IMPULSIVE INTENT/IMPASSIONED DESIGN

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I. INTRODUCTION

This brief essay addresses two aspects of the doctrinal area of intentional homicide: (a) the still struggling efforts of courts to define premeditation, and (b) the absence in our jurisprudence of any robust understanding of the homicidal mental state of unpremeditated intent to kill.

I will artificially isolate intentional murder from the array of homicide doctrines with which it is closely allied: eligibility for the death penalty; unintentional murder in the form of felony murder; second-degree unintentional murder under the rubrics of "extreme indifference" or "depraved heart" homicide; and voluntary manslaughter, where an intentional murder is mitigated under a "heat of passion" formula. Nevertheless, these doctrines will unavoidably sneak back into my observations in a few places.

My chief and undramatic conclusion will be that I agree with the old and persistent argument that the premeditation doctrine—still operative in a majority of the states—deserves to disappear.[1] The only benefit we have obtained from the survival of the doctrine has been a thriving literary genre of *tours de force* consisting of verbal dexterity far exceeding any comprehensible moral or psychological content. I also conclude that beyond the obvious advantage of abolition—that it will eliminate a confusing rule that leads to irrationally disparate sentences—it might make the challenge of defining

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1. Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, 75 LAW & CONTEMP. PROBS., no. 2, 2012, at 83, 84 n.3 (compiling a list of twenty-nine state murder statutes that employ a premeditation or deliberation formula).

intentional murder more interesting and useful and will enhance our legal pedagogy. I will also suggest two caveats regarding abolition. First, the doctrine could arguably be salvaged, or its downside reduced, by clarifying a moral distinction between two kinds of intentional murderers—but one very difficult to render in jury instructions. Second, even if we abolish the doctrine, the underlying intuition that premeditation meaningfully distinguishes among intentional murderers will remain in the minds of many state officials, and the discretion to act on that intuition will still show up somewhere in the criminal justice system.

II. BACKGROUND

The old reporters are full of early twentieth-century cases parsing the nuances of premeditation. *Watson v. United States* offers an example of the typical venerable verbiage:

> To prove premeditation, the government must show that a defendant gave "thought before acting to the idea of taking a human life and [reached] a definite decision to kill." Deliberation is proved by demonstrating that the accused acted with "consideration and reflection upon the preconceived design to kill; turning it over in the mind, giving it second thought." Although no specific amount of time is necessary to demonstrate premeditation and deliberation, the evidence must demonstrate that the accused did not kill impulsively, in the heat of passion, or in an orgy of frenzied activity.[2]

This typical formulation leaves unresolved questions about the relationship between what we can call the quantitative and qualitative aspects of premeditation to courts and juries:

> "[S]ome appreciable time must elapse" between the formation of design to kill and actual execution of the design to establish that reflection and consideration amounted to deliberation. The time need not be long. Thus, the government is not required to show that there was a "lapse of days or hours, or even minutes," and the time involved may be as brief as a few seconds. Although reflection and consideration, and not lapse of time, are determinative of deliberation, "[l]apse of time is important because of the opportunity which it affords for deliberation." The evidence of premeditation and deliberation must be sufficient to persuade, not *compel*, a reasonable juror to a finding of guilty.[3]

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2. Watson v. United States, 501 A.2d 791, 793 (D.C. 1985) (alteration in original) (citations omitted).

3. *Id.* (alteration in original) (citations omitted) (quoting Bostic v. United States, 94 F.2d 636, 639 (D.C. Cir. 1937)).

Some courts have acknowledged that qualitative aspects of the intellectual and emotional features of the killing may moot the issue of setting a minimum duration.[4] For example, the D.C. Circuit in *Austin v. United States* explained:

> In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion. . . . A sudden passion, like lust, rage, or jealousy, may spawn an impulsive intent yet persist long enough and in such a way as to permit that intent to become the subject of a further reflection and weighing of consequences and hence to take on the character of a murder executed without compunction and "in cold blood". The term "in cold blood" does not necessarily mean the assassin lying in wait, or the kind of murder brilliantly depicted by Truman Capote in *In Cold Blood* (1965). Thus the common understanding might find both passion and cold blood in the husband who surprises his wife in adultery, leaves the house to buy a gun at a sporting goods store, and returns for a deadly sequel. . . . [A] homicide conceived in passion constitutes murder in the first degree only if the jury is convinced beyond a reasonable doubt that there was an appreciable time after the design was conceived and that in this interval there was a further thought, and a turning over in the mind—and not a mere persistence of the initial impulse of passion.[5]

On the other hand, some courts have recognized that the limits and uncertainties of the quantitative and qualitative features mean that appellate review of premeditation must turn on sufficiency-of-evidence questions.[6] Therefore, both juries and trial courts need some guidance about the types of evidence that can somehow establish the presence of the required definitional features of premeditation. One famous case, *People v. Anderson*, is the source of the conventional wisdom on the subject:

> The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as "planning" activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of

4. *See generally* Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967) (discussing how persistent passion can affect the issue of appreciable time), *overruled by* United States v. Foster, 783 F.2d 1082 (D.C. Cir. 1986) (en banc).

5. *Id.* at 137.

6. *See generally* People v. Anderson, 447 P.2d 942 (Cal. 1968) (en banc) (analyzing the type of evidence sufficient to sustain a finding of premeditation and deliberation).

> considerations" rather than "mere unconsidered or rash impulse hastily executed"; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).[7]

But throughout the last century, the efforts of judges to capture the elusive sentiment behind the notion that the premeditated murderer was more culpable than the merely intentional murderer became a virtual word factory of hyper-nuanced formulations. One fascinating, older example is *Commonwealth v. Scott*.[8] In that case, a police officer asked Scott if he had any moonshine, and Scott responded by saying, "This is what I have for you," and shot the officer dead.[9] Conceding that before this encounter the defendant did not bear the officer any ill will, the court held that "it was for the jury to say . . . whether during that brief conversation, defendant formed in his mind the conscious purpose of taking life and selected the instrument of death . . . . It is the *fully formed purpose*, not the time, which constitutes the higher degree . . . ."[10] Somehow the phrase "fully formed" aimed at suggesting a sense of resolve or singularity of goal, regardless of whether it involved anything that we might call premeditation, and even if the full formation could be virtually instantaneous because the situation presented the defendant with so clear a motive.[11] Sixty years later, courts were invoking and further parsing that highly interesting phrase: One court said that the fully formed purpose "may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act," thus apparently adding back the time element, but only by slicing time so finely that "a moment" could satisfy the quantity requirement if something qualitatively sufficient happened in that moment.[12]

It is not as if we have not been warned about the arguable incoherence of these formulations. Although they have been reduced almost to a quaint, adage-like status, it is worth referring to Cardozo's famous lament and to its restatement in the famous Michael and Wechsler essay, both of which led to the decision by the drafters of the Model Penal Code (MPC) to abolish the premeditation/intent distinction in favor of a single degree of murder, with

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7. *Id.* at 949 (citations omitted).

8. *See* Commonwealth v. Scott, 130 A. 317, 319 (Pa. 1925) (concluding that to constitute murder in the first degree "there must have appeared a well-defined intent to take life").

9. *Id.* at 318–19 (emphasis added).

10. *Id.* at 319 (emphasis added).

11. *Id.* (holding that a fully formed purpose, not time, constitutes murder of the higher degree).

12. Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986) (per curiam), *receded from by* Evans v. State, 838 So. 2d 1090 (Fla. 2002) (per curiam).

aggravation matters left to the special rules for the death penalty.[13] Cardozo observed:

> There can be no intent unless there is a choice, yet . . . the choice without more is enough to justify the inference that the intent was deliberate and premeditated. The presence of a sudden impulse is said to mark the dividing line, but how can an impulse be anything but sudden when the time for its formation is measured by the lapse of seconds? Yet the decisions are to the effect that seconds may be enough. . . . The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.[14]

Jerome Michael and Herbert Wechsler observed that if we eliminate from premeditation the requirements that the killing be done calmly and some appreciable time before the killing, we are left with

> nothing precise as the crucial state of mind but intention to kill. Such a result creates peculiar difficulty in a jurisdiction like New York where "design" to kill is, by statute, the distinguishing feature of second-degree murder. The trial judge must solemnly distinguish in his charge between the two degrees in terms which frequently render them quite indistinguishable . . . .[15]

Hence, the premise of the homicide law in the MPC was that intentional (i.e., unjustified and unexcused) killing should be a singular category of murder, and the key consequence of the traditional degree distinction—eligibility for the death penalty—should turn on the more complex and calibrated aggravating-and-mitigating-circumstance structure of modern capital punishment law.[16] The drafters commented:

> [W]e think it plain that the case for a mitigated sentence does not depend on a distinction between impulse and deliberation; the very fact of long internal struggle may be evidence that the actor's homicidal impulse was deeply aberrational, far more the product of extraordinary circumstances than a true reflection of the actor's normal character, as, for example, in the case of mercy killings, suicide pacts, many infanticides and cases where a

13. *See* MODEL PENAL CODE § 201.6 (Tentative Draft No. 9, 1959).

14. Benjamin N. Cardozo, Address at The New York Academy of Medicine: What Medicine Can Do for Law, *in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 70, 99–101 (4th ed. 1938).

15. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 708–09 (1937) (footnotes omitted).

16. *See supra* note 13 and accompanying text.

> provocation gains in its explosive power as the actor broods about his injury.[17]

III. THE DOCTRINE PERSISTS

Ironically, while the new death-penalty structure advocated by the MPC drafters became the constitutional law of the land, the old premeditation doctrine, with all the moral and literary artistry it generates, has persisted.[18]

But before returning to the caselaw, let me pose this question: What is the actual measurable significance of the premeditation formula? We can respond to this question with a virtually whimsical statistical exercise because the paucity of reliable data and complexity of the variables make any formal measurement so hopeless as to liberate us from any obligation of rigor. First, let us put aside the role of premeditation as a predicate for a death sentence. Death sentences are rare and getting rarer in the United States, so the major effect of premeditation is to lengthen a prison sentence.[19] How much does it lengthen a prison sentence? Even in formal legal terms, the variations among the states are so wide, and their contingency on judicial discretion so large and hard to capture, that any measurement is wildly speculative. But for convenience, let me work with California. Recent research shows that there are 16,953 life prisoners in California who have been convicted of noncapital murder and who are serving life sentences with the possibility of parole.[20] Of these, roughly half, 8,299, were convicted of first-degree murder.[21] As a rough measure, the sentence for second-degree murder is fifteen years to life, and for first-degree murder it is twenty-five years to life.[22] We can use that ten-year difference as a guide, even though it may bear only a very weak relationship to the actual sentences these murderers receive, given all sorts of enhancements, multiple charges, and so on, and in any event, because of parole, the length of a murderer's sentence bears only a weak relationship to the actual time they will serve. Even worse, the classification of first- and second-degree murders in these California numbers does not tell us whether the murder charges were

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17. MODEL PENAL CODE § 201.6 cmt. at 70.

18. *See* Gregg v. Georgia, 428 U.S. 153, 179 (1976).

19. *See NEW RESOURCES: Latest "Death Row, USA" Now Available*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/node/5708 (last visited Oct. 23, 2014) (discussing a new report documenting the diminishing rate of death sentences in the United States); *see also* RICHARD C. DIETER, A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY, DEATH PENALTY INFO. CENTER 15 (June 2007), *available at* http://www.deathpenaltyinfo.org/CoC.pdf (reporting Americans' diminishing interest in sustaining the death penalty).

20. Robert Weisberg et al., *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STANFORD CRIM. JUST. CENTER 15 (Sept. 2011), http://blogs.law.stanford.edu/newsfeed/wp-content/uploads/sites/15/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf [hereinafter *Life in Limbo*].

21. *Id.*

22. *See id.*

based on premeditated intentional killing or on the felony-murder rule.[23] So liberated into empirical whimsy, we can assay that if most of the first-degree murders were premeditated, then a theoretical number of about 80,000 represents the number of extra human years of punishment due to premeditation. If we then assume that California has about 10% of the United States population, we multiply by ten, but then divide by two to reflect that only about half the states have premeditation formulas operating like California's, and if we simply finesse all the legal differences in the sentencing laws of these states, we get to 400,000 human years of punishment. Obviously, the purpose of this exercise is just to offer some crude, intuitive sense of what is existentially at stake in the survival of premeditation.

Returning to the caselaw, the examples of the continuing vexations of the premeditation doctrine are legion, but an intriguing example arose in the transition period to the new death-penalty laws. In *Baxter v. State*, the defendant was apparently quite overwrought over a mistaken—and utterly unreasonable—perception that his wife was adulterous.[24] Perhaps confusing the question of whether the killing should be mitigated to manslaughter with the question of whether it could be aggravated to first-degree murder, the court said:

> Even if he had at times worked himself into a passion because of suspicion, wholly unfounded under this record, he had ample time for his passion to subside.
>
> . . . .
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> Furthermore, the law is well settled that if premeditation exists, it is immaterial that the defendant was in a passion when that design was executed.[25]

First-degree murder can exist because of the extended duration of the defendant's manifest desire to kill, even if the effect of that duration is that the defendant's blood becomes progressively hotter. Thus, a killer who might legitimately be denied mitigation of the murder to manslaughter because of the "cooling time" component of the heat-of-passion doctrine becomes a premeditator.[26] The case is notable precisely because in trying to distinguish two levels of murder, the court is unable to avoid gliding into factual analysis and doctrinal verbiage that is more relevant to the mitigation-to-manslaughter question.[27] And, as I will suggest below, this perhaps inadvertent shift in the

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23. *Compare* CAL. PENAL CODE § 189 (West 2014) (stating that felony murder can be first-degree murder), *and* People v. Patterson, 778 P.2d 549, 553 (Cal. 1989) (en banc) (discussing the common-law rule making felony murder second-degree murder), *with* CAL. PENAL CODE § 188 (West 2014) (stating that unintentional, "abandoned and malignant heart" murder is second-degree murder).

24. Baxter v. State, 503 S.W.2d 226, 228 (Tenn. Crim. App. 1973).

25. *Id.* at 229.

26. *Id.* (explaining that even if defendant had been in a passion, plenty of time had passed for it to subside).

27. *See id.* at 229–30.

case may tell us something useful about the meaning of second-degree intentional murder.[28]

Meanwhile, *Baxter* also produced an interesting dissent from Judge Galbreath, who sensibly demonstrated that the majority had tortured any meaning out of premeditation law:

> A rather diligent search of the compiled decisions of our Supreme Court has failed to uncover a single opinion in which a slaying prompted by the jealous passion aroused by a firm conviction on the part of a husband that another man has debauched his wife has been held to be murder in the first degree. The suppressed frustration and resentment that naturally arises in the mind of a husband whose wife has been sexually active with another man is too well known to warrant elaborate discourse. That this powerful emotion may not subside even after days of worry and mental turmoil is also recognized. Thus it sometimes occurs that after days and nights of brooding, reflection and unsuccessful efforts to overcome the violence that is locked up inside, the reason is overcome and tragedy results.
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> The fact that the defendant appeared calm to witnesses who saw him before the shooting does not dispel the fact that in all likelihood he was, and had been for days, working himself up to the ultimate frenzy of jealously that motivated his final outburst. This very appearance of calm and the effort to hide the real emotion has long been recognized as much worse than would be outbursts of vocal rage accompanied by crying and threats against the object of passion, others or himself. Shakespeare was right, as students of the emotion know, when he advised, "Give sorrow words. The grief that does not speak whispers the o'er burdened heart and bids it break."[29]

But another interesting feature of the dissent is its cautious prediction about soon-to-be changes in the death penalty and their implications for the murder doctrine.[30] Notably, the judge was writing in the period between the *Furman v. Georgia* decision that invalidated all the then-existing death-penalty laws in the nation and the *Gregg v. Georgia* decision that approved those following the MPC model.[31] Judge Galbreath's admonition to the majority underscores that forty years ago the fate of premeditation was seen by some as hinging on its relation to, and the constitutionality of, capital punishment:

> The time may soon come when all persons convicted of first degree murder will indiscriminately be put to death as the only permissible punishment if the death penalty is to conform to constitutional standards

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28. *See infra* notes 29, 42 and accompanying text.

29. *Baxter*, 503 S.W.2d at 232 (Galbreath, J., dissenting).

30. *See id.*

31. *See generally* Gregg v. Georgia, 428 U.S. 153 (1976) (holding the death penalty does not violate the Eighth and Fourteenth Amendments in all circumstances); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (holding the death penalty can constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

> discussed in *Furman v. Georgia*. If this ever happens, it is my firm conviction that no jury would ever decree death as the deserved punishment of a man who, convinced of his wife's infidelity with another man, in a torment of passion kills either the object of his love or the person he is convinced has defiled her body.[32]

Judge Galbreath was probably right that few juries would have wanted a killer like Baxter to suffer the death penalty.[33] And after the *Furman* decision rejected the old, unguided laws, two states—North Carolina and Louisiana—concluded that the constitutional solution was to eliminate jury discretion altogether.[34] Had those laws become the norm, Judge Galbreath's warning about jury nullification might indeed have proved prescient. But the Supreme Court rejected those mandatory laws, hence satisfying or alleviating the concern about the most arbitrary possible consequence of the arguably incoherent premeditation doctrine.[35] Nevertheless, under the newly approved death-penalty laws, premeditation still works as a necessary, if not quite sufficient, predicate for making the defendant legible for capital punishment; and in any event, as noted below, premeditation still has great purpose, as it always has, outside the context of the death sentence.

So to cut to the simple historical conclusion: in the 1970s it was plausible to predict that the advent of a new type of death-penalty law would render the premeditation doctrine vestigial because of its designation of narrowing factors that make a murderer eligible for the death penalty and a new concept of a penalty trial that weighs aggravating factors against mitigating factors. But it remains, and it remains important. A scan of the reporters reveals an astonishing number of appellate cases where the definition or application of premeditation remained a major issue.[36] The overwhelming majority of these cases are affirmances of first-degree convictions where the court rejected an insufficiency-of-evidence claim.[37] That result is unsurprising given the hopelessness of insufficiency claims generally, but it reminds us that we have

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32. *See Baxter*, 503 S.W.2d at 233 (Galbreath, J., dissenting) (citations omitted).

33. *See* Thomas L. Jones, *The Murder Trial of O.J. Simpson*, CRIME LIBR., http://www.crimelibrary.com/notorious_murders/famous/simpson/man_8.html (last visited Oct. 27, 2014). In the murder trial of O.J. Simpson in 1995, the prosecutor sought a first-degree premeditated murder charge, plus the special circumstance of a double killing, but only sought to use that charge to win a sentence of life without the possibility of parole. *Id.* The inference at the time was that while theoretically possible, a death-penalty charge did not fit the case, in part because it arose out of an emotionally volatile domestic dispute. *See* Seth Mydans, *Debating Death Penalty in Simpson Case*, N.Y. TIMES, July 19, 1994, at A12.

34. *But see generally* Roberts v. Louisiana, 428 U.S. 325 (1976) (holding North Carolina's mandatory death sentence for first-degree murder unconstitutional); Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting these mandatory death-penalty sentencing laws as unconstitutional).

35. *See generally Roberts*, 428 U.S. 280 (holding a mandatory death sentence unconstitutional); *Woodson*, 428 U.S. 325 (finding mandatory death-penalty sentencing unconstitutional).

36. *See* Lee R. Russ, Annotation, *Modern Status of the Rules Requiring Malice "Aforethought," "Deliberation," or "Premeditation," as Elements of Murder in the First Degree*, 18 A.L.R. 4TH 927, 961–72 (1982).

37. *Id.*

achieved so little advance in, or at least meaningful elaboration of, the definition of premeditation that defendants tend to be left with insufficiency claims instead of attacks on jury instruction elements. These cases rework the old rhetoric, and yet they more subtly negotiate the moral and psychological issues.[38] Indeed, it is ironically appropriate that Cardozo's admonition comes in a book called *Law and Literature* because premeditation has forced or invited judges to engage in fairly bizarre exercises of literary artistry.[39] I offer here a brief representative sampling.

One case re-asked the old question of whether "malice aforethought" is the same thing as premeditation.[40] In *Kazalyn v. State*, the Nevada Supreme Court had defined premeditation as "a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing," and then stated, "If the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation . . . it is willful, deliberate and premeditated murder."[41] But eight years later, in *Byford v. State*, the court changed course and concluded that *Kazalyn* improperly collapsed willfulness and deliberation into the definition of premeditation, which raised the risk that a jury's finding of premeditation would automatically create a finding of the other necessary elements and blurred the distinction between first- and second-degree murder.[42] The court established a new jury instruction, including this language:

> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.
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> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.[43]

State v. Anderson presents a twist.[44] There, the court's instruction to the jury included the word "considered," based on a state statute that stated that premeditation "means to consider, plan or prepare for, or determine to commit."[45] Anderson argued on appeal that the word considered "was confusing to the jury and misleading in determining whether premeditated murder occurred because 'considered' implies that an actual decision did not

38. *See id.*

39. *See* Cardozo, *supra* note 14, at 70.

40. Kazalyn v. State, 825 P.2d 578, 583 (Nev. 1992) (per curiam), *receded from by* Watkins v. Skolnik, No. 56979, (Nev. Nov. 18, 2011).

41. *Id.*

42. Byford v. State, 994 P.2d 700, 713 (Nev. 2000) (en banc).

43. *Id.* at 714.

44. State v. Anderson, 789 N.W.2d 227, 240 (Minn. 2010).

45. *Id.* (quoting MINN. STAT. ANN. § 609.18 (West 2008)) (internal quotation marks omitted).

have to take place and that premeditation could occur prior to intent."[46] Indeed, he contended that the jury's confusion was illustrated by this question the jurors sent to the judge from the jury room:

> Page 7 of our instructions states "premeditation" means that the defendant considered, planned, prepared for, or determined to commit the act before the defendant committed it. Do all of the underlined items have to be true to determine premeditation or can one of these items determine it? For example, if the defendant "considered" committing the act is this considered premeditation?[47]

The jurors' response is fascinating because, having received judicial phrasing that analyzed the defendant's putative thinking process in highly subtle and calibrated ways, they requested precision that the instruction purported to offer, but nevertheless did not deliver.[48] Apparently the trial judge refused to address this question and told the court just to follow the wording already given.[49] The state supreme court found no serious flaw in the instruction:

> A district court has discretion to decide whether to give additional instructions in response to a jury's question on any point of law, and may expand previous instructions, reread the instructions, or give no response. . . . Moreover, the jury's question on whether one of the terms sufficed, or whether all had to be present, was a grammatical question, not one of confusion over the meaning of the term "considered." Contrary to Anderson's argument, we conclude that "considered" does not lead a jury to believe that an actual decision to kill beforehand need not take place, and we conclude that the court was well within its discretion by simply rereading the jury instruction on premeditation in answer to the jury's question.[50]

One can accuse the court of condescendingly dismissing a good question by treating it as merely grammatical and without substance. But one can also credit the court with recognizing a real problem here: the instruction would permit a finding of premeditation where the mere question of whether it was the right or wrong thing to kill crossed the defendant's mind—or even whether it was a self-interested thing to do—and yet nothing further that rose to the level of thoughtfulness occurred. And yet even if the latter were true, one could accept, if not respect, the appellate and trial courts' decisions that the legal system had "hit the wall" in terms of what could be extracted from premeditation beyond a mandate to juries to use their moral intuition about culpability.

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46. *Id.*

47. *Id.* (emphasis omitted) (quoting the jury's question).

48. *See id.* at 240–41.

49. *Id.* at 241 ("[T]he district court did not abuse its discretion in declining to give Anderson's requested information.").

50. *Id.* at 240.

IV. THE CURRENT STATE OF THE ART OF DESCRIBING PREMEDITATION

A more thorough sampling of the last few decades of decisions reveals hundreds of cases where courts continue to struggle with the premeditation doctrine.[51] Almost a century after Cardozo's warning, those struggles produce further efforts at linguistic or conceptual artistry—or, to some, further examples of feckless verbal confusion. Premeditation and deliberation are said to characterize a thought process after enough time to give the killer a "second look" that is "undisturbed by hot blood."[52] A killer has premeditated if he "distinctly and rationally formed a design to kill, and did not act simply from a rash unconsidered impulse."[53] Premeditation means "thought beforehand for some length of time, however short," and deliberation means "an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause."[54] If premeditation and deliberation are otherwise established, it is immaterial that the defendant "was in a passion or excited when the design was carried into effect."[55] Premeditation is "an intent that is thought out or considered before commission of the fatal act, rather than some undefined condition of the mind or heart."[56] It is a feature of premeditation that "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."[57] Premeditation is a "successive thought of the mind."[58] For premeditation to be established, there is no need for the killer to "have a rational motive for killing. Anger at the way the victim talked to him or any motive, shallow and distorted but, to the perpetrator, genuine may be sufficient."[59] Premeditation entails "thinking of killing the victim before doing so, but not necessarily a matter of long-range planning."[60] In first-degree murder cases, we may see "[f]irst the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution."[61]

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51. *See supra* Part II.

52. People v. Gonzalez, 444 N.W.2d 228, 231 (Mich. Ct. App. 1989) (per curiam).

53. Mulder v. State, 992 P.2d 845, 854 (Nev. 2000) (en banc) (per curiam).

54. State v. Lowery, 309 S.E.2d 232, 237 (N.C. 1983).

55. State v. Blue, 699 S.E.2d 661, 665 (N.C. Ct. App. 2010) (internal quotation marks omitted).

56. Hogan v. State, 2006 OK CR 27, 139 P.3d 907, 924.

57. People v. Hargrove, 116 Cal. Rptr. 2d 814, 823 (Cal. Ct. App. 2002) (quoting People v. Thomas, 25 Cal. 2d 880, 900 (1945)) (depublished).

58. People v. San Nicolas, 101 P.3d 509, 539 (Cal. 2004) (alteration in original) (quoting People v. Sanchez, 24 Cal. 17, 30 (1864)) (internal quotation marks omitted).

59. People v. Lunafelix, 214 Cal. Rptr. 33, 36 (Cal. Ct. App. 1985) (citations omitted) (internal quotation marks omitted).

60. State v. Bedford, 7 P.3d 224, 233 (Kan. 2000) (citing State v. Rice, 932 P.2d 981 (Kan. 1997)), *disapproved of by* State v. Marsh, 102 P.3d 445 (Kan. 2004).

61. Commonwealth v. Sleeper, 760 N.E.2d 693, 707 (Mass. 2002) (alteration in original) (quoting Commonwealth v. Tucker, 76 N.E. 127, 141 (Mass. 1905)).

But let me close this legal potpourri with an Arizona story that could serve as a *reductio ad absurdum*, which finds a narrative in the 2003 case of *State v. Thompson*.[62] The long-standing Arizona statute was innocuous enough, defining first-degree murder simply in terms of the presence of premeditation.[63] For most of the state's history, that term had been construed to mean "reflection,"[64] meaning "more . . . than is involved in the mere formation of the specific intent to kill."[65] In 1978, the legislature altered the definition so that premeditation was established if

> the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.[66]

But the state supreme court then became concerned that juries would infer that the mere passage of time, making reflection possible, was sufficient as a proxy for actual reflection.[67] The lower courts continued to be divided and confused over this issue.[68] And then in 1998, the legislature stepped in again so that the new statute reads as follows:

> "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. *Proof of actual reflection is not required*, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.[69]

In the face of this new statute, the defendant argued that the additional phrase abolished any discernible distinction between first- and second-degree murder, and thus rendered the statute unconstitutional.[70] The *Thompson* court then recognized three possible approaches to this question:

> The question before us is whether this definition of premeditation abolishes the requirement of actual reflection altogether, whether it eliminates the requirement of direct proof of actual reflection, or whether it substitutes for the necessary proof of actual reflection the mere passage of enough time to permit reflection. The State asserts the third interpretation, that the legislature intended to relieve the State of the burden of proving a defendant's

62. *See generally* State v. Thompson, 65 P.3d 420 (Ariz. 2003) (en banc) (discussing premeditation).
63. *Id.* at 424.
64. *See* Macias v. State, 283 P. 711, 715 (Ariz. 1929).
65. State v. Magby, 554 P.2d 1272, 1279 (Ariz. 1976) (en banc).
66. ARIZ. REV. STAT. ANN. § 13-1101(1) (1978).
67. *See, e.g.*, *Thompson*, 65 P.3d at 425; State v. Guerra, 778 P.2d 1185, 1190 (Ariz. 1989) (en banc).
68. *See Thompson*, 65 P.3d at 426.
69. ARIZ. REV. STAT. ANN. § 13-1101(1) (2010) (emphasis added).
70. *Thompson*, 65 P.3d at 423–24.

> hidden thought processes, and that this definition of premeditation establishes that the passage of time may serve as a proxy for reflection.[71]

Ultimately, and, it seems, very ambivalently, the court chose the second interpretation:

> We conclude . . . that if the only difference between first and second degree murder is the mere passage of time, and that length of time can be "as instantaneous as successive thoughts of the mind," then there is no meaningful distinction between first and second degree murder.
>
> . . . Recognizing that direct proof of a defendant's intent to kill often does not exist, the legislature sought to relieve the state of the often impossible burden of proving premeditation through direct evidence. But by this act the legislature did not intend to eliminate the requirement of reflection altogether or to allow the state to substitute the mere passing of time for the element of premeditation. While the phrase "proof of actual reflection is not required" can be interpreted in a way that relieves the state of the burden of proving reflection, such an interpretation would not pass constitutional scrutiny, and the legislature could not have intended such a result. Accordingly, we conclude that the legislature intended to relieve the state of the burden of proving a defendant's thought processes by direct evidence. It intended for premeditation, and the reflection that it requires, to mean more than the mere passage of time.[72]

The court acknowledged that:

> Part of the confusion, we believe, stems from the unfortunate use of the adjective "actual" to describe reflection. It is unquestioned that the state must prove the defendant's "actual" intent or knowledge in a first degree murder case, yet there is no suggestion—nor could one reasonably be made—that the state must prove with direct evidence the element of intent or knowledge. We allow the state to satisfy its burden with circumstantial evidence of intent or knowledge. The state's burden is the same when establishing the element of premeditation.[73]

But as if somewhat worried that in saving the statute from unconstitutionality it had engaged in a disingenuous rationalization, the court added:

> We also discourage the use of the phrase "as instantaneous as successive thoughts of the mind." We continue to be concerned that juries could be misled by instructions that needlessly emphasize the rapidity with which reflection may occur. Accordingly, trial judges should, in future cases, instruct juries as follows:

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71. *Id.* at 424.
72. *Id.* at 427 (footnote omitted).
73. *Id.* n.7.

> "Premeditation" means that the defendant intended to kill another human being [knew he/she would kill another human being], and that after forming that intent [knowledge], reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.
>
> . . . .
>
> This instruction does not mean that the state must rely on direct evidence of premeditation; as we have noted, such evidence is rarely available. Nor does this instruction mean that the state cannot rely on the passage of time between the formation of intent and the act of killing as a fact tending to show premeditation. This instruction merely clarifies that the state may not use the passage of time as a proxy for premeditation. The state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time *is* premeditation.[74]

Finally, although troubled by the language in the instruction that the trial judge had admittedly taken straight from the statute, the court was willing to uphold the conviction.[75] It did so not only because any error was harmless in light of the overwhelming evidence of true planning of the killing, but also because "the jury was not instructed that actual reflection can occur as instantaneously as successive thoughts of the mind."[76]

How do we assess this Arizona story and its purported resolution in *Thompson*? We are in a quandary similar to the one described above in regard to the Minnesota *Anderson* case.[77] It is in the nature of the challenges courts face with the mysteries of premeditation that each of the following views is possible. First, the court tells the jury that the key issue is whether the defendant reflected on his decision to kill. The court, therefore, usefully directs the jury to the most morally salient criterion and properly tells the jury that while specific duration is by itself insufficient, the jury can draw on any available facts to establish reflection. Second, the previous interpretation is correct, but it irrationally excludes from the category of premeditation the straight-line killer who forms and sustains a plan and never engages in inner reflective dialogue on the decision to kill. Third, in its tortured and troubled effort to salvage the constitutionality of the statute, the court is leaving juries in hopeless confusion, burdened by unadministrable verbal nuances. Finally, the court's opinion is a wise and elegant achievement in aligning legislative intent, constitutional norms, and institutional practicalities.

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74. *Id.* at 428–29 (alteration in original) (emphasis added).
75. *See id.* at 429.
76. *Id.*
77. *See supra* text accompanying notes 44–50.

V. SO WHAT IN THE WORLD IS SECOND-DEGREE INTENTIONAL MURDER?

Some years ago I was invited to comment on a very intriguing paper by Professor Reid Fontaine, titled *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*.[78] As the title suggests, the subject was the classic excuse/justification dilemma, but in my response, I took the occasion to offer a modest observation about an oddity in our jurisprudence of homicide.[79] First, we often think of intentional homicide as the core and most intuitively plausible form of homicide. In degree-distinguishing jurisdictions, we therefore start out with second-degree murder—the default category. We can aggravate it to first-degree murder if premeditation is present. We can mitigate it to voluntary manslaughter if we find adequate provocation or perhaps imperfect self-defense, or negate it altogether if we find a full affirmative defense. The default category of intentional murder is the clearest meaning of the vague term "malice" or "malice aforethought." Rationalizations of killings in the course of a felony or unintentional, grossly reckless or depraved-heart murder are based on some rough equivalence to the default category.

But almost all of the court doctrines and commentary relevant to intentional homicide are about when it is not second-degree intentional murder.[80] A large portion of the doctrines and commentary are about how we should aggravate to premeditation.[81] Perhaps an even larger part is about when we should mitigate to some version of voluntary manslaughter.[82] All of this leaves our core category as a negative category. We rely, often implicitly, on a simple understanding of intent—whether intuitive or perhaps just from borrowing the not very illuminating language of the MPC in defining "purposely"—whether the defendant has the "conscious object" to kill. But then we are left with the idea that second-degree intentional murder is intent that is not premeditated or mitigated, and I suggested in my response to Professor Fontaine's article that this is an unsatisfying gap.[83]

To follow up on this observation, I recently undertook an exercise that, while it sounds tedious, proved interesting—a review of the case selection in most of the substantive criminal law casebooks. Those books that have major sections on homicide obviously run through the degrees of murder and treat how premeditation aggravates, and certain factors mitigate, intentional murder. But it is hard to find a case anywhere about the positive meaning of nonpremeditated intent. My own casebook covers this category simply with

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78. *See generally* Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27 (2009) (concluding that heat of passion should be analyzed as an excuse rather than a justification).

79. *See* Robert Weisberg, *The Values of Interdisciplinarity in Homicide Law Reform*, 43 U. MICH. J.L. REFORM 53, 57–58 (2009) [hereinafter *The Values of Interdisciplinarity*].

80. *See id.* at 58–63; *infra* notes 83–84 and accompanying text.

81. *See infra* note 86 and accompanying text.

82. *See infra* note 87 and accompanying text.

83. *See The Values of Interdisciplinarity*, *supra* note 79, at 61–63.

Francis v. Franklin, which is really a constitutional evidence case about presumptions—in effect, a case that assumes the meaning of intent and discusses how to *prove* intent.[84] A survey of the homicide chapters in fifteen other casebooks reveals that virtually none offer what might be called a stand-alone second-degree murder case.[85] While it is hard to sort out the variables when the data set is a group of casebooks with principal cases, notes, and explanatory text, the great majority demonstrated the distinction between first- and second-degree murder solely in terms of the presence or absence of premeditation.[86] Any further parsing of the meaning of second-degree murder involves the heat of passion defense, which could mitigate the murder charge to manslaughter. In short, this survey leads us to conclude that second-degree intentional murder consists, however clumsy this sounds, of unpremeditated murder that is done without passion or in the presence of unreasonable passion. A few books include a case that indirectly, and murkily, suggests that

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84. *See* JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 341–46 (7th ed. 2012) (discussing Francis v. Franklin, 471 U.S. 307, 316–18 (1985) (holding a jury instruction unconstitutional because it told the jury to presume that a person intends "the natural and probable consequences of his acts")).

85. *See, e.g.*, JOHN S. BAKER, JR. ET AL., HALL'S CRIMINAL LAW: CASES AND MATERIALS 231–353 (5th ed. 1993); RICHARD J. BONNIE ET AL., CRIMINAL LAW 856–980 (Thomson Reuters/Foundation Press, 3d ed. 2010) (1997); DAVID CRUMP ET AL., CRIMINAL LAW: CASES, MATERIALS, AND LAWYERING STRATEGIES 39–136 (2d ed. 2010); JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 235–378 (Thomson Reuters, 6th ed. 2012) (1999); MARTIN R. GARDNER & RICHARD G. SINGER, CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW 517–668 (4th ed. 2004); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 419–523 (9th ed. 2012); WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 345–477 (Thomson Reuters, 5th ed. 2011) (1978); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 345–477 (2005); ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS 15–153 (3d ed. 2009); PAUL MARCUS ET AL., CRIMINAL LAW 403–565 (7th ed. 2012); ANDRE A. MOENSSENS, CRIMINAL LAW: CASES AND COMMENTS 394–501 (Thomson/Foundation Press, 8th ed. 2008) (1973); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 171–273 (3d ed. 2012); STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW: CASES AND MATERIALS 257–404 (3d ed. 2008); RUSSELL L. WEAVER ET AL., CRIMINAL LAW: A CONTEMPORARY APPROACH 355–419 (4th ed. 2011); LLOYD L. WEINREB, CRIMINAL LAW: CASES, COMMENT, QUESTIONS 1–384 (7th ed. 2003).

86. *Accord* CRUMP ET AL., *supra* note 85, at 44–48; WEAVER ET AL., *supra* note 85, at 365; *see, e.g.*, BONNIE ET AL., *supra* note 85, at 859–74 (discussing State v. Brown, 836 S.W.2d 530, 537–43 (Tenn. 1992) (rejecting the idea that premeditation can occur in the "twinkling of an eye")); MOENSSENS, *supra* note 85, at 422–41 (discussing State v. Guthrie, 461 S.E.2d 163, 181–83 (W. Va. 1995) (rejecting the "twinkling of an eye premise") and Midgett v. State, 729 S.W.2d 410, 412–15 (Ark. 1987) (rejecting the "twinkling of an eye premise"), *superseded by statute*, ARK. CODE ANN. § 5-2-202 (West 2014), *as recognized in* Byrd v. State, 992 S.W.2d 759 (Ark. 1999)); *see also* KADISH ET AL., *supra* note 85, at 427–32 (using Commonwealth v. Carroll, 194 A.2d 911, 915–18 (Pa. 1963) (holding that even if the premeditation or deliberation occurred right at the time of murder, the jury should still consider the full range of evidence, including the defendant's additional conduct before, after, and during the murder, in coming to a proper first-degree conviction)); GARDNER & SINGER, *supra* note 85, at 549–55 (discussing State v. Bingham, 719 P.2d 109, 112–14 (Wash. 1986) (en banc) (illustrating that even when the duration factor is very evident, the absence of deliberation may set the cap at second-degree intentional murder)); LOEWY, *supra* note 85, at 20; WEINREB, *supra* note 85, at 124–31 (discussing People v. Wolff, 394 P.2d 959, 975–77 (Cal. 1964) (en banc) (holding that mental disability, in the form of what we might think of as "diminished capacity," might negate proof of premeditation, hence allowing for the possibility of a demonstrably mentally afflicted, intentional murderer), *superseded by statute*, CAL. PENAL CODE § 198 (West 2014), *as recognized in* People v. Wolff, 774 P.2d 698 (Cal. 1989) (en banc)).

second-degree intentional murder has something to do with provoked passion, because that is the thing the defendant bears the burden of showing to mitigate a murder down from premeditation.[87] The closest thing in any of the casebooks to a decision that gives affirmative doctrine of second-degree intentional murder is a case that replaces intentional murder with depraved-heart murder and permits a jury to convict without choosing between the two—a notion to which I refer below.[88]

The law can get by—and has managed to do so—without putting any richer content into the second-degree intentional murder mental state analysis, but an effort to give it some greater content might inform decisions about punishment. This effort might also enhance our teaching. Discussions of such mental states as recklessness and negligence often go beyond the formal MPC-style definitions to probe their psychological and moral indicia or implications, and of course the same is often true when we teach premeditation. Yet when it comes to the core category of intentional murder, students are given no material with which to appreciate and probe the emotional and mental processes that mark someone as a murderer.[89] And of course beyond pedagogic value, an enhanced effort to elaborate on these components of unpremeditated, intentional murder might lead to some legislative reform, most obviously where a jurisdiction asks whether to retain the premeditation/intent—and hence first/second-degree—distinction.

One iconic statement about murder law helps us, albeit indirectly, start to fill the content gap. In his pre-Cardozo denunciation of the premeditation doctrine, Sir James Stephen famously said:

> 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. The following cases appear to me to set this in a clear light. 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. A man makes advances to a girl who repels him. He deliberately, but instantly, cuts her throat. 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

87. *See, e.g.*, KADISH ET AL., *supra* note 85, at 437–52 (discussing Girouard v. State, 583 A.2d 718, 721–23 (Md. 1991) (confirming that second-degree intentional murder can really mean only the default space between first-degree murder, on which the prosecution bears the burden of proving premeditation, and manslaughter, requiring the defendant to bear some burden to prove mitigation)); WEINREB, *supra* note 85, at 72–92.

88. *See, e.g.*, State v. Standiford, 769 P.2d 254, 260–64 (Utah 1988); BAKER, JR. ET AL., *supra* note 85, at 276–80; *infra* note 128.

89. *See The Values of Interdisciplinarity*, *supra* note 79, at 58.

> represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.[90]

Thus, Stephen informs us that a second-degree intentional murder can be: (1) largely unmotivated except by a sudden strong desire to experience killing when an opportunity arises; (2) motivated by some event that produces what we might subjectively call an emotional reaction that is psychologically comprehensible but cannot pass any test of reasonableness, and hence can be no less than voluntary manslaughter, but is in some sense not even honest and hence does not deserve any mitigation to manslaughter; or (3) an unplanned, instrumental decision to kill, as where a thief or burglar encounters an unexpected witness.[91]

The first of these types is the most chilling. This figure exhibits what Coleridge famously called the "motiveless Malignity" of Shakespeare's Iago.[92] But I suggest that this frightening character is something of a straw man in Stephen's enumeration because it probably describes a minuscule number of intentional, unpremeditated killings. The great majority of these are motivated killings that lack premeditation.[93] The motives take the forms of the second and third Stephen categories.[94] At least where the premeditation formula does not require a measurable period of time for reflection, as is true in many states, we have the idea of intent that can be formed instantaneously and instrumentally. *Baxter*, ironically, provides a good description in its confused analysis of this type of killer.[95] It is the instance of the impassioned killing when we accord no moral respect to that cause, so that the difference between second-degree intentional murders and heat-of-passion murders is the lack of any "reasonable provocation." But to avoid the error of defining reasonable provocation only negatively, we can invert the language of cases describing things that are not premeditation, and then we can say that this subcategory affirmatively consists of killings done out of "ill will, hatred, [or] spite,"[96] "in an orgy of frenzied activity,"[97] out of "lust, rage, or jealousy,"[98] or out of "suppressed frustration and resentment," the result of which is that "the reason is overcome and tragedy results."[99] Thus, if we put aside cases where courts

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90. JAMES FITZJAMES STEPHEN, 3 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (London, MacMillan & Co. 1883).

91. *See id.*; *The Values of Interdisciplinarity*, *supra* note 79, at 60.

92. SAMUEL TAYLOR COLERIDGE, *Coleridge's Notes from His Annotations on the Interleaves of Shakespeare's (AYSCOUGH) II* 1042–76, *in* 5 THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE: LECTURES 1808–1819 ON LITERATURE II 315 (R. A. Foakes ed., 1987).

93. *See The Values of Interdisciplinarity*, *supra* note 79, at 59–61.

94. *See supra* note 92 and accompanying text.

95. *See supra* notes 24–27 and accompanying text.

96. M.H. v. State, 936 So. 2d 1, 3 (Fla. Dist. Ct. App. 2006).

97. Frendak v. United States, 408 A.2d 364, 371 (D.C. 1979).

98. Austin v. United States, 382 F.2d 129, 137 (D.C. Cir. 1967), *overruled by* United States v. Foster, 783 F.2d 1082 (D.C. Cir. 1986).

99. Baxter v. State, 503 S.W.2d 226, 232 (Tenn. Crim. App. 1973) (Galbreath, J., dissenting).

have acknowledged some reasonable basis for this passion, anger, or desire for revenge and treat voluntary manslaughter as the exception to the rule, we have usefully defined one of the two key types of unpremeditating, intentional murderer: the person who chooses, however instantaneously, to value indulgence in powerful emotion over the life of another, in part because, in that moment, he enjoys the belief that the victim deserves to die.[100]

So what of the final subcategory? This is the impulsively instrumental killer. He may not exhibit passion or anger at all; he is solving a practical problem, often the result of his path of antisocial or illegal activity. But his lack of passion is not the same thing as the coolness associated with premeditation, especially in a jurisdiction where premeditation requires some distinct duration of thinking, or some internal dialogue. He just sees a problem in a sudden moment, and he solves it immediately.

Let us return to the case of *Francis v. Franklin* and consider the facts:

> Franklin, then 21 years old and imprisoned for offenses unrelated to this case, sought to escape custody on January 17, 1979, while he and three other prisoners were receiving dental care at a local dentist's office. The four prisoners were secured by handcuffs to the same 8-foot length of chain as they sat in the dentist's waiting room. At some point Franklin was released from the chain, taken into the dentist's office and given preliminary treatment, and then escorted back to the waiting room. As another prisoner was being released, Franklin, who had not been reshackled, seized a pistol from one of the two officers and managed to escape. He forced the dentist's assistant to accompany him as a hostage.
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> In the parking lot Franklin found the dentist's automobile, the keys to which he had taken before escaping, but was unable to unlock the door. He then fled with the dental assistant after refusing her request to be set free. The two set out across an open clearing and came upon a local resident. Franklin demanded this resident's car. When the resident responded that he did not own one, Franklin made no effort to harm him but continued with the dental assistant until they came to the home of the victim, one Collie. Franklin pounded on the heavy wooden front door of the home and Collie, a retired 72-year-old carpenter, answered. Franklin was pointing the stolen pistol at the door when Collie arrived. As Franklin demanded his car keys,

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100. *See* JACOB KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 31 (1989). In this regard, sociologist Jack Katz has proffered an analysis of what he calls "righteous slaughter" killings. *Id.* at 18–19. In a powerful, if somewhat melodramatic fashion, Katz captures the mindset of the killer who subjectively views the killing as justified and who treats the killing as a kind of obligatory ritual sacrifice. *Id.* at 31–39. The would-be killer must understand not only that the victim is attacking what he, the killer, regards as an eternal human value, but that the situation requires a last stand in defense of his basic worth. *Id.* at 31. The would-be killer must undergo a particular emotional process. *Id.* at 22–31. He must transform what he initially senses as a humiliating situation into a rage. *Id.* In rage, the killer can blind himself to his future, forging a momentary sense of eternal unity with the good. *Id.* at 18–19.

> Collie slammed the door. At this moment Franklin's gun went off. The bullet traveled through the wooden door and into Collie's chest killing him.[101]

Now assume the jury could reasonably conclude that Franklin intended Collie's death. If so, we have a clear case of an impulsive instrumental killing. In that fatal moment, Franklin valued his own continued liberty over Collie's life. Unlike the passion cases discussed above, there is nothing personal here; Franklin did not indulge in the emotion-wrought belief that Collie deserved to die. Collie just needed to die because he was an obstacle to an interest Franklin accorded great weight, and while Franklin subjectively felt justified in so weighing his self-interest, his feeling obviously satisfies no objective norm. While different from the passion cases for reasons readily seen, it is nevertheless like those cases in the simple sense that at the moment of fatal choice, the defendant made that unjustified, unmitigated valuation. Or consider the case *People v. Caruso*, a useful example of (arguably) instantaneously formed intent.[102] Caruso was absent without leave from the military.[103] He trespassed into a relative's home, possibly just to hide or to steal something, although the case is never treated as involving a burglary or possibly a felony murder.[104] The court explained:

> There was no eyewitness testimony concerning the shooting. Forensic evidence and the testimony of witnesses who responded to the victim's telephone calls for help constituted much of the proof. This evidence revealed that the victim was shot at the entrance to his home. Defendant fired three shots, two of which struck the victim. The shots were all fired from the vicinity of a small couch in the residence about 17 feet from the entrance. Although the rifle was a pump action, two witnesses familiar with the weapon indicated that the three shots could have been fired within a matter of a few seconds. It was nighttime when the shooting occurred and there was no proof as to whether the premises were alighted or dark. There was no evidence of animosity between defendant and his stepuncle. The victim did not die immediately and was conscious following the shooting. Yet, defendant did not take additional shots to a vital area of the victim's body to ensure the victim's immediate demise. While a jury certainly could have concluded that defendant's actions manifested an intent to kill, there is a reasonable view of the evidence—when considered in the light most favorable to defendant—that defendant, on the run, frightened and absent without leave from the army, was surprised by a sound at the door and shot in that direction to drive away or injure the would-be entrant in order to facilitate his getaway.[105]

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101. Francis v. Franklin, 471 U.S. 307, 309–10 (1985).
102. *See* People v. Caruso, 776 N.Y.S.2d 337, 340 (N.Y. App. Div. 2004).
103. *Id.* at 341.
104. *Id.* at 340–41.
105. *Id.* (internal citations omitted).

These facts were laid out in the typical context of a decision of whether a first-degree premeditation charge was valid.[106] In this case, the court found the facts insufficient for premeditation.[107] But again, while the facts allowed the court to determine why this was not premeditation, we can invert them and use them as a positive description of unpremeditated intentional murder. Unlike the passion category above, there is nothing personal here, no sense that Caruso thought the victim deserved to die. But possibly unlike the *Franklin* case, here we sense some fright, shock, and distress at the moment the choice arose. Either way, at that key moment, the hyper-valuation of his own interest was decisive, and that characterization helps supply content to the concept of intentional murder.

To find some grounding for, and to consider the implications of this content, I turn to some of the notable recent scholarship on murder culpability. I will focus on two important articles for this purpose.[108] These two key articles combine into one of the most thoughtful modern treatments of premeditation and murder culpability. In *Plotting Premeditation's Demise*, Professor Kimberly Kessler Ferzan performs a great service in reviewing the doctrinal mess that premeditation has caused.[109] More importantly, she deploys her great philosophical skills in showing how moral principles, among other values, can help us understand what is wrong with the doctrine and what could conceivably set it right (although her title is self-explanatory).[110] One key insight is that the notion of indifference to human life, which is usually associated with unintentional murder under such terms as depraved or extreme indifference or gross recklessness, could, in theory, capture some of the serious questions and values that the usual doctrine avoids or distorts.[111]

Ferzan's essay exemplifies a small, but very rich category of writing about murder culpability. In this genre, the author takes on all the definitions of premeditation as I discussed them above and engages in the thought experiment of taking all the fine distinctions and permutations seriously, pointing out their implications and then showing (with far more clarity and elegance than courts can achieve) that the search for a coherent doctrine is quixotic.[112] And, as in Ferzan's case, the experiment nevertheless often turns up striking insights that

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106. *See id.* at 341.

107. *See id.*

108. *See generally*, *e.g.*, David Crump, *"Murder, Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257 (2007) (analyzing jurisdictional approaches to homicide sentencing based on varying levels of culpability); Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump's Model Laws of Homicide*, 109 W. VA. L. REV. 369 (2007) (rejecting Crump's suggestion to abolish harsher sentences for premeditated murder); Michael J. Zydney Mannheimer, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879 (2011) (arguing that the distinction between first- and second-degree murder should be based on deterrence rather than a heightened level of culpability).

109. *See* Ferzan, *supra* note 1, at 83.

110. *See id.* at 87, 92.

111. *See id.* at 104–07.

112. *See id.* at 84–87.

enable us to imagine culpability rules free of the burden of defining premeditation.[113]

By hypothesizing that some content can be found in premeditation, Ferzan offers a deep and subtle analysis of the features of thinking, or non-thinking, that can lead to a killing.[114] There is the "should" question: we can examine how much and how well the killer doubts the decision to kill; that is, how much weight does he give to the reasons not to kill.[115] But, she notes, asking the question does not get us very far because both the presence and absence of this factor can cut both ways and can beg the question of whether the killing might even be justified.[116] There is the "why" question: that of motive, but again, we have the doctrines of justifications to take care of this, and so it does little to help us import any coherence into the idea of premeditation.[117] Then there is the "how" question: that word could refer to the evidentiary factors associated with the *Anderson* case,[118] but because Ferzan is concerned with actual processes of thinking, she puts the question more in terms of the degree of mental investment by the killer in the means of killing.[119] Of course if the killer takes extra mental steps to exacerbate the degree of suffering of the victim, that gratuitous pain enhances culpability, but that is still collateral to the mentation question.[120] Ultimately, Ferzan chooses to unravel her own hypothesis.[121] While thinking very methodically about how the means of killing seems to increase culpability, relaxing into some preconscious state of mind to adopt a satisfying attitude toward the killing seems no less culpable. Similarly, giving the method no thought whatsoever, perhaps because the plan was obvious and settled on at the start of the time of possible reflection, also seems no less culpable.[122]

In the end, Ferzan looks to the degree of indifference—or what she calls the indifference assessment.[123] This of course means indifference to the value of the life killed, and my extrapolation of hypervaluation of one's own interest is simply the flip side of Ferzan's idea.[124] Of course terms like extreme indifference or gross recklessness usually refer to unintentional murders.[125] And that is the real point. The idea of indifference then enables us

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113. *See id.* at 108.
114. *See id.* at 92.
115. *Id.* at 92–93.
116. *Id.*
117. *Id.* at 93–94.
118. *See supra* note 7 and accompanying text.
119. *See* Ferzan, *supra* note 1, at 94–97.
120. *See id.*
121. *See id.* at 92, 101–02.
122. *See id.* at 95–96.
123. *Id.* at 196.
124. *Id.* at 96–97; *see* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1015–20 (1998).
125. *See* MODEL PENAL CODE § 210.2(1) (1962) (distinguishing between homicide committed purposely or knowingly and homicide committed recklessly with extreme indifference to human life).

to settle on a unitary definition of murder that encompasses both the intentional and the grossly reckless—the difference between the two is trivial. The first is a conscious purpose to kill.[126] The second is a willingness to undertake an egregiously high risk of death in the service of an egregiously unjustified interest.[127]

Ferzan's reliance on indifference has important legal, moral, and psychological implications. As noted above, one casebook selection that lends some content to the meaning of intentional murder does so by eliding it with depraved-heart murder.[128] And this evocative term, or its synonyms, invites some moral and psychological content lacking in the bare term of intent. The revisionist scheme of the MPC relies heavily on this concept because its single degree of homicide is just that—a combination of intent and gross recklessness, and indeed the MPC tries to shoehorn felony murder, a concept it otherwise rejects, into this formula.[129] Second, the Supreme Court has read the Eighth Amendment to require extreme indifference as a sufficient, and probably minimally necessary, predicate for death-penalty eligibility.[130] The Court may have been drawn to this standard because of its venerable, yet complex, legacy.[131] Finally, the concept of psychopathy or antisocial personality has come to dominate psychological and neurological analyses of criminal proclivity, and as I have suggested elsewhere, the medical indicia of psychopathy correctly map the aspects of an offense or an offender that motivate capital juries to vote for

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126. *See* Ferzan, *supra* note 1, at 102.

127. *See id.* Again, I am setting aside how felony murder might map onto this definition. I am also avoiding the difficult question of whether this blended mental state of indifference should lead to the same punishment even if, by luck, the death does not occur.

128. *See supra* text accompanying note 88.

129. *See* MODEL PENAL CODE § 210.2(1)(a–b) (stating that a killing in the course of several enumerated non-homicidal felonies establishes a presumption of extreme indifference).

130. *See* Tison v. Arizona, 481 U.S. 137, 157–59 (1987). The "reckless indifference" formula the *Tison* Court chose has a venerable and complex legacy. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 447–48 (1978). The Court drew on the *mens rea* definitions and principles identified by George Fletcher in his reading of the common law, which have been adopted in most states. *Tison*, 481 U.S. at 157–59. "Quintessential examples are firing into a crowd; driving an automobile along a crowded sidewalk at high speed; opening the lion's cage at the zoo; placing a time bomb in a public place; poisoning a well from which people are accustomed to draw water; opening a drawbridge as a train is about to pass over it, and dropping stones from an overpass onto a busy highway." People v. Suarez, 844 N.E.2d 721, 730 (N.Y. 2005) (per curiam) (internal citations omitted). In several states now, it is possible for an egregiously drunk driver who kills another driver or a pedestrian to be convicted of second-degree murder, not just vehicular manslaughter. *See, e.g.*, People v. Watson, 637 P.2d 279, 295–98 (Cal. 1981).

Reckless indifference is associated with the colorful common-law term "abandoned and malignant heart"—used to denote a non-intentional killing deserving of the highest level of liability. Mayes v. People, 106 Ill. 306, 312–13 (1883). Even the old case from which this language emerges is ambiguous as to what that mental state is. *Id.* In that case, *Mayes v. People*, a drunken man hurled a beer glass at his wife, who was standing right next to a visible fire, thereby setting off flames that killed her. *Id.* The court's condemnation of him in its famous language suggests the court thought the man actually recognized that he would be taking a chance and callously took that chance anyway. *Id.* Or it might have meant that the vile motive he had for hurting his wife showed him to be so immoral as to merit a murder conviction of the highest charge even if it had not subjectively crossed his mind that his actions might kill her. *Id.*

131. *See supra* note 130 and accompanying text.

death.[132] Roughly speaking, the psychopath (or sociopath, or antisocial personality) is a person who is perfectly sane, perfectly oriented in time and space, perfectly perceptive about causes and effects, perfectly cognitively able to comprehend and assess the wrongfulness and illegality of his conduct, but simply uncaring in the extreme, and unaffected by the suffering he inflicts.[133] Of course, the very fact that this character is described in medical terminology reflects the view of some that it is indeed a psychiatric or neurological condition that should lower or negate legal culpability.[134] But while such medical and philosophical debates about science and free will continue, the notion of the psychopath will remain useful in capturing the moral and psychological qualities of the culpably indifferent killer.

Now I return to Ferzan's essay in my effort to lend some content to the idea of second-degree unintentional murder, on the assumption that premeditation is still the law. Ferzan's piece concludes by rejecting the premeditation formula for first-degree murder, so she deploys the idea of indifference as the basis for a single degree of murder.[135] But of course, I am really following her lead. That is, I agree that the premeditation doctrine should be abolished, but my inquiry has been to establish what content there is to second-degree unintentional murder in a world that still has premeditation. While I have focused on the ideas of impulsive manifestations of intent, I agree that the search for coherent criteria by which we can aggravate culpability because of extended deliberation or reflection is probably quixotic.

VI. SALVAGING PREMEDITATION

Nevertheless, might it be possible to sustain this idea of hypervaluation or indifference as a core concept of murder and still have something like, or replacing, premeditation as a basis for aggravation to a higher degree? I hesitantly suggest this might be possible. If we return to the subcategories of indifference above, I have described them as what might be called "situational."[136] Whatever the deeper character of the person, his act at the fatal moment is one of extreme indifference, or, to use the medical term, at that moment he acts like a psychopath.[137] Might there be a type of indifferent homicide that marks the killer as more than just a situational

132. Robert Weisberg, *The Unlucky Psychopath as Death Penalty Prototype*, *in* WHO DESERVES TO DIE: CONSTRUCTING THE EXECUTABLE SUBJECT 40, 52 (Austin Sarat & Karl Shoemaker eds., 2011) [hereinafter *The Unlucky Psychopath*].

133. *See* Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 366–71 (2008); Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 191–95 (2008).

134. *The Unlucky Psychopath*, *supra* note 132, at 56.

135. Ferzan, *supra* note 1, at 101–07.

136. *See supra* Parts IV–V.

137. *See supra* Parts IV–V.

psychopath? Obviously, psychopathy is a continuing, and perhaps permanent condition. But in a constitutional system, even when we feel it right to condemn a person for his evil character, we must link that judgment to a specific act that merits the longer punishment that might follow from such a condemnation of character.[138]

To play out this possibility, I turn to another major paper on murder culpability: *On Premeditation*, by Mordecai Kremnitzer.[139] Kremnitzer's paper joins Ferzan's in this remarkable genre of elegantly hypothesizing and then unraveling explanations of premeditation. Like Ferzan, Kremnitzer traces all the trajectories and paths between arousal of intent and killing, and then shows how no particular sequence of thought or feeling dominates any other as a basis for a higher charge.[140] In any event, he finds the very role of planning mysterious.[141] Kremnitzer asks, does it matter whether the conscious meditation occurs at the time of the killing?[142] The clear case is one where the formation of the intent is followed quickly by the integration of thinking and behavior and the execution of the plan.[143] But, he notes those uninterrupted cases may be rare, so many permutations are common.[144] Most obviously, when the meditation occurs very early, it may remain "theoretical," and the killer has not "undergone the ordeal by fire of performance."[145] Moreover, sometimes actual, severe provocation may intervene after an initially cool decision to kill, so that discerning cause and effect may be problematic.[146] On the other hand, sometimes a person is provoked into distress and, in a state of hot hostility, forms a deliberated plan to kill.[147] Kremnitzer surveys approaches to premeditation among many cultures as they futilely struggle to find a moral difference between the planner and the nonplanner, and he observes that each approach turns back into questions of evidence and availability of proof that avoid clarifying the legal definition.[148]

Nevertheless, Kremnitzer does discover a philosophically intriguing basis for aggravation of murders that might somewhat map on to conventional definitions of premeditation. With wry wit, he puts the question in terms of "[s]elf fulfillment."[149] Self-fulfillment means having internalized the value system that motivates your

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138. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (stating that justice requires punishment to "be graduated and proportioned to [the] offense" (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910))), *modified on reh'g* 554 U.S. 945 (2008).

139. *See generally* Mordechai Kremnitzer, *On Premeditation*, 1 BUFF. CRIM. L. REV. 627 (1998) (discussing premeditation).

140. *Id.*

141. *Id.* at 631–36.

142. *Id.* at 636.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 637.

147. *Id.* at 645.

148. *Id.* at 628–36.

149. *Id.* at 628.

action.[150] In the positive sense of the enlightenment, it refers to the true status of a moral being, as opposed to a merely obedient citizen—it is the one who chooses to act on moral criteria.[151] So the premeditating killers are the ominous reverse: his "moral and legal feelings are dead."[152] He kills his own humanity as well as his victim's.[153] Premeditation is a manifestation of intent that faithfully reflects the killer's personality.[154] External circumstances may present the occasion for the murder, but play no serious causal role.[155] So in Kremnitzer's view, the premeditating killers "stand by the homicide in the fullest sense."[156] They do not just "act in accordance with [their] will;" they "decide what [their] will is."[157] "[T]he perpetrator is not only expressing his personality, he is also molding it."[158]

So if one is philosophically inclined or legally obligated to maintain a premeditation doctrine or some standard for distinguishing among intentional murders, we could still use the concept of psychopathy. Once we manage to get past the Stephen distraction, we can see second-degree killers as momentary or situational psychopaths.[159] They kill instrumentally out of a morally obtuse belief that their goals trump others' lives, or they kill angrily because they subjectively feel justified—the difference between these two is trivial.[160] So who then are the premeditators? Let us describe them as inveterate, irredeemable psychopaths. They do not just make a culpable pathological choice; they reveal themselves to be inherently psychopathic.[161]

I have chosen the form of the short, suggestive essay in part to relieve myself of any obligation to spell out prescriptions and recommendations. I confess my difficulty in rendering this moral and psychological distinction in the language of jury instructions. I can offer a few crude, programmatic suggestions. One way to decide if a killer deserves the first-degree conviction is if he kills a second time in a wholly separate incident. Any argument of merely situational psychopathy diminishes drastically the second time. Of course, the killer might be caught after the first killing. But if we roughly decide that second-degree murder merits, say, a ten-year sentence, then most second-degree murderers would be released while still young enough to possess some continuity of character, so this case would not be different than that of someone who is charged at once with two discrete killings. Another possibility turns on the role of the death penalty. If the apparatus of modern death-penalty law is designed, or at least operates, to capture the notion of the irredeemable

150. *Id.*
151. *Id.*
152. *Id.* at 629.
153. *Id.*
154. *Id.* at 643.
155. *See id.*
156. *Id.* at 657.
157. *Id.* at 643.
158. *Id.*
159. *See id.* at 642.
160. *See id.*
161. *See id.* at 643–45.

psychopath, then, setting the death penalty aside, this apparatus might serve the more fundamental, and statistically far more important, purpose of deciding who gets a longer sentence for first-degree murder. A useful example is New York, which does not have the death penalty, but whose first-degree murder statute on the types of aggravating factors originally generated for modern death-penalty laws.[162]

Indeed, instead of serving as a prescriptive legal guide, it might serve us after-the-fact as an explanation of patterns of jury decisions in premeditation cases when jurors have to respond to the typically opaque premeditation formulas in assessing the killer's culpability. Or, in the states where murderers are sentenced to life with the possibility of parole,[163] it might help explain the pattern by which discretionary decisions are made as to which lifers are "suitable for parole release."[164]

VII. CONCLUSION

I side with the abolitionists on premeditation. But I end with ambivalence. The sentiment behind the higher culpability we attribute to the things we call premeditation is alive and powerful, even if inchoate. Whether or not we try to legislate in a formula, the discretion to carry out this sentiment will reside somewhere in the legal system. The discretion is inevitable because with or without premeditation, the category of intentional murder is so heterogeneous. Given the heterogeneity of offenses and offenders that fall on the borderline of premeditation, there are at least three places where discretion resides: (1) in juries, judges, or, in effect, sometimes prosecutors who decide whether the defendant's actions were premeditated, and hence, should be in a high sentencing range; (2) in judges who decide where the sentence should lie in that range; and (3) in the parole board—in states with discretionary parole for life prisoners—that will in many ways reprise the jurisprudential decisions rendered by other actors at earlier states.

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162. N.Y. PENAL LAW § 125.27 (McKinney 2009 & Supp. 2014).

163. The availability and actual operation of parole of murderers is of course widely variant among the states. *See* Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 496 (1999) (discussing the widely variant status of parole release in the United States as of 1998).

164. *See Life in Limbo*, *supra* note 20, at 11.