

# Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula\*

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*Beginning with Pennsylvania in 1794, most American jurisdictions have, at one time or another, separated the crime of murder into two degrees based on the presence or absence of premeditation and deliberation. An intentional, premeditated, and deliberate murder is murder of the first degree, while second-degree murder is committed intentionally but without premeditation or deliberation. The distinction was created in order to limit the use of the death penalty, which generally has been imposed only for first-degree murder.*

*Critics have attacked the premeditation-deliberation formula on two fronts. First, they have charged that the formula is imprecise as a measure of the relative culpability or dangerousness of intentional murderers. The premeditation-deliberation formula, the critics tell us, is incapable of segregating out the worst murderers because it is both under- and overinclusive. In addition, critics have pointed to the courts’ inability or unwillingness to apply the premeditation-deliberation formula in any coherent fashion. Many courts have held that the premeditation and deliberation required to transform a mere intentional, second-degree murder into first-degree murder can be formed in the instant before the killing. Thus do many courts fail to meaningfully distinguish one degree of*

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*intentional murder from the other. This second failing appears inextricably related to the first: since many unplanned but intentional murders are as bad as or worse than many planned killings, and their perpetrators at least as dangerous, courts contort the meanings of premeditation and deliberation to allow the most culpable and dangerous murderers to be punished most harshly.*

*These criticisms are founded on the premise that the distinction between first- and second-degree murder is grounded solely upon principles of retribution and incapacitation. What the critics have overlooked is that there is a powerful deterrence-based rationale for distinguishing premeditated, deliberate murders from those that are unpremeditated or nondeliberate. Where a murder is premeditated and deliberate, it is much more likely that the murderer has not only planned out the crime itself but has developed a plausible way to avoid or delay detection. Because the value of punishment as a deterrent depends in large part on the likelihood and swiftness of punishment, crimes that are less likely to be punished swiftly, all other things being equal, ought to be punished more severely. Thus, given two equally dangerous and culpable intentional murderers, we are arguably justified in punishing more severely the one who, by virtue of better planning beforehand, is more likely to escape or delay detection.*

#### INTRODUCTION

Beginning in 1794, most American jurisdictions have recognized at least two forms of intentional murder, the distinguishing feature of which is the presence or absence of premeditation and deliberation on the part of the murderer. Thus, many states punish more severely those murderers who act with premeditation and deliberation than those who act intentionally but in an unpremeditated or nondeliberate manner. Murders in the former class are deemed murder in the first degree, and those in the latter class are considered murder in the second degree.

Typically, the distinction has been explained on both retributivist and incapacitacionist grounds. From a retributivist standpoint, those who act with premeditation and deliberation have greater moral culpability than other intentional murderers and therefore deserve greater punishment. From an incapacitacionist standpoint, those who act with premeditation and deliberation are more dangerous than other intentional murderers, and thus require greater incapacitation than the typical murderer.

Critics have attacked the premeditation-deliberation formula on both theoretical and practical levels. In terms of theory, they point out, it has never quite been clear whether the typical premeditated and deliberate murderer really is more dangerous or more culpable than the typical unpremeditated or nondeliberate murderer. One can point to many cases of unpremeditated or nondeliberate murder, both real and imagined, that seem worse than many instances of premeditated and deliberate murder. The premeditation and deliberation formula, the critics tell us, is incapable of segregating out the worst murderers.

Critics also point to the courts' inability or unwillingness to apply the premeditation and deliberation formula in any coherent fashion. Many courts have held that the premeditation and deliberation required to transform a mere intentional, second-degree murder into a first-degree murder can be formed in the instant before the actual killing. Thus do many courts fail to meaningfully

distinguish one degree of intentional murder from the other. This second failing appears inextricably related to the first: since many unplanned but intentional murders are as bad as or worse than many planned killings, and their perpetrators at least as dangerous, courts contort the meanings of premeditation and deliberation to allow the most culpable and dangerous murderers to be punished as severely as the law allows.

What the critics fail to fully appreciate, however, is that the premeditation-deliberation formula can additionally be justified on the principle of deterrence. This Article supplies what is missing from existing critiques of homicide law: a deterrence-based rationale for distinguishing premeditated and deliberate murders from those that are unpremeditated or nondeliberate. Whether or not intentional murderers who also premeditate and deliberate are the most dangerous and culpable killers, they are the most deterrable. More importantly, because the value of punishment as a deterrent depends in large measure on the likelihood of swift punishment, crimes that are harder to detect and prosecute, all other things being equal, ought to be punished more severely. Where a murder is premeditated and deliberate, it is much more likely that the murderer has not only thought out the crime itself but has developed a plausible means of avoiding, or at least delaying, detection. The premeditation-deliberation formula thus seeks to identify those killers most likely to escape or significantly delay detection, apprehension, and punishment, requiring that punishment severity be maximized to offset the diminished certainty and swiftness of punishment for such culprits. Given two equally dangerous and culpable intentional murderers, the theory goes, we are justified in punishing more severely the one who, by virtue of better planning beforehand, is more likely to escape or delay detection.

#### I. THE PREMEDITATION-DELIBERATION FORMULA: THE DOCTRINE AND ITS DIFFICULTIES

The concept of premeditation and deliberation is one of the most controversial in the field of homicide law.<sup>1</sup> The premeditation-deliberation formula has been with us since Pennsylvania introduced the concept in 1794.<sup>2</sup> Today, it is the device used

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1. See Mordechai Kremnitzer, *On Premeditation*, 1 BUFF. CRIM. L. REV. 627, 627 (1998) (“I doubt any other element connected to the crime of murder is as controversial as premeditation.”).

2. MODEL PENAL CODE § 210.6 cmt. 4(b), at 123 (1980) (“The first major limitation on capital murder in the United States was the Pennsylvania Act of 1794.”); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 4.2.3, at 253 (1978) (noting that the premeditation-deliberation formula was introduced in 1794 by Pennsylvania); SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 101 (1998) (noting that Pennsylvania introduced the concept of premeditation and deliberation in 1794); Frank Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274, 274 (1953); Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 375 (1994) (“[T]he Pennsylvania legislature first divided the crime of murder into degrees in 1794.”); Charles L. Hobson, *Reforming California’s Homicide Law*, 23 PEPP. L. REV. 495, 526 (1996) (“American jurisdictions have been dividing murder into degrees since the landmark Pennsylvania reforms of 1794.”); Bruce Ledewitz, *Mr. Carroll’s Mental State or What Is*

to separate first- from second-degree murder in about half the states. However, it has come under withering attack from virtually all who have studied the law of homicide. The attack has come on two fronts. First, commentators have noted the imprecision in the terms “premeditation” and “deliberation.” Second, they have asserted that the formula fails to segregate out the very worst murders for special treatment.

#### A. The Doctrine

Prior to 1794, there were no separate degrees of murder in any common-law jurisdiction.<sup>3</sup> In that year, Pennsylvania revolutionized the law of homicide by adopting a statute that divided murders into two degrees (the “1794 Statute”):

[A]ll murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree . . . .<sup>4</sup>

The Pennsylvania reform swept across the Nation.<sup>5</sup> It was adopted by Virginia two

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*Meant by Intent*, 38 AM. CRIM. L. REV. 71, 75 (2001) (“The common law crime of murder was divided into two degrees by statutory reform in Pennsylvania in 1794.”); Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. REV. 261, 261–62 (2002) (“In 1794 . . . Pennsylvania became the first state to enact a statute that divided murder into degrees.”); Leo M. Romero, *A Critique of the Willful, Deliberate, and Premeditated Formula for Distinguishing Between First and Second Degree Murder in New Mexico*, 18 N.M. L. REV. 73, 82 (1988) (“The willful, deliberate and premeditated language . . . first appeared in a 1794 Pennsylvania statute . . . .”); Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1012 (2001) (discussing the 1794 Pennsylvania statute).

It appears that the term “willful and premeditated murder” dates back to at least the so-called Hempstead Code of 1664. See Harry E. Barnes, *The Criminal Codes and Penal Institutions of Colonial Pennsylvania*, 11 BULL. FRIENDS’ HIST. SOC’Y PHILA. 3, 4 (1922). In 1682, while still a colony under the leadership of William Penn, Pennsylvania had restricted use of the death penalty to those who committed premeditated or willful killings. See *id.* at 9; WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (1793), reprinted in 12 AM. J. LEGAL HIST. 122, 133–35 (1968); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760–61 (1949); Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 145–46 (1999). In 1718, however, these laws were repealed and Pennsylvania’s laws were once again brought into conformance with those of mother England. See MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 17, 138 (1973); Barnes, *supra*, at 13–15; BRADFORD, *supra*, at 136–37; Keedy, *supra*, at 762–63.

3. See Mounts, *supra* note 2, at 273 (“[T]he common law recognized no divisions within the law of murder; that step was accomplished by statute.”).

4. Act of Apr. 22, 1794, ch. 1777, § 2, 15 Pa. Stat. 174, 175.

5. Mounts, *supra* note 2, at 262 n.5 (“Most other states also followed Pennsylvania’s lead and enacted statutes that made premeditated and deliberate murder first degree.”); Pauley, *supra* note 2, at 146 (“Soon, many states copied the Pennsylvania

years later,<sup>6</sup> and “by the early twentieth century most American jurisdictions recognized some form of premeditation doctrine.”<sup>7</sup> The premeditation-deliberation formula was in its ascendancy by mid-century, when over three-quarters of the states used it as the dividing line between first- and second-degree murder.<sup>8</sup>

Within a few years, that number dropped somewhat,<sup>9</sup> and in the ensuing decades the premeditation-deliberation formula suffered a moderate decline,<sup>10</sup> probably as a result of the influence of the American Law Institute’s (ALI) Model Penal Code (MPC) which does not divide murder into degrees.<sup>11</sup> Yet, the prediction made more than a half-century ago that “the degree device . . . will be reduced to an historical oddity”<sup>12</sup> has not come to pass. Currently, twenty-six states, the District of Columbia, and the federal government utilize some form of the premeditation-deliberation formula, at least in part, to distinguish first- from second-degree murder.<sup>13</sup> Of these, seventeen states subject to capital punishment only those guilty

premeditation/deliberation distinction.”); Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 453 (1990) (observing that Pennsylvania’s division of murder into degrees “proved popular in the new republic”).

6. MODEL PENAL CODE § 210.6 cmt. 4(b), at 123 (1980).

7. PILLSBURY, *supra* note 2, at 101; *see also* David Crump, “Murder, Pennsylvania Style”: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions, 109 W. VA. L. REV. 257, 259 (2007) (“[O]ther states from Maine to California have imitated [Pennsylvania].”); Ledewitz, *supra* note 2, at 76 (“The vast majority of American jurisdictions ultimately followed the Pennsylvania reform . . . .”); Romero, *supra* note 2, at 82 (“[T]he scheme became a common feature in murder statutes in the United States.”).

8. *E.g.*, Brenner, *supra* note 2, at 274 (noting that thirty-seven states and the District of Columbia had adopted the formula by 1953); A. Singleton Cagle, Note, *The Intentional Murder at Common Law and Under Modern Statutes*, 38 KY. L.J. 424, 431 (1950) (noting that the Pennsylvania distinction had been adopted in thirty-eight states as of 1950).

9. *See* Givelber, *supra* note 2, at 380 (“As of 1959, thirty-four states employed a murder statute modeled on or closely resembling the Pennsylvania formula.”).

10. *See* Crump, *supra* note 7, at 300 (“American jurisdictions have increasingly rejected the premeditation-deliberation formula.”).

11. *See* MODEL PENAL CODE § 210.2(1)(a), at 13 (1980).

12. Brenner, *supra* note 2, at 294.

13. 18 U.S.C. § 1111(a) (2006) (“willful, deliberate, malicious, and premeditated”); ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2010) (“premeditation”); ARK. CODE ANN. § 5-10-101(a)(4) (2006) (“premeditated and deliberated purpose”); CAL. PENAL CODE § 189 (West 2010) (“willful, deliberate, and premeditated”); COLO. REV. STAT. ANN. § 18-3-102(1)(a) (West 2002) (“deliberation”); D.C. CODE § 22-2101 (2001) (“deliberate and premeditated”); FLA. STAT. ANN. § 782.04(1)(a)(1) (West 2007) (“premeditated”); IDAHO CODE ANN. § 18-4003(a) (2004) (“willful, deliberate and premeditated”); IOWA CODE ANN. § 707.2(1) (West 2003 & Supp. 2010) (“willfully, deliberately, and with premeditation”); KAN. STAT. ANN. § 21-3401(a) (2007) (“with premeditation”); MD. CODE ANN., CRIM. LAW § 2-201(a)(1) (2002) (“deliberate, premeditated, and willful”); MASS. ANN. LAWS ch. 265, § 1 (LexisNexis 2002) (“deliberately premeditated”); MICH. COMP. LAWS ANN. § 750.316(1)(a) (West 2004) (“willful, deliberate, and premeditated”); MINN. STAT. ANN. § 609.185(a)(1) (West 2009) (“with premeditation”); MO. ANN. STAT. § 565.020(1) (West 1999) (“deliberation”); NEB. REV. STAT. ANN. § 28-303 (LexisNexis 2009) (“deliberate and premeditated”); NEV. REV. STAT. ANN. § 200.030(1)(a) (LexisNexis 2006) (same); N.H. REV. STAT. ANN. § 630:1-a(I)(a), (II) (2007) (same); N.M. STAT. ANN. § 30-2-1(A)(1) (West 2003) (“willful,

of first-degree murder.<sup>14</sup> Thus, in these states, a finding that the defendant killed not just intentionally but also with premeditation and deliberation can mean the difference between life and death. Moreover, the maximum penalty for second-degree murder tends to be a prison term short of life imprisonment. In Arizona, for example, while first-degree murder is punishable by a maximum sentence of death,<sup>15</sup> second-degree murder is punishable by a maximum sentence of sixteen years in prison.<sup>16</sup>

To be guilty of first-degree murder of the premeditation-deliberation variety, the defendant must intend to kill.<sup>17</sup> However, intention to kill is merely necessary, not sufficient, to render a murder one of the first degree.<sup>18</sup> The actor must also “premeditate the killing and deliberate about it.”<sup>19</sup> These terms imply “an element of coolness, of calm reflection.”<sup>20</sup> They also “suggest a plan or design conceived

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deliberate and premeditated”); N.C. GEN. STAT. ANN. § 14-17 (West 2000) (“willful, deliberate, and premeditated”); OHIO REV. CODE ANN. § 2903.01(A) (LexisNexis 2010) (“prior calculation and design”); R.I. GEN. LAWS § 11-23-1 (2002) (“willful, deliberate, malicious, and premeditated”); TENN. CODE ANN. § 39-13-202(a)(1), (d) (2006 & Supp. 2009) (“premeditated”); VT. STAT. ANN. tit. 13, § 2301 (2009) (“wilful [sic], deliberate and premeditated”); VA. CODE ANN. §§ 18.2-31, 18.2-32 (2009 & Supp. 2010) (“willful, deliberate, and premeditated”); WASH. REV. CODE ANN. §§ 9A.32.020, 9A.32.030(1)(a) (West 2010) (“premeditated”); W. VA. CODE ANN. § 61-2-1 (LexisNexis 2005) (“willful, deliberate and premeditated”); WYO. STAT. ANN. § 6-2-101(a) (2009) (“premeditated”).

14. ARIZ. REV. STAT. ANN. §§ 13-751(A), 13-752(A) (2010); ARK. CODE ANN. § 5-10-101(c)(1) (Supp. 2009); CAL. PENAL CODE § 190(a) (West 2008); COLO. REV. STAT. ANN. § 18-1.3-1201(1)(a) (West 2004); FLA. STAT. ANN. § 775.082 (West 2010); IDAHO CODE ANN. § 18-4004 (2004); KAN. STAT. ANN. § 21-3439(a) (2007); MD. CODE ANN., CRIM. LAW 2-201(b)(1)(i) (LexisNexis 2002); MO. ANN. STAT. § 565.032 (West 1999); NEB. REV. STAT. ANN. § 29-2519(1) (LexisNexis 2009); NEV. REV. STAT. ANN. § 200.030(4), (5) (LexisNexis 2006); N.C. GEN. STAT. ANN. § 14-17 (West Supp. 2009); OHIO REV. CODE ANN. § 2929.02 (LexisNexis Supp. 2010); TENN. CODE ANN. § 39-13-202(c) (2006); VA. CODE ANN. § 18.2-31 (Supp. 2010); WASH. REV. CODE ANN. §§ 10.95.020, 10.95.030 (West 2002); WYO. STAT. ANN. § 6-2-101(b) (2009).

15. ARIZ. REV. STAT. ANN. § 13-751(A) (2010).

16. *Id.* § 13-710(A).

17. See WAYNE R. LAFAVE, CRIMINAL LAW § 14.7(a), at 766 (4th ed. 2003).

18. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.03(C)(1), at 514 (5th ed. 2009) (“Most jurisdictions understand ‘wilful, deliberate, premeditated’ to mean more than an intention to kill.”); Pauley, *supra* note 2, at 154 (“A murderer may kill intentionally but without premeditating.”); Julie Engels, Note, *Mens Rea: Purpose to Kill Offenses*, 36 LOY. L.A. L. REV. 1401, 1402 (2003) (“[A] purpose to kill alone is not sufficient to support a finding of premeditation.”).

19. LAFAVE, *supra* note 17, at 766; see also Crump, *supra* note 7, at 263 (“[F]irst-degree murder generally requires a ‘deliberate’ and ‘premeditated’ killing.”); Rollin M. Perkins, *The Law of Homicide*, 36 J. CRIM. L. & CRIMINOLOGY 391, 449 (1946) (“[A] fatal act might be intentional and yet entirely too hasty to be deliberate and premeditated.”); Engels, *supra* note 18, at 1402 (“While premeditated murder requires a purpose to kill, it also demands a ‘preexisting reflection and weighing of considerations.’” (footnote omitted) (quoting *People v. Perez*, 831 P.2d 1159, 1163 (Cal. 1992))).

20. Pauley, *supra* note 2, at 153; see also Brenner, *supra* note 2, at 280 (observing that the terms imply “the operation of a rational mental process which questions the execution of a plan to kill and subsequently decides to complete the plan to the exclusion of other

well in advance of the homicidal act,”<sup>21</sup> indicating that there must be “a significant lapse of time between initial determination to kill and the act of killing.”<sup>22</sup>

Wayne LaFave helpfully suggests the following distinctions between the necessary elements of intent, premeditation, and deliberation: “[F]or premeditation the killer asks himself the question, ‘Shall I kill him?’. The intent to kill aspect of the crime is found in the answer, ‘Yes, I shall.’ The deliberation part of the crime requires a thought like, ‘Wait, what about the consequences? Well, I’ll do it anyway.’”<sup>23</sup> Thus, premeditation is thought to require some *quantity* of time for reflection on the homicidal act before the killing is performed,<sup>24</sup> while deliberation

alternatives”); Kremnitzer, *supra* note 1, at 655 (“[I]t would be suitable to require that the process of deliberation be carried out composedly and in a calm state of mind, and not in a tempestuous state of mind.”); Mounts, *supra* note 2, at 261 (“In the public mind a ‘deliberate and premeditated murder’ involves careful and precise planning by a cold, detached, ruthless killer . . . .”); Perkins, *supra* note 19, at 448 (“Deliberation means that the act is done in a cool state of blood.” (quoting *State v. Benson*, 111 S.E. 869, 871 (N.C. 1922))); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 707 (1937) (observing that deliberation suggests the decision to kill was reached “calmly”).

21. MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980); *see also* M. Patricia Walther, Note, *Should Virginia Put the Planning Back into the Premeditation Required for Murder?*, 40 WASH. & LEE L. REV. 341, 345 (1983) (“For first degree murder, a killer deliberates or plans the homicide before making the ultimate decision to kill.”).

22. MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980); *see also* Perkins, *supra* note 19, at 449 (“Those who first employed th[e] word [premeditation] in this type of first degree murder statute undoubtedly had in mind a malicious scheme thought out well in advance of the fatal act itself.”); Wechsler & Michael, *supra* note 20, at 707–08 (observing that premeditation implies “some appreciable time prior to the homicide”).

23. LAFAVE, *supra* note 17, at 776 n.4; *see also* Keith W. Blinn, *First Degree Murder—A Workable Definition*, 40 J. CRIM. L. & CRIMINOLOGY 729, 733 (1950) (“‘[P]remeditatedly’ has reference, as the literal meaning of the word implies, to having thought over the matter beforehand, and ‘deliberately’ pertains more to the manner of committing the act, or to the fact that its commission was determined upon in cold blood.”); Pauley, *supra* note 2, at 154 (“To be guilty of first degree premeditated murder, the defendant must have deliberated and/or planned the killing . . . before making the decision to kill.”); Romero, *supra* note 2, at 83 (“Only deliberation, in the sense that it means a mental process that involves careful thought and weighing of the facts and consequences, connotes a concept that is not necessarily included in the notion of intent.” (footnote omitted)).

Rollin Perkins pointed out that intent to kill need not precede the premeditation and deliberation:

If one has pondered over the possibility of taking another’s life and has reflected upon this matter coolly and fully before a decision is reached, he may truly be said to have killed “wilfully, deliberately and premeditatedly,” although after his intent was fully formed he carried it into effect as rapidly as thought can be translated into action.

Perkins, *supra* note 19, at 450. One might think of the actor’s mental state in the premeditation and deliberation phase in such a case as being one of conditional intent, by which the actor thinks, in essence: “I shall kill him if I decide it is to my advantage to do so.” *See generally* Gideon Yaffe, *Conditional Intent and Mens Rea*, 10 LEGAL THEORY 273 (2004).

24. *See* LAFAVE, *supra* note 17, at 767; ROY MORELAND, *THE LAW OF HOMICIDE* 207 (1952) (“The word ‘premeditation’ . . . adds the requirement that th[e] weighing of alternate

is thought to refer to the *quality* of the actor's thoughts leading up to the fatal act—a coolness of mind capable of such reflection.<sup>25</sup> The idea of deliberation presumes a rational actor who “rais[es] considerations in favor of the [killing] and against it, and deliberat[es] between them.”<sup>26</sup>

### B. The Difficulties

In practice, however, the premeditation-deliberation formula is not so neatly cabined.<sup>27</sup> Rather, courts have tended to equate, either explicitly or implicitly, premeditation and deliberation with intent to kill, thus destroying any meaningful difference between first- and second-degree murder. This failure to define premeditation and deliberation in a meaningful fashion is, critics have charged, symptomatic of a deeper flaw in the premeditation-deliberation formula: it does not meaningfully distinguish between the very worst intentional killers and the “ordinary” murderer. That is to say, according to the critics, the distinction is neither clear nor principled.<sup>28</sup>

#### 1. Defining Premeditation and Deliberation

Given how quickly the human mind works, there is a great deal of difficulty in distinguishing “premeditated and deliberate” killings from those that are merely intentional. As then-Chief Judge Cardozo wrote: “If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and

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courses of action and the final decision must occur an appreciable length of time before the homicidal act is committed.”); Crump, *supra* note 7, at 348 (“[T]he requirement of premeditation . . . implies, at the very least, a need for some kind of prior mental focus.”); Ledewitz, *supra* note 2, at 77 (“Premeditation, in contrast to deliberation, requires ‘sufficient time’ to plan to carry out the killing.”).

25. See DRESSLER, *supra* note 18, § 31.03(C)(2), at 516; LAFAVE, *supra* note 17, at 766–67; see also MORELAND, *supra* note 24, at 207 (“‘Deliberation’ . . . naturally means a rational process in which the mind weighs and considers alternative courses of conduct . . . .”); Mounts, *supra* note 2, at 299–300 (“The true test of premeditation and deliberation . . . [i]s not the duration of time as much as the extent of the reflection.”); Pauley, *supra* note 2, at 155 (“[T]o deliberate means to consider, to think carefully.”); Stephanie M. Griffin, Note, *Whether the Elements of Deliberation and Premeditation Adequately Distinguish First Degree Murder from Second Degree Murder: State v. Garcia*, 24 N.M. L. REV. 437, 440 (1994) (noting New Mexico jury instruction requiring that “a person must weigh and consider the act of killing before commencing th[e] act” in order for the jury to find deliberation).

26. Kremnitzer, *supra* note 1, at 631.

27. See BENJAMIN N. CARDOZO, *What Medicine Can Do for Law, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 70, 97 (1931) (“[O]n the face of the statute the distinction is clear enough. The difficulty arises when we try to discover what is meant by the words deliberate and premeditated.”); Kremnitzer, *supra* note 1, at 645 (“The lack of clarity of the term ‘premeditation’ has drawn considerable criticism.”).

28. See Romero, *supra* note 2, at 76 (“Distinctions are principled in the sense that first degree murder includes killings that are more heinous than those killings encompassed by second degree murder. Distinctions are clear to the extent that they meaningfully differentiate the two degrees of murder . . . .”).

premeditated, since choice is involved in the hypothesis of the intent.”<sup>29</sup> Suzanne Mounts put the point more bluntly: “[T]here is no principled basis for distinguishing between an intentional killing and one that is premeditated and deliberated . . . .”<sup>30</sup> Thus, many courts have held that premeditation and deliberation can occur in the instant before the act of killing.<sup>31</sup> In these jurisdictions, “an intention to kill could be ‘deliberate’ even though it was not a product of calm reflection and ‘premeditated’ even though no appreciable time elapsed between the intention and the act.”<sup>32</sup> Thus, “convictions for first degree

29. CARDOZO, *supra* note 27, at 100; *see also* Crump, *supra* note 7, at 348 (“[A] concept of instant premeditation undercuts the legislative distinction between the two degrees of murder.”); Hobson, *supra* note 2, at 520 (“Given the speed at which we think, and the relatively long time it takes for us to act on our thoughts, all intentional killers have thought about killing and then decided to kill the victim before the killing occurred.”); Romero, *supra* note 2, at 83 (“[T]he vagueness of the terms makes it difficult to identify which intentional killings are willful, deliberate and premeditated.”); Saraliene S. Smith, Note, *It Can Happen in an Instant: Rethinking Pattern Instructions for Kansas on Premeditated Murder*, 16 KAN. J.L. & PUB. POL’Y 1, 5–6 (2006) (“Failing to provide jurors with a clear definition of premeditation opens the door for jurors to disregard the term altogether and, without the element of premeditation, first-degree premeditated murder is no different than second-degree intentional murder.”).

30. Mounts, *supra* note 2, at 266.

31. *See* CARDOZO, *supra* note 27, at 97 (“To deliberate and premeditate within the meaning of the statute, one does not have to plan the murder days or hours or even minutes in advance . . . .”); DRESSLER, *supra* note 18, § 31.03(C)(3), at 517; Brenner, *supra* note 2, at 280 (noting that courts have “declar[ed] that the prerequisite mental operation may be completed in a period of time so slight as to be imperceptible”); Givelber, *supra* note 2, at 381 (“Most courts did not require the passage of any appreciable time before the killing in order for the jury to find that the defendant had deliberated.”); Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 245 (2001) (“Generally, to premeditate does not require an extended time span but may be accomplished in a ‘matter of days, hours, or even seconds.’” (quoting *Commonwealth v. Tucker*, 76 N.E. 127, 141–42 (Mass. 1905))); Kremnitzer, *supra* note 1, at 637 (“[P]remeditation can crystallize during a violent or fatal action.”); Ledewitz, *supra* note 2, at 77 (“[T]his is not planning in the conventional sense, for no minimum length of time is required.”); Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump’s Model Laws of Homicide*, 109 W. VA. L. REV. 369, 371 (2007) (“[Some] states say there must be appreciable premeditation, but this simply means capable of being appreciated, and this can be a matter of seconds.”); Mounts, *supra* note 2, at 296 (“[P]remeditation and deliberation do not require any set amount of time . . . .”); Pauley, *supra* note 2, at 151 (observing that under many court decisions, “time is irrelevant to the issue of premeditation [and] [t]he defendant can premeditate in a very short time—in an instant, in fact”); Perkins, *supra* note 19, at 449 (“Premeditation means ‘thought of beforehand’ for some length of time, however short.” (quoting *State v. Benson*, 111 S.E. 869, 871 (N.C. 1922))); Stacy, *supra* note 2, 1030 n.84 (“[M]any jurisdictions do not require that any appreciable time elapse between the formation and the execution of the intent to kill.”).

32. MODEL PENAL CODE § 210.6 cmt. 4(b), at 125 (1980).

murder have frequently been affirmed where such short periods of time [as a few seconds] were involved.”<sup>33</sup>

The difficulties with this position are manifest. Syntactically, “[p]remeditation’ that appears ‘instantaneously’ is an oxymoron.”<sup>34</sup> As Matthew Pauley put it:

If premeditated means thought about beforehand, it strains credulity to say that a murder can be premeditated in a fraction of a second. It strains it even more to say that such a murder is deliberate in the sense that the killer carefully weighed the alternatives with calmness and depth of thought.<sup>35</sup>

If conviction for both first-degree and second-degree murder requires intent to kill, and all that distinguishes the former from the latter is the presence of premeditation and deliberation, but these can be formed seconds before the act of killing, then the distinction has effectively been obliterated.<sup>36</sup> Thus, courts have included within the category of premeditated and deliberate murders those which are more readily classified as “hasty, impulsive, spur-of-the-moment action, and not the result of real and substantial reflection.”<sup>37</sup> This is especially problematic in those states in which, absent a finding of premeditation and deliberation, the killer is ineligible for the death penalty. As Cardozo put it: “Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.”<sup>38</sup>

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33. LAFAVE, *supra* note 17, at 767; *see also* Ledewitz, *supra* note 2, at 86 (“Essentially, no time is too short for premeditation to be satisfied.”).

34. Crump, *supra* note 7, at 275; *accord* Kealy, *supra* note 31, at 247 (“[I]s it possible for calm reflection and deliberation to be achieved in a moment?”); Pauley, *supra* note 2, at 155 (“Can a murder be ‘premeditated and deliberate’ if the murderer ‘reflected’ for a split second before killing?”).

35. Pauley, *supra* note 2, at 155; *see also* Perkins, *supra* note 19, at 449 (“The notion that a fully formed intent is always deliberate and premeditated, no matter how short the time between the first thought of the matter and the execution of the plan, is preposterous.”).

36. *See* MODEL PENAL CODE § 210.6 cmt. 4(b), at 125 (1980) (noting that this approach “blurs any distinction between the two categories of the offense”); DRESSLER, *supra* note 18, at 515 (observing that under this approach, “[n]early every intentional killing constitutes first-degree murder”); LAFAVE, *supra* note 17, at 767; Brenner, *supra* note 2, at 280 (observing that the terms “have been construed in such a manner as to render meaningless the statutory distinction between first and second degree murder”); Griffin, *supra* note 25, at 444 (“[A] murder in which the killer deliberated for just a few seconds is not clearly distinguishable from a murder in which the killer has acted upon a rash impulse.”); Kremnitzer, *supra* note 1, at 654 (“If we make do with any sort of deliberation, even with a fleeting thought of the illegality of the action passing through the perpetrator’s consciousness, this blurs and neutralizes the distinction between premeditation and spontaneous intention.”); Mounts, *supra* note 2, at 283–84 (“Depending on the time span required to engage in premeditation and deliberation, the distinction between a premeditated and deliberated intent to kill and a bare intent to kill can be described as somewhere between elusive and non-existent.”); Romero, *supra* note 2, at 83 (“To the extent that premeditation refers to a thought process between the intent to kill and the act of killing, this term applies equally to second degree murder since intent actuates conduct.”).

37. Brenner, *supra* note 2, at 280.

38. CARDOZO, *supra* note 27, at 101; *see also* Mounts, *supra* note 2, at 327 (“Can any

Some courts have even explicitly ruled that premeditation and deliberation require nothing more than intent to kill.<sup>39</sup> These courts do not even make a pretense of distinguishing premeditated and deliberate murders from other intentional murders. In these jurisdictions, “once intent to kill is established, the existence of premeditation and, presumably, deliberation as well, are jury questions only.”<sup>40</sup> Cardozo thought the premeditation-deliberation formula best construed in this way, as a device by which the jury could use its common-sense judgment to distinguish more sympathetic murderers and spare them the death penalty: “What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy.”<sup>41</sup> Nevertheless, he thought the distinction wrought by the premeditation-deliberation formula “much too vague to be continued in our law.”<sup>42</sup> He believed the mercy-dispensing power “should be given to them directly and not

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ephemeral difference that might exist have been intended to justify the determination of whether someone lived or died?”).

39. See DRESSLER, *supra* note 18, at 514 (observing that some courts treat premeditation and deliberation as “the intent to kill”); Brenner, *supra* note 2, at 281 (observing that Pennsylvania itself has taken this approach); Crump, *supra* note 7, at 287 (“Some jurisdictions . . . have compressed premeditation and deliberation into the lesser-included concept of intent.”); Hobson, *supra* note 2, at 516 (observing that in California at one time “premeditation was expanded to the point where simple specific intent to kill satisfied the premeditation and deliberation requirement”); Mounts, *supra* note 2, at 280 (asserting that one court’s “elaboration of the meaning of willful, deliberate, and premeditated suggested these terms were indistinguishable from the ‘deliberate intention’ of express malice”); Pauley, *supra* note 2, at 152 (“Under [one] interpretation, premeditation is exactly the same as intent to kill.”); Pillsbury, *supra* note 5, at 454 (observing that some “state courts view[ed] premeditation as nothing more than a ‘conscious purpose to bring about death’” (quoting *Commonwealth v. O’Searo*, 352 A.2d 30, 37–38 (Pa. 1976))); Stacy, *supra* note 2, at 1030 n.84 (noting that in some jurisdictions, “the meaning of ‘premeditation’ has been equated with ‘intentional’ so that there is no meaningful analytical distinction between a premeditated intentional killing, which is first-degree murder, and an unpremeditated intentional murder, which is second-degree murder”).

40. Ledewitz, *supra* note 2, at 86; see also Mounts, *supra* note 2, at 324 (“[T]he court now seems to regard the category of premeditated and deliberated murders as a sort of ‘catchall’ for murders that the court deems particularly reprehensible but that are not committed by one of the other means specified [by statute].”).

41. CARDOZO, *supra* note 27, at 100; see also Brenner, *supra* note 2, at 285 (“[B]ecause of the vagueness of the distinction between first and second degree intentional murder, the second-degree murder provision is serving, not as a substantive definition of crime, but as a safety valve for juries which entertain doubts raised by considerations apart from the distinction between the two degrees of murderous intent . . . .”); Givelber, *supra* note 2, at 381 (“[T]he premeditation and deliberation formula resulted in giving the jury unguided discretion to return first-degree murder.”); Pauley, *supra* note 2, at 163 (observing that “the lack of meaningful guidelines from the courts about when a murder is premeditated and when it is not . . . means that juries are left to use their own judgment as to what premeditation and deliberation mean in any particular case”); Romero, *supra* note 2, at 86 (“[T]he jury [is] left to apply its own conception of what deliberate intention means.”).

42. CARDOZO, *supra* note 27, at 99.

in a mystifying cloud of words.”<sup>43</sup> Some modern commentators have agreed with this assessment.<sup>44</sup>

This approach has serious flaws. First, unbridled jury discretion to decide to convict of a crime that paves the way for the death penalty,<sup>45</sup> on the one hand, or one that is punishable only by little more than a dozen years in prison, on the other, verges on lawlessness.<sup>46</sup> Such overly broad discretion can lead to unpredictable, inconsistent, undesirable, and even indefensible results.<sup>47</sup> In addition, this approach fails miserably as an exercise in statutory interpretation.<sup>48</sup> As Tom Stacy cogently observed: “The simultaneous departure from the text and the pretense of following it carry the troubling messages that courts are not bound by statutory text and that insincerity is an acceptable feature of judicial reasoning.”<sup>49</sup> If we are to take statutory interpretation seriously, premeditation and deliberation must mean something more than mere intent.

Other courts treat the premeditation-deliberation distinction more seriously and find that these words must, in practice as well as in theory, mean something more than simply intent to kill.<sup>50</sup> For example, the Michigan Court of Appeals in *People v. Morrin* held: “While the minimum time necessary to exercise th[e] process [of

43. *Id.* at 100.

44. *See, e.g.*, Smith, *supra* note 29, at 15 (urging that jurors be instructed that “premeditation is meant to reflect a higher level of culpability than second-degree intentional murder”).

45. Unlike in Cardozo’s time, a jury finding of premeditation and deliberation can no longer, by itself, automatically subject the killer to the death penalty. *See* Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (holding mandatory death penalty for premeditated and deliberate murder violates Eighth and Fourteenth Amendments). However, in seventeen states, a defendant cannot be sentenced to death absent such a finding. *See supra* text accompanying note 14; *see also* Mounts, *supra* note 2, at 263 (“[A]lthough no longer in itself a basis for the imposition of the death penalty, conviction of first degree murder remains a necessary predicate.” (footnote omitted)).

46. *See* Mounts, *supra* note 2, at 263 n.7 (“[T]he imprecise definition of premeditation and deliberation . . . inevitably amplified the problem of unguided juror discretion by extending the possibility of a death sentence to a large segment of what, in theory, was second degree murder.”); *see also* Crump, *supra* note 7, at 275 (“Unguided discretion is the opposite of law; it is lawlessness.”).

47. *See* Crump, *supra* note 7, at 275 (“[D]iscretion manifests itself in arbitrary results, dissatisfied litigants, and lessened respect for law.”); Stacy, *supra* note 2, at 1070 (observing that overly broad discretion can lead to “inconsistent” and “indefensible” results).

48. *See* Crump, *supra* note 7, at 287–88 (observing that this approach “fails to give faithful meaning to the text written by the legislature”); *accord* PILLSBURY, *supra* note 2, at 101 (noting that premeditation and deliberation must mean something more than intent); Kealy, *supra* note 31, at 246–47 (“If premeditation simply means intent to kill, then there is no reason for a legislature to include modifiers such as premeditated, deliberate or willful for first-degree murder.”); Pauley, *supra* note 2, at 154 (“If premeditation is synonymous with intent to kill, why did the legislature choose to use the word premeditated instead of intentional?”).

49. Stacy, *supra* note 2, at 1032 n.91.

50. *See* DRESSLER, *supra* note 18, § 31.03(C)(3), at 517–18; Stacy, *supra* note 2, at 1071 (“Some jurisdictions and some juries do hew to ‘premeditation’s’ ordinary meaning of planning.”).

premeditation and deliberation] is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a ‘second look.’”<sup>51</sup> Commentators tend to applaud such a result.<sup>52</sup> Yet this approach simply highlights, but does not resolve, the difficulties of giving the words “premeditation” and “deliberation” coherent and consistent meaning. Once one recognizes that some span of time is necessary for the existence of premeditation, one must decide the difficult question of how much time is sufficient.<sup>53</sup> And once one gives serious weight to the quality of reflection implicit in the term “deliberation,” one must decide the nature of the reflection sufficient to constitute deliberation.<sup>54</sup>

The true difficulty lies with instructing a lay jury to determine whether a killer premeditated and deliberated when there is no precise definition for those terms. As Cardozo wrote: “The . . . distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it.”<sup>55</sup> He added with admirable candor: “I am not at all sure I understand it myself . . .”<sup>56</sup> Neither courts nor commentators have been capable of resolving this question in any but the vaguest of ways.<sup>57</sup>

51. 187 N.W.2d 434, 449 (Mich. Ct. App. 1971).

52. See, e.g., Perkins, *supra* note 19, at 450 (“The sound interpretation of such a statute is that a killing is deliberate and premeditated if, and only if, it results from real and substantial reflection.”); Romero, *supra* note 2, at 86–87 (“The thought processes described in the definition of deliberate intention would seem to require some time. To engage in careful thought and to weigh the considerations for and against the proposed course of action that might result in a killing must involve the passage of time . . .”).

53. See Hobson, *supra* note 2, at 516 (“While there is a temporal component to premeditation, it is inexact.”); Mounts, *supra* note 2, at 327 (“From the beginning, th[e] issue of the time required to premeditate and deliberate has plagued any effort to distinguish these elements from the intent to kill.”).

54. Hobson, *supra* note 2, at 517 (“[I]t is extremely difficult to set guidelines for how much reflection is enough to demonstrate premeditation . . .”). Blurring the lines even more, there may be yet a third category of killer between the impulsive and the deliberative: the seemingly impulsive killer who “conscious[ly] refus[es] to deliberate before causing harm.” Pillsbury, *supra* note 5, at 456 n.64. Such a classification would be akin to the problematic notion of “willful blindness,” which implicates something more than recklessness but something less than full knowledge. See DRESSLER, *supra* note 18, § 10.04(B), at 128 (observing that a person acts with willful blindness with regard to the existence of a fact when he “is aware of a high probability of the existence of the fact in question[] and . . . deliberately fails to investigate in order to avoid confirmation of the fact”).

55. CARDOZO, *supra* note 27, at 100; see also Blinn, *supra* note 23, at 733 (“[I]n practice it is impossible to explain to the lay jury with unerring accuracy these distinct and separate mental states requisite for first degree murder.”); Mounts, *supra* note 2, at 284 (“If a killer can form this more aggravated mental state in a matter of moments, how can the jury differentiate aggravated intent to kill from non-aggravated intent to kill?”).

56. CARDOZO, *supra* note 27, at 100–01.

57. See FLETCHER, *supra* note 2, at 256 (“[A]fter over a century of litigation, the courts have not been able to settle upon a consistent interpretation of the test . . .”); Crump, *supra* note 7, at 264 (“[T]he line that [the premeditation-deliberation formula] draws between first- and second-degree murder is vague, indeterminate, and shifting.”); Hobson, *supra* note 2, at

These difficulties are well illustrated by the West Virginia case of *State v. Guthrie*.<sup>58</sup> Guthrie suffered from depression, borderline personality disorder, panic attacks, and body dysmorphic disorder, causing him to be obsessed with his nose.<sup>59</sup> The victim, who worked with Guthrie in a restaurant, teased Guthrie and snapped him with a wet dishtowel several times, once striking him on the nose.<sup>60</sup> Guthrie removed the gloves he was wearing, removed a knife from his pocket, started toward the victim, and stabbed him once in the neck, killing him.<sup>61</sup> At Guthrie's trial for first-degree murder on a premeditation-deliberation theory, the jury was instructed that premeditation and deliberation simply meant that the killing was intentional.<sup>62</sup> Guthrie was convicted.<sup>63</sup> The Supreme Court of West Virginia determined that the jury instruction erroneously conflated intent to kill with premeditation and deliberation.<sup>64</sup> However, the court made clear that a properly instructed jury *could* have found Guthrie guilty of first-degree murder, because Guthrie might have premeditated and deliberated in the time it took him to remove his gloves, take out his knife, and walk toward the victim.<sup>65</sup> Indeed, the court approved a jury instruction that "[a]ny interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient."<sup>66</sup>

## 2. Justifying the Premeditation-Deliberation Formula

The difficulty in defining premeditation and deliberation, critics of the formula charge, is not its greatest flaw. This difficulty, they argue, has come about because courts stretch the concepts of premeditation and deliberation in order to cover truly abhorrent murders that are not, strictly speaking, premeditated and deliberate. Courts are reluctant to consign some unpremeditated or nondeliberate murders to the category of second-degree murder when they are of the type that constitutes the very worst intentional murders. That this practice is so pervasive demonstrates, the critics charge, that the premeditation-deliberation formula is inadequate to separate first- from second-degree murder for the simple reason that there is little if any

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514 (1996) ("[T]he requisite cold-bloodedness is very difficult to define . . ."). For examples of vague articulations of the test, see Kremnitzer, *supra* note 1, at 654 ("The correct path . . . requires a significant process of deliberation but does not require hours of deliberation."); Perkins, *supra* note 19, at 450 ("It is true the law does not attempt to set a period of time for this requirement in terms of hours, or minutes or even seconds; but premeditation takes 'some appreciable time.'" (quoting *State v. Zdanowicz*, 55 A. 743, 746 (N.J. 1903))); Romero, *supra* note 2, at 87 ("[T]he jury instruction should define deliberation so as to include sufficient time for the careful thought and weighing of the considerations for and against the killing."); Engels, *supra* note 18, at 1403 ("[T]he test for premeditation does not consider the duration, but rather the extent of the reflection.").

58. 461 S.E.2d 163 (W. Va. 1995).

59. *Id.* at 172.

60. *Id.* at 171.

61. *Id.*

62. *Id.* at 179.

63. *Id.* at 171.

64. *Id.* at 181–83.

65. *Id.* at 176.

66. *Id.* at 182–83 (internal quotation marks omitted).

correlation between the presence of premeditation and deliberation of the murder, on the one hand, and the dangerousness and culpability of the offender, on the other.<sup>67</sup> As the Commentary to the MPC charged, the “judicial inconsistency and obscurity” in interpreting the premeditation-deliberation formula “are largely symptomatic of the lack of an intelligible policy underlying the . . . formulation.”<sup>68</sup>

The difficulty, the critics charge, is that the premeditation-deliberation formula is not carefully calibrated to separate out the worst murderers because the presence of planning activity is at best a rough proxy for the most heinous killings.<sup>69</sup> The premeditation-deliberation formula, therefore, is both over- and underinclusive.<sup>70</sup> On the one hand, it elevates to first-degree murder planned killings that, for one reason or another, evoke our understanding if not our sympathy.<sup>71</sup> On the other

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67. See, e.g., Kremnitzer, *supra* note 1, at 650 (“It may be that certain minimalist interpretations that have dramatically narrowed [the] meaning [of premeditation] . . . derive from an objection to the element itself . . . .”); Mounts, *supra* note 2, at 267 (suggesting the possibility “that, regardless of the theoretical feasibility of drawing a distinct line” between murders that are premeditated and deliberate and those that are not, “it has not been drawn because the court[s] [are] not convinced of its correlation to culpability”); Pillsbury, *supra* note 5, at 454 (“We might see what courts have done with premeditation . . . as a covert move to find room for motivation analysis.”); Romero, *supra* note 2, at 92 (suggesting that confused application of the premeditation-deliberation formula “reflects the judgment that deliberation does not identify the worst murders”); Stacy, *supra* note 2, at 1031 (asserting “that many courts are diluting the statute’s plain meaning” because of “discomfort with the conclusion that premeditation is the *sine qua non* of killings that deserve the most severe punishment”).

68. MODEL PENAL CODE § 210.6 cmt. 4(b), at 126 (1980).

69. See Kremnitzer, *supra* note 1, at 647 (noting the criticism that “[t]he distinction that is based on the existence or the absence of premeditation does not differentiate deeds on a solid, justifiable, moral basis”). For examples of this critique, see Hobson, *supra* note 2, at 514 (asserting that the types of killings covered by first-degree murder statutes “do not necessarily warrant more punishment”); Pauley, *supra* note 2, at 166 (“Premeditation is simply not a good way to distinguish first from second degree murder.”); Romero, *supra* note 2, at 83 (“Willful, deliberate and premeditated homicides do not necessarily include the most heinous killings that deserve the greater punishment reserved for first degree murder.”).

70. See Crump, *supra* note 7, at 264 (opining that the premeditation-deliberation formula “sometimes gets it backward, punishing lesser crimes more severely and depreciating the seriousness of more blameworthy offenses”); Givelber, *supra* note 2, at 382 (“[C]ritics objected that the presence of premeditation did not necessarily signal that the defendant was in the class of the most morally blameworthy killers while its absence did not necessarily mean that the defendant was not in that class.”); Stacy, *supra* note 2, at 1011 (“In defining the most serious category of intentional homicides, [the traditional paradigm] overlooks aggravating circumstances whose importance surpasses that of premeditation as well as the mitigating significance premeditation itself sometimes possesses.”).

71. See Kremnitzer, *supra* note 1, at 648 (noting the criticism that the premeditated killer might be “worthy of less blame by virtue of the fact that he considered, during the process of deliberation, inhibiting and restraining factors . . . , that he has a conscience, and that his inhibitions against wrongdoing are active . . . in contrast with a killer evincing a complete lack of conscience or a total dullness of moral sense”). For examples of this critique, see Crump, *supra* note 7, at 278–79 (asserting that the premeditation-deliberation formula results in “murders that arguably are less blameworthy” being punished more

hand, it treats less seriously those murders deemed unplanned, at least by courts that take the distinction seriously, yet which evoke the full measure of our disgust.<sup>72</sup>

a. Overinclusiveness of the Premeditation-Deliberation Formula

The overinclusiveness of the premeditation-deliberation formula was cogently summarized by the MPC Commentary. In a widely cited passage, the Commentary eloquently explained why some premeditated murders may, in fact, be among the most sympathetic: “Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than a true reflection of the actor’s normal character.”<sup>73</sup> The Commentary provides as examples of planned-out but sympathetic murders “most mercy killings[,] . . . suicide pacts, many infanticides, and cases where a provocation gains in its explosive power as the actor broods about his injury.”<sup>74</sup>

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severely); Givelber, *supra* note 2, at 383 (“[T]he very act of considering whether to kill might suggest that the decision to take life was uncharacteristic or might suggest that the killing was undertaken with good motives, as in a mercy killing.”); Kealy, *supra* note 31, at 252 (“[I]t has become clear that certain premeditated killings may be deemed ‘understandable’ by the general public, and deserve a lesser sentence . . . .”); Mounts, *supra* note 2, at 296–97 (“[T]he existence of premeditation and deliberation—that is, of forethought and consideration of alternatives—[i]s not in all cases necessarily correlated with a high level of moral turpitude.”); Romero, *supra* note 2, at 93 (“Mercy killings and some family homicides following deep emotional struggles do not seem to present the same depravity exhibited by the contract slayer.”).

72. See Kremnitzer, *supra* note 1, at 647–48 (noting the criticism that the premeditation-deliberation formula favorably treats “those who do not even consider inhibiting considerations because of their . . . general lack of morality” and “whose degree of dangerousness is no less, and in some cases may be higher, than that of the premeditated killer”). For examples of this critique, see Crump, *supra* note 7, at 278 (arguing that the premeditation-deliberation formula results in “[h]ighly blameworthy crimes . . . being categorized merely as second-degree [murders]”); Kealy, *supra* note 31, at 248 (“[M]any unpremeditated killings shock society’s conscience more than premeditated murders.”); Pauley, *supra* note 2, at 165 (“[S]ome of the worst murders are not planned at all.”); Romero, *supra* note 2, at 93 (“[T]he willful, deliberate and premeditated basis excludes very grave murders from the first degree murder category that deserve the maximum punishment.”).

73. MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980); see also PILLSBURY, *supra* note 2, at 99 (arguing that the premeditation-deliberation formula is “overbroad, permitting the classification of too many killings in the worst offense category”); Stacy, *supra* note 2, at 1032 (“[T]he traditional paradigm fails to appreciate that compelling mitigating circumstances sometimes accompany premeditation and that premeditation itself sometimes possesses mitigating significance.”).

74. MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980); accord Kealy, *supra* note 31, at 249 (“One form of premeditated killing, mercy killing, society may not view as particularly ‘blameworthy.’”); Kremnitzer, *supra* note 1, at 632 (“[I]t is proper to distinguish between one who acted coolly from worthy motives, and one who acted heatedly from unworthy motives . . . .”).

The textbook example of the arguable overinclusiveness of the premeditation-deliberation formula is the North Carolina case of *State v. Forrest*.<sup>75</sup> Forrest visited his father, who was hospitalized, terminally ill, untreatable, near death, and with a “Do Not Resuscitate” order in place.<sup>76</sup> When a nurse attempted to comfort Forrest, he replied: “Go to hell. I’ve been taking care of him for years. I’ll take care of him.”<sup>77</sup> After Forrest was left alone with his father in the hospital room, Forrest killed his father with four gunshots to the head from a single-action revolver, meaning that the gun had to be cocked each time it was fired.<sup>78</sup> Shortly thereafter, he admitted to the police that he had put his father “out of his suffering” and that he had “promised [his] dad [he] wouldn’t let him suffer.”<sup>79</sup> Forrest was convicted of first-degree murder,<sup>80</sup> requiring that the jury find premeditation and deliberation pursuant to North Carolina law.<sup>81</sup> The North Carolina Supreme Court affirmed, finding sufficient evidence of premeditation and deliberation in Forrest’s taking the gun to the hospital, the lack of provocation by the victim, his statements to the nurse just before the killing, and, especially, his statements to the police thereafter.<sup>82</sup>

On a retributivist view, Forrest hardly seems like he is among the most blameworthy of killers.<sup>83</sup> While he intentionally ended the life of another human being, and therefore (absent a defense of euthanasia) deserves punishment as a murderer, his act would likely be classified by reasonable people as among the least heinous of murders. There is no reason to doubt the sincerity of his belief that he acted in order to relieve the suffering of his father. Moreover, death appeared close at hand and Forrest’s actions only hastened what likely would have come about naturally within days or even hours. Finally, the homicidal act was designed to, and did, result in instantaneous death, avoiding the infliction of undue physical or psychological suffering on the victim.

Likewise, from an incapacitacionist standpoint, Forrest seems to be among the least dangerous of killers. His act was a once-in-a-lifetime, out-of-character response to an extraordinary situation. Seen in this light, the chances of Forrest ever killing again appear to approach nil.<sup>84</sup> And, again, the lack of any physical or psychological harm inflicted on the victim demonstrates that Forrest’s character was hardly that of a cold-hearted sadist.

Yet, on a conventional view of the premeditation-deliberation formula, the determination of the North Carolina Supreme Court was most assuredly correct.

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75. 362 S.E.2d 252 (N.C. 1987).

76. *Id.* at 253.

77. *Id.* at 254.

78. *Id.*

79. *Id.*

80. *Id.*

81. See N.C. GEN. STAT. ANN. § 14-17 (West 2000).

82. *Forrest*, 362 S.E.2d at 258.

83. See Stacy, *supra* note 2, at 1033 (“From a retributivist perspective, Forest’s [sic] premeditated mercy killing of his father constituted a qualitatively less serious infringement of autonomy than [an] unpremeditated but brutal killing of [a] child . . .”).

84. See *id.* at 1034 (“Forest [sic] hardly can be viewed as posing great dangers to others unless incarcerated.”).

Whether premeditation and deliberation can be measured in seconds or only in days and hours, the fact that Forrest brought a gun to a hospital room sealed his fate.<sup>85</sup> His act was planned and calculated; it was premeditated and deliberate under any definition of those terms.

One might argue that the overinclusiveness problem is largely illusory. After all, virtually every critic of the premeditation-deliberation formula who comments on its overinclusiveness cites a single case: *Forrest*.<sup>86</sup> Thus, it may well be that true mercy killings are rarely prosecuted as first-degree murders and that, when they are, juries seldom convict of that charge.<sup>87</sup> Even if both of these propositions are true, however, this does not necessarily detract from the overinclusiveness problem. That prosecutors might wisely exercise their discretion, and juries understandably exercise mercy, with regard to more sympathetic killers does not take away from the fact that such killers are, in fact, guilty of first-degree murder and could be punished accordingly. Indeed, it is precisely because prosecutors and juries have few if any real guidelines to follow in determining which murders are premeditated and deliberate that arbitrariness might result.

Moreover, Suzanne Mounts has identified another category of murders with regard to which the premeditation-deliberation formula is overinclusive: those where the killer is afflicted with a mental disease or defect, but one of insufficient severity to render him legally insane.<sup>88</sup> She notes that the existence of premeditation and deliberation presupposes normally functioning cognitive abilities.<sup>89</sup> Yet, in a person afflicted with a mental illness, “cognitive abilities [do not] necessarily correlate with culpability.”<sup>90</sup> This is because, modern psychological theory surmises, “mental illness can often leave cognitive abilities unaffected, while seriously undermining emotional and volitional capacities.”<sup>91</sup> It is true that a first-degree murder defendant suffering such impairments might well have an expert testify that he<sup>92</sup> might not have had the capacity to deliberate in the

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85. See *id.* at 1033 (suggesting that Forrest probably “did ‘premeditate’ the killing,” given his “prior motive to kill” and the fact that he “carried a concealed pistol into the hospital”).

86. E.g., Kealy, *supra* note 31, at 249 n.344 (discussing *Forrest*); Pauley, *supra* note 2, at 164–65 (discussing *Forrest*); Pillsbury, *supra* note 5, at 454 & n.60 (citing *Forrest*).

87. See Neil P. Cohen, *Thoughts on Professor Crump’s Comparison of Traditional American Homicide Law and the Model Penal Code*, 109 W. VA. L. REV. 357, 363 (2007) (“One reason for this lack of authority is that, in reality, states with a Pennsylvania model may well not produce anomalous results with any frequency.” (emphasis omitted)); Kremnitzer, *supra* note 1, at 652 (“[C]riticism of premeditation always repeats the same opposite examples, which clearly reflect a category that is very limited, numerically speaking, and atypical, qualitatively speaking.”).

88. See Mounts, *supra* note 2, at 298.

89. *Id.*

90. *Id.*; see also Pillsbury, *supra* note 5, at 454 & n.59 (asserting that the premeditation-deliberation formula is overinclusive because it has been held to apply even to those suffering from PCP intoxication and organic brain injury).

91. Mounts, *supra* note 2, at 298.

92. This Article uses the male pronoun when referring to a particular hypothetical murderer because the overwhelming majority of murderers are male. See Office of Justice Programs, *Homicide Trends in the U.S.: Trends by Gender*, BUREAU OF JUSTICE STATISTICS

full sense of the word, despite his unimpaired cognitive capabilities. Nevertheless, there is no guarantee that a jury will credit such testimony, especially in the face of the contrary testimony of a prosecution expert witness.

b. Underinclusiveness of the Premeditation-Deliberation Formula

The second criticism of the premeditation-deliberation formula is that it is underinclusive. That is, critics charge, murders that are unplanned are often among the most reprehensible and their perpetrators among the most dangerous.

In 1883, James Fitzjames Stephen wrote perhaps the earliest and most famous criticism of the use of premeditation as the dividing line between more serious and less serious murders. Stephen was actually discussing not the 1794 Statute but the French Code, which, according to him, punished most murders with life imprisonment but which punished by death four general classes of aggravated murders, including those “aggravated by premeditation or waylaying,” where premeditation was “defined as a preconceived design.”<sup>93</sup> Stephen decried the irrationality of separating premeditated from non-premeditated murder on the basis of the increased gravity of the former: “As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders.”<sup>94</sup> Stephen, in a widely cited passage, proceeded to give several examples of impulsive murders that intuitively seem as bad as, if not worse than, planned murders:

[1] A., passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. [2] A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. [3] A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor’s brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural, as ‘aforethought’ in ‘malice aforethought,’ but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.<sup>95</sup>

Nearly a century later, the Commentary to the MPC, in defending the Code’s elimination of degrees of murder, famously repeated this criticism. Relying heavily on Stephen, the Commentary argued that many impulsive murders will be more abhorrent than many premeditated murders: “[S]ome purely impulsive murders will present no extenuating circumstance[s]. The suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required.”<sup>96</sup>

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(2011), <http://bjs.ojp.usdoj.gov/content/homicide/gender.cfm> (indicating that 88.8% of all homicide offenders between 1976 and 2005 were male).

93. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 93 (London, MacMillan & Co. 1883).

94. *Id.* at 94.

95. *Id.*

96. MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980).

Other prominent commentators have echoed these sentiments. George Fletcher has noted that murders that are planned, especially those involving ambush or lying in wait, have always been seen as “particularly heinous.”<sup>97</sup> However, Fletcher further observed, “while planning and calculation represent one form of heinous or cold-blooded murder, premeditation is not the only feature that makes intentional killings wicked.”<sup>98</sup> Utilizing Stephen’s examples, Fletcher noted that it is the very absence of thought or foresight that makes some killings so atrocious: “Wanton killings are generally regarded as among the most wicked, and the feature that makes a killing wanton is precisely the absence of detached reflection before the deed.”<sup>99</sup> Fletcher concluded that the premeditation-deliberation formula is underinclusive: “[T]here is obviously a flaw in the criterion of ‘premeditation and deliberation.’ It takes one of several grounds that are sufficient to treat a homicide as among the most wicked, and takes that one ground to be necessary to the exclusion of all others.”<sup>100</sup> Likewise, Samuel Pillsbury has written: “Premeditation assumes that the worst wrongs involve the most extended, dispassionate consideration of wrongdoing, and while this is often so, it is not always.”<sup>101</sup> And Tom Stacy has weighed in: “[I]mpulsive as well as premeditated killings can evidence the highest degree of disrespect for others.”<sup>102</sup>

The poster child for the underinclusiveness of the premeditation-deliberation formula is a California case, *People v. Anderson*.<sup>103</sup> After several days of heavy drinking, Anderson killed the ten-year-old daughter of his live-in girlfriend while he was alone with the victim in their home.<sup>104</sup> The victim suffered over sixty stab wounds, including some to her vaginal and rectal areas.<sup>105</sup> Blood was found in almost every room of the house and on Anderson’s clothes, and bloody footprints the size of the victim’s feet were discovered going from room to room.<sup>106</sup> The

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97. FLETCHER, *supra* note 2, at 253.

98. *Id.* at 254.

99. *Id.*

100. *Id.*

101. PILLSBURY, *supra* note 2, at 99; *see also* Pillsbury, *supra* note 5, at 455 (“[A]n impulsive killing, depending on motivation, may present a more culpable offense than a reflective killing by a brooding, self-doubting offender.”).

102. Stacy, *supra* note 2, at 1028.

103. 447 P.2d 942 (Cal. 1968); *see, e.g.*, PILLSBURY, *supra* note 2, at 104 (opining that *Anderson* “leads us to doubt whether an impassioned decision to kill is necessarily less culpable than a dispassionate one”); Hobson, *supra* note 2, at 521 (“*Anderson* . . . is an excellent example of a murder far worse than many premeditated killings.”); Ledewitz, *supra* note 2, at 108 n.163 (“[R]eliance on a requirement of planning in first degree murder cases has failed in the past.” (citing *Anderson*)); Mounts, *supra* note 2, at 303–04 (“The problem with the result in *Anderson*, if there is one, results from the legislative definition of first degree murder.”); Pauley, *supra* note 2, at 160 (citing *Anderson* for the proposition that a strict approach of the premeditation-deliberation formula “leads to odd results . . . where brutal murderers are not punished to the maximum extent that the law allows for their heinous crimes”). An exhaustive analysis of *Anderson* is contained in Crump, *supra* note 7, at 265–83.

104. *Anderson*, 447 P.2d at 944–45.

105. *Id.* at 945.

106. *Id.*

victim's dress and underpants, with the crotch torn out, were found torn and bloodied, but, importantly, there was no evidence of sexual assault.<sup>107</sup> Anderson was found guilty of first-degree murder, requiring a finding of premeditation and deliberation under California law, and sentenced to death.<sup>108</sup> On appeal, the California Supreme Court reduced the conviction to murder in the second degree, based on the insufficiency of evidence of premeditation and deliberation.<sup>109</sup>

Just as Forrest's moral culpability approached the nadir of that of all intentional murderers, so was Anderson's somewhere near its zenith. Anderson brutally and senselessly murdered a ten-year-old girl with over sixty stab wounds. The bloody footprints and other evidence indicated that he likely chased his victim throughout the house as she bled to death. That he tore off her clothes, ripped the crotch from her panties, and inflicted stab wounds to her genital region indicate perhaps that he took some perverse sexual pleasure in the pain and suffering he was inflicting.<sup>110</sup> It is not a stretch of the English language to characterize the girl's murder as an act of torture. Anderson's actions demonstrate sheer wanton barbarity and disregard for the young life he snuffed out.

Likewise, Anderson's dangerousness seems to follow inexorably from his moral depravity. For if Anderson was capable of this torturous murder of a young innocent, either with a motive stemming from his sexual deviance, or with no motive at all, it is reasonable to assume that Anderson might try to kill again. And since he chose as his victim one who is among society's most vulnerable, he would stand a high likelihood of succeeding.<sup>111</sup> In short, both our moral intuitions and a reasoned utilitarian calculus tell us that Anderson should suffer the most severe punishment permitted by law.

At the same time, the California Supreme Court's decision seems correct, at least upon any meaningful view of the premeditation-deliberation formula.<sup>112</sup> There was no evidence that the murder was planned out beforehand for any appreciable length of time. Rather, it seems to have been the result of a spur-of-the-moment burst of rage. Unless we are to either invent facts that do not appear in the record, or contort the meaning of premeditation and deliberation to include an intention formed in the instant before the commencement of the homicidal act, or after the act's commencement but before the fatal blow was struck,<sup>113</sup> we must conclude that Anderson's act was unpremeditated and nondeliberate.

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107. *Id.*

108. *Id.* at 943–44, 946–47.

109. *Id.* at 947–53.

110. Pauley, *supra* note 2, at 160 (“The jury might have believed that the defendant’s act was part of a deliberate, if bizarre, plan to achieve sexual gratification.”); Pillsbury, *supra* note 5, at 455 (“The case involved . . . circumstances which strongly suggested a sexual motivation, a crime that ranks high on an intuitive scale of homicide offenses.”).

111. *See* Mounts, *supra* note 2, at 303 (“The murder was particularly violent and unprovoked, and the victim was a vulnerable child.”).

112. *See id.* (“[I]n terms of the court’s application of the statute, it is hard to argue with the decision.”); Pillsbury, *supra* note 5, at 455 (“[T]he court took seriously the notion that premeditation requires cool calculation and a carefully reflected-upon decision to kill.”).

113. *See* Mounts, *supra* note 2, at 316 (observing that, arguably, “with each stab or blow, the perpetrator again decided to inflict a deadly wound and thus premeditated and

## II. POSSIBLE PENOLOGICAL JUSTIFICATIONS FOR THE PREMEDITATION-DELIBERATION FORMULA

Virtually all who have written about the premeditation-deliberation formula begin from the same retributivist premise: that the formula exists to punish more blameworthy murderers more severely. Some also assume that the formula is additionally based on the incapacitationist function of punishing more dangerous killers more severely. None has adequately examined the possibility that the formula is supported also by the rationale of deterrence.

### A. Retribution and Incapacitation

Critics of the premeditation-deliberation formula almost uniformly begin from the premise that the formula is grounded in retributivist theory. Retributivism posits that criminal punishment is justified by the moral culpability of the criminal actor.<sup>114</sup> According to this assumption, the formula is designed to capture the very worst murderers—that is, the formula presumes that those who plan out their killings are categorically worse than those who kill intentionally but on impulse. Thus, George Fletcher wrote: “The historic function of this formula is determining whether the murder is sufficiently heinous to be subject to the extreme penalty of death.”<sup>115</sup> Likewise, Samuel Pillsbury wrote that “[p]remeditation assumes that the worst wrongs involve the most extended, dispassionate consideration of wrongdoing.”<sup>116</sup> The ALI, in its Commentary to the MPC, agreed: “[The formula] probably rests on the premise that there exists some dependable relation between the duration of reflection and the gravity of the offense. Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse.”<sup>117</sup> And Daniel Givelber has written: “Premeditation and deliberation treat[] the premeditated murderer as more depraved than one who kill[s] on impulse.”<sup>118</sup> In short, the premeditation-deliberation formula is designed essentially to “serve[] as a proxy for the worst motives to kill.”<sup>119</sup> When we know the offender

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deliberated on the act of killing,” but that “*Anderson* itself is an example of a case in which such an argument apparently was made and rejected”). At least one commentator seems to support this position. See Kremnitzer, *supra* note 1, at 637 (“What starts as a violent or harmful assault . . . can, during the execution, become premeditated action.”).

114. See DRESSLER, *supra* note 18, § 2.03(B)(1), at 16.

115. FLETCHER, *supra* note 2, at 253.

116. PILLSBURY, *supra* note 2, at 99; see also *id.* at 100 (observing that in the premeditation-deliberation formula, “we find the idea that a cool and preconceived design to kill is the hallmark of the worst form of homicide”).

117. MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980).

118. Givelber, *supra* note 2, at 382.

119. PILLSBURY, *supra* note 2, at 100; see also DRESSLER, *supra* note 18, at 514 (positing that “the division of murder into degrees is meant to separate the most heinous forms of murder” from others); MORELAND, *supra* note 24, at 208 (“[A] ‘deliberate’ killing is a more opprobrious offense than an ‘intentional’ one since it is a weighed act.”); Blinn, *supra* note 23, at 735 (“The basis of the distinction between the degrees of murder is one of severity of punishment whereby the punishment may be adapted to the heinousness of the act.”); Hobson, *supra* note 2, at 526 (“Murder was originally divided into degrees to keep less culpable murderers from being subject to capital punishment.”); Ledewitz, *supra* note 2, at

has killed for what we believe to be a truly abhorrent motive, “we are confident that the soul of the offender is truly and fully evil” and that “the death penalty may be inflicted.”<sup>120</sup>

Even those few scholars who are more sympathetic to the premeditation-deliberation formula make this assumption about the formula’s retributivist foundation. Mordechai Kremnitzer, for example, writes that a killing performed after deliberation “is more blameworthy” because the perpetrator, unlike the intentional but spontaneous killer, had to overcome the “obstacles . . . [of] contradictory considerations and inhibitions” before acting.<sup>121</sup> And Neil Cohen, after accepting “the notion that homicide law should permit actors to be sorted according to their moral blameworthiness,” finds that the premeditation-deliberation formula is a suitable way of doing so.<sup>122</sup>

That so many who have written on the issue presume that the premeditation-deliberation formula is grounded in retributivism is surely due in no small part to the fundamental structure of the criminal law, and homicide law in particular. As Suzanne Mounts writes: “[T]he most characteristic feature of the modern homicide scheme [is] its hierarchical structure of culpability.”<sup>123</sup> This feature represents the heavy influence of the MPC, with its “hierarchy of four carefully defined mental states.”<sup>124</sup> This structure treats intentional conduct as more morally blameworthy than reckless conduct, which is in turn more morally blameworthy than negligent conduct.<sup>125</sup>

Some commentators have asserted that, in addition to retributivist concerns, the utilitarian goal of incapacitation also drives the premeditation-deliberation formula. Incapacitacionist theory posits that the primary purpose of punishment is to physically prevent the criminal actor from committing further offenses.<sup>126</sup> The contention is that the killer who premeditates and deliberates is not only more culpable, but is also more dangerous, than the killer who merely kills intentionally. Thus, one student commentator wrote that the “introduction of premeditation into the criminal law reflects society’s belief that a killer acting according to a preconceived plan is more dangerous, more culpable, and less capable of reformation than an impulsive killer.”<sup>127</sup> Mordechai Kremnitzer agrees:

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81 (“Presumably, th[e] division was made along the lines of mental states in order to identify the most culpable killers.”); Mounts, *supra* note 2, at 289 (“[F]irst degree murder obviously must reflect markedly greater blameworthiness than . . . that of second degree murder.”); Romero, *supra* note 2, at 76 (“[T]he division of homicides . . . reflects the view that . . . [t]he more reprehensible the homicide, the greater the punishment the killing should warrant.”).

120. Ledewitz, *supra* note 2, at 82.

121. Kremnitzer, *supra* note 1, at 641.

122. Cohen, *supra* note 87, at 360–62; *see also* Loewy, *supra* note 31, at 370 (“All other things being equal, a preconceived intentional killing in cold blood is more blameworthy than an instantaneous unintentional hot blooded killing.”).

123. Mounts, *supra* note 2, at 264; *see also* Cohen, *supra* note 87, at 360 (“[S]caling moral blameworthiness is exactly what homicide law is all about . . .”).

124. Pillsbury, *supra* note 5, at 457.

125. *See* Givelber, *supra* note 2, at 422 (observing that “[t]he distinctions between intent, recklessness, negligence, and pure accident permeate the criminal law,” in large part because “choice underlies any theory of desert”).

126. Dressler, *supra* note 18, § 2.03(A)(2), at 15.

127. Walther, *supra* note 21, at 357; *accord* Bullock v. United States, 122 F.2d 213, 214

“[H]omicide following cold blooded deliberation may indicate a particularly dangerous perpetrator.”<sup>128</sup> In addition, the act itself may be more dangerous because planned-out acts are more likely to be successful than unplanned acts.<sup>129</sup>

### B. What the Commentators Overlook: Deterrence

While commentators have focused primarily on the supposed retributivist justifications, and secondarily on incapacitacionist justifications, for the premeditation-deliberation formula, only a few have observed that the formula can also potentially be defended on deterrence grounds. Those who have done so, however, discuss only a simplified view of deterrence that does not advance the resolution of the formula’s fundamental pragmatic difficulty: defining what “premeditation and deliberation” means in the context of an intentional killing. A more sophisticated deterrence-based approach to the premeditation-deliberation formula would more precisely define the class of intentional killers who are most deterrable as those who, we can say with a high level of confidence, have thought about the consequences of their actions. Such an approach has great potential for both explaining this problematic doctrine and helping courts apply it in a coherent way.

#### 1. The Simple Case for Deterrence

Deterrence theory posits that criminal punishments are designed primarily “to convince the general community to forego criminal conduct in the future.”<sup>130</sup> The simple case for a deterrence-based view of the premeditation-deliberation formula was explained by Tom Stacy: “It is said that deterrence supports an increased penalty for premeditated killings on the ground that those who deliberate beforehand might include the added penalty in their deliberative calculus and be deterred by it.”<sup>131</sup> Stacy found fault with this rationale, however, on two grounds.

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(D.C. Cir. 1941) (observing that the distinction “reflect[s] 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”).

128. Kremnitzer, *supra* note 1, at 644; *see also* Stacy, *supra* note 2, at 1027 (discussing and rejecting “the need for incapacitation” as a possible justification for the premeditation-deliberation formula).

129. Kremnitzer, *supra* note 1, at 634–35 (“In general, a well planned deed is more dangerous than a deed that is not well planned.”).

130. Dressler, *supra* note 18, § 2.03(A)(2), at 15 (emphasis omitted); *see also* Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney & P-O. Wikström, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* 5 (1999) (defining deterrence “as the avoidance of a given action through fear of the perceived consequences”).

131. Stacy, *supra* note 2, at 1026; *see also* Bullock, 122 F.2d at 214 (observing that the distinction between premeditated murder and other murders “reflect[s] a belief that . . . the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder”); Franklin E. Zimring & Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* 106 (1973) (“[W]e can assume that persons guided by impulse rather than judgment, premeditation, or reflection are by definition less likely to be restrained by threats because they are less likely to reflect on the consequences of their act.”).

First, he doubted that a marginal increase in penalty would have any effect on the rational killer: “Will many offenders really reason that a killing is worth committing if the expected penalty is, say, only fifteen years instead of twenty-five?”<sup>132</sup> Second, Stacy repeated the assertion that unpremeditated or nondeliberate killers are often more dangerous, and therefore more in need of incapacitation, than those who premeditate and deliberate.<sup>133</sup> Since incapacitation and deterrence are both utilitarian goals, the argument goes, the increased deterrence value in punishing premeditated and deliberate killers more harshly is effectively canceled out by the increased incapacitacionist justification for punishing impulsive killers more harshly.<sup>134</sup>

Stacy’s first objection is valid only if first-degree murder is punished merely by adding prison time to the punishment for second-degree murder. However, the difference in punishment awaiting first- and second-degree murderers, at least as contemplated by the 1794 Statute, is not a difference of degree but one of kind. Even those skeptical of the marginal deterrence effect of increased sentence severity acknowledge that such an effect is most probable where sentence severity crosses a “threshold” from one type of punishment to another.<sup>135</sup> Thus, asking whether potential premeditated and deliberate killers will be more effectively deterred by the prospect of a greater prison term is the wrong question. The question is rather whether they will be more effectively deterred by the prospect of death rather than imprisonment.

Stacy’s second contention is also not compelling. First, his assertion is unproved and unprovable, in large part because the social benefits to be expected from incapacitation and deterrence are both immeasurable and incommensurable. One cannot gauge just how much social benefit in terms of either deterrence or incapacitation can be expected from a particular penal sanction. And even if one could, it remains to be seen whether one “unit” of incapacitation is a fair trade for one “unit” of deterrence. Stacy also errs by assuming that just because *some* unpremeditated or nondeliberate murderers will be more dangerous than *some* premeditated and deliberate murderers, the *typical* unpremeditated or nondeliberate murderer will be more dangerous than the *typical* premeditated and deliberate murderer. After all, the underinclusiveness argument appears to be that impulsive murderers are *often* more dangerous than premeditated murderers, not that they *invariably* are. The real question is whether, assuming an impulsive murderer and a premeditated murderer are equally dangerous (and culpable), do considerations of deterrence support a heftier sentence for the latter? Stacy supplies no reason to answer that question in the negative.

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132. Stacy, *supra* note 2, at 1027.

133. *See id.*

134. *See id.* (“The utilitarian school of thought, which includes considerations of incapacitation as well as general deterrence, does not support punishing premeditated killings more harshly as a category than impulsive ones.”).

135. *E.g.*, ZIMRING & HAWKINS, *supra* note 131, at 209 (“Movements from fines to jail, or from county jail to state penitentiary, in that they involve crossing a ‘threshold,’ might produce increasing rather than diminishing returns.”); *see also* VON HIRSCH ET AL., *supra* note 130, at 7–8 (discussing the significance to deterrent effect of crossing “thresholds”).

## 2. The Problem with the Simple Case for Deterrence

The real problem with the deterrence rationale suggested above is that it does not support a distinction between intentional killings and those that are not only intentional but also premeditated and deliberate. It is true that “[o]ne should have the greatest control over what one does purposely, and signalling [sic] that the most severe punishment awaits those who purposely violate the law should discourage such conduct.”<sup>136</sup> Yet this proves too much, for *all* intentional killings are done “purposely,” while only those occasioned also by premeditation and deliberation are punished the most severely.

The simple deterrence rationale would be a workable justification for the premeditation-deliberation formula if those who premeditate and deliberate are deterrable while those who do nothing more than intend to kill are not. But such a claim is doubtful, for the difference is one of degree rather than of kind. Intentional but impulsive killers are deterrable to at least some extent; they are simply not *as* deterrable as those who premeditate and deliberate. Herbert Wechsler and Jerome Michael made exactly this point in their classic work on the law of homicide:

[D]eliberation may proceed for a longer or shorter time and is more or less thorough depending upon (a) the number of relevant desires which are considered and the prudence with which their satisfaction is appraised as means to happiness; (b) the accuracy with which probable consequences are foreseen; (c) the accuracy with which the adaptation of means to end is determined. The less thorough the deliberation, the more “impulsive” the act.<sup>137</sup>

That is to say, though some intentional murders are more deliberate than others, there is no such thing as a wholly nondeliberate intentional murder. Guthrie,<sup>138</sup> for example, had some opportunity, however fleeting, to contemplate the consequences of his actions in the moment between his forming of the intent and his execution of the action.<sup>139</sup>

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136. Givelber, *supra* note 2, at 422.

137. Wechsler & Michael, *supra* note 20, at 734 n.139; *see also* ZIMRING & HAWKINS, *supra* note 131, at 107 (asserting that Wechsler and Michael saw the distinction between deliberateness and impulsivity “as primarily one of degree”).

138. Guthrie stabbed and killed his coworker after the coworker teased him about his nose. *See supra* text accompanying notes 58–66.

139. It is true that, absent a confession, we can never know whether Guthrie took advantage of that opportunity and actually did contemplate the consequences of his actions. However, the same can be said of the killer who acts hours, days, or weeks after forming the intent to kill. *See* Kremnitzer, *supra* note 1, at 633 (“The process of weighing considerations in favor and against homicide are hidden to the beholder, and extremely difficult to prove.”). Nonetheless, given the gravity of the choice to be made, we are justified in inferring that one who had the opportunity to contemplate the consequences of the decision to kill did, in fact, do so, at least absent any indication to the contrary. *See id.* (“The decision to kill is such a significant decision that one can assume that if there were time and ability to deliberate whether to kill, the perpetrator would have deliberated the matter.”).

It follows that even impulsive murderers are deterrable, at least to some extent. As Wechsler and Michael concluded, “the creation of [a] motive [to obey the law] may . . . lead . . . excitable men to control their excitement.”<sup>140</sup> The level of deterrence to be expected from proscriptions against intentional killings, like the level of deliberation attendant to any particular intentional killing, is simply a matter of degree.

At the same time, homicide in general is less susceptible to deterrence than many other crimes.<sup>141</sup> For one thing, proscriptions against killing based on moral and religious doctrine run deep—in a way that proscriptions against tax evasion do not—and therefore probably have a deterrent effect that obviates much of the purported deterrent effect of the penal sanction for homicide.<sup>142</sup> That is to say, most of us are deterred from killing by our moral and religious sensibilities more so than by the law against murder; and most of the remainder are not deterred by either. For another thing, crimes such as homicide are typically driven by emotion rather than by a cool, rational calculus.<sup>143</sup> This is significant because “very high degrees of emotional arousal may eclipse thoughts of future consequences by riveting all of the potential criminal’s attention on his present situation.”<sup>144</sup> Finally, murder can be generally characterized as an expressive crime, “where the act itself is what the potential criminal wants,” as opposed to an instrumental crime, one that is merely a means to some other end, such as financial gain.<sup>145</sup> Penal sanctions naturally have a greater deterrent effect with respect to instrumental crimes, where other criminal or noncriminal behavior can be substituted to achieve a like result, than expressive crimes, where the crime is an end in itself.<sup>146</sup>

This is not to say that homicides are generally not deterrable. “[T]he fact that deterrence is more difficult with respect to some offenses does not mean that changes in the credibility or severity of threats will not result in marginal deterrence in these cases.”<sup>147</sup> It is only to point out that the simple deterrence rationale discussed above greatly exaggerates the relative deterrability of planned

140. Wechsler & Michael, *supra* note 20, at 736 (emphasis omitted); *see also* ZIMRING & HAWKINS, *supra* note 131, at 107 (“Wechsler and Michael do not draw the conclusion that impulsive behavior is nondeterrable.”); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 968 (1966) (“Even in an emotional crime like murder, with all its pathological elements, it would be untenable to claim that the magnitude of the punishment has no effect whatsoever.”).

141. *See* Herbert L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 433, 459 (1957) (“In all countries murder is committed to a very large extent either by persons who, though sane, do not in fact count the cost, or are so mentally deranged that they cannot count it.”).

142. *See* ZIMRING & HAWKINS, *supra* note 131, at 132–34; Andenaes, *supra* note 140, at 967 (“[M]urder in our culture is surrounded by massive moral reprobation.”).

143. *See* ZIMRING & HAWKINS, *supra* note 131, at 129.

144. *Id.* at 136.

145. *See id.* at 138–39 (citing William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 708). Of course, murder can be an instrumental crime according to this typology, as when one murders a competitor for some business advantage, or a spouse for the life insurance proceeds.

146. *See id.* at 139.

147. *Id.* at 140.

as opposed to impulsive murders. It does so not only by understating how deterrable impulsive killings are relative to premeditated and deliberate killings, but also by overstating how deterrable premeditated and deliberate killings are in general.

Thus, it seems that a deterrence-based rationale for the premeditation-deliberation formula suffers from the same fundamental defects as the retributivist or incapacitacionist rationales that have been roundly criticized. First, as a justificatory matter, since deliberateness, and therefore deterrability, exists only on a sliding scale, the notion of premeditation and deliberation can act only as a rough proxy for the killer's deterrability, just as it could act only as a rough surrogate for his dangerousness and moral depravity. If "premeditation and deliberation" is defined in any robust manner, one will always be able to point to killings on the "impulsive" side of the arbitrary line between deliberate and impulsive killings that might have been subject to the marginal deterrent effect of an increase in punishment.

Second, as a definitional matter, we still have the problem of just where to place that arbitrary line. Once we view deliberateness, and therefore deterrability, as a spectrum rather than a binary choice, there is no reasoned explanation that is immediately apparent for placing the distinction between deliberateness and impulsivity at any particular point on that spectrum. And since even the most impulsive but intentional murderer is deterrable, if only to the slightest extent, and since deterrence is a social benefit that eludes accurate measurement, judges will inevitably give in to the hydraulic pressure of moving the line closer and closer to the killing. The result is the same as it has been under a regime in which the premeditation-deliberation formula has been justified on retributivist and incapacitacionist grounds: since the formula coincides with its underlying rationale only in a very approximate way, it will be defined into oblivion.

### 3. A More Sophisticated View of Deterrence

We cannot conclude that a more severe penalty for a planned murder is justified on the ground that those who plan their murders will be deterred while those who kill impulsively will not. As shown above, such a view suffers much the same defects as other purported justifications for the premeditation-deliberation formula. That is, it dramatically oversimplifies the relative deterrability of premeditated as opposed to impulsive killers, and it fails to give guidance as to how much pre-planning, and of what quality, should qualify for more severe treatment.

If a justifiable and workable dividing line, based on deterrence grounds, between premeditation and impulsivity eludes us, perhaps it is because we are asking the wrong question. Instead of seeking to define that class of intentional killers who are the most deterrable, we can reframe the question more broadly: under what circumstances is enhanced punishment for some intentional killers but not others justifiable based on grounds of deterrence? Framing the question in this way avoids the pitfall in thinking that the deterrent effect of a given punishment will necessarily vary proportionally with punishment severity. Rather, it allows us to

take into account the two other critical variables in the equation of deterrence: certainty of punishment and swiftness of punishment.<sup>148</sup>

The consensus among penologists and criminologists over the last two centuries has been that the certainty of punishment is a critical factor in deterring crime.<sup>149</sup> Some have gone so far as to say “that if punishment could be made certain almost all crime would be eliminated.”<sup>150</sup> Most agree that the certainty of punishment is a stronger indicator of the expected deterrent effect than punishment severity.<sup>151</sup> Of

148. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005) (“General deterrent effects depend on a number of factors . . . [including] the severity of the penalty; the swiftness with which it is imposed; [and] the probability of being caught and punished . . . .”); see also ZIMRING & HAWKINS, *supra* note 131, at 195 (cautioning against viewing punishment severity as the “price” of crime, an increase in which should depress demand, given that “the price of a product is a sure condition of purchase, while the incidence of consequences threatened for an offense will be only occasional”).

149. See *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (plurality opinion) (“[D]eterrent effect depends not only upon the amount of the penalty but upon its certainty . . . .”); ZIMRING & HAWKINS, *supra* note 131, at 161; Andenaes, *supra* note 140, at 960 (“[T]he degree of risk of detection and conviction is of paramount importance to the preventive effects of the penal law.”); Frase, *supra* note 148, at 72 (“Research has found that offenders are more sensitive to the probability of punishment than to its severity.”); see also VON HIRSCH ET AL., *supra* note 130, at 47 (“The current research . . . indicates that there are consistent and significant negative correlations between likelihood of conviction and crime rates . . . . [S]uch a pattern is at least consistent with an hypothesis of marginal deterrence with respect to certainty of punishment.” (citation omitted)); Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 547 (1973) (finding that probability of apprehension and punishment correlated negatively with crime commission to a greater extent than punishment severity for murder, rape, and robbery); David P. Farrington, Patrick A. Langan & Per-Olof H. Wilkström, *Changes in Crime and Punishment in America, England and Sweden Between the 1980s and 1990s*, 3 STUD. ON CRIME & CRIME PREVENTION 104, 127 (1994) (“[T]he most important correlate of the change in the survey crime rate in these data is the change in the probability of an offender being convicted.”); Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721, 741 (1989) (“[W]e find that certainty of punishment has an important deterrent effect.”).

Zimring and Hawkins justifiably caution against drawing too definitive a conclusion from the studies that have been performed. ZIMRING & HAWKINS, *supra* note 131, at 167–71. For example, many of the studies involve relatively low-level crime with relatively low-level punishment consequences. Zimring and Hawkins leave open the very question that concerns us here: whether “variations in risk of severe penalties, such as the death penalty and life imprisonment, function in this context in the same way as variations in the risk of encountering fines.” *Id.* at 171.

150. ZIMRING & HAWKINS, *supra* note 131, at 161 (quoting L. Radzinowicz, *Preface to F.H. McCLINTOCK & EVELYN GIBSON, ROBBERY IN LONDON: AN ENQUIRY BY THE CAMBRIDGE INSTITUTE OF CRIMINOLOGY*, at x (1961)); see also STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE 53 (1971) (“[T]here is widespread belief in the proposition that a high likelihood of getting caught is a more potent deterrent than a high severity of penalty . . . .”).

151. See VON HIRSCH ET AL., *supra* note 130, at 5 (“[M]ost earlier studies have suggested that certainty has substantially the stronger general deterrent effect [than severity].”); ZIMRING & HAWKINS, *supra* note 131, at 161; Andenaes, *supra* note 140, at 964 (“[I]t has

course, since we are looking at the deterrent effect in the mind of the potential criminal, the subjective appreciation of the possibility of punishment, not the actual possibility, is the determinative factor.<sup>152</sup> But the two are directly related, for as the objectively real risk of punishment increases, the subjective assessment of the risk usually will as well.<sup>153</sup> And of course, when we speak of the risk of punishment, we are necessarily including the risks of detection and apprehension.<sup>154</sup>

Penologists also agree that swiftness of punishment is very important in achieving a desired deterrent effect of the penal sanction. It is commonly accepted that people sharply discount pains that are not to be experienced until the distant future.<sup>155</sup> This is especially true of those most likely to commit crime.<sup>156</sup> Accordingly, “[t]hreats of punishment in the distant future are not as a rule as important in the process of motivation as are threats of immediate punishment.”<sup>157</sup> Johannes Andenaes concluded that the “certainty of rapid apprehension and punishment would prevent most [criminal] violations.”<sup>158</sup>

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been commonly accepted that the certainty of detection and punishment is of greater consequence in deterring people from committing crimes than is the severity of the penalty.”).

152. See VON HIRSCH ET AL., *supra* note 130, at 6 (“The subjective character of deterrence is one of its most important characteristics . . . .”); ZIMRING & HAWKINS, *supra* note 131, at 162; Andenaes, *supra* note 140, at 963 (“The decisive factor in creating the deterrent effect is . . . not the objective risk of detection but the risk as it is calculated by the potential criminal.”).

153. See ZIMRING & HAWKINS, *supra* note 131, at 164.

154. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 42 (1990) (“[R]esearch suggests that certainty of apprehension and punishment most strongly influences behavior . . . .”); VON HIRSCH ET AL., *supra* note 130, at 6 (“‘Certainty’ should be used to refer to the likelihood of being caught, and made liable to punishment, given commission of an offence. In practice, this ordinarily means the likelihood of being arrested and convicted.” (citations omitted)); ZIMRING & HAWKINS, *supra* note 131, at 196; Andenaes, *supra* note 140, at 961 (“[L]awlessness may flourish when the probability of detection, apprehension and conviction is low.”).

155. See Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975) (describing “time discounts” by those considering the threat of long prison terms); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 3–4 (1999) (“The disutility that a person experiences from imprisonment in any future year might be discounted to the present at some positive rate.”).

156. See Polinsky & Shavell, *supra* note 155, at 4 n.5 (“[O]ne might expect that those individuals in the population who are most present oriented would gravitate toward crime, since the discounted expected disutility of sanctions is lower for them than for others.”).

157. Andenaes, *supra* note 140, at 961 n.21; accord VON HIRSCH ET AL., *supra* note 130, at 48 (“There is a general tendency to discount contingent future costs—and to the extent that potential offenders are more oriented to immediate satisfactions, this tendency is heightened.”). Despite the intuitive appeal of this hypothesis, there has been little research on the effects of swiftness of punishment as a factor in deterrence. See *id.* at 5 n.††.

158. Andenaes, *supra* note 140, at 961 (emphasis omitted).

#### 4. The Virtue of Parsimony

A final concept—parsimony—must be discussed in order to fully understand a deterrence-based approach to the premeditation-deliberation formula. The principle of parsimony, a concept coined by Norval Morris, is that “[t]he least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed.”<sup>159</sup> Parsimony is a quintessentially utilitarian concept<sup>160</sup> that looks to both the benefits achieved by punishment and the costs it imposes on society and the individual.<sup>161</sup> Parsimony is also a humane impulse,<sup>162</sup> for any punishment meted out beyond that which is necessary to serve its utilitarian goals would amount to the unnecessary infliction of pain and suffering.<sup>163</sup> Thus, the goal for the humane utilitarian is to make the penal sanction severe enough to achieve its desired ends, but no more severe than that.<sup>164</sup>

### III. LOOKING TO DETERRENCE THEORY TO UNDERSTAND THE PREMEDITATION-DELIBERATION FORMULA

These basic precepts of utilitarian penal theory—and especially the critical nature to the deterrence equation of the probability and swiftness of detection, apprehension, and punishment—were famously propounded by Enlightenment thinkers Cesare Beccaria and Baron Montesquieu in the decades before the American Revolution. Pennsylvanians who were largely responsible for the revolutionary 1794 Statute were well-versed in Beccaria’s and Montesquieu’s views, often parroting them in their own works. This view of deterrence provides the missing explanation for the premeditation-deliberation formula and greatly aids in our understanding of the 1794 Statute and its descendents.

#### A. A Closer Look at the 1794 Pennsylvania Statute

To say that the drafters of the 1794 Statute were heavily influenced by Beccaria and Montesquieu would be an understatement. The works of these two architects of

159. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 59 (1974); *see also* Frase, *supra* note 148, at 68 (defining parsimony as “a preference for the least severe alternative that will achieve the purposes of the sentence”).

160. *See* Frase, *supra* note 148, at 77 (referring to parsimony as a “utilitarian principle of necessity and efficiency”); Hart, *supra* note 141, at 450 (“Clearly it is part of a *sane* utilitarianism that no punishment must cause more misery than the offense unchecked . . . .” (emphasis in original)).

161. *See* Frase, *supra* note 148, at 72 (“Criminal penalties should not cost more than the benefits they achieve or cause individual or social harms which outweigh their crime-controlling effects or other benefits. . . . Penalties should not be more severe or more costly than necessary . . . .”).

162. *Id.* at 77 (referring to parsimony as “a humane . . . principle”).

163. *See* MORRIS, *supra* note 159, at 61 (“[A]ny punitive suffering beyond societal need is, in this context, what defines cruelty.”).

164. *See* Andenaes, *supra* note 140, at 965 (“[F]or those who wish to make the criminal law more humane the problem is one of determining how far it is possible to proceed in the direction of leniency without weakening the law’s total preventive effects.”).

deterrence theory virtually drove Pennsylvania to adopt the 1794 reform. Their handiwork can be seen both in the run-up to the statute and the structure of the statute itself.

### 1. The Pennsylvania Revolution

To fully understand the 1794 Statute, one must go back thirty years earlier, to the 1764 publication of Cesare Beccaria's *On Crimes and Punishments*,<sup>165</sup> a manifesto of deterrence theory, recognized by some as "the most important book of the century on penal law."<sup>166</sup> Beccaria took the classic utilitarian position that the primary goal of the criminal law was the forward-looking one of preventing crime rather than the backward-looking one of punishing crime.<sup>167</sup> This was largely to be brought about through specific and general deterrence, influencing the offender, through the imposition of punishment, to be law-abiding in the future and encouraging others, through the threat of punishment, to do the same.<sup>168</sup>

Beccaria forcefully set forth the notion that the certainty of punishment mattered far more for deterrence purposes than punishment severity, writing that "[o]ne of the most effective brakes on crime is not the harshness of its punishment, but the unerringness of punishment."<sup>169</sup> He elaborated:

The certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all. For, even the smallest harms, when they are certain, always frighten human souls, whereas hope . . . holds at bay the idea of larger harms, especially when it is reinforced by frequent examples of the impunity accorded by weak and corrupt judges.<sup>170</sup>

Here he echoed the words of Montesquieu who wrote: "If we enquire into the cause of all human corruptions[,] we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments."<sup>171</sup>

Beccaria was equally forceful in his assertion that the swiftness of punishment was critical for purposes of achieving the desired deterrence effect. As he put it:

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165. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed., Richard Davis trans., Cambridge Univ. Press 1995) (1764).

166. Marcello Maestro, *Benjamin Franklin and the Penal Laws*, 36 J. HIST. IDEAS 551, 554 (1975); see also John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 204–15 (2009) (discussing the widespread influence of Beccaria's work); Albert Post, *Early Efforts to Abolish Capital Punishment in Pennsylvania*, 68 PA. MAG. HIST. & BIOGRAPHY 38, 38 (1944) (referring to Beccaria's book as "epoch-making").

167. See BECCARIA, *supra* note 165, at 103 ("It is better to prevent crimes than to punish them.").

168. See *id.* at 31 ("The purpose [of the penal sanction], therefore, is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.").

169. *Id.* at 63.

170. *Id.*

171. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 122 (1750).

“The swifter and closer to the crime a punishment is, the juster and more useful it will be . . . because the smaller the lapse of time between the misdeed and the punishment, the stronger and more lasting the association in the human mind between the two ideas *crime* and *punishment*.”<sup>172</sup> In contrast, delay between crime and punishment tends to weaken the connection between the two in the minds of those who are the targets of the law’s deterrent message.<sup>173</sup>

Beccaria also espoused the principal of parsimony. Punishment should be administered, he explained, only to the extent that is necessary to deter criminal conduct.<sup>174</sup> Because punishment is an evil to be avoided to the extent possible, the object of the penal law should be to inflict the types and amounts of punishments that will “make the most efficacious and lasting impression on the minds of men,” while, at the same time, inflicting “the least torment to the body of the condemned.”<sup>175</sup> In particular, though Beccaria was generally opposed to capital punishment, he allowed that death could be an appropriate punishment for a crime, but only if the death of the culprit “is the true and only brake to prevent others from committing crimes.”<sup>176</sup>

Beccaria’s impact on this side of the Atlantic cannot be overstated. According to Adolph Caso, *On Crimes and Punishments* was “more influential than any other single book” during the 1770s and 1780s.<sup>177</sup> According to one study, Beccaria was the sixth most cited secular source during the period from 1760 to 1805.<sup>178</sup> During the 1770s, citations to Beccaria accounted for one percent of all citations to published sources; in the 1780s, the figure rose to three percent.<sup>179</sup> A full one-third of all American libraries from 1777 to 1790 had at least one copy of *On Crimes and Punishments*.<sup>180</sup>

Beccaria’s impact was especially great in Pennsylvania.<sup>181</sup> An English edition of *On Crimes and Punishments* was published in Philadelphia no later than 1778.<sup>182</sup>

172. BECCARIA, *supra* note 165, at 48–49 (emphasis in original).

173. *Id.* at 49 (“[I]n unsophisticated minds . . . [a] long delay only serves to separate these two ideas further . . .”).

174. *Id.* at 68 (“If a punishment is to be just, it must be pitched at just that level of intensity which suffices to deter men from crime.”).

175. *Id.* at 31; *see also* Frase, *supra* note 148, at 78 (observing that the “concept of parsimony . . . has been strongly promoted by utilitarian philosophers as far back as Beccaria”).

176. BECCARIA, *supra* note 165, at 67.

177. ADOLPH CASO, *WE THE PEOPLE . . . : FORMATIVE DOCUMENTS OF AMERICA’S DEMOCRACY* 264 (1995).

178. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984). Montesquieu was first. *Id.*

179. *Id.*

180. Bessler, *supra* note 166, at 207 n.79.

181. Referring to Pennsylvania, Bradford wrote: “[A]s soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them.” BRADFORD, *supra* note 2, at 137.

182. *See* Michael Kraus, *Eighteenth Century Humanitarianism: Collaboration Between Europe and America*, 60 PA. MAG. HIST. & BIOGRAPHY 270, 273 (1936); Post, *supra* note

The influence of this treatise can be seen in the works of three men deeply involved in the reform of Pennsylvania penal law in the late eighteenth century: James Wilson, professor at what is now the University of Pennsylvania Law School and Associate Justice of the U.S. Supreme Court, who in 1790 delivered a lecture entitled *The Necessity and Proportion of Punishments*;<sup>183</sup> Benjamin Rush, professor of clinical medicine at the University of Pennsylvania,<sup>184</sup> who published *An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society* in 1787<sup>185</sup> and *Considerations on the Injustice and Impolicy of Punishing Murder by Death* in 1792;<sup>186</sup> and William Bradford, Attorney General of Pennsylvania from 1780 to 1791, who published *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* in 1793.<sup>187</sup>

Wilson, Rush, and Bradford each espoused the utilitarian view of Beccaria and Montesquieu that the goal of the criminal law is to prevent crime. Bradford, for example, began his pamphlet this way: “The general principles upon which penal laws ought to be founded appear to be fully settled. Montesquieu and Beccaria led the way in the discussion . . . .”<sup>188</sup> According to Bradford, it had become axiomatic and was “no longer considered as the subject[] either of doubt or demonstration[] [t]hat the prevention of crimes is the sole end of punishment . . . .”<sup>189</sup> Wilson wrote succinctly: “The end of criminal jurisprudence is the *prevention* of crimes.”<sup>190</sup> Rush began his 1787 *Enquiry* with the observation that punishment is

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166, at 38. Caso contends that an edition was published in Philadelphia two years earlier. CASO, *supra* note 177, at 307.

183. See Keedy, *supra* note 2, at 768; Homer T. Rosenberger, *James Wilson’s Theories of Punishment*, 73 PA. MAG. HIST. & BIOGRAPHY 45, 45 (1949).

184. See Keedy, *supra* note 2, at 768.

185. BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY (1787), *reprinted in* REFORM OF CRIMINAL LAW IN PENNSYLVANIA: SELECTED ENQUIRIES 1787–1819 (Morton J. Horwitz & Stanley N. Katz eds., 1972).

186. BENJAMIN RUSH, CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH (1792), *reprinted in* REFORM OF CRIMINAL LAW IN PENNSYLVANIA: SELECTED ENQUIRIES 1787–1819, *supra* note 185. Rush has been directly linked to the 1794 Statute. See Bessler, *supra* note 166, at 233.

187. *Editor’s Introduction* to BRADFORD, *supra* note 2, at 122. Bradford had an especially influential role in the penal reform of 1794. See JOB R. TYSON, ESSAY ON THE PENAL LAW OF PENNSYLVANIA 30 (1827) (giving Bradford credit for the 1794 legislation); Post, *supra* note 166, at 40 (“Bradford . . . was the moving force behind the Pennsylvania statute of 1794 . . .”).

188. BRADFORD, *supra* note 2, at 126. Of course, the notion that the debate between utilitarianism and retributivism as the proper basis for the penal sanction was “fully settled” in 1793 appears laughable today. See, e.g., Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1282 (Joshua Dressler ed., 2d ed. 2002) (“Although punishment has been a crucial feature of every developed legal system, widespread disagreement exists over the moral principles that can justify its imposition.”).

189. BRADFORD, *supra* note 2, at 126 (emphasis omitted).

190. 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 3 (Bird Wilson ed., 1804) (emphasis in original); see also *id.* at 357 (relating instruction to grand jury that “[t]o prevent crimes is the noblest end and aim of criminal jurisprudence” and that this was “the strongest” or even “the sole argument for the infliction of punishments”).

designed to effect the utilitarian goals of reformation, general deterrence, and incapacitation.<sup>191</sup>

Each also set forth Beccaria's and Montesquieu's view that the certainty of punishment was far more important than the severity of punishment in deterring crime. Indeed, Bradford placed Montesquieu's quote to that effect<sup>192</sup> on the very cover of his pamphlet.<sup>193</sup> Inside, he wrote that "[t]he prospect of escaping detection and the hopes of an acquittal or pardon, blunt [the] operation" of the law,<sup>194</sup> and that "the imagination is soon accustomed to overlook or despise the *degree* of the penalty, and . . . the *certainty* of it is the only effectual restraint."<sup>195</sup> Rush cited Beccaria for the proposition that "where certainty has taken the place of severity of punishment, crimes have evidently and rapidly diminished."<sup>196</sup> And Wilson wrote:

The certainty of punishments is a quality of the greatest importance. . . .  
When a criminal determines on the commission of a crime, he is not so much influenced by the lenity of the punishment, as by the expectation, that, in some way or other, he may be fortunate enough to avoid it.<sup>197</sup>

Wilson also emphasized Beccaria's point that the swiftness of punishment is more critical than its severity, so that punishment be viewed by those to be deterred as the inexorable consequence of the crime. In Wilson's words:

The principles both of utility and of justice require, that the commission of a crime should be followed by a speedy infliction of the punishment.  
. . . . When a penalty marches close in the rear of the offence . . . an association, strong and striking, is produced between them, and they are

191. RUSH, *supra* note 185, at 3.

192. See *supra* text accompanying note 171.

193. BRADFORD, *supra* note 2, at 124 ("If we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments." (quoting MONTESQUIEU, *supra* note 171, at 122)).

194. *Id.* at 130.

195. *Id.* (emphasis in original).

196. RUSH, *supra* note 186, at 10 (emphasis omitted); RUSH, *supra* note 185, at 14 ("[T]he *certainty* of punishment operates so much more than its severity . . . in preventing crimes." (emphasis in original)).

197. THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D., *supra* note 190, at 36; see also *id.* at 357 ("There are, in punishments, three qualities, which render them fit preventives of crimes. The first is their moderation. The second is their speediness. The third is their certainty."); Rosenberger, *supra* note 183, at 60 ("Wilson held the view that laxity in enforcement of the law has more influence on a person contemplating crime than does mild punishment."). It is notable also that Blackstone had this to say about Beccaria: "It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment." 4 WILLIAM BLACKSTONE, COMMENTARIES \*17 (emphasis in original). Blackstone's influence among lawyers and lawmakers of the early American republic cannot be overstated. See, e.g., Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-6 (1996) (discussing Blackstone's influence on early American jurists and lawyers, including James Wilson).

viewed in the inseparable relation of cause and effect. When, on the contrary, the punishment is procrastinated to a remote period, this connexion is considered as weak and precarious, and the execution of the law is beheld and suffered as a detached instance of severity, warranted by no cogent reason, and springing from no laudable motive.<sup>198</sup>

Rush and Bradford each also parroted Beccaria's views on parsimony. Rush, favorably quoting Empress Catharine II of Russia, wrote: "That a punishment . . . might be conformable with justice, it ought to have such a degree of severity as might be sufficient to deter people from committing the crime."<sup>199</sup> Bradford posited as an axiom "[t]hat every punishment which is not absolutely necessary for th[e] purpose [of preventing crime] is a cruel and tyrannical act."<sup>200</sup> In particular, Bradford set forth Beccaria's view that death should be utilized as a punishment rarely if at all. Bradford wrote that if the goals of incapacitation and general deterrence could "be obtained by any penalty short of death, to take away life, in such case, seems to be an authorized act of power."<sup>201</sup>

Beccaria's views, filtered through the likes of Bradford,<sup>202</sup> Wilson,<sup>203</sup> and Rush,<sup>204</sup> found their way into Pennsylvania law. "In the years preceding the American Revolution, Pennsylvania had witnessed the growth of a movement for reform of the penal law generally and for moderation of punishments in particular."<sup>205</sup> In 1776, Pennsylvania adopted a new constitution, section 38 of which called for the legislature to reduce the infliction of capital punishment and replace it in some cases with punishments more proportionate to the offense: "The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes."<sup>206</sup> Section 39 continued this theme

198. THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D., *supra* note 190, at 34; *see also* Rosenberger, *supra* note 183, at 59 (observing that Wilson "mentions that punishment should be dealt out quickly following commission of the offense").

199. RUSH, *supra* note 186, at 12.

200. BRADFORD, *supra* note 2, at 126 (emphasis omitted).

201. *Id.* at 128–29.

202. *See id.* at 126 (citing Beccaria in the second sentence of his pamphlet); *see also* Bessler, *supra* note 166, at 210 (noting that Bradford's work "echoed many of Beccaria's arguments"); Post, *supra* note 166, at 40 ("Bradford showed himself to be a true disciple of Beccaria, [Englishman John] Howard, and Montesquieu.").

203. *See* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D., *supra* note 190, at 9, 13 (citing Beccaria); *see also* Bessler, *supra* note 166, at 209 ("Wilson . . . was thoroughly enamored with Beccaria's ideas."); Rosenberger, *supra* note 183, at 46 ("James Wilson's writings indicate that he was familiar with . . . Beccaria and others on the subject of punishment.").

204. *See* RUSH, *supra* note 186, at 10, 13 (citing Beccaria); *see also* MAESTRO, *supra* note 2, at 140 (observing that Rush was influenced by Beccaria); Bessler, *supra* note 166, at 209 ("Rush . . . was . . . an admirer of Beccaria's work."); Post, *supra* note 166, at 41 ("The arguments used by Rush were almost wholly those of Beccaria.").

205. MODEL PENAL CODE § 210.6 cmt. 4(b), at 123 (1980).

206. Keedy, *supra* note 2, at 766–67 (quoting PA. CONST. § 38 (1776)).

by calling upon the legislature to create prisons so as to both make capital punishment less necessary and enhance the deterrent value of punishment by placing imprisoned felons in full view of the public for long periods of time.<sup>207</sup>

A decade later, the Pennsylvania legislature heeded the instructions of the state constitution and “abolished the death penalty for robbery, burglary, sodomy and buggery,”<sup>208</sup> leaving death as a punishment only for “murder, rape, arson, and treason.”<sup>209</sup> In its place, the state implemented the punishment of hard labor, at first in public and later in the penitentiary.<sup>210</sup> On February 22, 1793, scarcely seven weeks after Bradford’s pamphlet was printed in its entirety in the *Journal of the Senate of the Commonwealth of Pennsylvania*,<sup>211</sup> the Pennsylvania Senate passed the resolutions that would become the 1794 legislation.<sup>212</sup> The purpose of the reform was to limit the use of capital punishment.<sup>213</sup> The pertinent resolution provided “that all murder perpetrated by poison or by lying in wait, or by any kind of wilful, premeditated and deliberate killing, shall be deemed murder in the first degree, and all other kinds of murder shall be murder in the second degree.”<sup>214</sup> Ten months later, no legislative action having been taken, a committee of the Pennsylvania Senate, with Bradford’s help, drafted a substantially similar bill.<sup>215</sup> On January 29, 1794, a provision was added deeming any murder “committed in the perpetration or attempt to perpetrate any arson[,] rape[,] robbery[,] or burglary” murder in the first degree as well.<sup>216</sup> On April 22, 1794, Pennsylvania enacted the legislation (the “1794 Act”) that, among other things, revolutionized the law of homicide by dividing murders into degrees and limiting capital punishment to murder in the first degree.<sup>217</sup>

207. See *id.* at 767 n.66 (“To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary, houses ought to be provided for punishing by hard labor, those who may be convicted of crimes not capital, wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labor.” (quoting PA. CONST. § 39 (1776))).

208. *Id.* at 767; see also Act of Sept. 15, 1786, ch. 1241, § 1, 12 Pa. Stat. at Large 280, 280–81.

209. MAESTRO, *supra* note 2, at 138.

210. *Id.* at 138–39.

211. See *Editor’s Introduction* to BRADFORD, *supra* note 2, at 122 (reporting that Bradford’s pamphlet was “printed in full in the Journal of the Senate for January 5, 1793”).

212. See Keedy, *supra* note 2, at 770–71.

213. Givelber, *supra* note 2, at 380 (observing that Pennsylvania adopted the 1794 Act “to ameliorate the harshness of the law and limit capital punishment”); Wechsler & Michael, *supra* note 20, at 703 (noting that “the primary objective” of the new statute “was to limit the use of the death penalty”).

214. Keedy, *supra* note 2, at 771 (quoting 3 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PA. 14 (1793)).

215. See *id.*

216. 4 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PA., Jan. 29, 1794, at 80 (1794) (emphasis omitted).

217. See 4 *id.*, Apr. 22, 1794, at 250. As used in this Article, the “1794 Act” refers to the entire piece of legislation enacted into law in Pennsylvania on April 22, 1794, while the

This reform is traceable directly to Beccaria<sup>218</sup> and Montesquieu.<sup>219</sup> The preamble to section I of the 1794 Act, which abolished the death penalty for all crimes but first-degree murder, read as follows:

WHEREAS the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by 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 endeavour 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 . . . .<sup>220</sup>

This short preamble is a virtual synopsis of the views of Beccaria and Montesquieu. Its first clause, characterizing “the design of punishment” as the “prevent[ion] [of] the commission of crimes,” staked out the utilitarian position on penology. The preamble also set forth the principle of parsimony: “[T]he punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety . . . .”<sup>221</sup> And the preamble then set out the critical point made by both Beccaria<sup>222</sup> and Montesquieu<sup>223</sup> that the prevention of crime is “better obtained by moderate but certain penalties, than by severe and excessive punishments.”

## 2. Utilizing the Death Penalty Only Where Necessary to Achieve Deterrence

Beccaria and Montesquieu, and their acolytes Bradford, Rush, and Wilson, posited what proponents of deterrence theory today purport to show empirically: that the deterrent effect of the penal sanction is not wholly contingent on the severity of the sanction, but, to the contrary, is largely contingent on its certainty and swiftness. In its simplest form, one can think of the components of general deterrence as represented by the equation

$$D = S \times C \times W$$

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“1794 Statute” refers only to that portion of the 1794 Act that defines first- and second-degree murder. For the language of the relevant portion of the 1794 Statute in its final form, see *supra* text accompanying note 4.

218. See MAESTRO, *supra* note 2, at 138–39 (attributing the 1794 legislation to “[t]he great popularity of Beccaria in North America”).

219. See Bradley Chapin, *Felony Law Reform in the Early Republic*, 113 PA. MAG. OF HIST. & BIOGRAPHY 163, 164 (1989) (“In those jurisdictions where the reformers succeeded, the influence of the Enlightenment rationalists, of Montesquieu and Beccaria, is written all over the record.”).

220. Keedy, *supra* note 2, at 772 (quoting 4 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PA., Apr. 22, 1794, at 242 (1794)).

221. See Brenner, *supra* note 2, at 276 (observing that the Act’s preamble states that “resort to capital punishment may be justified only as a measure of social defense, and then reluctantly”).

222. See *supra* text accompanying notes 169–70.

223. See *supra* text accompanying note 171.

where D represents the overall general deterrent effect of punishment, S represents the severity of punishment, C represents the certainty of punishment, and W represents the swiftness of punishment.

It follows that, for the penal sanction to have a consistent deterrent effect, punishment severity must be increased when the certainty and swiftness of punishment are diminished. Theorists have made this claim for centuries. Johannes Andenaes reports: “Where the probability of detection of criminal behavior is low, legislatures are sometimes inclined to compensate by increasing the severity of penalties. In the history of criminal law this has been a recurrent theme.”<sup>224</sup> The principle of parsimony, moreover, dictates a corollary to this rule: the severity of punishment must be increased *only* when necessary to achieve the desired deterrent effect.

This exact view was propounded by William Paley, whose 1785 publication, *The Principles of Moral and Political Philosophy*,<sup>225</sup> was one of the many influences on James Wilson.<sup>226</sup> Like Beccaria and Montesquieu before him, and Bradford, Rush, and Wilson afterward, Paley believed in the utilitarian principle that “[t]he proper end of human punishment is not the satisfaction of justice, but the prevention of crimes.”<sup>227</sup> Like the others, he believed that this principle primarily

224. JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 135 (1974); *see also* Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (plurality opinion) (“[S]ince deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties.”). One objection to this theory is that, if the risk of apprehension is low enough, an increase in punishment severity might well have no effect:

[I]f potential offenders find in the uncertainty of apprehension a reason for believing that they will not be caught, they will be immune to the influence of severer penalties. . . .

If the threatened consequences are so high at the outset that only the foolhardy would find it worthwhile to run the risk of apprehension and punishment, the marginal deterrent effect of increased severity might well be minimal, for the foolhardy are a majority of the critical audience of a penalty change.

ZIMRING & HAWKINS, *supra* note 131, at 196–97; *see also* Andenaes, *supra* note 140, at 965 (“[W]hen the risks of detection are considered small, it is possible that questions about the severity of the penalty tend to lose their significance.”).

There are two responses to this objection. First, Zimring and Hawkins are speaking to those who seek to *increase* the marginal deterrent effect through an *increase* in punishment severity. The situation facing Pennsylvania in 1794 was quite different. Their task was to *maintain* the expected deterrent effect of the penal law while using the capital sanction only when necessary. That is, the 1794 Statute did not increase sentencing severity for premeditated and deliberate murders; it reduced sentencing severity for other types of murders. Second, and more importantly, the fact that proponents of deterrence theory might be incorrect is beside the point. The claim here is merely that deterrence theory goes a long way in *explaining*, but not necessarily *justifying*, the premeditation-deliberation formula.

225. WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (Liberty Fund 2002) (1785).

226. *See* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D., *supra* note 190, at 9, 12 (citing Paley).

227. PALEY, *supra* note 225, at 373.

manifested itself in the ideas of general and specific deterrence.<sup>228</sup> Also like the thinkers previously discussed, Paley believed that “[t]he *certainty* of punishment is of more consequence than the severity,”<sup>229</sup> and adhered to the utilitarian principle of parsimony.<sup>230</sup>

But Paley went further than other utilitarian penologists of his time by explicitly advocating that the severity of punishment be calibrated with the certainty of punishment. He wrote: “[T]he uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counteracted by additional penalties and increased terrors.”<sup>231</sup> He elaborated that the severity of punishment should be dictated, not only by the harm it causes, but also by the ease with which a crime is concealed:

[T]he right of punishment results from the necessity of preventing the crime: for if this be the end proposed, the severity of the punishment must be increased in proportion to the expediency and the difficulty of attaining this end; that is, in a proportion compounded of the mischief of the crime, and of the ease with which it is executed. The difficulty of discovery is a circumstance to be included in the same consideration. It constitutes indeed, with respect to the crime, the facility of which we speak. *By how much therefore the detection of an offender is more rare and uncertain, by so much the more severe must be the punishment when he is detected.*<sup>232</sup>

Thus, two equally pernicious crimes might be punished differently if one is easier to commit successfully—that is, easier to commit with impunity—than the other.<sup>233</sup>

228. *See id.* (“The fear lest the escape of the criminal should encourage him, or others by his example, to repeat the same crime, or to commit different crimes, is the sole consideration which authorises the infliction of punishment by human laws.”).

229. *Id.* at 390 (emphasis in original).

230. Paley wrote:

[P]unishment ought not to be employed, much less rendered severe, when the crime can be prevented by any other means. Punishment is an evil to which the magistrate resorts only from its being necessary to the prevention of a greater. This necessity does not exist, when the end may be attained, that is, when the public may be defended from the effects of the crime, by any other expedient.

*Id.* at 374.

231. *Id.* at 377.

232. *Id.* at 375–76 (emphasis added).

233. *See id.* at 374 (“[T]he stealing of goods privately out of a shop may not, in its moral quality, be more criminal than the stealing of them out of a house; yet being equally necessary, and more difficult, to be prevented, the law, in certain circumstances, denounces against it a severer punishment.”); *see also* ANDENAES, *supra* note 224, at 135 (“Compensating for weak enforcement with harsh penalties may . . . lead to severe treatment of one type of offense in relation to another offense which, although more reprehensible, is more easily detected.”); 4 BLACKSTONE, *supra* note 197, at \*16 (observing that at one time on the Island of Man, it was not a felony but a trespass to steal a horse or an ox “because of the difficulty in that little territory to conceal them or carry them off,” but “steal[ing] a pig or a fowl, which is easily done,” was a capital crime); *cf.* Frase, *supra* note 148, at 68 (“[R]ealizing the goal of efficiently preventing future crime sometimes requires unequal or

### 3. The Structure of the 1794 Statute

The central insight that punishment severity must be calibrated with the certainty and swiftness of punishment goes a long way toward explaining the premeditation-deliberation formula. The certainty and swiftness of punishment are diminished when a killing is planned out, because when a killing is planned, the perpetrator has likely thought out not just how to commit the crime but how to get away with it. Even where he is ultimately unsuccessful, his prior planning will likely, at the very least, delay his apprehension and punishment. Only in such cases is the death penalty necessary as a deterrent. This view of premeditation and deliberation as being less about the crime and more about the cover-up is consistent with important aspects of the medieval origins of modern homicide law and sheds important light on other parts of the 1794 Statute.

#### a. Premeditation and Deliberation

The notion that punishment severity should be enhanced when punishment certainty and swiftness are decreased provides the missing deterrence-based explanation for the premeditation-deliberation formula. When prospective criminal offenders believe that there is a relatively low likelihood that they will be apprehended and punished quickly for a particular crime, or a crime committed in a particular manner, more such potential offenders will be encouraged to commit the crime. In order to balance out this increased motivation to commit the offense, the severity of the punishment for the offense must be concomitantly increased.

Seen in this way, the concept of premeditation and deliberation can be taken as a type of shorthand to refer to killings that are planned out in sufficient detail to allow the perpetrator to escape, or at least to significantly delay, detection, apprehension, and punishment. It is a common sense proposition that when a crime—be it homicide, robbery, or wire fraud—is contemplated, one of the primary considerations on the prospective offender’s mind is the *successful* completion of the crime. Successful completion of a crime necessarily includes the ability to enjoy the fruits of one’s criminal efforts without adverse consequences, and so true careful planning of a crime necessarily includes a concomitant plan to avoid such consequences.<sup>234</sup> Accordingly, any rational prospective offender who truly plans out his crime will also plan out a way to avoid detection, apprehension, and punishment.<sup>235</sup> Prior planning also affects the swiftness of punishment, albeit less directly. Even when a killer who has planned out his crime fails to completely escape detection, apprehension, and punishment, he has often planned sufficiently to at least delay the inevitable.

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disproportional treatment.”).

234. See Kremnitzer, *supra* note 1, at 631 (observing that one perspective on deliberation “focuses on the plan and the scheming that is undertaken prior to the action,” such as “how to overcome the problems of time, place, instruments, expected obstacles in the path of success; and finally, *how to evade justice*” (emphasis added)).

235. See *id.* at 633 (“[A] person who acted on the basis of an advance plan is not surprised by the outcome, does not lose her cool, gets rid of traces of the act, acts to ensure evasion of justice . . . .” (emphasis added)).

This view accords with the ancient understanding of murder, a concept that originated out of a special concern for secret killings. Even prior to the Norman Conquest of England in 1066, the Anglo-Saxons distinguished between secret and open killings: “The earliest English law on homicide concentrated exclusively upon the secrecy of the act.”<sup>236</sup> Secret killings were considered “unemendable,” that is, ineligible to be remedied by compensation to the victim’s family, while open killings were “emendable.”<sup>237</sup> The former type of killing was originally known as a “morth-slaying,” “morth” being a term used to connote all secret crimes.<sup>238</sup>

The distinction took on special significance following the Conquest. The conquering Normans began to fall victim to secret homicides at the hands of the embittered population of subjugated Anglo-Saxons.<sup>239</sup> “Morth” evolved into its Latinized form, “murdrum,”<sup>240</sup> and William the Conqueror instituted a special fine, also called “murdrum,” to be paid by the local community (the “hundred”) whenever a Norman, though not an Anglo-Saxon, was killed and the killer remained at large.<sup>241</sup>

236. Pillsbury, *supra* note 5, at 450; accord Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 416 (1976) (“Th[e] distinction between slaying by stealth and slaying openly and of a sudden was embedded in Anglo-Saxon criminal law and survived after the Conquest at least until the middle of the twelfth century.”).

237. See 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 486 (Cambridge Univ. Press 1984) (S.F.C. Milsom ed., 2d ed. 1898) (“[F]rom of old the Germanic peoples have commonly treated under the head of *morth* a few aggravated kinds of homicide which were unemendable crimes, while mere open and intentional slaying was emendable.”); Green, *supra* note 236, at 416–17 (observing that stealthy slayings “were ‘botless,’ or unemendable crimes; that is, they could not be remedied through the payment of compensation (*bot*) by the slayer or his kin to the kin of the slain”); Mounts, *supra* note 2, at 270 (“Initially, homicides were distinguished based on the means used to carry out the killing—those committed by secrecy, under cover of night, or otherwise untraceable to the perpetrator were . . . not resolvable through emendment.”). According to Bracton, the distinction was introduced by Cnute, who ruled England from 1016 to 1035, in order to protect his Danish countrymen from the secret vengeance of the English. See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 995 n.75 (1932) (citing BRACTON, DE LEGIBUS 134b).

238. 3 STEPHEN, *supra* note 93, at 25, 28; see also PILLSBURY, *supra* note 2, at 100 (“In pre-Norman times ‘murth’ or ‘murther’ meant a secret killing.”); Mounts, *supra* note 2, at 270 (explaining that the term “‘morth’ . . . applied to secret crimes generally”).

239. See MORELAND, *supra* note 24, at 9 (“After the Norman conquest of England, the enmity of the subjected Anglo-Saxons sought satisfaction in secret slayings of Normans by waylaying.”); Mounts, *supra* note 2, at 271 (“Anglo-Saxon hatred of the conquering Normans often was expressed in secret killings accomplished by lying in wait.”).

240. 3 STEPHEN, *supra* note 93, at 25; Mounts, *supra* note 2, at 270.

241. See MORELAND, *supra* note 24, at 9 (“William the Conqueror imposed a heavy amercement fine called the *murdrum* upon any hundred where a Norman was found slain by an unknown hand.” (footnote omitted)); 2 POLLOCK & MAITLAND, *supra* note 237, at 487 (“[U]nder the Conqueror’s law the hundred paid a fine when a foreigner was slain and the slayer was not produced. This fine and its cause were alike known as a *murdrum* . . . .” (footnote omitted)); Mounts, *supra* note 2, at 271 (“[T]he Norman monarchs . . . responded [to such killings] by imposing a heavy fine called the ‘murdrum,’ which was imposed on the

Gradually “murdrum” began to be used to connote all secret killings,<sup>242</sup> that is, those in which the killer was not brought to justice<sup>243</sup> or where the body of the victim was concealed.<sup>244</sup> In the twelfth century, the distinction became less important, when “all homicide that was regarded as worthy of heavy punishment” became unemendable.<sup>245</sup> However, according to Glanville, “murder” continued at that time to refer to “homicide which is committed in secret, no one seeing or knowing of it.”<sup>246</sup> The distinction between secret and open killings also finds expression in the writings of Bracton, who distinguished between voluntary homicides in the presence and in the absence of witnesses.<sup>247</sup> In 1340, the murdrum fine was abolished, there no longer being any foreign-born Normans among the English.<sup>248</sup> But “murdrum,” of course, lived on, evolving into our own term “murder.”<sup>249</sup>

Thus, the concept of murder, at its very origin, dealt specifically and explicitly with killings committed in secret so that either the perpetrator or the very act itself was concealed. The understanding that the premeditation-deliberation formula expresses a special concern for killings that take place after a period of planning sufficient to allow the killer to avoid or delay detection, apprehension, and punishment, therefore, accords well with the ancient roots of the law of murder.<sup>250</sup>

community if the killer was not produced.”).

242. See JOHN BELLAMY, *CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES* 53–54 (1973) (“Murder [in medieval England] meant not so much premeditated killing as homicide by stealth.”); cf. MORELAND, *supra* note 24, at 9 (“Anyone killed under such circumstances was presumed to be a Norman . . .”).

243. See 2 POLLOCK & MAITLAND, *supra* note 237, at 487 (observing that the murdrum “was a fine occasioned by a secret homicide, a homicide secret in this sense that no one was brought to justice as its author”); 3 STEPHEN, *supra* note 93, at 28 (“[M]urdrum’ [was] distinguished from other forms of [homicide] not by any peculiarity in the offence itself, but by the fact that the criminal [wa]s unknown.”).

244. See 2 POLLOCK & MAITLAND, *supra* note 237, at 486 (“The word *morth*, which was known to Normans as well as to Englishmen, seems to imply concealment, in particular the hiding away of the dead body.” (footnote omitted)).

245. *Id.*; accord Green, *supra* note 236, at 417 (“The legal distinction between these two types of homicide was obliterated in the course of the reforms of Henry II (1154–1189).”).

246. Sayre, *supra* note 237, at 995 (quoting GLANVILLE (1187–89) lib. 14, c. 3); see also 2 POLLOCK & MAITLAND, *supra* note 237, at 486 (“[I]n Glanvill[e]’s day one had still to distinguish that secret homicide which is *murdrum* from a mere *homicidium*.”).

247. See 3 STEPHEN, *supra* note 93, at 29–30.

248. MORELAND, *supra* note 24, at 9 (“By 1340 there were practically no foreign born Normans left in England. Therefore, the fine was abolished in that year . . . .”); Sayre, *supra* note 237, at 995 (“By the fourteenth century . . . there were practically no foreign born Normans left . . . and the practice was definitely abolished in 1340.”).

249. See MORELAND, *supra* note 24, at 9 (“[T]he word ‘murder’ lived on as the worst kind of homicide . . . .”); Sayre, *supra* note 237, at 995 (“[T]he term ‘murder’ lived on in the popular imagination as the worst kind of homicide . . . .”).

250. Nor is it a wholly foreign concept that different types of murder should be treated differently based on considerations of deterrence. The English Homicide Act of 1957 did just that, designating as capital crimes five categories of murder for which the death penalty was thought “to be uniquely effective” as a deterrent. Sidney Prevezzer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 648–49 (1957) (quoting TIMES (London), Feb. 7, 1957, at 4 (statement of British Home Secretary)); see also

That this deterrence-based rationale constitutes *one* explanation for the premeditation-deliberation formula does not mean that other concerns are wholly absent. Quite the contrary, for when it came to distinguishing different types of murder, the 1794 Statute and its proponents fell back on retributivist reasoning and rhetoric. The division was made, according to the Act itself, because “the several offenses which are included under the general denomination of murder, differ so greatly from each other in the degree of their *atrociousness*, that it is unjust to involve them in the same punishment.”<sup>251</sup> Similar language appears in both Bradford’s and Rush’s commentaries. Rush distinguished different types of murder based on their “atrociousness.”<sup>252</sup> And Bradford, in proposing that capital punishment be reserved for the “deliberate assassin,” wrote that “it were better that ten such atrocious criminals should suffer the penalty of [death], than that one worthy citizen should perish by its abolition.”<sup>253</sup> The offense of deliberate assassination, he concluded, implicates “extreme depravity.”<sup>254</sup>

Distinguishing crimes based on their “atrociousness” or “depravity” is obviously the language of the retributivist. Thus, that Bradford, Rush, and the 1794 Statute itself used such language in justifying the division of murder into degrees appears to validate the instincts of most commentators that the distinction is grounded in retributivist theory. This creates a paradox: why would Bradford and Rush, so heavily influenced by the deterrence-based thinking of Beccaria and Montesquieu, revert to retributivist language when it came to murder? Recent work by Paul Robinson and John Darley suggests two possible, related answers.

Robinson and Darley persuasively argue, based on empirical research, that retributivist judgments are largely intuitive.<sup>255</sup> That is to say, they are based on processes that are “fast, automatic, effortless, associative, implicit (not available to

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Hart, *supra* note 141, at 437 (observing that the five classes of capital murder retained by the 1957 Homicide Act “do not represent an attempt to distinguish between murders according to heinousness or moral gravity, but to select for capital punishment those types of murder in which its deterrent effect is likely to be most powerful”). It did so, not by focusing on the diminished certainty of punishment in some cases, but by focusing on homicides committed by “the professional criminal,” who was thought to be uniquely susceptible to the deterrent effect of the death penalty. MODEL PENAL CODE § 210.6 cmt. 4(a), at 123 n.42 (1980); *accord* Prevezer, *supra*, at 649.

251. Act of Apr. 22, 1794, ch. 1777, § 2, 15 Pa. Stat. at Large 174, 175 (emphasis added).

252. See RUSH, *supra* note 186, at 14 n.\*.

253. BRADFORD, *supra* note 2, at 147. Bradford’s views are particularly important, given that the word “deliberate” in the 1794 Statute is taken directly from his *Enquiry*. See Keedy, *supra* note 2, at 771 (“It seems clear that the words ‘wilful’ and ‘premeditated’ were taken from the Act of 1682 and the word ‘deliberate’ from the memoir of Justice Bradford.”).

254. BRADFORD, *supra* note 2, at 147; see also *id.* at 149 (“[W]hen we consider how different, in their degree of guilt [many murders] are from the horrid crime of deliberate assassination, it is difficult to suppress a wish, that some distinctions were made in favor of homicides which do not announce extreme depravity.”).

255. See Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 8 (2007) (“[T]he culturally shared judgments of the relative blameworthiness of different acts of wrongdoing are commonly intuitive rather than reasoned judgments.”).

introspection), and often emotionally charged.”<sup>256</sup> On the other hand, utilitarian thinking is a product of a system of reasoning, which is ““slower, serial, effortful, [and] more likely to be consciously monitored and deliberately controlled.””<sup>257</sup> That being so, it is possible that Bradford and Rush, and in turn the Pennsylvania legislators in 1794, while generally sympathetic to the deterrence theory espoused by Beccaria and Montesquieu, reverted to a more intuitive, retributivist assessment of murder, given the highly emotionally charged nature of the crime.

It is also possible that Bradford and Rush—with or without the complicity of the Pennsylvania lawmakers—used this retributivist language strategically. As Robinson and Darley go on to argue, “there is great utility in a criminal justice system that provides for a distribution of liability and punishment in concordance with the citizens’ shared intuitions of justice.”<sup>258</sup> If utilitarian considerations deviate somewhat from those intuitions, it seems far easier to convince a citizenry that its intuitions are just a bit different from what it thinks they are than to give up those intuitions altogether.<sup>259</sup> A strategic utilitarian thus would be well served to clothe his policy choices regarding gradations of punishment in retributivist language, even if those policy choices are primarily driven by utilitarian concerns.<sup>260</sup>

Whatever the specific motivations of those responsible for drafting the 1794 Statute, our task is to formulate a justification for the premeditation-deliberation formula that not only is consistent with the prevailing penological zeitgeist of 1794 but also makes some sense today. And as most commentators have taken pains to assert, retributivism, even when alloyed with incapacitation, provides a meager justification for the premeditation-deliberation formula. In order to provide a fuller account, one must go past the language of the 1794 Statute to its fundamental penological underpinnings. The claim is not that the deterrence-based rationale advanced here provides the sole explanation for the formula. The claim is rather that such a rationale is indispensable, in conjunction with more conventional retributivist and incapacitacionist rationales, to a complete understanding of the premeditation-deliberation formula.

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256. *Id.* at 5 (quoting Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 698 (2003)).

257. *Id.* (alteration in original) (quoting Kahneman, *supra* note 256, at 698); *cf. id.* at 38 (“[I]t is desert, not deterrence or incapacitation, that drive people’s intuitive assignments of punishment.”).

258. *Id.* at 18.

259. *See id.* at 52 (“[R]ather than trying to ‘talk people out of’ their existing intuitions, a more effective approach may be to fight fire with fire . . .”).

260. *E.g.*, Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1020 (asserting that Herbert Wechsler, chief architect of the Model Penal Code, took the view that when liberal reform faced popular opposition, reform measures “should be incorporated, even camouflaged, within larger initiatives that accommodated retribution”).

### b. Specific Means

The two specific means of murder that the 1794 Statute designated as first-degree—poison and lying in wait—can also be explained at least in part by looking to the concern for detecting and punishing murderers. While this portion of the Statute, like the premeditation-deliberation formula, is conventionally understood on retributivist grounds, the deterrence rationale provides a complementary explanation that presents a fuller picture as to why these specific means of killing were singled out.

#### i. Poison

Once one recognizes the significance of the certainty and swiftness of punishment in the deterrence equation, the special status of murder by poison in the 1794 Statute is easier to understand. First, in an age before the advent of modern explosive technology,<sup>261</sup> murder by poison was the only way to kill remotely. One could poison another and be miles away by the time the poison had been taken and anyone realized a crime had occurred. Thus, capturing and punishing the killer who chose to murder by poison was particularly problematic, at least when compared to the killer who chose the pistol, club, or stiletto as his weapon.

Even more importantly, however, at a time when forensic toxicology was in a primitive state, even detecting that a murder by poison had occurred was problematic. Poisoning is one of the most secretive of crimes, because it involves two layers of secrecy.<sup>262</sup> Like many other homicides, it typically occurs in the privacy of the home.<sup>263</sup> Yet “there [i]s another aspect to the secretness of poison: unlike other weapons, poison d[oes] its work on the interior of the body, leaving no visible signs of violence.”<sup>264</sup> Consequently, death by poison often simulates death by natural causes, so it is often difficult to tell the difference between the two.<sup>265</sup>

This is true even today, when forensic toxicology has become a well-developed field.<sup>266</sup> But that field began to take shape only in the first half of the nineteenth

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261. The safety fuse, for example, was not invented until 1831. See STEPHEN R. BOWN, A MOST DAMNABLE INVENTION: DYNAMITE, NITRATES, AND THE MAKING OF THE MODERN WORLD 77 (2005).

262. See Mark Essig, *Poison Murder and Expert Testimony: Doubting the Physician in Late Nineteenth-Century America*, 14 YALE J.L. & HUMAN. 177, 181 (2002) (“Poisoning involved a double secrecy.”).

263. See *id.* (“[Poisoning] was carried out secretly, within the home, behind closed doors . . .”).

264. *Id.*

265. *Id.* (“Because the symptoms of some poisons resembled those of disease, it was often difficult to tell whether a person had died from poison or from natural causes.”); see also *id.* at 194 (“The symptoms of morphine poisoning—in particular, deep coma and very slow respiration—were thought to be very similar to a number of diseases, including uremic poisoning . . . and cerebral hemorrhage.”).

266. See, e.g., David S. Caudill, *Arsenic and Old Chemistry: Images of Mad Alchemists, Experts Attacking Experts, and the Crisis in Forensic Science*, 15 B.U. J. SCI. & TECH. L. 1, 27–29 (2009) (discussing 2007 case of Cynthia Sommer, who was convicted of poisoning her husband, but had charges against her dropped after the expert testimony at her trial was

century.<sup>267</sup> The founding of modern toxicology is generally dated to the 1814–15 publication of Mateu Orfila’s *Traité des Poisons*,<sup>268</sup> which was available in this country in 1817.<sup>269</sup> And the Marsh test, which became the generally accepted method for testing for arsenic in Britain,<sup>270</sup> was not developed until 1836.<sup>271</sup> It was not until “the 1840s [that] toxicology had emerged as the first modern forensic science.”<sup>272</sup> In a number of notorious cases in the early to mid-nineteenth century, when forensic toxicology was in its infancy, alleged killers were convicted and sentenced to life imprisonment or death for murder by poison before the deaths were discovered to have been the result of natural causes.<sup>273</sup> Others were convicted, and some executed, in cases where the evidence of poisoning was very problematic.<sup>274</sup>

But if nineteenth-century Americans were concerned that natural deaths were being mistaken for cases of poisonings, they were absolutely terrified of the reverse. After all, if a death from natural causes could be mistaken for a poisoning, the opposite is equally true. Mark Essig paints a portrait of a society gripped by fear of a crime that, according to official statistics, was exceedingly rare:<sup>275</sup>

Nineteenth-century Americans suspected that many cases of poisoning escaped detection altogether. “We do not know how many persons who were buried as having died of disease, may have died of poison,” one physician explained. Every poison murder case that made it to trial raised the fear that scores more had gone undetected. This fear of undiscovered crime lay at the heart of the nineteenth-century obsession

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severely attacked following the verdict).

267. See DEBORAH BLUM, *THE POISONER’S HANDBOOK: MURDER AND THE BIRTH OF FORENSIC MEDICINE IN JAZZ AGE NEW YORK* 1 (2010) (“The chemical revolution of the 1800s changed the relative ease of . . . killing[] [by poison.]”); Caudill, *supra* note 266, at 3 (pointing out “[t]he advancements in toxicology during the first half of the nineteenth-century, particularly with respect to detection of arsenic”).

268. Caudill, *supra* note 266, at 18 & n.103; see also BLUM, *supra* note 267, at 1–2.

269. Caudill, *supra* note 266, at 23 n.137 (“American editions of Orfila’s works were available by 1817 . . . .” (citing S. K. Niyogi, *Historic Development of Forensic Toxicology in America up to 1978*, 1 AM. J. FORENSIC MED. & PATHOLOGY 249, 251–52 (1980))).

270. See *id.* at 26 (“The Marsh test was publicized in the 1840 Lafarge trial by Orfila, and was soon the prominent method of arsenic detection in English trials.”).

271. Caudill, *supra* note 266, at 19 n.105; see also BLUM, *supra* note 267, at 2.

272. Essig, *supra* note 262, at 181.

273. See Caudill, *supra* note 266, at 1–2, 11–15 (discussing 1828 Pennsylvania case of Mrs. William Logan, accused of poisoning her husband but later cleared); *id.* at 22 (discussing 1859 British case of Thomas Smethurst, convicted of murder by poisoning but later pardoned); *id.* at 23 (discussing 1826 British case of Hannah Russel, convicted of murder for poisoning her husband, but later pardoned based on new evidence).

274. See also *id.* at 15–16 (discussing 1817 New York case of Abraham Kessler, executed for poisoning his wife); *id.* at 16–17 (discussing 1853 New York case of John Hendrickson, wrongfully executed for poisoning his wife); *id.* at 18–19 (discussing 1840 French case of Madame Lafarge, sentenced to life imprisonment for poisoning her husband); *id.* at 21 & n.121 (discussing 1856 British case of William Palmer, accused of poisoning three people).

275. Essig, *supra* note 262, at 180 (“Available statistics suggest that poison murder . . . accounted for a tiny fraction of the total number of murder cases.”).

with poison murder. . . . It was this uncertainty that made poisoning such a dreaded crime.<sup>276</sup>

And what was true of nineteenth-century Americans during the infancy of forensic toxicology was also true of late eighteenth-century Americans, when the science was in what can only be termed its embryonic stage. Prior to the publication of Orfila's treatise, testing for arsenic focused on its physical, as opposed to chemical, properties.<sup>277</sup> Such tests were performed as early as 1752,<sup>278</sup> but were not widely publicized until about a half-century later.<sup>279</sup> Thus, in the United States, "before '1800 virtually no local practitioners could test a corpse for signs of poisoning.'"<sup>280</sup> Accordingly, "more often than not poisoners walked free . . . [and] [a]s a result murder by poison flourished."<sup>281</sup>

This background sheds much light on why Pennsylvania in 1794 would punish murder by poison as first-degree murder. It was exceedingly difficult to detect at that time, using the most primitive of tools, that such an event was even a homicide. And even if the *fact* of murder could be established with some confidence, the *perpetrator* of the murder might still be in doubt, given the ability of the perpetrator to escape the scene before the deed was done.<sup>282</sup> According to classic deterrence theory, since the perceived probability of punishment was significantly lower for murder by poison than for the typical intentional killing, the severity of the threatened punishment would have to be enhanced to maintain the hoped-for deterrent effect of the law.<sup>283</sup> Support for this view comes from Gabriel

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276. *Id.* at 181 (footnote omitted) (quoting Charles T. Jackson, *Statistics of Poisoning in New England*, 63 BOSTON MED. & SURGICAL J. 389, 389 (1860)).

277. See Caudill, *supra* note 266, at 23–24 (discussing 1752 examination based on physical, rather than chemical, properties of arsenic and performed by Anthony Addington for the English trial of Mary Blandy).

278. *Id.*

279. See *id.* at 24 & n.140 (discussing publication of descriptions of various tests in 1803, 1805, and 1806). Interestingly enough, one of these tests was performed by none other than Benjamin Rush. *Id.* at 24.

280. *Id.* at 23 n.137 (quoting JAMES C. MOHR, DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA 51 (1993)); see also BLUM, *supra* note 267, at 1 ("Until the early nineteenth century few tools existed to detect a toxic substance in a corpse.").

281. BLUM, *supra* note 267, at 1. Blum reports that, prior to 1800, murder by poison "became so common in eliminating perceived difficulties, such as a wealthy parent who stayed alive too long, that the French nicknamed the metallic element arsenic *poudre de succession*, the inheritance powder." *Id.*

282. Even today, murder by poison is particularly problematic in that respect. When one thinks of the most notorious unsolved crimes of the last generation, surely one of the first that springs to mind is the series of poisonings that occurred in the Chicago area in 1982, when a still-unknown assailant placed cyanide in Tylenol capsules that were then placed back on store shelves and sold to unsuspecting consumers. See Jonathan Saltzman, *Fatal Tampering Case Is Renewed: FBI Searches a Condo in Cambridge*, BOSTON GLOBE, Feb. 5, 2009, at B1, available at [http://www.boston.com/news/local/breaking\\_news/2009/02/fbi\\_searches\\_ho.html](http://www.boston.com/news/local/breaking_news/2009/02/fbi_searches_ho.html) (describing the FBI's search of the home of a leading suspect in the still-unsolved Tylenol killings).

283. Like secret homicides in general, murder by poison also holds a particular

Tarde, who in 1912 wrote, though unfortunately without supporting data, “that the number of cases of poisoning decreased very rapidly towards the middle of th[e] [nineteenth] century, from the time when discoveries in chemistry and toxicology made it possible more surely to discover the causes and the perpetrator of this type of crime.”<sup>284</sup>

Admittedly, there are also retributivist and incapacitationist rationales for elevating murder by poison to first-degree murder. First, the murderer who kills remotely is arguably more culpable because he is cowardly—one might say “unmanly,” in the vernacular of 1794—compared to the killer who has to confront his victim face-to-face.<sup>285</sup> Second, poisoning was a uniquely effective way in 1794 not only of killing remotely but of killing multiple persons simultaneously, making the poisoner at once more culpable and more dangerous. A disgruntled servant might poison her employer’s entire dinner party; a sociopath might kill many of the inhabitants of an entire village by poisoning its water source.

Yet, like the premeditation-deliberation formula itself, the murder-by-poison provision is starkly overinclusive if its rationale is solely retributivist or incapacitationist in nature.<sup>286</sup> First, it clearly covers single-victim poisonings, such as when a jealous husband poisons his unfaithful wife, a situation far more likely to occur than a mass killing of strangers.<sup>287</sup> In addition, poison might well be used in a mercy killing, infanticide, or suicide pact killing, homicides that critics of the premeditation-deliberation formula have noted are among the most sympathetic of intentional murders.<sup>288</sup> Thus, the retributivist and incapacitationist bases for heightened punishment for poisoners provide an incomplete account at best. A deterrence-based rationale, focused on the difficulty of detecting, apprehending, and punishing poisoners, helps to fill in the gaps.

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significance in the development in modern homicide law. In 1530, murder by poison was made high treason, punishable by boiling the offender to death. 3 STEPHEN, *supra* note 93, at 44; Mounts, *supra* note 2, at 270 n.39. At least one commentator has claimed, albeit without support, that “murder by poison merited execution by boiling because poisoners were especially difficult to apprehend.” Rudolph J. Gerber, *Economic and Historical Implications for Capital Punishment Deterrence*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 437, 446 (2004).

284. GABRIEL TARDE, *PENAL PHILOSOPHY* 476 (Rapelje Howell trans., 1912).

285. See Pillsbury, *supra* note 5, at 458 (characterizing the act of the poisoner as “cowardly subterfuge”).

286. See Crump, *supra* note 7, at 293 (“These specific-means definitions of first-degree murder exhibit the flaw of disparity just as the premeditation-deliberation formula does: a disconnect from blameworthiness.”).

287. See Jack D. Marietta & G.S. Rowe, *Violent Crime, Victims, and Society in Pennsylvania, 1682–1800*, 66 PA. HIST. 24, 31 (1999) (“Most murder victims knew their assailants—like most of their modern counterparts. 23.8 percent of murder cases which led to the death sentence involved persons related to the victims.”).

288. See MODEL PENAL CODE § 210.6 cmt. 4(b), at 127 (1980) (including as among the most sympathetic intentional killings “most mercy killings . . . [,] suicide pacts, [and] many infanticides”).

## ii. Lying in Wait

Quite obviously, a special concern for stealthy killings also animates the heightened punishment for “murder . . . perpetrated by means of . . . lying in wait . . . .”<sup>289</sup> Lying-in-wait murder has been defined as “concealment for the purpose of taking the victim unaware.”<sup>290</sup> That is to say, “[t]he defendant must be hidden from his victim” so as to facilitate “a successful attack.”<sup>291</sup> Murder by lying in wait involves “waiting, watching, and secrecy” on the part of the perpetrator.<sup>292</sup>

Indeed, what we would call lying-in-wait murder animated the special concern for secret killings in medieval times. The secret killings of Normans by Anglo-Saxons that gave rise to the term “murder”<sup>293</sup> generally involved “waylaying, *i.e.*, killing by stealth from ambush.”<sup>294</sup> Thus, what we now call waylaying, ambush, or lying in wait, those in the twelfth century knew simply as murder.<sup>295</sup> Such a crime was deemed either unemendable or emendable only with a heavier financial sanction, or *wite*, than was typical.<sup>296</sup> This special concern for lying-in-wait murder led, in 1389, to a statute that treated such killings more seriously than the typical murder by denying to the Crown the authority to pardon anyone who killed in such a manner.<sup>297</sup>

Again, the special treatment of lying-in-wait murder has generally been explained on retributivist grounds.<sup>298</sup> First, like murder by poison, murder by

289. Act of Apr. 22, 1794, ch. 1777, § 2, 15 Pa. Stat. at Large 174, 175.

290. Comment, *Lying in Wait Murder*, 6 STAN. L. REV. 345, 345 (1954) (quoting *People v. Tuthill*, 187 P.2d 16, 21 (Cal. 1947)); see also Perkins, *supra* note 19, at 447–48 (“‘Lying in wait’ . . . means ‘hiding in ambush or concealment . . . [with the] purpose of taking the person attacked unawares . . . .’” (quoting *State v. Tyler*, 97 N.W. 983, 985 (Iowa 1904))).

291. Comment, *supra* note 290, at 346.

292. *Id.* at 345–46 (quoting *Tuthill*, 187 P.2d at 21); see also FLETCHER, *supra* note 2, § 4.4.6, at 305 (noting that lying in wait is defined in California as “waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise” (citing Caljic § 8.25)); H. Mitchell Caldwell, *The Prostitution of Lying in Wait*, 57 U. MIAMI L. REV. 311, 326 (2003) (“[W]aiting, watching, and secrecy, or concealment . . . are the essentials of lying-in-wait murder.”); Merrill K. Albert, Note, *Criminal Law: Homicide: Murder Committed by Lying in Wait*, 42 CAL. L. REV. 337, 338 (1954) (“[I]t is generally stated that lying in wait requires three elements: watching, waiting, and concealment, for the purpose of taking the victim unawares.”).

293. See *supra* text accompanying notes 243–53.

294. Albert, *supra* note 292, at 337–38 (emphasis in original).

295. See 2 POLLOCK & MAITLAND, *supra* note 237, at 468 (“[A] premeditated, or as we should say intentional, assault takes the place of lying in wait, lying in ambush.”); Caldwell, *supra* note 292, at 322 (“[A] more accurate synonym for twelfth century ‘simple’ murder was killing while lying in wait or by ambush.”); see also Pillsbury, *supra* note 5, at 450 (tracing especial seriousness of lying-in-wait murder under English law to pre-Norman focus on secret killings).

296. See 2 POLLOCK & MAITLAND, *supra* note 237, at 469 (observing that killing by ambush was “a specially reserved plea of the crown to be emended, if indeed it was emendable, by a heavy *wite*”).

297. See Caldwell, *supra* note 292, at 323.

298. See *id.* at 322–23; Albert, *supra* note 292, at 337 (“English law . . . regarded a murder committed by lying in wait as a particularly heinous and repugnant crime.”);

ambush can be seen as particularly cowardly because it deprives the victim of the chance to defend himself.<sup>299</sup> Second, it can be regarded as particularly cruel, especially in an earlier and more religious age, to end someone's life without providing the victim the opportunity to prepare for the next world.<sup>300</sup>

At least one commentator has explained the special treatment of lying-in-wait murder on incapacitacionist grounds as well. Samuel Pillsbury casts the secret killer as among the most dangerous, a hidden traitor in the midst of the community: "The secret killer . . . represents the most dangerous enemy of peaceful human society because his crime smacks of treachery; he is the mole in the moral community. By contrast, the provoked killer openly confronts his victim."<sup>301</sup> Thus, by failing to afford the victim the right of self-defense, the lying-in-wait killer is not only more culpable for his cowardice, but he is also more dangerous because he is more likely to succeed in the act of killing.

But as with premeditation and deliberation, if the rationale for treating lying-in-wait murder more seriously than intentional murder generally is retributivist and incapacitacionist in nature, then the lying-in-wait category is both underinclusive and overinclusive. It is underinclusive because *any* murder in which the victim is taken by surprise can be seen as particularly repugnant and dangerous.<sup>302</sup> Take, for instance, the killer who travels to the victim's house at night, silently enters through the front door, and cuts the victim's throat. Or imagine the killer who walks up behind the victim on a public street and fires a gun at her head at close range. In neither instance has the killer afforded the victim a chance for self-defense or self-reflection before death. Yet, in neither case can we properly say that the killer has lain in wait.<sup>303</sup>

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Comment, *supra* note 290, at 350 (asserting that poisoning and lying in wait "were considered the most infamous type of murder").

299. See BELLAMY, *supra* note 242, at 54 (asserting that homicide by stealth "was heinous, not because of any evil preparations, but because it caught a man off his guard"); MORELAND, *supra* note 24, at 199 (observing that "the crime of killing by lying in wait [was] a homicide of extreme heinousness," in part "because of its cowardly nature"); Caldwell, *supra* note 292, at 353 n.281 ("Being murdered without a chance to defend yourself is a particular [sic] vulgar and undesirable way to die."); Pillsbury, *supra* note 5, at 450 n.40 (noting that concept of lying in wait "suggests lack of opportunity for self-defense which may be offensive in a culture that honors the use of violence in mutual combat"); Albert, *supra* note 292, at 340 (observing that concealment evinces "cowardice").

300. See Caldwell, *supra* note 292, at 322 ("Throughout western civilization, special scorn has been reserved for those who murdered by surprise or otherwise in a fashion that deprived the victim of the opportunity for reflection and contrition.").

301. Pillsbury, *supra* note 5, at 458.

302. See 3 STEPHEN, *supra* note 93, at 94 (observing that treating murder by waylaying as especially serious "has the strange peculiarity that it includes waiting for a man and excludes pursuing him"); Pillsbury, *supra* note 5, at 450 ("The worst killings may involve 'open' slaughter . . ."); see also Pauley, *supra* note 2, at 167 (suggesting that "a cold-blooded killer who follows an elderly woman home from the supermarket, and then stabs her to death forty times with a steak knife in front of her grandchildren on the steps of her home" is "particularly heinous" despite the fact that the killer "did not conceal himself before the killing").

303. See *Richards v. Superior Court*, 194 Cal. Rptr. 120, 125 (Cal. Ct. App. 1983) (rejecting the contention that merely killing a victim unawares from behind constitutes a

At the same time, at least from a retributivist perspective, the lying-in-wait category is arguably overinclusive as well. For one thing, the quality of the killer's reasoning abilities may be so poor as to cry out for mitigation.<sup>304</sup> For another, with regard to some secret killings, the killer's actions might be understandable, though not forgivable.<sup>305</sup>

What has been largely overlooked is the deterrence-based concern for lying-in-wait murder, centered around the difficulty of detecting, apprehending, and punishing the killer. It appears that no one has made this connection since Roy Moreland observed, more than a half century ago, that *both* retributivist *and* deterrence-based concerns animate the strictures against lying-in-wait murder. He wrote that, in medieval England, "the crime of killing by lying in wait continued to remain a homicide of extreme heinousness, because of its cowardly nature *and the difficulty of discovering the assassin in such cases.*"<sup>306</sup>

What really distinguishes the two hypothetical murders discussed above from a true lying-in-wait murder is that, with respect to the latter, the killer has taken special measures to avoid detection. The killer who merely enters the front door of a home or pursues his victim on the street has done nothing to reduce the possibility that witnesses will see and be able to identify him. By taking their victims unawares, they act in a cowardly and repugnant fashion, and are therefore highly culpable. By depriving the victims of the opportunity for self-defense, they also increase the likelihood that the killings themselves will succeed, and they are therefore very dangerous. But only by watching and waiting in secrecy—that is, by lying in wait—to be confident that there are no witnesses can each of these killers also maximize the likelihood that the crime will be a complete success, that is to say, committed with impunity.<sup>307</sup>

The conventional retributivist and incapacitacionist view of lying-in-wait murder has focused on concealment from the *victim*. A deterrence-based view, centered on the certainty and swiftness of punishment, looks to concealment from *potential witnesses*. A true lying-in-wait murder involves both levels of secrecy: concealment not only from the victim but from potential witnesses as well. What makes a true

lying-in-wait murder); Caldwell, *supra* note 292, at 356 n.316 (asserting that characterizing a front-door entry as "lying in wait" would stretch the concept "to the point of meaninglessness"); *see also* Pauley, *supra* note 2, at 167 (observing that lying in wait has been held to be absent "where the defendant waited for the victim in his own living room, or followed the victim on the street, or stood outside with a shotgun in anticipation of the victim, or sat in a parked car with a gun outside the defendant's store before the shooting" (footnotes omitted)).

304. *See* Pillsbury, *supra* note 5, at 450–51 ("Secret killings may not involve the highest level of rationality; even with an opportunity to consider consequences, emotional stress or mental disturbance may influence the quality of the actor's practical reasoning and present grounds for mitigation.").

305. *See id.* at 451 ("[O]ne who kills in secret may have good cause for grievance against the victim.").

306. MORELAND, *supra* note 24, at 199 (emphasis added); *see also* Caldwell, *supra* note 292, at 368 ("If there is no physical concealment, is there really a difficulty . . . in finding out who the murderer is?").

307. *See* 3 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 452 (1956) ("The criminal's chances of success [a]re his chances of impunity . . .").

lying-in-wait murder distinctive, then, is that its special treatment in the law can be explained on all of these grounds—retributivist, incapacitationist, and deterrence-based—at once.

### c. Felony Murder

Finally, there is the felony murder provision of the 1794 Statute: “[A]ll murder . . . which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree . . . .”<sup>308</sup> This provision, too, is best explained on grounds of deterrence. Recall that the 1794 Act not only separated murder into two degrees, reserving capital punishment for first-degree murder. It also eliminated capital punishment for arson and rape,<sup>309</sup> establishing the potential prison term for arson at five to twelve years,<sup>310</sup> and for rape at ten to twenty-one years.<sup>311</sup> Eight years earlier, Pennsylvania had eliminated capital punishment for robbery and burglary,<sup>312</sup> setting the maximum prison term for those crimes at ten years.<sup>313</sup> Finally, the 1794 Act also established the potential prison term for second-degree murder at five to eighteen years.<sup>314</sup>

Given all this, the deterrence rationale for retaining the death penalty for felony murder predicated on “arson, rape, robbery or burglary” is obvious. A murder committed during one of these crimes, absent evidence of premeditation and deliberation, poisoning, or lying in wait, would otherwise constitute second-degree murder. But if the punishment for second-degree murder were five to eighteen years in prison, the rational arsonist, rapist, robber, or burglar would be induced to kill his victim, thereby eliminating perhaps the only witness to the crime, in order to greatly reduce the probability of apprehension. After all, the robber or burglar who kills his victim would face a scant eight additional years in prison over and above what he might face for the robbery or burglary; the arsonist, only six additional years than he might face for the arson; and the rapist, perversely, three fewer years than he might face for the rape.

Beccaria and Montesquieu, and their Pennsylvania disciples, recognized these perverse incentives created by a system that punished most felonies equally. Montesquieu claimed: “In Russia where the punishment of robbery and murder is the same, they always murder. The dead, say they, tell no tales.”<sup>315</sup> By contrast, wrote Montesquieu: “In China those that add murder to robbery, are cut into pieces; but not so the others . . . .”<sup>316</sup> The result, according to Montesquieu, was that robbers in that country “never murder.”<sup>317</sup> Beccaria wrote: “If an equal punishment is laid down for two crimes which damage society unequally, men will not have a

308. Act of Apr. 22, 1794, ch. 1777, § 2, 15 Pa. Stat. 174, 175.

309. See *supra* text accompanying note 217.

310. Act of Apr. 22, 1794, ch. 1777, § 2, 15 Pa. Stat. 174, 175.

311. *Id.* at 175–76.

312. See *supra* text accompanying note 211.

313. Act of Sept. 15, 1786, ch. 1241, § 1, 12 Pa. Stat. at Large 280, 281.

314. Act of Apr. 22, 1794, ch. 1777, § 2, 15 Pa. Stat. 174, 176.

315. MONTESQUIEU, *supra* note 171, at 131 (footnote omitted).

316. *Id.* (footnote omitted).

317. *Id.*

stronger deterrent against committing the greater crime if they find it more advantageous to do so.”<sup>318</sup> Bradford echoed these words when he wrote:

Whatever be the punishment inflicted on the higher degrees of murder it ought to be *widely* different from that of every other crime. If not different in its *nature* at least let there be some circumstance in it calculated to . . . remove the temptation which the villain otherwise has to prevent the discovery of a less crime by the commission of a greater.<sup>319</sup>

While the prison term for second-degree murder was potentially longer than those for arson, robbery, and burglary, the drafters of the 1794 Act likely understood that one should “expect a decline in the marginal disutility of imprisonment as sentences lengthen . . . .”<sup>320</sup> For one thing, “[t]he early part of a criminal sentence is when much of its damage is done.”<sup>321</sup> The “damage” done early on in a criminal sentence includes its stigmatic effect, adverse impacts on employment opportunities, effects on familial relations, and the shock of adjustment to severe “restraints on liberty and threats on well-being.”<sup>322</sup> For another thing, because future events are heavily discounted, especially among potential offenders,<sup>323</sup> “offenders should be less deterred by the last years of a sentence than by the first years.”<sup>324</sup> When one factors in the expected steep drop in the certainty and swiftness of apprehension, prosecution, and conviction when one kills the only witness to his crime, the rational felon could be expected to take the gamble of a few extra years in prison in hope of impunity.<sup>325</sup> Only an increase in

318. BECCARIA, *supra* note 165, at 21.

319. BRADFORD, *supra* note 2, at 148 (emphasis in original); *see also* RUSH, *supra* note 185, at 9 (observing that the robber or burglar can naturally be expected to “add murder to theft, in order to screen himself, if he should be detected”).

320. Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 982 (2008).

321. Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 95 (1991).

322. *Id.*; *see also* Binder, *supra* note 320, at 982 (observing that conviction of a crime and “incarceration may have a permanently stigmatic effect irrespective of the length of imprisonment”).

323. *See supra* text accompanying notes 157–60.

324. Binder, *supra* note 320, at 983; *see also* Cole, *supra* note 321, at 95 (“Discounting exaggerates the effects of the disproportionate occurrence of pain during a prison sentence.”). It might be true that felons who killed their victims faced a term of imprisonment for murder *in addition to* the prison term for the predicate felony. Without knowing sentencing practices at the time, it is impossible to say whether consecutive sentences were typically imposed under such circumstances. *See The Supreme Court, 2008 Term: Leading Cases*, 123 HARV. L. REV. 153, 199–201 (2009) (observing that founding-era practice on consecutive and concurrent sentencing was unclear and unsettled). In any event, for the reasons stated in the text, an additional prison term on top of that threatened for commission of the underlying felony was probably thought to be deeply discounted in the mind of the felon.

325. *See* Cole, *supra* note 321, at 95 (“From a deterrence perspective, treating murder monolithically effectively affords potential felony murderers with fewer—not more—

the severity of the sentence—from prison to death—could offset the inducement to kill.<sup>326</sup>

Of course, that the imposition of the death penalty could be thought to be the only effective way to prevent violent felons from intentionally killing their victims does not fully explain the felony murder provision of the 1794 Statute. After all, as conventionally understood, the felony murder doctrine also covers unintended killings, even those that are accidental, that occur during felonies.<sup>327</sup> Commentators have noted “[t]he illogic of the felony-murder rule as a means of deterring killing . . . when applied to accidental killings occurring during the commission of a felony,” for accidents cannot be deterred.<sup>328</sup> However, as Guyora Binder has persuasively argued, felony murder liability in 1794, while it covered more than intentional killings, did not cover all deaths occurring during a felony. Rather liability “was limited . . . to deaths resulting from acts of violence committed in the furtherance of particularly dangerous felonies.”<sup>329</sup> Thus the felony-murder rule in 1794 covered only conduct that was both committed during felonies and that was independently culpable—that is, reckless or grossly negligent—with regard to the death of the victim.<sup>330</sup> The distinctive aspect of the felony-murder rule was that it elevated what would ordinarily be manslaughter to murder because the death occurred during the commission of a dangerous felony.<sup>331</sup>

Given this, the felony murder provision of the 1794 Statute makes sense on deterrence grounds. Retaining capital punishment for felony murder predicated on arson, rape, robbery, or burglary could be thought not only to discourage those

incentives to abstain from killing.”).

326. See *id.* at 91 (“Felons will generally view resulting death simply as a means of ensuring escape or silencing witnesses, both of which are simply means to financial reward. If the cost of causing death is increased, we might expect these felons to regard causing death as inconsistent with their own motivation—committing a financially beneficial crime.”).

327. See MODEL PENAL CODE § 210.2 cmt. 6, at 30 (1980) (“The classic formulation of the felony-murder doctrine declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony.”).

328. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 451 (1985); cf. David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 371 (1985) (“The argument against deterrence often proceeds on the . . . assumption that felony murder is addressed only to accidental killings and cannot result in their deterrence.”).

329. Binder, *supra* note 320, at 978; see also Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 187–97 (2004); Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today’s Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 18 (2006) (asserting that felony-murder liability existed in 1794 “only if the felonious act was known to be dangerous to life and likely to cause death”).

330. See Binder, *supra* note 320, at 978 (“American reformers did not, by and large, see felony murder liability as strict liability, but instead saw felonious motive as one of a number of forms of culpability aggravating *already culpable* homicides to murder, or to murder of a higher degree.”) (emphasis in original).

331. See *id.* at 983 (characterizing as “the distinctive feature of felony murder liability” the fact that it “aggravates liability for unintended homicide based on certain felonious motives”).

committing such felonies from intentionally killing their victims, but also to encourage such felons to affirmatively exercise due care with regard to those victims. Absent the threat of capital punishment, even those violent felons who might not be induced to kill their victims might yet be induced to accomplish their felonies with reckless disregard to whether their victims died.<sup>332</sup> This is so because the consequence of such recklessness—elimination of witnesses to the crime—inures to their benefit, thus presenting a strong inducement not to exercise due care. This answers Binder’s objection that a deterrence rationale for the felony-murder rule “does not explain why manslaughter liability suffices as a deterrent for reckless nonfelons, but not for reckless felons”:<sup>333</sup> reckless nonfelons gain no benefit when their conduct kills, while reckless felons benefit through elimination of one or more witnesses to their crimes. One could reasonably conclude that only the threat of the death penalty can act as a motivation to exercise due care, given the strong inducements to the contrary.

*B. A Look at a Modern Statute: The California “Drive-By Shooting” Provision*

To see a modern example of how retributivist, incapacitationist, and deterrence-based concerns may work together to distinguish first- from second-degree murder, one need look no further than the “drive-by shooting”<sup>334</sup> provision of section 189 of the California Penal Code. That section is an expanded version of the 1794 Statute and includes within the definition of first-degree murder any “murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death . . . .”<sup>335</sup>

The retributivist and incapacitationist concerns underlying this provision are fairly obvious. From a retributivist standpoint, one who discharges a firearm from a vehicle, at least where the vehicle is moving at the time, is arguably more culpable than someone shooting on foot. This is because the shooter knowingly risks the death or serious injury of large groups of innocent people in addition to the intended target.<sup>336</sup> These typically include children and adolescents. Indeed, one

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332. See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1449 (1994) (characterizing as “the more prevalent of the two main deterrent explanations of felony-murder” the fact that “[t]he goal is to encourage greater care in the performance of felonious acts”).

333. Binder, *supra* note 320, at 983.

334. See KELLY DEDEL, PROBLEM-ORIENTED GUIDES FOR POLICE: PROBLEM-SPECIFIC GUIDE NO. 47: DRIVE-BY SHOOTINGS 2 (2007) (“A drive-by shooting refers to an incident when someone fires a gun from a vehicle at another vehicle, a person, a structure, or another stationary object.”).

335. CAL. PENAL CODE § 189 (West 2010).

336. See H. Range Hutson, Deirdre Anglin & Marc Eckstein, *Drive-By Shootings by Violent Street Gangs in Los Angeles: A Five-Year Review from 1989 to 1993*, 3 ACAD. EMERGENCY MED. 300, 301–02 (1996) (finding that nearly half of those shot at in drive-by shootings in Los Angeles during a five-year period were “innocent bystanders,” “defined as [those] with no known gang affiliation, who w[ere] shot at, injured, or killed in a drive-by shooting”); see also DEDEL, *supra* note 334, at 3 (“The specifics of a drive-by shooting—in which the shooter is aiming a gun out the window of a moving vehicle at a moving target,

study found that children and adolescents comprised 30% of those shot at in drive-by shootings in the City of Los Angeles in 1991,<sup>337</sup> and that close to one-quarter of all child and adolescent homicide victims in Los Angeles in 1991 were victims of drive-by shootings.<sup>338</sup> A similar study found that over half of the homicide victims of drive-by shootings in Los Angeles County from 1979 to 1994 were children and adolescents.<sup>339</sup> Thus, the drive-by killer is arguably more culpable than the average killer because of the grave risk of death he creates for large numbers of people.

For similar reasons, we might reasonably conclude that the drive-by killer is more dangerous than the average killer. By undertaking a drive-by shooting, he manifests his willingness to put more than just his intended target in harm's way.<sup>340</sup> Because he risks the lives of many people at once, the drive-by killer is arguably more dangerous, and therefore in greater need of incapacitation, than his pedestrian counterpart.

But what if these considerations are not present in a particular case? It seems that the drive-by killer who targets a lone victim with no risk to innocent bystanders is neither more culpable nor more dangerous than the pedestrian killer. Perhaps he is less dangerous, in fact, because of the difficulty in shooting someone from a moving vehicle. Indeed, David Crump utilizes California's drive-by shooting provision as a prime example of the defects of statutes based on the 1794 Statute.<sup>341</sup> Crump posits two scenarios. In the first, two armed men are sitting on the curb when a bicyclist appears; one man dares the second to kill the bicyclist; and, without hesitation or thought, the second man raises his gun and fires a shot at the bicyclist, killing him.<sup>342</sup> The second scenario is identical except that the two men are sitting in a car at the time.<sup>343</sup> In California, the killing in the first scenario would likely be second-degree murder, while that in the second would, because of the drive-by shooting provision, be murder in the first degree.<sup>344</sup> Crump notes the absurdity of treating the two murders differently based on the fortuity of whether the killer and his cohort happen to be inside or outside of a vehicle, observing that the "distinction does not correlate with blameworthiness at all . . . ."<sup>345</sup>

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and is often inexperienced in handling a gun—mean that shots often go wild and injure people or damage property that was not the intended target.”).

337. H. Range Hutson, Deirdre Anglin & Michael J. Pratts, Jr., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 324 (1994) (finding that of 2222 people shot at, 677 were under the age of 18).

338. *Id.* at 326–27 (“The 36 homicides resulting from [drive-by] shootings represented . . . 23 percent of all homicides among children and adolescents in Los Angeles in 1991 . . .”).

339. H. Range Hutson, Deirdre Anglin, Demetrios N. Kyriacou, Joel Hart & Kelvin Spears, *The Epidemic of Gang-Related Homicides in Los Angeles County from 1979 Through 1994*, 274 J. AM. MED. ASS'N 1031, 1033 (1995) (“Child and adolescent victims accounted for 681 homicides (50.2%) by drive-by shootings.”).

340. *See* Hutson et al., *supra* note 337, at 327 (“Since a large number of people can be injured or killed in one incident, the morbidity and mortality, the total medical cost, and the cost to society are enormous.”).

341. Crump, *supra* note 7, at 295–99.

342. *Id.* at 295–96.

343. *Id.* at 299.

344. *Id.*

345. *Id.*

But the distinction is absurd only if one looks at the law of homicide solely through the eyes of a retributivist. Once one takes deterrence into account, the distinction starts to look more sensible. When one shoots another as a pedestrian, escape is difficult. While bystanders may be too fearful to take action themselves, it is likely that they would be able not only to summon the authorities quickly but to identify the gunman.<sup>346</sup> Not so for one who chooses to kill by shooting out of a vehicle. First, such a culprit may be very difficult to identify, especially if the vehicle is moving at the time, and especially if the shooting takes place under cover of darkness, as such shootings typically do.<sup>347</sup> More importantly, where the perpetrator is already in a vehicle when the shooting occurs, escape from the scene is much more likely.<sup>348</sup> Indeed, not only is the distinction sensible,<sup>349</sup> but it is the foundation for the Fourth Amendment rule that, while a warrant based on probable cause is necessary to search a package that might contain evidence of a crime, the need for a warrant evaporates once the package enters a readily mobile vehicle.<sup>350</sup>

Thus, like the premeditation-deliberation formula itself, retributivist and incapacitationist concerns can only partially explain California's decision to make drive-by shootings that result in an intentionally inflicted death first-degree murder. Only a deterrence-based theory, centered around the difficulties of detecting, apprehending, and punishing the perpetrators of such crimes, can fill in the gaps and better explain why this particular form of murder has been singled out for harsher treatment.

#### CONCLUSION

The premeditation-deliberation formula is like a two-legged stool, uneasily supported by retributivist and incapacitationist rationales. When understood solely with regard to the culpability and dangerousness of the premeditated and deliberate killer, the stool is shaky. A third rationale, deterrence, is necessary for a complete

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346. This is not to say that bystanders would be *willing* to do so, but only that they would be *able* to do so. See, e.g., Jamie Masten, Note, "Ain't No Snitches Ridin' wit' Us": *How Deception in the Fourth Amendment Triggered the Stop Snitching Movement*, 70 OHIO ST. L.J. 705, 705–06 (2009) (describing the "Stop Snitching" movement as having "gathered a whole generation of teens and young adults who are refusing to talk to the police—even when they are innocent witnesses to violent crime").

347. See Hutson et al., *supra* note 337, at 326 ("Drive-by shootings usually occurred at night, when it was difficult to identify automobiles, license plates, and faces, thus lessening the possibility of apprehension."); see also DEDEL, *supra* note 334, at 7 ("Many drive-by shootings occur under the cover of darkness, either to help the shooters avoid detection or because the precipitating events occur at night."); THE VIOLENCE POLICY CENTER, DRIVE-BY AMERICA 2, 7 (2007) (estimating that close to three-quarters of drive-by shootings over a six-month period took place between 7 p.m. and 7 a.m.).

348. See DEDEL, *supra* note 334, at 2 ("Using a vehicle allows the shooter to approach the intended target without being noticed and then to speed away before anyone reacts.").

349. See Cohen, *supra* note 87, at 359 n.4 ("[I]t seems to me appropriate . . . to say that shooting from a car merits special harsh treatment, perhaps because of . . . the difficulty of apprehending drive-by killers . . .").

350. See *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment).

understanding of the doctrine. A deterrence-based rationale, focused on the diminished certainty and swiftness of punishment when killers plan out their crimes, proves a good fit for the premeditation-deliberation formula. When a killer plans out his crime, as when he decides to kill by poison or by lying in wait, he significantly increases the probability that he will evade, or at least delay, detection, apprehension, and punishment. Thus, classic deterrence theory tells us, punishment severity must be enhanced to counterbalance this effect.

Whether this explanation for the premeditation-deliberation formula provides a justification for its continued use is a separate question. But there is little doubt that those directly and indirectly responsible for the 1794 Statute that first articulated the formula had deterrence foremost in their minds. In attempting to understand the formula, we ignore classic deterrence theory at our peril.