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Statutory Intentional Murder

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Student Notes

STATUTORY INTENTIONAL MURDER*

Murder in the United States today is defined by statute. Most of the statutes now divide murder into two degrees, but a few have created three degrees. In two of the states which have three degrees of murder there is no provision for capital punishment. In Georgia, Illinois, Kentucky, Louisiana, Maine, Mississippi, Oklahoma, South Carolina, South Dakota and Texas there are no degrees of murder.

From a standpoint of construction the murder statutes as to intentional murder may be divided into three types:

1. Those which define murder generally and also by degrees, and which deviate from the common law only by the additional requisite of deliberation and premeditation, or premeditation alone, for a first degree conviction.

2. Those which define murder generally, utilizing only a bare common law definition of the crime.

3. Those which attempt to depart from the common law entirely and set up a new definition.

Typical of the statutes of the first group is that of California which describes intentional murder as follows:

“187. Murder defined. Murder is the unlawful killing of a human being, with malice aforethought.

“188. Malice defined: [Express and Implied]. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears.

“189. [Degrees of murder]. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree and all other kinds of murders are of the second degree.”

The statute of Georgia, illustrative of the second group, creates no degrees of murder and represents a mere general common law definition of the crime. The Georgia statute reads as follows:

“60. Murder. 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 note by Mr. Cagle on page 424 is a companion note to this one.

1 The first state to create statutory degrees of murder was Pennsylvania in 1794. See N. Y. LAW. REV. COMMISSION REPORT 543 (1937).

Kentucky is the only state which does not have a statute generally defining murder. See Lucas v. Com., 231 Ky. 76, 78, 21 S. W. 2d 113, 114 (1929); Com. v. Illinois C. R. R., 152 Ky. 320, 324, 153 S. W. 459, 461 (1913). In South Carolina although murder is defined by statute it is not made a statutory offense. See State v. Bowers, 65 S. C. 207, 213, 43 S. E. 656, 658 (1903).

2 MINN. STAT. sec. 619.07 (1945); WISC. STAT. sec. 340.02 (1943).

3 CALIF. PENAL CODE, tit. 8, secs. 187, 188, 189 (Deering, 1941).

4 GA. CODE ANN. sec. 60 (Parks, 1914).
The New York statute representative of the third group of statutes defines the intentional murder as:

"1044. Murder in the first degree defined. 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

"1046. Murder in the second degree defined. Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation."

The intentional murder under the statutes is either first or second degree. Intentional first degree murder, punishable by death or long imprisonment, is murder which is marked by deliberation and premeditation. Nearly all of the statutes expressly require deliberation and premeditation, or premeditation alone, but the meaning of these words and the manner in which they may be determined are questions upon which there is considerable diversity.

**Deliberation and Premeditation**

At common law certain acts of killing were set out for special condemnation. Among such acts, one was a killing by lying in wait. After the Norman Conquest, the English, seeking vengeance, killed Norman travelers and as a result the Norman kings imposed the fine of *murdrum* upon the district in which such killings occurred. The fine of *murdrum* was abolished, but the phrase *lying in wait* remained in the law. A killing by poisoning also was shortly thereafter declared to be murder. Petit treason, the killing of a husband by the wife, or the killing of a master by a servant, became an aggravated murder. The depravity of the act was no doubt the basis upon which punishment was meted out at the common law.

A killing by poisoning or while lying in wait normally suggests a preconceived and well prepared plan and this may have been the reason the statutes adopted such phraseology; or, perhaps, the legislators merely intended to incorporate the common law into the statutes. The first degree statutes of twenty-five states, which are California type statutes, incorporate the phrase, "All murder which shall be perpetrated by means of poison, or lying in wait " or a phrase sub-

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6 N. Y. CONSOL. LAWS, Pt. 1, Art. 94, secs. 1044, 1046 (Thompson, 1939).
8 1 Blackstone, *Commentaries* 196.
8 Stephen, *op. cit. supra*, note 8, at 140. The early statutes in this country made petit treason a special kind of murder. Today petit treason as a distinct type of murder in many states has been abolished by statute. Representative of such statutes is N. Y. CONSOL. LAW, Pt. 1, Art. 94, sec. 1040 (Thompson, 1939).
8 In other states to cause the death of another in a duel is by statute made first or second degree murder. See 5 Nev. Comp. Laws sec. 10104 (Hillyer, 1929); 3 Ore Comp. Laws sec. 25-104 (1940); R. I. Gen. Laws, c. 606, sec. 9 (1938).
A killing as the result of poison, lying in wait, torture, by perjury or subornation of perjury, or with extreme atrocity and cruelty, indicates that the killing was probably not an impulsive act. Each act requires some preparation, and at least a sufficient time for a rational mental process. However, it is questionable whether a modern statute on intentional first degree murder should set aside specific acts which if proven are conclusive of the existence of deliberation and premeditation. It is arguable that if specific acts are categorized that might more readily deter potential offenders by impressing upon such persons that certain designated acts will be first degree murder. But the fine legal technicalities attached to the manner in which an intentional killing may be accomplished are not of general knowledge. Any rational person knows that it is morally and legally wrong to kill a human being by poison, or while lying in wait, or by any other intentional means. A statute which categorically states that a murder perpetrated by poison, lying in wait, or torture shall be first degree murder should mean no more than that a homicide which is perpetrated by poison, lying in wait, substantially the same." Other statutes list poison and omit "lying in wait." In Arizona, California, Colorado, Idaho, Montana, New Mexico, New Hampshire, Nevada, North Carolina, and North Dakota, "torture is specifically condemned. The statute of Massachusetts uses the phrase with extreme atrocity or cruelty." New Hampshire, North Carolina, and West Virginia include death by starving." The Nebraska statute punishes for first degree murder, "whoever by wilful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person." Virginia, West Virginia and North Carolina provide for the first degree conviction of one who causes the death of another by imprisoning the latter. If the killing is proved to have been committed in one of the manners specifically condemned this conclusively establishes deliberation and premeditation.

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or torture shall be first degree murder if it is found to be intentional, deliberate and premeditated. It is not impossible to imagine a murder intentionally committed by poison which is not deliberate and premeditated. In *People v. Caruso* the defendant murdered the doctor who was attending the son of the defendant. The doctor had not provoked the defendant, but in the defendant’s tortured mind he imagined that the doctor laughed upon finding that the son was dead. It was held that the killing was not premeditated. Suppose the defendant in this case, instead of strangling and stabbing the doctor, had gone into the kitchen and returned with a cup of poisoned coffee for the doctor from which the doctor drank and died. Would this have shown deliberation and premeditation any more than the acts of strangling and stabbing which actually took place? It is believed that the answer should not be in the affirmative as a matter of law. A murder by lying in wait in which deliberation and premeditation did not exist is not impossible to imagine. For example: A who has been reproved and incited to anger by B steps out of the doorway of the room in which A and B had been present. Shortly thereafter B comes through the doorway. It is dark and B does not realize that A is waiting outside the doorway. A strikes B a blow which causes B’s death. The fact that A was lying in wait should be irrelevant if A was mentally incapable of deliberation and premeditation. If only one injustice might occur from the practice of specially condemning certain acts of killing, this should be sufficient to discontinue the classification of particular manners of killing which are designed to conclusively establish deliberation and premeditation. In Colorado a killing perpetrated by torture is first degree murder, but a killing by extreme atrocity and cruelty may not be. To base a decision upon the technical distinction between these two terms would seem to be a questionable procedure.

The manner in which the murder is effected should merely be evidence of the intent and premeditation requisite for a first degree intentional murder conviction. It effects no real purpose to condemn specific acts in a murder statute which conclusively establish deliberation and premeditation unless it is to ease the burden of the prosecution. In fact, to specially condemn certain acts as deliberate and intentional murder by statute shows an attempt to categorize human minds collectively.

The California type of intentional murder statutes have attempted to describe the requisite state of mind for a first degree intentional murder conviction by listing certain specially condemned acts as murder. But it was impossible and impracticable, of course, for the legislators to list all the manners of killing which might amount to first degree murder. Therefore, it was necessary to describe in more general terms the state of mind which might be found to warrant a first degree murder conviction. This general phrase in the California statute follows immediately after the terms poison, lying in wait, etc., and is phrased, "or by any other kind of wilful, deliberate and premeditated killing." The First degree murder statutes of twenty-nine states and the District of Columbia, as does the...
California statute, require a deliberate and premeditated killing. Others omit the word *deliberate* and employ the term *premeditated* only. The statutes of Delaware, Georgia, Illinois, Louisiana and Maine make no mention of deliberation and premeditation. The statute of Delaware requires express malice aforethought, and Georgia, Illinois and Maine require malice aforethought either express or implied. The Louisiana statute has no terminology descriptive of deliberation and premeditation.

This general phraseology, descriptive of the requisite state of mind for an intentional first degree murder conviction, should indicate that a mere momentary impulse to kill is not in accord with the legislative intent in the use of the words deliberate and premeditated. Literally, deliberation and premeditation indicate thought processes which require a lapse of a certain period of time. But an interval of time is not all that the words connote. In addition to and during this period of time these words require, it would seem, that a rational mind be at work before it can logically be said that there was deliberation and premeditation.

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25. *Del. Rev. Code, c. 148, 5157 sec. 1 (1935)* (Many of the states which use the words *deliberate* and *premeditated* use the term *malice aforethought* to define murder generally, as does the California statute quoted in the text *supra*).


28. *See People v. Thomas, 25 Cal. 2d 880, 156 P. 2d 7 18 (1945).*

29. The courts are not unanimous in their interpretation of the meanings of deliberation and premeditation.


*Deliberate* means "to weight in the mind; to consider the reasons for and against; to consider maturely; reflect upon: ponder." *Webster’s New Intl. Dictionary* 692 (2nd ed. 1939). *Premeditate* means "to think on, and revolve in the mind, beforehand; to contrive and design previously." *Id.* at 1950.
Obviously the legislatures and the courts cannot categorically lay down a specific period of time by which to measure and gauge deliberation and premeditation in all cases. Neither would it seem that the legislatures and courts can set forth any general objective tests to determine if there has been a rational mental process during that period which transpires from the formation of intent to kill until the killing actually occurs. Many courts hold that it is unnecessary that any period of time elapse between the fomenting of the intent to kill and the killing.25 The statutes of North Dakota, Oklahoma and South Dakota incorporate this rule.26 Other courts using more cautious language state that there must be a lapse of an appreciable time between the intent to kill and the killing in order to sustain a first degree murder conviction.26

It is more realistic and probably the practice of most courts to abandon the time element as an infallible test and merely inquire if there has been a rational mental process. Under such plan, time is a factor, of course, but not necessarily the controlling factor in arriving at a decision. The state of mind of the defendant immediately preceding the killing up until the time of the act of killing is the important factor. How to determine this state of mind is one of the most important and one of the most important and one of the most difficult problems in the criminal law. It is one of the most important because a verdict that there was deliberation and premeditation may result in the extermination of a life which might well be beneficial to society. It is one of the most difficult because the court and jury must, if the job is properly done, pry into the subjective mental processes of a human being, a task which science will unquestionably admit cannot be done without error.

All courts and juries must use the objective circumstances of the killing as a factor in determining if deliberation and premeditation exist. It is necessary in perhaps most cases to find deliberation and premeditation wholly from circumstantial evidence.29 "Ill will, previous difficulty between the parties, declaration of intent to kill either before or after striking the fatal blow" may be sufficient evidence of deliberation and premeditation.20 If the killing was by the use of a deadly weapon this may establish an inference of deliberation and premeditation.20 If the killing was committed in a brutal manner this is evidence of first degree murder.24 Of course these tests are valid and necessary but they are no more than general evidentiary rules which can be applied to the case of each and every individual to determine the existence or non-existence of deliberation and premeditation. However, if deterrence of crime is to be realized as fully as possible, intentional murder should be punished as first degree only where the defendant

26 1 N. D. Rev. Code sec. 12-2709 (1943); Okla. Stat., tit. 21, sec. 703 (1941); 1 S. D. Code sec. 13,2038 (1939) (In Oklahoma and South Dakota murder has not been divided into degrees).
27 Bullock v. United States, 122 F. 2d 213 (App. D. C. 1941); State v. Merry, 136 Me. 245, 8 A. 2d 143, 146 (1939); People v. Guadagino, 233 N. Y. 344, 353, 135 N. E. 594, 597 (1922); State v. Arata, 56 Wash. 185, 105 Pac. 227 (1909).
29 Id. at 54.
31 Evans v. United States, 122 F. 2d 461 (C. C. A. 10th 1941).
in fact does deliberate and premeditate, and whether or not he does so, it is believed, should be garnered, not only from the physical circumstances of the killing but from that particular defendant's subjective mental processes in each individual case, taking into consideration his mental and emotional make-up along with the objective circumstances of the act.

The law has long recognized that a sudden unprovoked assault, adultery or certain other acts of provocation will reduce what might otherwise be first degree murder to the crime of voluntary manslaughter. Several courts have expressly recognized certain lesser acts of provocations to deny the existence of deliberation and premeditation and thereby mitigate the degree of murder from first to second. But the provocation must be one which would have obscured the reasoning power of an ordinary man under like circumstances and would have been sufficient to have prevented a rational thought process. A quarrel between the defendant and the deceased would seem sufficient to create a state of mind in the defendant which might prevent deliberation and premeditation. The Missouri Court has stated that "Opprobrious epithets, insulting gestures and the like" are sufficient provocation to deny the existence of deliberation and premeditation.

In one case it was stated there may not have been deliberation and premeditation where the defendant after being rebuked by the man who had inveigled her into unlawful cohabitation, went away, secured a razor, and on her return slashed the inveigler's throat, causing his death. But it was found to be first degree murder where the defendant, husband of the deceased, strangled the deceased after being informed by her that she had found another man and did not care whether she left the defendant or not. In a late California decision, People v. Thomas, the defendant and the deceased, both defense plant workers, had been living in adultery for a number of years. The defendant worked nights and the deceased worked days. On the night of the murder the defendant came back home instead of going on to his job. As he approached the house he overheard the mother of the deceased, who was at that time living with them, tell the deceased that she (the deceased) should not be "runnng out" on the defendant. The ensuing conversation between the deceased and her mother convinced the defendant of his previous suspicions of his mate's infidelity. Defendant then went into the house, pushed deceased out the door, and threw her from the porch. She ran down the street and the defendant followed, shot and killed her. The California Supreme Court reversed a first degree conviction holding that the trial court erred in its interpretation of the statutory meaning of deliberation and pre-

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35 In Bullock v. United States, 122 F.2d 213, 214 (App. D.C. 1941) the court stated: "Statutes like ours, which distinguish deliberate and premeditated murder 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."

37 Rivers v. State, 75 Fla. 401, 78 So. 343 (1918).
39 See State v. Eaton, 154 S.W. 2d 767, 769 (Mo. 1941). In State v. Jackson, 344 Mo. 1035, 130 S.W. 2d 595 (1939), the defendant testified that as he walked toward the house of the deceased (defendant's ex-mistress) he overheard the deceased say to another man that "she could kill the black son-of-a-bitch" (he defendant). Held: This, if true, was sufficient provocation to negative deliberation and premeditation.
42 25 Cal. 2d 880, 156 P. 2d 7 (1945).
meditation; that these words meant more than a mere specific intent. The court stated that the legislative intent when creating the statute was to give greater acknowledgment to "differing degrees" of human frailty and that the defendant may not in fact have deliberated and premeditated.

In most of the cases just commented upon, the courts have given emphasis to human frailty; or stated in other words, in those cases the courts have attempted to delve into the particular defendant's subjective mental processes in order to determine if there was an actual deliberation and premeditation, but apparently none of them recognize any provocation which would not incite the passions of a reasonable man.

In one situation the law, it would seem, has gone beyond the reasonable man standard in recognizing a "human frailty." This is where the intoxicated mind is allowed as a defense to deliberation and premeditation. Intoxication is a rather generally recognized factor for the court and jury to consider in determining the existence or non-existence of deliberation and premeditation. Whether or not it is just to recognize voluntary drunkenness as a factor which will confuse the reasoning faculties and thereby mitigate a first degree murder to a second degree murder is not questioned, but if it is, by way of analogy, the law should not be so reluctant to recognize hereditary and environmental defects in the individual which result in character traits not common to all persons. Of course, every alleged uncontrollable temper cannot be recognized by the law, but allowance, it would seem, can be made where the particular circumstances justify it. It is believed that it is not unjust for a court to apply different standards to different individuals in determining if there has been deliberation and premeditation, if the court can practically do so. It takes greater provocation to incite A than it does to incite B, yet both commit murders under the same provocation, there is no reason why B should not receive a milder punishment than A if B can convince the court and jury by competent proof that he was incapable of deliberation and premeditation at the time of the killing.

The only case found which recognizes a provocation which, it is believed, would not have been a provocation to a reasonable man under like circumstances and which was allowed to reduce what might have otherwise been first degree murder to second degree murder is the case of People v. Caruso. In that case the defendant Caruso murdered the doctor who was attending his son. The doctor arrived late, not unlike doctors often do. Perhaps Caruso while awaiting the arrival of the doctor meditated upon his poverty, his inability to furnish his son better medical care, or perhaps better food. When the doctor arrived the son was dead. Possibly Caruso had an ungovernable temper. That inference is not unwarranted by the facts. Revenge for the death of his son no doubt entered Caruso's mind. He did suspect malpractice, but had no reason to do so. But it was held that Caruso did not kill with deliberation and premeditation. The life of a blameless human being was extinguished, but who would have benefitted had the life of his murderer also been extinguished?

Because of the peculiar circumstances in the Caruso case it is extremely easy to agree that the defendant should not have been convicted of first degree murder. Sympathy is invoked for him. But changing from that case to a situation where there is no sympathy for the defendant, it is difficult for us to answer impartially

\footnote{Garner v. State, 28 Fla. 113, 9 So. 835 (1891). See also cases cited in Notes, 12 A. L. R. 883-888 (1921) and 79 A. L. R. 903-904 (1932). But intoxication will not be allowed to reduce the degree of murder if it can be shown that defendant planned the murder before becoming intoxicated. State v. McManus, 217 N. C. 445, 8 S. E. 2d 251 (1940).}
\footnote{See note 19 supra.}
the question: Did the defendant actually deliberate and premeditate? Instead most people are apt to look with sympathy toward the deceased and those he left behind, and to look with anger and contempt upon the defendant.

Perhaps the solution to the problem of deliberation and premeditation rests upon calm and deliberate-minded trial judges who are capable of creating a judicial state of mind in the jury. If the jury looks upon the question of deliberation and premeditation as the trial judge should look upon it, this will probably be as near as the law can go toward achieving perfection as to the question of deliberation and premeditation. The legislatures cannot lay down categorical rules to guide the courts in determining the existence of deliberation and premeditation. It would seem to be a matter in which the courts must necessarily have great flexibility. The legislatures can and should require that deliberation and premeditation exist for a first degree murder conviction.

The distinction between deliberation and premeditation stated by many of the courts is perhaps more artificial than real, but making such distinction may aid in informing the jury that a rational mental process is required for a first degree murder conviction. There would seem to be no doubt that both words are useful, and if an additional adjective description of a rational mental process might be found its use would not create redundancy. There should be no doubt that deliberation and premeditation mean more than a mere intent to kill at the moment the killing takes place. Any person who kills, takes a life intentionally, unless the act is accidental or negligent, but all do not kill with deliberation and premeditation.

If deliberation and premeditation are to be the test for unexcusable and unjustifiable homicides, which are designated as first degree murder, then what is the role of malice aforethought in the first degree murder? Also, if a second degree murder is a killing, not excusable or justifiable, which is not marked by deliberation and premeditation, does the term malice aforethought have any significance in this grade of homicide?

The significance and usefulness of malice aforethought, and certain further problems, as related to the above questions, are discussed below.

Malice Aforethought

At the beginning of this note where a classification of intentional murder statutes was attempted it was stated that one group (of which the California statute was an example) followed the common law definition of murder except for the additional requisite of deliberation and premeditation; that another group (of which the Georgia statute was typical) was merely declaratory of the common law; and that still another group (of which the New York statute was illustrative) attempted to depart from the common law definition of the crime.

The common law definition of murder, which was the unlawful killing of a human being with malice aforethought, either express or implied, is still in use by the great majority of states today. Both the Georgia and California type statutes employ the common law term, malice aforethought. The reason or reasons why the majority of states have tenaciously clung to the phrase is not to easily understood. Is it because the phrase has some practical value to the law? How have the states which have dispensed with the phrase accomplished such a result?

Malice aforethought, as analyzed by Stephens, was a phrase which signified several states of mind. Briefly these states of mind were: the intention to cause death or grievous bodily harm to a human being; knowledge that the

act in question which causes death will probably cause death or grievous bodily harm to a human being; (c) intent to commit a felony; and (d) an intention to oppose the legal act or acts of an officer of the law where the offender has knowledge of the officer's identity.

In discussing the intentional murder we are, of course, only concerned with (a) of Stephen's analysis, but to get a clear concept of the term malice aforethought it is necessary to consider all of the classifications of the analysis collectively. It is obvious that the four categorizations of the analysis cannot be labelled either intentional or negligent alone since (a) itself is the actual intentional state of mind found in the crime of murder and (b) is the negligent state which accompanies the killing and which is now known to the law as the negligent murder. A killing occurring under (c) or (d) of the analysis might be intentional or negligent depending upon the circumstances of the particular case. These states of mind collectively make up the term malice aforethought.

It is not seriously doubted that there was logic underlying the employment of the term malice aforethought in the common law. It is difficult in most situations and impossible, perhaps, in others to determine whether the state of mind which motivated a defendant to cause death was one of actual intent or, on the other hand, one of wanton disregard of safety. There is a difference between such states of mind, but to distinguish between them by proof is difficult. With reference to criminal intent it has been said that "As far as actual intention is concerned, more is required than an expectation that the consequence is likely to result from the act." But, "On the other hand it is not necessary that the consequence should be 'desired' in the usual sense of that word. Since a negligent state of mind which will warrant a murder conviction is not too dissimilar in physical make-up from an intentional state of mind which will also sustain a murder conviction, it is not illogical that early in our judicial history there was felt a need for ascribing to these states of mind a fixed general term, perhaps in order to assign to such states an appropriate place in the law. This may be one reason behind the early widespread employment of the term malice aforethought.

The utility of the phrase, however, has been questioned considerably, and since deliberation and premeditation have found their way into the statutes, the term would seem to be absolutely useless today in the intentional first degree murder. Several states have phrased their statutes so as to leave out entirely any mention of malice aforethought, yet the substantive crime of murder has not basically changed from what it was at the common law, as that law was adopted in this country. The statutes of Florida, Louisiana, Minnesota, New Jersey, New York, North Dakota, Oklahoma, South Dakota, Washington, and Wisconsin make no mention of malice aforethought. The way in which these states have abandoned the use of the phrase is most simple. Instead of using malice aforethought in the statutes, they have merely defined the phrase either by statute or by judicial decision. In Minnesota, New York, and Washington, the statutes state that any killing of a human being unless excusable or justifiable, is first degree murder when committed with a premeditated design and that such killings are second
degree murder when committed with a design but without premeditation.\textsuperscript{50} This, as to the intentional murder, is essentially what malice aforethought in the legal sense has long meant. The New York and Washington statutes in express terms also state what murders are excusable and justifiable.\textsuperscript{54} In Oklahoma, North Dakota, and South Dakota the statutes are to the effect that a killing without authority of law shall be murder where the actor with a premeditated (or deliberate) design effects the death of another.\textsuperscript{52} The statutes of these states, in order to define what is a killing without authority of law, define excusable and justifiable homicides.\textsuperscript{53} The remaining states which have abolished the term malice aforethought, Florida, Louisiana, New Jersey, and Wisconsin have also accomplished such a result in a similar manner.\textsuperscript{24} The Mississippi statute is worded very similarly to the statutes just discussed and makes no mention of malice aforethought.\textsuperscript{55} However, in Bangren v. State, a case decided two years after the enactment of the present Mississippi statute, the court stated that malice aforethought was a necessary element of murder.\textsuperscript{53} Such a holding would appear to be contrary to the legislative intent.

As early as 1854, the state of New York discarded the term malice aforethought from its law.\textsuperscript{27} In 1919, the Florida Court held that the statute of that state did not make malice an element of the offense of murder.\textsuperscript{53} In the same year the New Jersey Court in State v. Moynihan stated:

\begin{quote}
"It is not true, as counsel argue in their brief, that the court eliminated from the jury the question of malice. This is an unwarranted deduction made by counsel, because the court did not in terms speak of malice being an ingredient of the crime charged. Malice, in its legal sense, means nothing more than an evil state of mind. The premeditated and deliberate design of a sane man to kill a human being, purposely executed without adequate legal justification, stamps such an act as the result of an evil state of mind; hence an act conceived in malice \textsuperscript{59}\"
\end{quote}

It has been held in a jurisdiction which employed the term malice aforethought that it was not error for the trial court to omit any reference to the term in an instruction to a jury.\textsuperscript{59}

\textsuperscript{24}2 Minn. Stat., secs. 619-07, 619.08 (1945); N. Y. Consol. Laws, pt. 1, secs. 1041, 1046 (Thompson, 1939); 1 Wash. Rev. Stat., tit. 11, secs. 2392, 2393 (Remington, 1932).
\textsuperscript{54}Okla. Stat., tit. 21, sec. 701 (1941); 1 N. D. Rev. Code, sec. 12-2708 (1943); 1 S. D. Code, sec. 13.2007 (1939) (Among these states, none except North Dakota have divided murder into degrees).
\textsuperscript{57}2 Miss. Code Ann., tit. 11, secs. 2215, 2218, 2219 (1942).
\textsuperscript{58}196 Miss. 887, 17 So. 2d 599 (1944).
\textsuperscript{59}Daisy v. People, 10 N. Y. 120, 136, 137 (1854).
\textsuperscript{60}Riggins v. State, 78 Fla. 459, 83 So. 267 (1919).
\textsuperscript{61}93 N. J. Law, 253, 106 Atl. 817 819 (1919).
\textsuperscript{62}Pruitt v. State, 163 Miss. 47, 139 So. 861 (1952), Durham v. State, 158 Miss. 833, 131 So. 412 (1930).
It is not contended that the states whose statutes have abolished the term malice aforethought have eliminated the substantive meaning of that term, as it was used in the late common law, from their law. They have merely eliminated the term itself. If murder is the killing of a human being which does not come within the definition of manslaughter and which is not excusable nor justifiable, and malice aforethought is the state of mind which motivates such a killing, malice aforethought in substantive meaning will perhaps always remain in the law of murder. If this is true, is it greatly important that use of the term should be discontinued?

The most practical reason that can be advanced as to why it would be best to dispense with the phrase is that its use is apt to confuse the jury. But this single reason is obviously sufficient to warrant discarding it.

The legal significance of malice has already been explained. This legal meaning of the term is almost the very antithesis of the ordinary meaning of the word. To the layman, malice means hatred, spite, malevolence, but malice as used in murder is not limited to hatred, ill will, or malevolence, but denotes a wicked and corrupt disregard of the lives and safety of others.

On the other hand, what is to be said in favor of retaining the term malice aforethought in the law? Professor Perkins has stated the argument as follows:

"With its [malice aforethought's] present import, it is rather a bit of juridical shorthand than an explanatory expression. It is not a key which unlocks mysteries, but a label to be attached after the secret is solved. It has no magical powers. It is not a rule of thumb which can dispense with a rigid scrutiny of the facts of each particular case. It is, however, a convenient symbol. The psychical element of the crime of murder is so complex and complicated that legal discussions would be greatly handicapped if there were no term to express it. If no more than this is demanded of the phrase malice aforethought, it has a very important function to perform."

Such argument is not even remotely convincing. It is true that retention of the phrase would not be unsound if it could be limited to use in classroom or private discussion, or to judicial and legal writing. But this is impossible of accomplishment. If the phrase is retained for any purpose in the law it will be used in courtroom instructions to juries. For this reason, it is believed that the use of malice aforethought should be discarded.

Express and Implied Malice.

In those states in which the term malice aforethought is still of significance, the word malice or malice aforethought has been broken down into malice express and malice implied. The California statute in defining malice states:

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears."

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Express Malice.

The definition of express malice as set forth by the California statute would appear to be the same as that expressed at an earlier date by Blackstone. Such definition was as follows:

"Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm."

Express malice as used above refers to the character of proof by which a murderous state of mind is discovered. The term through its long history has acquired other meanings to such an extent that it would seem of dubious value even if the term malice aforethought is retained. It has acquired at least three other meanings. First, the term has acquired the meaning of ill will, hate and malevolence, and second, it has come to be known in modern statutes as the legal equivalent of the term "deliberation and premeditation." Thus killings which result from poison, lying in wait, torture, perjury or extreme atrocity and cruelty would be denominated as killings with express malice. Such manners of killing are the one pointed out heretofore as being those which many statutes make conclusive evidence of deliberation and premeditation, and hence first degree murder in the states which have divided murder into degrees. Such a definition of express malice is no doubt what leads some courts to state that a killing by express malice is first degree murder. The following third and extremely unique use of the term appears in some cases: If A with legal malice toward B, kills B, he is said to have acted with express malice. While on the other hand, if A with legal malice toward B kills C instead of B, A is said to have acted with implied malice.

If the term malice aforethought were abolished from the law by one swift stroke of the legislative pen it would be unnecessary to advocate the discontinuance of the supposedly descriptive adjectives express and implied. But if it can be urged upon the legislatures that the use of the terms express malice and implied malice are in hopeless confusion, this may prompt hastier consideration of the undesirability of the term malice aforethought. In an early New York case, Darry v. People, it was stated:

"There is no difference in the nature or degree of the malice intended, whether it be called express or implied, when these terms are used in their most appropriate sense. If properly applied, they refer only to the evidence by which the existence of malice is established. Both alike, the one no less than the other, mean actual malice, malice shown by the proof to have really existed. They are appropriate terms to express different modes of proof, and are habitually used for that purpose, but are not adapted to the description of different degrees of malicious intent."

Again in the same opinion Judge Selden said:

"A glance at the law of murder, as it existed prior to the Revised Statutes, will make it evident that the terms express and implied malice used so copiously in every definition of murder at common law, must have been intentionally excluded from the stat-

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64 BL. COMM. 199.
65 See Note, 38 L. R. A. (n. s.) 1054, 1075 (1912).
67 Ferrell v. State, 43 Tex. 503 (1875).
68 10 N. Y. 120, 136, 137 (1854).
ute; and I think it equally clear, in view of the great looseness and inaccuracy with which these terms had been used, that this exclusion was wise.\textsuperscript{50}

\textbf{Implied Malice.}

Implied malice, just as express malice, may refer to the method of proof.\textsuperscript{51} Where the malice is not expressly apparent it may be implied, i.e., inferred as a fact or presumed as a matter of law. Used in that sense, implied malice is a term which covers that part of the field which is not covered by express malice. For example, those statutes which hold that a killing by express malice is first degree murder may arbitrarily hold that those prompted by implied malice are second degree.\textsuperscript{52} The term has also been used to signify a killing in which the offender intending to kill A instead kills B.\textsuperscript{53} The theory of implied malice, as to the intentional murder perhaps can best be illustrated by discussing certain doctrines which have developed in the law of murder. These are: (1) the presumption of malice which arises from the act of killing, and (2) the presumption of malice which follows the use of a deadly weapon.

\textbf{Presumption of malice from the act of killing.}

It is not often, of course, that a killing occurs where the only evidence available is the fact that a defendant has committed the act, but such cases do arise. There are also many cases which arise where there is but little evidence other than that defendant has killed another. Statutes in several states have provided for such occurrences by placing an evidential burden on the defendant.\textsuperscript{54} The Arkansas statute may be said to be typical of such legislation. The Arkansas statute is phrased as follows:

\begin{quote}
"Burden of proof—The killing being proved, the burden of proving circumstances of mitigation, that justify or excuse the homicide, shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest, that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."
\end{quote}

In an early Massachusetts case, the lower court instructed to the effect that where the state had established the killing it was upon the defendant to prove by a preponderance of evidence that he did not commit the act or that his actions were justified or that there were extenuating circumstances. There were other instructions which lessened the harshness of that instruction, but as a whole the instructions were clearly prejudicial. The appeal court, however, did not reverse.\textsuperscript{55} In another early case, the jury, in the lower court was instructed that every homicide is presumed to be murder in the second degree and in order to elevate the offense to murder in the first degree, the burden of proof was on the state, and in order to reduce the offense below murder in the second degree, the burden of

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{50}] Id. at 136.
\item[\textsuperscript{51}] See Note 64, supra.
\item[\textsuperscript{52}] People v. Butterfield, 40 Calif. App. 2d 725, 105 Pac. 2d 628 (1940); See also State v. Phillips, 187 Atl. 108, 110 (Del. ct. Oyer & Ter., 1936).
\item[\textsuperscript{53}] Musick v. State, 21 Tex. App. 69, 18 S. W. 95 (1886).
\item[\textsuperscript{55}] Id. at 136.
\item[\textsuperscript{56}] Com. v. York, 9 Met. 93, 43 Am. Dec. 373 (1845).
\end{enumerate}
\end{footnotesize}
proof was on the defendant. On appeal it was held this instruction was not prejudicial inasmuch as the jury was told in other instructions that they should consider all of the evidence presented. Technically such an instruction was clearly erroneous and might, as a practical matter, have been prejudicial since it is undisputed that in a criminal case the burden of proof rests throughout the trial on the prosecution.

While there are courts which take a rather strict view of the so-called presumption of malice from the act of killing doctrine, there are others which have taken an extremely liberal view. In a late Virginia case, Roark v. Commonwealth, the defendant, during a quarrel with deceased, struck him a not-too-violent blow, which knocked him to the street causing a brain concussion and death. The upper court held that the presumption of malice instruction should not have been given; that the facts did not warrant such an instruction. In Miller v. State, an Indiana case, the defendant was a war veteran who in active service had been gassed and shelled. He had never fully recovered from his war experiences. The evidence was to the effect that he and his companion consumed several alcoholic drinks at a tavern and that after returning home defendant shot his companion. The defense was that the killing was accidental, that the gun went off as defendant examined same to determine the name of the maker. There was no evidence of enmity between the parties; there was also no evidence of struggle in the room where the killing took place. The court of appeal, in reversing the lower court, stated: "The law never presumes murder upon any state of facts. It is the inelusive province of the jury, to indulge in a presumption of guilt." Such a holding could be called a direct repudiation of the presumption of malice from the act of killing theory, yet it may be that the decision is in effect not so broad.

In England the doctrine of presumption of malice from the act of killing has been expressly repudiated in the case of Woolmington v. Dir. of Public Prosecutions. Just what effect its abolition will have on English law is not too easy to predict. It is no doubt true that if there are no presumptions of law attached to the unexplained killing this would mean that there will be no instructions given to the effect that the burden of showing excuse, justification or palliating circumstances rests upon the defendant. Also, it would mean that an appellate court could not supply, by presumption of law, the omission, in an instruction in the trial court, of an essential element of the crime charged. There should be no legal presumptions in the crime of murder. The jury will without the aid of a presumption in the form of an instruction, draw the proper inferences from the fact that defendant has killed another and has offered no evidence to excuse, justify or palliate the act. It must be conceded that a jury cannot be denied the right to decide questions of fact in criminal cases, but very often an erroneous instruction will prejudice a jury toward a defendant. There are limitations on

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51 182 Va. 244, 28 S. E. 2d 693 (1944). In State v. Cross, 212 W Va. 253, 24 S. E. 896 (1926), the court held that the presumption of malice instruction was only proper in a case where the killing appeared to have been willful and intentional.
52 223 Ind. 50, 58 N. E. 2d 114 (1944).
53 In Davis v. State, 51 Neb. 301, 70 N. W. 984 (1897), the court stated that the presumption was not rebutted where the defendant testified that his purpose in tampering with a railroad track, which caused the derailment of a train, was that he intended to flag the train and to pretend to have discovered the condition of the track in the hope of obtaining a reward.
54 In Baker v. People, 114 Colo. 100, 160 Pac. 2d 983 (1945), the Colorado Court held that where the killing has been established the court should instruct upon the defense no matter how incredible, improbable, or unreasonable the testimony of the defendant may be.
55 1935 A. C. 460.
the legislative power to disturb the discretion of the court to properly comment on the evidence, it is true, but it is within the legislative province to enact laws which will prevent peremptory instructions in capital cases where the only evidence is that defendant has committed an unexplained homicide.

Presumption of Malice from the Use of a Deadly Weapon.

It is stated to be the rule that the law implies or infers malice from the use of a deadly weapon. The basis of this doctrine, no doubt, originated out of pure common sense and human experience. It is no more than what would be expected for a jury to infer that if A has killed B with a deadly weapon, A, unless he offers sufficient proof in rebuttal, acted with a design to kill B. Likewise, if A administers poison to B, or shoots him from ambush, or tortures B, or has a strong motive for killing B, it is only reasonable to infer that A acted with a design to kill B. In such situations it is a natural probability that A intended to kill, because he used a deadly weapon and should be held accountable for knowing that such weapon would cause death or serious bodily harm.

A deadly weapon is one which is likely to cause death or serious bodily harm. Such definition takes into consideration the nature of the weapon and the manner in which it is used. It would seem that the type of the weapon means little unless considered with the manner of its use. There must be a weapon, but that may be any instrument or other thing which can be used to destroy human life. The basic consideration is whether or not the object was used in such a way as might cause death or serious bodily harm. If the weapon was so used, should it be a mere fact for the jury to consider in arriving at a verdict, or should the law create presumptions which may carry greater weight toward a conviction than mere inferences of fact? The statute of Texas may in certain situations create true presumptions of law where there has been a killing with a deadly weapon. The Texas statute is as follows:

"Intention presumed.—The intent to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."

In a recent Texas case, Baylor v. State, the defendant killed the deceased by stabbing him in the neck with a pocket knife. Upon the trial for murder the lower court instructed the jury to the effect that if the defendant voluntarily and with malice aforethought killed the deceased, he should be found guilty of murder. The jury was also instructed that: "A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury." On appeal, it was determined, by some process of reasoning, that the trial court in the instruction did not require the jury to find, in order to convict, that defendant had the intent to kill; that the statute created the presumption only in

86 See People v. McMurchy, 249 Mich. 1471, 228 N. W. 723, 726 (1930).
89 People v. Russell, 59 Calif. App. 2d 660, 130 Pac. 2d 661, 663 (1943).
90 See Pannill v. Com., 185 Va. 244, 38 S. E. 2d 457 (1946).
91 Texas Penal Code, Art. 45 (Vernon, 1936). The deadly weapon statute in Alabama is as follows: "When the killing in any sudden encounter or affray is caused by the assailant by the use of a deadly weapon, which was concealed before the commencement of the fight, his adversary having no deadly weapon drawn, such killing is murder in the second degree, and may, according to the circumstances, be murder in the first degree." See Ala. Code, tit. 14, sec. 316 (1940).
92 208 S. W. 2d 558 (Texas, 1948).
93 Id. at 560.
94 Id. at 560. (The charge to the jury included both the phrase malice aforethought and the word voluntarily).
cases where the weapon was deadly per se; and that since a pocket knife was not a deadly weapon per se it was error for the trial court not to require the jury to find an intent to kill. But the court in its opinion stated:

"The intent presumed by Art. 45, P C., [the statute set out above] is a legal presumption against the accused and should be strictly construed, because it is at variance with and antagonistic to the paramount presumption of innocence which continues throughout the trial of every criminal case. The intent to kill which is presumed in a murder case arises only when the weapon 'used is such as would ordinarily result in the commission of that crime. This has reference to the weapon, itself. We cannot bring ourselves, therefore, to the conclusion that a weapon deadly only because of the manner of its use and not deadly of and within itself is not [sic] within the presumption."

The implication of Baylor v. State is that if the defendant causes a death with any instrument which is per se deadly, that although an instruction omits to mention that the jury must find the killing intentional, such is not error, for the law will presume the necessary intent. Such a view, it is submitted, will work injustice. It may, in a case in which the court determines that the weapon was deadly per se, take the real question of fact out of the hands of the jury and place it in the control of the court. Proof of the use of a deadly weapon must, of course, have its proper effect in a given case but proof of the use of a deadly weapon should not deny a defendant the right to have all the essential elements of the crime charged submitted to the jury.

The deadly weapon doctrine, it would seem is presently employed to serve two related purposes in the law of murder. First, where the assault is admittedly intentional or where the evidence is unequivocal that it was intentional, the doctrine serves only to gauge the degree of harm intended. Second, if the only evidence is the proof of a homicide by the use of a deadly weapon, i.e., if there is no proof of an intentional assault, the law may presume that the offender acted with an intent to kill or cause grievous bodily harm. In the latter situation it is not intent which invokes the doctrine; but instead it is the doctrine which invokes the intent.

In the deadly weapon doctrine as in the presumption of malice from the act of killing, justice would not go wanting if there were no legal presumptions which in any way might place the burden of proof on the defendant. The jury will, without the aid of such presumptions, draw the proper inferences from the fact that defendant has killed and has offered no evidence to excuse, justify or palliate the act.

Presumption from the use of a deadly weapon and presumption of unexplained killing compared.

The presumption of malice from the act of killing doctrine in practical effect includes the deadly weapon doctrine. It is generally held that under either doctrine if the defendant offers no evidence in excuse, justification, or palliation that the crime is second degree murder; that it is upon the state to prove the crime was first degree murder and upon the defendant to show the crime was manslaughter or that it was no crime at all. So far as can be told from the cases the presumption which accompanies each doctrine is of the same strength. There is one difference between the doctrines and this difference makes the presumption from the act of killing the more undesirable. This difference is that in the pre-
sumption of malice from the act of killing, the weapon which caused the death need not be a deadly one; therefore, such doctrine is a more potent weapon against those accused of the crime of murder.

**Conclusion.**

When the intentional murder statute of the various states are considered as a whole the question arises as to what the legislatures might do to clarify and improve the law of murder. The California and New York type statutes have generally adopted the requirement of deliberation and premeditation for a first degree murder conviction. While all of these states have not placed upon the words deliberation and premeditation a meaning other than a mere intent to take life, some of them do require a lapse of an appreciable period of time in order for it to be found that deliberation and premeditation existed. The statutes of a minority of states, for example, the Georgia type statute, do not make deliberation and premeditation a requirement of murder. Deliberation and premeditation, it is believed, should be made a requirement of first degree murder and in order that punishment be most effective as a deterring force, only those who actually do deliberate and premeditate should be punished for first degree murder. Whether or not there was deliberation and premeditation in a particular case should be a question of fact for the jury and the jury should upon the advice of the court give acknowledgement to human frailties in arriving at a decision. To state that particular manners of killing are conclusive evidence of deliberation and premeditation, as the California type statute does, is undesirable.

The modern murder statutes have not greatly altered the common law of murder as is set forth in Stephen's analysis. The similarity of Stephen's analysis and the statutes may be readily seen by a cursory comparison. At least ten states, however, have discarded the word malice in the crime of murder. The phrases malice aforethought and express and implied malice have not a single practical advantage to offer toward a clarification of murder, and, on the other hand, no doubt, at times confuse the juries which must consider such phraseology. If it is found that legal terminology, after a careful weighing of advantages and disadvantages, is of no value to the law, it should be discarded. The legislatures, if they wish to abolish the term malice from the law, may do so by revising their murder statutes so as to omit any reference to that term. There is also no reason why the courts in the various states where malice aforethought is used in the definition of murder could not dispense with the necessity of the use of the phrase, without statutory change, by judicial decision as long as the substantive meaning of the term is retained.

It is not contended that the statutes of all of the states could be improved, but it is true that the majority could be. The New York statute, for example, would seem as near perfect as is possible to phrase a murder statute. Other states have statutes very similar to the New York statute. There is found in the New York Statutes or decisions no mention of legal presumptions arising from an unexplained killing or from the use of a deadly weapon. A few may escape deserved punishment if legal presumptions in murder are abolished, but this would seem to be outweighed by the fact that if such presumptions are entertained a few who are innocent will be unjustly punished.

It is not that the substantive law of murder needs a thorough revision, for perhaps that law as it presently exists, in great part, represents the feelings and beliefs of the people more so than any other branch of the law. The real objection to the present state of the law of murder would seem to be in the obsolete theories and phraseology carried over from the common law. Broad abstract terms should be cautiously employed in the law of murder for while they may have been useful for clarifying thought at one time, many of them have grown into devices for confusing thought.

**Clarence Creech**