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NOTE

THE INTENTIONAL MURDER AT COMMON LAW AND UNDER MODERN STATUTES*

The purpose of this note is to make a survey of the intentional murder statutes, which, in the majority of jurisdictions make intentional murder a statutory offense. These statutes will be analyzed and compared to the common law offense of intentional murder in an endeavor to determine whether they are, in the main, a codification of the common law, or whether they present major deviations from it. To this end, the note will be divided into two principal parts. The first will be a brief resume of the common law intentional murder as it existed at the time the American Colonies were forming their judicial systems based upon law drawn directly from England.¹ The second part of the note will contain a discussion of the various intentional murder statutes as they exist today with an attempt to relate them to the common law, and comments on the more prevalent similarities or discrepancies which appear to exist, together with a suggested model statute applicable to the crime of intentional murder.

I.

INTENTIONAL MURDER AT COMMON LAW

Sir James Fitzjames Stephen formulated an analysis for murder at common law which will be very helpful as a basis for a brief survey of the intentional murder at common law

"Murder is homicide not excused or justified and with malice aforethought either expressed or implied. Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not."²

This subsection (a) of Stephen's analysis of common law murder is the description of the state of mind required for the intentional murder at common law; the subsection breaks down naturally into

* The note by Mr. Creech on p. 441 is a companion note to this one.
² A Digest of the Criminal Law 218 (8th ed. 1947).
three distinct situations where an intention to kill will be attributed to an actor causing the death of another. They will be discussed in turn:

(1) Where there is an express intent to cause the death of the person killed.

As used in this note, express intent may be evidenced in two ways: direct express intent or indirect express intent. A description of the former is the state of mind of one who does an act with the purpose and design of unlawfully and unjustifiably effecting the death of another thereby. In other words, he purposefully and unlawfully uses fatal means at his disposal toward a definite and desired end, which is the death of the other.

Due to the severity of punishment and the universal stigma which accompanies the intentional murder, it is understandable that one who has committed such a crime would generally be exceedingly reticent to disclose his state of mind to the prosecutor. As a consequence, the law has been required, as a matter of expediency in many cases, to infer the express intent to kill from the various circumstances of the particular case. These may take the form of threats of vengeance, lying in wait, or other circumstances showing directly that the actor entertained an express intent to kill.

To complement the use of direct evidence to cast a light upon the intent of the criminal, the law may utilize inferences of express intent from any one of several particular fact situations. Examples of such indirect express intent are where the killing is accomplished through the use of a deadly weapon, poison, or if it is committed in an exceptionally cruel and brutal manner, as by torture, the law will proceed upon the theory that the actor intended the natural and expected consequences of his act, and therefore intended to cause the death. The same inference arises from the very act of the killing itself, where there has been no apparent provocation, justification or alleviation. This inference was allowed to stand against the defendant at common law until he could show an adequate explanation of his state of mind which would rebut the inference of express intent to kill.

The second fact situation to which Stephen's analysis (a) applies is:

\[\text{References:}\]

5 East, Pleas of the Crown 224 (ed. of 1803).
7 Hale, Pleas of the Crown 455 (ed. of 1778).
9 Commonwealth v. Webster, 5 Cush. 295 (Mass. 1850).
10 Hale, Pleas of the Crown 455-456 (ed. of 1778).
(2) Where there is an intent to inflict grievous bodily harm upon another

This category or division of Stephen's analysis (a) pertains to the state of mind of the actor when he does not have an express intent to effect the death of his victim, but rather designs to inflict a grievous bodily injury upon him.

The early common law did not seem to put emphasis upon the degree of the bodily harm intended by the actor, and it would appear that the doing of any bodily harm to another, unlawfully, and resulting in death, would have constituted the requisite malice.10 However, in later years the degree of the intended harm began to assume importance.

To constitute the degree of intended grievous bodily harm, less than death, which is sufficient to establish the state of mind required for intentional murder, the courts have made use of such expressions as "grievous mischief," "great bodily harm," or "serious bodily harm."11 It will be apparent to the reader that these descriptions of the degree of injury intended by the actor are not conclusively helpful, but they do serve as guides to the court in presenting adequate instructions to the jury on this matter.

The third category into which Stephen's analysis (a) may be divided is:

(3) Where the intent to kill or inflict great bodily harm upon one person results in the death, not of the intended victim, but of a third person.

This situation is generally described by the term "transferred intent." If a man shoots at one person with intent to kill another, or puts poison in one man's drink intending to kill him and a stranger picks up the glass by mistake and dies as a result of drinking it, the crime attributed to the actor is intentional murder, notwithstanding the fact that actually he had no intent to cause that person's death.12

The basis for this doctrine seems to be that as the actor had the state of mind requisite for intentional murder, and by his act he did cause another's death, the law will transfer the intent to kill from the proposed victim to the person actually killed, thereby making the intentional murder complete.

10 1 HALE, PLEAS OF THE CROWN 451 (ed. of 1778).
12 Johnson v. State, 92 Ga. 36, 17 S. E. 974 (1893); 1 HALE, PLEAS OF THE CROWN 466 (ed. of 1778).
From the preceding discussion concerning the nature of the common law intentional murder the following summary may be drawn. It resulted from an unlawful killing with "malice aforethought." This malice aforethought was a nebulous term which was required for all common law murder, and was used to describe the state of mind of an actor who had committed murder. In the case of the intentional murder, it was satisfied by any one of the following situations:

(1) Where there was an express intent to cause the death.

(2) Where there was an intent to inflict grievous bodily harm upon another.

(3) Where the intent to kill or inflict grievous bodily harm upon one person resulted in the death, not of the intended victim, but of a third person.

Within these three categories may be grouped all the cases of intentional murder at common law

II

STATUTORY INTENTIONAL MURDER

The need for a thorough revision of the Criminal law has been recognized for many years. The present law is much the same as that which was designed to deal with problems arising in a society existing centuries ago. It is conceded, human nature being what it is, that the problems today are of much the same nature, but the circumstances under which they arise are considerably different. Due to this fact, the application of ancient law to modern crime is quite often clumsy and gives rise to increasing demand for a modern Criminal Code.13

One of the primary arguments in favor of this revision of the Criminal Law is evident when the present state of the law of murder is considered. Murder is perhaps the most heinous of all crimes and is punished with the severest penalties of the law. It would seem plausible that the law regarding murder would be settled quite satisfactorily and that at least the crime would have been defined with judicious precision. Unfortunately, this is not the case, and the present definition of murder is perhaps the most uncertain element in the entire law of Crimes. This anomaly stems from the phrase "malice

"malice aforethought" which was used by the common law as the key phrase in the definition of murder.14

The significance of the troublesome phrase, malice aforethought, seems to have been born out of the statute of 23 Hen. VIII c. 1 sec. 3. Before this statute's enactment, the distinction in felonious homicide between a killing with or without malice was merely nominal, both being indiscriminately punished by death. The term "manslaughter" was used to describe the offense in both cases. When, however, the benefit of clergy was taken away from murders with malice prepense by this statute, the more modern distinction between that most aggravated form of homicide and the inferior grades came to be recognized, so that at the period when we succeeded to the English common law, the term malice prepense or malice aforethought was firmly entrenched in the definition of murder.15

After the passage of this statute "malice aforethought" was used in its popular sense; malice was an ill will expressing an enmity of heart.16 The malice was required to exist before the act which took the life of another person, and to give expression to this idea the word aforethought was employed. The definition of murder was, therefore, the unlawful killing of another with malice aforethought. However, as the common law expanded, the original meaning of malice aforethought was altered. There came before the courts cases of homicides for which no excuse or palliation was proved, and a large class of cases where there was no actual intention to effect the death of the person killed; nor was there evidence of ill will or personal enmity. The courts were faced with choosing one of two alternatives; one was to revamp the traditional definition of murder and abandon the phrase malice aforethought. The other was to justify a conviction under the old definition by the employment of artificial meanings attached to the words malice aforethought, by which they would be made to qualify the taking of human life in all cases where sound policy, or the demerits of the offender, required that he be subjected to capital punishment. This change from the conventional meaning of the phrase, to one of "art", with its resultant ramifications of "express" and "constructive" or "implied" malice, or as it is sometimes called, "malice in law" and "malice in fact", brought about the confusion with which the definition of murder now abounds.

14 Chitty's Blackstone c. 4, p. 152. Synonyms sometimes used were "malice prepense," "malice prepensed" or merely "malice."
15 Note 2 supra.
16 Perkins. A Re-examination of Malice Aforethought. 43 Yale L. J. 541 et seq (1934).
In a criminal prosecution for murder, the defendant is entitled to a trial by jury. The jury, to be able to intelligently pass upon the innocence or guilt of this defendant, must necessarily know or have for its consideration, the definition of the crime which he is charged with committing. Today that definition is so entwined with legal fiction and opaque considerations that the average juror finds it difficult, if not impossible, to determine exactly what the crime of murder consists of. Therefore the law today is in the same position as it was in 1874 when Sir James Fitzjames Stephen gave his testimony before a select committee of the British House of Commons appointed to consider a Homicide Law Amendment Bill. In response to a question as to the state of the law in regard to the definition of malice aforethought, the great judge replied, "My opinion is that the present definition of malice aforethought can only mislead the jury."\(^\text{17}\)

Turning now to the modern murder statutes, it will be of interest to trace their development and to attempt to reason why they were not designed so as to bring about an orderly and exacting law or murder.

Pennsylvania, in 1794, was the first state to make a distinct change in the law of murder. Under English law, murder had but one punishment, and that was death. This singular punishment for all persons guilty of the crime of murder seemed harsh because there were certain acts resulting in an unlawful killing which were considered with more disapprobation by society than were others. For example, the same punishment was meted out to the felon who planned and executed a diabolical murder as was given to a person who wrongfully cause the death of a fellow being, although at the time he had no actual intent to kill any one. With this situation in mind, the Pennsylvania lawmakers revised their statute of murder. The result was a division of the crime into first degree and second degree murder. The Pennsylvania Statute reads:\(^\text{18}\)

> "All murder that shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree."

With this statute the Pennsylvania legislature accomplished its

\(^{17}\) L. R. A. (N. S.) 1109.

\(^{18}\) PA. STAT. title 18, sec. 2221 (1936).
The avowed purpose. The more heinous murders were separated and were designated "first degree murders" in contradistinction to the relatively less offense forms of murder which were placed in the "second degree murder" group. An appropriate penalty was assigned to each of the two degrees.

As stated in the preceding paragraph, the Pennsylvania lawmakers accomplished their purpose. However, it seems that beyond the division of the crime into degrees, and the introduction of improved phraseology, the statute took but a small step in the direction of arranging the law of murder into a more orderly state. It did not provide a statutory definition of the word "murder", however, the word was used directly in the definition of both degrees. As there was no statutory definition of murder given, it must be presumed that the word as used in the statute had its common law connotation; i.e., "an unlawful killing with malice aforethought." It will be observed that with regard to the first degree murder, this indirect inclusion of malice aforethought has no ill effect, as the specific acts, or types of acts, which constitute the crime are set out with particularity, and the concept of malice aforethought is thereby circumvented. In the second degree provision, however, there are no such specific acts, and in order to define the crime, the definition of malice aforethought must be employed. From this consideration of the original modern murder statute, it can be concluded that the common law definition of murder, with its malice aforethought appendage, is one of the foundations upon which the majority of the present day murder statutes are built.

The primary concern of this note is a discussion of the intentional murder statutes of the several states. The preceding analysis of the Pennsylvania statute concerned its full scope, but is justified because of its wide-spread influence upon the statutory law of murder of this country. However, the remaining discussion will be limited to the intentional murder provisions of the various statutes.

The preamble to the Pennsylvania Murder Statute reads: "Whereas the design of punishment is to prevent the commission of crimes, and repair the injury that hath been done thereby to society or the individual, and it hath been found by experience that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments; And whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety". PA. LAWS 1794, c. 257, sec. 1, 2. See Wechsler & Michael, A Rationale of the Law of Homicide, 37 Col. L. Rev. 701, 703, fn. 10 (1937).

To the first degree offense was relegated the punishment of death or life imprisonment; for second degree murder the punishment was a lesser term imprisonment.
The most expedient analysis of a subject as extensive as the statutory intentional murder, must of necessity employ some criterion by which the various statutes may be grouped or classified. This distinguishing feature, for the purposes of this note, can best be expressed by the following question: "Does the particular intentional murder statute under scrutiny employ the common law conception of "malice aforethought" in any manner, either directly or by implication?" The application of this question to each of the intentional murder statutes resulted in the formation of two opposing groups of statutes. As would be expected in view of the background of all American law, the statutes which contain some implication of the common concept of "malice" comprise the larger of the two groups. Only ten states have defined the crime of intentional murder without the use of terms smacking of the common law

The thirty-eight intentional murder statutes which comprise what will be arbitrarily termed the "Malice Group" in contradistinction to the "Non-malice Group", are, with the exception of the common employment of some implication of "malice", by no means heterogenous. For this reason it is deemed advisable to further divide this large category into sub-divisions composed of statutes which are distinctly similar to each other. The statutes in the "Malice Group" will, therefore, either fall into the (1) "Pennsylvania type", (2) "Codification type" or (3) the "General Malice type"

(1) Pennsylvania Type

The influence of the Pennsylvania statute has previously been mentioned. Its principal contribution to the law of murder, the division of the crime into degrees, has been viewed with favor and consequently adopted by all but ten of the states. The phrasing of the statute has also been used by many states as a pattern or guide to form the whole or part of their intentional murder provisions. The most wide-spread adaptation of the phrasing is that which reads: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing,"

The entire murder statutes of nine states, as well as the intentional murder provisions, show a very close resemblance, in both form and

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21 GA. PEN. CODE 4th Div. art. 1, sec. 60 (Parks, 1914); ILL. REV. STAT. c. 38, sec. 358 (1945); KY. R. S. sec. 435.010 (1948); LA. CODE CRIM. LAW & PRACT. ANN. art. 740-30 (1943); ME. REV. STAT. c. 129, sec. 1 (1935); MISS. CODE ANN. sec. 2215 (1942); OKLA. STAT. tit. 21, sec. 701 (1941); S. C. CODE ANN. sec. 1101 (1942); S. D. CODE sec. 13.2007 (1939); TEN. STAT., PEN. CODE art 1256 (1956).
substance, to the Pennsylvania statute. For this reason they will be classified as the Pennsylvania type intentional murder statute. Three of these statutes are virtual reproductions of the Pennsylvania statute. They are the statutes of Connecticut, Maryland and Vermont. They do not define murder by statute but use the word in its common law sense in their intentional murder statutes for both the first and second degrees. North Carolina, Virginia and West Virginia use all the words of the Pennsylvania statute but, in addition, employ other terms. For example, the intentional murder statute of Virginia reads: "Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing." North Carolina goes a step further and adds the word "torture" to the provision for first degree intentional murder. The second degree intentional murder in both statutes is expressed precisely as that of the Pennsylvania statute. New Hampshire is similar to these last mentioned statutes. It differs, however, in that it does not employ the word "wilful", but suffices to leave "deliberate and premeditated" to describe the first degree intentional killing. The form of the second degree intentional murder statute is practically the same as that of the Pennsylvania statute. The Michigan first degree provision is almost an exact reproduction of the Pennsylvania statute. The only distinction which can be pointed out is that, unlike the latter, the Michigan Statute has placed the provisions for the second degree intentional murder in a separate paragraph. The Missouri murder statute is as follows:

"Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree."

"All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."

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30 Mo. Rev. Stat. Ann. sec. 4376 (1939). It is interesting to notice that in Missouri the distinction between first and second degree intentional murder is the word "deliberate": "wilful and premeditated" are common to both degrees. See State v. Reagan, 108 S. W. 2d 391 (Mo 1937); State v. Liolios, 285 Mo. 1, 225 S. W. 941 (1920).
Of the nine statutes which are classed as the "Pennsylvania type", this Missouri statute, perhaps has less in common, both in form and substance, with the Pennsylvania statute than any of the others. Yet, a glance at the two in comparison will detect the marked similarity which serves as the basis for the classification.

(2) The Codification Type

The California murder statute is in substance very similar to the Pennsylvania statute. In fact, there is little justification for placing this into a separate sub-division other than upon the recognition of the form which characterizes this statute. It seems that the California legislature has codified the common law. Murder has been defined by statute in terms of the common law. Also, express and implied malice have been defined as they were at common law and placed into statutory form. Murder, however, is divided into first and second degree. The definition of the degrees of murder is taken directly from the Pennsylvania statute, and the only alteration is the inclusion of the word "torture". Therefore the intentional murder statute of California reads: "All murder which is perpetrated by means of poison or by lying in wait, torture, or by any other kinds of wilful, deliberate, and premeditated killing, all other kinds of murders are of the second degree." It will be noted that in this statute, as was true with the Pennsylvania type, the express use of the word "malice" is not employed to describe the intentional murder.

The codified form of the California statute has attracted a considerable following. Eleven states have adopted it; four almost exactly, and the other seven with minor differentiations. The intentional murder provisions of Arizona, Idaho and Nevada are precisely the same as the California statute quoted above. Iowa fails to include the word "torture" in the first degree statute and also makes separate paragraphs for the first and second degrees. Other than these minor variances, it is very similar to the California statute.

The Tennessee and Arizona murder statutes are a codification of the common law. They would be proper material for classification with the California statute, in both form and substance, but for the fact that the word "malicious" appears in the first degree intentional murder definitions which read: "All murder which shall be perpetrated by means of poison or by lying in wait, torture, or by any other kinds of wilful, deliberate, and premeditated killing, all other kinds of murders are of the second degree." It will be noted that in this statute, as was true with the Pennsylvania type, the express use of the word "malice" is not employed to describe the intentional murder.

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52 CAL. REV. CODE sec. 189 (1941).
53 ARIZ. CODE ANN. sec. 43-2002 (1939); IDAHO CODE ANN. sec. 17-1103 (1932); NEV. COMP. LAWS ANN. sec. 10068 (1929).
54 IOWA CODE sec. 690.1, 690.2 (1916).
55 ARK. DIG. STAT. sec. 2969, 2970, (1937); TENN. CODE ANN. sec. 10768, 10769 (Williams, 1934).
trated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, malicious, and premeditated killing.

Colorado, Montana, and New Mexico introduce a variation in the intentional murder provision by expressly including the common law doctrine of transferred intent. With this inclusion, the intentional murder statutes read as follows:

“All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or perpetrated from a deliberate and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed, is murder in the first degree; and all other kinds of murder are of the second degree.”

The three states, Alabama, Rhode Island, and Utah have the same provision for transferred intent as do Colorado, Montana and New Mexico. The distinction to be drawn between them is that the former states use both “malicious” and “maliciously” in the intentional murder statute. These seven last-mentioned statutes are the first, so far, in this survey to expressly employ the word “malice” or “malicious” in the intentional murder statute. It is submitted that the use of the words with their common law implication of malice aforethought has added little or nothing to the definition of intentional murder, or to the doctrine of transferred intent, and on the contrary may, due to possible common law connotation and interpretation, result in a definition so obscured by legal fiction that it will be impossible for a jury to understand.

(3) The General Malice Type

The largest subdivision of the malice group is made up of sixteen states, which are not codified and employ the word “malice”, “malicious” or “malice aforethought” in their definition of intentional murder. These statutes have few other characteristics which are mutually applicable and, therefore, offer a doubtful promise of any helpful classification.

Indiana, Kansas, and Wyoming have similar provisions in their intentional murder statutes. Indiana and Wyoming agree that the first degree intentional murder should be done purposely and with

35 Ibid.
37 Ibid.
premeditated malice. Kansas' first degree statute is similar to the Pennsylvania type, but the second degree uses the words "purposely and maliciously, but without deliberation and premeditation" to describe the crime.  

Intentional first degree murder in either Oregon or Nebraska is defined: "If any person shall purposely, and of deliberate and premeditated malice, kill another" The second degree requires that the killing shall be done "purposely and maliciously, but without deliberation and premeditation."  

The Ohio statute provides that "Whosoever purposely, and either of deliberate and premeditated malice, or by means of poison" is guilty of first degree intentional murder. This state does not follow the common law; the intentional murder statute, however, is similar in effect and content to the statutes of the common law states.  

The definition of the intentional murder, as provided by the Code of the District of Columbia, is quite similar to that of Ohio. It involves a "purposeful killing" also, and the District of Columbia Courts have held much the same as those in Ohio in regard to the requirement of an actual intent to kill for the crime of first degree intentional murder. Implied malice constitutes murder only in the second degree. The second degree intentional murder for this jurisdiction is defined: "Whoever with malice aforethought kills another, is guilty of murder in the second degree." The distinction between the first and second degrees is based upon actual intent, as well as deliberation and premeditation.  

The eight states remaining to be discussed in this category exemplify the least divergence from the common law. The Kentucky statute goes no further than to assign the punishment for "Any person who commits wilful murder." The courts of South Carolina have held that their statute, which defines murder in common law terms, does not even make murder a statutory offense. Neither Kentucky nor South Carolina has divided the crime into degrees.  

Massachusetts defines first degree intentional murder as follows:

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45 D. C. Code sec. 22-2401 (1940).
47 D. C. Code sec. 22-2402 (1940).
48 Ky. R. S. sec. 135.010 (1918).
"Murder committed with deliberately premeditated malice aforethought". This is distinguished from the second degree by the words "deliberately premeditated." The Delaware Code makes a similar provision, but substitutes "express malice aforethought" for deliberately premeditated malice aforethought.

The Maine, Illinois, and Georgia statutes are similar and provide little more than the common law definition of murder. The Georgia Penal Code makes the following provision which typifies all three statutes: "Murder is the unlawful killing of a human being in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied." The Illinois statutes define express malice as "that deliberate intention unlawfully to take the life of a fellow creature.

The Texas statute requires that the intentional murder be committed "voluntarily" and in "the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing." This otherwise admirable definition of the offense is marred by a subsequent provision that in any murder trial the court will define "malice aforethought" for the jury. As has been pointed out previously in this note, such a task is practically impossible.

The second of the two principal groups into which the forty-eight intentional murder statutes have been divided contain ten states and is designated the "Non-malice Group." The basis upon which they are classified together is that they do not employ, either expressly or by any implication, the common law concept of "malice." The argument as to why this is an admirable characteristic has been set out previously, and will not be reiterated here.

The intentional murder statute of New York is perhaps the best illustration of pure statutory murder which eschews the phraseology of the common law. This statute reads as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or

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51 Ibid.
The second degree intentional murder is a "killing of a human being when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation." The phrase, "deliberate and premeditated design" was chosen for the purpose of expressing in words a juryman could understand, the state of mind required for an actor to be guilty of first degree intentional murder. That they were well chosen, must be conceded after a glance at the dictionary; a "deliberate design" expressed in terms of dictionary definitions reads as follows: "A plan, formed in the mind, of something to be done or produced, and arrived at, or determined upon, as a result of careful thought and weighing of considerations." Add to this the further requisite of "premeditation," as understood by the average juror, and he should have a satisfactory idea as to what he must find present in the facts of the case in order to convict a prisoner of first degree intentional murder. This use of words in a statute which mean exactly what the jury would ordinarily think they mean, is superior to the use of words which, when defined as used in the law, have little or no resemblance to their natural or literal meanings.

Many courts have had a tendency to adopt a rather strained definition of the word "premeditation," at least from the layman's point of view. This may stem from the fact that "premeditation" and "aforethought" are so closely associated in natural meaning that these courts have allowed themselves to apply some aspects of the common law definition of "aforethought" to that of "premeditation." The result of this tendency is to change the ordinary definition of premeditation so that, at law, a killing would be "premeditated" if the intent to kill was formed simultaneously with the act which produced the death.

This consideration may have influenced the legislature of Mississippi when it drew up their intentional murder statute. The word "premeditated" is not used in the statute, which defines the intentional murder as:

"The killing of a human being, without the authority of law, by any means or in any manner, shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;"

The New York statute's employment of the word "deliberate" in

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1. N. Y. PEN. LAW sec. 1046 (Thompson, 1937).
2. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1944).
3. State v. Smith, 49 Conn. 376 (1881); People v. Cunningham, 6 Parker Gr. R. 398 (N. Y. 1864).
4. MISS. CODE ANN. sec. 2215 (1942). Mississippi has no degrees of murder.
addition to "premeditated" serves as a useful guard against the possibility of any unlawful intentional killing becoming murder in the first degree.

Statutes of the six states of Florida, Minnesota, Oklahoma, South Dakota, Washington and Wisconsin are similar to the New York statute, the principal difference being that the word "deliberate" is not used to supplement "premeditated." The first degree intentional murder provision of Washington is typical:

"The killing of a human being is murder in the first degree when committed either—
(1) With a premeditated design to effect the death of the person killed, or of another"

"The killing of a human being is murder in the second degree when—
(1) Committed with a design to effect the death of the person killed or of another, but without premeditation;"

In the Minnesota statute, this omission of "deliberate" in the first degree provision is partially remedied by the second degree statute. The intentional killing is second degree murder if done "without deliberation and premeditation." Thus, by indirection, makes deliberation as well as premeditation a requisite of first degree intentional murder.

The three statutes remaining to be discussed in the Non-malice Group have certain objectionable features, which may be pointed out here. The New Jersey intentional murder statute, at first blush, would be classed as a Pennsylvania Type statute. The provisions for the intentional murder in the two statutes are identical in form. However, the word "murder," as used in the New Jersey statute, has been given a statutory definition in terms which avoid the use of implication of "malice aforethought." The word "murder" as employed by the Pennsylvania statute is used in its common law sense. The advantage gained by the abolition of common law terminology in the New Jersey definition of murder was lost, however, because this definition was made up of a lengthy list of specific situations, each of which would be murder if the killing were committed under that particular set of circumstances. Thus, the definition is overburdened with particular-
ity, which may result in an undesirable rigidity and lack of flexibility necessary to meet new situations which might well arise. As this word “murder” is incorporated directly in the first degree intentional murder statute, and indirectly in the second, their desirability and efficiency are accordingly reduced.

The objection to the North Dakota intentional murder statute is that, on its face, it fails to provide for an intentional killing which was committed without any deliberation or premeditation. To begin with, the statutory definition of murder is as follows:

"Homicide is murder in the following cases:
1. When perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being.

Two other provisions within this definition include the negligent murder and the felony murder. The crime of murder is then divided into degrees:

"The intentional murder is 'Every murder perpetrated by means of poison, or by lying in wait, or by torture, or by other wilful, deliberate or premeditated killing is murder in the first degree. All other kinds of murder are murder in the second degree.'"

A glance at the statutory definition of murder will show that any killing which is to be regarded as murder, either in the first or the second degree, must by the express terms of that definition, be a premeditated killing. From this it seems to follow that any intentional killing which is not premeditated, will fall under the provisions of the manslaughter statute—"Homicide, not excusable or justifiable but perpetrated in a manner not constituting murder, is manslaughter."

The criticism of the Louisiana statute is directed toward the fact that it omits the possibility that an intentional homicide could occur under such circumstances as to make it excusable or justifiable. The statute reads, "Murder is the killing of a human being, (1) when the offender has a specific intent to kill or to inflict great bodily harm; or Thus, a person who in self-defense, kills another with a "specific intent" to do so, even though justified in his actions, would presumably also meet the requirements for a murderer, as set out in the intentional murder statute. Admittedly, this defect can be, and is, remedied by the court's instructions and rulings upon the trial, but it is suggested, in view of the fact that there are no degrees of murder

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60 N. D. REV. CODE sec. 12-2712 (1943).
62 Note 59 supra.
63 N. D. REV. CODE sec. 12-2715 (1943).
64 LA. CODE CRIM. LAW & PRACT. ANN. art. 740-30 (1943).
in Louisiana, and the single punishment for murder is death, that the statute could have been worded so as to clearly except excusable and justifiable intentional killings.

The foregoing survey of the forty-eight intentional murder statutes may be employed as an aid in the drawing up of a suggested model intentional murder statute. The statutes which have embodied some use or implication of common law "malice aforethought" will, for reasons presented above in the discussion of the statutes, not be considered as desirable precedent for this model statute. Of the ten states which have not embodied the concept of "malice" in the phrasing of their intentional murder statutes, New York seems to approach nearest to what, in the opinion of the writer, such a statute should be and contain. The crime is separated into two degrees, a characteristic inherited from the original Pennsylvania statute. It is defined in general terms which gives the statute elasticity essential to enable it to contain new acts, resulting in intentional killings not heretofore dealt with by law. Finally, and probably most outstanding, the words used to describe the crime are defined by both the law and the man on the street in precisely the same manner. Therefore the definition of intentional murder is open to immediate understanding by the average juror and will result in a more intelligent and efficient consideration by him of the guilt or innocence of the accused on the facts in the case.

The New York statute, therefore, is the pattern from which is cut the following model intentional murder statute. The reader will notice that the only alteration in the New York statute suggested by the writer is the preface to the second degree provision.

This suggested intentional murder statute is set out here as a model designed to accomplish speedy justice and to dispense with many of the undesirable characteristics of the common law definition of intentional murder:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed:

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or"

"The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when committed:

1. From a design to effect the death of the person killed, or of another, but without deliberation and premeditation."

A. Singleton Cagle