line of earthy reasoning, the court going so far in the second of the two cases as to declare that premeditation and deliberation signify an intent springing from the reasoning powers of the brain rather than from the impulse of the moment.

Indeed, as if to repent in earnest of its former ways, the Appeals Court leaned over backwards subjectively and said, in a case where defendant, being jilted and mocked by her faithless

36. (*Oyer and Terminer* 1873) 4 N. Y. Cr. Rep. 355.

37. (1882) 88 N. Y. 117.

38. *People v. Hawkins* (1888) 109 N. Y. 408, 17 N. E. 371; *People v. Jackson* (1909) 196 N. Y. 357, 89 N. E. 924.

paramour when she pleaded with him to marry her, hurried home, got a razor, returned, and slit his throat:

Deliberation and premeditation imply the capacity at the time to *think and reflect*, sufficient volition to make a choice, and by the use of these powers, to refrain from doing a wrongful act. * * * If, at the moment, in consequence of what he said to her and the final culmination of the alleged wrongs of which she conceived herself to have been the victim, *she became incapable of reasoning or of deliberating, the act, we think, would not constitute murder in the first degree.*³⁹

And in a case⁴⁰ where deceased struck defendant, who pulled his gun and snapped it several times before it went off, killing deceased, the court, by a bare majority however, recognized that from beginning to end the episode took but one or two minutes and that the defendant's mind might have been in such condition that he could not deliberate. In *People v. Caruso*⁴¹ the Appeals Court again took the position that only where the killer's mind has engaged in a process of reasoning leading to the decision to do the fatal act had a "deliberate and premeditated design to kill" existed.

It is pointed out in the *Communication* of the Law Revision Commission, however, that in all these cases "The question upon which guilt was made to turn was: did overwhelming emotion *in fact* overcome the defendant's mind and drive him to kill? Immaterial was the question: should he under the facts of this kind of a case have been so overcome by emotion that by an unreasoned impulse he was driven to kill?"⁴² This state of affairs indicated that, although the court took a more subjective approach than it had been theretofore wont to do, it had not wholly divorced itself from common law concepts of cooling time, provocation, emotion, *et cetera*, so as to be able to consider the purely psychic aspects of such cases. In requiring that the actual state of mind of the offender and all the influences bearing upon the mental condition be taken into account, the high court was merely giving the logical implications of the policy underlying the 1873 and 1881 statutes their due effect. In the absence of psychologi-

39. *People v. Barberri* (1896) 49 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717 (italics supplied).

40. *People v. Fiorentino* (1910) 197 N. Y. 560, 91 N. E. 195.

41. (1927) 246 N. Y. 437, 159 N. E. 390.

42. *Communication*, p. 58.

cal data on which to base conclusions as to each slayer's frame of mind, the courts resorted principally to the evidence of preparation to commit the crime to prove a reasoned determination to kill free from driving impulse.⁴³

Furthermore, in their anxiety to emphasize the time element, which had been so completely repudiated in the *Clark* and *Sullivan* cases, the courts were laying a foundation for a further development. In the *Majone* case⁴⁴ the court sanctioned an instruction to the effect that "design must precede the killing by some appreciable space of time. But the time need not be long," for "the human mind acts with celerity which is sometimes impossible to measure." Here was the handwriting on the wall, and to the perceiving it meant that deep down in the mind of the court there was stirring, unconsciously or subconsciously, a desire to return to the rule of the *Clark* and *Sullivan* cases, even if the return were made in the guise of a fictionalized formula. It is not surprising, therefore, to find the Court of Appeals, as early as 1884, declaring in *People v. Conroy*⁴⁵ that:

To infer the existence of deliberation and premeditation does not require the lapse of any special period of time. * * * The shortness of time elapsing between the conception of the intention and its execution form no legal defense of the crime. * * * It required mental effort to realize that he had a pistol, to contemplate its use, and to appreciate the existence of a cause for its production at that time.⁴⁶

By 1887 the court was ready to recognize that a five second interval was sufficient to justify the finding of deliberation and premeditation, even where the circumstances indicated heightened provocation and mental unbalance.⁴⁷ Of course, there was caustic protest on the part of some judges to this reversal of form. Learned, P. J., for instance, chided the court in terms of its own mechanics, pointing out that "an opinion of the court "shaking mad" to shift a shot gun to his left hand and with his right draw a revolver from a pocket;⁵² the interval between

43. See *People v. Lewis* (1889) 115 N. Y. 663, 21 N. E. 1062; *People v. Sliney* (1893) 137 N. Y. 570, 33 N. E. 150; *People v. Hamilton* (1893) 137 N. Y. 531, 32 N. E. 1071; *People v. Rohl* (1893) 138 N. Y. 616, 33 N. E. 933; *People v. Scott* (1897) 153 N. Y. 40, 46 N. E. 1028; *People v. Pekarz* (1906) 185 N. Y. 470, 78 N. E. 294.

44. (1883) 91 N. Y. 211, 1 N. Y. Cr. Rep. 94.

45. (1884) 97 N. Y. 62, 2 N. Y. Cr. Rep. 565.

46. 97 N. Y. at 79.

47. *People v. Schuyler* (1887) 106 N. Y. 298, 12 N. E. 783.

the argument and the decision would hardly be called a deliberate and premeditated opinion."⁴⁸ But such protests were futile to dam the flood of cases that thereafter adopted the rule of the *Majone, Conroy, Clark, and Sullivan* trials, which had emphasized the brevity and the objectivity of temporal element.

The courts in rapid succession found the following intervals sufficient to indicate that the defendant had *time* to consider the nature of his act: "from half a minute to two minutes," while defendant was holding a pistol in his hand;⁴⁹ "a space of about three minutes," the time necessary to choke a person to death;⁵⁰ "a matter of seconds";⁵¹ the time it took defendant who was "shaking mad" to "shift a shot gun to his left hand and with his right draw a revolver from a pocket";⁵² the interval between shots fired in rapid succession;⁵³ or the time that elapsed between the first and sixth effort to fire a revolver, the second, third, fourth, and fifth attempts being misfires.⁵⁴ The case that capped the climax, however, was *People v. Jackson*⁵⁵ where the court affirmed a conviction based on the charge:

But the time that elapses which shows deliberation need not be a day. It need not be a minute. It may be a second, or a fraction of it. It must be time enough so that reasons arise for not doing the act thought of, and so that the mind makes its choice and decides to do that which was done.⁵⁶

The inconsistency of such reasoning is apparent in the light not only of psychology⁵⁷ but also of the vaunted logic of the law. The subjective approach that characterized the *Caruso* and *Fiorentino* cases was totally disregarded, and the will of the legislature to ameliorate the treatment of homicides that arose out of un-

48. *People v. Beckwith* (1887) 45 Hun 422, 428, 10 N. Y. St. Rep. 97.

49. *People v. Constantino* (1897) 153 N. Y. 24, 47 N. E. 37.

50. *People v. Pullerson* (1899) 159 N. Y. 339, 53 N. E. 1119.

51. *People v. Ferraro* (1900) 161 N. Y. 365, 55 N. E. 931.

52. *People v. Rodawald* (1904) 177 N. Y. 408, 70 N. E. 1.

53. *People v. White* (1903) 176 N. Y. 331, 68 N. E. 630; *People v. Jones* (1909) 194 N. Y. 83, 86 N. E. 810.

54. *People v. Harris* (1913) 209 N. Y. 70, 102 N. E. 546.

55. (1909) 196 N. Y. 357, 89 N. E. 924.

56. 89 N. E. at 925.

57. No matter by what brand of psychology one elects to test the subjective shortcomings of such an approach to the problem of guilt or innocence in a homicide case, the result is the same. Behaviorism, determinism, Freudian psychoanalysis, psychology based on instinct, reflex action, or emotion—all argue against the proposition that choice and reflection, or to put the matter legalistically—premeditation, deliberation, and intent, are matters of instantaneous mental reaction.

settled and irrational conduct was set at naught. Many extra cases were thereby brought under the first degree murder provision and, to return to Mr. Justice Cardozo's lament: "Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men [went] to their death."⁵⁸

The court continued to drift farther away from *any* subjective approach to the problem by computing the nature of the intent from the actual physical manifestations exhibited by the result produced, disregarding even proof of the most obvious mental conditions that bear on the functions of intent. In *Sindram v. People*⁵⁹ the court declared, for instance, that

* * * evidence that the prisoner had an irascible temper or was subject to fits of passion from slight causes was not admissible. * * * If his acts were such as to satisfy the jury that the killing was with premeditation and deliberation, his bad temper or eccentricities of character, not amounting to insanity, could not detract from the effect of his acts, or shield him from responsibility therefor.⁶⁰

In *People v. Cain*,⁶¹ a more pronounced case of obviously upset mentality, the court reached a similar result. The defendant, a negro, became embroiled in an argument with two white passengers on an elevated train. The three disembarked together, and one of the white men made a pass at the negro, who drew a knife and ran toward the street. The defendant's antagonists disappeared into a crowd. Several people attempted to stop the negro; a shot rang out; the negro ran amuck in the crowd swinging his knife wildly. Nine persons were stabbed, three died. At the trial the district attorney admitted that the negro was insane. Although the train of events was sufficient to unbalance even a normal person, the court affirmed a conviction of first degree murder, being impressed with the admission of the district attorney, but holding that defendant knew right from wrong and knew the nature and quality of his acts.

These are the New York cases to date.⁶² Hereafter we shall have occasion to comment on the possible statutory cure for the ailment of the New York law and to compare such a cure with

58. *Supra*, p. 306.

59. (1882) 88 N. Y. 196.

60. 88 N. Y. at 199, 200.

61. (1912) 206 N. Y. 202, 99 N. E. 566.

62. See also *People v. Zackowitz* (1930) 254 N. Y. 192, 172 N. E. 466.

other possible remedies. Until then, we shall leave New York and move into the legal family circle of the other states.

Bad parents beget bad children. This is no less true in the law than in eugenics. The New York murder laws are the parents of similar statutes in several other states. We should, therefore, take a passing glance at the offspring to see whether their environment has, in any measure, overcome their heredity.

B. *Orthodox Florida Justice and Jumping Florida Justices.* One of the early cases in Florida of the type that elicits our interest is *Ernest v. State*.⁶³ The victim was apparently cut on the neck by a razor in the hands of defendant. Deceased, however, did not perish from the immediate effects of the wounds but from tetanus which set in afterward. Defendant was convicted of murder and based an appeal upon an allegedly erroneous charge to the jury that, on the subject of malice or a premeditated design, when a killing is proved, the law presumes that it was done with premeditated design unless it shall appear from the evidence, either on the part of the defense or the State, that there was excuse or justification. In commenting on the context of this charge the Florida Supreme Court said:

* * * we think [this clause] is clearly error. The word "malice" is not found in our statutes relating to homicide. Premeditation is defined as meaning intent before the act, but not necessarily an intent existing *any extended time before the act*. "Premeditated design," as used in the statute, means an intention to kill, design means intent and both words imply premeditation." * * * "The question of premeditation is one of fact, like all other facts, to be determined by the jury."⁶⁴

63. (1883) 20 Fla. 383.

64. 20 Fla. at 388-389. Italics are supplied. The Florida statute reads as follows: "Sec. 7137. *Murder.* The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery or burglary, shall be murder in the first degree, and shall be punishable by death. When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by imprisonment in the prison for life, or for any number of years not less than 20 years. When perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery or burglary, it shall be murder in the third degree and shall be punished by imprisonment in the State prison not exceeding twenty years." Fla. Comp. Gen. Laws (1927). The

It is evident from this case that the Florida courts took a running start on the road of unreality, following the adoption of their new statute. Although refusing to let the lower court "get away" with instructions that would confuse "malice" with "premeditated design," the high court itself indulged in a logomachy that defies rational interpretation; and, in the use of the phrase "but not necessarily an intent existing any extended time before the act," opened the door invitingly, as the New York court did in the *Leighton* and *Majone* cases, to the concept of spur-of-the-moment intent in its most deplorable form.

It has been observed that the unwillingness of modern courts to accept psychological data is out of tune with the willingness of courts in the past to allow medical testimony to be read into the record, regardless of the then relatively undeveloped state of medical science.⁶⁵ The instant case is a perfect illustration of this point and again shows the inconsistency of the 1883 court in approaching medical forensics realistically but denying the same approach to the psychic elements of the case. Of course, the answer is that the court felt that it knew something about *tetanus*, whereas it perhaps had never heard of psychology. The significant thing is that the medical evidence accepted is all out of kilter with present knowledge of the subject; just as psychological testimony today may be out of adjustment with the knowledge developed in that field in the future. But the court accepted the medical knowledge.

In 1886, about the time the New York Appeals Court was putting the skids under judicial realism in applying its murder statutes,⁶⁶ the Florida Supreme Court was wrestling with *Carter*

Florida statute, according to Hocker, J., in *Cook v. State* (1903) 46 Fla. 20, 39, 35 So. 665, "borrowed the phrase 'premeditated design' from the New York statutes," although Wisconsin had a similar law. *Carter*, P. J., insisted that the Florida statute is a literal transcript of the Wisconsin statute. Reference to the section on Wisconsin cases, *infra* p. 339, will indicate that Wisconsin looked to New York for statutory inspiration.

65. Accredited schools have been offering well patronized courses in psychology and its sister sciences for several years. There are habit clinics, juvenile courts, probation offices, penitentiaries, asylums, delinquency clinics, employment agencies, and various other institutions throughout the land utilizing the services of trained psychologists. It is safe to assert that the science is much more developed than was medical science when the courts first began to rely on its expert testimony and guidance in criminal cases. Why then is the law so loath to make changes in its substantive structure based on the psychological facts at hand?

66. See note 47, *supra*, and text supported thereby.

*v. State.*⁶⁷ A city ordinance prohibited blocking the sidewalk. Deceased, a policeman, warned a negro standing near a saloon against violating this ordinance and told him to be gone. Another negro came from the saloon and counseled the first negro to stand his ground. The deceased returned and commanded both to move. Defendant refused and deceased poked him in the ribs with his police stick. There was an exchange of words, and the defendant went into the saloon and emerged again in about a minute. The deceased told him that if he didn't move on, he would "put him away." Defendant refused, with an oath, and deceased struck him on the elbow and again on the head. Defendant drew a revolver and killed deceased. On appeal, counsel for the defense argued that there was no proof of premeditation, and that the time intervening between the commencement of the altercation and the killing was too short to allow of prisoner's forming a design to effect the death of the deceased. To this, the appeal court replied:

The law does not prescribe what length of time should intervene between the formation of the design by one to effect the death of another and the execution of such design. All that it requires is that there be such an interval of time between the intent and the act as will repel the presumption that it was done upon a sudden impulse conceived and executed almost instantaneously, or that its execution followed so quickly after the design as to show that the mind was not fully conscious of its own intention. If there is an intent to kill, an interval of time sufficiently long for the prisoner to be fully conscious of what he intends, and then an execution of such intent, it is sufficient to convict the prisoner of murder in the first degree. These are all questions of fact for the jury.⁶⁸

Considering the fact that the defendant was a colored person accused of murder in the deep South, the language of this court is surprisingly liberal. On the other hand, the temporal element is made so elastic by the court as to be almost meaningless, and the case therefore falls in the same category, so far as development in the law is concerned, as *Ernest v. State*.

This half-way position in the law was not to be long sustained,

67. (1886) 22 Fla. 553.

68. 22 Fla. at 558. The court here relied on *Commonwealth v. Drum* (1868) 58 Pa. 9, 16, an early case under Pennsylvania murder statutes, which were the first to divide murder into degrees.

however, for in 1892 came *Lovett v. State*.⁶⁹ Deceased owed defendant, a negro boy, fifty cents. Defendant, who had been target practicing in the woods with his pistol, went to the home of deceased to collect. Deceased met defendant at the door and threw him off the steps. Defendant ran from the yard and with an oath dared deceased to come out. Deceased, a large, powerful man, started menacingly toward defendant, who fatally shot him. The following syllabus by the court explains the nature of the defendant's appeal, following conviction of murder, with respect to the element of premeditation, and the court's reaction thereto:

It is not erroneous to charge that the premeditation which the law requires to constitute murder in the first degree need not be for any particular length of time; that it is sufficient if the premeditation *was but for a moment*, provided the action of the slayer was the result of such premeditation. The use of the word "moment" does not imply less time than was necessary for deliberating upon the subject of killing and forming a distinct design or determination to kill, of which defendant was fully conscious before firing the fatal shot.⁷⁰

*Cook v. State*⁷¹ was the battle-ground for one of the most revealing word battles in the history of American homicide cases. The defense was that the accused was too intoxicated to form a premeditated design to kill. The trial judge, *inter alia*, gave the following charge:

* * * If the mind of the accused was in a condition to form a purpose, and there was sufficient time for the forming of that purpose, and for the mind to be conscious of that purpose to kill, it is sufficient time to constitute premeditation, and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant had fully formed a purpose to shoot and kill Smith, and that he was conscious of that purpose when he fired the shot, they will find the defendant guilty of murder in the first degree.⁷²

Hocker and Shackelford, JJ., and Taylor, C. J., thought the charge an improper definition of premeditated design. Carter, P. J., and Maxwell and Cockrell, JJ., dissented. The court being equally divided, the question presented in the charge was not

69. (1892) 30 Fla. 142, 11 So. 550, 3 judges dissenting.

70. Italics supplied.

71. (1903) 46 Fla. 20, 35 So. 665.

72. 35 So. at 671.

decided. The affirmative opinion by Hocker relied on *Sullivan v. People*, which, it will be recalled, declared in effect that the intention of the New York legislature in revising the murder statutes was to rule out the possibility of putting spur-of-the-moment killings in a first degree murder category. Hocker saw no difficulty in the fact that the New York Court of Appeals overruled the *Sullivan* case in *People v. Clark*,⁷³ for, he reasoned, the fact that the legislature, being dissatisfied with this decision, again amended the statute indicated the way in which it should have been construed even before amendment. In a closely knit and convincing opinion, invoking leading decisions from several other states, he demonstrated that "premeditated" has a literal meaning of its own as well as a legislative intent behind it and is not to be construed away by technical interpretation.

Carter, P. J., on the other hand, insisted that the court was bound by the definitions of premeditation in the *Ernest, Carter*, and *Lovett* cases, bolstered by *Olds v. State*,⁷⁴ and that with reference to New York the *Clark* case was controlling. The fact that the legislature more than twenty years after this decision amended the state should not, he thought, influence Florida to place a different construction on its statute, for the Florida legislature had reenacted it without adding anything to the definition—an indication that it was entirely satisfied with definitions taken from the New York decisions before the statute was amended there.⁷⁵

*People v. Majone*⁷⁶ and *People v. Conroy*⁷⁷ were to the dissenters the guiding lights, for, they reasoned, these cases were decided even after the New York statute had been amended so as to include both the words "deliberate" and "premeditated" as modifiers of "design"; and, if the court could hold in the teeth of such an amendment that the time for reflection need not be long and that it was enough that the intention precede the act, although that follow immediately, it must necessarily be that the doctrine of the earlier cases in Florida was sound and unimpeachable. The truth is that the dissenters did not have the

73. (1851) 7 N. Y. 385. For all of these cases refer back to the previous section dealing with New York statutes and cases.

74. (1902) 44 Fla. 452.

75. See 46 Fla. at 66, 67, 35 So. at 681.

76. (1883) 91 N. Y. 211, cited supra, note 44.

77. (1884) 97 N. Y. 82, cited supra, note 45.

stamina to depart from tradition. Their attitude, and the attitude of courts throughout the land on this issue, is epitomized in the final paragraph of Judge Carter's opinion:

The charges criticised in the present case are sustained by our previous decisions, and I do not understand that this fact is seriously questioned. In order to hold them erroneous we must overrule the uniform decisions of this court for nearly a quarter of a century construing "premeditated design" and disregard the rule of construction appertaining to reenacted statutes. We must disregard and declare to be erroneous the decisions rendered in the only States that have statutes like ours. We must interpret into our statutes the words "wilful and deliberate," which to my mind is judicial legislation pure and simple, and depart from our conservatism by disregarding and setting at naught our own decisions as well as the weight of authority in States where those words are made by statute part of the definition, for by the great weight of authority there the charges under consideration are correct. I am willing to assume this responsibility, and thereby unsettle the law of homicide in this State as understood for nearly a quarter of a century.⁷⁸

1906 found the Florida court still divided on the question. Two new judges who had been appointed split in their views. It is surprising that Shackelford, who had become Chief Justice, departed from his views in the *Cook* case and voted with the dissenters in 1906. Apparently the reasoning of the dissenters in *Cook v. State* had even more than its desired effect, however, for we find in the case of *Keigans v. State*⁷⁹ a trial judge giving this charge to the jury:

The premeditated design to kill may have existed in the mind of the slayer for a month, a week, a day or an hour, or may have been formed a moment before the fatal shot was fired. * * * If you believe defendant shot and killed * * * , it would make no difference at what precise time he made up his mind * * * . If, when he fired the pistol he intended to kill he is guilty of murder in the first degree, even though he may not have had in his mind any such intention at the time he drew his pistol.⁸⁰

Judge Parkhill's opinion attacking this charge pointed out that as a whole it went a step further "in whittling away and short-

78. *Cook v. State* (1903) 46 Fla. 20, 77, 35 So. 665, 685.

79. (1906) 52 Fla. 57, 41 So. 886.

80. 41 So. at 886.

ening the time in which the defendant must have formed a premeditated design to kill," and that if the words "if at the time he fired the fatal shot he intended to kill" were taken literally, the charge did away entirely with the requirement of the law that there must be such an interval of time between the intent and the act as will repel the presumption that it was done upon a sudden impulse conceived and executed almost instantaneously. He deplored the fact that such a charge permitted the defendant to be convicted of murder in the first degree upon proof of instantaneous or "flashlight premeditation." Surprisingly, he cited *People v. Majone* to support his contention just as the dissenters had done to support their views in the *Cook* case.

1907 found the court still divided and the opponents of "flashlight" intent seeing vice in an instruction defining premeditation "as meaning intent before the act but not necessarily an intent existing any extended time before the act."⁸¹ The dissenters did not consider the charge "ideal" but found it not to be "seriously objectionable." Thus the court sat back and mused about the stalemate it had played itself into. The fulminations of the court had centered around the temporal element, but Cockrell, one of the dissenters, came as close to recognizing the subjective psychic aspects of such a case as any of the several justices on either side had done in the long dispute, when he timidly admitted that

No distinct and conscious intent to kill a human being can be formed by the average man of ordinary intelligence and perception without some premeditation, and as a general proposition in the domain of mind study, I can see no flaw in it. If the peculiarities of the mentality of the slayer at the time of the homicide call for an exception to this general proposition, it may be given in a separate charge; but this exception does not destroy the general rule.⁸²

The deadlock was broken in 1908 when Parkhill, J., "went over to the enemy." *Barnhill v. State*⁸³ furnished the motif for Parkhill's departure. The victim in this case passed defendant's store and gave vent to a vigorous oath addressed either to a cow on the sidewalk or to defendant's wife. Defendant emerged and reproached deceased but not in an angry tone. Deceased thereupon called defendant a vile name and threatened him, where-

81. *Stokes v. State* (1907) 54 Fla. 109, 44 So. 759.

82. 44 So. at 765.

83. (1908) 56 Fla. 16, 48 So. 251.

upon the two started a fight. Deceased drew a knife and without opening it hit defendant over the head several times, drawing blood. Deceased asked a bystander for his gun to kill defendant. The two then separated. Deceased threatened to get a gun from a nearby store and kill defendant. Defendant, knowing that a rifle was kept at the store, got his shot gun and within five or six minutes was pointing it at deceased who stood knife in hand at the counter of the store from which he had threatened to get a gun. Defendant testified that he knew deceased would get him unless he shot first. The defense contended that there was not a sufficient interval passed between the fight and the slaying to allow for a formation of premeditated design within the meaning of the statute and so pleaded on appeal, following imposition of the death sentence. But Parkhill, J., thought that the circumstances, plus the fact that defendant had at least six minutes to cogitate, were sufficient to warrant sending him to his doom; and the fact that two justices believed that the time "was too short for defendant to have become so cool as to be able to form a premeditated design" was not sufficient to save him.

The same result was reached in 1915 in *Wise v. State*,⁸⁴ which case saw one of the two remaining stalwarts jump the fence into the camp of the majority. The extent to which the corrosion was acting upon the court is apparent when the facts of the case are considered. Prisoner and deceased were drinking when a sudden quarrel was precipitated. Prisoner commanded deceased to leave the house, and deceased struck accused on the head with a whiskey bottle, then ran. Prisoner followed deceased and fatally cut him on the neck and back. Here were facts that would have justified the court in taking Judge Cockrell's advice⁸⁵ and in giving heed to the peculiarities of the mentality of a drunken mind. But the court, led by Chief Justice Taylor, disregarded any subjective considerations and found the orthodox temporal element quite sufficient to take care of the exigencies of the case.

Miller v. State^{85a} found the court divided three to two on the question of premeditation (with Taylor, C. J., back on the right side of the fence and, strange to say, with the majority of the

84. (1915) 69 Fla. 260, 67 So. 871.

85. *Stokes v. State* (1907) 54 Fla. 109, 44 So. 759, 765, cited supra, note 82.

85a. (1918) 75 Fla. 136, 77 So. 669.

court with him). In this case, although the opinion went off on another track, the court held that where a man, accused of murder, was suddenly confronted by two armed men sent to watch for him, and fired a gun, killing one of them, he was not guilty of murder in the first degree. There was found no evidence that the defendant premeditated the design to kill the deceased, nor that he had any intention an instant before the fatal shot was fired to kill the deceased.

In 1925 a particularly revolting case⁸⁶ came before the court, involving a sex slaying of a white woman by a negro. The court hewed to the line of the *Ernest, Carter, and Lovett* cases in the matter of premeditation. The case is only interesting as an addition to our theme in that the Florida court, for the first time in such a case, gave psychology passing notice—but what notice! Said the court: "All psychological investigation shows that the process of mental conception lies beyond the scrutiny of exact observation."⁸⁷

1927 found two new judges standing against the court and refusing to find sufficient time for premeditation in *Powell v. State*,⁸⁸ where the accused, in a fight with three assailants on the east side of the street, took refuge in his car, turned it around, and fired the fatal shot from the west side of the street at the menacingly approaching trio. In this case and another, *Green v. State*,⁸⁹ Chief Justice Ellis, who had indicated a contrary state of mind in the *Miller* case, voted with the proponents of the orthodox view, which justified a finding of ample time for premeditation on the facts involved in the *Powell* case; and in the *Green* case even Justice Brown, one of the two faithful in the *Powell* case, went over to the majority.

The last ten years in Florida have witnessed no material abrogation of the rule first announced in *Ernest v. State*.⁹⁰ In *Buchanan v. State*,⁹¹ involving the slaying of two revenue officers, Ellis, C. J., again flatly declared it to be unnecessary that the intention should have been conceived for any particular period of time. In

86. *Lowe v. State* (1925) 90 Fla. 255, 105 So. 829.

87. 105 So. at 831, the court citing Wharton, *Criminal Law* (11th ed. 1912) for this scientific generalization.

88. (1927) 93 Fla. 756, 112 So. 608.

89. (1927) 93 Fla. 1076, 113 So. 121.

90. See especially *Hasty v. State* (1935) 120 Fla. 269, 162 So. 910.

91. (1928) 95 Fla. 301, 116 So. 275.

*Wooten v. State*⁹² the defendant, who was driving a car, drove under a fallen tree and caused deceased, who was riding the running board, to exclaim, "That's right; wreck it." Thereupon defendant seized a pistol and, saying, "I'll kill you," fatally shot the rider. The unanimous court declared that the force of defendant's exclamation showed "premeditated design" to kill, without reference to the time factor. The court did not even pause to consider that mere words may not be conclusive indices of thought.

The last case to be cited from Florida, *Forehand v. State*,⁹³ leaves a modicum of hope that the court has in its nature an element of judicial realism. The two Forehand brothers engaged in a fracas with some C. C. C. boys near a rural drink and dance hall. One of the brothers used a knife in the fray, and both were later taken in custody by the deceased, a deputy sheriff. The accused, Pleas, struck deceased in the face, and deceased replied with a blow from his blackjack. A struggle ensued between the brothers, the sheriff, and a fourth man. Lannie Forehand secured the blackjack and attempted to strike the sheriff. The two grappled and fell. The accused seized the sheriff's pistol and fired five shots at the two men on the ground, killing both of them.

The court cited all of the standard cases, but did not let the matter rest on these decisions. Instead it took a definite subjective step forward. Said Ellis, J.:

As the element of premeditation is an essential ingredient of the crime of murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused was guilty of murder in the first degree as defined by our statute. * * *

The fact that one of those persons was the brother of the accused and was in the danger of being struck by a bullet from the pistol in the hands of the accused seems to us to indicate the presence of a blind and unreasoning passion which momentarily obscured the reason of the accused and displaced any capacity to form a premeditated design to kill Pledger.⁹⁴

92. (1932) 104 Fla. 597, 140 So. 474.

93. (1936) 126 Fla. 464, 171 So. 241.

94. 171 So. at 243, 244.

Thus we leave Florida courts, realistically speaking, not much better than we found them but with the assurance that the "lego-athletic" propensities of the judges may sometime stimulate a majority of them to vault into the higher realms of subjectivity and there, with a psychology book in one hand, a stop watch in the other, and the milk of human kindness in their hearts, learn a lesson in law that is not to be discovered in the tomes of the ancients nor the confused opinions of a New York judicial hierarchy.

C. *Washington Judges Watch the Clock*. It is now surely no surprise to discover that the corrosive influences that ate away the apparent humanitarian intent of the legislators in New York and Florida also made their appearance in Washington, although under the earliest homicide statutes in Washington⁹⁵ murder in the first degree was changed to killing done purposely and of "deliberate and premeditated malice," and in the second degree retained the purposive element minus the elements of premeditation and deliberation.

We are early told that the liberalizing statutory definitions in Washington were meant by the framers to take the place of "the old definition of murder, viz., the unlawful killing of any subject whatsoever through malice aforethought."⁹⁶ Accordingly the Supreme Court of Washington, in *Rutten v. State*,⁹⁷ the first case giving rise to the time element question, held erroneous an instruction declaring that "there need not be any appreciable space of time between the formation of intention and the killing. They may be as instantaneous as the successive thoughts of the mind." Said the court:

While no great amount of time necessarily intervenes between the intention to kill and the act of killing, yet under our statute there must be time to deliberate, and no deliberation can be instantaneous. * * * Deliberation means to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon,—and while it may be difficult to determine just how short a time it will require for the mind to deliberate, yet if any effect is to be given to the statute which makes a difference between murder in the first

95. Wash. Terr. Code (1881) secs. 786, 790; see Leonard v. Territory of Washington (1885) 2 Wash. Terr. Rep. 381; Wash. Penal Code (1891) secs. 1, 3.

96. *Rutten v. State* (1895) 13 Wash. 203.

97. *Ibid.*

and second degree, the language [of the instruction] is too broad.⁹⁸

It is evident from this case that the Washington court, as the Florida and New York courts had done before, strove at first to follow the letter of the statutory definition. But it, too, found the departure from common law concepts, as they had come to be understood, a difficult one to make.

Indeed a case⁹⁹ to confirm this assertion came within two years. The facts are not recorded, but apparently the time element with reference to premeditation was involved. The court deftly recalled the precise words of the objectionable instruction in *State v. Rutten* and then drew this subtle distinction:

The instruction in the case at bar provides for an appreciable space of time, *viz.*, a *moment*, and this is a moment of time before the doing of the act. It is true, that a moment is the smallest division of an appreciable space of time, but it is a division, and an appreciable one, and this qualification removed the instructions from the objections commented upon in the case above referred to [the *Rutten* case].^{100a}

As matters stood in 1900, therefore, an *instantaneous* intent was adjudged impossible and frowned upon, but a *momentary* intent had the approval of the court. As was largely true of the other states we have noted, there was no attempt to view the problem subjectively. The temporal element was the sole criterion. Washington courts looked at the clock; but the clock turned out only abstract time, and no one knew in Washington in 1900 whether it took a man one tick or sixty tocks to formulate an intent to kill.

Eight years after the turn of the century the court was confronted with a case¹⁰⁰ in which defendant had quarreled with his wife the day before and on the morning of the shooting. They separated, and defendant procured a pistol, made a trip of two miles in returning to his wife, drew his revolver while holding her, and shot her when she broke and ran away. The jury was instructed that there need be no particular length of time between the formation of the intention to kill and the killing, if

98. 13 Wash. at 212.

99. *State v. Gin Pon* (1897) 16 Wash. 425, 47 Pac. 961.

99a. 47 Pac. at 963. The rule of the *Gin Pon* case was reiterated in *State v. Hawkins* (1900) 23 Wash. 289, 63 Pac. 258.

100. *State v. Bridgham* (1908) 51 Wash. 18, 97 Pac. 1096.

the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer. Defendant was convicted of first degree murder and appealed.

The Supreme Court, in upholding the instruction, reminded defendant that in *State v. Straub*¹⁰¹ it had declared that "any conviction or intention that enters into the mind of man enters with the rapidity of thought" and had held the *Rutten* case instruction bad because it had said that the intention might be formed and its execution carried out in the same or successive instants. The instant case was saved from the fate of the *Rutten* case because the instruction recognized that there must be deliberation and time therefor, but that no definite standard as to lapse of time need be set up. The expression that there need be no particular length of time was explained as meaning merely that no fixed or definite time is necessary. Obviously, the court was influenced by the hideous nature of the crime and was seeking a way out of the dilemma it had worked itself into by its primarily weak approach to the problem.

In 1909 the state of Washington adopted a criminal code. Its framers "lifted from the code of New York the sections defining murder in the first and second degree and manslaughter,"¹⁰² except that the Washington Code provision contained only the word "premeditated" as a modifier of "design,"¹⁰³ whereas the New York law, as will be recalled, included both the words "premeditated" and "deliberate." It is to be noted, also, that the framers of the Washington Code failed to follow the prior definition of their own statutes in its inclusion of the term "deliberate." Whereas the New York legislators had thought it advisable to add the term "deliberate" to give stronger expression of legislative intent to the statute, the Washington law makers, for some reason not explained by the cases, thought the inclusion of the word unnecessary.

One of the first cases that came before the court after the adoption of the Criminal Code with its New York provision, was *State v. Blane*,¹⁰⁴ where the accused had given the son of deceased liquor from a bottle. Deceased resented this, took the bot-

101. (1896) 16 Wash. 111, 47 Pac. 227. See also *State v. Arata* (1909) 56 Wash. 135, 105 Pac. 227.

102. *State v. Palmer* (1918) 104 Wash. 396, 399, 176 Pac. 547.

103. Wash. Rem. Comp. Stats. (1922) sec. 2392.

104. (1911) 64 Wash. 122, 116 Pac. 660.

tle from the accused in a scuffle, and attacked accused with it. Prisoner drew a pistol and shot deceased. The trial court was not influenced by the fact that a new murder statute had come into being but promptly gave the old instruction, that "no particular space of time need intervene between the formation of the intent to kill and the killing." This instruction was ascribed as error by defendant on appeal. The court talked about cases under the old statutes and thereon based an affirmation of the orthodox instruction without even the saving grace of a dissent.

The last two cases we shall tarry upon in Washington involve facts that would have warranted the court in making a subjective inquiry into the mental condition of the slayer as of the time of the killing; but the court, in keeping with its time-telling tradition, despite the fact that Washington universities were turning out trained psychologists by the score who could have been consulted, looked to the temporal aspects of the cases only and, being, no doubt, largely influenced by the facts, sent two more first degree murderers down the last mile.

In *State v. Adamo*¹⁰⁵ defendant and deceased had engaged in an extended quarrel during which threats of death had been made by deceased. On the day of the homicide defendant was escorted by deceased as he came from a wholesale house. There was an exchange of heated words, and deceased attempted to lay hands on defendant as he again entered the wholesale warehouse. When defendant emerged the second time, he was, according to some evidence, threatened again by deceased, whereupon defendant drew his revolver and fired at deceased. Deceased then attacked defendant, and defendant fired the fatal shots. Defendant was convicted of first degree murder. In his appeal he complained of the court's instruction to the jury concerning premeditated design, to the effect that if defendant shot deceased with the intention of killing him, and if this intention was thought about or considered by him beforehand, then there was premeditation, a moment's reflection being sufficient. This instruction was upheld on appeal.

In *State v. Gaines*,¹⁰⁶ the evidence indicated that defendant in a drunken rage had strangled his victim into insensibility, had then gone to a nearby garbage dump, procured a stone, returned,

105. (1924) 128 Wash. 419, 223 Pac. 9.

106. (1927) 144 Wash. 446, 258 Pac. 508.

and inflicted mortal wounds. Following a conviction of first degree murder carrying a death penalty, defendant appealed, alleging that his instruction to the effect that there was no evidence of premeditation in the case and that defendant could not therefore be found guilty of murder in the first degree had been erroneously disallowed. The Supreme Court sustained the disallowance, saying that choking takes some appreciable time, and that it could not be held that, under the facts and circumstances of the case, there was no evidence from which the jury could find premeditation.

Thus we leave Washington, having gained the impression that whereas in New York is well-nigh impossible to give a satisfactory and intelligent charge to a jury involving the time element, in Washington it is a relatively simple matter under the same kind of statutes, because the Washington courts are not fighting with their legislators over the humanitarian factors involved, and because Washington courts and Washington lawyers have apparently not yet discovered, as have New York and Florida judges and lawyers, that in such cases there is a human subjective element as well as a temporal objective one. When they make this discovery, we can expect trouble but also reform in Washington.

D. *Minnesota Wavers on the Threshold of Realism, Then Walks Out.* In 1862 Minnesota enacted homicide statutes¹⁰⁷ patterned to a large extent, as far as first degree murder was concerned, on the Revised Statutes of New York of 1829.¹⁰⁸ Killing "perpetrated with a premeditated design to effect the death of * * * any human being" was murder in the first degree; killing in the heat of passion upon sudden provocation or sudden combat intentionally, but without premeditation, was manslaughter. Under the obvious force and intention of this statute, the Supreme Court of Minnesota early declared that the words "intentionally" and "with premeditated design" in the foregoing provisions were not synonymous expressions, "the latter involving a greater degree of forethought than the former."¹⁰⁹ The Minnesota legislature had shown more foresight than the New York lawmakers as far as the manslaughter clause was concerned, for the New

107. Minn. Laws of 1862, c. 14.

108. See note 17, *supra*.

109. *State v. Brown* (1867) 12 Minn. 538.

York law made no provision for "intentional" slayings under its manslaughter rules.

The Minnesota court as early as 1868 injected a commendable semi-subjective approach into its reasoning process by declaring that:

It is the province of the Court to define what will constitute a provocation, by, in substance, informing the jury that it must be something, the natural tendency of which would be to disturb and obscure the reason to an extent which might render the average man of fair mind and average disposition liable to act rashly or without due deliberation or reflection, and from passion, rather than from judgment, and something which the jury are satisfied did so disturb and obscure the reason of the defendant in the case before them, so that the homicide was the result of the provocation.¹¹⁰

Now to ascertain whether these early travels along the road of realism were continued.

In 1878, for some reason not revealed by the cases, but inferentially because of the wide spread between the first degree murder provision and the second degree manslaughter clause, which allowed many morally more reprehensible homicides than the term manslaughter connotes to escape fitting punishment, the legislature amended the law. First degree murder was left as it had been. Second degree murder, embracing cases where there was design to kill but without premeditation or deliberation, was added to the statute, and manslaughter was taken out of the intentional homicide classification.¹¹¹ In short, the new statute was designed very much on the order of the New York Penal Code of 1881.¹¹²

A case, involving the time element, in which a most extraordinary charge had been given to the jury, came before the Supreme Court of Minnesota in 1889.¹¹³ The defendant in the case was a fugitive from arrest in another town. He had gone to a dance hall about midnight and while there saw two policemen who he suspected were waiting an opportunity to arrest him. He approached them and ordered them downstairs at the point of his revolver. The trio had moved some distance up the

110. *State v. Hoyt* (1868) 13 Minn. 132, 147.

111. Minn. Gen. Stats. (1878) c. 94.

112. See note 35, *supra*, and text supported thereby.

113. *State v. Thos. Brown* (1889) 41 Minn. 319, 43 N. W. 69.

street, when a third policeman approached from the side or rear. When he got within thirty feet, defendant turned and shot him fatally before exchanging shots with one of the others. No words passed between defendant and deceased. Defendant was apparently calm when he fired the fatal shot. On these facts the jury were instructed in part as follows:

By the use of the word "deliberation" in the statute the idea is conveyed that the perpetrator weighed the motive for the act and its consequences, the nature of the crime or other things connected with his intention, with a view to a decision thereon; that he considered all these and that the act is not suddenly committed. There is no prescribed time for either premeditation or deliberation. * * * this of course depends upon the activeness of the mind of the perpetrator. You have seen the defendant upon the stand, and you can judge somewhat of the activity of his mind from the manner in which he testified. [If he debated the question of killing in his mind for any length of time, even an instant, and as a result of such debate determined the question and acted upon the determination thus made, he is guilty of murder in the first degree.]¹¹⁴

The possibility of a jury judging the actions of a defendant's mind at the time and place of the murder from his manner of testimony in the witness box involves such an enormous psychological *non-sequitur* as to be deserving of no further elucidation. The temporal element of the charge was also extreme. Note particularly the phrases "no matter how short the struggle" and "for any length of time, even an instant." But the Supreme Court of the state of Minnesota put its judicial sanction on this charge! The court avoided the subjective part of the charge but became subjective upon its own account in a way that will bear repetition. Said the court:

There is great difference in the character of men in respect to habits of thought and action, as well as to self-restraint and sense of moral obligation; and persons who have become depraved through evil habits and associations are generally reckless of restraint, and ripe for crime. Such men will hesitate but little to commit desperate acts, and will act quickly under slight temptation, and from motives which would fail to influence others. We cannot measure the celerity of mental processes and whether in a case of homicide

114. 41 Minn. at 320 (bracketed portions appear in the report).

a premeditated design to kill was formed, must, where the question can arise at all, be left to the jury to determine from all the circumstances. And we think this question was fairly submitted to the jury in this case.¹¹⁵

A possibility ignored by the court was that lack of "self-restraint or sense of moral obligation" may be an index of a mentality so hair-triggered, flighty, or purposeless as to plunge one headlong into a desperate deed without being led there through all of the mental processes incident to the forming of an intent.

On the time-element phases, the court reasoned that the words "in an instant" must be considered in the connection in which they are used, and the sentence objected to as a whole clearly implied to the court that there must be sufficient time for the operation of those mental processes in which the judgment is to be exercised and the purpose definitely formed.

The next case of any significance in Minnesota, so far as our problem is concerned, is *State v. Prolow*.¹¹⁶ Prolow was approached by a drunken bully in a saloon, who threatened to knock him down. The crowd encouraged a fight, and Prolow was made to feel inferior and cowardly by their remarks. The proprietor of the saloon intervened and castigated Prolow for starting the brawl, when in fact Prolow was but an innocent bystander. Prolow left the saloon, purchased a pistol "to shoot some dogs," returned to the saloon, and quarreled with the proprietor over the previous scene. The proprietor took Prolow chokingly by the neck and threw him bodily from the saloon. Prolow fired four shots into the proprietor, as he turned to re-enter the saloon, with fatal results. Prolow, convicted of first degree murder, complained in vain of the charge to the jury that "premeditation" does not mean calm and deliberate revolving of a proposition in the mind. Premeditation might be formed at any time, a moment or instant before the killing. The intention of killing and the act of killing might be as instantaneous as the successive thoughts of the mind. Or, so the lower court was allowed to say.

This case, to all intents and purposes, wiped out the distinction between first and second degree murder that the legislature had created in Minnesota just as similar cases had done in New York. As a matter of fact, the Minnesota court in the instant case relied

115. Id. at 323, 43 N. W. at 69.

116. (1906) 98 Minn. 459, 108 N. W. 873.

in part on *People v. Beckwith*,¹¹⁷ one of the cases that contributed to the downfall of the legislative intent in the juggled history of the New York homicide statutes.

The depth of objectivity into which the Minnesota court sank after several bold attempts to take a more rational view is illustrated in the final case of our Minnesota research, *State v. Workmack*.¹¹⁸ Deceased in this case, while drunk, quarreled with defendant in her home and then left. Later she returned and renewed the dispute with defendant, standing just outside defendant's door. Defendant, provoked, opened the door and shot deceased. Defendant was convicted of first degree murder, and her appeal raised the question of the existence of a premeditated design to effect death. The Supreme Court justified the verdict in this language:

The offense may be found to be of this grade from the mere fact and circumstances of the killing, and where there are no circumstances to prevent or rebut the presumption the law will presume that the unlawful act was intentional and malicious and was prompted and determined by the ordinary and natural operations of the mind. * * * The law will not, therefore, attempt to lay down a more "specific" rule. It cannot define the length of time within which the determination to murder or commit the unlawful act resulting from death *must* be formed.¹¹⁹

Thus Minnesota has gone the way of other states that have "lifted" their murder laws from New York's box of Pandora. The one blessing discoverable in the Minnesota situation is that Mr. Justice Cardozo's ghastly reminder that "scores of men have gone to their death" upon the basis of the "fine distinction" of the statutes "with its mystifying psychology" has less opportunity to be realized in Minnesota than in New York, because Minnesota has abolished the death penalty. But the illogicality of the situation as here analyzed remains.

E. Wisconsin—*A Study in Unrealized Realism*. There remains for consideration, as one of the states having murder statutes similar to those that have caused such distress in New York and, to a lesser degree, wherever else they have been adopted, the

117. (1886) 103 N. Y. 360, 8 N. E. 662.

118. (1921) 150 Minn. 249, 184 N. W. 970.

119. *Ibid.*, quoting and citing *State v. Thos. Brown* (1889) 41 Minn. 319, 43 N. W. 69.

state of Wisconsin. Prior to 1849 in Wisconsin, it was necessary in order to constitute murder under the common law as interpreted by Wisconsin courts that the homicide be committed "with some degree of deliberation and intelligence, and with the intention of doing some great bodily harm."¹²⁰ In 1849, however, the Wisconsin legislature, looking toward the east, thought it saw a great light in the New York Revised Statutes of 1830 relating to homicide and, with certain modifications, adopted them.¹²¹

Twenty-five years later, in *Hogan v. State*,¹²² which determined the law on spur-of-the-moment killings in Wisconsin and is followed to this day, the learned judge was led to remark:

From this statute of New York, ours was taken in 1849. But it was taken with so vital a difference, that it cannot be properly said that it was copied. * * * And indeed, there seems to be a strong presumption that, borrowing the language of the New York statute, the legislature of this State took it in a sense of its own, different from the sense in which it seems to have been used in New York. * * * This is an additional reason why we should not follow the construction of the New York courts, if, in our view we can find a different construction, satisfactory to us, and more harmonious with the legislative purpose in the distribution of the crime into degrees.¹²³

Having pointed out the intrinsic difficulties of his task of construing the Wisconsin statute, the judge decided that the words "premeditated design to effect death" in the definitions of murder in the first and second degrees signified merely an intent to kill and did not exclude a sudden intent. This result, of course, defeated any humanitarian intention that the Wisconsin legislature might have had in enacting the statute. That the New York legislators did in fact have such a purpose was admitted by the Wisconsin court itself. But the court simply took the attitude that the Wisconsin statute was poorly drafted and did not express that intention, and that such an interpretation as given was justified accordingly.¹²⁴

120. *Rowan v. State* (1872) 30 Wis. 129, 11 Am. Rep. 559.

121. Wis. Rev. Stats. (1849) c. 164, sec. 2.

122. (1874) 36 Wis. 226.

123. 36 Wis. at 240-241.

124. A frontal attack on the logic of the Wisconsin court here is contained in the opinion of Hocker, J., in *Cook v. State* (1903) 46 Fla. 20, 35 So. 665. Quoting: "Undoubtedly the 'design' mentioned in all the sections

Hogan v. State was cited to justify the approval of the following charge to the jury in *Roman v. State*:

No matter what the provocation; no matter what the heat of passion, no matter if there were any previous assaults; no matter what the other surrounding circumstances may have been: unless the act was justifiable, if there was a premeditated design to produce death, it is murder in the first degree.¹²⁵

The court saw no error in this charge, it being clear from the whole that by the provocation and heat of passion here spoken of were meant such as were not incompatible with the formation in the mind of the accused of a deliberate premeditated design to kill. This charge hits a new low in realism. There is an utter disregard for any subjective factors that well up naturally out of passion and provocation to becloud the mind in its functions.

In *Clifford v. State*¹²⁶ the court, saying in one breath that "A premeditated killing is murder in the first degree and can be nothing else, because it implies the lying in wait, and malice aforethought, and settled design," in the other indorsed a charge to the effect that "the wilful intent, premeditation or deliberation need not exist for any particular length of time before the crime is committed." And when we stop to examine the facts in the case, the inconsistency becomes even more marked. Defendant and deceased had quarreled in the lobby of a hotel over

of the statute is 'premeditated design' and where 'design' is used without the qualifying word 'premeditated' that word is understood. Any other construction would make a senseless jumble of the statute. But if the 'design' mentioned in all sections of the statute is 'premeditated design,' how, in the name of reason, does it follow that it can in any section, and especially in the one defining murder in the first degree, be anything less than 'premeditated design'? And yet that is the plain doctrine of the opinion of *Hogan v. State*. In other words, when under a rhetorical figure a part is used to signify the whole, then the whole only means what a part of the whole means. And it is by this reasoning that the phrase 'premeditated design' was emasculated, so as to mean only design, or intent, without qualification. It is impossible for us, try as we may, to gain the consent of our judgement to such reasoning or its consequences. We believe it to be an unqualified violation of the essential laws of deduction. For a whole is always equal to, and never less than the sum of its parts; and conversely a part is never equal to a whole, though under the rhetorical figure of synecdoche, a part may be put for the whole, or the whole for a part, and when so used a part always signifies the whole and no less than the whole." 35 So. at 674-675.

125. (1877) 41 Wis. 312, 314.

126. (1883) 58 Wis. 477, 486, 17 N. W. 304.

a gambling debt. Defendant under considerable excitement started upstairs to bed. Deceased followed him and insisted on his returning and settling the debt. A friend intervened. Defendant drew a pistol, fired twice into the floor, and then, when deceased grappled with him, fired the fatal shots. To speak in terms of "lying in wait" under such facts is to forget and pervert the ancient and accepted meaning of that term.

An attempt to break away from the doctrine of the *Hogan* case in *Terrill v. State*¹²⁷ drew a sharp dissent. The killing here arose out of a continuous and hectic physical struggle between several men in a bar room, following upon a night of drinking and quarreling. When the fight reached a climax, deceased attacked defendant, who had asked deceased before not to hit him; and defendant, being no match physically, drew a revolver and shot deceased. The trial court charged the jury, in part, that

if you are convinced * * * that when [defendant] shot * * * he did so pursuant to an *intent then distinctly formed* in his mind to kill * * *, you cannot lawfully find defendant guilty of manslaughter in the second degree; for the defendant, in such a case if he killed from a *premeditated design* to kill, is guilty of murder in the first degree.¹²⁸

The supreme court, in language which they said was not contrary to *Hogan v. State*, held that the charge was erroneous in that it failed to distinguish between the intentional and unnecessary killing under the statutes and a killing perpetrated by premeditated design to effect the death of the person killed. The dissenting judge, a perfect personification of arch-objectivity in the law, declared:

If there is any branch of the law where the doctrine of *stare decisis* should be more rigidly maintained than any other, it is in respect to criminal law, and particularly in regard to the law of criminal homicide. To carefully and effectually distinguish between the different degrees of felonious homicide is at best not free from difficulty, and certainly such difficulty should not be increased by new distinctions, having the effect to overrule or cast doubt upon the settled law as it has heretofore been understood in this state for a quarter of a century, and in New York, from whence our statutes, prescribing the degrees of felonious homicide were adopted.¹²⁹

127. (1897) 95 Wis. 276, 287, 70 N. W. 356.

128. 70 N. W. at 360 (italics supplied).

129. *Id.* at 361.

Such reasoning epitomizes the view that spells backwardness in the law. It forbids a departure from traditional cases even though manifestly wrong and fails to see in human psychology any elements that will respond to the whip of passion and provocation so as to distort the normal mental processes. It is against this very type of reasoning that this paper inveighs. As to abrogating the rule of *stare decisis* in criminal cases, reference might be made, *inter alia*, to Bishop, who deplores the fact that some courts have mutilated the statutory definition of homicide by construction and vigorously contends that such decisions should not be regarded as *stare decisis*.¹³⁰

The same result as that of the *Terrill* case was reached in *Sullivan v. State*.¹³¹ The valiant stand of the Wisconsin court to liberalize the law, however, was doomed to fail. The forces that molded the law in Florida, New York, Washington, and Minnesota had "put their finger" on the rule of the *Terrill* and *Sullivan* cases and grievously wounded it in the dissenting opinions to those cases. The court as a whole fired what it deemed to be the *coup de grace* in *Perugi v. State*,¹³² one year later. The official reporter thus summarized the result:

Every homicide, not justifiable or excusable, perpetrated in pursuance of a previous intention to kill distinctly formed in the slayer's mind, is murder in the first degree, even though the killing follows instantly the formation of such intention. *Terrill v. State*, 95 Wis. 276, and *Sullivan v. State*, 100 Wis. 283, insofar as they conflict with this doctrine, are expressly overruled.¹³³

Here again the court relied upon New York decisions but was careful to cite only those in its favor. Under the spell of the resuscitated rule of the *Perugi* case, the court found no difficulty in holding in *Miller v. State*,¹³⁴ in the words of the syllabus, that:

In a prosecution for murder, uncontradicted evidence that during a quarrel between the deceased and the defendant, the latter was pushed down stairs, [he had been beaten with a hammer also by deceased] and that he immediately went around the house, procured an ax, returned with it to the second story, and struck deceased, inflicting a mortal wound,

130. Bishop, *Criminal Procedure* (3d ed. 1880) secs. 571 to 587.

131. (1898) 100 Wis. 283, 75 N. W. 956, Marshall, J., again dissenting.

132. (1899) 104 Wis. 230, 80 N. W. 593.

133. 104 Wis. at 231.

134. (1900) 106 Wis. 156, 81 N. W. 1020.

shows ample time and opportunity for the formation of the premeditated design to kill, which is necessary to murder in the first degree.¹³⁵

So far as can be ascertained, the rule of the *Hogan*, *Perugi*, and *Miller* cases is the rule in Wisconsin today.¹³⁶ Only twice—in the *Terrill* and *Sullivan* cases—were there attempts by the Wisconsin court to rise above its own source, New York, in the matter of judicial realism, and these were so feeble that the first puff of dissent blew them to high heaven.

F. *A Bird's-Eye View of the Rule in Other States.* The question must have arisen in the mind of the reader as to whether the problem we are exploring is common only to those states that have homicide statutes patterned after the New York laws. To jump directly to the answer, it may be briefly stated that the problem, so far as the cases investigated reveal, rears its head in every state, no matter what the nature or type of the positive laws regarding murder may be. There are, to be sure, differences in the degree to which courts hew to the line of objectivity and orthodoxy relative to such cases. And there are frequent examples, such as we have cited above, where dissenting judges have seen the light, or where the court as a whole has been forced to face the opposition stubbornly with its back to the wall. But by and large the doctrine has taken universal root and persisted in its unrealistic growth.¹³⁷ A bird's-eye view of the rule in other states may be gained by examining a few sample cases.

Missouri statutes, after the manner of Pennsylvania, define murder in the first degree as "willful, deliberate and premeditated killing."¹³⁸ Under this statute Missouri courts have held that "if the slayer had time to think * * * for a minute as well as an hour or a day, it is deliberate, willful and premeditated;"¹³⁹ it is sufficient to constitute the crime if willfulness and deliberation are proven, though they arose and were generated at the period of the transaction,¹⁴⁰ "premeditatedly" means thought of

135. 106 Wis. at 156-157.

136. See *Hedger v. State* (1911) 144 Wis. 279, 128 N. W. 80; *Zingler v. State* (1911) 146 Wis. 531, 131 N. W. 837; *Radej v. State* (1913) 152 Wis. 503, 140 N. W. 21.

137. For comprehensive notes on scattered cases see Notes (1880) 18 Am. Dec. 782; (1905) 7 L. R. A. (N. S.) 1056.

138. R. S. Mo. (1929) secs. 3982, 3983.

139. *State v. Dunn* (1853) 18 Mo. 419; *State v. Holme* (1873) 54 Mo. 153.

140. *State v. Starr* (1866) 38 Mo. 270.

beforehand any time however short,¹⁴¹ the court finding no error in the absence of the word "length" between "any" and "time" in the instruction; "deliberately" does not mean brooded over, considered, reflected upon for a week, a day, or an hour, but it means an intent to kill executed by a party, not under the influence of violent passion suddenly aroused by some provocation, but in the furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose.¹⁴² *State v. Young*¹⁴³ brings all these approved charges down to date into our era of profound judicial realism. It is evident, therefore, that Missouri is no more progressive than the states having the New York type statutes.

A backward-looking glance at Georgia's cases in point reveals that in 1909 its Supreme Court indorsed a charge reading:

It is not necessary for intention to exist for any length of time before the killing. In legal contemplation, a man may form the intention to kill, do the killing instantly, and regret the deed as soon as it is done. * * * Malice lives in the gleam of the blade, and in the flash of the pistol; it has not to exist for any greater length of time than that.¹⁴⁴

The last sentence of the charge was thought to be a bit too figurative but was nevertheless approved. In 1887 the court declared (and this example is the acme of unreality) that "a mind swayed by sudden impulse of passion, especially when inflamed also by whiskey, may resolve, execute and repent almost in the same moment. A man may form an intent to kill, do the killing instantly, and regret the deed as soon as done."¹⁴⁵ At the half century mark the court found that in the absence of provocation to rise up, draw a pistol, and in one moment discharge its contents, the intention to shoot at the very moment of firing would amount to a deliberate intention to kill.¹⁴⁶ No matter in which

141. *State v. Landgraf* (1888) 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26.

142. *State v. Fairlamb* (1893) 121 Mo. 137, 25 S. W. 895, citing *State v. Wieners* (1877) 66 Mo. 13; *State v. Avery* (1892) 113 Mo. 475, 21 S. W. 193; *State v. Andrew* (1882) 76 Mo. 101; *State v. Ellis* (1881) 74 Mo. 207, 219.

143. (1926) 314 Mo. 612, 286 S. W. 29.

144. *Leonard v. State* (1909) 133 Ga. 435, 66 S. E. 251; see also *Mills v. State* (1909) 135 Ga. 155, 65 S. E. 368.

145. *Weeks v. State* (1886) 79 Ga. 36, 3 S. E. 323, 325. See also *Bailey v. State* (1883) 70 Ga. 617.

146. *Mitchum v. State* (1852) 11 Ga. 615; and see *Roberts v. State* (1847) 3 Ga. 310, 325.

sequence the investigator examines the cases, from beginning to end, or from end to beginning, the result is the same.

Taking a sweeping view of cases wherein the courts have held that deliberation and premeditation as well for a moment as for a week or a year will render an intentional killing murder in the first degree, we find that this variation of the time doctrine prevails in at least fifteen States.¹⁴⁷ Nevada courts have held that the question is not how long did the prisoner deliberate before giving the fatal stroke, but did he deliberate at all.¹⁴⁸ California allows intent and act to follow "as instantaneous as successive thoughts of the mind" and holds that no appreciable time between the formation of the intent and the act need be shown.¹⁴⁹ Arkansas holds that mature reflection and deliberation upon the act of killing are not necessary; there must be deliberation, premeditation, and a formed design to kill, but if they exist, it matters not how short the time before the killing, it is murder in the first degree.¹⁵⁰ Alabama is on record to the effect that deliberate and premeditated as used in the statute, mean only this: "that the slayer must intend, before the blow is delivered, though it be only an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow; or, in other words, if the slayer had any time to think before the act, however short such time may have been, even a single moment, and did think, and he struck the blow as a result of intention to kill, produced by this even momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing."¹⁵¹ Illinois' high court found sufficient time in "a short space in which to form the deliberate purpose."¹⁵² Colorado requires no particular time;¹⁵³ and Idaho, no appreciable length of time.¹⁵⁴ Montana holds that the intent may be formed a mo-

147. See cases cited Note (1880) 18 Am. Dec. 783.

148. *State v. Ah Mook* (1877) 12 Nev. 369.

149. *People v. Sanchez* (1864) 24 Cal. 17, 30; *People v. Cotta* (1874) 49 Cal. 166; *People v. Fleming* (1933) 218 Cal. 300, 23 P. (2d) 28; *People v. Garcia* (1935) 2 Cal. (2d) 673, 42 P. (2d) 1013.

150. *McAdams v. State* (1869) 25 Ark. 405.

151. *Daughdrill v. State* (1896) 113 Ala. 7, 32, 21 So. 378.

152. *Peri v. People* (1872) 65 Ill. 17, 23; see also *People v. Newman* (1935) 360 Ill. 226, 195 N. E. 645.

153. *People v. Maestas* (1932) 91 Colo. 36, 11 P. (2d) 227.

154. *State v. Wilson* (1925) 41 Idaho 616, 634, 243 Pac. 359.

ment before the act;¹⁵⁵ and Oklahoma declares that intent may be formed instantly preceding homicide.¹⁵⁶

In the following cases, although the length of the period elapsing between the formation and consummation of the intent to kill as measured by the time required for the intervening acts and occurrences, which presumably followed in rapid sequence, was very brief, it was held sufficient to show premeditation and deliberation essential to murder in the first degree: Where defendant, after fancied provocation, put on his shoes, arose, stepped back about two steps, drew his pistol, and shot deceased;¹⁵⁷ where deceased, after having attacked defendant with an ax but failing to strike him, walked away, and, when about sixty feet from defendant, the latter stealthily approached, and, seizing the ax, slew him;¹⁵⁸ where defendant, after picking up a gun, immediately went down a stairway and shot deceased, it being assumed that the intent to kill was formed after taking up the gun;¹⁵⁹ where defendant, upon seeing deceased, a stranger, walking with his wife, approached and, after some words, stabbed him;¹⁶⁰ where defendant, after receiving the provocation, drew a revolver from his pocket with his left hand, transferred it to his right hand behind his back, and shot deceased;¹⁶¹ where defendant, having been ordered off an engine, and having reached the ground, asked the engineer to hold a light so that he could find his hat, and, while the engineer was complying with the request, shot him;¹⁶² where defendant, a patient in a hospital, after receiving fancied provocation from a nurse, borrowed a knife from another patient, the latter opening it at his request, and rapidly followed the nurse and inflicted a fatal wound upon her, although but ten or twenty seconds elapsed between the first intimation of his purpose and the infliction of the fatal wound;¹⁶³ where defendant, having made an assault with a heavy cane upon deceased, and the cane having been taken away by bystanders, followed the deceased, who was retreating, and, drawing a pistol,

155. *State v. Cates* (1934) 97 Mont. 173, 33 P. (2d) 578.

156. *Basham v. State* (1930) 47 Okla. Cr. 204, 287 Pac. 761, 763.

157. *McKenzie v. State* (1870) 26 Ark. 334.

158. *King v. State* (1901) 68 Ark. 572, 60 S. W. 951, 82 Am. St. Rep. 307.

159. *Dixon v. State* (1900) 128 Ala. 54, 29 So. 623.

160. *State v. Peffers* (1890) 80 Iowa 580, 46 N. W. 662.

161. *State v. Daniel* (1905) 139 N. C. 549, 51 S. E. 858.

162. *State v. Dowden* (1896) 118 N. C. 1145, 24 S. E. 722.

163. *Commonwealth v. Buccieri* (1893) 153 Pa. 535, 26 Atl. 228.

shot him;¹⁶⁴ where defendant, who was intoxicated, broke down a door, and dragged deceased from his house, and struck him in several places with a club;¹⁶⁵ where defendant, having been engaged in a dispute with deceased and been knocked down by him, turned, arose, walked toward deceased, then turned and walked back, finally, turning again with his hand behind him, came up to deceased, and stabbed him with a knife he had concealed in his hand;¹⁶⁶ where, a dispute having arisen between defendant and others riding in a wagon which resulted in a scuffle, the defendant, after saying, "Let's quit," jumped from the wagon, taking with him a bundle, from which he drew a pistol, and shot deceased.¹⁶⁷

And thus we could go on, extending the foregoing list *ad nauseam*, but no useful purpose would be served thereby. Before closing this chapter, however, let us see how the federal courts have construed the law in the relatively few cases that have come before them relating to the time element.

G. *The Federal Courts Speak.* Although the crime of murder is not known as such to the Federal Government, except in places over which it may exercise exclusive jurisdiction,¹⁶⁸ a number of cases have reached the federal courts involving the time element.

The Supreme Court is on record to the effect that the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but it may spring up at the instant and may be inferred from the fact of killing.¹⁶⁹ Strangely, in this case, the high court took note of the fact that there were some states that required proof of deliberate premeditation and cited as evidence of this contention *People v. Clark*, the New York case that overthrew the high-minded intention of the New York legislature to force a consideration of the time element. So even the Supreme Court of the United States has become entangled in the web of confusion that enmeshes the doctrine and is not above a one-sided approach to the question.

164. *State v. Dennison* (1892) 44 La. Ann. 135, 10 So. 599.

165. *Commonwealth v. McFall* (Pa. 1794) Addison 255.

166. *Commonwealth v. Morrison* (1899) 193 Pa. 613, 44 Atl. 913.

167. *People v. Calton* (1888) 5 Utah 451, rev'd on other grounds (1889) 130 U. S. 83.

168. See *Pettit v. Walsh* (1904) 194 U. S. 205.

169. *Allen v. United States* (1896) 164 U. S. 492.

When one considers the instructions that had been given to the jury in the foregoing federal cases and the indorsement of them by the Supreme Court, the hopelessness of any judicial amelioration of the problem, so far as the high court is concerned, if it follows its own unrealistic precedent, is intensified. Add to this the rule announced by a lower federal court in a more recent decision,¹⁷⁰ to the effect that "deliberation and premeditation may be instantaneous," and you have a placement of the federal courts with respect to the problem, side by side with the state courts.

III. FIVE POSSIBLE SOLUTIONS

Having demonstrated the unreality of the present approach to the problem by reference to factual situations, it now behooves us at least to indicate a number of possible solutions. This we do in utmost humility, fully cognizant of the difficult nature of the task and the inadequacy of any solution from certain points of view. It is one thing to point out a problem and quite another to solve it. But then, this may be a matter into which academic "fools" *should* walk, inasmuch as it seems that judicial "angels" fear to enter.

A. Reformation of the Judicial Attitude. The first solution suggests itself and is one that has by implication protruded from these pages like the well-known sore thumb. It is to develop by a process of education, by public opinion, by more careful appointive or elective attention to the type of minds that occupy the bench, by prayer, or by legerdemain, a new and thoroughly modern attitude on the part of the courts toward the problem.

The step needed is for the legal order to confess that the idea of pigeon-holing states of mind in applying the murder doctrine is a product of a bygone age, before there was any subjective scientific exploration of the thinking process, when judge and jury, legislator and lawyer assumed, no less than the theologian, to know the inner workings of the mind under the stress of any time or tide on the basis of objective reasoning and circumstantial evidence; and that this ancient view is not consistent with the knowledge we have today of mental phenomena in particular, however limited that knowledge may be, and of crime causation factors in general. Even a cursory examination of the trend of

170. Aldridge v. United States (1931) 60 App. D. C. 45, 46, 47 F. (2d) 407, rev'd on other grounds (1931) 283 U. S. 308.

modern scientific thought will reveal that "the *a priori* philosophical and theological dogmas long customary in * * * sciences other than law are gradually surrendering to inductions, hypotheses, and 'laws,' which take accurately observed factual data as their points of departure. So also a shift in emphasis has recently been occurring in jurisprudence—a reorientation from 'immutable principles' (so often prejudiced preconceptions, or what Freudians call 'wishful thinking'), as axioms for legal reasoning, to critical examination of the living stuff of litigation."¹⁷¹

There are many references to which courts may turn in making their *modus operandi* more subjective.¹⁷² The up-to-date criminal court, for instance, should be conversant with psychology. No matter what brand of psychology is espoused by such courts, findings based thereon will justify the subjective approach. Of course, this "science," in common with the law, has its champions of theories, but whether a given court accepts behaviorism or determinism, Freudian psychology, the instinct theory, or doctrines relating to reflex action or emotion in considering the abstractions of intent or the length of time that choice, reflection, or selection take with respect to particular cases, the net result will be the same—all of these "brands" of psychology tend to confirm the validity of the subjective approach. For instance, it is rather definitely shown by modern psychology that choice or intent may be influenced by a "slight discoordination between the aim con-

171. Sheldon Glueck, *The Social Sciences and the Scientific Method in the Administration of Justice* (1933) 167 *Annals* 108; see also Cantor, *Law and the Social Sciences* (1933) 16 *A. B. A. J.* 385; Pound, *The Call for a Realist Jurisprudence* (1931) 44 *Harv. L. Rev.* 697.

172. See, e. g., Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 *Col. L. Rev.* 431; Llewellyn, *Some Realism about Realism* (1931) 44 *Harv. L. Rev.* 1222; Frank, *Law and the Modern Mind* (1930); Simpson, *Book Review* (1936) 49 *Harv. L. Rev.* 666; Mechem, *The Jurisprudence of Despair* (1936) 21 *Iowa L. Rev.* 669; see also Fuller, *American Legal Realism* (1934) 82 *U. of Pa. L. Rev.* 429; Kennedy, *Principles or Facts* (1935) 4 *Fordham L. Rev.* 53; Sheldon Glueck, *A Tentative Program of Cooperation Between Psychiatrists and Lawyers* (1925) 9 *Ment. Hyg.* 686; Cantor, *Law and the Social Sciences* (1930) 16 *A. B. A. J.* 385; Sheldon Glueck, *The Social Sciences and Scientific Method in the Administration of Justice* (1933) 167 *Annals* 108; Sheldon Glueck, *Crime and Justice* (1936); Smith, *The Psychology of the Criminal* (1923); Brasol, *The Elements of Crime* (1931) 45; Watson, *Psychology from a Standpoint of a Behaviorist* (2d ed. 1924); Goodwin, *Insanity and the Criminal* (1924) 81; McConnell, *Criminal Responsibility* (1912); Shaffer, *The Psychology of Adjustment* (1936) 1; Jung, *Collected Papers* (2d ed. 1920) 397; Bjerre, *The Psychology of Murder* (1927) 7, 8, 9.

ceived and the physical mode of its execution";¹⁷³ by a disintegration of the will mechanism,¹⁷⁴ by a mild form of neurasthenia or primary fatigue,¹⁷⁵ by hysteria, by emotion, or by any one of a hundred mental states that fall short of a legal definition of insanity;¹⁷⁶ by the endocrine system, "which may reduce the individual ability to remember, to discriminate, and to plan";¹⁷⁷ by heredity, by anxiety or worry, or by myriad other nervous conditions; by hunger; by fear; by drunkenness; by "difficulties of adjustment and errors in habit formation";¹⁷⁸ by environmental frustrations; by ethnic factors; by personality traits; and, in short, by all the normal and abnormal, subnormal and super-normal, factors and strange, perhaps little understood, nuances of psychic difference which make man what he is and compel him to be what he ought not to be.

Accredited schools have been offering well patronized courses in psychology and its sister sciences for many years. Habit clinics, juvenile courts, probation offices, penitentiaries, asylums, delinquency clinics, employment agencies, and various other institutions throughout the land utilize the services of trained psychologists. It is safe to assert that this science is much more developed than was medical science when the courts first began to rely on its expert testimony and guidance in criminal cases. Why then is the law so loath to make changes in its substantive and procedural structure based on the psychological facts at hand? Of course, lawyers and courts can always blame the legislatures for tying their hands with short-sighted statutory laws, and this may be a partial explanation of the confusion that exists.

173. Brasol, *The Elements of Crime* (1931) 336.

174. *Ibid.*

175. See Shaffer, *The Psychology of Adjustment* (1936), especially the chapters on emotion and hysteria.

176. East, *Forensic Psychiatry* (1927) 86: "From the point of view of public safety certain high grade defectives may be more dangerous than the insane, as their mental condition may be more elusive to the uninitiated. They may be more dangerous than the professional criminal * * * and the blind impulsive acts which are sometimes committed by defectives may injure the law abiding citizen who has no opportunity of self-protection from attack by one who may appear normal to him."

177. Shaffer, *op. cit. supra*, note 175, c. XII.

178. Shaffer, *op. cit. supra*, note 175, at 167: "It is probable that all delinquency and even adult crime has its origins in difficulties of adjustment and errors of habit formation. Popular opinion, however, is slow in accepting an objective attitude toward these problems, clinging to a belief in the individual's free will choice of right or wrong conduct."

But it is only a *partial* explanation, and the writer has digressed here to recognize that fact.

A battalion of great thinkers could be marshalled to support these views.¹⁷⁹ In the annals of modern legal literature, save for the pronouncements of writers and jurists "hogtied" by *stare decisis* and overly inflexible rules of the court, it would be difficult to find an advocate of any less liberal philosophy. But the appalling fact is that all the turmoil and the shouting of this vanguard of the law have had little effect in reforming the criminal law in general or the law of homicide in particular.

Homicide law is struggling from within to shake off the inconsistent growths of old creeds, but with little help from the outside. It is a hopeful sign, however, that jurists, in increasing tempo and number, are concerning themselves with "law in action" as a fit supplement for "law in books." This is being accomplished by reference to the cognate fields of economics, anthropology, sociology, and psychology; and although this concept of law is yet in its infancy, it is drawing invigorating sustenance from those allied sciences.

B. Return to Literal Meanings. A second possible solution is to force a return to the literal meanings of such words as "premeditation," "deliberation," *et cetera*. Early courts employed these terms according to their ordinary definitions,¹⁸⁰ and there has been a disposition on the part of many courts of the present judicial era to recognize the validity of such natural procedure.

Paradoxically, homicide law can, therefore, move forward by looking backward. By returning for guidance to the era of literal meanings for the words with which we are concerned, we can arrive at a more rational and realistic result in our treatment of spur-of-the-moment intent cases.

C. Revision of Substantive Definitions. The third, and perhaps most acceptable approach to the problem, *if it can be worked out*, is the solution suggested by Mr. Justice Cardozo when he invited the students of the mind to say whether the distinction in the New York statutes relating to first and second degree murder

179. A reference to such a list is Professor S. P. Simpson's *Outline for Jurisprudence Seminar* (1937-1938, Harvard Law School) pp. 4-11.

180. On this point see Levitt, *The Origin of the Doctrine of Mens Rea* (1922) 17 Ill. L. Rev. 117; Sayre, *Mens Rea* (1932) 45 Harv. L. Rev. 974; Perkins, *A Re-examination of Malice Aforethought* (1934) 43 Yale L. J. 537.

had "such substance and soundness that it should be permitted to survive"—that is, to revise the substantive definition of the crime of murder.

As to this proposal the Law Revision Commission of New York insists in its *Communication* that:

Whatever the solution, the remedial statute must in some manner attempt to specify a test for selecting capital cases with reference to the mentality and character of the defendant. The undeveloped state of psychological science increases the difficulty of the task immeasurably, for, to a large extent, the problem is one of proper terminology, and this need might have been easily satisfied, were scientific knowledge in this field more highly developed. Nevertheless, the law need not be thwarted in its desire for more adequate definition. A closer proximation to the end desired may be achieved, as long as the goal is clearly understood.¹⁸¹

True, such great criminal lawyers as Wharton are more pessimistic than this, with respect to a satisfactory solution through revision of the statutes, insisting that "if the sagacity of our jurists working on this important topic for so long a series of years has been unable to construct a terse, satisfactory definition of murder, this is because such a definition cannot, from the nature of the thing to be defined, be constructed."¹⁸²

In the light of what has been said with respect to the unreality of thinking through this problem in terms of words only, instead of in terms of what is known or reasonably inferred by and from accredited sciences of the mind, and in the light of the assertion, which we have seen developed in fact, that jurists twist and redefine mere words to conform to their personal predilections, it would seem that the problem is larger than merely one of proper terminology; and that although revision of the statutes undoubtedly would be a great step in the desired direction, this step alone will not suffice.

Stephen¹⁸³ insists that any new substantive definition of the crime of murder must remain merely an approximation. The truth of such a declaration is evident when we stop to consider the possibility of cases arising which technically fall under the first degree definition but which actually concern persons whose

181. *Communication*, p. 88 et seq.

182. 1 Wharton, *Criminal Procedure* (1918) sec. 420. And see Judge Carter's opinion in *Cook v. State* (1903) 46 Fla. 20, 77, 35 So. 665.

183. 3 Stephen, *History of Criminal Law of England* (1883) 85.

characters do not warrant comprehension within a definition that makes their offense a capital one. We have already seen that despite the wide variation in the statutes, when the different state courts are faced with the problem, they resolve it in much the same manner. Whether the statute involved is based upon common-law terminology, or is of the New York type or the Pennsylvania type, or is a combination of these three forms (which classification is said roughly to categorize all jurisdictional statutory provisions¹⁸⁴), the general result of the cases is the same. That this may not be the fault of the lawmakers but of the judges we have also seen.

Texas tried to solve the problem by leaving first degree murder undefined except in a sort of residuary definition. But this approach only defers the problems of definition to second degree murder and also leads to a revival of the common law rules. In addition, problems of great difficulty in other respects have been created by this different statutory attack on the problem in Texas.¹⁸⁵

Draftsmen of a proposed penal code for Germany prior to the present regime made a proposal similar to the statutes of Texas, reversing the process followed in New York by describing the lesser degree of murder and including murder in the first degree in the residuary definition. In favor of this approach it can be said only that instead of attempting a description of a state of mind, it merely requires enumeration of extenuating circumstances more easily ascertainable objectively.

Of all the current statutory or code provisions in point examined by the author, the pertinent section of the Oregon Code seems least capable of misinterpretation by the courts. It reads:

There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion.¹⁸⁶

184. See *Communication*, p. 89; compare Michael and Weschler, *A Rationale of the Law of Homicide* (1927) 27 Col. L. Rev. 702.

185. See Raymond, *Criminal Law—What Constitutes Murder in Texas* (1930) 8 Tex. L. Rev. 391; Comment (1930) 9 Tex. L. Rev. 118.

186. Ore. Code Ann. (1930) sec. 14-214.

No cases involving the time element were discovered under this statute. It is not possible, therefore, to draw any conclusions from the manner in which the statute is working out in practice.

The so-called "functional approach" to the problem is illustrated by the Philippine Penal Code of 1932¹⁸⁷ and by a proposal of Edward Livingston made in 1873.¹⁸⁸ Such an approach relies on a rather full description of the "attendant circumstances" under which murder may be committed. The weakness of these examples is that the first makes "with evident premeditation" one of the attendant circumstances and the latter includes within its substantive definition the words "premeditated design," both of which expressions we have shown to be easily capable of judicial distortion.

There have been other proposals made for a revision of homicide statutes of particular jurisdictions that are worthy of passing notice. The Illinois State Bar Association and the Judicial Advisory Committee of Cook County, for instance, submitted a Draft Code of Criminal Law and Procedure in 1935, based essentially on common law terminology, Section 18 of which reads:

Murder. (a) Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. [The unlawful killing may be] perpetrated [by poisoning, striking, starving, drowning, stabbing, shooting or] by [other] of the [various forms or] means by which human [nature] life may be overcome and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Pennsylvania's proposed code draftsmen, on the other hand, reverted to the type of statute employed by New York in 1860¹⁸⁹ in their offering.¹⁹⁰

With this brief resume of existing statutes and proposed changes, we have seemingly run the gamut of contemporaneous solution possibilities through the medium of positive law. There

187. For full text of the Philippine code provisions, see *Communication*, p. 91.

188. 2 Livingston, *Complete Works of Edward Livingston on Criminal Jurisprudence* (1873) 147.

189. See text material supported by notes 26, 27, *supra*.

190. Draft Code of Criminal Law of Pennsylvania (1924) sec. 142, drafted by Commissioners appointed to revise the Pennsylvania Penal Code.

is in the light thereof no doubt opportunity for another Bentham, Field, or Livingston to give the law the benefit of a yet other definition framed according to the letter of analytical jurisprudence but vitalized by a modern sociological spirit.

D. *Revision of Punishment Provisions.* A fourth possible solution is to allow the substantive definition provisions of the various statutes relating to murder to remain as they are for courts to contend with and merely to revise the punishment provisions of the statutes. New York is about to be driven to this extremity. After seeing its courts torture the intention of the legislators on several previous occasions when they have focused their humanitarian motives on a substantive statutory distinction between first and second degree murder, recent sessions of the New York legislature have considered several bills introduced for the purpose of amending the statutory provision relating to punishment of premeditated and deliberate murders. The proposed legislation, for the most part, is designed either to eliminate the death penalty entirely¹⁹¹ or to leave with the jury the discretion of invoking it and substituting therefor varying terms of imprisonment. The obvious purpose of these bills is to accomplish indirectly what the New York legislature has not been able to accomplish directly, namely, to force recognition of the fact that although some murders have all of the technical aspects of first degree crimes, morally they may be miles removed and that punishment should be meted out accordingly. Whether leaving the matter in the hands of a jury will work out this desired result is a question that is open to grave doubt.

Some far-sighted state, sooner or later, is going to take the sentencing function out of the hands of the judge or the jury entirely and vest it in a board of experts, which may or may not be an adjunct of the court. This board—which may include a psychologist or psychiatrist, a judge or lawyer, and a sociologist

191. With respect to the elimination of the death penalty as a solution, the *Communication* has this to say at p. 88: "It need merely be reiterated here that the class of individuals which a first degree murder definition should seek to encompass are those who, as the result of a reasoned selection, chose homicide as the means of achieving their end, whether that be pecuniary gain, solution of marital difficulty, or vengeful satisfaction. It is against the danger created by such persons that the murder sanction is directed. If there is any deterrent force in capital penalty, it will be felt only by those who have time to think and reason, and *do* think and reason. The threat of the death penalty is an appeal to reason, the very faculty that will contemplate the commission of murder."

—will look not to the crime alone, but upon the criminal as a human being and not as the object of a capriciously applied law, and sentence him accordingly. This will be the millennium of the subjective approach. Until the day comes, if we can't successfully revise the definition of the crime of murder, so as to give it a more subjective aspect, we can at least "make the punishment fit the crime."¹⁹²

E. Standardization of State Homicide Laws. A fifth possible solution, which is rather but an extension of the third or fourth, is to standardize murder laws among the several states, either by a slow process of interstate cooperation, through the unifying influence of a restatement of homicide law, or by means of uniform federal homicide legislation, which of course would require a constitutional amendment. If the several states continue to be divided in their statutory approach to the solution, unless one or more of them can happily hit upon a rule that will seize the fancy and meet the requirements of all, sooner or later there will be an even wider divergence of judicial decision that will lead to greater confusion than now exists. On the other hand, if the states continue to follow blindly in the path of a chosen leader, as Wisconsin, Florida, Washington, and Minnesota have followed New York, the law will remain static and confused. From either one of these viewpoints, and from others that could be mentioned, there is much to be said in favor of a move toward national uniformity of homicide laws.

These solutions by no means exhaust the possibilities. Others will no doubt occur to every student of the problem. The real grandeur of the law is always potential. The law always has in its own fertile soil the seeds of progress and reform. We cannot hope for reform overnight. But in the meantime if we rest assured that eternal justice has come into full bloom under the sole aegis of our knowledge and experience from out of the past, we deceive ourselves. We must not place full faith and credit in institutions which have no better credentials than their past. The time is ripe for a complete reexamination and restatement of the criminal law in the light of modern knowledge and legitimate

192. The *Communication* suggests that a combined revision of the substantive definition of the crime and the punishment provisions might be worked out. Presumably, such a solution would proceed along the same lines as we have indicated with respect to either.

scientific speculation, and of no branch of the criminal law is this more cogently true than that narrow and yet important branch which deals with the trying and taking of men's lives for their having taken other men's lives.