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FIRST DEGREE MURDER—A WORKABLE DEFINITION

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There has been considerable judicial as well as academic criticism¹ of the hair-splitting technicalities distinguishing first and second degree murder as the result of words of art used to define the degrees of murder. But since the American legislatures have been prone to enact statutes calling for such refinements, it has been the duty of the legal profession and the courts to interpret and apply them. Unfortunately, all too frequently, both the bar and the bench have been careless and inexact in the use of terms thus resulting in confusion and dissipating the clear rule of guidance which the attorney seeks and the client demands.

North Dakota in following this general trend has divided murder into two degrees by providing: "Every murder perpetrated by means of poison, or by lying in wait, or by torture, or by other willful, deliberate or premeditated killing, or in committing or attempting to commit any sodomy, rape, mayhem, arson, robbery, or burglary, shall be deemed murder in the first degree; all other kinds of murder shall be deemed murder in the second degree."² It is obvious at the outset that the North Dakota statute defining first degree murder divides itself into three categories. The first is where perpetrated by means of poison, or lying in wait, or by torture; the second is where results from the commission of certain specified felonies which are commonly considered felonies of violence—sodomy, rape, mayhem, arson, robbery and burglary; and the third is when it is by any willful, deliberate or premeditated killing. It is with this third category that the present comment is concerned.

Under the common law felonious homicide—which was the killing of a human creature, of any age or sex, without justification or excuse³—was divided into manslaughter and murder.⁴ The distinguishing characteristic between murder and manslaughter was the existence of *malice aforethought* in the former and its absence in the latter. Blackstone summarized

1. Cardoza, *Law and Literature and Other Essays and Addresses* (1931), page 97.
2. First enacted by North Dakota Code (1895) §7065 it is contained presently in North Dakota Code (1943) §12-2712.
3. 4 Blackstone's Commentaries (Lewis' Ed.) 190.
4. 4 Blackstone's Commentaries (Lewis' Ed.) 188.

the rule as “. . . the killing must be committed *with malice aforethought*, to make the crime of murder. This is the grand criterion which now distinguishes murder from other killing; and this malice prepense, *malitia praecogitata*, not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart. . . and it may be either *express* or *implied* in law.”⁵ Thus the all important element was that of malice aforethought. While this element may be evidenced by personally malevolent feelings, it is not malice in the ordinary layman sense and therefore does not necessarily mean personal hatred or revenge against the person killed.⁶ Malice aforethought is a condition of the mind in which one unlawfully and voluntarily does a serious bodily injury to another in willful disregard of his legal rights, or does a cruel act voluntarily without excuse, justification, or extenuation.⁷ It does not imply deliberation, or the lapse of considerable time between the intent to take life and the actual execution of that intent, but rather denotes “. . . purpose and design, in contradistinction to accident and mischance.”⁸ “. . . It may spring up at the instant, and may be inferred from the act of killing”⁹ so long as it is the moving cause of the act or concomitant with the act. Thus, malice aforethought has been raised not only in those cases where the accused had an unlawful intention to kill¹⁰ but also where death resulted from intentionally inflicted great bodily harm¹¹ or death resulted to another unintentionally from wantonly reckless conduct on the part of the accused¹² or death resulted unintentionally to a human being from the accused’s commission of or attempted commission of a felony.¹³

Prior to 1895, the North Dakota Code did not provide for the division of murder into degrees and simply stated: “Homicide is murder in the following cases: 1. When perpetrated without authority of law, and with a premeditated design to effect death of the person killed, or of any other human being. 2. When perpetrated by any act imminently dangerous to others and

5. 4 Blackstone’s Commentaries (Lewis’ Ed.) 198.

6. 2 Burdick, *The Law of Crimes* §448b.

7. *State v. Wetter*, 11 Idaho 433, 83 Pac. 341, 346 (1905). For an excellent discussion see *Turner v. Commonwealth*, 167 Ky. 365, 180 S.W. 768 (1915).

8. *Commonwealth v. Webster*, 5 Cush. [Mass.] 295 (1850).

9. *Allen v. United States*, 164 U.S. 492, 495 (1896). It is to be noted that the Court grasping for words to describe malice aforethought used approvingly the words “deliberately” and “premeditation.”

10. *State v. Young*, 50 W.Va. 96, 40 S.E. 334 (1901).

11. *Durr v. State*, 175 Miss. 797, 168 So. 65 (1936).

12. *Banks v. State*, 85 Tex. Cr. R. 165, 211 S.W. 217 (1919); *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924).

13. *Rex v. Elnick*, 53 D.L.R. 298 (1920) Mant. Ct. of Appeal.

evinced a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated without design to effect death by a person engaged in the commission of any felony."¹⁴ Thus it is seen that the definition of murder merely incorporated the decisional law of common law murder with "premeditated design" being used to describe the element of "express malice aforethought."¹⁵ The punishment provided for murder was death or imprisonment at hard labor in the territorial penitentiary for life, in the discretion of the jury.¹⁶ In 1895, a new Penal Code was adopted¹⁷ which continued the previous definition of murder but divided murder into first and second degrees. Punishment for first degree murder was death or imprisonment in the penitentiary for life¹⁸ while punishment for second degree murder was fixed at imprisonment in the penitentiary for not less than ten nor more than thirty years.¹⁹ This punishment for first degree murder continued in effect until 1915 when the legislature abolished capital punishment for first degree murder.²⁰

An examination of the statutes of the various states defining the degrees of murder discloses a wide variety of conduct which

14. Compiled laws of the Territory of Dakota (1887) §6442.

15. It should be noted that section 12-2709 of the 1943 North Dakota Code entitled "Premeditation; Meaning of: Design to Effect Death Inferred" and which reads: "A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution, and is inferred from the fact of killing unless the circumstances raise a reasonable doubt as to whether such design existed," refers simply to a *premeditated design to effect death* being the consolidation of two sections from the previous code concerning such design and not the words of art *premeditated killing* as a distinguishing factor between first and second degree murder.

16. Compiled laws of the Territory of Dakota (1887) §6449.

17. Upon the admission of North Dakota to statehood, there was a feeling that action should be taken to adapt the laws then in force to the constitution of the state. Thus chapter 82 of the 1891 session laws of North Dakota provided for the compilation, publication, distribution and sale of the laws of the state of North Dakota and authorized the appointment of a commission of three for this purpose. This commission met and after some study prepared recommendations to accomplish their objects but due to the protracted contest for the election of United States senator during the 1893 session of the legislature no action was taken. However, by chapter 74 of the 1893 session laws of North Dakota a new commission was authorized to codify and revise the laws under the following general titles: The Political Code, the Civil Code, the Code of Civil Procedure, the Probate Code, the Justices' Code, the Penal Code and the Code of Criminal Procedure. The 1895 legislature after consideration and some changes adopted these Codes. (See: Preface to 1895 North Dakota Code.)

18. North Dakota Code (1895) §7068.

19. North Dakota Code (1895) §7069.

20. Chapter 63 of the 1915 session laws of North Dakota presently contained in 1943 North Dakota Code section 12-2713 which reads: "Every person convicted of murder in the first degree shall be punished by confinement at hard labor in the penitentiary for life. If the person shall be convicted of murder in the first degree while under life sentence upon a conviction of murder in the first degree, he may be punished by death."

may constitute the highest degree of murder; however, running through these statutes are certain common patterns so that the states can be said to fall within certain classes.

There is the class of which Florida is typical which defines first degree murder as: "The unlawful killing of a human being when perpetrated from a premeditated design to effect death of the person killed or any human being . . . shall be murder in the first degree. . . ." ²¹ Also included within this class is Minnesota, ²² Wisconsin, ²³ and Wyoming. ²⁴

There is another class of statutes of which Arizona is typical which provides: ". . . or any other kind of willful, deliberate and premeditated killing . . . is murder in the first degree. . . ." ²⁵

Identical in wording of this category of elements constituting first degree murder are the statutes of Arkansas, ²⁶ California, ²⁷ Idaho, ²⁸ Iowa, ²⁹ Kansas, ³⁰ Maryland, ³¹ Montana, ³² New Mexico, ³³ North Carolina, ³⁴ Vermont, ³⁵ Virginia, ³⁶ and West Virginia. ³⁷ Because of the historical connection between North and South Dakota it should be observed that the present South Dakota statutes ³⁸ do not divide murder into degrees but retain almost identically the definition applicable in the Dakota Territory and in North Dakota prior to 1895.

The present North Dakota statute is peculiar in that the qualifying words *willful*, *deliberate*, and *premeditated* are connected with the disjunctive "or" rather than the conjunctive "and." Since North Dakota seemingly stands alone, the question is posed—Was "or" purposely substituted for "and" or was the substitution an act of inadvertence?

21. Florida Code (1941) §782.04.

22. Minn. Stat. Ann. (1945) §619.07: "The killing of a human being, . . . when perpetrated with a premeditated design to effect the death of the person killed or of another."

23. Wisc. Stat. (1947) §340.02: "Such killing, when perpetrated from premeditated design to effect the death of the person killed or of any human being, shall be murder in the first degree . . ."

24. Wyoming Compiled Stat. (1945) §9-201 reads: "Whoever purposely and with premeditated malice . . . kills any human being, is guilty of murder in the first degree."

25. Ariz. Code (1939) §43-2902.

26. Arkansas Stat. (1937) §2969.

27. Deering's Penal Code for Calif. (1937) §189.

28. Idaho Code Ann. (1947) §18-4003.

29. Iowa Code (1946) §690.2.

30. Kansas Gen. Stat. Ann. (1935) §21-401.

31. Maryland Ann. Code (1939) Art. 27 §475.

32. Rev. Code of Montana (1935) §10955.

33. New Mexico Stat. (1941) §41-2404.

34. North Carolina Gen. Stat. (1943) §14-17.

35. Vermont Stat. (1947) §8240.

36. Virginia Code (1942) §4394.

37. West Virginia Code (1943) §5916.

38. South Dakota Code (1939) §13.2007.

However close these words may be in connotation to the layman, the decided cases attempted to establish that they were not synonyms of precisely the same meaning. Thus the Court of Errors and Appeals of New Jersey stated with respect to an instruction on these words that “. . . however brief may be the time required for the performance of any one of the three mental acts involved in murder in the first degree, viz., premeditation, willfulness (i.e., intention) and deliberation, the fact remains that they are not only distinct mental acts but also that one succeeds another . . . [and] they cannot therefore be synchronous as is implied in this instruction.”³⁹ So also the Kansas Supreme Court,⁴⁰ after admitting that other states had held these words to be synonymous,⁴¹ stated that “. . . it has long been determined here that “premeditatedly” 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. The court then proceeded to illustrate that it might be possible for the accused to have thought the matter over and decided to kill another and then to come upon the victim suddenly and commit the homicide in the heat of passion so that it could be said to have been committed premeditatedly, but not deliberately. Despite the most sincere efforts of the jurists to keep each of these terms within its proper sphere, an examination of the instructions frequently given by trial courts demonstrates that in practice it is impossible to explain to the lay jury with unerring accuracy these distinct and separate mental states requisite for first degree murder.⁴² Even a cursory glance in “Words and Phrases” will clearly indicate the hodgepodge condition which exists. The lines are far from being clear and distinct.⁴³

The early decisions did not shed much light on the problem whether first degree murder is distinguished from second degree murder by the three fold requirement of “willful, deliberate and premeditated killing” or merely by any one or a combination of these words. In *State v. Noah*,⁴⁴ the information charged first degree murder and used the conjunctive alleging that the fatal shooting was with “. . . an unlawful, willful and

39. *State v. Clayton*, 83 N.J.L. 673, 85 Atl. 173 (1912).

40. *State v. Johnson*, 92 Kans. 441, 140 Pac. 839 (1914).

41. *Cook v. State*, 46 Fla. 20, 35 So. 665, 676 (1903); *Bower v. State*, 5 Mo. 364 (1838).

42. For a critical analysis see Knudson, *Murder by the Clock* (1939) 24 Wash. U.L.Q. 305.

43. 33 *Words & Phrases*, 325 (1940).

44. *State v. Noah*, 20 N.D. 281, 124 N.W. 1121 (1910).

premeditated and deliberate intent to kill. . . .” The court pointed out that “Murder is divided into two degrees, by the statute, according to the facts and circumstances attending the killing, depending upon the presence or absence of deliberation and premeditation.” The court then proceeded to state “. . . If the killing was willful and unlawful, but done without deliberation or premeditation, the offense would be murder in the second degree.”

In *State v. Mueller*,⁴⁵ the defendant convicted of second degree murder complained that the trial court had not properly instructed the jury as to what constitutes first degree murder and what constitutes second degree murder. The Supreme Court affirming the conviction approved the trial court’s instructions which explained “In order to constitute murder in the first degree as charged in the information, the killing must have been willful, with malice aforethought, and with premeditation and deliberation. There must have been a specific, deliberate, premeditated intention to take life, unaccompanied by any circumstances of mitigation. The generally accepted meaning of the word ‘premeditation’ is prior determination to do the act in question and then determination to do it, but it is not essential that this intention should exist for any considerable period of time before it was carried out. If the determination is formed deliberately and upon due reflection it makes no difference how soon the fatal resolve was carried into execution. An act is willfully done when done intentionally and on purpose. Murder in the second degree differs from murder in the first degree only in the fact that as to the second degree there is no premeditation or deliberation. Thus, where a person forms a design to kill in the midst of a conflict and immediately executes such design, the killing is not premeditated, and is therefore no higher offense than murder in the second degree.” It is readily seen that the court was inexact in its requirements for first degree murder and approved inconsistent statements in this single instruction.

However in *State v. Carter*,⁴⁶ the court in affirming a second degree murder conviction considered the trial court’s instructions that to convict the defendant of first degree murder the jury must find that the killing was “. . . willful, deliberate and premeditated.” The Supreme Court stated “This stated that law perhaps more favorably to the defendant than the language of the statute justifies. It does not appear that all of these

45. *State v. Mueller*, 40 N.D. 35, 53, 168 N.W. 66 (1918).

46. *State v. Carter*, 50 N.D. 270, 195 N.W. 567 (1923).

elements, to wit: willfulness, deliberation and premeditation, must be present, but that if anyone of them is, it is sufficient. The disjunctive 'or' not 'and' is used in the statute." This decision would seem to finally authoritatively settle that the North Dakota statute presents a unique standard for first degree murder and that the disjunctive was used intentionally.

Conclusion

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. It is submitted that in the class of homicides perpetrated with malice aforethought sufficient to constitute murder and with a degree of "intention" sufficiently deliberate and premeditated to call for the highest punishment, the North Dakota statute using the disjunctive "or" is more workable at the trial court level with the lay jury than the conjunctive "and" with its resulting complication of instructions that is almost necessarily a result from an attempt to give distinct meanings to the three different terms although it is then conceded that ". . . they may be as instantaneous as successive thoughts of the mind."⁴⁷ The alternative seems to be bluntly expressed by Justice Weaver in his dissenting opinion in *Downing v. Farmers' Mutual Fire Insurance Co.*,⁴⁸ in which he stated that regardless of how solemnly and faithfully the trial courts go through the perfunctory routine in their instructions the jurors will ignore it in their deliberations.

47. *People v. Aranda*, 83 Pac. 2d 928 (Calif. 1938).

48. *Downing v. Farmers' Mutual Fire Insurance Co.*, 158 Iowa 1, 138 N.W. 917 (1912) involving instructions to jurors as to the use of their own knowledge and experience in determining the issues of fact in the case.