

1953

The Impulsive Murder and the Degree Device

Frank Brenner

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Frank Brenner, *The Impulsive Murder and the Degree Device*, 22 Fordham L. Rev. 274 (1953).
Available at: <https://ir.lawnet.fordham.edu/flr/vol22/iss3/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Impulsive Murder and the Degree Device

Cover Page Footnote

Assistant District Attorney, New York County, New York.

THE IMPULSIVE MURDER AND THE DEGREE DEVICE

FRANK BRENNER†

THE first statute to divide the crime of murder into degrees, enacted in Pennsylvania in 1794,¹ was soon followed by like legislation in thirty-seven states and the District of Columbia,² so that today murder-grading in the United States is a device which has about it the aura of inertia associated with a matter, for better or worse, long settled. That is not to say, however, that the passing of time has foreclosed consideration of the merits of murder-grading. Rather, it would seem that it has provided us with sufficient perspective for a present reappraisal of our past position in that regard. With that thought in mind, it is the purpose of this paper to ascertain and examine the considerations which were responsible for the infusion of the degree device into the American law of homicide; to evaluate in the light of more than a century of experience the degree of success or failure which the legislation has attained; and, finally, to examine the degree device on the merits and to then suggest whether, as an original proposition, it should be adopted today by the ten American states which do not employ it,³ as well as by England, which likewise does not. In so doing, attention will be paid only to

† Assistant District Attorney, New York County, New York.

1. Pa. Laws 1794, c. 257, §§ 1, 2.

2. Ala. Code Ann. tit. 14, § 314 (1940); Ariz. Code Ann. § 43-2902 (1939); Ark. Stat. Ann. tit. 41, §§ 2205, 2206 (1947); Cal. Pen. Code § 189 (1949); Colo. Stat. Ann. c. 48, § 32 (1935); Conn. Rev. Gen. Stat. c. 417, § 8350 (1949); Del. Rev. Code c. 149, §§ 5157, 5158 (1935); D.C. Code §§ 22-2401 to 22-2403 (1940); Fla. Stat. § 782.04 (1949); Idaho Code Ann. tit. 18, § 4003 (1949); Ind. Ann. Stat. §§ 10-3401, 10-3404 (Burns, 1933); Iowa Code §§ 690.2, 690.3 (1950); Kan. Gen. Stat. Ann. §§ 21-401, 21-402 (1949); Md. Ann. Code Gen. Laws art. 27, §§ 497, 498 (1939); Mass. Ann. Laws c. 265, § 1 (1933); Mich. Stat. Ann. §§ 28.548, 28.549 (1938); Minn. Stat. §§ 619-07 to 619-10 (Henderson, 1949); Mo. Rev. Stat. Ann. §§ 4376, 4377 (1939); Mont. Rev. Codes Ann. § 94-2503 (1947); Neb. Rev. Stat. §§ 28-401, 28-402 (1943); Nev. Comp. Laws Ann. § 10068 (Supp. 1949); N.H. Rev. Laws c. 455, § 1 (1942); N.J. Stat. Law §§ 2A: 113-2 (1952); N.M. Stat. Ann. § 41-2404 (1941); N.Y. Pen. Law §§ 1044, 1046; N.C. Gen. Stat. Ann. § 14-17 (1943); N.D. Rev. Code § 12-2711 (1943); Ohio Gen. Code Ann. §§ 12400, 12403 (Page 1939); Ore. Comp. Laws Ann. §§ 23-401 to 23-404 (1940); R.I. Gen. Laws c. 606, § 1 (1938); Tenn. Code Ann. §§ 10768, 10769 (Williams, 1934); Utah Code Ann. § 103-28-3 (1943); Vt. Rev. Stat. § 8240 (1947); Va. Code Ann. §§ 18-30 (1950); Wash. Rev. Stat. Ann. §§ 2392, 2393 (Remington, 1932); W. Va. Code Ann. § 5916 (1949); Wis. Stat. §§ 340.02, 340.03, 340.09 (1949); Wyo. Comp. Stat. Ann. §§ 9-201, 9-204 (1945).

3. Ga. Code Ann. § 26-1002 (1933); Ill. Rev. Stat. c. 38, § 358 (Smith-Hurd, 1933); Ky. Rev. Stat. § 435.010 (1948); La. Rev. Stat. tit. 14, § 30 (1950); Me. Rev. Stat. c. 117, § 1 (1944); Miss. Code Ann. § 2215 (1942); Okla. Stat. Ann. tit. 21, § 701 (1937); S.C. Code Ann. § 1101 (1942); S.D. Code § 13.2007 (1939); Tex. Pen. Code Ann. art. 1256 (1948).

impulsive and deliberate murders. Examination of other types of murder known to the common law or statute, such as felony murder, is beyond the scope of this paper.

THE EVOLUTION OF DEGREES OF MURDER

The Pennsylvania statute, the first to create degrees of murder, was enacted at a time when Anglo-American law punished by death a staggering number of crimes,⁴ and at a time when public sentiment was exerting pressure to mitigate in this respect the rigor of the common law.⁵ In accordance with generally prevailing community standards of morality, it withdrew from the sanction of the death penalty those homicides, murders at common law, which were not characterized as "wilful, deliberate and premeditated" and which did not arise out of certain enumerated felonies.⁶ The preamble to the statute, purporting to declare the purpose of the legislation, stated:

"Whereas the design of punishment is to *prevent* the commission of crimes, and to *repair* the injury that hath been done thereby to society or the individual, and it hath been found by *expericase*, ~~that~~ these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And whereas it is the duty of every government to endeavor to *reform*, rather than to exterminate

4. Until almost the close of the eighteenth century, such crimes as counterfeiting, robbery at a distance from the highway, settling on Indian lands, and larceny were punishable by death in Pennsylvania. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. of Pa. L. Rev. 759, 763, 764, 767 (1949). In England, during the years 1714 to 1830, 156 new offenses were made capital. At the end of the eighteenth century all felonies except petty larceny and mayhem were punishable by death. Report of Select Committee on Capital Punishment, nos. 10 to 14 (1930). "If a man injured Westminster Bridge, he was hanged. If he cut down young trees; if he shot rabbits; if he stole property valued at five shillings . . . for any of these offenses, he was immediately hanged." *Id.* no. 15.

5. The writings of Montesquieu, Beccaria, and Voltaire had a great impact upon the thought of the day. Typical of the reform advocated is the statement: "It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser, and that which is more pernicious to society rather than that which is less. . . . It is a great abuse amongst us to subject to the same punishment a person who only robs on the highway, and another that robs and murders." Montesquieu, *The Spirit of Laws*, Vol. 1, bk. 6, c. 16, pp. 130, 131 (Eng. ed. 1750). Two New York cases are illustrative of the dissatisfaction which the harshness of the common law was arousing in juries. Despite a clear instruction of guilt, the defendant was acquitted in both *Christian Smith's Case*, 2 City Hall Rec. 77, 83 (Oyer & Terminer, 1817) and *Mary Gardner's Case*, 5 City Hall Rec. 70 (Oyer & Terminer, 1819).

6. ". . . all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree. . . ." Pa. Laws 1794, c. 257, § 2.

offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety . . ."⁷

The statutory statement of policy discloses on its face an intent to ride the triple rails of prevention, more properly termed deterrence, retribution, and reformation. Passing the question whether three distinct theories of punishment may be simultaneously and consistently pursued,⁸ it is important to note that the restriction against the "extermination" of offenders is equated to reformation, and, further, that it is coupled with an explicit statement to the effect that resort to capital punishment may be justified only as a measure of social defense, and then reluctantly. This declaration, therefore, seems to suggest that a desire to immure the application of the death penalty was not the basic motivation for the passage of the act in Pennsylvania or elsewhere, as has so often been said.⁹ Of course, it is true that the spectre of capital punishment was intimately responsible for the differentiation between types of murder in terms of the penalties to be attached to them. But, it is equally true that the preamble to the Pennsylvania statute, which for all intents and purposes may be considered representative of the purpose of subsequent similar legislation in other jurisdictions, strongly suggests that a desire to restrict the use of the death penalty was the "cause" of murder-grading legislation only in a very broad sense; and that it would be more accurate to say that the homicide degree-legislation of Pennsylvania and other states was one of the initial products of an era which marked the very humble beginning of a more enlightened criminological viewpoint—a viewpoint which manifested itself in an effort to apply the death penalty, as well as other penalties, not indiscriminately, but in a manner calculated to produce some measure of public benefit.¹⁰

7. (Emphasis supplied.)

8. See generally, Glueck, *Principles of a Rational Penal Code*, 41 *Harv. L. Rev.* 453 (1928); Strahorn, *Criminology and the Law of Guilt*, 84 *U. of Pa. L. Rev.* 491 (1936).

9. The following are two typical commentaries. "Were it not for the existence of the death penalty in this State, there would be no necessity of subdividing the crime of murder. The division of this crime into two groups . . . and the continuance of this scheme in the present law, has been an acknowledgment by the Legislature that not all cases of murder should entail the capital penalty. In effect, therefore, the creation of a first degree of murder has been an extraction from the general category of murder of certain cases to which it was thought proper to apply capital punishment." Report of the New York State Law Revision Commission, N. Y. Leg. Doc. No. 65 (P) 58 (1937) (Communication and Study Relating to Homicide).

"In those states which, beginning with Pennsylvania in 1794, varied the English scheme, the primary objective was to limit the use of the death penalty—an objective accomplished by the division of murder into two degrees with the death penalty reserved for the first degree." Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 *Col. L. Rev.* 701, 703 (1937).

10. In this regard an examination of contemporaneous Pennsylvania legislation is

In any event, whatever may be said of the role played by capital punishment in bringing to pass degree legislation in the past, it is, indeed, abundantly clear that repugnance of the death penalty does not afford a basis upon which to justify the present existence of murder-grading. Examination reveals that the picture has changed in recent years in the United States regarding the use of the death penalty to the extent that at present it is mandatory for first-degree murder in only two states and the District of Columbia.¹¹ Six states have abolished altogether resort to capital punishment.¹² In the great majority of states discretion is vested in either the judge or jury, usually the jury, to impose upon the defendant convicted of first-degree murder either death or life imprisonment. In three states the jury is offered a third alternative; it may bind the judge to sentence the defendant to a minimum term of years.¹³

illuminating. Pa. Const. § 38 (1776), 9 Stat. at Large 600, reads as follows: "The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes."

An act passed in 1786 which abolished the death penalty for robbery, burglary, sodomy, and buggery, Act of Sept. 15, 1786, § 1, 12 Stat. At Large 281, reenacted by Act of April 5, 1790, § 1, 13 Stat. At Large 511, stated in its preamble that the reason for the act was Section 38 of the Constitution, and stated further: "And whereas it is the wish of every good government to reclaim rather than to destroy . . . and it having been found by experience that the punishments directed by the laws now in force *as well for capital as other inferior offences* do not answer the principal ends of society in inflicting them, to wit, to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences. . . ." (Emphasis supplied.)

11. Conn. Rev. Gen. Stat. § 8351 (1949); D.C. Code § 22-2404 (1940); Vt. Rev. Stat. § 8242 (1947). In New York the death penalty is mandatory in all cases of first degree conviction, except that in felony murder cases the jury may recommend life imprisonment. N.Y. Pen. Law §§ 1045, 1045a. The recommendation, however, is not binding upon the court. *People v. Ertel*, 283 N.Y. 519, 29 N.E. 2d 70 (1940). In Delaware the death penalty is mandatory in all cases of first degree conviction. Here again, the jury may make a recommendation, not binding on the court, of life imprisonment. Del. Rev. Code c. 149, § 5157, c. 155, § 5330 (1935).

12. Me. Rev. Stat. c. 117, § 1 (1944) (no degrees of homicide); Mich. Stat. Ann. § 28.548 (1938); Minn. Stat. § 619-07 (Henderson, 1949); N.D. Rev. Code § 12-2713 (1943) (with exception not material); R.I. Gen. Laws c. 606, § 2 (1938) (with exception not material); Wis. Stat. § 340.02 (1949). In N.H. Rev. Laws c. 455, § 4 (1942) and Wash. Rev. Stat. Ann. § 2392 (Remington, 1932) it is provided that first degree murder shall be punished by life imprisonment, unless the jury affirmatively recommends the death penalty.

13. Ill. Rev. Stat. c. 38, § 360 (Smith-Hurd, 1933) (not less than 14); Tenn. Code Ann. § 10771 (Williams, 1934) (not less than 20); Va. Code Ann. § 18-31 (1950) (not less than 20). A statistical study of the use of capital punishment, accurate as of 1947, is contained in the appendix to the concurring opinion of Frankfurter, J. in *Andres v. United States*, 333 U.S. 740, 767 (1947).

Not only is the present-day death penalty greatly removed from its former formidably ubiquitous position, but it coexists with a further refinement in murder-grading; for three states have more than two degrees of murder.¹⁴ In one of these, Florida, whereas first degree murder may be punished by death, second and third degree murder cannot.¹⁵ If Florida's desire be merely to withdraw from the operation of the death penalty those murders less reprehensible than others, it could class all the ones so withdrawn in a second-degree category. The existence of a third degree of murder, the punishment for which is less severe than that for second degree, is clearly not explained by reference to the death penalty.

Minnesota and Wisconsin, the only other states with three degrees of murder, are, in addition, in the category of five states that utilize degrees of murder although they have abolished capital punishment.¹⁶ *A fortiori*, under these circumstances capital punishment does not explain the grading of murder.

Manslaughter, the allied division of unlawful homicide, has been graded in all but fifteen states.¹⁷ As with murder, it is usually divided

14. Fla. Stat. § 782.04 (1949); Minn. Stat. §§ 619-07 to 619-10 (Henderson, 1949); Wis. Stat. §§ 340.02, 340.03, 340.09 (1949). All three states have three degrees of murder. New Mexico once held the all-time "record" with five degrees of murder. N.M. Comp. Laws §§ 687 et seq. (1884).

15. Fla. Stat. §§ 782.04, 919.23 (1949) (first degree: intentional murders and enumerated felony murders—death or life imprisonment; second degree: "depraved heart" murders—20 years to life; third degree: felony murders not enumerated in first degree—up to 20 years).

16. See note 12 supra. Maine has abolished capital punishment but does not employ degrees of murder.

17. Ariz. Code Ann. § 43-2904 (1939); Fla. Stat. § 782.07 (1949); Ill. Rev. Stat. c. 38, §§ 361 to 364 (Smith-Hurd, 1933); Iowa Code § 690.10 (1950); Mc. Rev. Stat. c. 117, § 8 (1944); Mass. Ann. Laws c. 265, § 13 (1933); Miss. Code Ann. §§ 2220 to 2233 (1942); Mo. Rev. Stat. Ann. §§ 4382 to 4391 (1939); Mont. Rev. Codes Ann. §§ 94-2507, 94-2508 (1947); Neb. Rev. Stat. § 28-403 (1943); N.M. Stat. Ann. §§ 41-2407, 41-2410 (1941); R.I. Gen. Laws c. 606, § 3 (1938); Vt. Rev. Stat. § 8243 (1947); Wash. Rev. Stat. Ann. § 2395 (Remington, 1932); Wyo. Comp. Stat. Ann. § 9-205 (1945). Manslaughter is considered ungraded where the statute provides but one punishment, even though the statute may speak of "voluntary" and "involuntary" manslaughter, as, for example, in Arizona. By the same token, "manslaughter" is considered graded, even where the term "degree" is not employed, if different punishments are prescribed by statute for different types of unlawful homicide not amounting to murder. See, e.g., Conn. Rev. Gen. Stat. §§ 8352, 2415 (1949) ("manslaughter" and "negligent homicide"); Idaho Code Ann. tit. 18, § 18-4007 (1949) ("voluntary manslaughter" and "involuntary manslaughter"); Ind. Ann. Stat. §§ 10-3405, 47-2001 (Burns, 1933) ("manslaughter" and "reckless homicide"); Md. Ann. Code Gen. Laws art. 27, §§ 454, 455 (1951) ("manslaughter" and "manslaughter by automobile").

into two degrees. New York and California establish three degrees,¹⁸ Kansas four,¹⁹ and Wisconsin five.²⁰ Manslaughter, of course, is not punishable by death. Something other than the death penalty, therefore, must explain its extensive grading.

Manslaughter is divided into degrees in seven of the ten states that do not employ degrees of murder.²¹ Here we find a surprising use of the degree device. It is surprising because if it be true that the degree device in the homicide area is the outgrowth of popular aversion toward capital punishment, then there would be, on that basis, a more compelling reason to grade murder than there would be to grade manslaughter, especially since murder is punishable by death in all the seven states.

A study of the use of the degree device throughout the criminal law generally is outside the scope of this paper. However, a few remarks in that connection will shed some additional light on the specific use of the degree device in the crime of murder. It is practically universally established by statute in the United States today that the use of a dangerous weapon will "aggravate" an assault and that the theft of \$101 is considered "grand" larceny, whereas the theft of a lesser amount is "petit."²² The same principle of grading which obtains in these two illustrations is extended to rape, robbery, arson, and other crimes. As thus employed, the degree device represents an attempt to individualize the treatment of offenders—to distinguish between the varying punishments to be administered them on the basis of the degree of resistance they have offered to the social order. It is, however, a very crude attempt at meeting the problem, since, in effect, treatment is accorded the overt crime instead of the subjective criminal. But more about

18. Cal. Pen. Code § 193 (1949) (aside from punishment of "manslaughter", there are different punishments for homicide arising out of operation of motor vehicle, turning upon presence or absence of gross negligence); N.Y. Pen. Law §§ 1050 to 1053b ("manslaughter" first and second degree, "criminal negligence in operation of vehicle resulting in death").

19. Kan. Gen. Stat. Ann. §§ 21-407 to 21-420 (1949) (four "degrees" of "manslaughter").

20. Wis. Stat. §§ 340.10 to 340.271 (1949) (four "degrees" of "manslaughter" and "negligent homicide").

21. Ga. Code Ann. §§ 26-1007 to 26-1010, 27-2506 (1933) ("voluntary manslaughter", "involuntary manslaughter from unlawful act," "involuntary manslaughter from negligent act"); Ky. Rev. Stat. § 435.020 (1948) ("voluntary manslaughter" made a felony; "involuntary manslaughter" not used in statute, but made common law misdemeanor by the cases); La. Rev. Stat. tit. 14, §§ 31, 32 (1950) ("manslaughter" and "negligent homicide"); Okla. Stat. Ann. tit. 21, §§ 711 to 722 (1937) ("manslaughter" first and second degree); S.C. Code Ann. § 1107 (1942) ("manslaughter" and "involuntary manslaughter"); S.D. Code §§ 13.2013 to 13.2023 (1939) ("manslaughter" first and second degree); Tex. Pen. Code Ann. arts. 1231 to 1243 (1948) ("negligent homicide" in first and second degree).

22. See, e.g., N.Y. Pen. Law §§ 1296, 1298.

"individualization" later. It will suffice now to say that murder and larceny are graded in accordance with the same rationale; and if there is a necessity for grading the latter, so there exists the same necessity for grading the former, in states where capital punishment is resorted to as well as states where it is not.

THE INVOLUTION OF DEGREES OF MURDER

The states that grade murder include in the first-degree category intentional homicides committed with an intent generally characterized as "deliberate and premeditated."²³ Such an intent on its face presupposes, if words are to be given their literal and common meaning, the operation of a rational mental process which questions the execution of a plan to kill and subsequently decides to complete the plan to the exclusion of other alternatives. To an alarming extent, however, the courts have not given these words their literal meaning. Instead, they have been construed in such a manner as to render meaningless the statutory distinction between first and second degree murder. The courts have declared that it takes *time* to premeditate and deliberate. But by declaring that the prerequisite mental operation may be completed in a period of time so slight as to be imperceptible, the courts have drawn within the confines of the first-degree murder category homicides the result of hasty, impulsive, spur-of-the-moment action, and not the result of real and substantial reflection. This emasculation of legislative policy is strikingly analogous to the development of the doctrine of malice at common law.²⁴

23. There are, of course, numerous variations from this general standard in the various jurisdictions. Some statutes add the word "wilful." Others employ the common law term "malice." Many jurisdictions mention specific modes of killing which will bring the homicide within the first degree category, such as, by "poison", "lying in wait", "torture", "extreme atrocity or cruelty." Compilations and categorizations of the various statutes are contained in Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. of Pa. L. Rev. 267, 268, 269 (1950); Note, *The Intentional Murder at Common Law and Under Modern Statutes*, 38 Ky. L. J. 424 (1950); Note, *Statutory Intentional Murder*, 38 Ky. L. J. 441 (1950); Perkins, *The Law of Homicide*, 36 Jour. Crim. L. & Criminology 391, 445-8 (1946); Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 Col. L. Rev. 701, 704-06 (1937).

24. At common law, murder was defined as homicide committed with "malice aforethought." It is probable that up until about the middle of the 17th century these words were understood in their literal sense, i.e., a culpable intent formed prior to the killing. Perkins, *A Re-examination of Malice Aforethought*, 43 Yale L. J. 537, 544-6 (1934). However, two developments were responsible for the distortion of "malice aforethought" out of all relation to its natural and literal meaning. First, in the case of an impulsive homicide, the presence or absence of express malice was determined by the answer to the question whether the killer's passions had subsided and self-control had been restored

In Pennsylvania, the first state to create degrees of murder, the transformation into terms of art of the statutory standard separating first-degree from second-degree murder has been both rapid and complete.²⁵ The "wilful, deliberate and premeditated" intent set forth by the statute²⁶ has been equated to a specific intent to kill. This development is illustrated by the recent case of *Commonwealth v. Jones*.²⁷ In that case the defendant pleaded guilty to having beaten to death with an eight-pound iron bar both his former mistress and her then paramour. The homicides followed an altercation with the pair which the defendant claimed drove him "haywire." In fixing the murder at first-degree, the court, after declaring that first-degree murder is distinguished from second-degree murder in that the former requires a specific intent to take life, stated that:

"Such intent supplies the qualities of wilfulness, deliberation and premeditation otherwise essential, by the statute, to murder in the first degree."²⁸

prior to the killing. This inquiry was resolved by the objective, temporal test of whether a reasonable time had elapsed within which the anger should have cooled; and the reasonable time was measured by the standard of the reasonable man in the community and not by the fact in the case at bar. If there had been an objectively sufficient "cooling" period, the intent of the killer was deemed deliberate and, therefore, with malice, and the crime of murder, not manslaughter, was made out. Thus, the quality of the state of mind of the killer was determined by lapse of time.

The second development referred to was that of the doctrine of implied malice. Proceeding upon the psychologically untenable fictions that persons, unless completely insane, necessarily intend the natural consequences of their acts and that state of mind at a given time, a subjective phenomenon, may be proved by one objective manifestation of conduct at that time, the inference was drawn that where death was caused by the use of dangerous weapons or by wounds inflicted in vital organs, the death was actually intended by the actor. This inference hardened into a presumption; malice was implied under the conditions enumerated; and an often insuperable burden of disproving malice was imposed upon the defendant. Thus, the dangerous nature of the act rather than the killer's state of mind in a particular case was the controlling consideration. See Report of the New York State Law Revision Commission, N.Y. Leg. Doc. No. 65 (P) 19-26 (1937) (Communication and Study Relating to Homicide).

25. In the leading case of *Commonwealth v. Drum*, 58 Pa. St. 9, 16 (1868), the court said: "Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in the evidence." (Emphasis supplied.)

26. Pa. Stat. Ann. tit. 18, § 4701 (1945).

27. 355 Pa. 522, 50 A.2d 317 (1947).

28. *Id.* at 525, 526, 50 A.2d at 319.

In the best tradition of seventeenth-century common law the court found the required "specific intent to kill" in a presumption it raised from the use of a deadly weapon:

"The lethal potentiality of the heavy weapon used . . . was *alone sufficient* to support the finding of homicidal intent which forthwith legally justified the elevation of the admitted murder to first degree."²⁹

The statutory distinction between impulsive and planned murders has been blue-pencilled by the courts in jurisdictions other than Pennsylvania. In New York the courts at present sanction instructions based upon a case which has withstood the test of time and which held that:

"Such design must precede the killing by some appreciable space of time. But the time need not be long . . . The human mind acts with celerity which it is sometimes impossible to measure . . ."³⁰

California declares that "there need be no appreciable space of time between the intention . . . and the act . . . they may be as instantaneous as successive thoughts of the mind."³¹ Other jurisdictions have declared that "only an instant"³² or "no particular time"³³ or "thought beforehand . . . however short"³⁴ will suffice. The discouraging state of affairs is perhaps epitomized by *State v. Gin Pon*, a well-entrenched Washington case, which declared:

". . . 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 instruction from . . . objections . . ."³⁵

The *Gin Pon* case has been adhered to by recent Washington decisions which hold that "no more than a moment in point of time" meets the temporal test of intent.³⁶

The judicial undermining of the "deliberate and premeditated" criterion

29. *Id.* at 529, 50 A.2d at 321. (Emphasis supplied.) In a prior case the same court had made quite clear its reliance upon inferences: "The fatal use of a deadly weapon against a vital part of another's body when established as a fact warrants an inference that the act was done with a specific intent to take life and so justifies a verdict of guilty of murder of the first degree." *Commonwealth v. Kelly*, 333 Pa. 280, 289, 4 A.2d 805, 809 (1939).

30. *State v. Majone*, 91 N.Y. 211, 212 (1883).

31. *People v. Smith*, 15 Cal. 2d 640, 648, 104 P.2d 510, 514 (1940).

32. *State v. Masato Karumai*, 101 Utah 592, 600, 126 P.2d 1047, 1051 (1942).

33. *Bailey v. Commonwealth*, 191 Va. 510, 62 S.E.2d 28, 31 (1950).

34. *State v. Lamm*, 232 N.C. 402, 406, 61 S.E.2d 188, 191 (1950).

35. 16 Wash. 425, 430, 47 Pac. 961, 963 (1897). (Emphasis supplied.)

36. See e.g., *State v. Davis*, 6 Wash. 2d 696, 706, 108 P.2d 641, 646 (1940).

ion has been widespread.³⁷ One state has even gone so far as to incorporate into its statutory law the rule that it is unnecessary that any period of time elapse between the fomenting of the intent to kill and the killing.³⁸ The development has evoked widespread comment and criticism. One recent article succinctly points out the trap into which have fallen those courts which hold, in effect, that the capacity of a defendant to harbor a deliberate and premeditated intent to kill depends upon the same kind of evidence necessary to prove malice at common law.³⁹ The writers state:

"A defendant's capacity for malice aforethought does *not* depend upon the same evidence as does his capacity for deliberation and premeditation. The murder-manslaughter distinction has a wholly different history and is based on wholly different criteria from those involved in distinguishing degrees of murder. The former is of common law origin, the latter statutory; the former involves an objective test, the latter subjective. The provocation which at common law reduces a homicide to manslaughter must be such as is calculated to produce hot blood or passion in a reasonable man, an average man of ordinary self-control. Unless it meets this objective standard of reasonableness, the subjective fact of passion does not make the killing manslaughter. Such factors as mental abnormality or intoxication are therefore irrelevant, since the 'reasonable man' standard postulates a sane and sober man. But the statutes dividing murder into degrees require by definition that for first degree murder the prosecution prove the actual existence of premeditation and deliberation. In determining the existence of these mental elements, abnormality, peculiarity, aberration, drunkenness, fatigue or any other condition tending to disprove their existence is admissible in evidence and should be taken into consideration."⁴⁰

Perhaps the most pointed criticism leveled at the unhappy state of affairs is found in the observations of the late Mr. Justice Cardozo. The learned jurist, pointing out the manner in which "deliberate and premeditated" has been reduced in meaning to a term of art entirely at odds with the most elementary teachings of psychology, declared:

". . . One may say indeed in a rough way that an intent to kill is always deliberate and premeditated within the meaning of the law unless the mind is so blinded by pain or rage as to make the act little more than an automatic or spontaneous reaction to the environment—not strictly automatic or spontaneous, for there could then be no intent, and yet a near approach thereto. . . . I think the distinction 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

37. For an exceptionally fine critique of this development see Knudson, *Murder by the Clock*, 24 Wash. U. L. Q. 305 (1939), and cases therein examined.

38. N.D. Rev. Code § 12-2709 (1943).

39. See note 24 *supra*.

40. Wehofer and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale L. J. 959, 969 (1947).

the time for its formation is measured by the lapse of seconds? Yet the decisions are to the effect that seconds may be enough. What is meant, as I understand it, is that the impulse must be the product of an emotion or passion so swift and overmastering as to sweep the mind from its moorings. A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death. I think the students of the mind should make it clear to the lawmakers that the statute is framed along the lines of a defective and unreal psychology."⁴¹

Mr. Justice Cardozo then put his finger upon the simple truth that a dividing line stripped of meaning ceases to be a dividing line. He stated, in substance, that the areas of first and second degree murder, once obscured by judicial construction, can never be redefined by the rendition of a general jury verdict, the finality of which reflects the reactions of twelve lay individuals to the factual circumstances of the particular case. He declared:

"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. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."⁴²

The development, more properly termed destruction, of the "deliberate and premeditated" standard has at times produced results so harsh as to compel protests, though indirect and, for the most part, ineffective. A New York study reports that often an appellate court, unable or unwilling, due to the broad scope given "deliberate and premeditated," to reverse a conviction has suggested an attenuation of the penalty by the exercise of the power of executive clemency.⁴³ Juries have engaged in a

41. Cardozo, *What Medicine Can Do For Law*, in *Law and Literature and Other Essays and Addresses*, 98-100 (1931). See also Blinn, *First Degree Murder—A Workable Definition*, 40 *Jour. Crim. L. & Criminology* 729, 733 (1950).

42. Cardozo, *op. cit. supra* note 41, at 100 to 101. The following is indicative of commentaries by other writers: "The statutory scheme was apparently intended to limit administrative discretion in the selection of capital cases. As so frequently occurs, the discretion which the legislature threw out the door was let in through the window by the courts." Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 *Col. L. Rev.* 701, 709 (1937). See also Knudson, *op. cit. supra* note 37; Perkins, *The Law of Homicide*, 36 *Jour. Crim. L. & Criminology* 391, 449, 450 (1946).

43. Report of the New York State Law Revision Commission, N.Y. Leg. Doc. No. 65(P) 84 n. 207 (1937) (*Communication and Study Relating to Homicide*).

similar practice.⁴⁴ The same study also reports that because of the vagueness of the distinction between first and second degree intentional murder, the second-degree murder provision is serving, not as a substantive definition of crime, but as a safety valve for juries which entertain doubts raised by considerations apart from the distinction between the two degrees of murderous intent, such as the question of identity.

A line of cases from New York illustrates that courts as well as juries, in cases which arouse public sympathy for the defendant, will strain to avoid the application of a temporal test of intent stated in terms of an imperceptible period of time and reach instead a result which is warranted by a common-sense reading of "deliberate and premeditated," but unsupportable by the emasculated and presumably binding version of the statutory standard. *People v. Caruso*⁴⁵ is such a case. In that case the defendant, half crazed with grief over the death of his young son, killed the doctor who had treated the boy in the illness from which he died and who the defendant believed had been instrumental in causing the death by faulty care. Believing the doctor to have laughed when told of the child's death, the defendant attacked the doctor, choked him into insensibility and, while the latter was thus helpless on the floor, walked to the cupboard about twelve feet away, obtained a knife, returned to the prostrate form of the doctor, and stabbed him in the throat, killing him. In reversing a conviction for murder in the first degree, the court asked the question:

"But was there premeditation and deliberation? . . . Time to deliberate and premeditate there clearly was. Caruso might have done so. In fact, however, did he?"

and answered it by holding:

"The attack seems to have been the *instant effect of impulse*. Nor does the fact that the stabbing followed the beginning of the attack by some time affect this conclusion. It was *all one transaction* under the peculiar facts of this case. If the assault was not deliberated or premeditated, then neither was the infliction of the fatal wound."⁴⁶

This emphasis upon the rational powers of the accused had been evidenced in at least two prior New York cases in which the facts had engendered sympathy for the defendant.⁴⁷

44. See, e.g., *People v. Cain*, 206 N.Y. 202, 208, 99 N.E. 566, 568 (1912) (court recommended executive clemency); *People v. Reich*, 110 N.Y. 660, 18 N.E. 104 (1888), reported in full in 6 N.Y. Cr. Rep. 146 (jury recommended mercy in face of inability to find a lower degree of homicide than murder in first degree under the law as it stands).

45. 246 N.Y. 437, 159 N.E. 390 (1927).

46. *Id.* at 445, 446, 159 N.E. at 392. (Emphasis supplied.)

47. *People v. Barberi*, 149 N.Y. 256, 43 N.E. 635 (1896) (after seducer had refused to fulfill his fraudulent promises to marry defendant, she left the bar where he was sitting,

This examination reveals, therefore, that the "deliberate and premeditated" standard has in New York become a device for the administration of *ad hoc* justice, *ad hoc* in the sense that it cannot be predicted with certainty whether a jury will, in the first instance, obey a charge which embodies the law as proclaimed in the *Majone*⁴⁸ case, or whether, if it does, an appellate court will not reverse it because of the presence of facts similar to the "peculiar facts" of the *Caruso* case.

The presence or absence of a "deliberate and premeditated" intent to kill may be called into question not merely by the fact of unleashed passion standing alone; for the susceptibility of a defendant to a fit of rage may be conditioned upon other factors which influence his state of mind, such as, fatigue, intoxication, and all the grays of mental instability which exist between the black of "normality" and the white of insanity, as the latter is determined by the application of the rules of *M'Naughton's Case*.⁴⁹ Again, if words are to be given their literal and common meaning, it would appear quite obvious that the above-mentioned factors must necessarily be considered in determining whether an intent to kill, assuming it to be present, is a "deliberate and premeditated" intent to kill. Unfortunately, the matter has not appeared obvious to the courts.

The decisions of a great many of our courts illustrate that although modern psychology and its allied sciences have in their explorations of the human mind vastly increased our knowledge of the motivations which prompt human behavior, law, which aims to influence and control human conduct, has remained, unfortunately, stubbornly disinclined to utilize the knowledge. The courts have always permitted a jury to consider a defendant's state of mind when a plea of insanity, an absolute bar to conviction, is interposed. Yet, to a great extent there exists an anomalous judicial obstruction to a consideration by the jury of evidence of the defendant's state of mind when the evidence is offered, not to preclude a conviction for murder, but, at best, merely to mitigate the offense in terms of the harshness of the penalty attached to it. The term "obstruction" is used advisedly; for not only is this all-or-nothing attitude an unenlightened one, in view of the advances which have been

went to her room, obtained a razor, returned and slashed his throat, killing him); *People v. Fiorentino*, 197 N.Y. 560, 91 N.E. 195 (1910) (defendant, previously charged by deceased with having had adulterous relations with the latter's wife, responded to deceased's unprovoked assault upon him by drawing a revolver, running after deceased, and, after several initially unsuccessful attempts at firing the gun, shooting him dead). In both cases the Court of Appeals reversed a conviction of first-degree murder.

48. See note 30 *supra*.

49. 10 C. & F. 200, 8 Eng. Rep. 718 (1843).

made by students of the mind, but, beyond that, it accounts for unparadonable evasion of the law by the courts. Since statutes make a "deliberate and premeditated" intent a prerequisite for a conviction of first-degree murder, it would seem to be required as a matter of law that all information at a court's disposal relevant to a defendant's state of mind be utilized. The great majority of courts, however, have paid lip service only to the statutory definitions of first-degree murder.⁵⁰ This fact is strikingly illustrated by the recent case of *Fisher v. United States*,⁵¹ in which the United States Supreme Court affirmed a first-degree murder conviction rendered in a federal court. The issue raised by the case was precisely stated by Mr. Justice Murphy in his dissenting opinion:

"May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?"⁵²

In the *Fisher* case the defendant, a negro janitor in a Washington, D. C., church library, was provoked into a fit of rage by a highly insulting remark concerning his race hurled at him by the deceased, a female librarian. In response to the outrageous remark, the defendant struck deceased with his hand. To silence the screams which then ensued, defendant secured a stick of wood and repeatedly struck her with it until it broke. Defendant then choked deceased into a state of unconsciousness. Some time later, when she partially regained consciousness and screamed anew, defendant stabbed her in the throat with a knife, killing her. Defendant explained his actions by the statement: "My idea was just trying to stop her from hollering, is all I can think about. The noise kept getting on my nerves."⁵³

The medical witness for the defense testified that the defendant possessed a "psychopathic personality associated with chronic alcoholism and with early schizoid tendencies." The government's medical witness testified that "a psychopathic personality is a person of unsound mind."

50. The manner in which the courts have divided is set forth in Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. of Pa. L. Rev. 267, 277-9 (1950); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale L. J. 959, 965-8 (1947). On the allied question whether voluntary intoxication may preclude the existence of a deliberate and premeditated intent the courts have split about evenly. Some few courts have also held that the jury may properly consider on that issue such factors as fatigue, influence of drugs, bodily disease, and the like. *Ibid.*

51. 328 U.S. 463 (1946).

52. *Id.* at 491.

53. This cited testimony and that which follows is conveniently assembled in Keedy, *op. cit.* supra note 50.

And yet the trial court refused the request of the defense that the following instruction be given:

"The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

The Supreme Court affirmed the conviction by a majority opinion of five justices; three dissented in separate opinions; and one took no part in the consideration of the case. That the denial of the requested instruction by the trial court was sustained is, indeed, unfortunate. It is astonishing, however, that it was sustained in spite of the unique District of Columbia statute which declares:

*"Whoever being of sound memory and discretion, kills another purposely, . . . of deliberate and premeditated malice . . . is guilty of murder in the first degree."*⁵⁴

THE BATTLE OF BRITAIN

England has never graded murder by statute. In that country one who is convicted of murder is automatically sentenced to death.⁵⁵ Over the years there has been constant agitation to change this state of affairs. An examination of this agitation will shed light upon the question whether, as an original proposition, murder should be graded.

In 1864 a Royal Commission was appointed to

*" . . . inquire into the Provisions and Operation of the Laws now in force in the United Kingdom, under and by virtue of which the Punishment of Death may be inflicted upon persons convicted of certain crimes . . . and to report whether any, and if any what alteration is desirable in such laws, or any of them . . ."*⁵⁶

The Commission took evidence for a year and a half, reported that it

54. D.C. Code § 22-2401 (1940). (Emphasis supplied.) The decision is not only at odds with the statute, but also inconsistent with a prior decision of the Supreme Court. In *Hopt v. People*, 104 U.S. 631 (1881) the court stated: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation necessarily becomes a material subject of consideration by the jury." (Emphasis supplied.)

55. Under English law murder is unlawful homicide with malice aforethought. Malice aforethought may consist of an intention on the part of the accused (1) to cause death; (2) to do an act which is intrinsically likely to kill; (3) to do an "act of violence" in furtherance of a felony of violence; (4) to resist arrest by someone he knows or has means of knowing is a constable acting within the scope of his duties. Cross and Jones, *An Introduction to Criminal Law* 218 (2d ed. 1949).

56. Report of Royal Commission on Capital Punishment, iii to iv (1866).

was undesirable that a man who killed in a sudden fit of passion should be liable to the same punishment as the assassin who long meditated and brooded over his crime, and unanimously recommended that, following the pattern set in the United States, murder be divided into two degrees.⁵⁷ The recommendation was never enacted into law, although before the close of the 19th century more than half a dozen murder-grading bills were introduced in Parliament.⁵⁸ A more recent parliamentary body to consider the grading question discussed in its report the various methods by which grading could be accomplished, declared that the majority of those who gave evidence before it were unfavorably disposed to grading, and concluded with the statement:

"If capital punishment passes, many of the above objections will lose their force, and it may be that the way will be opened for a scientific grading of murder."⁵⁹

The Commission did not recommend grading; but suggested that the death penalty be suspended for five years.

Very recently, in 1949, a second Royal Commission on Capital Punishment was created, the terms of reference of which permitted, if not required, a conclusion on the advisability or inadvisability of dividing the crime of murder into degrees.⁶⁰

After four years of study of all the major facets of the law of murder, the Commission concluded, with respect to the question of murder-grading:

"Our examination of the law and procedure of other countries lends no support to the view that the objections to degrees of murder, which we discussed above, are only theoretical and academic and may be disproved by the practical experience of those countries where such a system is in force. We began our inquiry with the determination to make every effort to see whether we could succeed where so many have failed, and discover some effective method of classifying murders so as to confine the death penalty to the more heinous. Where degrees of murder have been introduced, they have undoubtedly resulted in limiting the application of capital punishment and for this reason they have commended themselves to public opinion, but in our view their advantages are far outweighed by the theoretical and practical objections which we have described. We conclude with regret that the object of our quest is chimerical and that it must be abandoned."^{60a}

A British defendant convicted of murder is not necessarily doomed to

57. Id. nos. 7 to 12.

58. Report of Select Committee on Capital Punishment, nos. 2 to 8, 162 to 168 (1930).

59. Id. no. 182. Consider this statement in the light of the discussion of "The Evolution of Degrees of Murder," *supra*.

60. London Gazette, May 6, 1949; 460 H.C. Deb. 329 (5th ser. 1949).

60a. Report of Royal Commission on Capital Punishment, no. 534 (1953). The "practical and theoretical objections" referred to are discussed at length under the general headings "Difficulties of definition" and "Difficulties of procedure." Id. nos. 498-503.

die. There has always existed in England, in the hands of an administrative officer of the government, a technique for the selection of capital cases. The Royal Prerogative of Mercy, termed executive clemency on this side of the Atlantic, exercised in the name of the King by the Home Secretary, may operate to pardon the murderer or to commute his sentence to a term of imprisonment.⁶¹ In practice, reprieves have been granted with ever-increasing liberality by the various Home Secretaries.⁶² An interesting, recent development resulted in the suspension for a time in Britain of the death penalty in 1948. In that year, the Standing Committee on the Criminal Justice Bill of the House of Commons voted to insert in the bill a clause suspending the death penalty for murder for an experimental five-year period. Acting on the assumption that this provision would subsequently be enacted into law, the Home Secretary felt that a humane attitude compelled the commutation of death sentences to life imprisonment in favor of those convicted of murder in the interim period. He, accordingly, advised the House of his contemplated action.⁶³ However, the provision suspending the death penalty never became law, and, in the face of a subsequent charge that his action had been unconstitutional, the Secretary felt compelled to renounce his position and revert to the policy previously resorted to for determining in which murder cases the death sentence should be commuted.⁶⁴ The row in the House of Commons was, however, productive of more heat than light; for had the Home Secretary pursued the identical course he had proposed, but without making public his reasons therefor, the charge of unconstitutionality could not conceivably have arisen. The criteria which prompted the Home Secretary to grant a reprieve in a particular case have never been disclosed to the public. Home Secretary Ede, himself, when asked in the House of Commons what were the considerations to which he had regard, responded:

"It is not desirable or possible to lay down hard and fast rules as to the exercises

61. The functions of the Home Office in relation to the treatment of offenders are described in Maxwell, *The Home Office* (London 1948).

62. Statistics gathered from Report of Select Committee on Capital Punishment no. 42 (1930) and East, *Psychiatry and Degrees of Murder, in Society and the Criminal* 255 (London 1949), illustrate that the proportion of reprieves to total death sentences has been increasing in more recent years.

Years	Executed	Reprieved
1880 - 1929 (50)	713	564
1900 - 1929 (30)	423	327
1920 - 1929 (10)	138	91
1929 - 1938 (10)	81	81

63. 449 H.C. Deb. 1306 et seq. (5th ser. 1948).

64. 451 H.C. Deb. 2370 et seq. (5th ser. 1948).

of the Prerogative of Mercy in Capital Cases, or to give, within the compass of an answer to a question, any adequate statement of the variety of considerations which may in practice be taken into account. . . . I have a duty to discharge. It is an exceedingly difficult and delicate duty, and I am only too well aware that on occasions when I reach certain decisions, for *reasons which I cannot disclose*, there may be, in consequence, great misgiving in the mind of the public—misgiving which would be removed if I could disclose my reasons. *I am precluded*, and, I think, *rightly precluded, from doing so.*"⁶⁵

Not only are the people of Britain uninformed as to the considerations which may or may not influence the Home Secretary in his administrative control over life and death, but they are often quite baffled by his actions. For reasons undisclosed, the death sentence has been carried out in England and Wales, despite a strong jury recommendation to mercy in 17 cases since January, 1938 and 5 cases since July, 1945.⁶⁶

A great deal has been written both staunchly supporting and vigorously opposing the role played by the Home Secretary in the application of the death penalty to those convicted of murder. One recent article commends it as an elastic form of grading and advances it as the type of grading most acceptable to "informed opinion."⁶⁷ Another writer has vehemently declared:

"No one would suggest that the Home Secretary . . . should be deprived of the power to grant a reprieve: but that should be a reserve power for exceptional cases. For the day-to-day task of assessing what is the suitable punishment in the circumstances of each individual case, the Home Secretary . . . is not the best, but the worst possible tribunal; worst because he is not really a tribunal at all but an administrative officer, working by the usual methods and channels of administration, worst because his own proper responsibilities are heavy enough to make it impossible for him to devote adequate time to each case without neglecting duties which he is better fitted to discharge, worst above all because his proceedings (except so far as he himself chooses to lift the veil) are conducted in secret. Doubtless he frequently consults the trial judge but he is under no obligation to do so, and the correspondence between them is confidential. . . . (H)e is exercising a judicial function. But judicial functions should be exercised in public by trained judges so that justice may not only be done but be seen to be done: and the prerogative of mercy is primarily a judicial function."⁶⁸

DEGREES OF MURDER ON THE MERITS

Murder may be committed by various means and for a great variety of motives, by minds rational and minds, for one reason or another, incapa-

65. 472 H.C. Deb. 453 to 454 (5th ser. 1950). (Emphasis supplied.)

66. Statement of Home Secretary Ede in 469 H.C. Deb. 217 (5th ser. 1949).

67. East, *Psychiatry and Degrees of Murder*, in *Society and the Criminal* 266 (London 1949).

68. Vesey-FitzGerald, *The Reform of the Law of Murder*, in Kecton and Schwarzenberger, *Current Legal Problems* 27 (1949). The writer suggests that murder be divided into two degrees.

ble of serious reflection. The grading of murder stems from a recognition of this fact and the further and obvious one that it would be unjust to treat with equal severity all types of murderers. But, it is submitted, the degree device is a distillate of an unsound premise upon which is constructed our present system of criminal law. The criminal law prescribes for each crime a prerequisite physical act and a simultaneously accompanying intent.⁶⁹ The prosecuting officer to make out the crime charged must prove the existence of both. The requirement that lawyers "prove" the existence of a past state of mind to a lay jury is rendered exceedingly difficult by at least two factors—the limited knowledge of both lawyers and lay jury in matters mental, and the exclusionary rules of evidence, including the hearsay rule. The requirement has to a great extent made the criminal law appear ridiculous in the public eye. The effect on a person of reasonable intelligence of the "battle of the experts" and the monstrous hypothetical question, based upon cumulative, unproved assumptions, bears vivid testimony to this fact.

Not only is the dichotomy of crime into act and intent difficult of application in practice, but it is doctrinally unsound. Its underlying assumption seems to be that one sample of conduct affords an adequate basis upon which to determine the fate of an accused, a psychological absurdity.⁷⁰ Equally absurd is the current manner of sentencing, the

69. The pigeon-holing of states of mind by law has evoked great criticism. "In criminal law . . . attempt is seen to classify states of mind, especially in the legislation dealing with homicides. In American states, various degrees of murder are commonly recognized, and manslaughter also is often classified into two or more degrees. These attempts to make arbitrary divisions of the functions of the mind, we believe, are bottomed on an unworkable plan. We do not doubt the reality of differences in the mind so far as mental processes are followed by external consequences, but precisely what these differences are and how they are to be grouped and evaluated are problems as to which there is no settled view among psychologists. What the psychologist cannot do in his own field, the jurist cannot do for him in making application of psychical concepts. We speak of intentional and unintentional acts in the law with the false assurance that we know just what these terms mean; while the fact is that they represent ideas of very great complexity. . . . All terms such as "mens rea" and the long array of words that attempt to describe states of mind must in a scientific analysis of legal ideas be replaced by functional ideas which state behavioristic attitudes. For our present purpose it is sufficient to repeat, that the effort of the jurist to analyze consciousness is futile and unnecessary." Kocourek, *Jural Relations* 261-3 (1927). See also Michael and Adler, *Crime, Law and Social Science* 79-86 (1933).

70. In areas where the indeterminate sentence as we know it operates (indeterminate within limits), the court before imposing sentence may, and often does, hear testimony regarding the accused which extends beyond proof of the facts of the crime charged. The indeterminate sentence, however, operates in first-degree murder cases in only three states. See note 13 *supra*. Ordinarily the jury in its discretion may cause the accused to be sentenced to either death or life imprisonment.

transmutation of the one sample of conduct into an assessment of time with an illusory sense of slide-rule precision.

That is the present status of our criminal law. In that context the degree device, coupled with the current rationale of sentencing, represents a crude attempt at individualizing the treatment of offenders. But it is becoming increasingly more evident with the passing of time that we are in a twilight zone, the transition period between criminal law as it has traditionally existed throughout the centuries and the treatment of offenders as it will exist in the enlightened future. Criminal law, with the customary sluggishness with which our legal institutions adapt themselves to change in underlying philosophy, is being gradually abolished, and in its place is being substituted a system of commitment procedures. The unrealistic dichotomy of crime into act and intent is weakening and giving way to a behavioristic criminal law—one in which the courts determine whether an act, deemed by statute to be anti-social, has been committed, and a body of experts determine what, in the final analysis, should be done with the defendant for society's protection and his own rehabilitation.⁷¹ There have already been incursions upon the traditional province of the criminal law. Whole groups or classifications of offenders have been singled out for commitment treatment. The defective delinquent and the sexual psychopath in a growing number of jurisdictions may now be committed to mental institutions, not for "punishment" for a determinate period, but for treatment for rehabilitation for as long or short a period of time as is required.⁷² Special treatment is also accorded the juvenile delinquent. The view that "punishment" is an instrument of social defense, to be exercised in the public interest for the twin purposes of deterrence and reformation, is the guiding principle of this movement. We may expect some time in the

71. See generally Glueck, *Crime and Justice* 204-47 (1936); Glueck, *The Social Sciences and Scientific Method in the Administration of Justice*, 167 *Annals* 106 (1933); Pound, *The Call for a Realist Jurisprudence*, 44 *Harv. L. Rev.* 697 (1931); Pound, *The Individualization of Justice*, *Yearbook of National Probation Ass'n* 104 (1930); Bates, *What May Be Done to Forward the Judicious Application of the Principle of Individualization*, 16 *Jour. Crim. L. & Criminology* 477 (1926).

72. Illustrative of the trend is N.Y. Laws 1950, c. 525, which provides for the commitment of the sexual psychopath for a fully indeterminate period of from one day to life. In transmitting the bill to the legislature, Governor Dewey said: "It would be a great mistake to consider this proposed sentence as a means of heaping punishment upon those whose acts shock and revolt us. In reality it is an experimental step taken in the hope that we may ultimately develop a wholly scientific method for the treatment of those who cannot or will not conform with our rules of behavior." *Report on Study of 102 Sex Offenders at Sing Sing Prison* 7 (Albany 1950). Such a statement of policy is indicative of the progress in thought being made. It considers crime as analogous to disease.

future that, as psychologically realistic rationales of "punishment" attract general acceptance, as we deflate present guilt attitudes, and substitute constructive therapy for the infliction of pain, the sentencing function will be exercised pursuant to a consideration of the whole personality of the criminal, and not limited to a consideration merely of his particular, overt crime. Professor Sheldon Glueck remarked some years ago:

"In the field of criminal justice, society has experimented for many years with mass-treatment, unscientific methods. Is it not time to make a serious effort at experimentation with the more promising techniques? Any system of diagnosis and treatment of the individual delinquent, based on a responsible application of such scientific instrumentalities as exist, few and imperfect as these may be, is superior to a practice which treats human acts *in vacuo*, and human beings mechanically, perfunctorily, and in the mass, on the basis of impossible rules set down by the legislature in advance of the events to which they are to be applied by perplexed judges."⁷³

Another writer has expressed the belief that:

"Some far-sighted state, sooner or later, is going to take the sentencing function out of the hands of the judge or jury entirely and rest 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—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 millenium of the subjective approach."⁷⁴

When that day is ushered in, the degree device, a refinement engrafted upon a system which prescribes *in advance* punishment for a crime, without particular reference to the criminal, will be reduced to an historical oddity. We will have no use for it.⁷⁵

But the criminal law moves forward by a painfully slow process of accretion. It can hardly be expected that the "millenium of the subjective approach" will be achieved by a single and complete legislative revamping of our present judicial machinery. In that light, therefore,

73. Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453, 465 (1928).

74. Knudson, *Murder by the Clock*, 24 Wash. U. L. Q. 305, 356, 357 (1939). See also Glueck, *Crime and Justice* 204-47 (1936).

75. "But while these forms of individualization (degree device) exist, they are very crude; they distinguish crimes rather than criminals; they prescribe *in advance* the length of time the patient should be kept in the hospital and then hold him there the full period or discharge him ahead of time, whether cured or not. . . . Legislative prescription of detailed degrees of offenses is individualization of acts, not of human beings, and is therefore bound to be inefficient. Judicial individualization, without adequate instruments wielded by competent personnel, is destined to deteriorate into a mechanical or erratic process involving the application of rules of thumb, or implied or expressed prejudices, or worse practices. Glueck, *Crime and Justice* 223, 224 (1936).

it is essential to consider whether affirmative action to divide murder into degrees in the legislatures of those states where it is presently ungraded will hasten the ponderous development of a more enlightened treatment of offenders. It is submitted that it would; for so long as the sentencing function remains in the hands of judges, irrespective of whether or not they are bound by jury recommendations of "mercy," it is essential that any permissible latitude in the punishment of offenders, whether for murder or any other crime, stem from legislative fiat openly expressed, rather than from inarticulate judicial calculation of an *ad hominem* nature. In that sense it is preferable to execute the sentencing function within the confines of legislatively created categories of punitive severity, created in accordance with the presence or lack of particular elements of a crime, rather than to trust to the arbitrary dispensing of punishment by judges of varying degrees of human frailty. This is so if for no other reason than the desirability of attuning our legal machinery to a state of consciousness. To meet knotty issues openly is a step in the direction of solving them. In this broad sense the degree device may be of catalytic significance in bridging the gap between the present and the future. Furthermore, although the degree device does not alter the substantive definition of crime, it does tend to focus the problems of definition which currently exist in the law of homicide. In considering how to utilize the degree device we cannot help but consciously reexamine our treatment of these problems. One clarification which might well result from the adoption of the degree device would take the form of the abolition of the common law formula of "malice aforethought" and the substitution for it of a standard similar to that of "design to effect death," employed in New York.⁷⁶

But how shall we grade murder? Grading in the United States ordinarily assumes a two-fold nature. In the first instance, the legislature creates by statute degrees or divisions of murder. Subsequently, the jury accordingly fixes the degree in the particular case.

This system seems preferable to the one which prevails in those states in which the legislature does not establish degrees of murder, but instead gives the jury, within very narrow limits, the power to commit the convicted murder to death or life imprisonment. It also seems preferable to the system which exists in Illinois, where the degree device is not used, but where, by means of flexible punishment provisions, the judge is given broad discretion by the legislature to sentence a murderer to death, life imprisonment, or a term of years of a minimum of fourteen.⁷⁷

76. N.Y. Pen. Law § 1044.

77. Ill. Rev. Stat. c. 38, § 360 (Smith-Hurd, 1933). This technique is endorsed in Perkins, *The Law of Homicide*, 36 *Jour. Crim. L. & Criminology* 391, 444 (1946).

These latter techniques are unsound; for although they establish processes which permit a differentiation in terms of punishment for different kinds of murderers, they establish erratic processes. They do not face the problem of stating openly which murderers shall be punished by means of which alternative. They reduce grading, more so than does the degree technique *per se*, to a device for the dispensing of "mercy," a term which connotes as the rationale of punishment the infliction of pain and not the reconditioning of offenders. This criticism is most applicable to the previously discussed British system of selecting capital cases, which is not one of grading at all. The British condemn all murderers, or, rather, all murders, with complete uniformity and then allow "mercy" to be extended, for reasons undisclosed, to "appropriate cases." In commenting on this system one writer, a psychiatrist, has pointed with apparent pride to the fact that in recent years as many men were reprieved as were executed.⁷⁸ It would seem, though, that if the saving of human lives *per se* were our concern, we could certainly increase the number of reprieves to the greatest extent possible by simply abolishing capital punishment. The simple truth is that our concern is much broader in scope. We must save men from the death penalty, if at all, only on the basis of a deliberate and openly avowed penal philosophy. The ultimate question must remain: what does society's protection require that we do with the accused? The answer to such a question cannot be cast in terms of "mercy" to be extended or withheld according to the inarticulate and unrestrained paternal notions of justice of the public conscience—the Home Secretary. But since we are presently insufficiently sophisticated to dispense justice rather than "mercy," it would be far better to have the latter extended in accordance with the inarticulate, paternal notions of justice of a judge, within restrictive limits set by an articulate legislature. The reluctance of the British to institute degrees of murder appears on examination to be no more than a traditional reluctance to upset settled notions.⁷⁹ To the particular objection that the degree device as practiced in America is unacceptable because it "would introduce a revolutionary change in the function of a jury, which would then have to determine not only the question of

78. East, *Psychiatry and Degrees of Murder, in Society and The Criminal* 266 (London 1949). See note 62 *supra*.

79. Diligent search has not unearthed any clear statement of past British objections to murder-grading. In ambiguous form, objections are summarized in Report of Select Committee on Capital Punishment nos. 169 to 177 (1930). See also East, *op. cit.* *supra* note 78 at 256.

innocence or guilt, but also that of blame and punishment,"⁸⁰ the short answer is: Revolutionary only as viewed in a medieval perspective.

In summation, it must be emphasized that we may not sit by idly and expect that one day an enlightened, progressive criminological attitude will suddenly appear before us like the Messiah. We must strive to reach that day. The institution of the degree device in the law of murder by England and the ten American states at present without it would represent a step forward. But, the success or failure of the degree device depends upon the clarity and reasonableness with which it divides the murder area. It is of paramount importance, therefore, that the statutory standard, once established, is not robbed of meaning by the courts. It is suggested that standard of "deliberate and premeditated" will serve the purpose, and further suggested that before a court contemplate taking steps to render the standard meaningless by unwarranted construction, it consider the good sense of the following:

"Statutes like ours, which distinguish deliberate and premeditated murders from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not."⁸¹

80. Report of Select Committee on Capital Punishment no. 177 (1930).

81. *Bulloch v. United States*, 122 F.2d 213, 214 (D.C. Cir. 1941).

FORDHAM LAW REVIEW

Published in March, June and December

VOLUME XXII

DECEMBER, 1953

NUMBER 3

Subscription price, \$2.00 per year

Single issue, Seventy-five cents

Edited by the Students of the Fordham University School of Law

EDITORIAL BOARD

SIDNEY M. FRUHLING

Editor-in-Chief

JOSEPH T. RYAN

Recent Decisions Editor

REMO J. ACITO

Book Review Editor

WILLIAM J. HOLLAND

Comments Editor

MARTIN J. MURTAGH

Business Manager

Associate Editors

JOHN P. CLARK

ELAINE P. DISERIO

JOHN D. HERTZ

WILLIAM N. MAIRS

JOHN A. MANNING

JAMES H. REIDY

JAMES J. TAYLOR

Faculty Advisors

FRANCIS X. CONWAY

WILLIAM HUGHES MULLIGAN

THOMAS J. SNEE

EDITORIAL AND GENERAL OFFICES, 302 BROADWAY, NEW YORK 7, N. Y.

CONTRIBUTORS TO THIS ISSUE

CHARLES S. DESMOND, A.B., 1917, Canisius College; LL.B., 1920, University of Buffalo; LL.D., 1933, Canisius College. Justice of the Supreme Court of New York, 1940; Associate Judge of the Court of Appeals of New York, 1941 to date. Author of *SHARP QUILLETS OF THE LAW* (1949); *Where Have the Litigants Gone*, 20 *FORD. L. REV.* 229 (1951). Contributor to numerous legal periodicals.

JOHN E. MCANIEFF, A.B., 1925, LL.B., 1931, Fordham University. Assistant Professor of Law, 1946 to date, Fordham University School of Law. Member of the New York Bar.

MAURICE J. DIX, LL.B., 1910, New York University. Member of the New York Bar. Author of *Requests for Admissions Under Rule 36 of the Federal Rules of Civil Procedure*, 10 *FORD. L. REV.* 74 (1941); *Decrees and Judgments under Section 5 of the Clayton Anti-Trust Law*, 30 *GEO. L. J.* 331 (1942); *Retirement Allowance and Pension Plans of Private Corporations*, 31 *GEO. L. J.* 22 (1942); *The Armor of the Juridical Conception*, 34 *GEO. L. J.* 432 (1946).

FRANK BRENNER, B.A., 1948, Lehigh University; LL.B., 1951, Harvard University. Assistant District Attorney, New York County. Member of the New York Bar. Auxiliary member of the Criminal Courts Committee of the New York County Lawyers Association.